Public Law: Workmen's Compensation

H. Alston Johnson III
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THE DUAL REQUIREMENT

Louisiana's Compensation Act, like those of many jurisdictions, provides that an injury is compensable only if it arises out of the employment and occurs in the course of the employment. These simple statements, of course, have spawned innumerable jurisprudential interpretations and some rather remarkable judicial efforts to give meaning and depth to the Act in the absence of any other legislative guidance.

Professor Emeritus Wex Malone, both in his treatise and in law review discussion, observed that although both of these factors are required to produce a compensation award, one may in fact influence the other. Or, as the Louisiana Supreme Court paraphrased the concept in a recent decision:

A strong showing by the claimant with reference to the arise-out-of requirement may compensate for a relatively weak showing on the during-course-of requirement, or vice-versa.

Two decisions during this past term indicate both the validity of this premise and its acceptance by the judiciary as a method of analyzing doubtful compensation claims. In Turner v. United States Fidelity & Guaranty Co., the court was faced with the not infrequent accident caused by knives or guns. The injured employee shot himself accidentally with a fellow employee’s gun in the employer’s parking lot. The employee was a repairman in a municipal utility department; he had returned from a worksite to the town warehouse and shop building to work on some electrical materials. Shortly thereafter, he and some other employees

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1. L.A. R.S. 23:1031 (1950): "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 persons hereinafter designated."

2. W. Malone, Louisiana Workmen's Compensation Law and Practice 171-248 (1951) [hereinafter cited as MALONE].


5. 339 So. 2d 917 (La. App. 3d Cir. 1976).
congregated in the parking lot to await the noon whistle, as they customarily did in anticipation of their lunch period. A fellow employee produced a pistol which he had been cleaning on the premises that morning, and in the process of inspecting the pistol, Turner managed to shoot himself.

The trial court rejected Turner's suit for compensation, concluding that the injury did not arise out of the employment. The appellate court encountered no difficulty in determining that the injury occurred during the course of Turner's employment; it was on the employer's premises, during work hours. The trial court had apparently reached the same conclusion. But there was obviously more difficulty in resolving whether the injury arose out of the employment.

The appellate court referred to the Louisiana Supreme Court's decision in *Lisonbee v. Chicago Mill and Lumber Co.*, \(^6\) in which the possible influence of the arising-out-of requirement on the in-the-course-of requirement, and vice versa, had been noted. However, in *Lisonbee*, the court concluded that the showing on both factors was weak and denied compensation to a night watchman who, during working hours, was killed by a thief in a grocery store across the street from his employer's premises. In the *Turner* case, the court of appeal found the showing that the injury occurred in the course of employment to be stronger than that made in *Lisonbee*, since Turner was on the employer's premises and was not in violation of any instructions of the employer, as Lisonbee allegedly had been. The court also determined that the injury had a "reasonable connection with the employment" since it was a fellow employee's pistol which caused the damage and judicial notice could be taken of the fact that idle workers will turn to various types of diversion which may prove injurious. Consequently, compensation was allowed.

One finds the concept used again in *Mitchell v. Employers Mutual Liability Insurance Co.*, \(^7\) a fascinating case involving the moonlight work of a chicken catching crew. The deceased, Mitchell, was a "crew supervisor" who had general authority over a crew which worked at night to catch chickens at various farms for processing. He was not required to be on the site of the work at all times, and in fact often had to leave to obtain additional materials for the workers, or for other purposes. On the night in question, he left a crew at work on a farm and eventually parked on a secluded dirt road about one-fourth of a mile away, where he was joined by a Mrs. Moran and a Mrs. Durr. The three sat in Mitchell's truck,

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\(^6\) 278 So. 2d 5 (La. 1973).

\(^7\) 341 So. 2d 35 (La. App. 3d Cir.), *cert. denied*, 342 So. 2d 1121 (La. 1977).
drinking coffee and visiting. Mrs. Durr's recently estranged husband came on the scene and inquired of his wife whether she was coming home. At her negative reply, the husband shot his wife and Mitchell, killing them both. There was evidence that Durr had accused Mitchell and Mrs. Durr of having an affair, and some corroborating evidence that this may have been the case. Durr was a fellow employee of Mitchell's, off duty at the time, and Mrs. Durr was a former employee of the same employer. The employer had a rule, probably known to Mitchell, that employees were not to have visitors at the farms where they were working.

