Louisiana Law Review

Volume 54 | Number 3
January 1994

Workers' Compensation

H. Alston Johnson

Workers' Compensation

H. Alston Johnson[*]

I. LEGISLATIVE DEVELOPMENTS

There were only a few developments of note in the 1993 Regular Session of the Louisiana Legislature, and they can be summarized very briefly. Legislation significantly strengthened the requirements for group self-insurance funds, doubling the net worth requirement for a group from $500,000 to $1 million as of January 1, 1994, imposing certain restrictions on the distribution of any surplus funds at the end of a fiscal year, and redefining the requirements for excess coverage for such groups.[1] There was no change, however, in the requirement that members of such a group simply be "members of the same bona fide trade or professional association" without actually being "engaged in the same or similar type of business,"[2] the additional qualification having been deleted by legislation enacted in 1991.[3]

Another act provided that the remedy granted to a worker for retaliatory discharge (termination or refusal to hire because of the filing of a compensation claim) "shall not limit or in any way affect" any other state or federal remedy, but also provided that a person bringing a frivolous claim for retaliatory discharge will be held responsible for reasonable damages, including attorney's fees and court costs.[4] The legislature also passed measures providing penalties for employers who misrepresent that they have provided compensation insurance and hefty fines for employers or claimants who make misrepresentations to defeat or obtain benefits.[5]

The remaining enactments were of somewhat more substance, but still rather minor. Act 884 filled a gap in the procedure employed by administrative hearing officers, to provide for enforcement of their orders through district judges if necessary.[6] Finally, Act 928 defined the term "professional athlete" for

---

* Adjunct Professor of Law, Louisiana State University.

1. 1993 La. Acts No. 351, § 1 (amending La. R.S. 23:1191 (Supp. 1993) and 23:1192 (Supp. 1993)); 1993 La. Acts No. 880, § 1 (amending La. R.S. 23:1192(A)(6) (Supp. 1993)).

2. La. R.S. 23:1191(A) (Supp. 1993).

3. 1991 La. Acts No. 13, § 1 (amending La. R.S. 23:1191(A) (Supp. 1993)).

4. 1993 La. Acts No. 638, § 1 (effective June 15, 1993, amending La. R.S. 23:1361 (Supp. 1993)).

5. 1993 La. Acts No. 828, § 1 (effective June 22, 1993, adding La. R.S. 23:1172.1 (Supp. 1993)); 1993 La. Acts No. 829, § 1 (effective June 22, 1993, amending La. R.S. 23:1208 (Supp. 1993)).

6. 1993 La. Acts No. 884, § 1 (amending La. R.S. 23:1310.7 (Supp. 1993)). Use of the district courts to enforce the orders of the administrative hearing officers follows a pattern established in other areas, such as having legislative contempt punished through the ordinary processes of the district court. *See* La. R.S. 24:5 (1989). This is a method much to be preferred, using the entities accustomed to such proceedings, rather than having the attempt made through administrative hearing

compensation purposes (interestingly, limited to NFL football players), introduced a specific provision relative to reductions in the benefits for such an athlete when other benefits are available, and revised the text of the notice that the employer must post about the availability of workers' compensation benefits and the penalty for fraudulent action in obtaining or defeating such benefits.[7] Taken in the narrow view of the constitutional requirement, it would appear that Act 928 violates the constitutional provision that each bill contain only one object.[8]

II. JURISPRUDENCE

A. The Employer: To Be or Not to Be a Third Person

As is almost always the case, one of the most litigated issues during this term was whether the employer might be made to respond in tort for a workplace injury. The casual student of workers' compensation law would think this a very elementary question, to which the answer must be in the negative. The veteran student knows it to be a complex question, one that is growing more complex by the year.

The focus of this year's discussion is the usual fare: intentional torts and other remedies against the employer outside of the Act. But there are a couple of very important new twists that may be the harbingers of even more interesting developments to come.

First, to matters of intentional tort. In this forum last year,[9] the decision by the Louisiana Third Circuit Court of Appeal in *Gagnard v. Baldridge*[10] affirming a trial court's awards both in tort and workers' compensation was criticized, and it was suggested that the case be overruled at the first opportunity. A writ was granted,[11] and the supreme court reversed the decision allowing double recovery during this term, although its rationale in doing so was somewhat unusual.[12] The defendant urged upon the supreme court the same basic argument that he had urged upon both lower courts, *viz.*, that if an employee brings an action based on an intentional tort, the employee is not entitled to pursue benefits under the Workers' Compensation Act. The supreme court, like the two lower courts, rejected this argument as fashioned. Rather, it held that the employee could pursue both but could not recover under both. In an instance in which an intentional tort recovery

---

officers or the legislature itself.

