Louisiana Law Review

Volume 47 | Number 5
Student Symposium: Conflict of Laws in Louisiana
May 1987

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Repository Citation
George W. Pugh Jr., *Judge Albert Tate, Jr. and the Employee Personal Injury Action: An Overview*, 47 La. L. Rev. (1987)
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JUDGE ALBERT TATE, JR. AND THE EMPLOYEE PERSONAL INJURY ACTION: AN OVERVIEW

George W. Pugh, Jr.

During my one year tenure as a law clerk with Judge Albert Tate, Jr.,[1] I was continually impressed with Judge Tate's concern and appreciation for the individual members of the labor populace and the hardships resulting from their work-related injuries. This concern was evidenced by a willingness to look at each case from the point of view of the injured worker and a strong desire not to allow procedural technicalities to prevent a just result. Moreover, as was the case with all litigants before his court, Judge Tate believed that the judicial process should proceed to resolution with all possible speed. Whether the results were favorable or unfavorable, Judge Tate was of the firm opinion that to the litigants, the matter before the court was of paramount importance. Accordingly, Judge Tate was constantly pushing himself and others to resolve matters before him as quickly as possible and to thereby return a measure of certainty to the litigants' lives.

In light of the noted concern of Judge Tate for laborers and their employment-related injuries, this writer decided to examine Judge Tate's impact on this area of Louisiana law. In doing so, it became apparent that Judge Tate's concerns have been clearly exhibited in his decisions and, particularly, in several noteworthy opinions authored by him on this subject. These opinions have had a substantial impact on the shaping of the Louisiana law of employment-related injuries and have gone far toward improving the lot of the injured worker in Louisiana.

The Louisiana courts and legislature have long recognized a distinction between actions by an injured employee for recovery against his employer or principal and those by an injured employee against a third person.[2] This distinction resulted from numerous considerations, including, on the one hand, the dependency of the employee and family on his livelihood and, on the other, the benefits obtained by the employer or principal from the employee's labor.[3] This distinction, more fully

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1. 1982-1983.
2. La. R.S. 23:1021 (1985).
3. If the accident was of the unavoidable variety, the employee was obliged by the prevailing system to shoulder his loss without redress. Yet it is safe to conjecture that the great bulk of work accidents must be regarded as part of the unavoidable loss of modern industrial operations, and it cannot be said that

explained below, resulted in different treatment being given to the employee's claims against employer-tortfeasors and those against third person-tortfeasors. There were many instances, however, when the characterization of a tortfeasor as an employer or as a third person became blurred and presented problems for the courts. This article addresses these problem areas and the manner in which they were considered and resolved by the concerned judicial efforts of Judge Albert Tate.

I. The Basic Employee Personal Injury Action and the Worker's Compensation Scheme

Beginning in 1914 with Louisiana Act No. 20, the Louisiana legislature recognized the then modern trend in other states and adopted a version of the workers' compensation statute.[4] Since then, the statute underwent substantive and procedural amendment almost every session of the legislature[5] but remained largely unchanged until 1975 and 1976 when major revisions were enacted.[6] From its original promulgation until today, however, the Louisiana compensation law has continuously evi-

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any person in particular is "to blame" for them. . . .

Who is to absorb the unavoidable cost of these accidents? It is futile to dismiss this question with the observation that the victim must shoulder his own accident costs. Seldom does the average worker have accumulated savings sufficient to tide him over anything more than the most trivial mishap. The loss brought about by a serious accident or death must usually be absorbed by relatives or friends who are in a poor position to bear the overload, or, as is more likely, the cost must be borne by organized charity or the state. . . .

Workmen's Compensation rests upon the sound economic principle that those persons who enjoy the product of a business—whether it be in the form of goods or services—should ultimately bear the cost of the injuries or deaths that are incident to the manufacture, preparation and distribution of the product. Certainly this has always been true with reference to the capital structures and the machinery and equipment necessary to process and distribute all industrial products. Expected wear and tear and breakage of every sort is anticipated by the producer and this cost is considered when he fixes the price of his commodity or service. This is done without any reference to whether or not the loss should be regarded as the result of fault on the part of the management. If the cost is a predictable incident of the operation, sound business judgment demands that it be included as an element of the price. The same should be true of the human wreckage that is involved in production. The expected cost of injury or death to workers can be anticipated and provided for in advance through the medium of insurance, and the premiums can be regarded as an item of production cost in fixing the price of the commodity or service.

1 W. Malone & H. Johnson, Workers' Compensation Law and Practice, § 31-32 at 37-38 in 13 Louisiana Civil Law Treatise (2nd ed. 1980) [hereinafter Workers' Compensation].

4. 1914 La. Acts 20.

