Louisiana Law Review

Volume 44 | Number 5
Ruminations on Tort Law: A Symposium in Honor of Wex Malone
May 1984

The Intentional Act Exception to the Exclusivity of Workers' Compensation

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THE INTENTIONAL ACT EXCEPTION TO THE EXCLUSIVITY OF WORKERS' COMPENSATION

In 1976 the Louisiana legislature amended the workers' compensation statutes to provide an intentional act exception to the exclusivity of workers' compensation in Louisiana Revised Statutes 23:1032.[1] The statute now expressly provides that a workers' compensation remedy shall not "affect the liability of the employer, or any officer, director, stockholder, partner or employee of such employer or principal . . . resulting from an *intentional act*."[2] By failing to define "intentional act," the legislature left it to the courts to determine what type of conduct would constitute an intentional act on the part of the employer or coemployee such as would permit the plaintiff to recover tort damages as well as his workers' compensation benefits. After eight years, the courts are still struggling to decide this issue.

History of the Intentional Act Exception

Historically, the workers' compensation remedy has been the exclusive remedy against the employer and his insurance carrier if the employee's injury fell within the coverage formula of the act. The employee was entitled to fixed benefits for an injury based on the sole criterion of whether the accident arose out of the course and scope of his employment, regardless of the employer's lack of fault. The employer was precluded from asserting the defenses of contributory negligence and assumption

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1. (Supp. 1984). LA. R.S. 23:1032 provides:

> The rights and remedies herein granted to an employee or his dependent on account of injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights and remedies of such employee, or any principal or any officer, director, stockholder, partner or employee of such employer or principal, for said injury, or compensable sickness or disease. For purposes of this Section, the word "principal" shall be defined as any person who undertakes to execute any work which is a part of his trade, business or occupation in which he was engaged at the time of the injury, or which he had contracted to perform and contracts with any person for the execution thereof.
>
> *Nothing in this Chapter shall affect the liability of the employer, or any officer, director, stockholder, partner or employee of such employer or principal to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act.*
>
> The immunity from civil liability provided by this Section shall not extend to: 1) any officer, director, stockholder, partner or employee of such employer or principal who is not engaged at the time of the injury in the normal course and scope of his employment; and 2) to the liability of any partner in a partnership which has been formed for the purpose of evading any of the provisions of this section.

Emphasis added.

2. *Id.* (emphasis added).

of risk to defeat the employee's claim for benefits.[3] In exchange for this no-fault liability, the employer was relieved of the prospect of large damage judgments.[4] Thus, workers' compensation has traditionally been a *quid pro quo* remedy.

Courts in the United States have recognized a common law right of action for an intentional injury inflicted by an employer on his employee, notwithstanding the exclusivity of a workers' compensation statute.[5] One argument which has been propounded in support of this action is that the injury does not fall within the coverage of the act because most compensation statutes require that the employee receive injury *by accident.* If the employer intentionally injures the employee, he can not logically claim it was an accident.[6] This right of action in tort is also recognized for policy reasons. If an employer knows that he will be liable in tort for intentional acts committed by himself or a coemployee, he will presumably take extra safety precautions in order to avoid potentially large damage judgments. Therefore, this right of action will tend to encourage safety in the work place.

While many states agree that an employee who is injured by some type of conduct other than negligence is entitled to something in addition to workers' compensation benefits, the states disagree as to what types of conduct will fall within this category. Undoubtedly, the traditional intentional torts of assault and battery are included. For example, when an employer strikes an employee, the courts have little difficulty concluding that this conduct was intentional.[7] The difficulty arises when the employer's conduct is so excessively negligent that the conduct must be deemed to be intentional. The disagreement may be illustrated by comparing two states' treatment of the exception.

Arizona has codified the exception in its workers' compensation statutes.[8] An exception exists for injuries caused by the employer's or coemployee's "wilful misconduct." The statute defines "wilful misconduct" as an act done knowingly and purposely with the direct object of injuring another. The statute has been interpreted as requiring a "deliberate intention as distinguished from some kind of intention presumed from gross negligence."[9] An argument that constructive intent would satisfy the requirement for wilful misconduct has been rejected.[10] The Arizona

3. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 2 (1983).

4. 2A *id.* § 65.

