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COMMENTS

Solidary Liability in Louisiana Tort Law, Article 2324: Amendments and Ambiguities

I. INTRODUCTION

The Louisiana Legislature amended Louisiana Civil Code article 2324 in 1987, transforming solidary liability in Louisiana tort law from a simple to a complex and confusing process. Before 1987, a plaintiff could recover the whole judgment from any solidarily liable defendant unless plaintiff's fault, if any, was greater than defendant's fault under Article 2324. The underlying policy behind solidary liability is to assure the plaintiff a complete recovery. In order to achieve this, the risk of insolvency of a tortfeasor was transferred from the plaintiff to the other solidarily liable tortfeasors. The 1987 amendments jeopardize the security provided to the plaintiff under Article 2324.

The 1987 amendments to Article 2324 were the result of efforts of tort reformers. Before 1987, some courts believed Article 2324 was unfair to tortfeasors. The main concern was for the solidarily liable tortfeasor only slightly at fault. Under pre-amendment Article 2324, even a solidarily liable tortfeasor only one percent at fault could be required to pay one hundred percent of the judgment if the plaintiff was not at fault. The tortfeasor's right to

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1. 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.

contribution from other tortfeasors provides little assistance if the other tortfeasors are insolvent. Amended Article 2324(B) places a cap on the amount a solidarily liable tortfeasor may be required to pay, which should lessen this unfair result. The legislature, however, did not stop at capping the amount the tortfeasor may be required to pay; it made other changes which caused ambiguity in the statute.

Phrases such as “recoverable damages,” “as otherwise provided by law,” and “to the extent necessary” were used in the statute but left undefined. The phrases are not defined elsewhere in the Civil Code, and because none of these phrases appeared in the pre-amendment statute, there are no jurisprudential interpretations. This absence of guidance has caused reactions from scholars, with one referring to the statute as a “monster.” Even the Louisiana Supreme Court has acknowledged that the statute is “not clear and free of ambiguity.” Nonetheless, the judiciary and scholars will be left with the task of interpreting amended Article 2324.

The 1987 amendments divided Article 2324 into two sections, Article 2324(A) and (B). In 1988, Article 2324 was amended again to add section (C). The purpose of this comment is to interpret the most confusing section of amended Article 2324, section (B). This comment does not explore the effects of contribution and indemnity in detail. However, contribution and indemnity will affect a tortfeasor’s ability to recover amounts paid in excess of his virile share. Before discussing the 1987 amendment to Article 2324(B), a brief discussion of solidary liability is helpful.

5. Article 1804 states in part: “A solidary obligor who has rendered the whole performance, though subrogated to the right of the obligee, may claim from the other obligors no more than the virile portion of each.” La. Civ. Code art. 1804.
6. Article 2324(B) states in part: “[L]iability for damages caused by two or more persons shall be solidary only to the extent necessary for the person suffering injury . . . to recover fifty percent of his recoverable damages . . . .” La. Civ. Code art. 2324.
7. Galligan, supra note 3, at 1.
8. Touchard v. Williams, 617 So. 2d 885, 888 (La. 1993).
9. Article 2324(A) applies to those who “conspire with another person to commit an intentional or willful act.” Under the amended statute, as well as the old statute, these solidarily liable tortfeasors are answerable for the damages caused by their act, or the whole judgment. The amendment does not appear to have changed solidary liability for intentional tortfeasors and is not discussed here.
10. This section provides only that interruption of prescription for one solidarily liable tortfeasor interrupts prescription for all solidarily liable tortfeasors. The tortfeasor must be found solidarily liable to interrupt prescription for all other solidarily liable tortfeasors. See Spott v. Otis Elevator Co., 601 So. 2d 1355 (La. 1992). This section has not caused much confusion and is not discussed here.
11. If a solidarily liable tortfeasor is required to pay more than his virile share, he may seek contribution from other solidarily liable tortfeasors who have not paid their virile share, but for no more than that share. See supra note 5.
Solidary liability in Louisiana is similar to joint and several liability at common law. Solidary liability applies when a plaintiff’s injuries are indivisible. If plaintiff’s injuries are divisible, defendants are not solidarily liable and are only liable for their virile share. Article 2324 applies only when a plaintiff’s injuries are not divisible and fault cannot be apportioned among defendants. A look at how Article 2324 was applied before 1987 will illustrate the problems with the amended statute.

II. PRE-AMENDMENT ARTICLE 2324

Under pre-amendment Article 2324, a plaintiff could, in some circumstances, recover the whole judgment from any solidarily liable tortfeasor even though that tortfeasor was only one percent at fault. If a portion of the fault was attributed to the plaintiff, comparative fault under Article 2323 applied such that plaintiff’s judgment would be reduced according to his portion of fault. A tortfeasor whose percentage of fault was less than that of the plaintiff was liable only for his virile share. Thus, the plaintiff could not seek the whole judgment from that tortfeasor. Furthermore, prior to the amendments, the plaintiff’s recovery could not be reduced by the fault of a statutorily immune tortfeasor, such as an employer. The fault of this tortfeasor was not quantified. The following hypothetical will illustrate how the pre-amendment statute was applied.

