Workplace Violence: Vicarious Liability and Negligence Theories as a Two-Fisted Approach to Employer Liability. Is Louisiana Clinging to an Outmoded Theory?

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I. INTRODUCTION

Horror stories of workplace violence saturate American newscasts and front page headlines. Shooting rampages such as the December 6, 2001, incident in which an Indiana factory worker opened fire at his workplace, killing one co-worker and injuring several others before killing himself, focus attention on workplace violence in America. In 1999 alone, the Bureau of Labor Statistics reported 645 workplace homicides in the United States. Although these statistics declined ten percent from 1998 and the statistics were the lowest total since the Bureau of Labor Statistics initiated its national tally of work-related fatalities in 1992, the fear of workplace violence remains. For instance, while shooting rampages dominate the media coverage, much less consideration is given to the two million workers who are susceptible to non-fatal violent assaults, attacks, and threats in the workplace. Experts who conduct workplace violence forums caution that "as the softening economy brings firings and increased financial pressures, employees need to be alert for potential episodes of workplace violence." Additionally, as anxiety regarding workplace safety increases, "employers need to rethink how best to meet their legal obligations to maintain safe workplaces." From a social standpoint, who is at risk from workplace violence? The answer to this question is both employees and third parties, such as on-premises customers, consumers, and suppliers. In 2000, workplace violence was the most significant security concern for employers because of its financial and emotional impact, which can devastate their businesses. Employers must consider the economic

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3. Id.

4. Id.


7. Workplace Violence: Job-Related Violence is Top Concern of Large
costs of workplace violence, including lost workdays, lost wages, lost revenue, and litigation costs. Additionally, employers must also bear the human costs of workplace violence such as diminished employee morale.

From a legal standpoint, however, the pressing issue concerns who is liable for workplace violence. The most common answer is employers. Thus, employers are contemplating their potential liability and, to no surprise, hoping to limit their liability in the context of workplace violence.

This comment examines the legal liability of an employer for workplace violence. Employers need to understand the various theories of legal liability with respect to workplace violence so they can assess their potential liability and implement measures that aim to not only limit their potential liability but also prevent and mitigate incidents of workplace violence, all of which are goals of tort law. When employers take preventive measures, workplace violence incidents may be less likely to occur.

Part II analyzes Louisiana employers’ potential liability for workplace violence through two factual scenarios. The first

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9. Id. at 2054.

10. There is also a third factual scenario of workplace violence involving a third party entering the workplace and committing an act of violence against an employee or multiple employees. For example, in Mundy v. Dep’t of Health and Human Res., 620 So. 2d 811 (La. 1993), a licensed practical nurse filed a negligence action against her employer, Charity Hospital, for injuries received when she was attacked by an unidentified third party in a Charity Hospital elevator. The court found that the workers’ compensation statute did not bar the negligence action because there was a relatively weak showing of “course of employment” and the risk which gave rise to the employee’s injury was “neutral.” Mundy v. Dep’t of Health and Human Res., 593 So. 2d 346 (La. 1992). Because the dual requirements of the workers’ compensation statute were not satisfied, the employer was denied tort immunity. Id. The employee argued that the hospital was negligent in failing to provide adequate security and in failing to maintain a safe working environment. Using the duty-risk analysis, the Louisiana Supreme Court held that the plaintiff failed to prove that the defendant was negligent. The court reasoned that the security measures taken by the hospital were reasonable and that the hospital could not have anticipated the incident involving the plaintiff. Thus, the court denied recovery.

Domestic violence that overflows into the workplace is another common manifestation of the third factual scenario of workplace violence. In Holliday v. State, 747 So. 2d 755 (La. App. 1st Cir. 1999), a husband walked into his wife’s office and shot her six times. The wife died as a result of this incident and her
scenario involves one or more employees committing intentional acts of violence against each other. The second scenario involves intentional acts of violence committed by employees against third parties. As seen by these two scenarios, dual-theories emerge in the Louisiana jurisprudence as avenues to hold employers responsible for acts of workplace violence: (1) vicarious liability\(^\text{11}\) and (2) negligent hiring, retaining, training, and supervising.\(^\text{12}\) The critical issue is whether both theories, when applied together, provide an unnecessary “two-fisted” approach to employer liability in the context of workplace violence. For instance, in *Libersat v. J & K Trucking, Inc.*,\(^\text{13}\) the Louisiana Third Circuit Court of Appeal held that the trial court did not err in refusing to instruct the jury on both vicarious liability and theories of negligent hiring and training. In the context of employer liability for workplace violence, the negligence theories

\(^\text{11}\) Vicarious liability is the traditional theory employed by plaintiffs to impose liability upon employers for intentional acts of workplace violence. Employers may also be held vicariously liable for the negligence of their employees when third parties are injured. However, because most employee acts of workplace violence involve intentional torts, the discussion in this comment is limited to employers' vicarious liability for intentional acts of workplace violence.

\(^\text{12}\) These negligence theories are emerging as a form of recovery for plaintiffs in the context of workplace violence.

\(^\text{13}\) 772 So. 2d 173 (La. App. 3d Cir. 2000). In *Libersat*, the driver of a car was killed when he rear-ended a truck, driven by the defendant’s employee, while it was stopped to make a U-turn. The car driver’s surviving spouse and children, alleged that the trial court erred by failing to instruct the jury on the defendant’s duty in hiring and training the truck driver. Further, they argued that the trial court did not instruct the jury on negligent hiring and training because the court likened vicarious liability to all possible theories of recovery. The third circuit held that if the employee did not commit an underlying tort, then the employer could not be held liable for negligent hiring and training, or presumably the other negligence theories. The court also noted that the trial judge was within his discretion in deciding what law was applicable and appropriate in this case.
provide the more appropriate basis for employer liability. Yet, Louisiana continues to cling to the outmoded theory of vicarious liability.

Part III discusses the theory of vicarious liability with respect to workplace violence. Part IV examines the theories of negligent hiring, retaining, training, and supervising in the context of workplace violence. Part V addresses ways in which employers can limit their potential liability and exposure to losses, including employment plans and employment practices liability insurance. Part V then explores what effect the emerging negligence theories have or should have on the application of the traditional vicarious liability theory in the context of workplace violence, suggesting that the much used vicarious liability theory should be restricted in the context of workplace violence while the negligence theories should provide the main avenue of recovery for plaintiffs. Part V finally analyzes the relationship between employer immunity for disclosing past employment information under Louisiana Revised Statutes 23:291 and the Louisiana Workers’ Compensation statute’s exclusivity provision with respect to workplace violence.

II. FACTUAL SCENARIOS OF WORKPLACE VIOLENCE

Two factual scenarios exemplify Louisiana employers’ potential liability for workplace violence: where one or more employees commit an intentional act of violence against each other (“employee-employee workplace violence”) and where an employee commits an intentional act of violence against a third party (“employee-third party workplace violence”). Quebedeaux v. Dow Chemical Company illustrates a scenario of employee-employee workplace violence. There, an employee brought an action against his former co-employee and Dow, his former employer, for injuries sustained when his co-employee committed a battery upon him at work. Both employees were subsequently terminated for fighting under Dow’s “zero tolerance” policy. The court held that Dow was responsible for the co-employee’s intentional tort under Louisiana Civil Code article 2320 because the conduct was so closely connected in time, place, and causation to employment duties that it constituted a risk of harm attributable to the employer’s business. Dow was assessed damages associated with the physical injuries that arose from the battery and the plaintiff’s termination. The plaintiff did not allege any negligence by Dow, such as negligent hiring, retaining, training, and supervising, because under Louisiana law, all negligence claims “arising out of

15. Id.
employment" and "in the course of his employment" are barred by the Louisiana Workers' Compensation statute.\textsuperscript{16} This limitation of workers' compensation law distinguishes employee-employee workplace violence from employee-third party workplace violence.