The trial court awarded compensation to Mitchell's survivors, but the appellate court reversed. Again, reference was made to the relationship between the two factors of the dual requirement, and to the Lisonbee discussion. The concurring opinion of Judge Watson is perhaps the clearest statement of the court's consideration of the interaction between the two factors; he distinguished the Mitchell case from the earlier Turner case, which awarded compensation and in which he wrote for the court. He noted that there was a strong showing of "in the course of" in the Turner case, since the injured employee was on the employer's premises and arguably engaged in the employer's business. Mitchell was not on the premises and was probably not engaged in the employer's business. There was some plausible connection with the employment in Turner, since the employee was injured by a fellow employee's pistol. The only connection in Mitchell was that the assailant happened to be an employee of the same employer, though he was not at work on that particular shift. Judge Watson concluded, "Mitchell is weak in both features: 'arising out of' and 'course of' employment. Thus, Turner met the requirements of 'course of' and 'arising out of' employment, while Mitchell does not."8

These decisions and others9 seem to indicate that the Louisiana courts have begun to recognize the interplay between the two features of the dual requirement concept, and are rather frankly viewing the question of compensability in its proper perspective. It should be recalled, however, that, like the practice of analyzing tort problems with a so-called duty-risk concept,10 the use of the dual requirement is merely an approach to the

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8. Id. at 42 (Watson, J., concurring).
9. Hall v. Joiner, 324 So. 2d 884 (La. App. 3d Cir. 1976) recognized the concept, but it does not appear that it was particularly critical to the result awarding compensation, which seemed quite proper.
process of judicial decision making. It is an honest effort by the court to do justice in the case within the guidelines provided legislatively. It is not intended to be, nor should it be frozen into, a formal rule or a doctrine. There is no substitute for an analysis of each situation upon its own facts, with a decision to be reached by weighing the relative merits of evidence which indicates whether the injury was in the course of employment and arose out of the employment.

**Principal’s Right of Indemnity Against Contractor For Compensation Paid To Contractor’s Employee**

It is well settled that if a principal is required under the tenets of section 1061 to pay compensation to the employee of a contractor, he is entitled to seek indemnity against the contractor for the amount so paid, since compensation for the employee is the primary responsibility of the contractor. The principal’s obligation, though potentially primary as to the employee, is nonetheless a secondary one toward the contractor.

It is less well recognized that the principal and the contractor may for their own reasons agree that the principal shall bear the compensation loss as between them. This is to say that these two parties may, if they wish, provide that the statutory indemnity granted to the principal shall not apply to their relationship. This was the case in *Andrews v. Spearsville Timber Co.*, in which the supreme court reversed the lower courts and held that the principal and the contractor had agreed that the principal would bear the cost of compensation. Theirs was an oral agreement arising from a statement by the principal to the contractor to the effect that he did not carry compensation insurance and that he had previously handled all claims himself and would continue to do so. The supreme court properly held that this agreement was inconsistent with the principal’s demand for indemnity.

**Disability**

In every term, there are unusual factual situations presented in which claims for disability awards are made. This term was no exception. In *Boucher v. Orleans Parish School Board,* plaintiff was a certified teacher with twenty years of experience. She claimed to have been physically assaulted on three separate occasions by irate parents during her term as a kindergarten teacher in 1975. It was her assertion that these physical

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12. 343 So. 2d 1008 (La. 1977).
13. 346 So. 2d 1124 (La. App. 4th Cir. 1977).
assaults had produced an emotional problem which the court termed "fear of black adults." There was medical evidence tending to show that as a result of the incidents, plaintiff could not work in teaching situations in which she would have contact with black parents and black teachers.

The trial court concluded that plaintiff was disabled from working as a teacher and determined that under the new definitions of disability contained in the major amendments to the Act in 1975, she should be classified as partially disabled.\(^4\) She was thought to be unable "to perform the duties in which she was customarily engaged when injured or duties of the same or similar character, nature and description for which she was fitted by education, training and experience."\(^5\)

The appellate court, while recognizing that trauma-induced neurosis or psychosis could be compensable, determined that plaintiff had failed to establish that she was disabled at all and reversed the trial court's decision. It seems significant that the court did not hesitate to assert that, had plaintiff proved her case, even "neurotic racial prejudice, which directly results from a course and scope accident and is proven to be disabling"\(^6\) could be covered under the Act.

Another interesting case, but one decided under the pre-1975 definition of disability, was *Cohrs v. Meadows*.\(^7\) Plaintiff was employed as a groom, assisting her husband in the care of defendant's thoroughbred horses. During her work on defendant's horse farm, she was stung by a bee and required outpatient treatment for hyper-reaction. Shortly thereafter, she was stung again with a similar result including hospitalization for eight days. She was advised to avoid risk of possible future stings.

