Cavalier v. Cain's Hydrostatic Testing, Inc.,
Quantification of Fault Prior to the 1996 Louisiana
Legislative Special Session

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Cavalier v. Cain's Hydrostatic Testing, Inc., Quantification of Fault Prior to the 1996 Louisiana Legislative Special Session

I. INTRODUCTION

On April 16, 1996, campaign rhetoric became reality when "Gov. [Mike] Foster signed into law his first bills, three measures that will drastically change the nature of civil litigation in Louisiana." These bills were a part of the governor's pro-business tort reform package. One such bill, House Bill 21, amended and reenacted Civil Code article 2323 and greatly simplified the law of comparative fault.

Art. 2323. Comparative fault

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 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 a 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 the 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.

Simply stated, in a tort action the factfinder must determine the fault of all parties, including the plaintiff and everyone "causing or contributing to the injury . . . 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 . . . or that the person's identity is not known or reasonably ascertainable." Once the
percentages of fault are determined, each actor is liable to the plaintiff for their respective percentage of fault. Obviously, if each actor is liable for his percentage of fault, the plaintiff's recovery will be reduced by his own percentage of fault. Consequently, "a person or business only partially at fault in an accident cannot be made to pay more than their [sic] share of the damages as determined by the courts." Finally, if a plaintiff's negligence combines with an actor's intentional tort, the plaintiff's percentage of fault shall be determined, however "his claim for recovery of damages shall not be reduced." The tort reform package did not stop at comparative fault, it also addressed the concept of solidary liability. House Bill 21 amended and reenacted Civil Code article 2324.

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

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.

The reference to "Paragraph A," is a reference to paragraph A of Civil Code article 2324. Paragraph A states: "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." Therefore, under revised Civil Code article 2324, only intentional or willful tortfeasors who act to cause harm will be solidarily liable for the damages they cause. Also, "[i]f 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." Finally, under revised Civil Code article 2324, "[a] joint tortfeasor shall not be liable for more than his degree of fault...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." Simply stated, under revised Civil Code article 2324, a negligent tortfeasor will only be liable for his percentage of fault. For example, if a tortfeasor's percentage of fault is determined to be 10%, he will be liable for only 10%.

5. Cooper, supra note 1.
7. Id.
8. Id.
9. Id.
A fact specific, fictional example may shed some light on how these revised articles will work together. Fred was injured in the course and scope of his employment for Slade Gravel Co. on April 30, 1996. Fred's injuries were caused by the concurrent negligence of Slade Gravel Co. and three third parties, Wilma, Betty, and Barney, an unknown nomad. After the accident, Barney, reflecting his nomadic tendencies, left town and his whereabouts are unknown. When Fred's case went to trial, the jury was required, under revised article 2323, to quantify the fault of all of the parties, including Fred's immune employer Slade Gravel Co.\textsuperscript{10} and the unknown/absent defendant, Barney. The jury then assessed fault as follows:

<table>
<thead>
<tr>
<th>Party</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fred</td>
<td>10%</td>
</tr>
<tr>
<td>Slade Gravel Co.</td>
<td>10%</td>
</tr>
<tr>
<td>Wilma</td>
<td>15%</td>
</tr>
<tr>
<td>Betty</td>
<td>10%</td>
</tr>
<tr>
<td>Barney</td>
<td>55%</td>
</tr>
</tbody>
</table>

Under revised Article 2324, Fred was then able to collect only 25% of his judgment, 15% from Wilma and 10% from Betty. Obviously, Fred could not collect from Barney, who was absent, nor could he collect from Slade Gravel Co., his immune employer. Contrary to prior jurisprudence, revised Civil Code article 2324 does not provide for the "bumping" of any defendant's liability to 50%, nor does it provide for a pro-rata division of an absent tortfeasor's percentage of fault. In other words, neither Wilma nor Betty can have their relative degree of fault elevated to 50% to ensure Fred's recovery of 50% of his judgment. Furthermore, the absent defendant's percentage of fault will not be divided on a pro-rata basis among the remaining parties. Under House Bill 21, each party's fault is calculated and each party is responsible for their assigned percentage of fault, period.

This casenote reflects the state of Louisiana law and the questions presented by the jurisprudence prior to House Bill 21. House Bill 21 represents the latest chapter in the struggle with the law of comparative fault and solidary liability. However, prior to the special session, the Louisiana Supreme Court had the proverbial last word and, given the sometimes antagonistic roles of the court and legislature, the policies espoused by the court remain relevant.\textsuperscript{11} In \textit{Cavalier v. Cain's Hydrostatic Testing, Inc.},\textsuperscript{12} the Louisiana Supreme Court, for the third time in the last five years,\textsuperscript{13} addressed the issue of whether a factfinder should quantify an employer's fault when the concurrent negligence of the employer and

\textsuperscript{10} The Louisiana Worker's Compensation scheme provides an employer with an immunity from suit in a negligence action. See La. R.S. 23:1032 (1995).


\textsuperscript{12} 657 So. 2d 975 (La. 1995).

\textsuperscript{13} Gauthier v. O'Brien, 618 So. 2d 825 (La. 1993); Guidry v. Frank Guidry Oil Co., 579 So. 2d 947 (La. 1991).
a third party combined to cause harm to an employee. Held: "[Q]uantification of [an employer's] fault is unnecessary and inappropriate." However, if the Cavalier decision was made according to revised Civil Code article 2323, the result would be completely different. Revised Civil Code article 2323 specifically addresses the situation presented in Cavalier. Under revised Civil Code article 2323, quantification of an employer's fault is mandated.

This casenote will address Cavalier's impact on the quantification of fault in negligence actions. In Part II, this casenote will detail the facts and issues presented to the supreme court in Cavalier. In Part III, this casenote will review the supreme court's prior handling of the issue. In Part IV, this casenote will describe how the Cavalier court resolved these issues and the court's reasoning. Finally, in Part V, this casenote will suggest what policies the Cavalier decision espouses, examine the notions of imputed negligence and duty/risk, describe how Cavalier may have affected solidary liability prior to the 1996 special session, and review some of the practical consequences of the decision.

II. CAVALIER v. CAIN'S HYDROSTATIC TESTING, INC.

Dennis Cavalier worked as a manual laborer for WHC Contractors ("WHC") which had contracted with Transcontinental Gas Pipeline Corp. ("Transcontinental") to fabricate and install a pipeline. WHC, in turn, subcontracted the hydrostatic testing of the pipeline to Cain's Hydrostatic Testing, Inc. ("Cain's"). While assisting Ray Parrish, an employee of Cain's, with the hydrostatic testing of the pipeline, Cavalier removed a plug from a valve connected to a section of pipe that was being depressurized. This in turn was the cause of Cavalier's injuries.

