Love and Fury: Recent Radical Revisions to the Law of Comparative Fault

David W. Robertson
Love and Fury: Recent Radical Revisions to the Law of Comparative Fault

David W. Robertson*

I. THE 1996 LEGISLATION AND THE PROVISIONS THEREBY REPLACED

Acts 3, 15, and 65 of the Louisiana Legislature's First Extraordinary Session of 1996 effected revolutionary changes in the law of comparative fault. This article analyzes those changes, criticizes the harshness of some of them, and predicts judicial reactions to some of the harsher provisions.¹

A. Louisiana Civil Code Articles 2323 and 2324

Act 3 of 1996, which took effect on April 16, 1996, amended Louisiana Civil Code article 2323 to read as follows:

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 other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as the result partly of his own negligence and partly as 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 a result partly of his own negligence and partly as a result of the fault of an intentional tortfeasor, his claim for recovery of damages shall not be reduced.

Before the 1996 changes, Louisiana Civil Code article 2323 was as set forth below.

**Former Art. 2323:**

When contributory negligence is applicable to a claim for damages, its effect shall be as follows: 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 claim for damages shall not thereby be defeated, but 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.

Act 3 of 1996 also amended Louisiana Civil Code article 2324 to read as follows:

**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, 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

---

2. Louisiana Revised Statutes 23:1032 confers a general immunity from tort liability upon employers covered by the workers' compensation system.
DAVID W. ROBERTSON

statute or otherwise, including but not limited to immunity as provided in R.S. 23:1032, or that the other person’s identity is not known or reasonably ascertainable.

C. Interruption of prescription against one joint tortfeasor is effective against all joint tortfeasors.

Before the 1996 change, Louisiana Civil Code article 2324 was as set forth below.

**Former Art. 2324.**

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.

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

**B. Louisiana Code of Civil Procedure Article 1812(C)**

Act 65 of 1996, which took effect on May 9, 1996, amended Louisiana Code of Civil Procedure article 1812(C). The changes were quantitatively small and few enough to permit using the following quotation to show both the former and post-1996 versions of the article. As the provision is formatted below, language deleted in 1996 is in brackets and language added in 1996 is in italics.
Art. 1812. Special verdicts

***

C. In cases to recover damages for injury, death, or loss, the court [may] at the request of any party shall 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 person 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 such fault, expressed in percentage.

2. If appropriate under the facts adduced at trial, whether another [person, whether party or not] party or nonparty, 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.
   i. For purposes of this Paragraph, nonparty means a person alleged by any party to be at fault, including but not limited to:
     a. A person who has obtained a release from liability from the person suffering injury, death, or a loss.
     b. A person who exists but whose identity is unknown.
     c. A person who may be immune from suit because of immunity granted by statute.

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 special damages and the total amount of general damages sustained as a result of the injury, death, or loss, expressed in dollars, and, if appropriate, the total amount of exemplary damages to be awarded.

C. The New Louisiana Revised Statutes 23:1104

Act 15 of 1996, which went into effect on June 18, 1996, created a new provision, Louisiana Revised Statutes 23:1104, providing as follows.

§ 1104. Quantification of employer fault

In a suit brought pursuant to R.S. 23:1101, the fault of persons immune from suit under R.S. 23:1032 shall be assessed as a percentage

3. Louisiana Revised Statutes 23:1101 provides that an employee covered by workers’ compensation remains entitled to sue a nonemployer (“third person”) in tort. It also provides that an employer or workers’ compensation carrier who has paid or become obligated to pay workers’ compensation benefits can sue the third person in tort to recover those benefits.
of the aggregate fault of all persons causing or contributing to the employee's injury, and the fault so assessed shall not be reallocated to any other person or party. The recovery had in such a suit by the employer or any other person having paid or having become obligated to pay compensation shall be reduced by the fault so assessed. This reduction is in addition to but not duplicative of any reduction made pursuant to Civil Code articles 2323, 2324, and 2324.24 and R.S. 23:1101(B).5

II. WHAT THE 1996 LEGISLATION SAYS ON ITS FACE—A PARAPHRASE

No matter what the theory of liability being asserted by the plaintiff, a percentage assessment of fault is to be made as to each person or entity shown to have been a cause in fact and a legal cause of the injuries in suit, regardless of whether the person or entity is a party to the lawsuit and regardless of any immunity to which the person or entity may be entitled. The plaintiff is entitled to full damages from any defendant shown to have been an intentional tortfeasor. The exposure of any other liable defendant is limited to that individual defendant's percentage-fault share of the total damages. Solidary liability is abolished except among those who commit or conspire to commit intentional or willful harm. An employer or workers' compensation carrier who has paid workers' compensation benefits to the victim remains entitled to some recoupment of such payments, but this recovery must be reduced to reflect both the employer's fault and (other)6 comparative-fault reductions in the employee's tort recovery.

4. Louisiana Civil Code article 2324.2 is captioned "Reduction of recovery" and reads as follows:
   A. When the recovery of damages by a person suffering injury, death, or loss is reduced in some proportion by application of Article 2323 or 2324 and there is a legal or conventional subrogation, then the subrogee's recovery shall be reduced in the same proportion as the subrogor's recovery.
   B. Nothing herein precludes such persons and legal or conventional subrogees from agreeing to a settlement which would incorporate a different method or proportion of subrogee recovery for amounts paid by the legal or conventional subrogee under the Louisiana Worker's Compensation Act, R.S. 23:1021, et seq.

5. Louisiana Revised Statutes 23:1101(B) provides as follows:
   B. Any person having paid or having become obligated to pay compensation under the provisions of this Chapter may bring suit against such third person to recover any amount which he has paid or becomes obligated to pay as compensation to such employee or his dependents. The recovery allowed herein shall be identical in percentage to the recovery of the employee or his dependents against the third person and, where the recovery of the employee is decreased as a result of comparative negligence, the recovery of the person who has paid compensation or has become obligated to pay compensation shall be reduced by the same percentage.

6. The parenthetical "other" is necessary because the employer's fault will occasionally reduce the compensation lien in cases in which the employee's tort recovery against the third party suffers no comparative-fault reductions. See discussion in Section III-C.
III. A HYPOTHETICAL CASE ILLUSTRATING THE APPARENT MEANING OF THE 1996 LEGISLATION

A. The Facts of the Hypothetical Case

A parcel-delivery service sends its employee, Porter, to Aaron's house to drop off a package that Aaron has been expecting for weeks. Aaron is under psychiatric care for a condition manifesting itself in frequent fits of rage. Porter's Employer knows of Aaron's condition and volatility but neglects to warn Porter. When Aaron complains about the late arrival of the package, Porter's response is offhand and flippant. Aaron flies into a rage and attacks Porter, beating him severely. During the attack a Mysterious Stranger arrives at the scene and helps Aaron batter Porter. The Mysterious Stranger, whose identity is never discovered, then disappears.

Aaron is usually able to control his temper with the aid of prescription medications. However, on the occasion in question, Aaron is taking the wrong medicine because of a mistake made by the Drug Store from which he obtains his supply.

Porter sues Aaron, alleging battery, and Drug Store, alleging negligence. If any party requests it, the trial judge must submit the issues of Employer's and Stranger's percentages of fault to the jury. (Drug Store will definitely request it.) The jury finds that Porter was somewhat to blame\(^7\) for his own injuries—he should have been more polite—and that Aaron, Drug Store, Employer, and Mysterious Stranger were also at fault in bringing about the injuries, further specifying:

- Porter's total damages: $100,000
- Porter's negligence: 10%
- Aaron's fault: 20%
- Drug Store's fault: 10%
- Employer's fault: 10%
- Stranger's fault: 50%

At the time of trial, Employer has paid $20,000 in weekly workers' compensation benefits.\(^8\) Employer intervenes in Porter's lawsuit to assert its compensation lien.\(^9\)

---

7. In the paper, attributions of "blame," "fault," or "negligence" mean that the party in question was guilty of legally relevant fault that was a cause in fact and a legal cause of the injuries in suit.

8. I am avoiding the additional complexity that might ensue if the employer had paid medical expenses in addition to weekly benefits. See generally Malone & Johnson, supra note 1, at 266-72.

9. There has been significant debate about the proper characterization of the employer's right to recoupment of some or all of its compensation payments from the employee's tort recovery against a nonemployer tortfeasor. See Malone & Johnson, supra note 1, at 281-98. Louisiana Civil Code article 2324.2 (added in 1989) characterizes it as a legal subrogation. I would like to steer clear of
B. Determining Plaintiff's Rights Against the Defendants

As to Porter's rights against Aaron and Drug Store, the dictates of the 1996 legislation, while quite surprising, seem relatively clear. The effect of the judgment against the two defendants should be that Porter can recover the full $100,000 from Aaron and that he is also entitled to recover $10,000 from Drug Store. Of course, this does not mean that Porter can collect $110,000. The judgment should provide that Drug Store is individually liable for $10,000, that Aaron is solidarily liable with Drug Store for that $10,000, and that Aaron has an additional individual liability of $90,000. As will be demonstrated in Section VII-A, Louisiana Civil Code article 2324(A) clearly authorizes imposing solidary liability upon Aaron in this situation.

An interesting question respecting the interpretation of the 1996 legislation arises if we posit that Porter settles with Drug Store during the course of the trial and continues the proceedings against Aaron. Louisiana Civil Code article 2323(C) can and should probably be read to indicate that Aaron is entitled to no reduction in his liability to reflect the settlement with Drug Store. Read literally, that is what Article 2323(C) says. Moreover, the predecessor law may well have denied intentional tortfeasors any reduction in their liability to reflect partial settlements entered into by the plaintiff with other tortfeasors. Nothing in the
background or language of the 1996 legislation indicates any intention to alter the law in that respect.