Plaintiff and her husband moved to another horse farm, but she no longer worked outside. She sought benefits for total and permanent disability, and was successful at both the trial level and the appellate level. The appellate court noted the long-standing Louisiana rule, under the prior definition of disability, that a skilled worker is permanently and totally disabled when his injuries prevent him from performing work of the same or a similar nature to the work he is accustomed to perform. Though plaintiff was limited to an award of 500 weeks of compensation under the pre-1975 Act, her recovery was nonetheless substantial.\(^8\)

\(^5\) Id. at 1127.
\(^6\) Id. at 1130.
\(^7\) 342 So. 2d 1172 (La. App. 1st Cir. 1977).
\(^8\) The appellate court affirmed the trial court’s award of $32.50 per week for
The amended definition of disability would probably have produced a more just resolution of the issue between the parties, had it been applicable. Plaintiff would no doubt have been classified as partially disabled, since there was no indication that she could not perform other employment which would not involve substantial risk of insect stings. She would then have been entitled to two-thirds of the difference between the wage she was earning at the time of the injury and the actual wage which she earned in any subsequent week, up to the applicable maximum number of weeks. This suggestion, however, reveals a serious omission in the amended Act. There appears to be no particular incentive to encourage such a person to return to work; as long as she does not, she receives a full two-thirds of her previous wage, since the difference between the previous wage and no wage at all is, obviously, the previous wage.

It might have been better to use the phrase "any lesser wages which the injured employee actually earns or is capable of earning in any week thereafter." This at least would permit an employer to attempt to prove that the individual in question, though unable to return to his former employment, is capable of earning some wage at a different job. It is believed that the amendments to the disability definitions in the Act were intended to introduce this measure of flexibility which had been so noticeably absent in the past.

While the Cohrs case may well be correct under the interpretations of the Act prior to 1975, there is danger that it might be used injudiciously as a precedent under the amended Act. Aside from the fact that the definitions have been changed so that Mrs. Cohrs almost certainly would have to be classified now as only partially disabled, the 500-week limit on compensation has also been removed on total and permanent disability. The only limit now is "the period of such disability" and in the case of a young worker, the amount payable in compensation for a total and permanent disability award could be substantial. Thus the value of the Cohrs case as a precedent should be limited.

500 weeks, $1,500.00 for medical expenses incurred and future medical expenses as provided by law.


21. The worker's life expectancy would be one limitation on such an award, but in the case of a young worker, as much as 50 years of compensation payments might be awardable, possibly at the maximum amount of two-thirds of the average weekly wage as defined under La. R.S. 23:1202. 1977 La. Acts, No. 40 amending Revised
EMPLOYER’S RIGHTS AGAINST THIRD PARTY FOR COMPENSATION PAID TO EMPLOYEE

The decision in *Lalande v. Index Geophysical Survey Corp.* 22 while not unexpected, lays bare again some substantial policy questions involving the employer’s right to seek reimbursement from an alleged tortfeasor who has caused, in whole or in part, the injury for which compensation was paid by the employer. In consolidated cases, plaintiffs sought damages in “executive officer” suits against certain individuals claimed to have been responsible for their serious injuries due to negligence. The compensation insurer of the employer of the injured employees intervened, seeking reimbursement by preference of all workmen’s compensation benefits paid.23

Prior to trial, the tort claim brought by the employees against the executive officers was compromised. As a part of the settlement, plaintiffs agreed “to indemnify, hold harmless, take over and defend any lawsuits and pay all costs and expenses necessary to defend any and all claims” including the intervention of the compensation insurer against the insurers of the executive officers. A substantial part of the settlement figure was deposited to be available to pay the intervention claim of the compensation insurer, if plaintiffs were unsuccessful in defending against that claim.

By virtue of the settlement, an interesting reversal of positions occurred. Plaintiffs, previously bent on establishing the negligence of the executive officers and negating any negligence on their own part in order to win the executive officer suit, were now required to prove that they were themselves negligent, barring the reimbursement claim by their employer’s insurer. By doing so, they would preserve for themselves that portion of the settlement which had been set aside to satisfy the interven-

Statute 23:1274 adds to the Act a very desirable provision to facilitate lump sum settlements in total and permanent disability cases, permitting such a settlement using as a term the injured employee’s life expectancy as shown by the latest American Experience Table of Mortality. See text at notes 52-54, infra.

22. 336 So. 2d 1054 (La. App. 3d Cir. 1976).
23. LA. R.S. 23:1101 (Supp. 1976) provides:

> When an injury or compensable sickness or disease for which compensation is payable under this Chapter has occurred under circumstances creating in some person (in this Section referred to as third person) . . . a legal liability to pay damages in respect thereto, the aforesaid employee or his dependents may claim compensation . . . ; and such employee or his dependents, relations, or personal representatives may obtain damages from or proceed at law against such third person to recover damages for the injury, or compensable sickness or disease.
tion. As the appellate court observed, "[i]t is ironic that plaintiffs each receive substantially larger damages because of their own negligence."24 Not unexpectedly, the compensation carrier argued strenuously that the plaintiffs' testimony was now self-serving and for that reason entitled to little weight.

But the appellate court agreed with the trial court that the injured employees had in fact contributed by their own negligence to their injuries, and that this negligence barred the claim for reimbursement by the insurer, who was in this instance simply subrogated to whatever rights the employer would have had in the premises.25 The decision of the supreme court several years ago in *Vidrine v. Michigan Millers Mutual Insurance Co.* 26 was distinguished on the ground that the employer who recovered the compensation benefits which he paid the employee was seeking reimbursement for injury to a non-negligent employee. The claimed bar to the reimbursement in *Vidrine* arose out of the negligence of a fellow employee of the injured employee, a situation admittedly not present in the *Lalande* case.