5. See 13 Workers' Compensation, supra note 3, § 36 at 50.

6. Id.

denced an underlying policy that work-related injuries be compensated by the employer *in all cases*, but that this compensation be substantially lower than that which the employee might otherwise have recovered in tort.[7]

The rationale for this policy has evolved from a complicated balancing of the interests of the employer and employee.[8] On the one hand, it is recognized that employees will occasionally become injured through no fault of either themselves, their employers or third persons.[9] In such cases, the employee, who is usually dependent on the employment for his and his family's livelihood, will have no avenue of recourse from any source and will have no means to support himself during the period of disability in the absence of a compensation remedy.[10] Moreover, even when the injury is caused, in fact, by the negligence or fault of his employer, a co-employee or a third person (thus potentially giving rise to a cause of action for monetary recovery), his recovery can be delayed indefinitely if he is required to prove fault in a protracted litigation proceeding.[11] The employer, on the other hand, has obtained substantial

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7. In order that the compensation principle may operate properly and with fairness to all parties it is essential that the anticipated accident cost be predictable and that it be fixed at a figure that will not disrupt too violently the traffic in the product of the industry affected. Thus predictability and moderateness of cost are necessary from the broad economic viewpoint. But these are also desirable from the personal point of view of worker and employer. The great need of the employee is for immediate cash to meet his emergency. If the amount of his claim is likely to be disputed, the delays of the old system and the inequities of compromise will be resurrected and one of the humane purposes of compensation will be lost. Furthermore, if the worker is to be guaranteed at least a minimum sum to care for medical expense and support for each and every accident, it is perhaps not unfair that he should forego his former claim to be fully remunerated for pain and suffering and those other intangible elements that go into the makeup of a conventional damage suit. From the employer's standpoint it is undesirable to establish a compensation rate so high that it will invite malingering and even feigned injury. Also, from an economic point of view it is obvious that there is more room for free play of competition between producers, if fixed items, such as compensation premium charges, constitute only a small part of the total cost of production.

13 Workers' Compensation, supra note 3, § 32 at 39-40.

8. Compensation, when regarded from the viewpoint of employer and employee represents a compromise in which each party surrenders certain advantages in order to gain others which are of more importance both to him and to society. The employer gives up the immunity he otherwise would enjoy in cases where he is not at fault, and the employee surrenders his former right to full damages and accepts instead a more modest claim for bare essentials, represented by compensation. (footnote omitted).

13 Workers' Compensation, supra note 3, § 32 at 40.

9. 13 Workers' Compensation, supra note 3, § 31 at 37.

10. Id.

11. Id.

economic benefit from its employees by reason of the labor performed by them. Moreover, the employer has required that the employees devote much of their available time and energy to the employment and has often exposed them to risks which they would not otherwise have encountered as a result of this employment.[12] If the employer is not placed under any obligation to compensate an injured employee for a non-fault work-related injury, the employer will have obtained the full economic benefit of the employee's labor but will have incurred no corresponding responsibility for his injuries unless the employee is successful in overcoming the heavy burden of proof (and also of time and money) in establishing fault on the part of the employer.[13] Further, the employer's ability to delay payment to the injured employee gives the employer considerable leverage in forcing the employee to agree to an inadequate settlement.[14] As stated by one noted commentator:

> The uncertainty of the outcome of torts litigation in court placed the employee at a substantial disadvantage. So long as liability depended on fault there could be no recovery until the finger of blame had been pointed officially at the employer or his agents. In most cases both the facts and the law were uncertain. The witnesses, who were usually fellow workers of the victim, were torn between friendship or loyalty to their class, on the one hand, and fear of reprisal by the employer, on the other. The expense and delay of litigation often prompted the injured employee to accept a compromise settlement for a fraction of the full value of his claim. Even if suit were successfully prosecuted, a large share of the proceeds of the judgment were exacted as contingent fees by counsel. Thus the employer against whom judgment was cast often paid a substantial damage bill, while only a part of this enured to the benefit of the injured employee or his dependents. The employee's judgment was nearly always too little and too late.[15]

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12. Prior to the 1975 amendments, the act specified that an employee must have been engaged in "hazardous" employment to be entitled to compensation. The jurisprudence under the act, however, interpreted this requirement broadly. The sole reason for the imposition of this requirement, at any rate, had been an effort to avoid any perceived constitutional difficulties with the act. Inasmuch as the act has withstood constitutional attack, the requirement of hazardous employment has been largely ignored. See Robbins v. Caraway-Rhodes Veterinary Hospital, 315 So. 2d 688 (La. 1975) (per Justice Tate) (finding employment at a veterinary hospital to be hazardous employment although not specifically so designated in the act). See also 13 Workers' Compensation, supra note 3, § 91-92.

13. 13 Workers' Compensation, supra note 3, § 13 at 31.

14. 13 Workers' Compensation, supra note 3, § 31 at 37.