5. *See, e.g.*, Boek v. Wong Hing, 180 Minn. 470, 231 N.W. 233 (1930); Castleberry v. Goolsby Bldg. Corp., 617 S.W.2d 665 (Tex. 1981).

6. 2A A. LARSON, *supra* note 3, § 69.

7. *See, e.g.*, Meyer v. Graphic Arts Int'l Union, 88 Cal. App. 3d 176, 151 Cal. Rptr. 597 (1979); Jones v. Thomas, 426 So. 2d 609 (La. 1983).

8. ARIZ. REV. STAT. ANN. § 23-1022 (1983).

9. Serna v. Statewide Contractors, 6 Ariz. App. 12, 15, 429 P.2d 504, 508 (1967).

10. *Id.*

courts seem to allow recovery in tort only where the injured employee can demonstrate an actual desire on the part of the injuring party to cause the harm.

In contrast to Arizona's treatment, California has adopted liberal standards for allowing the injured employee additional recovery. If the employee's injury or death is proximately caused by a "willful physical assault" by the employer, the employee may bring an action at law for damages against the employer.[11] If the employee's injury is not caused by such an assault, but by reason of the serious and willful misconduct of the employer or his managing representative, the amount of compensation recoverable is increased by one-half.[12] The California courts have interpreted *serious and willful misconduct* as "an act deliberately done for the express purpose of injuring another, or intentionally performed either with knowledge that serious injury is a *probable* result or with a positive, active, wanton, reckless and absolute disregard of its *possibly* damaging consequences."[13] The courts have allowed additional recovery when the employer knows of a dangerous condition which is likely to cause injury, but fails to take precautions to eliminate the danger.[14] This standard is extremely liberal when compared to the actual desire standard applied in Arizona.

Louisiana appears to have adopted a standard which falls somewhere in between the Arizona and California standards. In 1981, the Louisiana Supreme Court had an opportunity to express its interpretation of the intentional act exception of the Louisiana Workers' Compensation Law in *Bazley v. Tortorich*.[15] Prior to 1981, some Louisiana appellate courts had interpreted intentional act to mean the defendant entertained a desire to bring about the result *and* should have believed that the result was substantially certain to follow.[16] Thus, the plaintiff was required to prove the defendant's actual desire in every case. The supreme court in *Bazley* concluded that intentional act means the same in the workers' compensation statute as intentional tort in reference to civil liability. The court adopted the *Restatement (Second) of Torts*' definition of intentional tort which provides that the defendant either desired to cause the consequences of his act *or* believed the consequences were substantially certain to result.[17]

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11. CAL. LAB. CODE § 3602 (West Supp. 1984).

12. *Id.* § 4553.

13. Mercer-Fraser Co. v. Industrial Accident Comm'n, 40 Cal. 2d 102, 120, 251 P.2d 955, 964 (1953) (emphasis added).

14. Rogers Materials Co. v. Industrial Accident Comm'n, 63 Cal. 2d 717, 408 P.2d 737, 48 Cal. Rptr. 129 (1965).

15. 397 So. 2d 475 (La. 1981).

16. *E.g.*, Crenshaw v. Service Painting Co., 394 So. 2d 706 (La. App. 3d Cir. 1981); Guidry v. Aetna Casualty & Sur. Co., 359 So. 2d 637 (La. App. 1st Cir.), *cert. denied*, 362 So. 2d 578 (La. 1978).

17. RESTATEMENT (SECOND) OF TORTS § 8A (1965). Prior to *Bazley*, intentional torts

The court expressly rejected the conjunctive test which the lower courts had adopted, thus eliminating the plaintiff's difficult task of proving actual desire on the part of the injuring party. The plaintiff need only prove that the defendant was substantially certain of the resulting consequences. The courts, however, are now faced with the problem of determining whether or not a defendant was "substantially certain."

The problems which have arisen since *Bazley* can be broken down into two main areas: (1) the court's requirements for alleging an intentional act in the plaintiff's petition, and (2) the need for a manageable standard in order to determine whether the defendant was substantially certain.