Thus it would appear that an employer is not entitled to reimbursement against a third party tortfeasor for compensation benefits paid when the employer himself is chargeable with sub-standard behavior,27 or when the employee to whom compensation was paid is so chargeable.28 But the

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Any person having paid or having become obligated to pay compensation under the provisions of this Chapter may bring suit against such third person to recover any amount which he has paid or become obligated to pay as compensation to such employee or his dependents.

At the time of the decision in *Lalande*, the statute read somewhat differently, but the difference was insubstantial.

24. 336 So. 2d at 1056. The trial court had also noted the same irony.
25. LA. R.S. 23:1162 (1950). 1976 La. Acts, No. 147 has subsequently amended LA. R.S. 23:1101, the basic third party action provision, to replace the phrase "any employer" in the authorization to bring a suit within the phrase "any person." This would apparently include the insurer and obviate any reference to LA. R.S. 23:1162. It should also be noted that the employer in *Lalande* was himself arguably a mere subrogee to the claims of his negligent employees. But see notes 36-37, infra.
26. 263 La. 300, 268 So. 2d 233 (1972).
27. MALONE, supra note 2, § 367. Such cases are infrequent due to the fact that most employers are not natural persons but rather corporate entities, which can act only through their employees. *But cf.* General Electric Co. v. Cuban Am. Nickel Co., 396 F.2d 89 (5th Cir. 1968) (court announces rule that negligence of employer does not bar reimbursement against tortfeasor, but it is almost certainly the case that it was the negligence of another employee of the employer rather than of the employer itself).
employer is entitled to reimbursement when the "negligence" with which he is chargeable is only vicarious, i.e., that it was the negligence of a fellow employee of the employee to whom compensation was paid.\textsuperscript{29}

It is appropriate to observe that beneath all of this verbiage and nice distinction, serious policy questions are lurking. The Compensation Act began with a very simple concept. The so-called fault system was functioning poorly in the employment accident context. Why not simply provide that an employment-rooted injury would be compensated at a lower amount, but without regard to whose fault it might be? And in the unusual case in which it could be shown that it was the fault of someone other than the employer or the employee, the loss could be shifted, by means of a third-party action against such a person, out of the employment relation altogether. This concept works fine when a "good" person (a blameless employee or employer) is attempting to shift loss onto a "bad" person (a personally careless tortfeasor).

But once vicarious liability and liability insurance are thrown into the mixture, the problem is complicated. Now the "bad" person has himself done nothing which might be classified as personally careless. He may either have stood in a particular relationship to the "bad" person (employer to an employee, parent to a child) or simply signed a contract with someone otherwise responsible for the "bad" person (insurer for the employer of the careless employee). There would appear to be no moral imperative that he relieve another "good" person (a blameless employer) of the cost of an injury rooted in that person's business enterprise, and even less that he relieve that employer in the event that the employer becomes a "bad" person (is himself negligent).

The existence of a third-party action against the tortfeasor is a vestige of the fault system playing a role within workmen's compensation. A true no-fault, enterprise system of compensating work-rooted injuries would leave the cost of an injury properly compensable under that system within that enterprise, regardless of where the blame for an injury might lie. Theoretically, the various costs to society incurred in shifting that loss around to follow the "fault" of someone would thereby be saved. This

pure no-fault concept has only been accepted in three states, and has been criticized. But it is well to consider whether the future may lie in this direction, especially since the fault principle is under attack on so many fronts. The workmen’s compensation scheme itself was perhaps the first small chink in the armor, and the predictions that the principle would prove to be contagious appear to have been correct, given recent developments in liability for harm caused by defective products and in compensation for victims of automobile accidents.

There are, however, some advantages to retaining the third-party action for the employer. It would stand to reason that an employer who has the possibility of shifting a work-related loss to a third person if he acts carefully himself has some incentive to observe safety procedures and provide a safe place to work. And in the situation in which the employer is without fault, the third-party action permits the most just resolution of the dispute: the tortfeasor pays exactly what he would have paid absent the compensation system (tort damages); the employer comes out even, paying compensation to the employee but receiving it from the tortfeasor; and the employee receives exactly what he would have been paid absent the compensation system.

The right of action against the tortfeasor works fine when the tortfeasor is wholly at fault and neither the injured employee, a fellow employee or the employer himself is in any way at fault. The difficult cases occur when the fault of the tortfeasor and the fault of one of these persons concur to cause the injury.

Example 1. Employer and Employee A are riding together in Employer’s vehicle. Employee A is injured through the concurrent fault of Employer and Tortfeasor. Employee A receives compensation from Employer and sues Tortfeasor in tort. Employer intervenes to recover compensation. Tortfeasor resists Employer’s claim on the basis that the Employer played a part in causing his own harm, and is barred by ordinary rules of contributory negligence. This is an instance of the employer’s negligence based on his own conduct, likely to be relatively infrequent in the days of corporate employers, since corporations can only act through employees, who would then fall under the heading of fellow employees of the injured employee.