Another interesting question will arise if we posit that Porter appeals the decision of the trial court and secures a determination by the court of appeal that the attribution of any fault to him was manifestly or clearly erroneous. As we will see in Section V-D, in similar situations under prior law the courts have used a "ratio approach" whereby the fault assessments against the other parties are adjusted proportionately so that they total 100%. Thus, Aaron's assessment would become 20/90ths (22.22%); Drug Store's and Employer's would each become 10/90ths (11.11%); and Stranger's would become 50/90ths (55.56%). On these assessments—which would not alter Porter's rights against Aaron—Porter would recover $11,111 from Drug Store.

I see nothing in the 1996 legislation that would preclude the continued use of the ratio approach in the present context—to effect judicial correction of a factually mistaken percentage assessment against one of the parties—and it seems the only sensible alternative. All the other conceivable alternatives are demonstrably worse. Remanding the case to the trier of fact for new assessments of the fault of the participants other than Porter would be an expensive and cumbersome maneuver, virtually unthinkable in the Louisiana scheme of things. For the appellate court itself to readjust the percentages of the participants other than Porter on a fact-review basis would offend well-established limitations on appellate fact review.

Parenthetically, it should be noted that there is no reason for doubting that a negligent tortfeasor is entitled to contribution from (and therefore to a settlement credit reflecting the plaintiff's having agreed to release) an intentional tortfeasor. See Jarreau v. City of Baton Rouge, 602 So. 2d 1124, 1126 n.3 (La. App. 1st Cir. 1992) (stating that it would normally be appropriate to reflect a plaintiff's settlement with an intentional tortfeasor by giving the negligent defendant a reduction reflecting the intentional tortfeasor’s percentage of fault).

Parenthetically, it should be noted that there is no reason for doubting that a negligent tortfeasor is entitled to contribution from (and therefore to a settlement credit reflecting the plaintiff's having agreed to release) an intentional tortfeasor. See Jarreau v. City of Baton Rouge, 602 So. 2d 1124, 1126 n.3 (La. App. 1st Cir. 1992) (stating that it would normally be appropriate to reflect a plaintiff's settlement with an intentional tortfeasor by giving the negligent defendant a reduction reflecting the intentional tortfeasor’s percentage of fault).

14. Under Clement v. Frey, 666 So. 2d 607 (La. 1996), appellate review of percentage-fault assignments is limited by a rule of deference whereby an assignment that is manifestly too low shall be raised, but only to the lowest reasonable percentage, and an assignment that is manifestly too high shall be lowered, but only to the highest reasonable percentage. See David W. Robertson, Allocating Authority Among Institutional Decision Makers in Louisiana State-Court Negligence and Strict Liability Cases, 57 La. L. Rev. 1079, 1084-85 (1997). In our hypothetical case, we are assuming that the court of appeal believes that it was manifestly erroneous to assign any fault to Porter.

15. See supra note 14.
determined that Porter was innocent—holds that Porter’s recovery against Drug Store remains limited to 10%, the fault that was manifestly erroneously allocated to Porter will have been effectively reassigned right back to Porter. On the other hand, if the court of appeal holds that Porter’s recovery against Drug store now becomes 20%, the fault mistakenly allocated to Porter will have been arbitrarily reassigned to Drug Store.

C. Determining the Amount of the Employer’s Compensation Lien

Recall that our hypothesized judgment in Porter’s case against Aaron and Drug Store provides that Drug Store is individually liable for $10,000, that Aaron is solidarily liable with Drug Store for that $10,000, and that Aaron has an additional individual liability of $90,000. We must now try to work the compensation lien into that judgment. Solution of this tricky problem begins by noting the requirement set forth in Louisiana Revised Statutes 23:1103(A)(1) that “damages shall be so apportioned in the judgment that the claim of the employer for the compensation actually paid shall take precedence over that of the injured employee.” In other words, the employer gets the first bite.

The next logical step takes us to the new Louisiana Revised Statutes 23:1104, which provides that the compensation lien is to be reduced by the “fault assessed” against the employer and that such reduction “is in addition to but not duplicative of any reduction made pursuant to Civil Code Articles 2323, 2324, and 2324.2 and R.S. 23:1101(B).” What can this mean? In trying to

16. This portion of this Article was not covered in the April 3-4 Professional Development Seminar (see supra note 1) and hence has not benefitted from the scrutiny of Galligan, Johnson, and Maraist. But I have reason to believe that Johnson disagrees with parts of my analysis.

17. The full text of La. R.S. 23:1103(A)(1) (1998) is as follows:

In the event that the employer or the employee or his dependent becomes party plaintiff in a suit against a third person, as provided in R.S. 23:1102 [sic], and damages are recovered, such damages shall be so apportioned in the judgment that the claim of the employer for the compensation actually paid shall take precedence over that of the injured employee or his dependent; and if the damages are not sufficient or are sufficient only to reimburse the employer for the compensation which he has actually paid, such damages shall be assessed solely in his favor; but if the damages are more than sufficient to so reimburse the employer, the excess shall be assessed in favor of the injured employee or his dependent, and upon payment thereof to the employee or his dependent, the liability of the employer for compensation shall cease for such part of the compensation due, computed at six percent per annum, and shall be satisfied by such payment. The employer’s credit against its future compensation obligation shall be reduced by the amount of attorney fees and court costs paid by the employer in the third party suit.

The reference to Louisiana Revised Statutes 23:1102 is presumably a typographical error; the intention was surely to refer to Louisiana Revised Statutes 23:1101.

18. Louisiana Revised Statutes 23:1103(A)(1) describes the compensation lien for prior payments as coming from “damages [that] are recovered,” whereas it describes the future-compensation credit as kicking in “upon payment [of damages] to the employee.” The issue of whether, and to what extent, the future-compensation credit should reflect the effects of the employer’s fault and the other comparative-fault reductions the plaintiff’s recovery may have suffered is not treated in this article.
figure it out, it may be useful to begin by simplifying the present hypothetical. Let's ignore Drug Store for the moment and suppose that Porter recovers $100,000 from Aaron as an intentional tortfeasor. In this situation, Louisiana Revised Statutes 23:1104 seems to call for cutting the employer's compensation lien from $20,000 to $18,000 to reflect the 10% fault assessment against the employer. Louisiana Civil Code articles 2323, 2324, 2324.2, and Louisiana Revised Statutes 23:1101(B) call for no further reduction in this situation, because they are all keyed to reductions in tort damages being suffered by the employee, here zero.

Now let's ignore Aaron for the moment and suppose that Porter recovers $10,000 from the negligent Drug Store. Again, Louisiana Revised Statutes 23.1104 requires the compensation lien must be reduced by 10% to reflect the employer's fault. In addition, Louisiana Revised Statutes 23:1101(B) calls for a further reduction, providing as follows (italics supplied):

Any person having paid or having become obligated to pay compensation under the provisions of this Chapter may bring suit against such third person to recover any amount which he has paid or becomes obligated to pay as compensation to such employee or his dependents. The recovery allowed herein shall be identical in percentage to the recovery of the employee or his dependents against the third person and, where the recovery of the employee is decreased as a result of comparative negligence, the recovery of the person who has paid compensation or has become obligated to pay compensation shall be reduced by the same percentage.

The two italicized phrases seem contradictory. The first italicized phrase would indicate that the compensation lien should be 10% of $20,000 = $2000. (Porter is recovering only 10% of his damages from Drug Store.) The second italicized phrase would indicate that the compensation lien should be 80% of $20,000 = $16,000. (The 80% results from reducing the lien to reflect the employer's 10% fault and Porter's 10% fault.)

Which is correct? It seems to me that the first phrase must control. If we let the second phrase control, the command of the first phrase—"shall be identical"—is violated, whereas allowing the first phrase to control does not entail a frontal violation of the second phrase, but merely makes that phrase redundant. If we make the assumption that the first phrase controls, the reduction set forth in Louisiana Revised Statutes 23:1101(B) swallows up the other potential reductions enumerated in the new Louisiana Revised Statutes 23:1104; they all become "duplicative" of Louisiana Revised Statutes 23:1101(B). On this reading, the new Louisiana Revised Statutes 23:1104 clarifies the meaning of Louisiana Revised Statutes 23:1101(B): In circumstances in which the law of comparative fault imposes reductions on the employee's tort recovery, the employer recovers the same percentage of the compensation lien that the employee recovers of the tort damages.
We are now ready to try to work the compensation lien into the judgment against Aaron and Drug Store. If our analysis is correct thus far, there are two controlling principles: (a) employer should not recoup more than $18,000—this principle results from the command of Louisiana Revised Statutes 23:1104 to penalize Employer for his fault; (b) the compensation lien should not swallow more than $2000 of Porter's recovery against Drug Store. This principle results from the command of Louisiana Revised Statutes 23:1101(B) that the compensation lien "shall be identical in percentage to the recovery of the employee." The judgment should therefore set forth a compensation lien of $18,000, with the proviso that no more than $2000 of the lien can be satisfied from the judgment against Drug Store.

IV. SOME RADICAL FEATURES OF THE NEW LAW

From the viewpoint of traditional torts thinking, some radical changes are seen in the ways in which the 1996 legislation seems to limit Porter's rights against Drug Store. It will reveal the radical nature of these limits if we assume that Aaron is uninsured and insolvent. Such an assumption is realistic; intentional tortfeasors are rarely insured against such liability, and they are frequently judgment-proof.