Pleading the Intentional Act

A preliminary pitfall for many plaintiffs has been inadequate pleading of an intentional act. Only a handful of reported cases have actually been decided on their merits; in most of the reported cases, the courts have sustained exceptions of no cause of action due to insufficient allegations in the plaintiff's petition. Many courts have held that the plaintiff's allegations that defendant's acts were "substantially certain" to cause harm were mere conclusions of the pleader, while the law requires plaintiff to allege specific facts to show how or why the defendant knew the plaintiff's injury was substantially certain to follow from his acts.[18]

The Louisiana Supreme Court recently liberalized the pleading requirements in *Mayer v. Valentine Sugars, Inc.*[19] The court held that the plaintiff had alleged a cause of action for an intentional act when he alleged that the defendants acted with the knowledge and belief that injury to the plaintiff was substantially certain to follow from their acts. The trial court had sustained the employer's exception of no cause of action because of the conclusory manner in which the element of intent was alleged.[20] Both the supreme court and the court of appeal relied on article 856 of the Louisiana Code of Civil Procedure which provides: "Malice, intent, knowledge, and other condition of mind of a person may be alleged generally." Consequently, the supreme court concluded that it was permissible for the employee to plead the intent element generally and without particularity.[21]

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were very insignificant in Louisiana due to the general disallowance of punitive damages in Louisiana. Attorneys have found it useless to attempt to prove an intentional tort when their recovery would be the same upon proof of negligence. This accounts for the lack of jurisprudence in Louisiana dealing with the proof of intentional torts.

18. *See* Shores v. Fidelity & Casualty Co., 413 So. 2d 315, 318 (La. App. 3d Cir. 1982).

19. 444 So. 2d 618 (La. 1984).

20. *Id.* at 619.

21. *Id.* at 620; *see also* Hurst v. Massey, 411 So. 2d 622 (La. App. 4th Cir.), *cert. denied*, 413 So. 2d 900 (La. 1982).

The effect of the supreme court's decision in *Mayer* may have unfortunate consequences in the future because it does violence to the concept of fact pleading in Louisiana. Article 891 of the Louisiana Code of Civil Procedure provides in pertinent part: "The petition . . . . shall contain a short, clear, and concise statement of the object of the demand and of the material facts upon which the cause of action is based . . . ." The petition must include material facts which show how or why the defendant believed injury to the plaintiff was substantially certain to result.[22] The plaintiff's allegation in *Mayer* that the defendant acted with the knowledge that injury to the plaintiff was substantially certain to follow is merely another way of alleging that the defendant's acts were intentional. The plaintiff has not alleged the material facts from which one can infer that the defendant had this knowledge.

Article 856 of the Code of Civil Procedure was never intended to be an exception to article 891's requirement of pleading material facts. Reading these articles *in pari materia*, a result which is contrary to *Mayer* can be reached. In full, article 856 provides: "In pleading fraud or mistake, the circumstances constituting fraud or mistake shall be alleged with particularity. Malice, intent, knowledge, and other condition of mind of a person may be alleged generally." The purpose of article 856 arguably was twofold: (1) to make the general rules of pleadings when fraud or mistake is alleged stricter in order to discourage frivolous claims of fraud or mistake by requiring a detailed evidentiary factual basis to support such an allegation, and (2) to distinguish fraud or mistake from intent, malice, knowledge, and other conditions of mind and therefore not require these latter elements to be alleged with great particularity. These states of mind, however, must still be pleaded under the general rule requiring allegations of material facts.[23] The comments to article 856 support this argument by noting that under Louisiana's system of fact pleading, all *material* allegations of the cause of action or defense *must* be pleaded. Hence, the first sentence of this article was actually not needed, but it was included to emphasize the necessity of pleading *full* particulars of the fraud or mistake averred. The comments go on to say that the other states of mind referred to in the second sentence cannot be fully particularized, and can only be raised through a general allegation. This last comment apparently means that these states of mind may be alleged

22. *Cf.* Delta Bank & Trust Co. v. Lassiter, 383 So. 2d 330 (La. 1980).

23. An example of an allegation of a material fact to support the conclusion that defendant acted with the knowledge that injury to the plaintiff was substantially certain to follow would be that defendant ordered plaintiff to work on a tower without ropes or safety devices when defendant knew it was a very windy day. This is distinguished from the more particular evidentiary fact that the defendant had told another employee that the wind was blowing about 30 miles per hour just prior to the accident. It is not necessary that plaintiff allege the more particular evidentiary facts.

generally in the sense that they may be alleged, as the general rule requires, with material facts.