7. 1993 La. Acts No. 928, §§ 1-2 (amending La. R.S. 23:1021 (Supp. 1993), 23:1225 (Supp. 1993) and 23:1302 (1985)).

8. La. Const. art. III, § 15(A).

9. H. Alston Johnson, *Workers' Compensation, Developments in the Law, 1991-1992*, 53 La. L. Rev. 1029, 1036-37 (1993).

10. 597 So. 2d 1269 (La. App. 3d Cir. 1992).

11. 604 So. 2d 956 (La. 1992).

12. Gagnard v. Baldridge, 612 So. 2d 732 (La. 1993).

is deemed to be appropriate, as in *Gagnard*, then the employer (if cast in judgment) is entitled to a credit against the recovery for any sums paid on the basis of a compensation claim.

Certainly there is much to support this view, and the supreme court's resolution of the matter is immeasurably better than the decision of the lower courts to award damages for both tort and workers' compensation without a credit to the employer. There is an interesting implication from the decision, however, which may not have been apparent to the court or to the parties. For years, it has been thought well established that a third-person tortfeasor, when sued by an employee in tort for damages resulting from a workplace injury, had no right to contribution or indemnity from the employer.[13] The usual rationale given is that the Act does not permit an employer to bear any tort damage for an ordinary workplace injury, whether directly in a suit by the employee or indirectly by way of a contribution demand from a person who is sued by the employee. To the surprise of many, the Act actually makes no such statement, limiting itself to the provision that the remedy granted to the employee is exclusive as to the employer, the principal or their employees; nothing is said about a contribution claim by a defendant tortfeasor against the employer.[14] It is the case law that has supplied the bar to contribution or indemnity.

Since the Act itself does not specifically forbid contribution or indemnity between the tortfeasor and the employer, the cases have had to devise other rationales. In some of the early cases, it seemed that the court believed that the remedy in compensation was based in contract, not tort; that the alleged tortfeasor and the employer could therefore not possibly be joint tortfeasors; and that in the absence of joint liability, there was no basis for contribution or indemnity.[15] In other words, the compensation statutes had somehow "destroyed" the concept of a tort between the employee and the employer in the workplace setting, replacing it with a limited statutory remedy written into the employment contract.

This notion in turn offered the courts a way to distinguish a contribution or indemnity claim in the workers' compensation setting from other instances of immunity, in which such claims were permitted. For example, when the wife who was a passenger in a vehicle driven by her husband and was injured in a two-car accident sued the other driver's insurer, the immunity that prevented the wife from suing her husband did not prohibit the other driver's insurer from seeking contribution from the husband.[16] The same result obtained when

---

13. The case most often cited for this proposition, though it was not the first so to hold, is LeJeune v. Highlands Ins. Co., 287 So. 2d 531 (La. App. 3d Cir.), *writ denied*, 290 So. 2d 903 (1974).

14. La. R.S. 23:1032(A) (Supp. 1993).

15. Sanderson v. Binnings Constr. Co., 172 So. 2d 721, 723 (La. App. 4th Cir. 1965). The same theme seems to be cited with approval in Bagwell v. South La. Elec. Co-op Ass'n, 228 So. 2d 555, 559 (La. App. 3d Cir. 1969), when the issue before the court was more an indemnity claim than contribution.

16. Smith v. Southern Farm Bureau Ins. Co., 247 La. 695, 174 So. 2d 122 (1965).

children who were passengers in a vehicle driven by their mother and were injured in a two-car accident sued the other driver through a proper representative; the immunity that kept the children from suing their parents did not prevent a contribution claim by the other driver against the parents.[17] In each instance, the supreme court reasoned that the immunity was procedural in nature; a tort had actually been committed, but there was a procedural bar to enforcing any remedy as a result of the tort, and the immunity was a personal one within the relationship (husband/wife, parent/child) envisioned by the statute. Thus, the immunity had not "destroyed" the concept of tort between the "immunized" persons, and the statute announcing the immunity did not prevent some third person from suing the otherwise immune person for contribution or indemnity.