Looking at Porter's case against Drug Store: on its face, what the legislation does is to charge Porter with his own percentage of fault, his Employer's percentage of fault, Aaron's percentage of fault, and Mysterious Stranger's percentage of fault. How could the legislature have believed that imputing the fault of all of these entities to the plaintiff—without imputing any of that fault to the defendant Drug Store—is fair or wise? After all, the trier of fact has authoritatively determined that Porter and Drug Store were equally at fault. I believe the answer lies in an implicit assumption that the percentage-fault findings can sensibly be treated as though they were factual causation assignments. That is, I believe the legislature was implicitly equating the finding that Drug Store was 10% at fault with a finding that Drug Store was causally responsible for only 10% of the damages. Such thinking then leads to the rhetorical question, "why should a defendant with only 10% of the responsibility bear more than 10% of the damages?" 19

One might well answer with another rhetorical question, "why should a plaintiff with only 10% of the responsibility bear more than 10% of the damages?" But a better answer is to insist on a closer and more careful analysis of the nature of percentage-fault assessments, whereby it is readily apparent that the 10% findings against Porter and Drug Store were not findings of causal

19. Maraist & Galligan, Burying Caesar, supra note 1, at 384-85, arguably falls under the sway of such rhetoric in stating: "[Full solidary liability after 1980] left some defendants scratching their heads, wondering, 'How, if I am only 20% at fault, can I be liable for 100% of plaintiff's damages?' The answer was that 100% liability upon a joint tortfeasor simply was a fact of life in a legal world in transition."
responsibility, but of comparative culpability vis-à-vis one another and vis-à-vis the other culpable actors. A moment’s reflection will make it clear that percentage-fault findings are not—indeed, cannot conceivably be—factual causation findings.

As everyone knows, under traditional torts thinking it is appropriate to divide damages on the basis of factual causation in any case in which such a division is feasible. For example, the court in *Buccola v. Marchese* found that injuries flowing from car wrecks in July and November were separate and assessed separate damages to each. Clearly that is not what is going on in Porter’s case. In Porter’s case, the faulty conduct of Aaron, Drug Store, Employer, and Stranger—and of Porter himself—combined to cause the same $100,000 injury. The assignment of 10% fault to Drug Store does not mean that Drug Store caused only 10% of Porter’s injuries. Drug Store caused all of it, just as Porter himself did, and just as the other entities did, too.

Once we have reminded ourselves that the percentage-fault assignments are not factual-causation shares, the ways in which the 1996 legislation limits Porter’s rights against Drug Store are seen as quite remarkable. The most radical change is the treatment of Stranger’s fault. Despite the lack of any traditional basis for imputing Stranger’s fault to Porter, that is effectively what the 1996 legislation commands. (It may parenthetically heighten the impression of strangeness to note that if Porter should later track down and sue Stranger, the previous adjudication of Stranger’s fault would be treated as meaningless. Plainly Stranger can in no way be bound by any feature of an adjudication to which he was never in any sense a party.)

The potential harshness of the 1996 legislation’s limits on victims’ rights can be even more dramatically highlighted by making only a slight change in the facts of the hypothetical case. Suppose that Porter was innocent, i.e., that he behaved properly and politely in response to Aaron’s complaints and did nothing to provoke the attack. In such a case, one may assume that the trier of fact would assign no fault percentage to Porter, so that the findings of fact might have been as follows:

- Porter’s total damages: $100,000
- Porter’s negligence: 0%
- Aaron’s fault: 20%

22. With perfect hindsight, one might be able to separate the injuries inflicted by Stranger from those inflicted by Aaron. But that factual apportionment would affect only Stranger’s liability—each of the others caused the entirety of the harms, because if any of them had behaved properly, there would have been no affray for Stranger to join. Moreover, it would generally be impossible as a practical matter to segregate the wounds inflicted by Stranger from those inflicted by Aaron. And there would be absolutely no need to do so here, when Stranger, who is the only participant who might conceivably benefit from such segregation, is utterly unaffected by the lawsuit.
Drug Store's fault: 10%
Employer's fault: 10%
Mysterious Stranger's fault: 60%

In this situation, the 1996 legislation still seems to call for limiting Drug Store's liability to $10,000. Harking back for a moment to the rhetorical question approach to issues like this, why should Porter—an innocent victim, one who has been "responsible for" none of his damages—ultimately bear the responsibility for 90% of them?

One further feature of the 1996 legislation deserves explicit attention. In early comparative-fault thinking, it was regarded as improper to assign percentage fault to anyone except parties to the lawsuit and settling tortfeasors. Nowadays, it is no longer regarded as unusual for particular jurisdictions to go further and require or permit assigning percentage fault to nonparties generally. But in requiring courts to assign percentage fault even to nonparties whose "identity is not known or reasonably ascertainable," the 1996 amendment to Louisiana Civil Code article 2323 seems to put Louisiana at the extreme edge of this spectrum. The current draft of the American Law Institute's proposed Restatement (Third) of Torts: Apportionment of Liability handles the subject of solidarity liability ("joint and several liability" in standard American parlance) by setting out five different alternative systems—one retaining full solidarity, one abolishing solidarity, and three hybrids or amalgams. The proposed Restatement alternative abolishing solidarity liability (except among intentional tortfeasors) describes a system closely resembling post-1996 Louisiana law. But even in such a system the Restaters are adamantly against allowing the quantification of nonparties who cannot be identified. Comment (f) to Restatement section 28B states:

A nonparty who is not sufficiently identified as to be subject to service of process or discovery should not be submitted to the fact finder for assignment of responsibility. A minimum condition for an assignment of responsibility to nonparties is that the nonparties be sufficiently identified that they could be joined in the suit (regardless of whether personal jurisdiction or subject matter jurisdiction would exist), or that discovery could be obtained from the nonparty.

In its zeal to encourage defendants to try to saddle the plaintiff with the fault percentages of virtually everyone in the vicinity of the accident, including Mysterious Strangers, the First Extraordinary Session of 1996 more than lived up to its name.

23. This was the position of the Uniform Comparative Fault Act, which is reprinted as an appendix in Symposium: Comparative Negligence in Louisiana, 40 La. L. Rev. 289, 419-36 (1980).
V. JUDICIAL MITIGATIONS OF CERTAIN ARGUABLY RADICAL FEATURES OF PREVIOUS COMPARATIVE FAULT STATUTES

A. Using Duty/Risk Reasoning on a Selective Basis To Permit Full Recovery by Negligent Plaintiffs

Before the comparative fault regime went into effect in 1980, the rule was that the plaintiff's negligence barred recovery. This total-bar rule was perceived as harsh, and courts frequently found ways around it. One way was to hold that the defendant's duty—the rule of law violated by the defendant—fully embraced the risk of the victim's negligence. For example, the supreme court in Rue v. State Department of Highways held that the contributory negligence of a motorist in allowing her vehicle to stray off the paved roadway onto the shoulder did not bar her recovery for injuries caused by defendant's negligent maintenance of the shoulder because "the Highway Department's duty to maintain a safe shoulder encompasses the foreseeable risk that for any number of reasons, including simple inadvertence, a motorist might find himself travelling on, or partially on, the shoulder." 24 Another way was to hold that the rule of law violated by the plaintiff did not extend to the risk presented by the defendant's negligence. For example, Laird v. Travelers Insurance Co. held that a motorist's duty not to stop and block the road did not extend to the risk of being struck from behind by a large and inattentively driven truck. 25

I have argued that these techniques should have disappeared once the comparative fault regime went into effect. 26 Briefly put, the argument against their retention is this: They were not "normal" or "mainstream" duty/risk (or, to say the same thing another way, legal cause) determinations, but rather what have come to be called "ameliorative" doctrines or techniques, with the adjective signaling the perception that they were invented solely for the purpose of avoiding the perceived harshness of the old total-bar contributory negligence rule. 27 One can tell that Rue was not "mainstream" by recalling the hundreds of cases in which entirely foreseeable and typical victim fault barred recovery (and by noting that nowadays motorists whose negligence combines with that of the Highway Department to cause their injuries regularly have their recoveries reduced by their percentages of fault). 28 One can tell that Laird was not "mainstream" by realizing that Mr. Laird would certainly have been held liable to an injured passenger in the Laird vehicle; in that circumstance, no court would have said that the large truck was the sole legal cause of the accident. Clearly Rue and Laird were instances of the ameliorative doctrines or techniques.

24. 372 So. 2d 1197, 1199 (La. 1979).
26. See Robertson, Ruminations, supra note 1, at 1359-64.
27. See generally David W. Robertson et al., Cases and Materials on Torts 413-28 (2d ed. 1998).
28. See, e.g., Campbell v. State Dep't of Transp. & Dev., 648 So. 2d 898 (La. 1995) (25% fault assigned to driver, 75% to highway department).
most famous member of the large family of ameliorative doctrines and techniques was the last clear chance doctrine. It is almost universally accepted that the last clear chance doctrine must disappear whenever a comparative fault regime—particularly, a "pure" comparative fault regime like Louisiana's—goes into effect. The other members of the "ameliorative" family should be no different.