Griffin v. Kmart Corporation\textsuperscript{17} illustrates a scenario of employee-third party workplace violence. In Griffin, Kmart was held vicariously liable for the acts of its employee under Louisiana Civil Code article 2320 and for negligent training under Article 2315. A sporting goods employee fired an air pistol twice at two customers who had asked the employee for a price check.\textsuperscript{18} The court found that because the employee was within the course and scope of his employment, Kmart was liable for one hundred percent of the damages under vicarious liability because the employee was one hundred percent at fault. Further, the court held that Kmart was negligent in failing to provide weapons handling training to the employee because the employee's criminal behavior was within the scope of the duty imposed on Kmart to provide such training.\textsuperscript{19} Hence, Kmart was liable to the plaintiffs for damages under both vicarious liability and a negligent training theory.

III. THE TRADITIONAL THEORY OF VICARIOUS LIABILITY

In common-law jurisdictions, respondeat superior denotes an employer's liability for its employee's wrong performed during the course and scope of employment.\textsuperscript{20} Louisiana Civil Code article 2320 codifies this concept and states:

Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed . . . . In the above cases, responsibility only attaches, when the masters or employers . . . might have prevented the act which caused the damage, and have not done it.

The master is answerable for the offenses and quasi-offenses committed by his servants, according to the rules which are explained under the title: Of quasi-contracts, and of offenses and quasi-offenses.

Thus, an employer is vicariously liable for the torts its employee commits in the course and scope of employment. Course and scope

\textsuperscript{17} 776 So. 2d 1226 (La. App. 5th Cir. 2000).
\textsuperscript{18} \textit{id.} at 1229.
\textsuperscript{19} \textit{id} at 1231.
\textsuperscript{20} Frank L. Maraist & Thomas C. Galligan, Jr., Louisiana Tort Law §13-2, at 308 (1996).
“refers not only to the conduct of the servant [employee] occurring while employed on the premises, or during the time of employment, but also to the furtherance of the purposes of his employment.”

In fact, under Louisiana law, there is a presumption in favor of finding course and scope.

In the context of workplace violence, the key issue is whether the employer is vicariously liable for the intentional torts or acts of its employees. This is critical for employers because vicarious liability is solidary, despite Louisiana’s comparative fault regime under Louisiana Civil Code articles 2323 and 2324(B). Because of solidarity, in a claim of vicarious liability, an employer is liable for all of the fault assigned to its employee. In both Quebedeaux and Griffin, the courts held that the employers were liable for their employees’ intentional acts of workplace violence because the employees were acting within the “course and scope of employment” at the time the acts were committed.

The Louisiana jurisprudence has established certain criteria for determining whether an employee is in the course and scope of his employment at the time he commits an intentional act of violence.

22. Id. For an illustration of the presumption of course and scope of employment, see Windham v. Security Ins. Co., 337 So. 2d 577 (La. App. 4th Cir. 1976), rehearing denied, application denied, 341 So. 2d 407 (La. 1977).
23. La. Civ. Code art. 2323(A) states:
In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person’s insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person’s identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.
24. La. Civ. Code art. 2324(B) reads:
If liability is not solidary pursuant to Paragraph A, then liability for damages caused by two or more persons shall be a joint and divisible obligation. A joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person’s insolvency, ability to pay, degree of fault, immunity by statute or otherwise, including but not limited to immunity as provided in R.S. 23:1032, or that the other person’s identity is not known or reasonably ascertainable.
LeBrane v. Lewis is the leading case involving an employer’s vicarious liability for the intentional torts of its employees. There, the issue was whether “the supervisor was acting within the course and scope of his employment” at the time the intentional tort was committed against a co-employee. The supervisor terminated plaintiff’s employment. When the manager who normally issued the termination pay was not in the office, the supervisor and plaintiff rode down the elevator together. A heated argument ensued, and the two men began to fight. Although it is unclear who was the initial aggressor, the fight ended with the supervisor stabbing the employee as the employee tried to run away. The court found that the factors to determine whether the supervisor was acting within the course and scope of his employment at the time the intentional act was committed were (1) whether the tortious act was primarily employment rooted; (2) whether the violence was reasonably incidental to the performance of the employee’s duties; (3) whether the act occurred on the employer’s premises; and (4) whether it occurred during the hours of employment. The court held the employer vicariously liable because the “dispute which erupted into violence was primarily employment-rooted, the fight was reasonably incidental to the performance of the supervisor’s duties in connection with firing the recalcitrant employee and causing him to leave the place of employment, [and] it occurred on the employment premises . . . during the hours of employment.” Since the LeBrane decision, courts “have required some connection between the intentional harm and the employment” in order to impose liability upon the employer.

In Samuels v. Southern Baptist Hospital, the employer was found to be vicariously liable when its employee raped a psychiatric patient in the employer’s hospital. The court applied the LeBrane factors to make the determination, noting that it was not necessary for all of the LeBrane factors to be met in order to impose liability upon the employer because each individual case had to be decided on its own facts and merits. Citing Turner v. State, the court stated,
If the tortious conduct of the employee is 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 then be regarded as within the scope of the employer’s employment, so that the employer is liable in tort to third persons injured thereby.33

The court also distinguished between liability in negligence cases and cases involving vicarious liability, stating that “vicarious liability is imposed upon the employer without regard to his own negligence or fault; it is a consequence of the employment relationship.”34 Thus, vicarious liability is a type of strict liability imposed upon the employer. Here, the intentional act of violence occurred on the employer’s premises while the employee was on duty, satisfying two of the LeBrane factors. Discussing other elements of the LeBrane test, the court stated,

[T]he tortious conduct committed by Stewart [the employee] was reasonably incidental to the performance of his duties as a nurse’s assistant although totally unauthorized by the employer and motivated by the employee’s personal interest. Further, Stewart’s actions were closely connected to his employment duties so that the risk of harm faced by the young female victim was fairly attributable to his employer, who placed the employee in his capacity as a nurse’s assistant and in a position of authority and contact with the victim.35

More recently, in Baumeister v. Plunkett,36 the Louisiana Supreme Court applied the LeBrane factors to a case dealing with the sexual battery of a clinical technician by a nursing supervisor while both employees were on duty. The court held that the employer was not vicariously liable for its employee’s sexual battery. In examining the meaning of the “course and scope of employment” under Louisiana Civil Code article 2320, the court stated that “course” pertains to time

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33. Samuels, 594 So. 2d at 574; accord LeBrane v. Lewis, 292 So. 2d 216, 218 (La. 1974).
34. Samuels, 594 So. 2d at 574 (citations omitted).
35. Id.
36. 673 So. 2d 994 (La. 1996).
and place while "scope" explores the employment-related risk of injury.\textsuperscript{37} The court found that employers were not vicariously liable simply because their employees had perpetrated an intentional tort during their working hours and on business grounds.\textsuperscript{38} Rather, an employer's "vicarious liability will attach in such a case only if the employee is acting within the ambit of his assigned duties and also in furtherance of his employer's objective."\textsuperscript{39} The court cited \textit{LeBrane} to determine if the employer was vicariously liable for the intentional acts of its employee and held that the last two \textit{LeBrane} factors (premises and hours) were established in this case. However, the first two \textit{LeBrane} factors did not exist. The court stated that it was not a risk attributable to the performance of the supervisor's duties for a nursing supervisor to find an employee alone in the nurses' lounge and sexually assault her.\textsuperscript{40} Further, the court reasoned that Plunkett's tortious act was not primarily employment rooted because "the purpose of serving the master's business" did not "actuate[] the servant to any appreciable extent."\textsuperscript{41} Under the facts of \textit{Baumeister}, the employee's sexual assault was completely immaterial to his employer's interests.\textsuperscript{42}