In 1984, an accident involving a forklift occurred at a construction site. George, owner of Katz Construction, was persuaded to drive a forklift by Elaine, a friend not employed by Katz. Elaine knew George was not qualified to drive the forklift, but thought it would be fun to see George act like a real construction worker. George also knew of his inability to drive the forklift and the dangers it would cause. Kramer, an employee of Katz Construction, was listening to his radio when the forklift George was driving ran over him. Kramer’s leg was

13. Article 1789 provides in part: “When a joint obligation is indivisible, joint obligors or obligees are subject to the rules governing solidary obligors or solidary obligees.” La. Civ. Code art. 1789.
14. Article 1789 states in part: “When a joint obligation is divisible, each joint obligor is bound to perform, and each joint obligee is entitled to receive, only his portion.” La. Civ. Code art. 1789.
15. Article 2323 states: “When contributory negligence is applicable to a claim for damages... the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person...” La. Civ. Code art. 2323.
16. Article 2324 previously stated that “when the amount of recovery has been reduced in accordance with the preceding article [Article 2323], 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 negligence has been attributed.” This exception has been retained in amended Article 2324(B).
17. Eskine v. Regional Transit Auth., 531 So. 2d 1159 (La. App. 4th Cir. 1988); Senez v. Grumman Flxible Corp., 518 So. 2d 574 (La. App. 4th Cir. 1987), writs denied; 521 So. 2d 1151 (1988); Franklin v. Oilfield Heavy Haulers, 478 So. 2d 549 (La. App. 3d Cir. 1985), writs denied, 481 So. 2d 1330, 1331 (1986).
crushed. The finder of fact determines that Kramer might have heard the forklift if he had not been listening to his radio and that the forklift had defective brakes. All the parties are solidarily liable since the injury is not divisible. The finder of fact allocates fault in the following manner:

<table>
<thead>
<tr>
<th>Party</th>
<th>Percentage of Fault</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kramer (Plaintiff)</td>
<td>15%</td>
</tr>
<tr>
<td>George (Employer)</td>
<td>60%</td>
</tr>
<tr>
<td>Elaine (George’s friend)</td>
<td>5%</td>
</tr>
<tr>
<td>Jerrylift (Manufacturer of forklift)</td>
<td>20%</td>
</tr>
</tbody>
</table>

Since this accident occurred before 1987, pre-amendment Article 2324 will apply. Under the pre-amendment article, it was improper to quantify employer fault. However, at times, such as when the employer intervened for reimbursement of worker’s compensation payments, juries would quantify the fault of the employer. When the improper quantification occurred, courts applied one of three methods to remedy the situation. If the plaintiff were more at fault than the third-party tortfeasor, the court might allocate all of the quantified employer fault to the plaintiff; conversely, if the third-party tortfeasor were more at fault than the plaintiff, the court might allocate all the quantified employer fault to the third-party tortfeasor. However, the Louisiana Supreme Court adopted a different approach that distributed the employer’s fault to all parties at fault, including the plaintiff, in proportion to their fault. This approach is the most recent pre-amendment method and will be used to redistribute the employer fault in the hypothetical. Thus, the fault would be reapportioned in the following manner:


COMMENTS

Under the pre-amendment article, Kramer is able to recover sixty-two and one-half percent of the judgment from Jerrylift, the manufacturer of the forklift. Kramer is not able to recover one hundred percent of the judgment because, under Article 2323, his comparative fault reduces the amount he can recover. Also, Kramer could not require Elaine to pay sixty-two and one-half percent of the judgment since her fault is less than his. Thus, Kramer is only able to collect, at most, twelve and one-half percent of the judgment from Elaine. Under the principles of contribution, if Jerrylift is required to pay sixty-two and one-half percent of the judgment, it is entitled to twelve and one-half percent of the judgment as contribution from Elaine.

This was a simple method of applying solidary liability. Amended Article 2324(B) poses problems not present under the pre-amendment article. First, does solidary liability apply if plaintiff can recover at least fifty percent of his recoverable damages? Second, what does the exception “for cases as otherwise provided by law” mean? Third, is employer fault quantified, and if so, what do you do with the quantified fault? Fourth, is phantom tortfeasor fault quantified, and what do you do with the quantified fault? Finally, what are “recoverable damages”?

III. WHEN DOES ARTICLE 2324 APPLY AFTER THE 1987 AMENDMENT?

A. When is it “necessary” to apply Article 2324(B)?

After 1987, some scholars and commentators questioned the applicability of amended Article 2324(B) when plaintiff could recover more than fifty percent of his judgment. The confusion arose from the language of Article 2324(B) providing that “liability for damages caused by two or more persons shall be

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22. See supra note 15 and accompanying text.
23. See supra note 16 and accompanying text.
24. See supra note 5.
25. Phantom tortfeasors are those third-party tortfeasors not made parties to the suit. Usually, they are drivers of vehicles that contribute to automobile accidents but leave the scene. See Devereaux v. Allstate Ins. Co., 557 So. 2d 1091 (La. App. 2d Cir. 1990); Varnado v. Continental Ins. Co., 446 So. 2d 1343 (La. App. 1st Cir. 1984).
solidary only to the extent necessary for the person . . . to recover fifty percent of his recoverable damages." If a plaintiff can recover fifty percent of his recoverable damages without invoking solidary liability, it appears solidary liability does not apply. This view was referred to as the conditional or functional liability interpretation. Both the Louisiana Third Circuit Court of Appeal and a scholar who has written extensively on Article 2324 followed this view. However, the Louisiana Second Circuit Court of Appeal expressed a contrary view. In Thompson v. Hodge and Johnston v. Fontana, the second circuit held solidary liability under Article 2324(B) was applicable before determining whether the plaintiff could recover fifty percent of his recoverable damages. This was the view later adopted by the Louisiana Supreme Court in Touchard v. Williams. The supreme court held that the legislature, in amending Article 2324(B), intended to place a cap on solidarity among joint tortfeasors rather than create conditional solidarity among joint tortfeasors. Thus, a plaintiff may require any solidarily liable tortfeasor to pay fifty percent of plaintiff's recoverable damages as long as plaintiff's degree of fault, if any, is less than the tortfeasor's degree of fault. If the tortfeasor's fault is greater than fifty percent of plaintiff's recoverable damages, then that tortfeasor will be liable for his virile share.