Cavalier filed a personal injury suit in the Thirty-Second Judicial District Court, Parish of Terrebonne, against Transcontinental, Parrish, and Cain's. WHC's worker's compensation carrier intervened to recover worker's compensation benefits paid to Cavalier. Transcontinental settled with Cavalier before trial and was dismissed from the suit. The trial judge instructed the jury to consider the fault of all blameworthy persons regardless of whether they were, or had ever been, a party to the suit. Fixing the damage award at $500,000.00, the jury found Cain's 20% negligent, WHC 80% negligent, and allocated no fault to Transcontinental or Parrish. The trial court, however, found that WHC was immune from suit because it was Cavalier's employer and disregarded WHC's 80% share of the damage award. The trial court held Cain's liable only for its virile share, 20% of the total

14. Cavalier, 657 So. 2d at 978.
16. Id.
17. The Louisiana Worker's Compensation scheme allows an employer to intervene in a suit to recover compensation that has already been paid to the employee. See La. R.S. 23:1101 (1995).
damage award, or $100,000.00 of the awarded $500,000.00. Additionally, the court awarded WHC's worker's compensation carrier 20% of the compensation payments made to Cavalier. All parties appealed.19

In an opinion by Chief Judge Lottinger, the Louisiana First Circuit Court of Appeal amended the trial court's judgment and held that under Gauthier v. O'Brien,20 Cain's was liable for the full amount of the damage award, $500,000.00.21 The court explained that Gauthier required the factfinder to quantify the immune employer's percentage of fault and then reallocate that fault among the remaining at-fault parties.22 As Cain's was the only remaining at-fault party, it bore the reallocation of the immune party's fault alone.23 Therefore, the court found Cain's liable for 100% of the damage award.24 The court of appeal also amended the trial court's award to WHC's compensation carrier and awarded the carrier 100% of the compensation payments made to Cavalier.25

On writ of certiorari, the Louisiana Supreme Court "decided to revisit the question of whether the jury, or judge in a bench trial, should quantify the fault

19. Cavalier, 637 So. 2d at 726.
20. 618 So. 2d 825 (La. 1993).
21. Cavalier, 637 So. 2d at 724.
22. This reallocation formula will be referred to as the "Gauthier Formula." For example:
Fred is injured during the course and scope of his employment for Slade Gravel Co. Fred's injuries are caused by the concurrent negligence of Slade Gravel Co. and two parties not affiliated with Slade, Barney, and Wilma. Fred's own contributory negligence was also a cause of the accident. The jury allocates fault as follows:

<table>
<thead>
<tr>
<th>Party</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fred</td>
<td>10%</td>
</tr>
<tr>
<td>Slade Gravel Co.</td>
<td>40%</td>
</tr>
<tr>
<td>Barney</td>
<td>20%</td>
</tr>
<tr>
<td>Wilma</td>
<td>30%</td>
</tr>
</tbody>
</table>

Because of worker's compensation, Slade Gravel Co. is immune from suit. Slade's fault will be apportioned among all of the remaining at-fault parties on a pro rata basis. To determine how much each party will have to bear, add the percentages of fault of all of the parties except the immune party, Slade. Fred + Barney + Wilma; or 10 + 20 + 30 = 60. Each party will bear a pro rata share of the employer's fault. In other words, Fred will bear 10/60 or 1/6 (his total/remaining parties total) of the 40%. Fred's grand total is 10% + 6.6% (approximately his percentage of Slade's fault; 1/6(40) = 6.6) = 16.6%. Barney will bear 20/60 or 1/3 of the 40%. Barney's grand total is 20% + 13.3% (approximately his percentage of Slade's fault; 1/3(40) = 13.3) = 33.3%. Wilma will bear 30/60 or 1/2 (her total/remaining parties' total) of the 40%. Wilma's grand total is 30% + 20% (approximately her percentage of Slade's fault; 1/2(40) = 20) = 50%. This method accounts for 100% of the applicable fault including the fault of immune parties. Using the approximate numbers for example: 16.6% + 33.3% + 50% = 99.9%.

23. Cavalier, 637 So. 2d at 730. The trial court did instruct the factfinder to quantify the employer's fault but failed to reallocate the employer's fault among the at-fault parties. Because Cain's was the only remaining at-fault party, the final outcome was unaffected.
24. Id. at 729-30.
25. Id. at 730.
of the plaintiff's employer in a tort action against a third party tortfeasor.  

Expressly overruling Gauthier, a unanimous court held the quantification of an employer's fault was "unnecessary and inappropriate." Quantification of an employer's degree of fault is neither "suggested by La.Code Civ.Proc. art. 1812C nor is made mandatory by La.Civ.Code art. 2324B." The court overruled the appellate court's reasoning, which was based on Gauthier, but affirmed the result, holding Cain's liable for 100% of the damages because it was the only party whose fault the jury should have quantified. Finally, in dicta, the court noted the appropriateness of quantifying the fault of non-parties in the following situations: a settling tortfeasor, a party whose negligence is

27. Id. at 984.
28. Id. at 978.
29. Id. at 984. La. Code Civ. P. art. 1812(C) reads:
   (C) In cases to recover damages for injury, death, or loss, the court may submit to the jury special written questions inquiring as to:
   (1) Whether a party from whom damages are claimed, or the person for whom such party is legally responsible, was at fault, and, if so:
      (a) Whether such fault was a legal cause of the damages, and, if so:
      (b) The degree of fault, expressed in percentage.
   (2) If appropriate, whether another person, whether party or not, other than the person suffering injury, death, or loss, was at fault, and, if so:
      (a) Whether such fault was a legal cause of the damages, and, if so:
      (b) The degree of such fault, expressed in percentage.
   (3) If appropriate, whether there was negligence attributable to any party claiming damages, and, if so:
      (a) Whether such negligence was a legal cause of the damages, and, if so:
      (b) The degree of such negligence, expressed in percentage.
   (4) The total amount of damages sustained as a result of the injury, death, or loss, expressed in dollars.

   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 solidary 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.

30. Cavalier, 657 So. 2d at 984.
31. Id. at 981.
imputed to the plaintiff or defendant, and the court implied that it was also appropriate to quantify a third-party defendant’s fault.

III. THE SUPREME COURT’S PRIOR HOLDINGS ON QUANTIFICATION OF EMPLOYER FAULT

A. Guidry v. Frank Guidry Oil Co.

The Louisiana Supreme Court first faced the issue of whether to quantify an employer’s fault in a third party workplace tort suit in the 1991 case of Guidry v. Frank Guidry Oil Co. In dissent, Justice Lemmon clearly stated “the issue . . . [to be decided is] how to handle employer fault in comparative fault cases involving multiple tortfeasors.” In a 4-3 decision, the court held the factfinder should not quantify the employer’s fault. The court’s analysis focused on the worker’s compensation scheme, the way other jurisdictions have handled the same issues, and Louisiana Code of Civil Procedure article 1812(C).

The court began by noting “[t]he rights and remedies of an employee in the Louisiana compensation scheme exclude all other rights and remedies against the employer.” Under the Louisiana Worker’s Compensation scheme, the employee surrenders his tort rights for the right to receive compensation, while the employer pays the compensation premiums with the certain knowledge that by doing so, he will be immune from suit in a negligence action. When the court turned to other states for guidance as to whether to quantify the immune employer’s fault, it found the other jurisdictions evenly divided on the issue. Finally, the court looked to the Louisiana Code of Civil Procedure.