30. Ohio, West Virginia and Georgia.
Example 2. Employee B and Employee A are riding together in Employer's vehicle. Employee A is injured through the concurrent fault of Employee B and Tortfeasor. Employee A receives compensation from Employer and sues Tortfeasor in tort. Employer intervenes to recover compensation. Tortfeasor resists Employer's claim on the basis that Employer is barred by the fault of his employee, B. This is the Vidrine\textsuperscript{33} factual situation.

Example 3. Employee B and Employee A are riding together in Employer's vehicle. Employee A is injured through his own fault and that of Tortfeasor. Employee A receives compensation from Employer and sues Tortfeasor in tort. Employer intervenes to recover compensation. Tortfeasor resists Employer's claim on the basis that the employee to whom compensation was paid was at fault, and this bars Employer's reimbursement claim. With the additional fact that the tort claim was settled, this is the Lalande\textsuperscript{34} factual situation.

In neither example 2 nor example 3 is Employer chargeable with conduct which was below the standard we expect of him, i.e., he was guilty of no "personal" negligence. And yet, in example 2, Employer is deemed entitled to reimbursement from Tortfeasor, and in example 3, Employer is not. Can the difference be justified?\textsuperscript{35}

It would be easy to say that Employer is only presenting Employee A's claim by way of subrogation, and may recover in those circumstances in which Employee A would have recovered. When Employee A was contributorily negligent, Employer loses. When Employee B was negligent in causing A's injury, Employer wins. But there is no clear indication that the Employer's right is one of subrogation from the injured employee;\textsuperscript{36} in fact, there is substantial support for the view that his right is


\textsuperscript{34} Lalande v. Index Geophysical Survey Corp., 336 So. 2d 1054 (La. App. 3d Cir. 1976).

\textsuperscript{35} It could be said that if the employer is not entitled to reimbursement in Example 3, he is being punished for the fault of the injured employee, perhaps because the Act prohibits punishing the injured employee for his own fault.

\textsuperscript{36} Unlike statutes in other states, LA. R.S. 23:1101 (Supp. 1976) does not use the word "assign" or "subrogate" or similar language; in fact, an amendment in 1920 removed from the article a reference to subrogation. However, see the comments of Chief Justice McCaleb in footnote 2 of the majority opinion on rehearing in Vidrine v. Michigan Millers Mut. Ins. Co., 263 La. 300, 268 So. 2d 233 (1972): "The author of this opinion is committed to the view that this is a legal subrogation."
independent of the employee’s rights altogether. If that is the case, there is no more reason to bar his recovery because of the negligence of the injured employee than because of the negligence of the non-injured employee.

It would be logical and desirable for the courts to eliminate these inconsistent results. It was argued, ultimately with success, in the Vidrine case that the Louisiana statute is absolute: any employer who pays compensation is entitled to shift that loss to a tortfeasor. The Act does not require that the employer be blameless. Unfortunately, the statute is not really so clear on the point. The first paragraph authorizes the injured employee to bring an action for damages when a compensable injury creates in “some person . . . a legal liability to pay damages . . . .”38 The second paragraph authorizes “any person having paid or having become obligated to pay compensation” to bring suit to be reimbursed the amount of that compensation against “such third person.” It is apparent that the person having paid compensation may proceed for reimbursement only against a person in whom there is a legal liability to pay damages.39 This liability of necessity involves the question of the duty imposed upon such a person and the risks encompassed by that duty. If it is not the duty of such a person to protect the employer against harm caused in part by the carelessness of persons employed by him, then such a person is not legally liable to pay damages thereby incurred by the employer. If the loss suffered by the employer is traceable in part to the carelessness of someone he has employed, there is ample reason to leave that loss where it has fallen. There are a number of ways to reach and express this conclusion; the simplest is probably just to say that “the negligence of the employer” bars his suit for reimbursement.40 One has really said that it is not the duty

37. LA. R.S. 23:1101 simply states that the person paying compensation “may bring suit” without specifying the source, if any, of this right. Mr. Justice Tate, in the original opinion in Vidrine, expressed the opinion that the employer’s right to indemnification was an independent right. The majority opinion on rehearing does not specifically controvert this point.
39. This appears to be the case whether the plaintiff is the employee or the employer. Since the employer’s action is one for tort damages (albeit measured by the compensation he has paid), it stands to reason that the third person must be legally liable to him in tort, as well as to the employee.
of a third person to protect the employer against losses caused in part by
his own employees.\textsuperscript{41}

There is thus a basis in the Act itself to bar reimbursement of any
employer who is either personally or vicariously negligent and to reverse
the \textit{Vidrine} decision. Third party reimbursement actions by employers
against tortfeasors would still be permitted and would be successful when
the employer proves that the duty of the tortfeasor extended to the harm
suffered—most probably, those instances in which the harm was suffered
solely because of the tortfeasor’s conduct. This interpretation would most
smoothly mesh the fault-based tort theory with the no-fault provisions of
the compensation system, and would leave a greater number of employ-
ment-related risks within the employment enterprise. It would also provide
the greatest incentive to the employer to be cautious himself and exhort his
employees to do likewise.