In the hypothetical above, Kramer would no longer be able to collect sixty-two and one-half percent of the judgment from Jerrylift. Under the supreme court's interpretation, Kramer would be limited to fifty percent of his recoverable damages. Since Jerrylift is already liable for fifty percent of the judgment, the most recoverable damages could be, the amendments to Article 2324(B) have limited Kramer's ability to collect his entire judgment. Amended Article 2324(B) has no effect on the amount Kramer could collect from Elaine since Kramer's fault is greater than Elaine's. Under amended Article 2324(B) and the pre-amendment version, Kramer is only able to collect twelve and one-half percent of the judgment from Elaine. Thus far, the amendments have had some effect on solidary liability, particularly the amount a plaintiff can collect from a solidarily liable tortfeasor less than fifty percent at fault.

27. La. Civ. Code art. 2324(B) (emphasis added).
31. 577 So. 2d 1172 (La. App. 2d Cir. 1991).
33. 617 So. 2d 885 (La. 1993).
34. Id. at 893.
35. See supra part II.
36. See infra part VI, discussing possible definitions of "recoverable damages."
B. Exception for cases "as otherwise provided by law"

Under amended Article 2324(B), "[i]f liability is not ... as otherwise provided by law, then liability for damages caused by two or more persons shall be solidary." Thus, Article 2324(B) does not apply in cases "as otherwise provided by law." Since this exception will allow a plaintiff to avoid the fifty percent cap, and impose greater liability on defendants, the meaning of this phrase is significant.

Most scholars and commentators are not sure exactly when "as otherwise provided by law" applies. At least one scholar believes it will be up to the courts to define, since there is no statutory definition. But, in the six years since the amendment to Article 2324(B), neither the Louisiana Supreme Court nor any Louisiana appellate court had directly addressed the issue. Only one federal court in Louisiana has provided some indication of when a situation "as otherwise provided by law" will arise. One scholar suggests some possible "as otherwise provided by law" situations: an insurance company solidarily liable with a third-party tortfeasor policy holder; a vicariously liable employer solidarily liable with a third-party tortfeasor employee; or custom, which is highly unlikely.

It has also been suggested that the phrase might be used by the courts to circumvent the fifty percent cap. However, even though the jurisprudence has not interpreted the phrase, it is clear that courts have been applying the fifty-percent cap. Another commentator presumed the phrase refers to other legislation and not jurisprudence. However, interpretations, thus far, have not shed much light on the meaning of "as otherwise provided by law," as used in Article 2324(B).

In Rosskamp v. Phillips Petroleum Co., the plaintiff tried to avoid the application of Article 2324(B) claiming Article 1818 came within the meaning of "as otherwise provided by law." If applied to cases to which Article 2324(B) applies, Article 1818 would allow the plaintiff to demand the whole performance from a solidarily liable tortfeasor and avoid the fifty percent cap by applying the rules of solidary obligations under the law of Obligations. However, Judge Duplantier rejected this interpretation:

37. La. Civ. Code art. 2324(B) (emphasis added).
38. Galligan, supra note 3, at 2.
40. Galligan, supra note 3, at 2.
41. Queenan, supra note 3, at 1376-82.
44. "An indivisible obligation with more than one obligor is subject to the rules governing solidary obligors." La. Civ. Code art. 1818.
While both Articles 2324 and 1818 are in Book III of the Civil Code, Article 1818 is in Title III, Chapter 3 of Book III, that chapter covers "Divisible and Indivisible Obligations." . . . Article 2324 [is] in Title V, Chapter 2, covering "Offenses and Quasi Offenses." The articles on offenses and quasi-offenses impose duties owed to the general public. While the articles can be described as imposing an "obligation," that "obligation" is distinguishable from the conventional or legal obligations created in Title III—Obligations in General. Thus, Article 1818 is inapplicable to torts.45

This interpretation makes it clear that applicability of Article 1818 is not a situation "as otherwise provided by law" and suggests tort obligations will not fall under the exception.

If two or more persons cause indivisible damage to another, Article 2324(B) probably will apply. The exception for those cases "as otherwise provided by law" will not affect these situations. Since this is the only solidary liability statute in the Civil Code that places a cap on solidary liability, legislators were probably concerned about the cap applying to non-tort solidary liability situations. The legislature may have added the phrase to clarify that the fifty percent cap applied only in tort cases and not in other solidary liability situations.46

IV. QUANTIFICATION OF EMPLOYER FAULT UNDER AMENDED ARTICLE 2324(B)

A. Pre-Amendment Decisions

Before Article 2324(B) was amended in 1987, the statute was interpreted as not requiring the quantification of employer fault.47 Louisiana Revised Statutes 23:1032 provides that worker's compensation is the exclusive remedy for an

46. Touchard v. Williams, 617 So. 2d 885, 891 (La. 1993).
employee for the negligent acts of his employer and co-employees. Thus, the employer is statutorily immune and would not compensate the plaintiff if its fault were quantified. Consequently, it was logical not to quantify employer fault. But this rule was not always followed.

At the trial level, employer fault had been quantified by juries, usually when the employer intervened to recover worker’s compensation payments. This was not totally without reason since Louisiana Code of Civil Procedure article 1812 permits the quantification of the fault of all parties. The fault quantified was handled in one of three ways. If the plaintiff was more at fault than the third-party tortfeasor, the plaintiff was allocated all the employer fault. If the third-party tortfeasor was more at fault than the plaintiff, the third-party tortfeasor was allocated the employer fault. Finally, the supreme court appeared to adopt a ratio approach that allocates the employer fault in proportion to the fault of the other parties at fault, including the plaintiff.