In its examination of Code of Civil Procedure article 1812(C), the Guidry court found Lemire v. New Orleans Public Service, Inc. instructive. In Lemire, the court had held quantification of an immune party’s fault was mandatory. The Guidry court, however, distinguished Lemire because Lemire

32. Id. at 981 n.3.
33. Id. at 982.
34. 579 So. 2d 947 (La. 1991). Justice Watson wrote for the majority. Justice Lemmon dissented and assigned reasons. Justice Calegero dissented and Justice Hall dissented, in part, and also assigned reasons. Justice Lemmon’s dissent is noteworthy because he wrote for a unanimous court in Cavalier. Cavalier and Guidry are consistent in their holdings.
35. Id. at 954.
36. Id.
37. Id. at 952.
38. Id. at 953. Under the Louisiana Worker’s Compensation scheme the employer is immune from suit in a negligence action. He is not immune from suit for an intentional tort.
39. Id. (citing 2 Arthur Larson & Lex Larson, Workman’s Compensation Law, § 76.11, at 14-561 (1982)).
40. 458 So. 2d 1308 (La. 1984).
41. Id. at 1311.
involved the statutory immunity of public agencies, whereas *Guidry* concerned the statutory immunity of employers. The court reasoned:

> [T]he compensation principle excludes the concept of employer fault. It is not clear that the statutory language was intended to embrace employer fault. Since the statute does not specifically require juries to consider the comparative fault of employers, there is no express legislative directive on the issue. Extending the amendment to employers would violate the compensation principle and cannot be done by implication.  

Therefore, the court held that Code of Civil Procedure article 1812(C) does not require the quantification of an employer’s degree of fault.

**B. Gauthier v. O’Brien**

Two years after the *Guidry* decision, the court, in *Gauthier v. O’Brien*, overruled *Guidry* and determined that the then recently amended Civil Code article 2324(B) required the quantification of an immune employer’s fault. However, the court instructed that after the factfinder determined the employer’s fault, the judge was to redistribute it proportionately among the other at-fault parties. The *Gauthier* court considered the same factors as the *Guidry* court in its analysis.

The court dispensed with Code of Civil Procedure article 1812(C) and *Lemire* quickly, explaining “'[i]n our view, the statutorily immune employer is analogous to the political subdivision defendant in Lemire.'” Moreover the court also stated “[a]llocating fault with respect to the employer pursuant to La.Code Civ. Proc. art. 1812(C)(2) will likewise serve to implement Louisiana’s comparative fault scheme.” The court found the doctrine of comparative fault required the factfinder to determine the fault of all parties, including immune parties.

The court acknowledged that the great deal of jurisprudence preceding *Gauthier* had held the factfinder should not quantify an employer’s fault. However, the court held in *Gauthier* that the jury should quantify an employer’s

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42. *Guidry*, 579 So. 2d at 953-54.
43. 618 So. 2d 825 (La. 1993).
44. Louisiana Civil Code article 2324 was also amended prior to the *Gauthier* decision; however, as footnote one in *Guidry*’s dissent notes, 579 So. 2d 947, 954 (La. 1991), *Guidry* arose prior to the enactment of Article 2324(B). Article 2324(B) did apply in *Gauthier*.
45. *Gauthier*, 618 So. 2d at 829.
46. *Id.*
The court rejected the contention that having the factfinder quantify an employer’s fault constituted an “inroad into the workers’ compensation scheme,” stating:

"[T]his characterization seems to overlook the fact that the employee has already recovered or will recover compensation as well as medical benefits from his or her employer. While it has been suggested that plaintiff/employees may be harmed by the reduction of their recovery based upon the combined proportion of fault allocated to the employer and the employee; the employee’s rights under the Louisiana workers’ compensation scheme are neither curtailed nor denied by allocating employer fault in tort actions against third parties." 50

The court noted that other states with compensation schemes similar to Louisiana’s had quantified employer fault without “an adverse impact on the employer or the employee.” 51 The court cited the Supreme Court of Idaho with approval: “‘[t]rue apportionment [of fault] cannot be achieved unless that apportionment includes all tortfeasors guilty of causal negligence either causing or contributing to the occurrence in question, whether or not they are parties to the case.’” 52

The court found further support for the quantification of an employer’s fault in the last sentence of Louisiana Civil Code article 2324(B):

Except as described in Paragraph A of this Article, or 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. 53

In the end, the court was unable to find any “compelling reason to refuse to assess employer fault under the circumstances presented by this case.” 54 The court held “[w]e overrule Guidry v. Frank Guidry Oil Co. . . . the assessment of fault is made mandatory by the 1987 amendment to La. Civ. Code art. 2324 B, and to that extent Guidry . . . [is] no longer the law.” 55

48. Gauthier, 618 So. 2d at 831.
49. Id. at 829.
50. Id.
51. Id.
52. Id. at 830 (quoting Pocatello Ind. Park Co. v. Steel West, Inc., 101 Idaho 783, 787, 621 P.2d 399, 403 (Idaho 1980)).
54. Gauthier, 618 So. 2d at 830.
55. Id. at 831. The court also overruled Guidry’s companion case, Melton v. General Elec. Co., 579 So. 2d 448 (La. 1991). In Melton, the court held, as in Guidry, an employer’s fault should not be quantified in a workplace negligence suit. Id.
The *Cavalier* decision departed from *Gauthier* and returned to the older jurisprudence concerning the quantification of employer fault. In 1993, two years before *Cavalier*, the supreme court held in *Gauthier v. O'Brien* that the jury must quantify an employer's fault. *Gauthier* was the basis for the first circuit's decision in *Cavalier*. The first circuit held the factfinder must quantify an immune employer's fault and the judge must proportionally allocate the employer's fault among the remaining at-fault parties, including the plaintiff.\(^{36}\) On appeal, the supreme court stated: "We therefore overrule the holding of *Gauthier* that quantification of employer fault either is suggested by La. Code Civ. Proc. art. 1812C or is made mandatory by La. Civ. Code art. 2324B."\(^{37}\) In dicta, the court also addressed the issues of quantification of other non-party fault and solidary liability.

### A. Quantification and Code of Civil Procedure article 1812(C)

The supreme court in *Cavalier* centered its analysis of the quantification issue around Code of Civil Procedure article 1812, the history of Louisiana's adoption of the comparative fault system, and Civil Code article 2324. Code of Civil Procedure article 1812 was amended in 1979 as a part of a legislative initiative to implement a system of comparative fault in Louisiana.\(^{58}\) The court explained "[a]rticle 1812C(2) permits quantification of the fault of 'another person, whether party or not,' if such quantification is appropriate."\(^{59}\) Thus, article 1812 does not mandate that the factfinder quantify an employer's or a non-party's fault.\(^{60}\) Rather, the quantification of a non-party's fault is "inherently a question to be decided by the courts."\(^{61}\) In performing its discretionary function, the court analyzed those factors favoring and disfavoring quantification. The court noted that under the Louisiana Worker's Compensation scheme, when an employee is injured by the negligence of the employer or by the combined negligence of an employer and a third party, the employer is immune from suit by the employee, is immune from suit by third parties seeking contribution, and has a statutory lien on the employee's recovery from third persons.\(^{62}\) The court explained that quantifying the fault of the employer would only hurt the employee. First, it would reduce the total amount of recoverable fault by including the immune employer in the allocation of fault. Second, the employer

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56. The "Gauthier Formula," see supra note 22. As the first circuit noted, Cain's was the only remaining at-fault party and would therefore bear the burden of the immune employer alone.


59. *Cavalier*, 657 So. 2d at 980 (emphasis added).

60. *Id.* (emphasis added).

61. *Id.* at 981.

62. See supra notes 17, 18, and 38.
could recover any compensation payments made to the employee from the amount the employee recovers from the third party. Because the court preferred to protect the employee's rights before the third party's, it determined that the factfinder should not quantify an employer's percentage of fault under Code of Civil Procedure article 1812(C).