15. Id.

The resulting statutory remedy for this problem provides the employee with definite benefits, calculated as a certain percentage of the employee's wages, for any work-related disability-causing injury.[16] This remedy accrues to the employee without any necessity of proving employer fault.[17] The employer, on the one hand, while subjected to this indisputable liability for these injuries, does not incur liability for the much greater recovery which the employee might have obtained in tort.[18] Thus, in this classic compromise, the employee gives up a potentially greater recovery in exchange for timely and certain, although less substantial, monetary benefits for work-related injuries. The employer, on the other hand, gives up the potential freedom from liability for non-fault injuries, but becomes unquestionably responsible for the payment of compensation benefits.

Because this statutory remedy has always represented a balancing of competing interests,[19] the result has been viewed on the one hand by employers as unfair and overly liberal in favor of injured employees, and on the other hand, by employees as providing a comparatively meager remedy for disabling injuries. Accordingly, it is not surprising that employers and employees alike have occasionally sought to avoid the sometimes harsh effects of the statute. Employees have sought to obtain benefits greater than those afforded by the act, and employers have sought to avoid responsibility for non-fault injuries. Some of these attempts, on each side, have been successful, and it is in the treatment of these attempts that Judge Albert Tate, Jr. distinguished himself as a judge actively involved in providing relief to injured employees and in balancing the competing interests, as required by statute, with a liberal view toward providing these employees with the greatest possible benefits.

It has been stated that:

> The importance of the compromise character of compensation cannot be overemphasized. The statutes [of the different states] vary a great deal with reference to the proper point of balance. The amount of weekly compensation payments and the length of the period during which compensation is to be paid are matters concerning which the acts differ considerably. The interpretation of any compensation statute will be influenced greatly by the court's reaction to the basic point of compromise established in the Act. If the court feels that the basic compromise unduly favors the employer, it will be tempted to restore what it regards as a proper balance by adopting an interpretation that

16. La. R.S. 23:1221 (Supp. 1987).
17. 13 Workers' Compensation, supra note 3, § 32 at 39.
18. 14 Workers' Compensation, supra note 3, § 361 at 132.
19. 13 Workers' Compensation, supra note 3, § 32 at 41.

> favors the worker. In this way, a compensation act drawn in a spirit of extreme conservatism may be transformed by a sympathetic court into a fairly liberal instrument; and conversely, an act that greatly favors the laborer may be so interpreted by the courts that employers can have little reason to complain.[20]

There is little question that, from its inception, the Louisiana compensation act was viewed as quite conservative.[21] Although the legislature amended the act in almost every subsequent legislative session, these amendments did not change the fundamentally conservative nature of the act until the major revisions of 1975 and 1976.[22] This conservatism was evidenced in such details as compensation being payable only to employees engaged in "hazardous" occupations, in compensation being payable for only scheduled periods of time rather than for the duration of the disability, and in compensation being payable at rates far below the national average.[23] This writer suggests that in light of this conservatism, the Louisiana courts, and notably Judge Tate, interpreted the compensation act liberally in favor of maximum coverage. This writer further suggests that this liberal interpretation, imposed by the courts, may have had an effect in prompting the legislature to liberalize the act.

In this regard, the oft-repeated maxim in connection with workers' compensation cases is that the statute should be interpreted liberally in favor of coverage. Judge Tate's recognition of this interpretive principle is evident in every known majority decision authored by him while on the Louisiana Supreme Court which involved the interpretation of the compensation act.[24] Not only did he often repeat the referenced general

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20. Id.

21. 13 Workers' Compensation, supra note 3, § 36 at 49-50.

22. Id.

23. 13 Workers' Compensation, supra note 3, § 37.

24. Allstate Ins. Co. v. Theriot, 379 So. 2d 950 (La. 1979); Lytell v. Strickland Transportation Co., Inc., 373 So. 2d 138 (La. 1979); West v. Bayou Vista Manor, Inc., 371 So. 2d 1146 (La. 1979); Crump v. Hartford Accident and Indem. Co., 367 So. 2d 300 (La. 1979); Cousins v. Lummus Co., 364 So. 2d 993 (La. 1978); Bolden v. Georgia Casualty & Surety Co., 363 So. 2d 419 (La. 1978); Henderson v. Travelers Ins. Co., 354 So. 2d 1031 (La. 1978); Lucas v. Ins. Co. of North America, 342 So. 2d 591 (La. 1977); Walker v. Gaines P. Wilson & Son, Inc., 340 So. 2d 985 (La. 1976); Lewis v. St. Charles Parish Hosp. Serv. Dist., 337 So. 2d 1137 (La. 1976); Verbois v. Howard, 322 So. 2d 110 (La. 1975); Robbins v. Caraway-Rhodes Veterinary Hosp., 315 So. 2d 688 (La. 1975); Owens v. Liberty Mutual Ins. Co., 307 So. 2d 313 (La. 1975); Woodard v. Southern Casualty Ins. Co., 305 So. 2d 528 (La. 1974); Dufrene v. Aetna Casualty & Surety Co., 298 So. 2d 724 (La. 1974); Bass v. Service Pipe Trucking Co., Inc., 289 So. 2d 78 (La. 1974); Crabtree v. Bethlehem Steel Corp., 284 So. 2d 545 (La. 1973); Bellard v. Tri-State Ins. Co., 282 So. 2d 453 (La. 1973); Williams v. Hudson East, 261 La. 959, 261 So. 2d 629 (1972); McDermott v. Funel, 258 La. 657, 247 So. 2d 567 (1971); Jordan v. Travelers Ins. Co., 257 La. 995, 245 So. 2d 151 (1971).