The ratio approach was first applied in Guidry v. Frank Guidry Oil Co., decided in 1991 after the amendments to Article 2324(B), which applied pre-amendment Article 2324. Guidry reaffirmed the rule that employer fault should not be quantified under pre-amendment Article 2324. The jury had already quantified employer fault after the employer intervened to recover worker’s compensation payments, and the court had to decide what to do with the fault quantified. Plaintiff was assessed ten percent of the fault, the third-party tortfeasor seventy percent, and the employer twenty percent. The court adopted Professor Robertson’s ratio approach and reapportioned the employer’s fault between the plaintiff and the third-party tortfeasor. Thus, the plaintiff’s fault was reassessed at twelve and one-half percent and the third-party tortfeasor’s at eighty-seven and one-half percent. However, the court was not unanimous in its treatment of employer fault in this situations.

48. Louisiana Revised Statutes 23:1032(B) states: “Nothing in this Chapter shall affect the liability of the employer . . . to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act.” La. R.S. 23:1032 (Supp. 1993).
49. Louisiana Revised Statutes 23:1032(A)(1)(a) states: “The rights and remedies herein granted to an employee . . . for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights and remedies of such employee . . . against his employer . . . for said injury . . . .” La. R.S. 23:1032 (Supp. 1993).
50. See the cases cited supra note 19.
51. Article 1812(C) provides, in part: “In cases to recover damages for injury . . . the court may submit to the jury special written questions inquiring as to . . . whether another person, whether a party or not, other than the person suffering injury . . . was at fault, and, if so . . . [t]he degree of such fault, expressed in percentage.” La. Code Civ. P. art. 1812.
52. 579 So. 2d 947 (La. 1991).
53. Id. at 954. The jury assessed forty-five percent of the fault to the plaintiff, thirty-five percent to the third-party tortfeasor, and twenty percent to the employer. But, the Louisiana Supreme Court reassessed the fault because the jury did not correctly evaluate comparative fault. Id. at 950-952.
54. Id. at 954. See Robertson, supra note 20, at 54-55.
55. 10% + (1/8 X 20% [2.5%]) = 12.5%.
56. 70% + (7/8 X 20% [17.5%]) = 87.5%.
Justice Lemmon wrote that employer fault should be quantified and dissented in the opinion. Not quantifying employer fault, he said, could result in a distortion of fault for the other tortfeasors. He also noted that it is simpler, fairer, and more logical to require the jury to quantify one hundred percent of the fault established by the evidence. Thus, Justice Lemmon felt that if the employer is at fault, its fault must be quantified.

Justice Hall dissented in part. He stated the plaintiff should have been able to recover ninety percent of the judgment rather than only eighty-seven and one-half percent. Justice Hall relied on Article 2323, which states that a plaintiff is entitled to the full amount of damages less his proportion of fault. Reapportioning employer fault on a ratio basis reduced plaintiff’s recovery by two and one-half percent. According to Justice Hall, the result is contrary to the scheme of the worker’s compensation law and comparative fault. Thus, Justice Hall believes the quantified employer fault should not affect the maximum amount the plaintiff can recover.

B. Post-Amendment Decisions

Even though Guidry was decided under the pre-amendment article, there was a hint the case may have been decided differently under amended Article 2324(B). In a footnote, Justice Lemmon indicates the case might have been decided differently under amended Article 2324(B) by making it clear that “[t]his case arose before the 1987 amendment to the solidary liability provisions of La. Civ. Code art. 2324.” Also, in Melton v. General Electric Co., decided the same day as Guidry, the Louisiana Supreme Court said that “[t]o require interrogatories of employer’s fault without express legislative direction would be an unjustified judicial innovation.” In addition, after refusing to quantify employer fault under the pre-amendment statute, the fourth circuit noted, “We do not disagree that this result seems unfair to appellant, but find this to be a correct application of the law and any change therein to be the province not of the courts but of the legislature.” Did amended Article 2324(B) provide the legislative direction the court was asking for?

The first circuit hinted that amended Article 2324(B) requires quantification of employer fault. In Thompson v. Petrounited Terminals, Inc., the court refused to reduce plaintiff’s recovery by the fault of his employer. The court recognized the “unfairness” of the result, but found itself without the authority

58. Id.
59. Id. at 956 (Hall, J., dissenting in part).
60. Id. at 954 n.1 (Lemmon, J., dissenting).
61. 579 So. 2d 448 (La. 1991).
62. Id. at 452.
64. 536 So. 2d 504 (La. App. 1st Cir. 1989).
to fashion a different remedy without a clear legislative mandate. The first circuit further stated:

We are however encouraged by the recent amendment to LSA-C.C. art. 2324 which now provides in pertinent part that:

[T]he 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, . . . regardless of such other person’s . . . immunity by statute or otherwise.66

This case was followed by numerous federal district court cases that quantified employer fault under amended Article 2324(B).67

In Jarreau v. City of Baton Rouge, the first circuit finally interpreted amended Article 2324(B). The court held employer fault must be quantified under amended Article 2324(B) "[i]n order to implement this provision."68 In contrast, the third circuit in Gauthier v. O’Brien held amended Article 2324(B) did not require the quantification of employer fault. This view was consistent with interpretations of the pre-amendment statute. The third circuit is the only court that found amended Article 2324(B) did not require the quantification of employer fault.