Despite the foregoing argument, perceptive and persuasive analysts, including Alston Johnson, have argued for the continued viability of the duty/risk ameliorative techniques in the comparative-fault era. Some decisions of the supreme court may be read as suggesting that the techniques are no longer part of the law. But in Bell v. Jet Wheel Blast, the court held that the negligence of one injured by a defective product will reduce recovery only "[w]here the threat of a reduction in recovery will provide consumers with an incentive to use a product carefully, without . . . drastically reduc[ing] the manufacturer's incentive to make a safer product." Arguably, the quoted language from Bell endorses both the Rue and Laird techniques. See also Turner v. New Orleans Public Service Inc., in which the court held that pedestrians' negligence reduces recovery in actions against negligent motorists but stated:

Care should be taken, however, to note that we do not hold that the victim's fault shall always reduce his compensation. There are cases in our literature in which injured persons have been allowed recovery (cases in which the contributory negligence of the plaintiff did not prohibit recovery). Some of those cases (which we do not propose to specify) should produce the same result today. See Bell v. Jet Wheel Blast, where we held that Bell's recovery should not be diminished because of his contributory negligence. The legitimate objectives of accident law, in all probability, will require us to reach a similar conclusion in some future cases.

The court has never repudiated the quoted language. Thus, the Louisiana

29. In a "pure" comparative fault system, the claimant may be assigned a percentage of fault ranging from 0% to 100%, and at no point short of an assignment of 100% is there a bar to recovery. A claimant who is assigned 99% of the fault in a particular incident recovers 1% of his loss. Louisiana's is the pure system. Some states have opted for "modified" systems, under which a claimant's recovery will be barred when it reaches a particular percentage, generally 50% or 51%.

30. See generally Johnson, supra note 1, at 319. It is not completely clear that Johnson favored the retention of the technique used in Laird—whereby the victim's duty would sometimes be held to exclude the risk of a particular tortfeasor's fault. But see id. at 325 n.27 (arguably an oblique approval of the technique).

31. See generally Maraist & Galligan, Burying Caesar, supra note 1, at 374-76.
32. 462 So. 2d 166, 171-72 (La. 1985).
33. 476 So. 2d 800, 804 (La. 1985).
34. Far from it. In Landry v. State, 495 So. 2d 1284, 1289 (La. 1986), the court quoted the relevant passage of Turner, fully endorsing it. See also id. at 1290 (endorsing "applying the comparative fault principles in strict liability cases on a case by case basis"); Sistler v. Liberty Mut.
Supreme Court remains on record as holding open the possibility of selective forgiveness of victim negligence through duty/risk reasoning.

B. Using Duty/Risk Reasoning On a Selective Basis to Bar Negligent Plaintiffs from Recovering

The “flip side” of the use of duty/risk reasoning to forgive negligent plaintiffs is the use of such reasoning to bar certain negligent victims from recovery. Here again, the legitimacy of using duty/risk thinking to supplant or override the apparent legislative command is debatable.\(^{35}\) In simple terms, the argument against the technique is that any holding to the effect that the victim’s negligence takes him beyond the scope of the defendant’s duty (or, to say the same thing another way, that the victim’s negligence was the sole legal cause of his injury) amounts to bringing the contributory negligence doctrine back into the law, thereby negating the legislature’s choice of the pure comparative fault approach.\(^{36}\) But let the debate rage as it will, there is no doubt that the courts sometimes use this technique to defeat recovery.\(^{37}\) For example, the court in

---

35. This matter is debated in Robertson, *Ruminations*, supra note 1, at 1364-71, and Johnson, supra note 1, at 334-37. For more recent commentary, see David W. Robertson, The Vocabulary of Negligence Law: Continuing Causation Confusion, 58 La. L. Rev. 1, 29-32 (1997); Robertson, supra note 14, at 1112-13.

36. The current draft of the new Restatement (Third) of Torts: Apportionment (Proposed Final Draft, 1998) of Liability proposes a pure comparative fault system (see § 7), but (at § 3, Illustration 7) is agnostic on the legitimacy of courts’ holding in particular cases that “unforeseeably egregious” conduct by a victim constitutes a superseding cause of the harm, leading to the conclusion that the defendant’s negligence was not a legal cause of the harm. I contend that the technique is illegitimate. If the only thing that makes the victim’s injury unforeseeable was the egregiousness of the victim’s fault, the core command of the pure percentage fault system is that the victim takes a very high percentage assignment but is not barred.

On the other hand, legal-cause arguments focusing on any other unusual feature of the situation—other than the egregiousness of the victim’s fault—are entirely compatible with the pure comparative fault system. This distinction—between “unforeseeable egregiousness” and “unforeseeable for any other reason”—is only moderately difficult to grasp and to test. In *Freeman*, discussed in the text immediately following *infra* note 37, a physician was out walking his dog late at night when his pager summoned him quickly to the hospital where he worked. He had to go home first. The faulty gate of his apartment complex had locked him out. In his hurry to answer the summons, he tried to scale the security fence and was injured. The court held that the physician’s negligent effort to gain entry made his injuries unforeseeable. That holding seems wrong; it seems to be contributory negligence in modern clothing. How can we tell it was wrong? One technique is to suppose a situation in which no one would say the physician’s effort to gain entry was negligent—say he was fleeing a mugger or a dangerous dog. Would the court say that such an injury to a tenant was an unforeseeable result of having a gate that sometimes locked tenants out? If you agree with me that the answer is probably not, then it becomes tolerably clear that the *Freeman* holding turned on the victim’s fault, not on some other aspect of the situation, and that makes it wrong in a pure comparative fault system.

37. The example in the Restatement draft is this: “A negligently spills gasoline on the street. B
Freeman v. Julia Place Limited Partners held that a tenant's negligence in trying to scale a fence when the defendant landlord's security gate malfunctioned was the sole legal cause of his injury. 38 Similar reasoning was used in Fowler v. State Farm Fire & Casualty Insurance Co., holding that a visitor's negligence in jumping from a balcony after the homeowner negligently locked him out there with two whiny children was the sole legal cause of his injury. 39

C. Using Duty/Risk Reasoning to Impose Full Liability, Thereby "Trumping" Defendants' Particular Statutory-Language Arguments For Limited Solidary Liability

When the comparative fault system first went into effect in 1980, Louisiana Civil Code article 2324 provided for solidary liability among all tortfeasors except those whose degrees of fault were less than the plaintiff's. Article 2324 was then amended in 1987 to restrict solidary liability. The 1987 version of Article 2324 provided for full solidarity among intentional tortfeasors. 40 For all other cases, it continued the provision that a tortfeasor whose degree of fault is less than the plaintiff's has no solidary liability. And it added a new restriction, stating that (aside from the intentional cases) "liability for damages caused by two or more persons shall be solidary only to the extent necessary for

sees the gasoline, understands that it might burn if ignited by a match, and nevertheless throws a lighted match into the gasoline. B is burned in the ensuing fire." The Restaters go on to indicate that "the unforeseeably egregious aspect of B's conduct—knowingly throwing a match on gasoline—is ... relevant to the question of whether B's conduct was a superseding cause and, consequently, whether A's negligence was a legal cause of B's injuries." Then they punt: "Whether a plaintiff's conduct constitutes a superseding cause is an issue that is beyond the scope of this Restatement."

I am not sure that a Restatement on Apportionment should punt on such a fundamental comparative-fault question. Here's my suggested solution to the Restatement hypothetical: If B's conduct is such that an innocent bystander could not recover from A—if a fire started by conduct like B's was beyond the scope of the foreseeable risks that made it negligent for A to spill the gasoline—then refusing recovery to B would be a sound application of "normal" legal cause reasoning. Cf. Buckley v. Bell, 703 P.2d 1089 (Wy. 1985). But if an innocent bystander could probably recover, then so must B, although B's recovery should be drastically reduced; the principles of comparative fault call for assigning B a very high percentage, in order to reflect the egregiousness of his fault.

Pure comparative fault systems handle egregious victim fault by assigning percentages, not by legal cause reasoning. That is the simple sermon I am trying to preach here. But—continuing with the spilled gasoline hypothetical—what of a victim who uses the gasoline to achieve self-immolation? Here there is no apparent objection to a court's holding that opportunistic suicide—or indeed, any willful self-injury—is outside the array of foreseeable risks created by the defendant's negligent spilling of the gasoline. This would be a rule of law, not a technique for the selective barring of recovery by ad hoc attributions of egregiousness, and there would be no inappropriate tension between such a rule and the premises of the pure comparative fault system.

38. 663 So. 2d 515 (La. App. 4th Cir. 1994), writ denied, 666 So. 2d 680 (La. 1996).
40. Intentional tortfeasors' solidary liability is treated in Section VII-A.
the person suffering injury, death, or loss to recover fifty percent of his recoverable damages." *Touchard v. Williams* read the quoted language to mean that any tortfeasor whose percentage of fault was equal to or greater than the plaintiff's could be held solidarily liable for 50% of the recoverable damages.

Thus, the pre-1996 law included two limitations on the exposure of tortfeasors (other than intentional ones) to solidary liability: a defendant with a degree of fault lower than the plaintiff's could not be "bumped up," and no defendant (with an individual assignment at 50% or lower) could be "bumped" above 50%. I have not found an instance of the use of duty/risk reasoning to transcend the first limitation, but the courts have sometimes used duty/risk reasoning to override the second. *Veazey v. Elmwood Plantation Associates, Ltd.* held that the 50% limit on solidarity expressed in the 1987 version of Article 2324 did not prevent holding a landlord with lax security measures solidarily liable with the rapist who took advantage of the lax security, basing its holding in major part on the following principle:

> [T]he scope of Southmark's duty to the plaintiff in this case clearly encompassed the exact risk of the occurrence which caused damage to plaintiff. As a general rule, we find that negligent tortfeasors should not be allowed to reduce their fault by the intentional fault of another that they had a duty to prevent. 44

Similarly, in *Lambert v. United States Fidelity & Guaranty Co.*, the supreme court—in a per curiam opinion—held that the 50% limit on solidarity expressed in the 1987 version of Article 2324 did not prevent holding a traffic tortfeasor liable for 100% of the damages brought about by the combination of the traffic tort and subsequent medical malpractice, reasoning as follows:

---

41. 617 So. 2d 885, 892 (La. 1993).