Additionally, the supreme court's decision in *Mayer* is not in accord with the purposes of workers' compensation. As previously mentioned, workers' compensation is a *quid pro quo* remedy. The employer has paid premiums for workers' compensation insurance with the understanding that all acts short of intentional ones would be covered by this insurance. By allowing an employee to get past the exception of no cause of action by making such a general conclusory statement, the employer's resources will be substantially depleted in having to defend these suits. If the injury is truly not an intentional one, the employer will have paid not only workers' compensation insurance premiums for the injury but also the high costs of defending a suit. This is clearly contrary to the purpose of having a workers' compensation system. The courts have a duty to promote judicial efficiency and should not permit a plaintiff to proceed to trial when the allegations of his petition are clearly insufficient to entitle him to recovery outside of the workers' compensation system.

Perhaps the strongest reason for requiring such a technical compliance with the pleading requirements when an intentional act is alleged is that the cause of action is an exception to the general rule that workers' compensation is the exclusive remedy of the employee. Where an exception is provided for in a statute laying down a general rule, the exception must be strictly construed.[24] The function of an exception is to exempt something from the scope of the general words of a statute which would otherwise be within the scope and meaning of such general words. Consequently, the existence of an exception in a statute clarifies the intent that the statute should apply in all cases save those which are specifically excepted. Any doubt should be resolved in favor of the general rule.[25]

Even though the plaintiff complies with *Mayer* and the trial court dismisses the defendant's exception of no cause of action, the battle is not over. The *Mayer* court may have felt compelled to assist an injured worker who may not have access to the crucial facts until he has a chance to engage in formal discovery. But once the plaintiff has had a chance to gather more detailed information to support his allegation of intent, the court would no longer have reason to provide additional protection. Indeed, the court in *Mayer* suggested that its reasoning would be different had a motion for summary judgment been at issue.[26] Article 966 of the Code of Civil Procedure allows a party to pierce the allegations of facts in the pleadings and obtain relief by summary judgment where the facts set forth in detail in affidavits, depositions, answers to interrogatories, and admissions on file show that there are no genuine issues

24. State v. Dep't of City Civil Service, 215 La. 1007, 42 So. 2d 65 (1949).
25. E. CRAWFORD, THE CONSTRUCTION OF STATUTES 609 (1940).
26. 444 So. 2d at 620.

of material fact to be tried. By strictly construing the intentional act exception at this stage of the proceedings, the courts could give recognition to the *quid pro quo* idea of workers' compensation and encourage judicial efficiency while still protecting the injured employee's cause of action from dismissal before he has had an opportunity to engage in discovery.

The *Mayer* decision on its face is a welcome relief to plaintiffs' attorneys. It has propounded the magic words which will set forth a cause of action: "The defendant acted with the knowledge and belief that injury to plaintiff was substantially certain to follow from his acts." Although it will be tempting to grab on to these words, a plaintiff's attorney would be well advised to approach *Mayer* with caution. The decision was not unanimous, and the supreme court may find it necessary to reconsider the standard it has set forth should it become apparent that it has misinterpreted article 856 and has opened the courts to many frivolous claims of intentional acts. Until this standard has become more firmly embedded in Louisiana law, a plaintiff should allege all material facts which he has available, particularly those which support the allegation that the defendant intended to cause the harm. The allegations should include specific acts and omissions of the defendant from which the inference can be drawn that the defendant was substantially certain that an injury would occur.

Determination of the Substantially Certain Standard

Although the pleadings have occupied the majority of the courts' time in this area of the law, a major problem arises from the lack of a workable standard for determining whether an employer or coemployee was "substantially certain" of causing injury to the plaintiff. In order to adopt such a standard, the courts must decide whether an objective or subjective determination will be used and what degree of certainty on the part of the defendant will be "substantial."