C. The Gauthier Approach

The Louisiana Supreme Court settled the conflict between the circuits when it reviewed Gauthier. The court departed from the longstanding jurisprudential history of not quantifying employer fault under Article 2324 and decided the amended statute required quantification. The majority found “employer fault must be assessed in order to appropriately assess tortfeasors fault; however . . . the employer . . . will not be adversely effected by an assessment of fault.”69 Pre-amendment jurisprudence interpreting Article 2324(B) did not quantify employer fault fearing quantification would penalize the party worker’s compensation was designed to benefit, the injured employee. However, the

65. Id. at 516.
66. Id. at 516-17 (citations omitted).
68. 602 So. 2d 1124 (La. App. 1st Cir. 1992).
69. Id. at 1127 n.5.
70. 606 So. 2d 915 (La. App. 3d Cir. 1992), rev’d, 618 So. 2d 825 (1993).
majority in *Gauthier* recognized that the employee will recover compensation.\(^{72}\) The majority also noted that quantifying employer fault would serve to implement Louisiana’s comparative fault scheme.\(^{73}\) The court further stated that it was not “unfamiliar” to allocate fault to non-parties since phantom tortfeasor fault has been assessed under Louisiana Code of Civil Procedure article 1812.\(^{74}\) The court held that the assessment of employer fault is made “mandatory” by the 1987 amendments to Article 2324(B).\(^{75}\)

After the court decided that Article 2323(B) requires the quantification of employer fault, it had to decide what to do with the fault quantified. Under the pre-amendment statute, courts used three approaches when employer fault was quantified.\(^{76}\) But the pre-amendment statute did not require the quantification of employer fault, as does amended Article 2324(B). Thus, the pre-amendment decisions were trying to reassess the fault as the jury would have assessed it had they not erred by quantifying employer fault. Despite this distinction, the supreme court adopted one of the pre-amendment methods.

The ratio approach, first used in *Guidry* and recommended by Professor Robertson, was adopted by the supreme court as the way of apportioning the employer fault quantified.

While employer fault must be quantified by a jury to enable the jury to reach a fairer determination of the relative fault of all blameworthy parties, the judge, after the jury has returned a verdict, should disregard the proportion of fault assessed to the employer and reallocate the proportionate fault to all other blameworthy parties.\(^{77}\) As a result, despite the quantification of employer fault required by amended Article 2324(B), there does not appear to be any difference from the result in *Guidry* which held pre-amendment Article 2324 did not require quantifying employer fault. In the hypothetical above,\(^{78}\) the result would be the same under *Gauthier*, since employer fault will be reapportioned in the same manner.

According to Justice Dennis’ dissent, this approach will reduce plaintiff’s recoverable damages when the plaintiff is also at fault.\(^{79}\) This view is contrary to that of the majority, which believes the “[a]llocation of employer fault and adopting a relative fault formula will not adversely impact a plaintiff’s recovery;

\(^{72}\) *Id.* at 829.  
\(^{73}\) *Id.*  
\(^{74}\) *Id.* at 831.  
\(^{75}\) *Id.*  
\(^{76}\) *See supra* notes 20 and 21 and accompanying text.  
\(^{78}\) *See supra* part II.  
\(^{79}\) *Gauthier*, 618 So. 2d at 834 (Dennis, J., dissenting). *See also id.* at 830, reflecting Professor Robertson’s belief that quantifying employer fault will result in an unfair reduction of plaintiff’s recovery.
a plaintiff's recovery will be reduced only in proportion to the plaintiff's own negligence."80 Justice Lemmon, concurring, explained the disagreement:

I disagree with my dissenting colleague that the ratio approach attributes part of the employer's fault to reduce the plaintiff employee's recovery. If the plaintiff employee is twenty percent at fault and the employer and third party tortfeasor are each forty percent at fault, the plaintiff employee's recovery will be reduced by one-third because of his comparative fault and twenty percent in relation to the third party tortfeasor's fault, the jury would have allocated two-thirds fault to the third party tortfeasor and one-third fault to the plaintiff employee.81

Based on Justice Lemmon's rationale, the result would be the same for the plaintiff under the ratio approach since the jury would have allocated fault in this manner had they not quantified employer fault. But the reason for allocating employer fault is to "appropriately assess the fault of third party tortfeasors."82 Does the ratio approach, as a method of dealing with employer fault after it has been quantified, appropriately assess the fault of third-party tortfeasors?

D. How does Gauthier change quantification of fault?

The effect of Gauthier on the quantification of fault is best illustrated by two situations.83 If a jury, after Gauthier, allocates ninety-nine percent of the fault to the employer and one percent to the third-party tortfeasor, the result does not appear to be different than if the employer’s fault was not quantified. Under Gauthier, employer fault must be quantified, but is reallocated to the other blameworthy parties. Since the only other blameworthy party is the tortfeasor, the tortfeasor will bear all of the employer’s ninety-nine percent fault. Consequently, the tortfeasor is liable for one hundred percent of the judgment. This is exactly what would have been assessed if employer fault was not quantified because only one defendant would have been allocated fault. Also, this illustrates the same situation feared under pre-amendment Article 2324, which was considered unfair.84 How can this be the result if the purpose of allocating employer fault is to appropriately assess the fault of third-party tortfeasors? Is the third-party tortfeasor liable for forty percent of the judgment, fifty percent of recoverable damages, or one hundred percent of the judgment? The result of Gauthier suggests that the third-party tortfeasor is liable for one hundred percent of the judgment since employer fault is "disregarded" and

80. Id. at 832.
81. Id. at 833 (Lemmon, J., concurring).
82. Id. at 826.
83. Gauthier was decided on a preliminary motion, and fault of the parties had not been quantified. Thus, the approach was not applied.
84. See supra part I.
"reallotted." If that is the effect, this approach, applied to these facts, does not appropriately assess the fault of third-party tortfeasors.

The situation is not much better when the plaintiff is also at fault. If the jury assesses fifty percent of the fault to the employer, forty percent to a third-party tortfeasor, and ten percent to the plaintiff, the reallocation not only affects the third-party tortfeasor, but also the plaintiff. The plaintiff will bear one-fifth of the employer fault, and the third-party tortfeasor four-fifths when employer fault is reallocated to the other blameworthy parties. After reallocation, the plaintiff's fault will be reassessed at twenty percent\(^8\) and the third-party tortfeasor's at eighty percent.\(^8\) Does the plaintiff have his recovery reduced by ten or twenty percent? Is the third-party tortfeasor liable for forty percent of the judgment, fifty percent of recoverable damages, or eighty percent of the judgment? After Gauthier, plaintiff's recovery is apparently reduced by twenty percent, and the third-party tortfeasor is liable for eighty percent of the judgment.\(^8\) Again, this is not appropriately assessing the fault of third-party tortfeasors. Thus, the real problem is not whether employer fault must be quantified, but what to do with it once quantified.

