Public Law: Workers' Compensation

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Repository Citation
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WORKERS' COMPENSATION

Alston Johnson*

DISABILITY: ADOPTION OF "ODD LOT" DOCTRINE

After this symposium was first written, the supreme court handed down three opinions in which the so-called "odd lot" doctrine was adopted for use in Louisiana.¹ This doctrine has been discussed previously in this forum² and elsewhere,³ and no extended treatment will be made at this juncture.

The opinion in Oster v. Wetzel Printing, Inc.,⁴ one of these three decisions, summarizes the characterization of an "odd lot" worker and its role in the disability determination as follows:

In determining whether an employee is permanently and totally disabled, it is not a prerequisite that he be absolutely helpless. If the evidence of his physical impairment and of other such factors as his mental capacity, education, and training indicates that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist, the injured employee is entitled to total disability compensation unless the employer or his insurer is able to show that some form of suitable work is regularly and continuously available to the employee within reasonable proximity of his residence.⁵

Due to her injury, age, and lack of education, the court held that the claimant in Oster was an "odd lot" worker and that the employer had not shown the existence of stable employment for her in the local labor market. In Turner,⁶ the same principles were adopted,

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¹ Oster v. Wetzel Printing, Inc., __ So. 2d ___ (La. 1980); Turner v. American Mut. Ins. Co., __ So. 2d ___ (La. 1980); Dusang v. Henry C. Beck Builders, Inc., 389 So. 2d 367 (La. 1980). The author of the opinions in Oster and Turner was Mr. Justice Dennis; the author of the opinion in Dusang was Mr. Chief Justice Dixon. See also the concurring opinion of Judge Stoker in Rushing v. Ins. Co. of North America, __ So. 2d at ___ (La. App. 3d Cir. 1980) (Stoker, J., concurring), suggesting such an adoption.
⁴ __ So. 2d ___ (La. 1980).
⁵ __ So. 2d at ___.
⁶ __ So. 2d ___ (La. 1980).
but the matter was remanded for further evidence on the availability of alternative employment.

In Dusang, the claimant was an ironworker and welder who suffered injuries to his wrist and shoulder in a fall on the job. After treatment, he returned to work but continued to complain of pain. The evidence of pain was uncontradicted, though its severity was somewhat less than that complained of by other workers in "substantial pain" cases. Nonetheless, the trial court awarded Dusang benefits based upon total and permanent disability, no doubt on the basis of "substantial pain." The appellate court narrowly amended the judgment to one based upon partial disability.8

The supreme court analyzed the evidence on pain and held that Dusang was suffering substantial pain, though it characterized the testimony of pain as "not so strong" as that in a recent total disability case which it had decided.9 But the court then held that even a worker suffering substantial pain is not necessarily totally and permanently disabled, unless he can show himself to be in the "odd lot" category of workers, as defined.

Adoption of the "odd lot" doctrine in these three cases is significant and will undoubtedly aid all judges in grappling with the new disability standard. It is particularly important that one of the deci-

7. There are numerous appellate decisions dealing with substantial pain since the enactment of the new disability standards in 1975. In most of them, the claimant was awarded benefits on the basis of total and permanent disability, even though in some instances it was shown that he had returned to gainful employment. See Richard v. Standard Fittings, 379 So. 2d 33 (La. App. 3d Cir. 1979); Lemoine v. Employers Cas. Co., 378 So. 2d 594 (La. App. 3d Cir. 1979); Guidry v. Ford, Bacon & Davis Const. Corp., 378 So. 2d 352 (La. App. 3d Cir. 1979) (partial disability); Jones v. Arnold, 371 So. 2d 1258 (La. App. 3d Cir. 1979); Simmons v. State, 368 So. 2d 775 (La. App. 3d Cir. 1979); Bonnette v. Travelers Ins. Co., 367 So. 2d 1261 (La. App. 3d Cir. 1979); Wright v. Liberty Mut. Ins. Co., 357 So. 2d 1213 (La. App. 3d Cir.), cert. denied, 360 So. 2d 1180 (La. 1979); Rachal v. Highlands Ins. Co., 355 So. 2d 1355 (La. App. 3d Cir.), cert. denied, 358 So. 2d 645 (La. 1978); Phillips v. Dresser Eng'r Co., 351 So. 2d 304 (La. App. 3d Cir.), cert. denied, 353 So. 2d 1048 (La. 1978). In many of these, the employer offered no evidence of other jobs available to a non-working claimant.