B. Quantification and Civil Code Article 2324(B)

In examining Article 2324, the court began with a historical overview of fault quantification and Louisiana's adoption of the doctrine of comparative fault. Before 1980, a joint tortfeasor could be held liable for 100% of the judgment, but he enjoyed contribution rights against the other tortfeasors. In 1979, the Louisiana Legislature amended five statutory provisions to adopt a system of "pure" comparative fault. However, the legislature failed to indicate whose fault the factfinder should quantify. The legislature's attempt to implement a more equitable comparative fault system was further flawed because Civil Code article 2324 provided that joint tortfeasors, whether intentional or negligent, were solidarily liable for the full amount of the damages. Consequently, if the

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63. Cavalier, 657 So. 2d at 982. For example: Fred is injured by the concurrent fault of his employer, Slade Gravel Co., and a third party, Barney. The jury quantifies fault as follows:

Fred 10%
Slade Gravel Co. 60%
Barney 30%

Fred can only collect 30% of the award because Slade Gravel Co. is immune from suit under worker's compensation. Fred's recovery of 30% is reduced further because Slade Gravel Co. is allowed to make a claim for the return of compensation payments already made to Fred. This return of compensation will come from the 30% Fred will receive.

64. The contribution claim was based on the number of tortfeasors. If there were three tortfeasors each would be liable for one-third. If there were four, each would be liable for one-fifth and so on. Contributory negligence was a bar to recovery. See Thomas C. Galligan, Jr., Article 2324: The Discombobulating State of Solidarity in Post Tort Reform Louisiana, 54 La. L. Rev. 551, 552-53 (1994).

65. Cavalier, 657 So. 2d at 979. Comparative fault was adopted by 1979 La. Acts No. 431. In a system of pure comparative fault the contributory negligence of the plaintiff reduces, but does not bar, his recovery. In a modified comparative fault state, the plaintiff's recovery is barred if he is fifty percent or more at fault. For example: Fred, Wilma, and Barney, all driving separate vehicles, are involved in an automobile accident. Fred files suit. A jury determines Fred's fault to be 51%, Wilma's 26%, and Barney's 23%. Fred's damage award is $100,000.00. In a state with a pure comparative fault system, Fred could only recover $49,000.00, i.e., the total damages award reduced by his percentage of fault, 51%. However, in a modified comparative fault state, Fred's recovery would be barred because he is more than 50% at fault. See Martha Chamallas, Comparative Fault and Multiple Party Litigation in Louisiana: A Sampling of the Problems, 40 La. L. Rev. 373 (1980).

66. The Uniform Comparative Fault Act was not adopted by the legislature. The Uniform Act calls for the factfinder to quantify the fault of settling tortfeasors and parties to the suit. See Uniform Comparative Fault Act §2(a).
factfinder determined a non-conspiring tortfeasor’s fault, for example, to be 10%, the plaintiff could hold that tortfeasor liable for the total amount of damages despite his slight degree fault. That tortfeasor could, of course, seek contribution from the other tortfeasor, but he would also bear the burden of a joint tortfeasor’s insolvency.

In 1987, as a part of a “tort reform” initiative, the legislature amended Civil Code article 2324 in an attempt to limit solidarity. As enacted, Civil Code article 2324(B) reduced a non-conspiring joint tortfeasor’s solidary obligation from 100% to 50% of the recoverable damages. Article 2324(B) also stated that a person would not become solidarily liable because of another’s immunity. The court noted, however, that this language did not suggest whether quantification of an employer’s fault was necessary. The court concluded that since neither Code of Civil Procedure article 1812 nor Civil Code article 2324(B) required the factfinder to quantify an employer’s fault, it was neither necessary nor appropriate.

C. Quantifying the Fault of Other Parties

Code of Civil Procedure article 1812(C) states a judge “may” instruct the jury to quantify the fault of non-parties. However, the Cavalier court stated unequivocally that “quantification of the fault of an employer is not necessary or appropriate under Article 1812(C) in an action against a third party tortfeasor.” Thus, use of Article 1812(C) to quantify an employer’s fault whose negligence combines with the negligence of a third party has been curtailed.

67. Galligan, supra note 64, at 551.
69. Louisiana Civil Code article 2324(B) (1987) provided in part:

(a) If liability is not solidary pursuant to Paragraph A [He who conspires with another person to commit an intentional or willful act], or as otherwise provided by law, then liability for the damages caused by two or more persons shall be solidary to the extent necessary for the person suffering injury, death, or loss to recover fifty percent of his recoverable damages; (b) however, when the amount of recovery has been reduced in accordance with the preceding Article [Civil Code article 2323 reduces the plaintiff’s recovery by the amount of his fault], 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.

(Emphasis and internal lower case “a” and “b” added). The meaning of section (a) was addressed by the court in Touchard v. Williams, 617 So. 2d 885 (La. 1993). Stated simply section (b) provides that if the plaintiff’s degree of fault is greater than a joint, negligent tortfeasor, than that joint negligent tortfeasor will be held liable only for his percentage of fault and no more.
71. Cavalier, 657 So. 2d at 982.
While the court placed an obvious limitation on the application of Code of Civil Procedure article 1812(C) in the employer/employee context, the court illustrated through express directive, implication, and footnote when the factfinder should quantify fault. First, the court explicitly stated that a factfinder should determine the fault of a non-party "when one tortfeasor has settled with and obtained a release from the tort victim." 72 Quantifying the fault of a settling tortfeasor "is not only appropriate but is necessary" 73 because "the tort victim's release of one tortfeasor deprives the remaining tortfeasors of their contribution rights against the settling tortfeasor." 74 The tort victim's recovery, therefore, "must be reduced by the proportionate share of the settling tortfeasor." 75 Without explanation, the court then implied that the factfinder should also quantify the fault of third-party defendants. "[J]uries should not be required to quantify the fault of a person that no party sees fit to join in the suit as a defendant or a third party defendant unless there is a compelling reason, such as the case of a settling tortfeasor." 76 Presumably, the plaintiff would not have to join the third party defendant as a primary defendant to have the third party's fault quantified. The court's language implies that if any party adds a third party to the suit, then the third party's fault should be quantified. Simply stated, a person's fault should be considered if he is either a primary defendant or a third-party defendant. To use Cavalier's language, quantifying a third-party defendant's fault is appropriate and necessary. Finally, and again without explanation, in footnote three of the opinion, the court stated that the factfinder should quantify a non-party's fault if the non-party's fault is imputable to the plaintiff or defendant. 77

D. Footnote Six, Civil Code Article 2324(B), and Touchard Footnote Three

On September 17, 1987, Brenda Williams, James Minter, Martha Causey, and Steven Lege were involved in a four car accident on Interstate 10. Mary Touchard, Brenda Williams' passenger, was injured in the accident and filed suit against the four drivers. The jury awarded Touchard $100,000.00 and apportioned fault among three of the four drivers as follows: Williams 63%; Causey 30%; and Lege 7%. 78 Touchard received a total of $62,000.00 from the parties. She received the policy limit of $25,000.00, from State Farm, Williams' insurer; $30,000.00 from Allstate, Causey's insurer; and $7,000.00 from Texas Farmer's, Lege's insurer. 79 Touchard did not receive the full amount of the

72.  Id. at 981.
73.  Id.
74.  Id.
75.  Id.
76.  Id. at 982 (emphasis added).
77.  Id. at 981 n.3.
78.  Touchard v. Williams, 617 So. 2d 885, 886 (La. 1993).
79.  Id. at 887.
damage award because Williams was insolvent and her insurer had paid up to the limit of her policy. The trial court’s interpretation of Article 2324(B)’s limitation of solidarity among tortfeasors would dictate from whom and how much Touchard would receive. Based on Article 2324(B), “[t]he lower courts . . . created conditional or ‘functional’ solidarity among joint tortfeasors.” As a result, “the existence or non-existence of solidarity liability among joint tortfeasors is conditioned upon whether the victim can successfully recover fifty percent of his recoverable damages from the joint tortfeasors.” Therefore, because Touchard’s actual recovery exceeded 50% of her recoverable damages, she was precluded from recovering additional amounts from either Causey or Lege. The Louisiana Third Circuit Court of Appeal affirmed.