E. What should be done with the quantified employer fault?

Solidary liability and worker's compensation are not mutually exclusive when the employer is at fault. Employer fault was not quantified before 1987 because, with worker's compensation as the employee's exclusive remedy, the employer could not be required to compensate the employee in a tort action for negligence.\(^8\) Why quantify employer fault if the plaintiff cannot recover anything from the employer? As the cases have indicated, this was not fair to the third-party tortfeasors who had to bear the employer fault that was not quantified.\(^9\) Gauthier made it clear, the reason for quantifying employer fault was to "appropriately assess the fault of third party tortfeasors." The majority did not, however, successfully achieve this goal in its treatment of the employer fault after quantification.

When an employee is injured by an employer or co-employee, the plaintiff/employee is not without compensation for the employer's or co-employee's fault. In fact, the majority recognizes in Gauthier that the plaintiff/employee recovers from his employer under worker's compensation.\(^9\) The compensation may not be as much as a tort judgment, but the worker's

\(^{85}\) 10% + (1/5 X 50% [10%]) = 20%.
\(^{86}\) 40% + (4/5 X 50% [40%]) = 80%.
\(^{87}\) This is supported by the United States Fifth Circuit's interpretation of Gauthier in Prestenbach v. Rains, 4 F.3d 358 (5th Cir. 1993).
\(^{88}\) See supra note 49 and accompanying text.
\(^{89}\) See the cases cited supra note 4.
\(^{90}\) Gauthier v. O'Brien, 618 So. 2d 825, 829 (La. 1993).
compensation law has been described as a "fair exchange,"\(^9\) and is designed as a "bargain"\(^2\) between the employer and the employee. As between the plaintiff/employee and the third-party tortfeasor, it is more equitable to require plaintiffs to bear the employer fault because they are receiving some compensation for that fault through worker's compensation. The third-party tortfeasor does not receive anything since he cannot seek contribution from the employer.\(^3\) Thus, making the plaintiff bear the quantified employer fault is not unconscionable. But, there is a better reason than equity to make the plaintiff bear his employer's fault.

Under pre-amendment Article 2324 it was widely held that a plaintiff's judgment was reduced by the fault of a solidarily liable, settling tortfeasor.\(^4\) The amended statute does not appear to change this result. Settlement is a compromise between the plaintiff and a defendant.\(^5\) As a result of the compromise, each party gives up certain rights in order to receive the benefit of preventing litigation, regardless of fault.

In Thompson v. Petrounited Terminals, Inc., the first circuit court of appeal characterized Louisiana's worker's compensation "as a compromise between employer and employee."\(^6\) The employee is assured of recovering compensation benefits from his employer if injured in the course and scope of employment. The employer is required to provide worker's compensation insurance to assure this recovery, but is immune from suit outside the worker's compensation scheme, regardless of fault.\(^7\) Thus, each party must give up certain rights in order to receive the benefit.\(^8\)

The worker's compensation "bargain" and settlement are not the same, but they produce similar consequences. In each compromise, a party gives up rights in order to assure recovery for injuries, regardless of the other party's fault. In the case of the settling plaintiff, if the settling tortfeasor is found at fault, then

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\(^3\) Gauthier, 618 So. 2d at 828.

\(^4\) Robertson, supra note 20, at 38-43, 50.

\(^5\) Article 3071 provides in part:

\[A transaction or compromise is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing.\]


\(^7\) The employer may be liable in tort for an intentional act against the employee. See supra note 48.

\(^8\) Gauthier v. O'Brien, 618 So. 2d 825, 828 (La. 1993).
the plaintiff’s recovery will be reduced by that fault. Consequently, the employee’s recovery should also be reduced by the employer’s fault.

Further support for reducing plaintiff’s recovery by employer fault is found in the reasoning of the Gauthier decision. The majority analogized to other jurisdictions with worker’s compensation schemes similar to Louisiana’s to support quantifying employer fault. A Kansas case referred to in Gauthier to support quantifying employer fault provides insight into what might be done with the fault once quantified. In Scales v. St. Louis-San Francisco Railway Co., the Kansas court reduced plaintiff’s recovery by the quantified employer fault. In that case, a third-party tortfeasor was found fifty percent at fault, and the employer fifty percent at fault. The Kansas court found that the third-party tortfeasor was not required to pay the entire judgment and reduced the plaintiff’s award by fifty percent, the employer’s fault. The majority should have used this opinion as a guide for determining what to do with the quantified employer fault instead of stopping with the principle of quantifying employer fault. The result in Gauthier would have been fairer if it had.

V. PHANTOM TORTFEASORS

As with employer fault, the quantification of the fault of phantom tortfeasors can be questioned under amended Article 2324(B). Amended Article 2324(B) provides that “a joint tortfeasor shall not be solidarily liable with any other person for damages attributable to the fault of such other persons . . . regardless of such other person’s insolvency, ability to pay, degree of fault, or immunity by statute or otherwise.” The quantification of phantom tortfeasor fault has not been as much of a problem for the courts as the quantification of employer fault. The second circuit has addressed the quantification of phantom tortfeasor fault under amended Article 2324(B).