The immunity of the employer under the workers' compensation statutes has never been so treated, and probably will not be after the *Gagnard* decision. But the notion that somehow the Compensation Act "destroys" the concept of tort between the employer and the employee, at least when there are allegations of intentional wrongdoing, is substantially discredited by the supreme court's statement that "the employer in his capacity as tortfeasor owes his employee damages."[18]

One other point about the *Gagnard* opinion bears mention. In some recent intermediate appellate cases,[19] dissenting judges have purported to find authority in *Bazley v. Tortorich*,[20] a leading supreme court decision on intentional conduct in the workplace setting, for the proposition that gross negligence and employer violations of safety rules should be considered "intentional acts" for which a tort remedy might be available. This position is not well taken, and should not gain currency by being repeated. The portion of the *Bazley* opinion to which these judges refer is the following statement:

> After considering broader penalties that would have provided double benefits for an employer's violation of a safety rule, failure to provide a safety device required by law, or gross negligence on the part of a supervisory employee . . . our legislature chose to impose a sanction for intentional wrongs by making the exclusive remedy rule inapplicable to such acts.[21]

---

17. Walker v. Milton, 263 La. 555, 268 So. 2d 654 (1972).

18. Gagnard v. Baldridge, 612 So. 2d 732, 736 (La. 1993). One might find damage to the concept as well in Williams v. Sewerage & Water Bd., 611 So. 2d 1383 (La. 1993), in which the supreme court held that an employer for a compensation claim and a tortfeasor for a tort, respectively, are solidarily bound to the employee/tort claimant because they are "obliged to the same thing." *Id.* at 1387 (quoting Hoefly v. Government Employees Ins. Co., 418 So. 2d 575, 576 (La. 1982)).

19. *See* Adams v. Time Saver Stores, Inc., 615 So. 2d 460, 464-65 (La. App. 4th Cir.) (Jones, J., dissenting), *writ denied*, 617 So. 2d 910 (1993); Armstead v. Boh Bros. Constr. Co., 609 So. 2d 965, 967-72 (La. App. 4th Cir. 1992) (Waltzer, J., dissenting).

20. 397 So. 2d 475 (La. 1981).

21. Bazley v. Tortorich, 397 So. 2d 475, 480 (La. 1981) (citation omitted).

These judges believe that "such acts" at the close of this excerpt must refer to "violation of a safety rule, failure to provide a safety device required by law or gross negligence on the part of a supervisory employee," thus leading to the conclusion that the inapplicability of the exclusive remedy rule must govern them as well. In light of the legislative history of the amendment by which the intentional tort provision was put into the Act,[22] this interpretation stretches Justice Dennis' words beyond any plausible meaning. The legislature was invited to consider a sanction other than a tort suit against the employer for gross negligence, safety violations, and the like and rejected that alternative in favor of a tort suit for intentional conduct only. Justice Dennis' reference of "such acts" could only mean the "intentional wrongs" which he mentions earlier in the same sentence. The legislature had an opportunity to remove gross negligence, safety violations, and the like from the purview of the compensation statutes and wisely chose not to do so; misinterpretation of Justice Dennis' opinion in *Bazley* should not be permitted to change that legislative choice.

The issue of the employer as a third person is discussed collaterally in another intentional act case. In *Trahan v. Trans-Louisiana Gas Co.*,[23] the appellate court reversed an exception of no cause of action that had been sustained in the employer's favor on a tort claim asserting "neuro-toxic" injuries from exposure to certain chemicals. The court reasoned that the allegations that the employer knew to a virtual certainty that the exposure would occur and would cause injury were sufficient to state a cause of action. The employee's spouse had asserted a loss of consortium claim as well, and in keeping with current jurisprudence,[24] the exception was overruled as to that claim because it was deemed to be derivative from the employee's claim and thus was to be treated in the same fashion.

But the spouse also asserted a claim for her own exposure to the allegedly hazardous chemicals because of her handling of her husband's clothing. The trial court had sustained an exception of no cause of action as to that claim as well, but the appellate court properly reversed. As to the direct claim of a non-employee, the employer is clearly a third person subject to suit in tort.[25] Another decision early in this term may perhaps prove to be the most important in a number of years, and speaks directly to the question of when the employer is a "third person" for purposes of claims outside the compensation statutes. In *Cox v. Glazer Steel Corp.*,[26] the supreme court held that the settlement by a

22. Wex S. Malone and H. Alston Johnson, III, Louisiana Workers' Compensation Law and Practice § 365, in 14 Louisiana Civil Law Treatise (Supp. 1993).