principle, but in every such decision, he interpreted the statute to provide the maximum compensation benefit to the injured employee. For example, on numerous occasions, Judge Tate wrote for the court in reversing lower appellate court awards of lesser coverage and in awarding, instead, permanent and total disability benefits to injured employees.[25] This was true even where the employee's only limitation from continuing at previous unskilled employment was an intolerance to certain cleaning compounds,[26] or where a skilled laborer could continue to work at his trade but could only do so if not exposed to heights,[27] could only do so with pain[28] or could only do some but not all of his prior duties.[29] This liberality of interpretation was also seen in connection with Judge Tate's holdings on other issues, as, for example, in finding "dependent" concubines and illegitimate children entitled to compensation benefits,[30] in expanding the scope of hazardous employment (which was a prerequisite for compensation coverage prior to 1975)[31] to include virtually all employment which caused work-related injury,[32] and in liberally interpreting the act to avoid the potentially harsh effects of prescription[33] or unwise settlements.[34] Even in dissent, Judge Tate invariably argued for greater benefits than were afforded by the majority.[35]

These decisions are strongly indicative of Judge Tate's sympathetic treatment of employees' work-related injuries within the context of the act. However, from time to time, innovative attorneys have presented arguments directed toward the expansion of remedies beyond those avail-

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25. West v. Bayou Vista Manor, Inc., 371 So. 2d 1146 (La. 1979); Crump v. Hartford Accident and Indem. Co., 367 So. 2d 300 (La. 1979); Cousins v. Lummus Co., 364 So. 2d 993 (La. 1978); Lucas v. Ins. Co. of North America, 342 So. 2d 591 (La. 1977); Walker v. Gaines P. Wilson & Son, Inc., 340 So. 2d 985 (La. 1976); Lewis v. St. Charles Parish Hosp. Serv. Dist., 337 So. 2d 1137 (La. 1976); Williams v. Hudson East, 261 La. 959, 261 So. 2d 629 (1972).

26. Lewis v. St. Charles Parish Hosp. Serv. Dist., 337 So. 2d 1137 (La. 1976).

27. Cousins v. Lummus Co, 364 So. 2d 993 (La. 1978).

28. Williams v. Hudson East, 261 La. 959, 261 So. 2d 626 (1972).

29. Lucas v. Ins. Co. of North America, 342 So. 2d 591 (La. 1977).

30. Henderson v. Travelers Ins. Co., 354 So. 2d 1031 (La. 1978); McDermott v. Funel, 258 La. 657, 247 So. 2d 567 (1971).

31. La. R.S. 23:1035 (1985). See also 13 Workers' Compensation, supra note 3, §§ 91-93.

32. Robbins v. Caraway-Rhodes Veterinary Hosp., 315 So. 2d 688 (La. 1975).

33. Allstate Ins. Co. v. Theriot, 376 So. 2d 950 (La. 1979); Crump v. Hartford Accident and Indem. Co., 367 So. 2d 300 (La. 1979); Bolden v. Georgia Casualty & Surety Co., 363 So. 2d 419 (La. 1978).

34. Verbois v. Howard, 322 So. 2d 110 (La. 1975); Dufrene v. Aetna Casualty & Surety Co., 298 So. 2d 724 (La. 1974); Crabtree v. Bethlehem Steel Corp., 284 So. 2d 545 (La. 1973).

35. Chivoletto v. Johns-Manville Product Corp., 327 So. 2d 413 (La. 1976); Lisonbee v. Chicago Mill and Lumber Co., 278 So. 2d 5 (La. 1973).

able to employees under the act, or directed toward the limitation of these remedies to the act alone, thus precluding greater tort recovery. Judge Tate's handling of these arguments provides considerable insight into the motivations and concerns of this great jurist.