42. Footnote 3 of the *Touchard* opinion, 617 So. 2d at 887 n.3, might have been read to indicate that only one tortfeasor could be "bumped up" to 50%. But that interpretation of the opinion made no practical sense at all, and *Cavalier v. Cain's Hydrostatic Testing, Inc.*, 657 So. 2d 975, 982 n.6 (La. 1995), cleared up any possible confusion, stating: "This court in *Touchard* . . . 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, as opposed to the previously existing one hundred percent."

43. *Touchard* expressed no view on the meaning of "recoverable damages." According to Marist & Galligan, Louisiana Tort Law, *supra* note 1, at 292-93 & n.51, several courts of appeal have held that it meant total damages less any reduction for victim fault. The authors cite *Ehrman v. Holiday Inns, Inc.*, 653 So. 2d 732 (La. App. 4th Cir.), *writes denied*, 655 So. 2d 343 (La. 1994), and *Kramer v. Continental Cas. Co.*, 641 So. 2d 557 (La. App. 3d Cir.), *writes denied*, 648 So. 2d 402, 403 (La. 1994). The current draft of the Proposed Restatement (Third) of Torts: Apportionment of Liability (Proposed Final Draft, 1998) indicates that a standard definition of "recoverable damages" is "the amount of damages to which the plaintiff is entitled after damages for the injury are reduced by any comparative responsibility of the plaintiff." *Id.* at § 20, Comment c.

44. 650 So. 2d 712, 719 (La. 1994).
[T]he original tortfeasor's liability for 100% of the tort victim's injuries is based on more than the imposition of a solidary obligation between joint tortfeasors; his liability for 100% of the victim's damages results because he is the legal cause of 100% of the victim's harm. The amendment to Civil Code article 2324 has not changed this result.\textsuperscript{45}

The supreme court reiterated this viewpoint in dictum in \textit{Turner v. Massiah},\textsuperscript{46} and similar reasoning was applied in \textit{Marceaux v. Gibbs}\textsuperscript{47} to impose 100% liability upon a jailer for harms done by an intoxicated escapee.

\textbf{D. Using a "Ratio Approach" to Hold a Defendant Liable Above That Defendant's Assigned Percentage or Above the 50% Cutoff Set Forth in the 1987 Version of Louisiana Civil Code Article 2324}

We have just seen that the 1980 version of Louisiana Civil Code article 2324 stated that a tortfeasor whose fault is less than the plaintiff's "shall not be liable for more than the degree of his fault" and that an additional limitation on solidary was added in 1987, amending Article 2324 to include a 50% ceiling on solidarity for non-intentional tortfeasors with individual assignments of 50% or less. Generally speaking, the defense bar has insisted that both these provisions ought to be interpreted to confine an affected defendant's liability to the specific numerical percentage assigned by the trier of fact.\textsuperscript{48} The courts have not always agreed. At times the courts have used or endorsed a so-called "ratio approach" that has the effect of translating the percentage assignments made by the initial trier of fact into higher percentages.\textsuperscript{49}

\textsuperscript{45} 629 So. 2d 328, 329 (La. 1993).
\textsuperscript{46} 656 So. 2d 636, 640 n.3 (La. 1995).
\textsuperscript{47} 699 So. 2d 1065 (La. 1997).
\textsuperscript{48} The language limiting the tortfeasor whose fault is less than plaintiff's to his share used the term "degree of his fault" whereas the 50% limitation was phrased as "fifty percent of [the] recoverable damages." The defense-side argument has been that both provisions are keyed to the numerical percentages assigned by the trier of fact.
\textsuperscript{49} In \textit{Solidary Liability in Tort} I demonstrated the operation of the ratio approach with an example in which the plaintiff's fault was 10%, the defendant's was 40%, and the plaintiff's statutorily immune employer was 50%. In the law governing the example, it was improper to attribute the employer's fault to either the plaintiff or defendant.

Under the ratio approach, the plaintiff's and defendant's relative degrees of fault become controlling. When the fault of those parties is compared, we see that plaintiff's fault is 10/50ths (20 percent) and the defendant's is 40/50ths (80 percent). Plaintiff is thus entitled to recover 80 percent of her damages from the defendant.

Note that the ratio approach yields an outcome that would not have been the first preference of either the plaintiff or the defendant. Presumably the plaintiff would have urged that defendant should pay 90 percent (thus charging the defendant with the consequences of the employer's percentage). Presumably the defendant would have urged that its liability was limited to 40 percent (thus charging the plaintiff with the consequences of the employer's percentage). The ratio approach charges neither party with the
This "ratio" technique affected a defendant's "degree of [individual] fault" argument in Guidry v. Frank J. Guidry Oil Co., in which the trier of fact assigned fault as follows:

Plaintiff: 45%
Defendant: 35%
Plaintiff's statutorily immune employer: 20%.

The court of appeal held that the fault percentages were factually appropriate but that the employer's fault should not have been quantified. It then gave effect to the trier of fact's assessment of the relative fault of plaintiff and defendant by holding that plaintiff was responsible for 45/80ths of the damages and defendant for 35/80ths (43.75%). The argument that the codal provision limiting a defendant whose fault is less than the plaintiff's to "the degree of his fault" meant that defendant could not owe more than 35% was rejected by the court of appeal on the following basis:

This reapportionment of fault does not violate Article 2324 because it merely reassigns negligence in a logical and fair manner to exclude fault assigned to a statutorily immune entity not even a party to the suit.

Just as the ratio approach could sometimes have the effect of seeming to alter the "degree of fault" limitation, it could also serve to hold a defendant with a less-than-50% assignment to liability above 50%, thus effectively modifying the 50% limitation that was introduced in 1987. In Gauthier v. O'Brien, the court illustrated the proper application of the ratio approach with the following hypothetical:

employer's percentage. Instead it distributes the employer's percentage between the plaintiff and the defendant in proportion to their percentages of fault. Another way to describe the ratio approach is to say that it is designed to yield the same outcome that the trier of fact would probably have achieved if instructed to ignore the employer's fault and to quantify the fault of only the plaintiff and the defendant. In the example, the trier of fact believed that the defendant's fault was four times greater than the plaintiff's. Presumably the trier of fact would have had much the same belief whether or not directed to quantify the employer's fault.

Robertson, Solidary Liability in Tort, supra note 1, at 228-29.

50. 572 So. 2d 607 (La. App. 3d Cir. 1990), modified, 579 So. 2d 947 (La. 1991).
51. 572 So. 2d at 611-12. In the supreme court, the court of appeal's reallocation technique was affirmed, but the supreme court disagreed with the factual assessments of fault, changing them to the following:

Plaintiff: 10%
Defendant: 70%
Employer: 20%.

On those findings, the supreme court held that the judgment should hold the defendant liable for 70/80ths (87.5%) of the damages. The supreme court did not express a view on the propriety of the court of appeal's handling of the defendant's "degree of fault" argument. 579 So. 2d 947 (La. 1991).
52. 618 So. 2d 825, 830 n.11 (La. 1993).
The court stated that on those findings, Defendant # 1 would be liable for 40/60ths (66.67%) of the damages. A concurring opinion offered a second example of the proper application of the ratio approach:

| Plaintiff: | 20% |
| Defendant # 1: | 40% |
| Defendant # 2: | 20% |
| Employer: | 40% |

Under the ratio approach, this defendant, too, would be liable for 40/60ths (66.67%) of the damages.

VI. CAN WE EXPECT TO SEE ANY OF THE FOREGOING TECHNIQUES, OR SIMILAR TECHNIQUES, APPLIED IN CASES ARISING UNDER THE 1996 LEGISLATION?

In their article titled *Burying Caesar*, Professors Maraist and Galligan have analyzed the prospects for post-1996 survival of several of the judicial techniques discussed in Section V. In this section, we will look at their (and my) predictions for each of these techniques and examine the prospects for similar but new techniques arising in the future.

A. Technique V-A

Maraist and Galligan believe the technique described at Section V-A—whereby duty/risk reasoning sometimes forgave negligent plaintiffs—can be no more. Here their reasoning centers on the change in the wording of Louisiana Civil Code article 2323. Before 1996, it provided for victim-fault reduction of recovery “when contributory negligence is applicable.” Alston Johnson and others argued that this phrasing left it up to the courts to decide the “when” question, thereby entailing the flexible duty/risk analysis. The present version of Article 2323 omits the “when” phrase and addresses its command to “any action for damages [in tort],” specifically including “any claim for recovery . . . under any law or legal doctrine or theory of liability,” thereby seemingly closing the loophole.