23. 618 So. 2d 30 (La. App. 3d Cir. 1993).

24. See Redding v. Essex Crane Rental Corp., 500 So. 2d 880 (La. App. 1st Cir. 1986), *writ denied*, 501 So. 2d 774 (1987); Theriot v. Damson Drilling Corp., 471 So. 2d 757 (La. App. 3d Cir.), *writ denied*, 472 So. 2d 907 (1985).

25. *See* Malone and Johnson, *supra* note 22, at n.87.20 (Supp. 1993) and Cushing v. Time Saver Stores, Inc., 552 So. 2d 730 (La. App. 1st Cir. 1989), *writ denied*, 556 So. 2d 1281 (1990).

26. 606 So. 2d 518 (La. 1992).

worker of his potential tort and compensation claims against his employer arising out of a hand injury did not preclude a subsequent suit under Louisiana Revised Statutes 46:2251 for discrimination against the handicapped when he alleged that his employer then refused to re-hire him because of the consequences of that workplace injury. Louisiana Revised Statutes 23:1032(B) exempts from the exclusive remedy of the act, in addition to liability resulting from an intentional act, liability to a "fine or penalty under any other statute . . . ."[27] The supreme court held in *Cox* that this provision does not bar "other statutory causes of action,"[28] particularly those, unlike the compensation remedy, which are based in fault.

The holding in *Cox* predictably led promptly to attempts to expand this concept to reach other statutory penalties. In *Billiot v. BP Oil Co.*,[29] the claimant sought punitive damages against his employer on the basis of reckless disregard of public safety in the handling of hazardous substances, and argued that *Cox* dictated that this "penalty" against the employer falls outside of the compensation statutes. Both lower courts rejected the argument, but the supreme court granted a writ,[30] and the matter is pending as this article is written.

Finally, some brief comment should be made about *Gauthier v. O'Brien*,[31] which is certainly the subject of more extended discussion elsewhere in this symposium. Following the 1987 amendment to Article 2324 addressing the issue of assigning percentages of fault to statutorily immune parties such as an employer when the employee sues a tortfeasor, it had been unclear whether the supreme court would adhere to its pre-1987 view that no percentage of fault should be assigned to an employer under those circumstances.[32] The appellate courts had divided in their views of the post-1987 provision.[33] In *Gauthier*, the supreme court held that the 1987 amendment required that a percentage of fault be assigned to the employer, if appropriate, even though the employer might not be (and probably would not be) a party to the litigation. But because of the jurisprudential immunity of the employer from contribution claims by the tortfeasor, no actual responsibility could be assigned to the employer. Rather, the percentage of responsibility assigned to the employer should be "reallocated"

---

27. In its entirety, La. R.S. 23:1032(B) (Supp. 1993) provides: "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."

28. *Cox*, 606 So. 2d at 520.

29. 617 So. 2d 28 (La. App. 4th Cir. 1993).

30. 619 So. 2d 558 (La. 1993).

31. 618 So. 2d 825 (La. 1993).

32. This view had been expressed in Guidry v. Frank Guidry Oil Co., 579 So. 2d 947 (La. 1991) and Melton v. General Elec. Co., 579 So. 2d 448 (La. 1991).

33. The first circuit thought quantification of employer fault should occur, Crane v. Exxon Corp., 613 So. 2d 214 (La. App. 1st Cir. 1992); Jarreau v. City of Baton Rouge, 602 So. 2d 1124 (La. App. 1st Cir. 1992), and the third circuit did not, Gauthier v. O'Brien, 606 So. 2d 915 (La. App. 3d Cir. 1992), *rev'd*, 618 So. 2d 825 (1993).

to the other blameworthy parties, including the plaintiff if appropriate, in the ratio that their respective percentages of fault bore to each other. Thus it seems fair to say that in post-1987 cases, the employer is a third person to whom some responsibility may be mathematically assigned, but the employer is not a third person for actual tort liability or for contribution toward tort liability.

B. Rights of an Intervening Employer or Carrier

About six years ago, the supreme court decided in *Brooks v. Chicola*[34] that reimbursement of the compensation carrier or employer for benefits paid must be limited to the damage awards made in a tort action for loss of earnings and medical expenses, and could not be exacted from a general damage award. This was a departure from a well-established practice and was criticized in this forum at that time.[35] Shortly thereafter, the legislature restored the law to its prior meaning and effectively overruled *Brooks*.[36] But in the interim, several decisions dealt with the law as it stood between *Brooks* and the legislative amendment.