It may be argued that this would result in "double recovery" for the
non-negligent employee, who might receive compensation from the em-
ployer and then a complete damage recovery from the tortfeasor. It is not
clear that this is necessarily a vice to be avoided.\textsuperscript{42} If one regards compen-
sation benefits as insurance which the employee has in some way secured
by his contract of employment, they might be analogized to collateral
benefits which ordinarily are of no assistance to a tortfeasor whose
blameworthy conduct brought about the occasion from which such bene-
fits arose.\textsuperscript{43} Given the relatively low level of compensation benefits, it is
difficult to term this result "double recovery." It is more akin to basic
subsistence plus tort damages where appropriate. In addition, there is no
indication that anyone is making a "double payment" to permit this
"double recovery."\textsuperscript{44} The employer has paid compensation, which he
would have had to do regardless of his own fault or the fault of the

\textsuperscript{41} This of course puts the question in the proper perspective of the duty of the
third person, the risk which occurred to the plaintiff (employer) and related issues
now familiar to the Louisiana appellate courts. It also properly leaves to the court
the question of the ambit of duty intended by the legislature’s general statement in
LA. R.S. 23:1101 that there must be a "legal liability to pay damages."

\textsuperscript{42} \textit{See} Malone, \textit{The Work of the Louisiana Appellate Courts for the 1972-1973

\textsuperscript{43} \textit{Id.} at 363.

\textsuperscript{44} Ordinarily, a countervailing argument suggesting that double recovery
should not be allowed is that it will require that some person pay an additional sum
that will serve to overcompensate a victim, as would be the case if a joint tortfeasor
were asked to pay a judgment already satisfied by the other joint tortfeasor. Each
would have paid the whole, when each should have only had to pay a half.
employee; the tortfeasor has paid tort damages, which he would have to do whether the compensation system existed or not.

A contrary view would be to adopt the very careful distinction suggested by Mr. Justice Barham’s dissent in the original Vidrine opinion. When the actual conduct of the employer itself is not at issue, but only negligence chargeable to it vicariously, there is no bar to reimbursement from the tortfeasor. This shifts some employment-rooted losses to the tortfeasor, even those in part caused by those involved in the employment, whether they are the compensated individuals or not. Under this view, Lalande should be repudiated, and the employer permitted to recover the compensation paid even when the compensated employee was negligent. It would also avoid the unfortunate spectacle presented in Lalande, in which the plaintiffs stood to gain more money by arguing that they were in fact contributorily negligent in causing their own harm. The basis of this position would be that the employer is not “at fault” in the moral sense because the compensated employee was negligent, and thus should not be barred from a loss suffered due to the fault of one of his own employees and the tortfeasor. The difficulty with this position is that the tortfeasor would now be paying something he would not have paid in the absence of the compensation system (compensation benefits paid to a negligent person).

One final observation about the Lalande case might be appropriate. The effort for reimbursement in Lalande, asserted against the insurer of executive officers of the same employer, was in fact only a request to shift the cost of compensation from one part of the employment enterprise (compensation insurance) to another (executive officer liability insurance). It was not an effort to shift the cost out of the employment enterprise altogether, as would have been the case if the tortfeasor was a genuine third person. Thus, the court may have reached the proper result, denying the shift of loss. But perhaps the real reason was that the case presented a situation not intended to be covered by section 1101, which was written to preserve to the employer and employee their previous right to cast the loss outside of the employment enterprise if possible. It is also impossible to calculate the effect on the courts of the knowledge that if reimbursement were permitted the employer in Lalande, the award would come out of the settlement already achieved by plaintiffs rather than from the tortfeasor as an additional amount.

CONFLICT OF LAWS

Because of its location, Louisiana has both the advantages and disadvantages of an active maritime industry. One of the supposed advan-
tages for certain maritime workers has been the protection offered by the Longshoremen's and Harbor Workers' Compensation Act, a federal statute intended to offer benefits to some of those injured in their labors in maritime-related endeavors. But the disadvantage sometimes incurred has been the conflict between this enactment and the Louisiana Compensation Act, and the uncertainty imposed by various judicial interpretations of these acts.

Another interpretation occurred during this past term, perhaps the last on this particular part of the problem. Poche v. Avondale Shipyards, Inc. was in fact two consolidated cases involving injury, in one case, and death in the other, as a result of work-related injury to two maritime employees injured while working entirely over land. The suits brought were "executive officer" suits, seeking recovery in tort against certain named executive officers of the employer of the injured person, and fellow employees, for alleged negligence. The primary difficulty was that the federal Act would clearly not permit such a suit, but the state Act at that time would.