Both \textit{LeBrane} and \textit{Baumeister} involve incidents of employee-employee workplace violence—one or more employees committing intentional acts of violence against each other—while \textit{Samuels} involves employee-third party workplace violence—intentional acts of violence committed by employees against third parties. In \textit{LeBrane} and \textit{Samuels}, the court imposed liability upon the employers under a vicarious liability theory. However, in \textit{Baumeister}, the court imposed no liability upon the employer. In these cases, the decision to impose liability upon the employer for its employee's intentional acts of workplace violence was directly tied to how narrowly or broadly the courts interpreted the \textit{LeBrane} factors and the term "course and scope of employment," focusing mainly on the "scope" analysis\textsuperscript{43} when "course" was clearly satisfied. Additionally, the

\textsuperscript{37} \textit{Id.} at 996 (citations omitted).
\textsuperscript{38} \textit{Id.} at 997 (citations omitted); accord \textit{Scott} v. Commercial Union Ins. Co., 415 So. 2d 327, 329 (La. App. 2d Cir. 1982); \textit{Bradley} v. Humble Oil & Refining Co., 163 So. 2d 180 (La. App. 4th Cir. 1964).
\textsuperscript{39} \textit{Baumeister}, 673 So. 2d at 996 (citation omitted).
\textsuperscript{40} \textit{Id.} at 999.
\textsuperscript{41} \textit{Id.} (emphasis omitted).
\textsuperscript{42} \textit{Id.} at 1000.
\textsuperscript{43} The "scope" analysis examines how far courts are willing to go in determining whether an injury is related to employment. This analysis is usually performed through the first two \textit{LeBrane} factors, analyzing whether the intentional act was primarily employment rooted and whether the violent act was reasonably incidental to the performance of the employee's duties.
courts tended "to find the employer liable, if at all rational, because he is more likely to be solvent than is the employee."44

The judiciary has varied greatly in its analysis of the term "course and scope of employment" in the context of intentional torts.45 For instance, the Samuels court "was extremely broad in finding employment rooted conduct" in the context of a sexual assault.46 The court broadly construed the term "course and scope of employment," apparently relying heavily upon the Louisiana presumption in favor of finding course and scope. However, in Baumeister, the Louisiana Supreme Court narrowed its interpretation and "came out with a more restrictive analysis" of the LéBrane factors, stating that "a sexual assault by a supervisor in a hospital . . . [is] not . . . reasonably incidental to the performance of his [employment] duties."47

Recently, two Louisiana courts had the opportunity to apply the amorphous LéBrane factors in Quebedeaux v. Dow Chemical Company48 and Griffin v. Kmart Corporation.49 In Quebedeaux, the court found that the battery was committed within the course and scope of employment because the intentional tort occurred on the employment premises and during working hours.50 Additionally, the dispute began over employment-related issues because the co-employee did not believe that the plaintiff executed his job efficiently and felt that the plaintiff took issue with taking orders from him.51 Because the fight and the argument between the two men were employment rooted, Dow was held vicariously liable for the battery of the co-employee.

In Griffin, whether the tort was committed during the "course of employment" was answered easily because the employee "was on duty working at the store in his assigned job when he assaulted the plaintiffs."52 The real issue, however, was whether the employee was within the "scope of employment" at the time he assaulted the plaintiffs. The court stated that "[t]he fact that Kmart presumably would not have condoned [the employee's] firing the air pistol at plaintiffs did not remove that act from the scope of his employment."53 Thus, the employee's conduct was "connected closely enough to his employment to make it fair that the loss be

44. Crawford, supra note 21, § 9.11, at 146.
45. Id.
46. Id. § 23.6, at 436.
47. Id.
51. Id.
52. Griffin, 776 So. 2d 1226, 1232 (La. App. 5th Cir. 2000) (citation omitted).
53. Id.
borne by the enterprise," and Kmart was found vicariously liable for the employee's assault.\textsuperscript{54}

The interesting issue in \textit{Griffin} is whether it was sensible for the court to also impose liability under a negligence theory. A negligence claim appears superfluous when the employee was in the course and scope of employment and Kmart was already liable for the totality of the damages under a vicarious liability theory. While \textit{Libersat v. J & K Trucking, Inc.}\textsuperscript{55} recognized the overlapping theories of vicarious liability and negligent hiring, retaining, training, and supervising, \textit{Griffin} is the perfect illustration of how Louisiana courts fail to acknowledge the overlap of the two theories, both of which are intertwined with an underlying tort of the employee.\textsuperscript{56}

IV. THE EMERGING THEORIES OF NEGLIGENT HIRING, RETAINING, TRAINING, AND SUPERVISING

While employers may have a valid defense against vicarious liability if the intentional act of their employee was not within the course and scope of his employment,\textsuperscript{57} they "still may face liability if [they] were negligent in the hiring," retaining, training, or supervising of their employees.\textsuperscript{58} However, as \textit{Libersat} explained, the employee must have first committed an underlying tort before an employer can be held liable for negligent hiring and supervising, and presumably the other negligence theories.\textsuperscript{59}

The negligence theories are based on Louisiana Civil Code article 2315, which states, "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."\textsuperscript{60} The negligence theories are analyzed as ordinary negligence suits and are to be reviewed using a duty-risk analysis.\textsuperscript{61} Additionally, courts commonly refer to negligent hiring, retaining, training, and

\textsuperscript{54} Id.
\textsuperscript{55} 772 So. 2d 173 (La. App. 3d Cir. 2000).
\textsuperscript{56} The overlap and tension between vicarious liability and the negligence theories with respect to workplace violence is addressed \textit{infra} in the proposals and recommendations section of this comment.
\textsuperscript{57} Crawford, \textit{supra} note 23, § 9.11, at 147.
\textsuperscript{58} Id.
\textsuperscript{59} The \textit{Libersat} court reasoned that "if [the employee] did not breach a duty to the Appellants then no degree of negligence on the part of [the employer] in hiring [the employee] would make [the employer] liable to the Appellants." 772 So. 2d at 179. Essentially, the court held that the employer was not negligent in hiring a bad driver if that bad driver was not negligent in causing the accident and injury.
\textsuperscript{60} La. Civ. Code art. 2315.
\textsuperscript{61} Smith v. Orkin Exterminating Co., Inc., 540 So. 2d 363 (La. App. 1st Cir. 1989).
supervising as one tort. Yet, it would be more prudent for courts to classify the negligence theories into separate and distinct causes of action.

*Griffin v. Kmart Corporation* is the first Louisiana case where a court used a theory of negligent training to impose liability upon the employer for its employee’s intentional act of workplace violence. The court found that Kmart had a duty to exercise care in hiring and training an employee whose job included handling and working with guns. Citing *Lou-Con, Inc. v. Gulf Building Services, Inc.*, the court stated, “When an employer hires an employee who in the performance of his duties will have a unique opportunity to commit a tort against a third party, he has a duty to exercise reasonable care in the selection of that employee.” The court held that:

Kmart failed to provide training to [the employee] in handling the weapons he was responsible for selling and inappropriate behavior with customers regarding guns. Such failure was a breach of Kmart’s duty. Providing an employee with access to guns provides that employee with a “unique opportunity” to cause injury to customers, regardless whether the employee’s action is done negligently or with intent. The fact