Objective/Subjective Determination

The courts must decide whether the issue of the defendant's knowledge at the time of the alleged intentional act will be an objective or subjective determination. There has been some discussion among the courts of appeal concerning an objective "should have known" standard. An argument has been made that unless the terms "should have known that the result would follow" are included in the definition of substantially certain, the Louisiana Supreme Court's rejection of the requirement of proving actual desire in *Bazley* will have been superfluous because the alternative "substantially certain" test will also require proof of an actual desire.[27]

27. *See, e.g.*, McDonald v. Boh Bros. Constr. Co., 397 So. 2d 846 (La. App. 4th Cir. 1981).

Arguably, a distinction can be drawn by adopting a test which falls somewhere between the subjective "actual desire" standard and the objective "should have known" standard. A possible middle position is a subjective determination of what the defendant *must have known* or *must have believed* the result would be. This standard is compatible with the *Bazley* requirement that *the defendant* believed the consequences were substantially certain to result.

This "must have known" standard can be analogized to the standard applied in determining whether a plaintiff has assumed a risk in a tort proceeding. In *Langlois v. Allied Chemical Corp.*,[28] the Louisiana Supreme Court stated that assumption of risk is to be determined by a subjective inquiry as opposed to the objective determination of contributory negligence. Following *Langlois*, the supreme court explained this subjective inquiry in *Prestenbach v. Sentry Insurance Co.*:[29] "[F]or purposes of a knowing assumption of risk, we impute knowledge to a plaintiff, not because he was in a position to make certain observations, but only when he actually makes those observations and, from them, should reasonably have known that a risk was involved." The trier of fact infers what the plaintiff subjectively knew by looking at the objective evidence. In the same sense, the trier of fact can examine the circumstances surrounding an employer to infer that he *must have known* that the employee would be injured.

A theoretical argument might be made that this subjective "must have known" test of the defendant's knowledge would encourage hiring supervisors who do not know how to do a job safely, since an ignorant supervisor would be less likely to appreciate the consequences of his act than one who is more safety conscious. This argument should be disregarded because, as a practical matter, an employer hires on the basis of whether an employee will help his business prosper, not on the basis of whether an employee will save him from lawsuits. A supervisor who does not know how to do a job safely will probably also not know how to do it effectively. Additionally, an employer who allows dangerous conditions to prevail in the workplace is subject to sanctions under provisions such as the Occupational Safety and Health Act of 1970.[30]

The supreme court in *Bazley* lent some support to this "must have known" standard. In its attempt to define intentional act, the court utilized the Louisiana Criminal Code's definition of intent, noting that the civil definition of intent in the *Restatement (Second) of Torts* is similar to Louisiana's criminal definition.[31] There are two types of intent in the

28. 249 So. 2d 133 (La. 1971), *over'd on other grounds*, Dorry v. LaFleur, 399 So. 2d 559 (La. 1981).

29. 340 So. 2d 1331, 1335 (La. 1976).

30. Pub. L. No. 91-596, 84 Stat. 1590 (codified at 19 U.S.C. §§ 651-678 (1982)).

31. 397 So. 2d at 481.

criminal context—specific and general. Specific criminal intent is defined as "that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act."[32] This language can be analogized to an instance in which the employer or coemployee actually desires to cause injury to the plaintiff, thus satisfying the first *Bazley/Restatement* definition of intent. General criminal intent is "present whenever . . . the circumstances indicate that the offender, in the ordinary course of human experience, *must have* adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act."[33] The comments which follow this definition state that a criminal defendant may have general criminal intent when the jury "believes he '*must have*' turned his mind to the consequences in acting as he did."[34] Similarly, a jury may find an employer responsible because he *must have* realized that injury to his employee was substantially certain to follow his act or omission, thus satisfying the alternative *Bazley/Restatement* definition of intent.[35]

The *must have known* standard would be preferable because it would fit within the contemplation of the supreme court's opinion in *Bazley*. The supreme court's efforts to reduce the plaintiff's burden of proof by adopting the disjunctive test will not have been a vain effort if this standard is adopted. This standard will give life to the alternative definition of intent (substantially certain of the consequences) without resorting to the level of mere negligence.