The Louisiana Supreme Court examined the long history of the relationship between the LHWCA and state compensation acts and noted the 1972 amendments to the LHWCA had in effect brought the federal scheme "on land." It was the defendants' contention that since the LHWCA clearly covered the injuries to the two employees (a point conceded by all), any application of state compensation law was impermissible; and, of course, that the ban on "executive officer" suits imposed by the federal Act would bar the actions brought by plaintiffs.

46. 339 So. 2d 1212 (La. 1976).
47. 33 U.S.C. § 933(i) (1970): "The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer."
49. As amended, 33 U.S.C. § 903(a) provides: "Compensation shall be payable under this chapter . . . but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."
The court of appeal took the view that the amendments did not pre-empt the power of the state to apply Louisiana compensation statutes to any injury on land which was also covered under the new scope of the federal Act. But it also was of the opinion that the Louisiana provision permitting an executive officer suit was inconsistent with the federal Act, and could not be applied. The result of the judgment of the court of appeal was that a maritime employee other than a seaman, injured on land, could elect to sue under state law for compensation benefits, but could not take advantage of the “executive officer” tort suit which state law also permitted at that time.

The supreme court agreed that there was no indication that Congress intended to pre-empt the field by amending the LHWCA and held that the federal and state Acts could exist together and the injured employee could elect to proceed under either. But it concluded that there was no reason why the “executive officer” provision of the state Act, though clearly inconsistent with the federal provision, could not be applied. In fact, the court appeared impressed with the argument that if one were to say that the state Act could be applied only to the extent it did not conflict with the federal Act, then the permitted election would be meaningless. The court viewed the 1972 amendments to the LHWCA as providing additional remedies for land-based maritime workers rather than depriving them of those remedies which they already had, which in Louisiana would include the possibility of proceeding against “executive officers” in a tort suit.

Significant as this decision may be for the parties involved, it is likely that this specific issue will not be making judicial headlines in the future. By an amendment effective October 1, 1976, the Louisiana legislature eliminated the “executive officer” and “fellow employee” suits previously permitted under the Compensation Act, thus making our own provisions harmonious with the federal Act. Thus, in the future, regardless of the election made by the injured worker, no “executive officer” suit will be available to him, and at least this area of potential conflict has been removed. But assuming that the legislative amendment eliminating such suits is prospective only, Poche may be of importance to litigants whose suits involve accidents to land-based maritime workers other than seamen occurring before October 1, 1976.

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Lump Sum Settlements

As the Compensation Act read prior to 1975, it was a relatively easy task to calculate the proper amount of a lump sum settlement of a total and permanent disability or death award. The appropriate weekly amount was multiplied by the maximum number of weeks compensation was payable and discounted to present value. However, the 1975 amendments eliminated any statement of a maximum number of weeks of compensation in total and permanent disability and death cases. In total and permanent disability cases, payments continue "during the period of such disability." In death cases, payments continue until death or remarriage of the surviving spouse, until designated ages for minor children, and until termination of incapacity for incapacitated minor children or of dependency for other dependents.

With the elimination of a specific number of weeks, it became difficult if not impossible to determine the proper amount of a lump sum settlement. It is conceivable that this difficulty was intentional; there are those who believe that workmen's compensation payments should be made on a weekly basis, as wages would have been. This has the advantage of assuring the injured worker a constant, if limited, source of income, and may also protect against the possibility of squandering a large award. On the other hand, given that these disputes are cast by the Act in an adversary setting, compromise and lump sum settlement seem desirable and much more efficient from the point of view of the attorneys involved.

The legislature has acted to provide a method to calculate a proper lump sum settlement:

Provided that where no term is set forth with respect to disability benefits for the lifetime of an employee, the amounts claimed as compensation may be commuted to a lump sum settlement, using no shorter term than the injured employee's life expectancy as shown by the latest American Experience Table of Mortality, by agreement of the parties with the court's finding that the lump sum settlement is fair and entered into willingly and understandingly.

There are several observations which should be made about the addition. First, the employee's life expectancy rather than work expectancy...
cy is the measure to be used. It might be objected that the employer should not be required, in order to achieve a compromise and lump sum settlement, to calculate benefits which would extend past a designated retirement age at which the employee could no longer be earning a wage. While this may appear to be unfair, it should be noted that under the prior provision, there was a limit of 500 weeks of compensation for death or total and permanent disability, even though this period might extend past normal retirement age. It should also be noted that the employer is free to reject such a compromise and lump sum settlement and continue payments on a weekly basis, though this is an unlikely result.

Second, court approval of the lump sum settlement is still required. It is to be hoped that, if the court should conclude that under the circumstances presented to it a lump sum settlement would be detrimental to the employee’s interest, it would reject the settlement.