II. Executive Officer Actions

Prior to 1976, the compensation statute provided that:

> *The rights and remedies herein granted* to an employee or his dependent on account of a personal injury for which he is entitled to compensation under this Chapter *shall be exclusive* of all other rights and remedies of such employee, his personal representatives, dependents, or relations.[36]

As is apparent from this language, the compensation act was the exclusive remedy available to an employee against his employer when the employee had been injured during the course and scope of his employment. By contrast, the courts had always held that the employee still had available a tort remedy against any third person.[37] Thus, an individual who was able to establish the fault of a non-employer tortfeasor that had contributed to his injury was able to recover against this tortfeasor for the full extent of his injuries.[38] Questions arose, however, in the characterization of a tortfeasor as a third person or as an employer. Innovative claimants attempted to obtain greater benefits by arguing that their fellow employees were persons separate and distinct from the partnership, corporation or proprietorship by which they were employed and were, therefore, third persons within the meaning of the act.[39] Thus, they argued, they were entitled to recovery in tort from these co-employees, including their foremen, superintendents and even including high level administrative personnel such as presidents and vice-presidents of their respective companies. In *Canter v. Koehring Co.*,[40] the Louisiana Supreme Court, per Judge Tate, addressed this argument and held that an injured employee would be permitted to recover in tort against these supervisory co-employees. The test applied by the court in determining this liability was whether the co-employee had been *personally* responsible for the safety of the injured person (including another employee), had not delegated this responsibility to a subordinate, and had breached its

36. La. R.S. 23:1032 (1985) (emphasis added).
37. 14 Workers' Compensation, supra note 3, § 362.
38. Id.
39. Adams v. Fidelity & Casualty Co. of New York, 107 So. 2d 496 (La. App. 1st Cir. 1958); Cf. Maxey v. Aetna Casualty & Surety Co., 255 So. 2d 120 (La. App. 3d Cir. 1971).
40. 283 So. 2d 716 (La. 1973).

duty of due care owed to the injured person. As stated by the court, the test was whether:

> 1. The principal or employer owes a duty of care to the third person (which in this sense includes a co-employee), breach of which has caused the damage for which recovery is sought.
> 2. This duty is delegated by the principal or employer to the defendant.
> 3. The defendant officer, agent, or employee has breached this duty through personal (as contrasted with technical or vicarious) fault. . . .
> 4. With regard to the personal (as contrasted with technical or vicarious) fault, personal liability cannot be imposed upon the officer, agent, or employee simply because of his general administrative responsibility for performance of some function of the employment. He must have a personal duty towards the injured plaintiff, breach of which specifically has caused the plaintiff's damages. If the defendant's general responsibility has been delegated with due care to some responsible subordinate or subordinates, he is not himself personally at fault and liable for the negligent performance of this responsibility unless he personally knows or personally should know of its non-performance or mal-performance and has nevertheless failed to cure the risk of harm.[41]

As could be expected, the *Canter* decision generated a great deal of commentary and litigation.[42] Employees who were already receiving workers' compensation benefits were able under this decision to pursue greater tort recovery from their supervisory co-employees.[43] While the courts generally applied the executive officer doctrine narrowly, there were numerous cases in which employees were successful in pursuing this avenue of recovery.[44]

While the reasoning behind the *Canter* decision is exemplary, the application of the so-called "executive officer" doctrine has been adverse

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41. Id. at 721 (footnote omitted).
42. Comment, Workmen's Compensation—Executive Officer Liability, 33 La. L. Rev. 325 (1973); Note, Who Is an Executive Officer for Liability Insurance Coverage?, 34 La. L. Rev. 141 (1973); Note, Workmen's Compensation—Third Party Tort Actions Against Executive Officers—Negligence, 46 Tul. L. Rev. 352 (1971); McKenzie, The Work of the Louisiana Appellate Court for the 1973-74 Term—Insurance, 35 La. L. Rev. 415, 419 (1975) (and cases cited therein).
43. 14 Workers' Compensation, supra note 3, § 364 at 152.
44. See, e.g., Boyer v. Johnson, 360 So. 2d 1164 (La. 1978) (per Justice Tate).

to the interests of the employers.[45] This is because the employers invariably carried liability insurance which covered the negligence liability of the employers' executive officers.[46] Moreover, as a practical matter, the company was *required* to provide this type of insurance protection in order to keep its high level employees retained and in order not to unduly stifle their operational decisions.[47] Accordingly, while the purpose of the *Canter* doctrine was to place responsibility for negligent conduct on the shoulders of the actual tortfeasors, and thereby to encourage due care and responsible conduct on the part of co-employees, the result was that the statutorily immune employers were paying tort damages to their injured employees through their insurance policies (with correspondingly high insurance premiums).[48] This state of affairs operated to defeat the delicate balance which the workers' compensation act had sought to create. However, as has been previously suggested, the fundamentally conservative nature of the act may have prompted the court to tip this balance more in favor of the employee.