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63. Usually, courts distinguish the separate negligence theories in their discussion and analysis, even if it is done inadvertently.
64. 776 So. 2d 1226 (La. App. 5th Cir. 2000).
65. The trial court in *Griffin* held that Kmart was negligent in the hiring, training, or supervising of the employee. 776 So. 2d at 1231. The appellate court found no clear error in this ruling but focused its decision on the theory of negligent training. *Id.* However, the appellate court cited cases that concentrated on negligent hiring, illustrating the common occurrence of how courts treat negligent hiring, retaining, training, and supervision as one tort.
66. *Id.* at 1232.
67. 287 So. 2d 192, 199 (La. App. 4th Cir. 1973), *writ denied*, 290 So. 2d 899 (La. 1974). In *Lou-Con*, the plaintiff, a client of a janitorial service company, filed suit against the company for damages to his building that one of the janitorial service company’s employees burned down. The plaintiff alleged theories of vicarious liability and negligent hiring and supervising. The court held that the company was not vicariously liable for its employee’s intentional act of arson because the employee broke into the client’s building after hours to perpetrate a theft and then set the building on fire to hide the theft. Thus, the employee was not within the course and scope of his employment at the time of the arson. Further, the court held that the employer was not negligent in hiring or supervising the employee because the company exercised reasonable care in the selection of the employee, including a background check with the New Orleans Police Department. The court also reasoned that the company was not negligent in supervising the employee because it was not foreseeable that an employee with a set of keys to a building would break in his workplace and commit the crime of arson.
68. *Griffin*, 776 So. 2d at 1231.
that [the employee] had access to guns was a cause-in-fact of
the harm to plaintiffs. 69

Because the court held that Kmart was negligent in training its
employee, the court did not address negligent hiring. There were
facts that might have warranted such a conclusion, including
admissions by the Kmart human resources manager that there were
concerns because the employee had been terminated by Wal-Mart at
Christmas and the employee's file lacked either a reference check or
a pre-employment questionnaire, either of which would have
provided a suitability rating on the employee who assaulted the
plaintiffs.

In hopes of increasing their chances of successfully imposing
liability upon employers for an employee's intentional act of
workplace violence, victims have begun to employ negligence
theories. The negligence theories are most often used when the
incidents of workplace violence involve employees and third parties
because workers' compensation bars most negligence claims arising
from employee-employee workplace violence. From a legal and a
social standpoint, it is important for courts and practitioners to
explore what effect the negligence theories have on the application of
the traditional theory of vicarious liability in the context of workplace
violence. The use of vicarious liability should be contracted in the
context of workplace violence because victims are likely to recover
under one of the negligence theories, which are more consistent with
Louisiana's fault principles and its pure comparative fault regime. 70

Two seminal Louisiana cases recognize the torts of negligent
hiring, retaining, training, and supervising: Smith v. Orkin
Exterminating Company, Inc. 71 and Roberts v. Benoit. 72 In Smith, the
issue was whether Orkin was negligent in retaining an employee who
raped Smith, one of Orkin's customers, because Orkin failed to
properly administer yearly polygraph examinations. 73 The court
stated that Orkin breached the duty it had to exercise reasonable care
in the hiring and retention of employees who they sent into a
customer's home. 74 Further, the court noted that Orkin had "a unique
business that as a matter of course sends employees into the homes
of its customers to perform services for which it charges and earns a

69. Id.
70. A further discussion of this topic is found infra in the proposals and
recommendations section of this comment.
71. 540 So. 2d 363 (La. App. 1st Cir. 1989).
72. 605 So. 2d 1032 (La. 1991).
73. 540 So. 2d at 365-67.
74. Id. at 367.
profit." Thus, as compared to a regular business, Orkin was held to a heightened standard of duty to protect against the intentional torts of its employees. Relying on this reasoning, the court held that Orkin was liable under a theory of negligent hiring.

In Roberts v. Benoit, the Louisiana Supreme Court expressly acknowledged the tort of negligent hiring under the fault principles embedded in Louisiana Civil Code article 2315. The court stated that even though the employer had a duty to exercise care in hiring, commissioning, and training the employee in question, this was only the first step of applying the duty-risk analysis. The court reasoned that the plaintiff's injury was outside the contemplation of the employer's duty. Thus, the court did not impose liability upon the employer under a negligent hiring, commissioning, and training theory.

In Harrington v. The Louisiana State Board of Elementary and Secondary Education, the tort of negligent hiring was explored in

75. Id. at 368.
76. By using the term "regular business," the court is referring to a business that does not send its employees into the homes of its customers.
77. 540 So. 2d at 368.
78. 605 So. 2d 1032 (La. 1991). In Roberts, defendant was hired by Sheriff Foti as a cook. Later, the sheriff commissioned all kitchen workers as deputy sheriffs so that they could qualify for state supplemental pay. The kitchen workers were given intermittent training, which included one eight hour day of firearm training, before their commission. During their training, the trainees were encouraged to carry their weapons while off duty. However, the trainees were also instructed not to use their weapons unless one's life was in danger or the use of deadly force was expected. At the time of the accident, defendant was not on duty, was in his plain clothes, and had been drinking. Defendant was at the plaintiff's house so that the plaintiff could repair a broken light in his car. While at the plaintiff's house, defendant removed his revolver and began playing with it. Then, the revolver discharged and severely injured the plaintiff. Plaintiff alleged that Sheriff Foti was directly liable for negligently hiring, commissioning, and training Benoit. Further, plaintiff argued that Sheriff Foti was vicariously liable for the tortious conduct of his employee. The Louisiana Supreme Court held that Sheriff Foti was not liable under either theory. The court stated that Benoit was not performing any function for which he was employed. Thus, the sheriff was not vicariously liable under La. Civ. Code art. 2320. Additionally, as stated above in the text, the court held that Sheriff Foti was not liable under any negligence theory because the plaintiff's injury was not within the scope of the sheriff's duty.
79. Id. at 1044.
80. Id. The Louisiana duty-risk analysis is equivalent to the proximate cause analysis in other jurisdictions.
81. Id. at 1045.
82. 714 So. 2d 845 (La. App. 4th Cir. 1998). In Harrington, the court also addressed the employer's vicarious liability for Veller's rape of Harrington. Citing the LeBrane factors, the court held that Veller was in the course and scope of his employment because Veller was acting within his position as Director of the Culinary Arts Apprenticeship Program and a Delgado instructor when he asked
the context of an "extended workplace" setting. Harrington was a student at the Culinary Apprenticeship Program at Delgado Community College. As part of the program, she had an apprenticeship in a hotel or restaurant and had to meet with chefs and owners, often during the evening. During one of these nighttime occasions, Veller, the director of the Culinary Apprenticeship Program of Louisiana, raped Harrington. Thus, the rape occurred in an "extended work environment." Harrington alleged that the state was negligent for its failure to investigate Veller's criminal background, which included felony convictions, before hiring him. Citing Smith v. Orkin Exterminating Company, Inc., the court stated that "[w]hen an employer hires an employee who will have a unique opportunity to commit a crime against a third party in the performance of his duties, the employer has a duty to exercise reasonable care in the selection of that employee." Citing Roberts v. Benoit, the court further stated that:

[I]n determining the exact risks anticipated by the imposition of the duty to use care in employing others, other courts have generally confined this duty to cases where there is a connection between the employment and the plaintiff, that is, where the plaintiff met the employee as a result of the employment and the employer would receive some benefit from the meeting had the wrongful act not occurred.

Veller admitted that while he had a criminal record when he accepted the position at Delgado, he did not disclose that fact to any of his superiors. Further, Delgado made no verbal inquiry nor requested on its job application as to Veller's criminal record. Officials at Delgado indicated that they routinely checked a prospective instructor's credentials but did not routinely conduct an investigation into a person's background. The court reasoned that:

Delgado had a duty to use reasonable care when hiring a person placed in a position of authority as a professor.
Delgado breached its duty by hiring Veller, a convicted felon who had served time in prison. The risk of being raped or harmed by a professor in a position of authority can be associated with the duty to use reasonable care when hiring. Thus, the State was independently negligent for hiring Veller and liable to Harrington for damages under a theory of negligent hiring.

When examining an employer's potential liability surrounding intentional acts of workplace violence, the theories of vicarious liability and negligent hiring, retaining, training, and supervising are clearly associated. From a policy standpoint, courts should consider what effect the emerging negligence theories have on an employer's vicarious liability for intentional acts of workplace violence, weighing how broad employer vicarious liability for workplace violence should be with the negligence theories in place.