The most important of these decisions were the companion cases of *St. Paul Fire & Marine Insurance Co. v. Smith*[37] and *Crowley v. City of Lafayette*,[38] in which the supreme court correctly held that the amendment was substantive in nature and could not be applied retroactively. That principle forced the court in *Ardoin v. Martin*[39] to grapple with the issue of proper allocation of a tort award between an intervening carrier and the injured employee when the tort award for lost wages and medical expenses alone was greater than the fund available to satisfy the debt.

In *Ardoin*, the employee was injured in an automobile accident with the defendant driver and brought a tort suit against the driver and his insurer, Allstate. The compensation carrier intervened seeking to recover benefits that it had paid to the employee, which at the time of trial amounted to some $63,000. Allstate deposited the balance of the policy limits in the registry of the court, totalling some $30,000; no explanation is given in the opinion as to the disposition of any balance of the policy proceeds prior to the deposit. In time, a rather substantial award was made in the tort suit, exceeding $300,000. But

---

34. 514 So. 2d 7 (La. 1987).

35. H. Alston Johnson, *Workers' Compensation, Developments in the Law, 1987-1988*, 49 La. L. Rev. 549, 560-64 (1988).

36. 1989 La. Acts No. 454, § 4, adding La. R.S. 23:1103(B) (Supp. 1993) to read:

> The claim of the employer shall be satisfied in the manner described above from the first dollar of the judgment without regard to how the damages have been itemized or classified by the judge or jury. Such first dollar satisfaction shall be paid from the entire judgment, regardless of whether the judgment includes compensation for losses other than medical expenses and lost wages.

37. 609 So. 2d 809 (La. 1992).

38. 609 So. 2d 199 (La. 1992).

39. 612 So. 2d 982 (La. App. 2d Cir. 1993).

$250,000 of that sum was for general damages, not available to satisfy the reimbursement claim of the carrier under *Brooks*. Predictably, the carrier wanted all $30,000 of the deposit. The trial judge refused the request, limiting the carrier to the percentage of the deposit corresponding to the ratio of the total compensation benefits paid to the total tort award. The appellate court affirmed that award.

Since the case was governed by *Brooks*, the appellate court probably made the best of a bad situation, but the result is likely not consistent with the statute. From the outset, Louisiana Revised Statutes 23:1103(A) and its predecessors have provided that when there is an intervention by the carrier and an award is made, "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 . . . ." It does not say that the claim of the employer shall be shared ratably with that of the injured employee. *Brooks* held that when the amount of weekly benefits paid exceeded the portion of the tort award for past loss wages, the employer or carrier simply did not receive any more than the past loss wages award. *Brooks* does not appear to be authority for "converting" the tort fund available (the deposit in the registry of the court) into the same categories and same proportions awarded by the trial court. In fact, the trial judge awarded more than $60,000 for lost wages and medical expenses; the compensation carrier had paid more than $63,000 for the same items; and some $30,000 was available to satisfy the tort judgment in the registry of the court. Permitting the carrier to receive the full $30,000 would not violate *Brooks*; the sum *awarded* was not less than the benefits paid, as it had been in *Brooks*.

C. Defense of Substance Abuse

Louisiana courts have historically been extremely wary about the use of employee fault to bar a compensation claim. In theory and in practice, employee fault should indeed have a very small role in a compensation system arguably based on no-fault principles. But we cannot ignore the fact that there are statutory provisions that bar recovery in certain circumstances, and they have in fact been expanded and strengthened in the Louisiana statutes in the last few years.

A decision during this term, however, indicates that our courts may be prepared to read the current version of these defenses just as narrowly as the former versions were read.[40] In *Thompson v. Capital Steel Co.*,[41] a drug test

40. For one of the most extreme examples of judicial refusal to interpret the defense in any but the most narrow fashion, see Ray v. Superior Iron Works and Supply Co., 284 So. 2d 140 (La. App. 3d Cir.), *writ denied*, 286 So. 2d 365 (1973). It seems fair to conclude that the claimant in *Ray* was quite intoxicated when he missed a curve and was injured in a one-car accident. But the court refused to believe that his intoxication caused his injury, presumably on the dubious basis that a sober person might have missed the curve as well.