Another noteworthy decision authored by Judge Tate in this area is *Cooley v. Slocum*.[49] In *Cooley*, similarly, Judge Tate spoke for the court in holding that an injured employee of a partnership could recover damages in tort from the individually negligent partners. The basis for this ruling, as in *Canter*, was that the partner was a distinct entity separate from the partnership-employer, and accordingly, the exclusivity provision of the statute relating to the employer did not apply to the individual partners.[50]

Effective October 1, 1976, the Louisiana legislature amended the compensation act to eliminate the executive officer action.[51] For causes of action arising subsequent to this effective date, therefore, an injured employee's recovery from his employer or his co-employees was limited

45. It has been noted that the executive officer suit

> gives rise to a serious problem of practical importance. If officers in the upper echelons of management find themselves exposed to the often disastrous prospect of tort liability for the almost unlimited number of employee accidents that could be in some way attributed to their negligent, they will be impelled in practice to exact liability insurance from the corporate employer. The result may be a denial to the employer of much of the practical advantage of the exclusive remedy provision.

14 Workers' Compensation, supra note 3, § 364 at 156 (quoting from W. Malone, Louisiana Workmen's Compensation Law and Practice § 366 (1st ed., Supp.)).

46. Id.

47. Id.

48. Id.

49. 326 So. 2d 491 (La. 1976).

50. Id.

51. 1976 La. Acts 147.

to workers' compensation benefits.[52] However, upon a showing that the employee's cause of action arose prior to this date, the employee is, even today, still entitled to pursue a tort remedy against his co-employees.[53] Accordingly, at least in the context of causes of action arising from occupational diseases such as silicosis and abestosis—in which the injurious exposure to dangerous products caused harm prior to October 1, 1976, but the disease has manifested itself only after this date—employers are still feeling the effect of the *Canter v. Koehring Co.* decision in this state.[54]

III. STATUTORY EMPLOYER

Inasmuch as the primary goal of the workers' compensation act has been to protect workers from the potentially catastrophic effect of on-the-job injuries, the act incorporated certain provisions designed to correct perceived problems of improper administration. One such perceived problem related to employers retaining independent contractors to perform certain aspects of the employer's work and thereby attempting to avoid workers' compensation liability.[55] By interposing an independent contractor as intermediary, the employer would argue that, inasmuch as the compensation act applied only to the employer-employee relationship, an injured worker was not *its* employee but was actually an employee of the independent contractor alone. Accordingly, the employer would argue that the independent contractor was exclusively liable for these benefits.[56]

So long as the independent contractor was solvent or had obtained compensation insurance, this would present no serious problem. However, if the independent contractor were impecunious or had not obtained such insurance, the injured worker would be left without a remedy because, absent statutory authority, he would not be able to proceed past the independent contractor and obtain compensation from the true principal. To resolve this apparent inequity, the legislature enacted La. R.S. 23:1061. This statute provides:

> Where any person (in this section referred to as principal) undertakes to execute any work, which is a part of his trade, business, or occupation or which he had contracted to perform,

52. Green v. Liberty Mutual Ins. Co., 352 So. 2d 366 (La. App. 4th Cir. 1977), cert. denied, 354 So. 2d 210 (La. 1978); Billedeaux v. Adams, 355 So. 2d 1345 (La. App. 3d Cir. 1978), on remand, 360 So. 2d 637.

53. See, e.g., Ducre v. Executive Officers of Halter Marine, Inc., 752 F.2d 976 (5th Cir. 1985), rehearing denied, 758 F.2d 651 (5th Cir. 1985), and cases cited therein.

54. Id.

55. 13 Workers' Compensation, supra note 3, § 121 at 230-31.

56. 14 Workers' Compensation, supra note 3, § 121.

> and contracts with any person (in this section referred to as contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him. . . .[57]

As is apparent, the effect of this statute is to permit an injured employee of an independent contractor to obtain workers' compensation benefits, not only from his immediate employer, but also from his principal, so long as he was engaged in work that was "a part" of the principal's "trade, business, or occupation" at the time of his injury.[58]

Although the referenced statute was enacted specifically to address the potential inequity resulting from employers hiring impecunious contractors, and was therefore intended to broaden the scope of recovery available to laborers, the statute has in fact been applied to limit this recovery.[59] This is because the exclusivity provision of the workers' compensation act, as it applies to an employee's recovery from his *direct* employer, has also been held to apply to an employee's recovery from his principal.[60] Thus, the statutory employer who has negligently caused the injury of an independent contractor's employee is able to entirely escape tort liability by interposing the statutory employer defense.[61] Moreover, this employer is able to avoid even compensation liability because this employer is ultimately entitled to indemnification from the injured employee's direct employer who remains primarily liable for these benefits.[62] In this way, an employer who has negligently caused the injury of an independent contractor's employee often incurs no liability whatsoever for its negligent conduct.[63] For this reason, it is easy to understand why the bulk of the jurisprudence interpreting La. R.S. 23:1061 has arisen in the context of an employee of an independent contractor seeking to obtain tort recovery from the principal, and the principal pleading the statute as a defense.[64]