V. PROPOSALS AND RECOMMENDATIONS

A. Employment Plans

Workplace violence has been called "a lawsuit waiting to happen." Many are likely to question why employers do not plan ahead and establish their own internal, preventive employment plans before workplace violence occurs. Employment plans are a rational measure for employers to implement in order to attempt to prevent workplace violence. They demonstrate an employer's concern about workplace violence and its commitment to address problems that occur. Explaining to employees and determining what behavior will amount to workplace violence is critical to the success of an employment plan, with the adoption of a written, formal definition of workplace violence being even better. Behavior that constitutes workplace violence should not only include the more traditional types of workplace violence—assaults, batteries, and fighting—but also general workplace harassment and "bullying," both of which can escalate into full blown workplace violence. Additionally, employers should create employment plans that emphasize hiring the best job applicant, warning employees of any direct threats of

89. Id. at 851.
91. Id.
92. Id.
violence, providing physical security, conducting surveillance, and providing training.94

An employer may be “found negligent in the management of its premises and working conditions by failing to maintain workplace security, failing to have emergency action plans, including training employees about alarms, evacuation, and places of refuge, and failing to have security devices and training for employees who interact with customers and third parties.”95 Thus, an ideal employment plan could potentially lessen an employer’s liability should its employee perpetrate a violent act in the workplace. Negligence liability would be less likely because the development and implementation of an employment plan may equal reasonable care. However, an employment plan may not help to prevent vicarious liability because vicarious liability is a form of strict liability. Still, with a well-balanced employment plan in place, courts may be more inclined to use discretion when they impose employer liability, reasoning that the employee’s intentional act of violence was not within the course and scope of employment. For instance, courts may reason that the intentional act of violence was not “primarily employment rooted” or “reasonably incidental to the performance of the employee’s duties” because the employer’s written, formal employment plan detailed the range of the employee’s employment duties and the employer’s definition of workplace violence. Employers will continue to contend that the intentional torts of their employees are not authorized; however, with employment plans that define what conduct constitutes workplace violence and the scope of an employee’s employment duties, employers’ standard argument may become more persuasive to the court. Yet because it is a form of strict liability, employer vicarious liability will likely remain unaffected by employment plans.

Employment plans may also have drawbacks. An example is the backfire of “zero tolerance” plans as illustrated by Quebedeaux v. Dow Chemical Company.96 There, both employees involved in the dispute were terminated in accordance with Dow’s policy of no fighting in the workplace. The plaintiff filed suit against Dow, claiming damages for mental anguish, past and future lost wages, and future lost benefits that resulted from his termination. The court stated that under respondeat superior liability, Dow was “liable for all consequences” of its employee’s intentional act of violence,97 including damages for mental anguish, past lost wages, future lost wages, and future lost benefits as a result of the employee’s

95. Workplace Safety, supra note 6, at 92.
termination. The critical issue in *Quebedeaux* was whether the employer’s “zero tolerance” plan backfired. The purpose of the “zero tolerance” plan was to limit or eliminate Dow’s liability. Instead, the policy triggered more extensive liability for Dow resulting from the employee’s termination. Situations like the one in *Quebedeaux* may actually deter employers from implementing “zero tolerance” plans, which are, in effect, absolute rules that remove employers’ discretion to impose discipline. Consequently, employers must continue to search for other mechanisms to limit their liability for acts of workplace violence.

There are also situations when employment plans may not suffice to limit an employer’s potential liability for workplace violence. Despite an employer’s preventive plans, incidents of workplace violence will vary, and the existing employment plan may not directly address them. Thus, employers must be more aggressive in attempting to limit their liability, look beyond internal employment plans, and seek assistance from both the courts and practitioners. Employers may be able to accomplish their goal of limiting potential exposure by investing in employment practices liability insurance policies, advocating the contraction of the vicarious liability theory in the context of workplace violence, seeking and disclosing employees’ employment information, and arguing for a narrow exception to the exclusivity provision of the Louisiana Workers’ Compensation statute.

**B. Employment Practices Liability Insurance**

In the early 1990s, a new variety of insurance policy, Employment Practices Liability Insurance (“EPLI”), emerged in the labor and employment sector. Having been called “the hottest selling, most talked about insurance product,” EPLI policies are another mechanism employers can utilize to potentially limit their liability. At their inception, EPLI policies were “tied to specific causes of action.” However, current EPLI policies include omnibus language and “cover wrongful employment practices and wrongful

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98. The policy may have also caused other employees to back away from the physical altercation instead of trying to stop it.
employment acts," containing broad provisions that encompass many "employment related causes of action."  

Initially, EPLI policies were burdened with many exclusions, including the intentional acts exclusion. Most insurance policies, similar to the EPLI, contain an intentional acts exclusion because, based on public policy, insurance companies do not want to subsidize intentional torts. However, "during the more recent evolution of [EPLI policies]," many of "these exclusions have begun to disappear" because the EPLI policies with the intentional acts exclusion were not selling very well. Yet, many jurisdictions "still have a public policy against insurance for intentional acts," and many courts are tentative to enforce coverage for intentional act employment claims.  

In jurisdictions where intentional acts are excluded from insurance coverage, employers can only depend on EPLI policies to offset their economic losses from damages awarded under either negligent hiring, retaining, training, or supervising. Even though most incidents of workplace violence involve intentional torts, it would still be prudent for employers to invest in EPLI policies in hopes of minimizing the overall economic costs of workplace violence, especially in the future because EPLI coverage is still evolving.

C. Contracting Vicarious Liability Theories in the Context of Workplace Violence

Employers are most concerned with their potential vicarious liability for intentional acts of workplace violence because under this solidary theory, the employer is liable for all of the fault allocated to its employee. One possible solution for employers is to encourage either the legislature or the judiciary to contract vicarious liability in the context of employer liability for an employee's intentional acts of workplace violence in light of the expansion of negligence theories in the same context. Employers should consider either hiring lobbyists to promote specific legislation on this issue or arguing, ad hoc in certain cases, for the contraction of vicarious liability in the courtroom.

1. Theoretical Analysis of Vicarious Liability

The traditional theory of "vicarious liability may be defined as the imposition of liability upon one party for a wrong committed by another party." Thus, when vicarious liability is imposed upon the

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102. Id.
103. Klenk, supra note 100, at 333.
104. Id.
105. Leitner, supra note 99, at §56.6(c).
106. Alan O. Sykes, The Boundaries of Vicarious Liability: An Economic
employer, the employer is apparently faultless and bears liability “only because of the strict liability doctrine of vicarious liability.” Following an utilitarian approach, vicarious liability for intentional torts is said to be “efficient” only when the intentional tort is due in large part to the employer-employee relationship and the imposition of vicarious liability upon the employer will not excessively lessen the employee’s desire to avoid wrongful behavior. The corrective justice approach, which is grounded on fairness, is another justification for the imposition of employer vicarious liability. This approach is based upon the “deeply rooted sentiment that business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.” The corrective justice theory, however, is unconvincing because it is based on a fiction, “construing . . . the doer as a composite: the employer-acting-through-the employee.” Finding this theory to be doctrinaire, Justice Oliver Wendell Holmes often argued that vicarious liability was not logical when the defendant’s action created risks unforeseeable to the employer. This argument reflects the language of Louisiana Civil Code article 2320, which states that “responsibility only attaches, when the masters or employers . . . might have prevented the act which caused the damage, and have not done it.” Article 2320 conveys the idea that employer vicarious liability was meant to be a form of negligence and