In 1993, the Louisiana Supreme Court granted writs “to determine whether Louisiana Civil Code article 2324(B) imposes solidary liability on joint tortfeasors only when the victim cannot collect at least 50% of his recoverable damages or whether the article imposes solidary liability on joint tortfeasors subject to a cap of 50%.” In reversing the third circuit, the Touchard court accepted the second circuit’s interpretation of Civil Code article 2324(B) and found that the article limited the exposure of joint tortfeasors to 50% of the recoverable damages. Therefore, non-conspiring, joint tortfeasors were solidarily bound but only up to 50% of the recoverable damages. As long as the plaintiff’s fault is less than the defendant’s, he may recover 50% of his recoverable damages from any one of the liable defendants regardless of that defendant’s degree of fault.

What the court described in footnote three has been characterized as the “footnote 3 bump up one” (bump one) approach. This approach applies in the

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80. Id.
81. Id.
82. Id. at 887 n.1.
84. Touchard, 617 So. 2d at 886.
85. Id.
86. Id. at 887 n.3.
87. Galligan, supra note 64, at 569.
situation where one joint tortfeasor is unable to "pay" his virile share. The bump approach allows the plaintiff to increase the liability of one joint tortfeasor to a maximum of 50% of the recoverable damages. If a joint tortfeasor's liability is 50% or more, the plaintiff cannot bump him. The increase allows the plaintiff to make up for shortages caused by another party's payment of less than its full share. An increase in the defendant's liability is only limited by the proviso that the defendant's fault must be greater than the plaintiff's. For example, Fred is involved in an automobile accident with Barney, Wilma, and Pebbles. The jury allocates fault to the parties as follows: Fred 0%, Barney 63%, Wilma 30%, and Pebbles 7%. Barney is insolvent. Fred may then "bump" either Wilma or Pebbles from their share of liability to 50% to compensate for Barney's insolvency. In footnote six, the Cavalier court took notice of Touchard. Cavalier footnote six stated: "This court in Touchard v. Williams interpreted the 1987 amendment to La.Civ.Code art. 2324B as placing a fifty percent limitation on the solidary liability of each negligent joint tortfeasor." The court used the word "each" in describing the 50% limitation. Cavalier could be read to allow a plaintiff to raise "each" defendant's degree of fault up to 50%. In other words each joint tortfeasor may be bumped, bump two as opposed to one. This interpretation, allowing a bump two, would change the current state of the law, bump one, as it is understood by some. However, neither footnote six nor the opinion in Cavalier explicitly overruled Touchard footnote three. Thus, Cavalier might be an affirmation of Touchard's footnote three or a reinterpretation of Touchard's text with regard to solidary liability. While the exact effect is unclear, what is clear is the confusion that remains. This note will discuss Cavalier's impact on Touchard's footnote three in more detail in Part V.

88. For example:

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<tbody>
<tr>
<td>Fred</td>
<td>0%</td>
</tr>
<tr>
<td>Barney</td>
<td>63%, but insolvent</td>
</tr>
<tr>
<td>Wilma</td>
<td>30%</td>
</tr>
<tr>
<td>Pebbles</td>
<td>7%</td>
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</tbody>
</table>

Fred's alternatives: (a) Fred can bump Wilma and recover 57%. (Wilma's 30% + A Bump Factor of 20% assigned to Wilma + Pebbles' 7%) or (b) Fred can bump up Pebbles and recover 80% (Pebbles' 7% + A Bump Factor of 43% assigned to Pebbles + Wilma's 30%)

However if the facts were changed:

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<tbody>
<tr>
<td>Fred</td>
<td>8%</td>
</tr>
<tr>
<td>Barney</td>
<td>60%, but insolvent</td>
</tr>
<tr>
<td>Wilma</td>
<td>25%</td>
</tr>
<tr>
<td>Pebbles</td>
<td>7%</td>
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</tbody>
</table>

Fred would be unable to bump Pebbles because his degree of fault, 8%, is greater than her degree of fault, 7%. Fred's only option would be to bump up Wilma. He can still recover from Pebbles, but only to her degree of fault. Therefore in this scenario Fred's maximum recovery is 57%. The allocation would look like this: Wilma 50% (her 25% + A Bump Factor of 25%) + Pebbles' 7%.

89. Cavalier v. Cain's Hydrostatic Testing, Inc., 657 So. 2d 975, 982 n.6 (La. 1995) (emphasis added) (citation omitted).
V. ANALYSIS

The most significant questions raised by Cavalier are: (1) what are the policies the court is trying to implement; (2) what does the court mean by negligence imputed to the plaintiff or defendant; and, (3) what impact, if any, did Cavalier’s footnote three have on the limitation of solidarity expressed in Touchard?

A. Policies Espoused by Cavalier: Quantify Fault When Necessary and Appropriate

Read strictly, Cavalier stands only for the proposition that a factfinder should not quantify an employer’s fault when the concurrent negligence of the employer and a third party combine to cause harm to an employee. Cavalier’s language regarding the settling tortfeasor and footnote three’s language concerning quantification of negligence imputed to the plaintiff or defendant are merely dicta. However, dicta from the Louisiana Supreme Court are persuasive in this unsettled area of the law and suggest what policies the court is trying to implement through its decisions. The court gives an indication of the underlying policies with its consistent use of the terms “necessary” and “appropriate.”

1. Necessity and Simplicity of Litigation

The court stated that the factfinder should not quantify an employer’s fault when the employer’s negligence combines with the negligence of a third party to cause harm to an employee because it is not necessary. It is not necessary, the court explained, because the joint tortfeasor cannot obtain contribution from the employer. The employer also enjoys the statutory immunity provided by worker’s compensation. The employer may only become a party to the suit by intervening to recover the compensation payments already received by the employee. Thus, the employer’s percentage of fault is irrelevant, i.e., unnecessary. However, the employer’s fault is relevant to the joint tortfeasor in Cavalier because by quantifying the employer’s fault the joint tortfeasor’s liability is initially decreased. However, the immune employer’s fault does not simply disappear.90 As the court of appeal noted, the employer’s fault should have been quantified and then distributed among the at-fault parties on a pro rata basis under the Gauthier formula. Consequently, the joint tortfeasor, being the only remaining party, would be liable for the whole. The joint tortfeasor in Cavalier was going to bear 100% of the liability regardless of whether the employer’s fault was quantified. However, quantifying the employer’s fault imposes the additional steps of quantification and redistribution before arriving at the final figure. Therefore, the factfinder should not quantify the employer’s fault because it would add additional, unnecessary steps to the equation. Simply stated, one

90. This is precisely what happened in Cavalier at the trial level.
of the policies espoused by *Cavalier* is simplicity of litigation. This policy is further reflected by *Cavalier*'s language which allows the factfinder to quantify the fault of the settling tortfeasor.