Third, it is still permitted that such a lump sum settlement may be discounted up to eight per cent. In the present days of substantial inflation, it should be a matter of negotiation whether a discount at a lower percentage, or perhaps none at all, would be a more proper settlement figure. This is presumably best left to the parties themselves to determine.

*Pepitone v. State Farm Mutual Insurance Co.*\(^{55}\) presented an interesting question involving compromise and lump sum settlement. Plaintiffs’ decedent was killed in a work-related accident and a claim was made against the employer’s insurer, which commenced weekly payments. The insurer then wrote to plaintiffs to propose a compromise and lump sum settlement, to which plaintiffs replied, requesting an offer of settlement. Another representative of the insurer replied, offering to settle the claim for $13,000.00. Plaintiffs’ attorney replied some four months later, accepting the offer. The insurer promptly replied, refusing to pay the $13,000.00.

Plaintiffs filed a tort suit, and the insurer intervened. By an answer and reconventional demand, plaintiffs requested the court to enforce the allegedly complete settlement and compel the insurer to pay to them the $13,000.00. The trial court refused to enforce the agreement, as did the appellate court. The appellate court reasoned that since a compromise and settlement of this type had to be presented to the court for approval by means of a joint petition,\(^{56}\) either party might unilaterally withdraw from an agreement prior to that time. The court expressed no opinion on the

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55. 346 So. 2d 266 (La. App. 4th Cir. 1977).
question of unilateral withdrawal after verification and filing of a joint petition but before court approval.

Substitution of Parties

An injured employee died of non-employment causes before he could file suit claiming a total and permanent disability award and medical benefits. There appeared to be no dispute that his injury was work-related. He was not survived by a wife, children or dependents, but his parents brought a compensation suit to recover disability benefits which had accrued in their son’s favor in the six months between the injury and his death, as well as medical expenses. They did not seek death benefits, nor did they claim dependency upon him.

The trial court sustained exceptions of no right of action, no cause of action and lack of procedural capacity, on the ground that the right to recover them was personal to the employee and abated at his death. The appellate court affirmed, but the supreme court reversed. The supreme court found no provision in the Compensation Act relative to the abatement of an employee’s action for compensation benefits which have accrued to him before his death, and rejected plaintiffs’ argument that article 2315 of the Civil Code should govern the case.

But the court did accept the argument that articles 426 and 428 of the Code of Civil Procedure establish a general rule of transmission of the right to enforce an obligation from an obligee to his heirs or legatees, even in those instances in which an action has not been commenced at the obligee’s death. The only exception is an action which is strictly personal. The court concluded that an action such as this one was not strictly personal, and recognized a “vested right” in the heirs of the employee to enforce payment of the medical expenses and disability benefits which

59. LA. CODE CIV. P. art. 426:
An action to enforce an obligation is the property of the obligee which on his death is transmitted with his estate to his heirs, universal legatees, or legatees under a universal title, except as otherwise provided by law. An action to enforce an obligation is transmitted to the obligee’s legatee under a particular title only when it relates to the property disposed of under the particular title.
These rules apply also to a right to enforce an obligation, when no action thereon was commenced prior to the obligee’s death.
60. Id. art. 428: “An action does not abate on the death of a party. The only exception to this rule is an action to enforce a right or obligation which is strictly personal.”
accrued until he died. The fact that the employee had not filed a suit for these benefits and expenses is of no moment. The obligation to pay these benefits and expenses is to be treated as an ordinary debt owed to the deceased, collectible by his personal representatives. 61

**Technical Rules of Evidence**

It is known, of course, that the court in workmen’s compensation cases “shall not be bound by technical rules of evidence or procedure,” 62 a statement which is supposed to have prompted some best-forgotten wag to wonder aloud which of the rules of evidence are not technical. The decision in *Highstreet v. Regency Apartment Hotel* 63 indicates that while this injunction gives the trial court considerable flexibility on the question of admissibility of evidence, there is not unfettered discretion. The deposition of a witness who had been difficult to locate was taken in the absence of plaintiff’s attorney, who had received only very short oral notice of the deposition but no written notice. At the trial, the witness was not presented and the deposition was admitted into evidence over plaintiff’s objection. Another witness offered hearsay testimony, also admitted over timely objection. Upon dismissal of plaintiff’s suit by the trial court, appeal was taken raising these issues among others.

The appellate court limited itself to the observation that the admission of the hearsay testimony and the deposition was “questionable” 64 and opined that without it, there would be little support for the trial judge’s conclusion that the employer had met its burden of establishing a defense under section 1081 (employee’s willful intention to injure himself or injure another). However, the appellate court found that, for other reasons, it agreed with the result reached by the trial court, and thus affirmed its decision.

61. See LA. CIV. CODE art. 1999; MALONE, supra note 2, § 301.
63. 337 So. 2d 536 (La. App. 4th Cir. 1976).
64. Id. at 539.