108. Throughout his article, Sykes explores the personal liability of the employee alone (rule A) versus the vicarious liability of the employer (rule B). Sykes, supra note 106, at 564. The purpose of the comparison between rule A and rule B is to determine the circumstances under which the different rules are efficient. Id. Sykes defines efficient as “the circumstances under which each rule best promotes economic welfare.” Id. As Sykes explains, “the concept of economic welfare that underlies the analysis is . . . [that] liability rule A . . . [is] said to be ‘efficient’ relative to liability rule B if rule A is potentially Pareto superior to rule B from the perspective of society as a whole.” Id. “An economic situation in which no person can be made better off without making someone else worse off” is called Pareto optimal or Pareto superior. Black’s Law Dictionary 1138 (7th ed. 1999).
110. Schwartz, supra note 107, at 1749.
111. Id. (quoting Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167 (2d Cir. 1968)).
112. Id. at 1752 (quoting Ernest J. Weinrib, The Idea of Private Law 187 (1995)).
not strict liability. However, this interpretation of the article was discarded by the Louisiana Supreme Court in *Weaver v. W.L. Goulden Logging Company* in 1906 where the court found that Article 2320 created a form of strict liability for employer vicarious liability.\(^{114}\) The *Weaver* court’s “judicial interpretation of article 2320” was codified in Louisiana Revised Statutes 9:3921.\(^{115}\)

Conversely, Justice Holmes generally supported the imposition of employer vicarious liability when the employer knew or reasonably could have foreseen the risks of torts committed by its employee.\(^{116}\) Perhaps Louisiana courts and the Louisiana legislature should reevaluate the *Weaver* decision and the true language of Article 2320, turning the statute into a negligence standard for employers and incorporating the negligence theories discussed *infra*.

The economic justifications for imposition of vicarious liability upon the employer are coupled with a deterrence rationale.\(^{117}\) An employee’s insolvency or his limited resources drives the economic analysis of employer vicarious liability.\(^{118}\) Thus, many scholars have suggested that employer vicarious liability is simply a “deep pockets” practice.\(^{119}\) Additionally, vicarious liability arguably is an incentive for employers to shrewdly select, train, supervise, and discipline employees.\(^{120}\)

But under vicarious liability, which is a form of strict liability, shrewd behavior by an employer does not help if an intentional tort is committed by its employee. Rather, shrewd behavior only helps to limit an employer’s liability when the employer is able to prevent the intentional tort from happening by hiring and training “safe” employees. Thus, the negligence theories may actually be more effective in deterring workplace violence than vicarious liability.

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114. See, e.g., *Weaver v. W.L. Goulden Logging Co.*, 116 La. 468, 40 So. 798 (1906). “For many years the [Louisiana] Supreme Court . . . gave full effect to the restrictive clause of . . . article [2320].” *Id.* at 472, 40 So. at 800. However, the *Weaver* court noted that “the restriction on the liability of masters embodied in article 2320 . . . of the Civil Code has been construed out of the text, for the reason that it practically nullifies the liability of the master for the acts of his servants as imposed by the express terms of the same article.” *Id.* at 473-474, 40 So. at 800.

115. *Maraist & Galligan, supra* note 20, § 13-2, at 308 n.7. La. R.S. 9:3921 (2000) states, in part: “Notwithstanding any provision in Title III of Code Book III of Title 9 of the Louisiana Revised Statutes of 1950 to the contrary, every master or employer is answerable for the damage occasioned by his servant or employee in the exercise of the functions in which they are employed.”


117. *Schwartz, supra* note 107, at 1755-64.

118. *Id.* at 1756.

119. *Id.* at 1744.

120. *Id.* at 1758.
2. Contracting Vicarious Liability

Why is such a contraction of vicarious liability in the context of workplace violence a logical step? The result under *Griffin v. Kmart Corporation*,\(^\text{121}\) where the plaintiffs asserted vicarious liability and negligence theories against Kmart, demonstrates why vicarious liability for workplace violence should be contracted. In *Kmart* both theories were successful and resulted in a damages award. Kmart was liable for one hundred percent of the damages under the vicarious liability theory because the employee was one hundred percent at fault. However, under the negligence theory alone, the plaintiffs would have collected only the employer’s virile share, seventy percent. Thus, the claim of negligent hiring, retaining, training, and supervising is superfluous if the employee is in the course and scope of his employment at the time the intentional act of workplace violence was committed.\(^\text{122}\)

Contracting vicarious liability in the context of workplace violence will prevent plaintiffs from having two theories that support the same recovery of damages, a result that has arguably been inappropriate and unnecessary. When vicarious liability is imposed upon the employer, the employer is liable for all of the fault assigned to its employee, which was one hundred percent in *Griffin*, despite Louisiana’s pure comparative fault regime under Louisiana Civil Code articles 2323\(^\text{123}\) and 2324(B)\(^\text{124}\) and the fault principles embodied in Article 2315.\(^\text{125}\) Application of the negligence theories may result in a lower allocation of fault to the employer; however, the negligence theories are more consistent with Articles 2323 and 2324(B). The solidarity imposed upon the employer by vicarious liability is residual solidary liability that is not consistent with Louisiana’s movement to a pure comparative fault regime.\(^\text{126}\) Further, the argument to contract vicarious liability is compatible with a main objective of the 1996 tort reforms—to scale back the theories of absolute liability and strict liability in Louisiana tort law.

Louisiana Civil Code article 2315 is a fault based article. It embodies the principle that Louisiana is more comfortable with imposing liability upon one who is primarily at fault, not upon one who is merely imputed with the fault of another. This “actually at

\(^{121}\) 776 So. 2d 1226 (La. App. 5th Cir. 2000).


\(^{124}\) *See supra* note 24 for the text of La. Civ. Code art. 2324(B).

\(^{125}\) La. Civ. Code art. 2315 states, “Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.”

\(^{126}\) Articles 2323 and 2324(B) illustrate Louisiana’s conscious shift to an allocation of fault regime.
fault" notion further strengthens the argument that vicarious liability should be contracted in the context of workplace violence because, under Louisiana's current law, the employer, who hopefully has a comprehensive employment plan in place to prevent workplace violence, will likely be held vicariously liable because of the imputation of its employee's fault. Considering Louisiana's pure comparative fault regime and the fault based principles of Article 2315, limiting vicarious liability, where the employer is not at fault and in light of the expansion of the negligence theories where it is alleged that the employer is at fault, is more consistent with the legal and social policies of Louisiana.

The negligence theories may also be the better method to impose liability on employers because they create incentives for employers to take additional precautions against workplace violence while vicarious liability does not. Employers may look at the negligence theories as a check-list and implement corresponding, precautionary procedures in order to avoid workplace violence and potential liability. With the negligence theories, employers have two chances to lessen or avoid liability. First, employers can implement employment plans or other preventative measures to try to impede workplace violence altogether. Second, if the employers cannot prevent workplace violence, they will be better able to defend against the negligence theories in court because they must only show that they demonstrated reasonable care in the development and implementation of their action plans. It is not easy for employers to recognize these incentives with the imposition of vicarious liability because even if employers take precautions, they are likely to still be held vicariously liable under the strict liability theory.

The counter-argument to the incentive based reasoning is that until vicarious liability is contracted, employers know and are forewarned that vicarious liability and its enormous consequences may be imposed when their employee commits an act of workplace violence. To prevent this, employers have only one option—to ensure that workplace violence does not occur. Some employers are likely to believe that workplace violence is inevitable and that they will likely be held vicariously liable; thus, they should not waste time and try to avoid the unpredictable incidents of workplace violence with burdensome and costly plans. The response to this counter-argument is that society generally favors an employment plan with maximum incentives. Unlike the "all or nothing" characteristic of vicarious liability, the negligence theories provide employers with maximum incentives because employers will have two chances to avoid or lessen their potential liability.
3. Achieving the Contraction of Vicarious Liability

A broad theory of vicarious liability has no apparent purpose when it is likely that the same parties can use the negligence theories. From a policy standpoint, courts should examine the tension between these two alternate theories. Application of the negligence theories in the context of workplace violence appears to be a new development in Louisiana tort law. With the emergence of the negligence theories, there is little or no added social benefit of having a broad theory of vicarious liability in the context of workplace violence when victims can be compensated under theories of negligent hiring, retaining, training, and supervising.