Quantifying the fault of the settling tortfeasor is necessary because, unlike the employer, his fault is relevant, and his inclusion in the litigation does not unnecessarily complicate the litigation. The settling tortfeasor's fault is relevant because the plaintiff has taken an action which will impair the remaining party’s ordinary contribution rights. By quantifying the settling party’s degree of fault, the plaintiff does not benefit from double recovery. Without quantifying the settling party’s fault, the plaintiff could collect from both the settling party and the remaining tortfeasors. The tort victim’s recovery “must be reduced by the proportionate share of the settling tortfeasor.”91 Again, one of *Cavalier*'s underlying policies is simplicity of litigation.

2. **Appropriate Recovery Through Accurate Apportionment**

Why is it inappropriate to quantify the employer’s fault? As noted above, the *Cavalier* court felt the negative impact of quantifying an employer’s fault was too great a burden on the plaintiff. First, it reduces the total amount of recoverable fault by including the immune employer in the allocation of fault. Second, the employer can recover any compensation payments made to the employee from the amount the employee recovers from the third party.92 When the factfinder quantifies the employer’s fault, the employee’s “pool” of money from which he can draw is reduced. Additionally, the worker’s compensation scheme allows the employer to recover any compensation payments made to the employee from any amount the employee recovers from the other parties. The employer recovers its compensation payments from the employee’s reduced recovery pool first, leaving any remaining balance for the plaintiff. Therefore, quantifying the employer’s fault doubly reduces the employee’s recovery. The *Cavalier* court clearly illustrates this point.93 Justice Dennis, concurring, also endorsed a policy in favor of the plaintiff’s rights:

Article 2324 as a whole should be strictly construed against the derogation of the established rights of tort victims against tortfeasors. . . . Article 2324 should not be interpreted to injure tort victims’ rights by compelling the quantification of the “fault” of the victims’ fully immune employers. Instead, . . . [2324(B)] should be read less injuriously so as, at most, to refer to persons who do not enjoy full immunity by virtue of the quid pro quo between employers and employees—for example, persons who enjoy partial or situational

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91. *Cavalier*, 657 So. 2d at 981.
92. See *supra* notes 17, 18, and 38.
93. *Cavalier*, 657 So. 2d at 982.
immunities, such as family members, governmental entities, and rural landowners. However, Justice Dennis' comments in favor of the plaintiff go too far. The immune employer does benefit from situational immunity just like a family member, governmental entity, or rural landowner. The employer's immunity is not absolute, the employer is situationally immune from suit only when its negligence causes injury; it is not immune from suit for intentional torts. But, Cavalier is about more than the plaintiff's rights, it is also about the need for appropriate recovery by joint tortfeasors, i.e., rights of contribution. Allowing the factfinder to quantify the settling tortfeasor's and the third party defendant's fault also demonstrates this underlying policy of Cavalier. Quantifying the settling tortfeasor's fault is appropriate because it will not penalize the plaintiff. The plaintiff has settled with the released party of his own accord and, by his own actions, has reduced the "pool" from which he will ultimately recover. Allowing the factfinder to quantify the fault of the third party defendant is also appropriate. The third party's fault represents what he must pay in the way of indemnification to the primary defendant who will pay all of the primary judgment. In this way, the third party defendant indirectly contributes to the plaintiff's recovery. Thus, Cavalier's second underlying policy is ensuring appropriate recovery through accurate apportionment of fault. However, Cavalier's policies can be turned around and used to demand the apportionment of an employer's degree of fault. If Cavalier's goal is to achieve an appropriate recovery through accurate apportionment of fault, then an employer's fault should also be determined. However, this argument fails to consider the statutory "bargain" between the employer and the employee, workers' compensation. The employer has paid compensation premiums with the knowledge that it will not be held accountable in a negligence action. The employer has also paid compensation benefits to the employee and will only recover those benefits if the employee recovers in tort from a third party tortfeasor.

The policies espoused by the Cavalier court favor simplicity and appropriate recovery. The factfinder should quantify the fault of non-parties only when it is necessary, that is, when their degrees of fault are relevant to either the plaintiff's recovery or to the contribution rights among the tortfeasors. Second, Cavalier's policies indicate the factfinder should quantify a party's degree of fault when it will aid in the plaintiff's recovery or in the contribution claims among the joint tortfeasors. If, as in the case of the employer, quantification of fault will reduce the plaintiff's recovery without any other effect, then quantification in that case is inappropriate. In footnote three, the court also indorsed quantification of a non-party's imputable negligence, but did not specifically address the quantifica-
tion of a phantom’s fault. However, the court’s language in footnote three may be instructive on how to handle the phantom’s degree of fault.

B. Quantification of Negligence Imputed to the Plaintiff or Defendant

In footnote three, the Cavalier court stated, without further explanation, that the factfinder should quantify a non-party’s fault if the non-party’s fault is imputable to the plaintiff or to a defendant. The court stated: “Another obvious situation in which quantification of the fault of a non-party is appropriate, as well as necessary, is when a non-party is a person whose negligence is imputable to the plaintiff or to a defendant.” What is meant by negligence imputed to the plaintiff or to a defendant? Black’s Law Dictionary gives the following definition of imputed negligence:

The negligence of one person may be chargeable to another depending upon the relationship of the parties, as for example, the negligence of an agent acting within the scope of his employment is chargeable to the principal. Negligence which is not directly attributable to the person himself, but which is the negligence of a person who is in privity with him, and with whose fault he is chargeable.

In Louisiana this relationship is also known as vicarious liability. Vicarious liability is a narrow concept. Parents are vicariously liable for their minor children and employers are vicariously liable for the torts of their servant agents under their control and in the course and scope of their employment. Imputed negligence in the context of vicarious liability would create a small class of persons for whom the plaintiff or defendant would be responsible. Fault can also be imputed by means of the negligence concept of duty/risk. Duty/risk is a concept which holds a person responsible for the acts of another because the actor’s conduct fell within the scope of the risk of the liable party’s conduct. In other words, the liable party’s action or inaction included the risk that the actor would cause harm. Imputed negligence in the duty/risk context would create a broad class of persons for whom the plaintiff or defendant would be responsible. Liability would extend to all situations when the acting party’s activity fell within the scope of the risk of the plaintiff or defendant’s actions or inactions. Cavalier’s underlying policies, simplicity and accurate recovery, should dictate

| 95. A “phantom” is someone who, for some reason, is unknown. For example, the unidentified driver who forces another off of the road and fails to stop. |
| 96. Cavalier, 657 So. 2d at 981 n.3. |
whether imputed fault should be extended to responsible parties in the narrow (vicarious liability) or broad sense (duty/risk).