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57. La. R.S. 23:1061 (1985).
58. 14 Workers' Compensation, supra note 3, § 126 at 250.
59. 13 Workers' Compensation, supra note 3, § 126 at 254, § 128 at 263-64.
60. Thibodaux v. Sun Oil Co., 218 La. 453, 49 So. 2d 852 (1950).
61. 13 Workers' Compensation, supra note 3, § 128 at 263-64.
62. La. R.S. 23:1062 (1985). See also 13 Workers' Compensation, supra note 3, § 129.
63. 13 Workers' Compensation, supra note 3, § 128 at 264.
64. 13 Workers' Compensation, supra note 3, § 126; 14 Workers' Compensation, supra note 3, § 364 at 146. It is also interesting to note, in this context, that the burden of proof shifts between the employer and employee depending on whether the employer is seeking to avoid compensation liability or whether the employee is seeking to obtain tort recovery. See 13 Workers' Compensation, supra note 3, § 126 at 259.

The supreme court again addressed this issue in 1972, at which time Judge Tate was a member of the court. In *Broussard v. Heebe's Bakery, Inc.*,[65] the court addressed the issue whether a lower court should have granted summary judgment in favor of an employer finding statutory employer status. In addressing this issue, the court first held that summary judgment had not been appropriate and held, moreover, that the employer was not, in fact, a statutory employer. The court went on to state, however, in pure dicta, that if statutory employer status had been granted, the compensation remedy would have been the exclusive remedy available to the injured employee.

Judge Tate filed a concurring opinion in *Broussard* in which he pointed out that much of the majority's verbiage had been dicta and that, accordingly, the case was an inappropriate vehicle for the court's resolution of this issue. Judge Tate went on to state:

> La. R.S. 23:1061 was not intended to prevent injured employees of a contractor from recovering in tort against a negligent principal. The intent of this statutory provision was simply to afford an injured employee an alternative remedy in compensation against a principal, who is entitled to indemnification from the true employer of the injured workman. When in fact the true employer is responsible in compensation and is solvent and insured, then the principal has no compensation liability and he is not entitled to rely upon the compensation act (designed to protect the employee, not a third person tortfeasor) as exempting him from liability under the exclusive-remedy provision of the compensation act. . . .
>
> An erroneous prior judge-made interpretation of legislation is always subject to judicial correction. Since judges made the mistake, they can correct it. The traditional duty of the judge in a civil-law jurisdiction such as Louisiana is to be bound by the legislative intent and the legislation itself, not by any erroneous precedent enunciated by the former or present judges of the court.[66]

Later courts and commentators have cited this concurring opinion in pointing out the problems which exist in the application of the statute and have further pointed out that Louisiana is the only state which has granted the advantage of exclusivity to the statutory employer.[67]

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65. 268 So. 2d 656 (1972).

66. *Broussard*, 268 at 661.

67. Klohn v. Louisiana Power & Light, 438 So. 2d 563 (La. 1983); Roelofs v. United States, 501 F.2d 87 (5th Cir. 1974), writ denied, 423 U.S. 830, 96 S. Ct. 49 (1975). See also Burse v. Boh Bros. Construction Co., 351 So. 2d 172 (La. 1977) (Justice Tate concurring in the denial of writs). See also 14 Workers' Compensation, supra note 3, § 364 at 150.

Although the *Broussard* opinion was hopefully viewed by some as a possible harbinger of change,[68] the Louisiana legislature in 1976 adopted the majority's interpretation of the statute and specifically amended section 1032 of the compensation act to solidify this interpretation.[69] The legislature thus foreclosed any further judicial reconsideration of the concerns raised by Judge Tate in *Broussard*, and the imbalance in the act remains. Judge Tate's concurring opinion in *Broussard*, however, is a clear example of his thoughtful and considered commitment to the welfare of the common laborer in today's society and the delicate balance sought to be achieved by the compensation act.

IV. Course and Scope of Employment

Another area in which Judge Tate has had an impact on the law of Louisiana as it relates to employer liability is in the context of defining and identifying the parameters of the phrase, "course and scope of employment." It is axiomatic that an employer will be held liable in damages for the torts of its agents or employees if these torts were committed during the course of the employee's employment.[70] However, it has not always been easy to define the boundaries of this concept, particularly where the employee was engaged in a pursuit which was wholly or partially motivated by personal concerns of the employee.[71] There can be no dispute that Judge Tate has been instrumental in expanding this concept for the benefit of those who have been injured by the negligence of such employees.

In *LeBrane v. Lewis*,[72] a supervisory employee terminated the employment of a subordinate. As the former was escorting the latter off of the employer's premises, a heated altercation arose in which each participant invited the other to engage in physical combat. Thereafter, while still on the employer's premises, the supervisory employee stabbed the discharged employee with a knife, causing injury. In subsequent tort litigation *against the employer*, the question arose whether the employer could be held responsible for the tort of the supervisory employee or whether that employee had been outside the course of his employment. In holding that the employee had been in the course of his employment and that, accordingly, the employer could be held liable, Judge Tate wrote for the court:

> The dispute which erupted into violence was primarily employment-rooted. The fight was reasonably incidental to the

68. See also 13 Workers' Compensation, supra note 3, § 128 at 264.
69. 1976 La. Acts 147.
70. La. Civ. Code arts. 2317 and 2320.
71. 13 Workers' Compensation, supra note 3, §§ 161-75.
72. 292 So. 2d 216 (La. 1974).