Courts can contract vicarious liability by narrowly construing the phrase “course and scope of employment” of Article 2320 and by not borrowing the liberal construction a similar phrase carries in the context of workers’ compensation. Courts and practitioners commonly refer to the requirement for workers’ compensation as an injury “within the course and scope” of employment. This language is “borrowed from discussions of tort cases in which the vicarious liability of an employer is often said to depend upon whether an employee tortfeasor was acting ‘within the course and scope’ of his employment.” It is not good policy to borrow concepts from one area of law to be used in another, especially because tort law and workers’ compensation serve distinct purposes.

The course and scope references found in Article 2320 and the workers’ compensation statute need to be clearly distinguished because “[i]n most states, and certainly including Louisiana, workers’ compensation statutes and cases will give a very broad interpretation to the concept of work-related injuries.” Thus, the key question is whether courts have been using the term “course and scope of employment” as a generic term in both vicarious liability cases and

127. La. R.S. 23:1031(A) (1998) states, “If an employee not otherwise eliminated from the benefits of this Chapter receives personal injury by accident arising out of and in the course of his employment, his employer shall pay compensation in the amounts, on the conditions, and to the person or persons hereinafter designated.” (emphasis added).
129. Id. at §144 n.1.
130. Id. See L.J. Earnest Construction v. Cox, 714 So. 2d 150, 151 n.1 (La. App. 2d Cir. 1998) (providing further distinction between the workers’ compensation actual statutory requirement and the shorthand reference to “course and scope of employment”).
workers' compensation cases. If so, many courts have likely imported "the liberal construction" accorded to most workers' compensation statutes into vicarious liability cases. As a result, the broad construction might have allowed plaintiffs to recover under vicarious liability theories in situations where they might not have if the workers' compensation liberal construction had not been imputed to vicarious liability cases. This occurrence strengthens the argument that vicarious liability theories should be contracted in the context of workplace violence.

Courts should also require "some type of employer-related catalyst, meaning the act performed ... should have some link to an employment-required duty, in order to hold an employer vicariously liable." Further, courts should not impose vicarious liability upon an employer when its employee's intentional act of violence was completely extraneous to the employer's interests. As discussed infra, "there is no magical formula to establish vicarious liability for intentional torts committed by employees." The closest standard is the LeBrane factor test, in which not all four factors have to be satisfied in order to impose vicarious liability upon the employer. Each case is also to be decided on its own merits, which essentially means that there is no consistency in the application of the rules.

Further, the Louisiana jurisprudence shows that many courts have an unwritten policy of imposing vicarious liability upon the employer when three of the four LeBrane factors are met. Because two of the LeBrane factors are readily established (employment premises and hours), plaintiffs have only to prove one additional amorphous LeBrane factor in order to impose vicarious liability upon the employer. Thus, the standard for imposing employer vicarious liability has become too flexible. The other two Lebrane factors—whether the act was primarily employment rooted and whether the act was reasonably incidental to the performance of the

132. Byrd v. Richardson-Greenshields Sec., Inc., 552 So. 2d 1099 (Fla. 1989). See also Timmons v. Silman, 761 So. 2d 507 (La. 2000) (analyzing a vicarious liability tort case of "frolic and detour" using workers' compensation secondary sources in order to determine whether an employee was in the course and scope of employment when he was involved in a multi-vehicle accident that injured third parties).


137. Id.
employee's duties—are especially subjective and indefinite. The satisfaction of these two elements appears to depend upon the discretion of the court. Thus, in the context of an employee's intentional acts of workplace violence, Louisiana courts should require that all four LeBrane factors be satisfied before imposing vicarious liability upon the employer. Taking these steps would contract vicarious liability theories in the context of workplace violence and would assist employers in their struggle to limit their liability. Finally, the contraction of vicarious liability would also be likely to create the appropriate incentives for employers to invest in safe workplaces.

D. Louisiana Revised Statutes 23:291—Is there a Duty to Disclose Employment Information?

A peripheral issue in the context of negligent hiring is the disclosure of an employee’s employment information and record to prospective employers. Again, Griffin v. Kmart Corporation\textsuperscript{138} demonstrates the importance of this issue. There, Kmart's human resources manager stated that the employee who committed the assault on the plaintiffs had “red flags” against him when he was hired because “he had been terminated from his previous job at Wal-Mart relatively close to Christmas.”\textsuperscript{139} The human resources manager admitted that she had only checked with the employee's last employer, Wal-Mart, and that Wal-Mart had only provided the employee's start and end dates of employment.\textsuperscript{140} Had Wal-Mart disclosed more about the employee's employment history with Wal-Mart to the Kmart human resources manager, the employee's assault may have been avoided because Kmart might not have hired the employee.

To encourage former employers to share employment information, Louisiana Revised Statutes 23:291 “provides protection from civil liability for torts, such as defamation, to those employers

\textsuperscript{138} 776 So. 2d 1226 (La. App. 5th Cir. 2000).
\textsuperscript{139} Id. at 1229-1230.
\textsuperscript{140} Id. at 1230.
who disclose employment information." Section 291 is a "shield law" for employers who provide employment references. The Louisiana statute is different from other shield laws because it contains immunity from the torts associated with hiring for employers who reasonably rely on the employment information given to them by a previous employer. However, section 291 also might have had the inadvertent consequence of assessing the prospective employer with an affirmative duty to secure employment information. As information becomes more readily available due to the immunity provided to former employers, courts may impose a greater duty on prospective employers to try to contact former employers. Further, courts may even rely on section 291 to impose a duty on former employers to provide employment information to prospective employers. As courts recognize broader duties on the part of employers regarding hiring, and presumably retention, training, and supervision, vicarious liability seems less necessary and less justifiable. Specifically, the imposition of an affirmative duty to obtain and provide employment information strengthens the argument that negligence theories, not theories of vicarious liability, should be the primary mechanism for courts to impose liability upon employers for acts of workplace violence. Many prospective employers excuse the

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141. La. R.S. 23:291 (2001) states:
A. Any employer that, upon request by a prospective employer, . . . provides accurate information about a current or former employee's job performance or reasons for separation shall be immune from civil liability and other consequences of such disclosure provided such employer is not acting in bad faith. An employer shall be considered . . . acting in bad faith only if it can be shown by a preponderance of the evidence that the information disclosed was knowingly false and deliberately misleading.
B. Any prospective employer who reasonably relies on information pertaining to an employee's job performance or reasons for separation, disclosed by a former employer, shall be immune from civil liability including liability for negligent hiring, negligent retention, and other causes of action related to the hiring of said employee, based upon such reasonable reliance, unless further investigation, including but not limited to a criminal background check, is required by law.


142. Aaron, supra note 141, at 1133.
143. Id.
144. Id.
145. Id.
146. In Keaton v. Summers, No. 99-1192, 2000 WL 680337 (E.D. La. May 24, 2000), the court, stated that former employers in Louisiana "do not owe a special duty to disclose negative information about a former employee to prospective employers." Id. at *8 (citing Aaron, supra note 141, at 1162-63).
failure to perform background checks and reference checks because the only information given by the former employer is often the start and end dates of employment. With section 291 in place, prospective employers arguably no longer have an excuse not to perform background checks and reference checks, just as former employers have no reason to withhold pertinent employment information. However, unless and until courts recognize an affirmative duty to obtain and provide accurate employment information, the importance of section 291, especially in the context of workplace violence and with respect to the negligence theories, remains unclear.