In Devereaux v. Allstate Insurance Co., the second circuit held that phantom tortfeasor fault must be quantified under amended Article 2324(B). This was not a surprise since phantom tortfeasor fault was quantified under pre-amendment Article 2324. Also, Gauthier’s policy of appropriately assessing the fault of third-party tortfeasors provides the rationale for quantifying phantom tortfeasor fault. If employer fault must be quantified to appropriately assess the fault of third-party tortfeasors, then it follows that phantom tortfeasor fault also

100. 582 P.2d 300 (Kan. 1978).
101. Id. at 309.
102. See supra note 25.
104. 557 So. 2d 1091 (La. App. 2d Cir. 1990).
must be quantified. Thus, the Louisiana Supreme Court should recognize quantification of phantom tortfeasor fault. However, there is still the problem of what to do with the fault quantified. The court in *Devereaux* did not address this issue, but *Gauthier* provides some guidance.

*Gauthier* can be extended to phantom tortfeasor fault, and the argument for using the ratio approach is stronger. No party benefits when there is phantom tortfeasor fault as compared to the plaintiff/employee receiving some compensation when the employer is at fault. Thus, applying the ratio approach and spreading the phantom tortfeasor fault among the other blameworthy parties is a fair solution. It is likely that the Louisiana Supreme Court will extend the application of the ratio approach to phantom tortfeasor fault.

VI. What are "Recoverable Damages"?

Even if all the above issues are resolved and a third-party tortfeasor’s fault is determined, another problem still remains: what are "recoverable damages"? Under amended Article 2324(B), "liability . . . shall be solidary only to the extent necessary for the person suffering injury . . . to recover fifty percent of his recoverable damages." This language differs from part A, which holds intentional tortfeasors liable "for the damage caused." "Damage" probably refers to the entire judgment. But, what are "recoverable damages"? Some scholars believe that recoverable damages refers simply to the total judgment. However, the Civil Code does not support this notion, and jurisprudence has not expressly defined the phrase.

Failing to define recoverable damages creates many problems since it is the basis for calculating the fifty-percent cap. Plaintiffs, in efforts to maximize their collection of the entire judgment, will argue that recoverable damages means the entire judgment. Defendants, to minimize plaintiff’s collection of the judgment, will argue that recoverable damages means something less than the entire judgment. There are several possible definitions of recoverable damages: the entire judgment less plaintiff’s fault; the entire judgment less employer fault, which is quantified under *Gauthier*; the entire judgment less phantom tortfeasor fault, which is quantified under *Devereaux*; the entire judgment less plaintiff’s fault and employer fault or phantom tortfeasor fault; the total judgment less settling tortfeasors’ fault; or any combination of the above. Considering the numerous possible definitions of recoverable damages, much confusion results from the lack of a definition. However, courts that have applied the cap have not grappled with the possible definitions, but have adopted a definition for recoverable damages without discussion.

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108. Robertson, supra note 20, at 45-46; Queenan, supra note 3, at 1373-76, 1383-84.
The definition of recoverable damages as the total judgment less employer fault is possible after Gauthier, which requires quantification of employer fault. Under a literal definition of recoverable damages, employer fault would not be included since a plaintiff cannot recover this amount from a statutorily immune employer. Gauthier supports the view that employer fault will not be subtracted from the total judgment to arrive at recoverable damages. Gauthier requires the reallocation of employer fault to the other blameworthy parties, which may include the plaintiff. It would not be fair to deduct again that amount from plaintiff's recoverable damages. Also, for all practical purposes, the amount of employer fault calculated under Gauthier is disregarded except as a basis for reappportioning it to other blameworthy parties.

Phantom tortfeasor fault may also reduce plaintiff’s recoverable damages since it is quantified under Devereaux, and that quantification is supported by Gauthier. But, again, since this fault will likely be reallocated to the other blameworthy parties, it would not be fair to deduct it from a plaintiff’s recoverable damages. If a plaintiff is at fault, Gauthier’s rationale supports requiring the plaintiff to proportionately share part of the phantom tortfeasor fault. Thus, the best definition of recoverable damages may require a reduction of the total judgment by the plaintiff’s fault after reallocation.

Reducing recoverable damages by plaintiff’s fault is supported by the Civil Code and the jurisprudence. Article 2323 requires a reduction of plaintiff’s recovery by the degree of his fault. Before amended Article 2324(B), a plaintiff could hold a solidarily liable tortfeasor liable only for the total judgment less plaintiff’s fault. Thus, under pre-amendment Article 2324 recovery was

109. If a plaintiff is twenty-five percent at fault, an employer fifty percent, and a third-party tortfeasor twenty-five percent, the employer fault of fifty percent, would be reallocated so that the third-party tortfeasor’s fault would be reassessed at fifty percent and the plaintiff’s at fifty percent. Plaintiff’s recovery is already reduced by fifty percent, his fault, under comparative fault. See supra note 15 and accompanying text. Thus, if recoverable damages are reduced by the employer’s fault, assessed at fifty percent, the plaintiff will not be entitled to recover anything even though the tortfeasor is twenty-five percent at fault.

110. Reducing recoverable damages by plaintiff’s fault may also be supported by Justice Dennis’ dissent in Gauthier v. O’Brien:

In the majority’s opinion, the present case raises the broad question of whether a plaintiff, under any circumstance, may have her recoverable damages from a tortfeasor reduced because of the job-related fault of her employer. The majority’s answer to the question is, yes, when the plaintiff’s fault contributes to her own injury, her recovery must be reduced not only in proportion to her percentage of total fault between her and the tortfeasor, but also by a share of the employer’s fault based on the ratio between her fault and the tortfeasor’s fault.

Gauthier v. O’Brien, 618 So. 2d 825, 834 (La. 1993) (Dennis, J., dissenting) (emphasis added). If Justice Dennis is using recoverable damages in the same context as Article 2324(B) then, in his opinion, the majority held that an at-fault plaintiff may have her recoverable damages reduced when her employer is also at fault. However, Justice Dennis also refers to plaintiff’s “recovery” later in the discussion. Thus, it is unclear what he is referring to by use of the term “recoverable damages” even though the term is unique to Article 2324(B).