> performance of the supervisor's duties in connection with firing the recalcitrant employee and causing him to leave the place of employment. It occurred on the employment premises and during the hours of employment.
>
> In short, the tortious conduct of the supervisor was so closely connected in time, place, and causation to his employment-duties as to be regarded a risk of harm fairly attributable to the employer's business, as compared with conduct motivated by purely personal considerations entirely extraneous to the employer's interests. It can thus be regarded as within the scope of the supervisor's employment, so that his employer is liable in tort to third persons injured thereby.[73]

The *LeBrane* decision has generated substantial legal discussion, and is generally viewed as the leading case on the concept of "course and scope of employment." Under the *LeBrane* rationale, so long as the tortfeasor-employee is at a location required by his employer, and is engaged in activities which are reasonably incidental to that employment, then the employer will be found liable for his tortious acts even if these acts were personally motivated. This decision, like the other decisions referred to in this article, may be justified by the rationale that the employer has chosen this employee, has required that the employee be in the place and at the time specified, and the employer is obtaining economic benefit from the employee's activities. It is reasonable to place upon the employer the risk that the employee will cause injury, not only while the employee is performing his regular duties, but also when the employee has momentarily deviated from these duties for personal reasons. Such a deviation is certainly foreseeable by the employer, and when the deviation is reasonably incidental to the employment duties, the employer should bear the loss. This is particularly true because the employer is better able from an economic standpoint to bear this loss and to pass this loss on to others. In the *LeBrane* case, it was not unreasonable or unforeseeable that an altercation would arise upon the firing of an insubordinate employee. Accordingly, it was not unreasonable for the court to place some of this "risk of harm fairly attributable to the employer's business" upon the shoulders of the employer.

V. CONCLUSION

The worker's compensation scheme represents a complex balancing of the interests of employers and employees in today's society. However, it cannot be disputed that this balance results in a lesser recovery to employees when their work-related injuries are caused by the negligence

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73. *LeBrane*, 292 So. 2d at 218 (footnote omitted).

of their employers. Prior to the 1975 and 1976 amendments, the act was a conservative instrument which provided recovery to injured employees at a rate far lower than the national average. It is perhaps because of this inherent inequity that whenever gaps were perceived in the administration of the act, through which injured employees could receive greater recovery, Judge Tate and the Louisiana Supreme Court opened these gaps so as to permit such recovery. One particular example of such a gap was the executive officer action recognized in *Canter v. Koehring Co.*,[74] in which injured employees obtained tort recovery against their supervisory co-employees. The statutory employer issue was another example. Although the court resolved this issue in favor of limiting the recovery of injured employees, Judge Tate's concurring opinion in *Broussard v. Heebe's Bakery, Inc.*[75] makes clear that Judge Tate would have decided this issue differently. On the basis of Judge Tate's resolution of these issues, one may hypothesize that although he approved of the compensation remedy, he would have preferred the act to have been more liberally drafted so that the recovery granted to injured employees would have been more in favor of the employee. This result may be justified in light of the economic benefit received by the employer as a result of the activities of its employees. Further, this result would encourage safer practices and due care on the part of the employer in the conduct of its business.

It is perhaps partially a result of the court's liberal treatment of the compensation act that the act was amended in 1975 and 1976 to provide greater recovery to employees and to better comport with the purposes for which the compensation act was enacted.

Finally, also in the context of employee-related injuries, Judge Tate wrote for the supreme court in expanding the definition of "course and scope of employment." *LeBrane v. Lewis*[76] broadened this concept to include even personally motivated activities so long as they were reasonably attendant to the employer's business.

Whatever opinion one might have with regard to Judge Tate's treatment of these issues, this writer suggests that this treatment exhibits Judge Tate's commitment to an unflagging interest in the problems of the common laborer injured while doing work that enriches his employer. This concern and interest cannot be faulted for it shows a commitment to the deeply rooted civilian concept that a person who has been injured by the fault of another should be compensated therefore. While the Louisiana legislature has, as of now, resolved these issues in a manner more beneficial to the employer, it should never be said that Judge

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74. 283 So. 2d 716 (La. 1973).
75. 263 La. 561, 268 So. 2d 656 (1972).
76. 292 So. 2d 216 (La. 1974).

Tate's resolution of these issues in a different fashion indicates he was anything less than a fair and true jurist committed to a just resolution and fair compensation to those members of our society who constitute the laboring class. For this, Judge Tate should be greatly respected, and for this he remains deserving of our gratitude and appreciation.