Those familiar with Louisiana Revised Statutes 23:291 may also argue that it gives nothing to employers that qualified privilege, or conditional privilege, did not previously provide them. Responding to threats of defamation litigation, many employers “adopted a ‘no comment’ policy regarding employment information references.” Louisiana already recognized qualified privilege as an affirmative defense to defamation; yet, section 291 is an express endorsement from the legislature that provides the same type of immunity. Section 291 may now give employers more confidence in seeking and disclosing employment information. Thus, if an employer is negligent in hiring an employee who commits an intentional act of violence due to its failure to perform a background check or a reference check with his former employer or because the former employer failed to provide pertinent employment information, the broad theory of imposing liability should be negligent hiring and not vicarious liability.

E. Louisiana Workers' Compensation Statute—Should All Negligence Actions be Barred by the Statute?

Louisiana courts may also be hesitant to contract vicarious liability in the context of workplace violence because of the Louisiana Workers' Compensation statute's bar of all negligence claims. This bar is especially important when discussing incidents

147. Aaron, supra note 141, at 1142-44.
148. Id. at 1131 (citing Robert S. Adler & Ellen R. Pierce, Encouraging Employees to Abandon Their “No Comment” Policies Regarding Job References: A Reform Proposal, 53 Wash. & Lee L. Rev. 1381 (1996)).
149. Id. at 1139, 1142-44. A qualified privilege attaches “if the communication is (1) in good faith, and is (2) on a subject in which the person making the comment has an interest or in reference to which he has a duty to a person having a corresponding interest or duty.” Id. at 1142 (citing Hines v. Arkansas Louisiana Gas Co., 613 So. 2d 646, 656-57 (La. App. 2d Cir. 1993)).
   Except for intentional acts provided for in Subsection B, the rights and
involving two or more employees committing intentional acts of violence against each other as illustrated in *Quebedeaux v. Dow Chemical Company* where an employee was injured in the workplace by a fellow employee’s battery. There, vicarious liability was the employee’s only form of recovery because a negligent hiring, training, or supervising claim was barred by the Louisiana Workers’ Compensation statute.

Vicarious liability should be contracted in the context of workplace violence. But in a *Quebedeaux* situation, vicarious liability is the only way for a plaintiff to recover. If vicarious liability is contracted, employees may not be able to recover as easily under the traditional theory of vicarious liability due to the contraction or under the negligence theories because of the workers’ compensation exclusivity rule. Thus, in situations such as this, vicarious liability should not be contracted unless the Louisiana Legislature revises or Louisiana courts interpret the Louisiana Workers’ Compensation statute to allow a narrow exception that does not bar negligent hiring, retaining, training, and supervising claims in the context of workplace violence.

In Louisiana, intentional torts are outside the scope of workers’ compensation coverage while negligence claims are covered by the Louisiana Workers’ Compensation statute. However, this is not a universal rule in all jurisdictions. Some workers’ compensation statutes do not exclude claims of negligent hiring and supervision arising from workplace sexual harassment. The Florida Supreme Court held that the Florida Workers’ Compensation statute did not afford the exclusive remedy for an employee’s claims based on sexual harassment in the workplace. The court reasoned that earlier pronouncements that workers’ compensation was the exclusive remedy for sexual harassment claims arising from workplace sexual harassment was based on Florida courts’ expansion of the definition of “accident arising out of . . . employment” to embrace a broad variety of injuries. Later, a federal court in Florida declared that, “in light of the strong public policy against sexual harassment in the

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remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights, remedies, and claims for damages . . .

154. *Id.* at 57.
155. Byrd v. Richardson-Greenshields Sec., Inc, 552 So. 2d 1099 (Fla. 1989).
156. *Id.* at 1102-03.
workplace, this court interprets Byrd as holding that the exclusivity rule of the workers’ compensation statute does not bar Gomez’s claim of negligent retention and supervision.157 Additionally, other jurisdictions such as Ohio have held that the State Workers’ Compensation law did not bar a claim of negligent infliction of emotional distress based on a sexual harassment claim.158

Louisiana has recently extended the reasoning used by other jurisdictions when dealing with workplace sexual harassment to a claim arising from job-related stress. In Richardson v. Home Depot U.S.A.,159 the Louisiana First Circuit of Appeal ruled that the exclusivity provision of the Louisiana Worker’s Compensation statute “does not bar all negligent infliction of emotional distress claims against an employer” arising from the employee’s job-related stress.160 The court’s reasoning was based on Louisiana Revised Statute 23:1021(7)(b), which provides,

Mental injury caused by mental stress. Mental injury or illness resulting from work-related stress shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable pursuant to this Chapter, unless the mental injury was the result of a sudden, unexpected, and extraordinary stress related to the employment and is demonstrated by clear and convincing evidence.161

The plaintiff did not prove that her job-related stress was “sudden, unexpected, and extraordinary.”162 Thus, her chronic stress was not considered to be a personal injury by accident arising out of and in the course of employment, and her negligent infliction of emotional distress was not barred.

The first issue to consider is whether incidents of workplace violence can be analogized to workplace sexual harassment claims or to a Richardson job-related stress claim. The analogy to workplace violence

159. No. 2000-0393, 2001 WL 293950 (La. App. 1st Cir. Mar. 28, 2001). In Richardson, the employee was a bookkeeper and “worked in the vault handling the financial paperwork for Home Depot’s consumer transactions.” Id. When the vault staff was reduced, the employee was required to perform additional employment tasks. She further alleged that other Home Depot personnel constantly called her during her vacation and holidays to inquire about vault procedures. The plaintiff developed health problems, including headaches, elevated blood pressure, stress, and anxiety. Id. She alleged that her health problems were directly related to the stress caused by her job at Home Depot.
162. Richardson, 2001 WL 293950, at *3.
sexual harassment is sound because sexual harassment is a type of workplace violence between employees. Further, just as there is a strong public policy to maintain a workplace free from sexual harassment, there is an even stronger public policy to maintain a workplace free from other incidents of workplace violence, especially those that involve physical injuries to employees. Yet, the analogy to a *Richardson* claim is not as easy to make because the Louisiana Workers’ Compensation statute does not cover job-related stress unless it is “the result of a sudden, unexpected, and extraordinary stress related to the employment and is demonstrated by clear and convincing evidence.”163 Thus, the Louisiana statute specifically allows such a negligence claim for job-related stress while it does not specifically allow for claims of negligent hiring, retaining, training, and supervising relating to workplace violence.

The next issue to consider is whether Louisiana courts should interpret the Louisiana Workers’ Compensation statute as did the Florida courts to allow negligent hiring, retaining, training, and supervising claims in the context of workplace violence or whether the Louisiana Legislature should consider revising the Louisiana Workers’ Compensation statute so that claims of negligent hiring, retaining, training, and supervising would not be barred by the statute. Louisiana could focus on the dual requirement of “arising out of... employment” and “in the course of... employment” in the Louisiana Workers’ Compensation statute.164 The first requirement refers to “an inquiry into the character or origin of the risk, while [the second requirement] brings into focus the time and place relationship between the risk and the employment.”165 In order to circumvent the Louisiana Workers’ Compensation statute, practitioners should begin to assert the theory that acts of workplace violence do not occur in the normal “course of employment,” or alternatively, that claims of negligent hiring, retaining, training, and supervising do not truly “arise out of employment.”

VI. CONCLUSION

Workplace violence affects everyone. We all watch the nightly newscasts that broadcast workplace violence. We may know a perpetrator. We could be a victim. We could simply be the consumer who will bear part of the employer’s economic costs of dealing with workplace violence. The issue of employer liability for acts of workplace violence is important because of its effects on employees

and its economic impacts on employers. New legal theories for imposing legal liability upon the employer, such as the negligence theories, are likely to continue to emerge. While courts should explore the new and emerging theories from both a legal and social policy standpoint to see their effect on other theories of recovery, employers must also take proactive measures, such as creating employment plans, investing in employment practices liability insurance, and arguing for a contraction of vicarious liability in the context of workplace violence, to address the issue of workplace violence sensibly and to minimize their own risk of liability, hopefully averting workplace violence incidents altogether.

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