41. 613 So. 2d 178 (La. App. 1st Cir. 1992), *writ denied*, 617 So. 2d 936 (1993).

following the claimant's work injury revealed the presence of the primary active ingredient in marijuana and the employer declined to pay benefits or medical expenses on the basis of Louisiana Revised Statutes 23:1081. There seemed to be no dispute that the testing procedures were sound, the chain of evidence was proper, and the results indicated the likelihood that marijuana had been used (though the claimant denied it). However, the hearing officer and the appellate court agreed that the test results were inadmissible because they were not obtained in a procedure pursuant to a "written and promulgated substance abuse rule or policy established by the employer."[42] There was no evidence that the rule or policy under which the testing occurred had been promulgated by the employer, and thus the court felt forced to conclude that the test results so obtained were inadmissible. Without those test results, the employer was unable to discharge its burden of proving intoxication, and thus it did not enjoy the benefit of the presumption of causation between intoxication and injury established by the amendments to Section 1081 in 1989.[43]

D. Prescription

A pair of interesting decisions during this term involving prescription deserve brief mention. In *Williams v. Sewerage & Water Board of New Orleans*,[44] the supreme court held that a timely suit against the employer for workers' compensation will interrupt prescription as to a tortfeasor for damages arising out of the same incident when the tortfeasor is added by amendment more than a year after the occurrence. This issue should probably have been regarded as undecided prior to the opinion, at least insofar as the supreme court was concerned. The supreme court's opinion rests largely on the conclusion that the employer and a tortfeasor whose conduct combines to cause injury to the employee should be regarded as solidarily bound to the employee, and thus a timely suit against one of the solidary obligors interrupts prescription as to the other.

In *National Union Fire Insurance Co. v. Ward*,[45] a Tennessee resident was employed as a truck driver and was injured in an accident in Louisiana.[46] The compensation carrier paid benefits to the employee under Tennessee law. The employee apparently never filed suit against the other driver in the accident, but eighteen months after the accident the compensation carrier did—in Louisiana. The carrier appeared to be operating under a Tennessee statute that specified that the injured employee had one year to sue a tortfeasor, and that if he did not do so, his claim was considered assigned to the employer or carrier to the extent of

42. La. R.S. 23:1081(8) (Supp. 1993).

43. 1989 La. Acts No. 454, § 3.

44. 611 So. 2d 1383 (La. 1993).

45. 612 So. 2d 964 (La. App. 2d Cir. 1993).

46. It is unclear from the opinion whether the employer would be considered a Tennessee citizen, but the implication seems to be that it was.

the compensation paid. Under Tennessee law, the employer or carrier was given an additional six months after this "assignment" to bring the claim.

Unfortunately for the carrier, a claim governed by Louisiana law would have to be brought within the standard one-year liberative prescriptive period applicable to tort claims. Thus, if the carrier's claim were governed by Tennessee law (as the carrier claimed), it was timely. But if the carrier's claim were governed by Louisiana law (as the defendant driver claimed), it was prescribed.

The carrier argued mightily that it was caught between the proverbial rock and a hard place. If it waited eighteen months to sue in Louisiana (as it had), it risked a successful exception of prescription. If it sued within a year, it risked the argument that its action was premature under Tennessee law, which required it to wait one year to see if the injured employee would take action on his own behalf. The court was not impressed. It reasoned that under either "traditional"[47] or "modern"[48] conflicts analysis, Louisiana should apply its own prescriptive rules to the controversy. That meant that a suit brought in a Louisiana court eighteen months after the incident was untimely. One assumes that the carrier should have brought its suit in Louisiana within twelve months of the incident and then argued that Louisiana law rather than Tennessee law governed the action, thus defeating the argument that it was acting "too soon" under Tennessee law.

47. Former Louisiana Civil Code article 15, applicable to this litigation, stated that "the prescription provided by the laws of this state applies to an obligation arising under the laws of another jurisdiction which is sought to be enforced in this state." This effectively classifies prescription as a procedural matter, permitting the forum state to use its own rules on the subject regardless of the law that it might apply to the substance of the dispute.

48. The court described the "modern" trend as treating prescription or statutes of limitation as substantive matters, and thus not necessarily to be that of the forum state. Rather, the applicable statute of limitation should be that of the state whose law applies to the other substantive matters in the case. In the court's mind, that was Louisiana, since the incident occurred in Louisiana.