Certainty Which Is "Substantial"

Another problem faced by the courts is the lack of a clear standard indicating what degree of certainty on the part of the defendant will be deemed "substantial." Several of the lower courts have attempted to determine what degree of certainty is required by *Bazley*. In *Jacobsen v. Southeast Distributors*,[36] the injuring supervisor testified that he knew there was a "reasonable probability" of an accident occurring in view of the hazardous type of work that the plaintiff was performing. The court found that a reasonable probability was not a substantial certainty and, therefore, reversed the trial court's finding of an intentional act. The court in *Reagan v. Olinkraft, Inc.*[37] held that a "reasonable anticipation" was insufficient and attempted to redefine substantially certain as being "virtually sure" or "nearly inevitable."

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32. CRIMINAL CODE: LA. R.S. 14:10 (1968).

33. *Id.* (emphasis added).

34. *Id.* comment (emphasis added).

35. *See also* Mize v. Beker Indus. Corp., 436 So. 2d 1333 (La. App. 5th Cir.), *cert. denied*, 440 So. 2d 761 (La. 1983).

36. 413 So. 2d 995 (La. App. 4th Cir. 1982).

37. 408 So. 2d 937 (La. App. 2d Cir. 1981).

The supreme court, despite opportunities to grant writs and provide more guidance to the *Bazley* requirement of *substantial* certainty, has declined to do so. Perhaps this is an indication that the supreme court wishes to leave a certain degree of flexibility with the lower courts. The late Professor Leon Green noted that the term "substantial," when used as a legal standard, is intended to be metaphysical. The trier of fact must translate the metaphysical standard into his own standard and then measure the conduct of the defendant by such standard.[38] Professor Green stated:

> The terms "substantial" and "appreciable" are not new terms in the law, but they have not been rendered useless by overwork. While they are relative terms, they are recognized as such. They do not purport to be definite . . . . Hence they are not so misleading. They are like the term "reasonable" in the test of negligence. They are of a fast color, although only relative.[39]

Perhaps the supreme court's failure to draw a bright line rule was an attempt to allow the lower court judges to weigh the various social policies involved in the case at hand, and then to determine whether a remedy outside of workers' compensation is justified.[40]

Proving Substantial Certainty

Once the plaintiff overcomes the burden of sufficiently alleging a cause of action based on an intentional act, he must introduce evidence of the circumstances which indicate that the injuring party must have known that injury to the plaintiff was substantially certain to follow his acts or omissions. To meet this burden, the plaintiff must introduce evidence which tends to prove the defendant's awareness of the danger and the degree of that danger. One factor would be the defendant's intelligence, as evidenced by his level of education and participation in job safety training programs. Another important factor is the defendant's work experience in the industrial setting in which the injury occurred. Additional factors may be equally important, such as the defendant's knowledge of other injuries which have recently occurred in a similar manner, whether the defendant had been informed of the severe danger involved in performing a certain task, warnings received by the defendant from other employees or safety inspectors concerning the gravity of a dangerous condition, or the defendant's knowledge of the lack of the plaintiff's work

38. L. GREEN, RATIONALE OF PROXIMATE CAUSE 138 (1927).

39. *Id.* at 140.

40. Although the trier of fact could be a judge or a jury, the reference here is to the judge. This is so because the judge will be the one responsible for determining whether or not the issue of the defendant's intent should be submitted to the jury. Based on the social policies, the judge could determine as a matter of law that reasonable minds would not differ as to the fact that the defendant's act was not intentional and therefore direct a verdict.

experience. The plaintiff must keep in mind that the time sequences involved are essential in the determination of the defendant's substantial certainty. If the factors which tend to prove the defendant's substantial certainty are so far removed in time from the time of the injury, the trier of fact may have difficulty finding any certainty on the part of the defendant, much less substantial certainty.

Conclusion

The intentional act exception to workers' compensation is evidently here to stay. The workers' compensation statutes have been amended several times since 1976, but Louisiana Revised Statutes 23:1032 has remained unchanged. In spite of the obvious confusion over the statute's interpretation, the legislature has chosen to leave it to the courts to determine its fate. The confusion seems to have reached a peak, and the need for a workable standard is evident. A reasonable and manageable standard which the courts could adopt is one in which an intentional act exception exists whenever the employer or coemployee actively desired the consequences or *must have known* that injury to the plaintiff was substantially certain to follow his act or omission. This standard, coupled with the courts' better application of Louisiana's procedural rules governing pleadings, should lead to a legitimate use of the intentional act exception.

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