Applying imputed negligence in the vicarious liability context would result in simple litigation and would also comport with Cavalier's policies. The only party whose negligence would be imputed to the plaintiff or to a defendant would be an imputee's minor child or servant agent. A judge's inquiry into the nature of liability would be simple and factually oriented, with few unrelated policy decisions factoring into the determination of fault. Do the facts suggest this individual is a child for whom the plaintiff or defendant is responsible? Do the facts suggest the non-party is an employee for whom the plaintiff or defendant is responsible? Applying imputed negligence in the duty/risk context, however, would not be as simple and could possibly result in a great number of persons whose fault could be imputed to the plaintiff or to a defendant. In the duty/risk context all of the plaintiff or defendant's activities, depending on the scope of the risk of the activities, could possibly generate persons for whom negligence could be imputed. The judge's inquiry would be factually driven and complicated by policy issues. Did this defendant have a duty to protect this person, from this harm, under these circumstances? Did this victim fall within the scope of the risk of this activity under these circumstances?

Despite the need for greater inquiry into the nature of the act and the larger number of persons for whom negligence would be imputed to the plaintiff or defendant, the duty/risk notion of imputed fault best comports with the policies underlying Cavalier. While the vicarious liability idea of imputed negligence is simple, it fails to address the danger of misallocating a non-party's fault. For example, if a non-party is neither a minor child nor a servant agent, under vicarious liability, that non-party's fault would not be quantified. The parties to the litigation could each bear the non-party's fault regardless of their relationship to him. But, if the duty/risk notion of imputed fault is applied, the parties will bear fault according to their relationship with the non-party. If one of the litigating party's actions included the risk the non-party would cause harm, then that party alone should bear the non-party's degree of fault. For example, Fred is the victim of Wilma, Pebbles, and Barney's concurrent fault. Pebbles is a non-party, phantom, or otherwise absent party, whose fault falls within the duty/risk of Wilma's activity. The percentages of fault, according to who actually did what to whom are:

- Fred 5%
- Wilma 55%
- Pebbles 10%
- Barney 30%

Wilma's percentage of actual fault is 65% because it includes both her degree of fault and Pebbles' fault, the person for whom she is also responsible. But, if the jury fails to consider Pebbles' fault, it may improperly assign her fault to one or both of the non-responsible parties, Fred or Barney. By quantifying Pebbles' fault, the jury (1) apportions fault according to who, both party and non-party,
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did what and (2) then assigns percentages of fault to the responsible parties. While the duty/risk notion of imputed fault falls in line with Cavalier's policies, it is also consistent with one of the court's most recent decisions in this area of the law, Veazey v. Elmwood Plantation Associates, Ltd.

On October 3, 1988, an unknown assailant, who entered through a second story bedroom window, raped Christi Veazey in her apartment at the Elmwood Park Plantation complex. Veazey filed suit against Southmark Management, the company entrusted with the management of Elmwood Park. Veazey claimed Southmark was negligent in providing inadequate security and negligent in its representations regarding both the amount of security and the number of past criminal acts at the complex. The jury found Veazey free from fault and awarded her $150,000.00 in general damages and $30,000.00 in special damages, for a total damage award of $180,000.00. However, in a manner inconsistent with the verdict, the jury allocated only 60% of the fault to Southmark and 40% to Veazey. The trial judge granted a plaintiff's motion for clarification and judgment not withstanding the verdict, and reallocated all of the fault to Southmark. "A divided [supreme court] held that because the 'specific' risk which made the complex operator's conduct negligent was the criminal attack by the rapist, the complex operator was liable for the full amount." In essence, the rapist's degree of fault was imputed to the defendant, Southmark, because the rapist's conduct fell within the scope of the risk, duty/risk, of the defendant's negligence. Thus, while Veazey deals with the imputation of an intentional actor's fault, similarly, Cavalier deals with the imputation of a negligent actor's fault.

In order to be consistent with Veazey, the phrase negligence "imputable to the plaintiff or to a defendant" must mean imputable within the duty/risk context. The rapist's intentional tort in Veazey was not imputable to the defendant because of vicarious liability: it was imputable because the rapist's actions fell within the risk created by the defendant's negligence. Therefore, it would be inconsistent to impute fault under duty/risk for intentional torts but to impute fault under vicarious liability for negligence actions. Cavalier represents a logical progression from Veazey. Therefore, if a phantom's negligence or intentional tort falls within the duty/risk of the plaintiff's or a defendant's activity, under Cavalier or Veazey, the phantom's negligence or intentional tort should be imputed to the responsible party.

100. See Martin v. Louisiana Dept. of Transp. and Dev., 665 So. 2d 457 (La. App. 5th Cir.), writ denied, 666 So. 2d 657 (1995), which states that fault should be apportioned to a phantom tortfeasor, but cites pre-Cavalier jurisprudence. Ferrell v. Fireman's Fund Ins. Co., 650 So. 2d 742 (La. 1995). But see Duplantis v. Danos, 664 So. 2d 1383 (La. App. 1st Cir. 1995), which holds that it is error to allocate fault to a phantom under Cavalier. Duplantis does not explore the meaning of imputed negligence.

101. 650 So. 2d 712 (La. 1994).

102. Id. at 713.

103. Maraist & Galligan, supra note 11, at 226.
One factual difficulty remains if a parallel is to be drawn between *Cavalier* and *Veazey*, between imputed negligence and imputed intentional torts. In *Veazey*, the rapist’s activity was the "specific" risk within the defendant's duty.\(^{104}\) "Identifying the 'specific' risk within . . . [each] defendant's duty may be a rather nebulous quest . . . ."\(^{105}\) As a result, "'scope of the risk' can be a 'slippery slope' to responsibility, *i.e.*, liability, for the unforeseeable and to what some might deem the unreasonable."\(^{106}\) However, the duty/risk class is not without its boundaries. Duty/risk is a question for the court to decide as a matter of law. The court in *Cavalier* alludes to this fact.

The *Cavalier* court pointed out that "since the Legislature did not specify which non-parties should have their fault quantified by the jury, the appropriateness, and indeed the necessity, of quantifying the fault of a particular non-party . . . is inherently a question to be decided by the courts."\(^ {107}\) That is, a judge will act as a gatekeeper: he will determine if the non-party's actions fall within the duty/risk of one of the parties. If the answer is yes, the factfinder will be allowed to quantify that non-party's fault which then will be reallocated to the appropriate party. In so doing, the correct party will bear the non-party's degree of fault. Finally, in applying the duty/risk notion of imputed fault, no relevant class of non-parties is left out of the inquiry because the duty/risk notion of imputed fault includes the narrower vicarious liability class.

C. *Cavalier*'s Possible Effect on the Limits of Solidarity

Another question left unanswered by *Cavalier* is, what impact, if any, does *Cavalier*’s footnote three have on the limitation of solidarity expressed in *Touchard*? As noted in Part IV.C of this casenote, *Cavalier*’s footnote six may have reversed *Touchard*’s footnote three regarding the nature of limited solidarity among non-conspiring tortfeasors. *Touchard*’s footnote three stated that a plaintiff could only seek 50% of his recoverable damages from one joint tortfeasor, that is, only one joint tortfeasor could have his percentage of liability raised to 50%, the bump one approach.