53. See id. at 833 (Lemmon, J., concurring).
55. See id. at 381-82.
56. See Johnson, supra note 1.
B. Technique V-B

Somewhat inconsistently (or so it seems to me), Maraist and Galligan predict that the flip-side technique described at Section V-B—whereby duty/risk reasoning sometimes served as a stand-in for the old contributory negligence bar—remains viable. This prediction is made in a footnote, without extended analysis, stating:

Of course, even under comparative fault there is the possibility that plaintiff’s negligence is a superseding cause relieving defendant of liability. 57

As a matter of generic subject matter, the cited authority, Sofec, is horribly apposite: it is an infamous instance of the use of legal cause reasoning—which is synonymous with duty/risk reasoning—to reintroduce the contributory negligence bar into what was supposedly a pure comparative fault system. (The Sofec Court went so far as to approve a trial in which the plaintiff did not even get to put on evidence of defendant’s fault. In a bifurcated trial, the issue of plaintiff’s negligence was tried first. When plaintiff’s employee was found to have been egregiously at fault, judgment was entered for the defendant, whose fault was never even examined.)

But Sofec, while generically apposite, is not a Louisiana authority. We should examine the pre- and post-1996 legislation to see whether the changes have eliminated or narrowed the loophole whereby victim negligence occasionally serves as a total bar to recovery. The elimination of the former Louisiana Civil Code article 2323 phrase “when contributory negligence is applicable”—and the explicit expansion of Louisiana Civil Code article 2323 to “any . . . legal doctrine or theory of liability”—should be as potent a loophole closer here as with respect Technique V-A. This new language is as inimical to totally barring negligent plaintiffs as to totally forgiving them.

Unfortunately, though, another 1996 change may give comfort to those who might want to argue that courts have lost the freedom to forgive negligent plaintiffs but are still quite free to bar negligent plaintiffs. The 1996 amendment deleted from Louisiana Civil Code article 2323 a statement that “the claim for damages shall not . . . be defeated” by victim fault. Nevertheless, Article 2323 continues to say that “the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable” to the plaintiff. This affirmative command—to reduce on a percentage-fault basis—necessarily implies a negative command—not to bar. Thus, on a fair reading of the new Article 2323, it is no more hospitable to Technique V-B than to Technique V-A.

C. Technique V-C

Here the key provision is Louisiana Civil Code article 2324(B), the meaning of which is clarified and in a sense delimited by Louisiana Civil Code article 2324(A) and Louisiana Code of Civil Procedure article 1812(C). By virtue of the 1996 legislation, Article 2324(B) seems to have lost the flexibility that sometimes allowed courts to use duty/risk reasoning to hold particular defendants to a liability higher than their assigned percentages. Former Louisiana Civil Code article 2324(B) applied its limits on solidary liability to situations in which "damages [were] caused by two or more persons," and neither it nor the then-versions of Louisiana Civil Code article 2323 and Louisiana Code of Civil Procedure article 1812(C) required courts to consider all putative tortfeasors, including nonparties to the lawsuit in question, as among the "persons" covered by the provision. Moreover, Louisiana Civil Code article 2324(B) included an explicit proviso—"[except] as otherwise provided by law"—that was potentially as big as conscientious courts should believe it needed to be.

To Maraist and Galligan, the post-1996 provisions seem designed to eliminate the flexibility. Article 2324(B) no longer has the phrase "as otherwise provided by law." Both Louisiana Civil Code article 2323(A) and Louisiana Code of Civil Procedure article 1812(C) now seem to make clear that the phrase "damages caused by two or more persons" comprehends all situations in which the defendant and some other culpable person contributed to the injuries, regardless of the other culpable person’s nature, identity, or even lack of identity.

D. Technique V-D

Under the pre-1996 legislation, the ratio approach was sometimes used as a way of bracketing and disregarding percentage-fault findings against entities whose fault (the courts felt) should not be charged to either the plaintiff or the defendant. Now that the legislature has spelled out that everyone’s fault should be quantified and (for the most part) charged to the plaintiff, there would seem

---

58. Louisiana Code of Civil Procedure article 1812(C) has a checkered past, which is rehearsed in Cavalier v. Cain’s Hydrostatic Testing, Inc., 657 So. 2d 975, 979-80 (La. 1995). In brief: (a) The 1980 version (then numbered Article 1811(B)) said nonparty fault “shall” be quantified. (b) A 1983 amendment changed “shall” to “may.” (c) A 1984 supreme court opinion, in dicta, said that “may” nevertheless meant “shall.” Lemire v. New Orleans Pub. Serv., Inc., 458 So. 2d 1308 (La. 1984). (d) A 1985 amendment directed the Law Institute to change the commentary that had led the court to say that “may” meant “shall.” (e) The 1996 change went back to “shall,” fortifying the command with other language.

59. See Maraist & Galligan, Burying Caesar, supra note 1, at 404-09.

60. I tend to agree with Maraist and Galligan about the legislature’s probable intentions, but would note in passing that the courts may find it necessary to preserve Technique V-C in order to avoid the conclusion that the 1996 version of Article 2324(B) is unconstitutional under Article I, sections 2 (due process) and 22 (access to courts) of the Louisiana Constitution of 1974.
to be no further occasion for using the approach in that way. I believe that Maraist and Galligan agree.

As was indicated in Section III-B, the ratio approach itself is probably alive and well, and will continue to be useful in situations in which the trier of fact has attributed a percentage of the fault to a particular party or entity and a reviewing court has subsequently determined that the facts do not support the attribution.

E. Other Techniques?

Maraist and Galligan are undoubtedly right in believing that the most widely available technique whereby comparative-fault courts can do justice within the constraints of the law will continue to be “the doctrine of comparative fault itself.” In their view, it has always been important—and under the relatively rigid post-1996 legislative regime will now be doubly so—for courts to arrive at percentage assignments to the parties and other entities in a way that is sensitive to the culpability of the various actors, the nature of their causal contribution to the injuries, the nature of the various duties owed by the actors, the law’s reasons for imposing those duties, the need for doing significant justice to the victims of tortious conduct, and the need to maintain significant deterrent pressure against both intentional malefactors and undue risk-takers. Of course, inasmuch as juries are the principal decision-makers in assigning percentages of fault, the contribution of judges and lawyers to this process will necessarily be indirect. Here we might perceive a paradox at the heart of the 1996 legislation. Whereas its philosophy and spirit are strongly and avowedly anti-flexibility and pro-control, among its effects will doubtless be a shift of emphasis (and thus of ultimate decision-making authority) from the judiciary to the jury.

This is not to say that the combination of lawyers’ ingenuity and trial judges’ zeal for justice will not invent new legal techniques for avoiding perceived unfairness and undue harshness. At this stage, no one can predict the number or nature of these new techniques, but only their inevitability. Here, solely for purposes of illustration, we will merely mention two possible arguments for giving more victim-friendly interpretations to the 1996 legislation than may be apparent on its face.

61. But see supra note 60.
62. See Maraist & Galligan, Burying Caesar, supra note 1, at 397-401.
63. Id. at 407.
64. Certainly I don’t imply that appellate judges don’t also have a zeal for justice. My point is that the flexibility-importing techniques awaiting invention will have their most vigorous life and—for the most part—their inception at the trial-court level.
65. In Malone & Johnson, supra note 1, § 371, at 23 (Supp. 1998), Johnson notes (in what seems to be a surprised tone) that the 1996 legislature’s enactment of Louisiana Revised Statutes 23:1104 is neither “pro-employer” nor “pro-business” but “in some small way . . . pro-claimant.” Other pro-claimant or pro-victim messages in the 1996 legislation are more difficult to spot, but they may nevertheless be found there if the search is vigorous enough.
One such possibility may be found in the configuration of the new Louisiana Code of Civil Procedure article 1812(C). Subsection (1) says that defendants' fault "shall" be quantified; Subsection (2) says that nonparty tortfeasors' fault shall be quantified "if appropriate under the facts adduced at trial;" and Subsection (3) says that the victim's negligence shall be quantified "if appropriate." No matter how strongly one might suspect that the difference in phrasing is the product of legislative inadvertence, i.e., hasty draftsmanship, it is certainly now open to plaintiffs in particular cases to argue that the difference in phrasing permits the court to entertain policy arguments against submitting particular victims' negligence to juries. Whether such arguments will be successful—whether, for example, they might be "trumped" by the first sentence of the new Louisiana Civil Code article 2323(A)—is a story for another day.66

A second such possibility arises from the fact that Louisiana Civil Code article 2324(A) calls for solidary liability among those who "conspire[] with [other persons] to commit . . . intentional or willful act[s]." "Willful" is a term with no clear definition, but the Maraist and Galligan treatise is surely correct in suggesting that it is one of several terms—including "wanton," "reckless," and "grossly negligent"—that "denominat[es] a . . . level of fault somewhere between intent and negligence."67 Reading Louisiana Civil Code article 2324(A) to impose solidary liability among reckless or grossly negligent tortfeasors is thus plausible on the face of the article,69 even though this would arguably expand the provision's reference beyond the intentional tort field to which it may formerly have been confined.

66. There is a pretty good argument that the first sentence of Louisiana Civil Code article 2323(A) does not encompass plaintiffs' fault. As Justice Kimball's opinion pointed out for the court in Veazey v. Elmwood Plantation Assoc., Ltd., 650 So. 2d 712, 715 (La. 1994), the Louisiana comparative fault statutes "all share a common characteristic: [they all] use the term "fault" when referring to tortfeasor conduct and "negligence" when referring to victim conduct." Nothing in the 1996 changes to the Civil Code altered this usage, although it should be noted that the 1987 amendment to Louisiana Civil Code article 2324—in language carried forward into the present version—broke from the usage in its reference to the "fault of such other person, including the person suffering injury, death, or loss." On the view that the legislature has, with great (although not perfect) consistency, used "fault" for tortfeasors and "negligence" for victims, the suggestion in Maraist & Galligan, Burying Caesar, supra note 1, at 380 n.217, that the second sentence of Louisiana Civil Code article 2323(A) "may be superfluous," is possibly mistaken.