111. See supra note 15.
reduced by the degree of plaintiff’s fault. This also reduced the amount for which a plaintiff could hold a solidarily liable tortfeasor liable. If a fifty-percent cap applies to the liability of solidarily liable tortfeasor’s, then it follows that when a plaintiff is at fault, his fault must be considered.

Despite this analogy to prior jurisprudence interpreting pre-amendment Article 2324, there are no post-amendment cases which support reducing recoverable damages by plaintiff’s fault. In fact, without expressly so stating, the jurisprudence appears to follow the view that recoverable damages means the whole judgment, even when plaintiff is at fault. Some courts disregard the language of Article 2324(B) and refer to recoverable losses instead of recoverable damages. Even though it appears unlikely for a court to reduce recoverable damages by plaintiff’s fault, no court has ever expressly said that recoverable damages could not be so reduced.

Perhaps a better approach is defining recoverable damages as the total judgment less any settling tortfeasor’s fault. The result of a compromise between the plaintiff and the settling tortfeasor is that the plaintiff receives a benefit from the settling tortfeasor and also gives up something for that benefit. Non-settling tortfeasors are not able to seek contribution because they will not have to pay any part of the settling tortfeasor’s portion of the judgment. Judgment will be reduced as a result of the settlement. Therefore, recoverable damages should also be reduced. As with plaintiff’s fault, Article 2324(B) does not limit a third-party tortfeasor’s liability by the proportionate fault of settling tortfeasors. If a settling tortfeasor is found fifty-one percent at fault, each of the other third-party tortfeasors could be required to pay fifty percent of recoverable damages. If recoverable damages means the whole judgment, each third-party tortfeasor could be required to pay fifty percent of the judgment. However, the plaintiff can only recover forty-nine percent of the judgment. Thus, recoverable damages will have to be something less than the whole judgment when the settling tortfeasor is more than fifty percent at fault. In fairness to other tortfeasors and to prevent confusion, recoverable damages should be reduced by settling tortfeasor fault. However, the only case since Gauthier involving a settling tortfeasor does not address the issue.


113. Devereaux, 557 So. 2d at 1093, 1096, 1100; Thompson, 577 So. 2d at 1178.

114. See supra note 95 and accompanying text.


116. David v. Cajun Painting Inc., 631 So. 2d 1176 (La. App. 5th Cir. 1994), held a settling tortfeasor is a blameworthy party to whom a proportion of the employer fault must be allocated. The case did not discuss how recoverable damages would be affected.
VII. CONCLUSION

The 1987 amendments to Article 2324(B) caused many problems, some resolved, some not, in solidary liability in Louisiana tort law. Despite these problems, amended Article 2324(B) is a workable statute, and jurisprudence has provided some guidance in the statute’s application.

We know Article 2324(B) places a cap on the liability of a solidarily liable tortfeasor. A solidarily liable tortfeasor is liable for only fifty percent of the injured party’s recoverable damages. The injured party may seek fifty percent of his recoverable damages from any solidarily liable tortfeasor even if the injured party could otherwise recover fifty percent of his recoverable damages. However, if the injured party is also at fault and the solidarily liable tortfeasor’s fault is less than the injured party’s fault, then the solidarily liable tortfeasor is liable for only his virile share and no more. Also, if a solidarily liable tortfeasor is liable for more than fifty percent of the injured party’s recoverable damages, then he will be bound to compensate the injured party for his virile share despite the cap.

In many situations, the failure to define recoverable damages will not cause problems. If plaintiff is not at fault, recoverable damages will probably be the whole judgment. However, if plaintiff is at fault and there is also employer fault or phantom tortfeasor fault, then recoverable damages may be reduced by a proportion of plaintiff’s fault, which may include a proportion of the employer fault or phantom tortfeasor fault. The only case involving a settling tortfeasor after Gauthier did not address the issue of “recoverable damages.” But, if recoverable damages can be reduced by plaintiff’s fault when there is also employer fault or phantom fault, then recoverable damages should also be reduced by settling tortfeasor fault. Consequently, the determination of recoverable damages could change, depending on the situation of the case.

If there is employer fault or phantom tortfeasor fault, it will be quantified under amended Article 2324(B). The problem remains of what should be done with the fault quantified. The Louisiana Supreme Court has held this fault should be “reallotted to the other blameworthy parties.” In theory, this seems fair, but when the employer is at fault, plaintiffs will receive a windfall since they will recover not only worker’s compensation benefits, but also a proportion of employer fault. Thus, plaintiff should absorb the quantified employer fault. This is consistent with the principle of “appropriately assessing the fault of third-party tortfeasors.” However, when a phantom tortfeasor is at fault, the ratio approach is a better way to apportion the uncompensated fault. Plaintiffs receive no collateral compensation attributable to the fault of a phantom tortfeasor as they do with the fault of an employer, and should not have to absorb this fault.

The exception to Article 2324(B) for cases “as otherwise provided by law” has had the least amount of jurisprudential interpretation of all the issues covered in this comment. This lack of interpretation, coupled with the frequent application of Article 2324(B) to tort situations, suggests that the exception will not provide a way for injured plaintiffs to avoid the fifty-percent cap on the
amount recoverable from solidarily liable tortfeasors. More than likely, this exception instead will prevent only solidarily liable parties, who are solidarily liable under theories other than tort, from benefiting from the cap.

Many problems caused by Article 2324(B) have been resolved by jurisprudential interpretations of the statute, and others will be resolved as the article is applied to more situations. Amending the statute and starting over, as some might suggest, may cause other problems for the courts to resolve. Thus, it is best to leave the statute in its current form and allow jurisprudence to resolve the remaining problems.

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