The *Touchard* court made it clear that modified solidary liability is not conditioned on a plaintiff’s actual recovery. "[C]onditional or functional solidarity, and its ramifications, among joint tortfeasors, has never been a part of Louisiana law."\(^{108}\) "[Conditional or functional liability] might frequently prompt post judgment reassignment of quantum exposure because of the conditional nature of the judgment. Thus a 'final' judgment would not become 'final' under this interpretation."\(^{109}\) Therefore, it is incorrect to assert that joint

\(^{104}\) Id.
\(^{105}\) Id.
\(^{106}\) Id.
\(^{107}\) Id.
\(^{108}\) Id.
\(^{109}\) *Cavalier* v. Cain's Hydrostatic Testing, Inc., 657 So. 2d 975, 980-81 (La. 1995).
\(^ {109} \) *Touchard* v. Williams, 617 So. 2d 885, 892 (La. 1993).
\(^ {109} \) Id. at 893.
tortfeasors are solidarily liable only to the extent necessary to recover 50% of the damage award.\footnote{10} Solidary liability is not contingent upon recovery. A defendant is either solidarily liable or not.

1. What is the Nature of Touchard's Limited Solidarity?

Touchard's text is ambiguous. In adopting the Louisiana Second Circuit Court of Appeal's reasoning,\footnote{111} the Touchard court stated "that the phrase [only to the extent necessary for the person suffering the injury, death, or loss to recover fifty per cent of his recoverable damages] was intended to limit the exposure of joint tortfeasors to 50\%, rather than 100\%, of the plaintiff's recoverable damages."\footnote{112} This may mean that each joint tortfeasor is solidarily liable for 50\%. Consequently, each would be responsible for up to 50\% and each could have its degree of liability elevated from its percentage of fault up to 50\% (bump two). However, the court continued, stating "[t]hus, a victorious plaintiff could secure 50\% of his recoverable damages from any one of the liable defendants."\footnote{113} Therefore, a plaintiff may recover 50\% of his damages from any one of the liable defendants. But, does this mean he may recover from only one or both of the joint tortfeasors: may the plaintiff bump one or bump two? However, the third sentence, quoted above, when read in pari materia with footnote three, appears to suggest that the plaintiff will bump only one tortfeasor. The judgment debtor, in turn, who pays more than his share, can seek contribution or indemnity from his joint tortfeasors.\footnote{114} The Touchard court did not apply its reading of Article 2324(B), but remanded the case to the district court.\footnote{115}

2. How has Touchard Been Received by the Lower Courts?

The lower courts have only applied Touchard’s handling of the 50\% liability issue once. In Hayes v. Kelly,\footnote{116} the Louisiana Third Circuit Court of Appeal interpreted Touchard as requiring a bump up of two joint tortfeasors. The Kelly court explained: "The Louisiana Supreme Court's interpretation of Article 2324(B) of the Louisiana Civil Code requires that each defendant, the City of Alexandria and the Sheriff of Rapides Parish, be held jointly liable for 50\% of [the] recoverable damages. Consequently, the City and the Sheriff are each liable to Hayes for $27,500.00."\footnote{117}
3. Ambiguity, Article 2324(B), and Solidary Liability

"When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law." Before the modification of solidary liability for non-conspiring tortfeasors, one joint tortfeasor could be held accountable for 100% of the damages. There are two ways to view article 2324(B)'s modification of this liability. First, a plaintiff could recover 100% of his damages, but Article 2324(B) would reduce each tortfeasor's exposure from 100% to 50% (bump two). Second, before the amendment to Article 2324(B), a plaintiff could hold one defendant liable for 100% of the damages. Therefore, Article 2324(B) would limit the 50% liability exposure to one tortfeasor (bump one). The policies that underlie solidarity determine which interpretation is correct.

Solidary liability ensures that (1) the plaintiff will recover, and (2) he will not have to bear the burden of an insolvent tortfeasor. Civil Code article 2324(B) strikes a fine balance if it allows the plaintiff to bump up two tortfeasors. The plaintiff is still ensured 100% recovery, but the burden of insolvency is spread between two tortfeasors. Bumping only one tortfeasor would shift the burden of insolvency from the tortfeasors to the plaintiff. This clearly fails to conform to the purpose of the law.

4. Cavalier's Language and the Weight of a Footnote

Cavalier's footnote six clearly interprets "the 1987 amendment to La.Civ.Code art. 2324B as placing a fifty percent limitation on the solidary liability of each negligent joint tortfeasor, as opposed to the previously existing one hundred percent." Cavalier's use of the word "each" suggests that both negligent tortfeasors are solidarily liable for 50% of the damages. This is the only reference in the majority opinion to Touchard. Is it possible the justices meant to overrule Touchard footnote three with another footnote which contains such ambiguous language? Does Cavalier mention Touchard's footnote at all? No, Cavalier does not refer to Touchard's footnote three; Cavalier cites the Touchard opinion. Arguably, Cavalier's footnote six is a reinterpretation of the meaning of the Touchard opinion. A reading of Cavalier's footnote six that allows the plaintiff to bump two best comports with the policies that underlie the modification of solidary liability, protecting the plaintiff and balancing the risks of insolvency.

119. Touchard, 617 So. 2d at 890.
D. Practical Consequences

*Cavalier* provides weapons for both the plaintiff and defendant. A plaintiff can now argue a non-party's negligence, for example the negligence of an absent party or phantom, is imputable to the defendant. That non-party's fault would then be quantified and assigned to the defendant, increasing the plaintiff's recovery. Likewise, the defendant can turn this argument around and argue that the non-party's fault should be imputed to the plaintiff. Of course, defense counsel can also attempt to lay all of the blame on a party whose fault will not be quantified. Alternatively, the defendant could argue that his duty did not extend to this risk or that all of the fault should be borne by the plaintiff. For example, the defendant in *Cavalier* could have argued that all of the fault should have been borne by the immune employer or the plaintiff. By "shifting the blame," there is a possibility that the plaintiff will not recover at all.

VI. CONCLUSION

In the Old Testament, King Solomon was forced to decide which of two women was the mother of a child. Not knowing which woman was the actual mother, the king demanded his sword. Solomon told the women he was going to cut the child in half and give half to each of them. One woman agreed, the other protested stating it would be better for the child to go with the first rather than be killed. King Solomon determined the real mother of the child was the woman who protested.\(^1\)

The *Cavalier* decision represents a judicial struggle of Solomon-like proportions. The Louisiana Supreme Court began its struggle in 1991 with a 4-3 vote in the *Guidry* decision. This decision was reversed in 1993 with a 6-1 vote in *Gauthier*. In *Cavalier*, the court unanimously returned to *Guidry*. However, the legislature, through House Bill 21, legislatively overruled *Cavalier* and amended and reenacted Civil Code articles 2323 and 2324. Throughout this series of cases and legislative changes, the judicial, legislative and executive branches have been faced with a number of competing issues and policies. All three branches of state government have had to recognize the employer's rights under worker's compensation and the employee's right to adequate compensation within the framework of comparative fault and solidary liability. Because *Cavalier* and revised Civil Code articles 2323 and 2324 involve so many competing issues, who is to say when or if these Civil Code articles will be amended again, marking a possible return to the principles espoused in the *Cavalier* decision. The *Cavalier* court, with four years of post-*Guidry* and two years of post-*Gauthier* experience, spoke with one voice: "We now hold that quantification of employer fault is unnecessary and inappropriate."\(^2\) However, in a classic exercise of democratic principles, the legislature

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121. 1 Kings 3:16-28.
122. *Cavalier*, 657 So. 2d at 978.
responded to *Cavalier* by amending two articles of the Civil Code, casting the *Cavalier* decision into the realm of prior jurisprudence and historical footnote.

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