67. "Reckless" and "grossly negligent" are often usefully distinguished. See, e.g., ULA Model Penal Code § 2.02(2)(c), indicating that recklessness includes an element of "conscious[ ] disregard[ ] of a [highly] substantial and unjustifiable risk of harm. Gross negligence generally means conduct that creates a highly substantial and unjustifiable risk of harm, without any requirement of conscious disregard.

68. Maraist & Galligan, Louisiana Tort Law, supra note 1, § 12-2, at 281. The authors point out, though, that at least one court of appeal has stated that "willful" is a synonym for "intentional." Id.

69. In one version, the suggested argument might contend that "willful" tortfeasors are solidarily liable for the plaintiff's total damages. A perhaps more plausible version might contend for solidary liability for the plaintiff's recoverable damages, defined as total damages minus a reduction for victim fault.
VII. THE REMAINING POCKETS OF SOLIDARY LIABILITY

A. Intentional Tortfeasors

From 1870 until its amendment in 1987, the provision that is now Louisiana Civil Code article 2324(A) provided:

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

Since its amendment in 1987, the provision now reads:

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.

The original version was amply broad enough to impose solidary liability upon all intentional tortfeasors. If one focuses on the new language of "conspiracy"—a word that normally means an agreement to commit an illegal act—the new version may appear to be narrower than its predecessor.

The Maraist and Galligan treatise takes the "conspiracy" language as a potentially serious restriction but emphasizes court of appeal decisions that have continued under the new provision to impose solidary liability upon intentional tortfeasors without regard to the existence of any conspiracy.70 The most vivid example is probably Johnston v. Fontana,71 which used Article 2324(A) against the participants in a spontaneous barroom fight. Maraist and Galligan's treatise also points out that there is authority at the supreme court level for taking the "conspiracy" language as having worked no change in the meaning of Louisiana Civil Code article 2324 respecting intentional tortfeasors. The court's opinion in Touchard v. Williams summarizes the 1987 changes to Louisiana Civil Code article 2324 in these terms:

Judgment debtors are no longer exposed to solidary liability for 100% of the judgment creditor's damages except where the joint tortfeasors commit "an intentional or wilful act."72

Justice Hall's dissenting opinion in Veazey v. Elmwood Plantation Associates, Ltd. picked up on the above-quoted Touchard observation and added:

Although couched in terms of solidary liability of a person who conspires with another to commit an intentional act, the underlying essence and policy of the code article is that a person who commits an intentional act is liable for the full extent of damage caused by the act. Thus, the rapist in this case, if named as a defendant, would be

70. See Maraist & Galligan, Louisiana Tort Law, supra note 1, § 12-2.
71. 610 So. 2d 1119 (La. App. 2d Cir. 1992), writ denied, 618 So. 2d 407 (La. 1993).
72. 617 So. 2d 885, 891 (La. 1993).
solidarily liable for 100% of plaintiff's damages, although the landlord's solidary liability would be limited to 50%, assuming less than 50% fault on the part of the landlord.73

Justice Hall went on to cite Johnston v. Fontana with approval.74

Clearly the interpretation endorsed by Justice Hall and others is better policy than would be insistence on finding a conspiracy. The remaining question is whether that policy can be squared with the language of the present Louisiana Civil Code article 2324(A). I believe it readily can be. First, let's recall that Louisiana Civil Code article 3506, setting forth general definitions of terms and principles of statutory construction applicable throughout the Civil Code, states in subsection 2:

The singular is often employed to designate several persons or things; the heir, for example, means the heirs, where there are more than one.

Article 3506(2) is thus persuasive authority for reading Louisiana Civil Code article 2324(A) to state:

Those who conspire with other persons to commit intentional or willful acts are answerable, in solido, with those persons, for the damage caused by such acts.

Conspirers, it says, are solidarily liable with committers. And it also says that conspirers are solidarily liable with other conspirers and committers with other committers. With the gentle assistance of Louisiana Civil Code article 3506(2), the meaning of Article 2324(A) thus seems quite plain: its thrust is to bring conspirers under the realm of solidarity, not to cut committers out. Reading Louisiana Civil Code article 2324(A) to require the presence of at least one conspirer would ignore the teaching of Louisiana Civil Code article 3506(2).

B. Tortfeasor Employee and Vicariously Liable Employer

The Louisiana jurisprudence has long been settled that employers are vicariously liable for the torts of employees that occur in the course and scope of the employment.75 Moreover, Louisiana Revised Statutes 9:3291(A) confirms and reinforces that jurisprudence by providing in pertinent part that "every master or employer is answerable for the damage occasioned by his servant or employee in the exercise of the functions in which they are employed." Nothing in the 1996 legislation purports to change this rule: clearly, vicarious liability has been preserved.

73. 650 So. 2d 712, 723 n.5 (La. 1994) (Hall, J., dissenting).
74. 610 So. 2d 1119. He also cited approvingly to Galligan, Discombobulating, supra note 1, at 560-62.
75. See generally Maraist & Galligan, Louisiana Tort Law, supra note 1, Chapter 13.
A close corollary of the rule of vicarious liability has been the rule that the tortfeasor employee and the vicariously liable employer are solidary obligors.\(^76\) By focusing carefully on the language of Louisiana Civil Code article 2324(B) keying the limitations on solidarity to instances of "damages caused by two or more persons," Maraist and Galligan's "Burying Caesar" makes a convincing demonstration that the 1996 legislation cannot reasonably be read to have eliminated the employer's and employee's solidary liability.\(^77\)

C. Tortfeasor and Tortfeasor's Liability Insurer

The law has long recognized that a tortfeasor and his liability insurer are solidary obligors.\(^78\) On reasoning broadly similar to that used by Maraist and Galligan to demonstrate the preservation of solidarity in the vicarious liability situation, it seems clear that solidarity has been preserved here, as well.

VIII. TORT INDEMNITY, CONTRIBUTION, AND SETTLEMENT CREDIT

A. Tort Indemnity

The Maraist and Galligan treatise indicates that general principles of tort indemnity—whereby one tortfeasor (the "indemnitee") can shift the entirety of its liability to the plaintiff onto another tortfeasor (the "indemnitor")—may have been applicable under pre-1996 Louisiana law in three situations: (1) when the indemnitee was vicariously liable for the indemnitor's tort; (2) when the indemnitor's fault "triggered" the strict liability of the indemnitee; and (3) when the indemnitee's fault was merely "passive" and the indemnitor's was "active."\(^79\) In their *Burying Caesar* article, the same authors indicate that "the doctrine of tort indemnity is more or less a dead letter" after the 1996 legislation.\(^80\) Let us briefly examine each of the three indemnity situations to see whether and why the "dead letter" designation is apt.

Allowing a vicariously liable employer to get indemnity from the tortfeasor employee was said by the court in *Dusenbery v. McMoran Exploration Co.* to be bad public policy:

It is doubtful that indemnity would be allowed to [a vicariously liable] employer against an employee for simple negligence, since such recovery is contrary to the very purpose of imposing vicarious liability.

---

77. See Maraist & Galligan, *Burying Caesar*, supra note 1, at 402-03.
79. Maraist & Galligan, Louisiana Tort Law, *supra* note 1, at 301.
on an employer who benefits from the services of the employee in the
course of his employment.\(^8\)

Moreover, Louisiana Revised Statutes 9:3921(A) provides in pertinent part:

\begin{quote}
[E]very master or employer is answerable for the damage occasioned by
his servant or employee in the exercise of the functions in which they
are employed. Any remission, transaction, compromise, or other
conventional discharge in favor of the employee, or any judgment
rendered against him for such damage shall be valid as between the
damaged creditor and the employee, and \textit{the employer shall have no
right of contribution, division, or indemnification from the employee
nor shall the employer be allowed to bring any incidental action...}
\textit{against such employee.}\(^9\)
\end{quote}

The probable intent of Louisiana Revised Statutes 9:3921(A) was to wholly
eliminate employee-employer indemnity. But if the italicized clause is read as
limited by the first part of the sentence—a reading that is indicated by the syntax
of the provision—then the provision fails to deal with the situation in which the
victim pursues only the employer and neither sues nor settles with the employee.
On the other hand, nothing in the provision’s syntax \textit{requires} that reading; the
italicized phrase can also be read as a stand-alone command. On the latter
reading, the provision eliminates employer-employee indemnity in all situations.
Particularly in light of the expression of policy by the \textit{Dusenbery} court, the
statute should and probably will be read as everyone believes was intended.

Maraist and Galligan tie the demise or near-demise of indemnity in the strict
liability “trigger” situation to the demise of strict liability itself. They thus
suggest that the only predictable remnant of indemnity in the “trigger” situation
may operate to indemnify a dog owner whose strict liability is brought about by
the negligence of one whom the owner has engaged to look after the dog.

It is not clear that Louisiana law ever recognized the passive/active version
of tort indemnity, and there is some authority that any negligence of the putative
indemnitee will defeat an indemnity claim, even as against an intentional
tortfeasor.\(^8\) There seems no good reason for any such restriction. In the
hypothetical case analyzed in Section III of this article, why should Aaron be
protected from an indemnity claim by Drug Store? Similarly, when a liquor
provider is held liable for harms done by a drunk driver, why shouldn’t the
provider be able to seek indemnity from the perpetrator? This matter may not
have enough practical importance to justify a lengthy debate, becauseperpetrators

\begin{enumerate}
\item[81.\ ] 458 So. 2d 102, 104 n.1 (La. 1984).
\item[82.\ ] La. R.S. 9:3921(A) (1997) (emphasis added).
\item[83.\ ] \textit{See} Thompson v. Cane Garden Apartments, 480 So. 2d 373, 374 (La. App. 3d Cir. 1985)
(holding that an apartment building held liable for negligent security measures could not get
indemnity from the criminal who exploited the poor security to rob and injure the building’s tenants).
\end{enumerate}
like Aaron and drunk drivers are frequently judgment-proof and thus not worth pursuing by either the victim or the cotortfeasor. But I see nothing in the 1996 legislation—and no other clear doctrine—that would prevent recognition of an indemnity right in these situations, and would hope that Maraist and Galligan’s “dead letter” prediction turns out to be wrong here.

B. Contribution

The basic principle of contribution is that any tortfeasor held liable to the victim for more than that tortfeasor’s individual share of the responsibility is entitled to turn to the other tortfeasors and insist that each of them pay over its full individual share. Conversely, contribution is not necessary and therefore not available on behalf of any tortfeasor whose liability to the victim is confined to that tortfeasor’s individual share.

Under the 1996 legislation, most tortfeasors’ exposure will be limited to their individual shares, so that the incidence of contribution litigation will have been drastically reduced. But—mostly for the sake of argument—I would claim that Maraist and Galligan may go a bit too far in stating that, post-1996, “contribution is of little or no importance.” Remember that intentional tortfeasors—and perhaps “willful” ones—can still be held beyond their individual shares, so that we can expect to see some contribution-seeking by such actors.

I can’t predict how such claims will fare. As was suggested in Section III-B, intentional tortfeasors ought not to be able to get contribution from “merely” negligent ones, and perhaps not even from one another. At this point, we don’t even know what a “willful” tortfeasor is, much less whether such tortfeasors will be liable beyond their individual shares or entitled to contribution from other tortfeasors.

C. Settlement Credit

When the victim settles with and releases a tortfeasor who would have owed contribution to another tortfeasor, the settling tortfeasor is insulated from any contribution claim and the remaining tortfeasor can assert the contribution claim against the victim in the form of a credit against liability. The credit is measured by the settling tortfeasor’s percentage of fault, just as that tortfeasor’s liability for contribution would have been measured. To claim the settlement credit, the remaining tortfeasor must establish the existence of the settlement, the settling tortfeasor’s liability (but for the settlement) to the victim, and the settling tortfeasor’s percentage of fault.

84. Maraist & Galligan, Burying Caesar, supra note 1, at 409.
85. The seminal case is Harvey v. Travelers Ins. Co., 163 So. 2d 915 (La. App. 3d Cir. 1964).
86. Steptoe v. Lallie Kemp Hosp., 634 So. 2d 331 (La. 1994); Taylor v. United States Fidelity & Guar., 630 So. 2d 237 (La. 1993); Raley v. Carter, 412 So. 2d 1045 (La. 1982).
Nothing in the 1996 legislation has altered these basic principles. However, the number of situations in which they will arise has been drastically curtailed. Few defendants will be in a position to claim settlement credit because few defendants will be exposed to liability beyond their individual percentage shares of the fault. To the extent that nonparty tortfeasors' fault will routinely be quantified and charged to the plaintiff, defendants will be unconcerned with whether the plaintiff has settled with any of the tortfeasors. In effect, defendants will be getting settlement credit without having to ask for it. All they'll need to ask for is the quantification of everyone's fault.

IX. RETROACTIVE APPLICABILITY OF THE 1996 LEGISLATION?

Louisiana Civil Code article 6 provides that "[i]n the absence of contrary legislative expression, substantive laws apply prospectively only" whereas "[p]rocedural and interpretative laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary." Keith v. United States Fidelity & Guaranty Co. held that the first sentence of the new Louisiana Civil Code article 2323—calling for the quantification of the fault of nonparty tortfeasors—is procedural and applies to require courts to quantify the fault of the plaintiff's statutorily immune employer in cases arising before the amendment's effective date (April 16, 1996). Justice Knoll's opinion for the Keith court did not directly address the retroactive applicability of the changes to Louisiana Civil Code article 2324(B), and Chief Justice Calogero wrote a concurring opinion to emphasize that the latter question remains open. After a period of uncertainty, during which the courts of appeal were divided on the retroactive applicability of the amendments to Article 2324(B), the supreme court held against retroactivity in Aucoin v. State.

Maraist and Galligan—writing in the interval between Keith and Aucoin—had strongly opposed retroactive application of the new Article 2324(B), pointing out that while "the mere allocation of fault may be procedural, what one does with it is substantive." Using the 1996 legislation retroactively to charge the fault of employers or other nonparty tortfeasors against the plaintiff's recovery would clearly have been a substantive application, and hence

---

87. 694 So. 2d 180 (La. 1997).
88. At one time, a panel of the Second Circuit was on record as approving retroactive application of the 1996 amendment to Louisiana Civil Code article 2324. But the Second Circuit then changed its mind and in a five-judge rehearing in Jones v. Hawkins, 708 So. 2d 749 (La. App. 2d Cir. 1998), held that "the 1996 amendment to art. 2324 is substantive and prospective only." See also Moore v. Safeway, Inc., 700 So. 2d 831, 835 & n.19 (La. App. 1st Cir. 1996); Jackson v. Town of Grambling, 690 So. 2d 942, 945 n.4 (La. App. 2d Cir. 1997); and Thornhill v. State Dep't of Transp. & Dev., 676 So. 2d 799, 809 n.14 (La. App. 1st Cir.), writ denied sub nom. Riley v. State, 683 So. 2d 272 (La. 1996).
89. 712 So. 2d 62 (La. 1998).
90. Maraist & Galligan, Burying Caesar, supra note 1, at 410.
precluded by Louisiana Civil Code article 6.91 Moreover, there is a long line of supreme court decisions holding that a personal injury cause of action is a vested right that cannot be retroactively impaired without violating both state and federal constitutional provisions.92 Justice Knoll’s opinion for the Keith court had referred approvingly to that line of cases, stating:

[S]ince the [retroactive] application of legislative enactments has constitutional implications under the due process and contract clauses of both the United States and Louisiana Constitutions, even where the Legislature has expressed its intent to give a substantive law retroactive effect, the law may not be applied retroactively if it would impair contractual obligations or disturb vested rights.93

Under those principles, it would have been unconstitutional to apply the 1996 legislation to charge a plaintiff whose case arose prior to its enactment with the fault of an employer or other nonparty tortfeasor. (Aucoin turned solely on Louisiana Civil Code article 6 and thus did not reach constitutional considerations.94)

Integrating Keith and Aucoin in cases arising before April 16, 1996, is slightly tricky. One must retroactively apply the new regime’s procedural features only. Suppose the hypothetical case analyzed above in Section III arose before 1996 and is being tried today. Keith calls for assigning fault to everyone, just as we did in Section III. But Aucoin precludes charging Porter, the victim, with anyone’s fault other than his own. Thus, on the findings the jury made in Section III—damages of $100,000, Aaron guilty of an intentional tort, Drug Store a negligent tortfeasor with fault of 10%, and Porter himself guilty of 10% negligence—the judgment should provide that Aaron and Drug Store are solidarily liable for $50,00095 and that Aaron is individually liable for another $50,000.

91. Socorro v. City of New Orleans, 579 So. 2d 931, 944 (La. 1991), held that any enactment that “has the effect of changing the law regarding the amount of damages recoverable in personal injury lawsuits” is “clearly substantive as opposed to merely procedural.” Egros v. Pempton, 606 So. 2d 780, 786 & n.10 (La. 1992), held that the 1987 amendment to Article 2324—which also had the effect of changing the law regarding the amount of damages recoverable in personal injury lawsuits—was substantive in nature and applicable only prospectively.


93. 694 So. 2d at 183.

94. See 712 So. 2d at 67-68.

95. Holding Drug Store for 50% is supported by either of two distinct lines of reasoning. First, liability of 50% is the result that would be reached under the ratio approach of Gauthier v. O’Brien, 618 So.2d 825 (La. 1993), provided one assumes that Veasey v. Elmwood Plantation Assoc., 650 So.2d 712 (La. 1995), would militate against the assignment of percentage fault to an intentional
X. CONCLUSION

Perhaps frustrated by what some would regard as judicial inhospitality to the 1987 revision of Louisiana Civil Code article 2324, the 1996 legislature came forth with a radical truncation of tort victims' rights. Whether the truncation will prove as radical in practice as it looks on paper depends on a complex set of behaviors and interactions among lawyers, jurors, trial judges, appellate courts, and future legislatures. Maraist and Galligan's "turf war" metaphor is apt enough, and so is Leon Green's magisterial description of tort law's seemingly relentless pendulum movement: "Creation and destruction will continue to go hand in hand as they have done from the beginning, and thus the schizophrenic balance of love and fury will be maintained." On the other hand, it may be best to close on a quieter note, to be continued . . . .

---

tortfeasor in this situation. On that view, the only two percentages that count are plaintiff's 10% and Drug Store's 10%—equal fault, hence a 50/50 split. Second, in any event, 50% is plainly the right answer under Touchard v. Williams, 617 So. 2d 885 (La. 1993), which held that principles of solidarity justify "bumping up" a defendant like Drug Store to 50% but no higher.

96. See Maraist & Galligan, Turf War, supra note 1.