8. Dusang v. Henry C. Beck Builders, Inc., 379 So. 2d 775 (La. App. 4th Cir. 1980) (five-judge panel, with one judge concurring with separate reasons and two judges dissenting).

9. 369 So. 2d at 371. The court noted that elements of the "odd lot" doctrine had played a role in previous supreme court decisions, even its most recent "substantial pain" case. Whitaker v. Church's Fried Chicken, Inc., 387 So. 2d 1093 (La. 1980); Lewis v. St. Charles Parish Hosp. Serv. Dist., 337 So. 2d 1137 (La. 1976); Futrell v. Hartford Accident & Indem. Co., 276 So. 2d 271 (La. 1973). In Whitaker, it was significant that the claimant was a person of very limited education who probably never could have been trained for the type of job which his physical post-injury condition would permit him to hold.
sions is a "substantial pain" case, since this indicates that the fact that the worker labors in pain (though a very persuasive factor) should not entirely determine the question of disability. Use of a "substantial pain" criterion as the only factor in a disability determination eventually would have destroyed any chance of uniformity, since pain is so subjective and difficult to measure or analyze. For one to consider the overall picture of the worker in the context of the labor market is a much better idea: given his residual disability and given his level of pain (if any), can we realistically expect that he will be able to hold regular employment? The "odd lot" doctrine, working in tandem with the new partial disability provisions, will give lawyers and judges the flexibility and expert testimony to decide that question as it ought to be decided.

MULTIPLE EMPLOYERS

Problems posed by multiple employment continue to plague Louisiana appellate courts. Multiple employment may take any number of forms, but some recognizable categories may be singled out for discussion. An employee might be employed regularly by one employer but temporarily "borrowed" by another for a different task. Such a transfer of employment should not really be termed "multiple" employment, since the employee actually has only one employer at any point in time. Such an employee, however, is permitted to seek compensation against either his regular employer or his "borrowing" employer.10 Under the circumstances, it is not surprising that the "borrowed employee" situation is discussed as if it were one of multiple employment. However, there were no significant decisions during this term involving borrowed employees.

A worker may also labor a part of the day at one job, and then "moonlight" at a separate job. Again, this should not actually be called multiple employment but rather successive employment. In common parlance, it may be said that the worker is holding two jobs at once. In legal terms, however, he has a separate contract of employment with each employer, devoting different portions of his day to each one. The compensation statutes make no specific reference to that situation, and the Louisiana courts have consistently fixed the rights of the employee to basic compensation benefits in accordance with the contract of employment under which he was working at the time of injury.11 For those purposes, any separate contract of employment would be irrelevant, and no contribution between the

employers would be appropriate. Such a result does not mean, of course, that the worker employed twenty hours a week at each of two jobs is only entitled to a wage determination based upon a twenty-hour work week. The definition of "wages" in the Act requires calculation of compensation benefits to be based upon a minimum of forty hours of employment per week.12

The decision during this term in Lott v. Louisiana Power & Light Company,13 a situation of successive employment, affirms this result. The decedent was employed as a "contract pumper" by Employer A for a monthly sum equivalent to $96.25 per week. He also was employed in the same capacity by Employer B (an entirely separate concern, for work at a separate location) for a monthly sum equivalent to more than $500.00 per week. He was killed while in the course of his employment for Employer A. The insurer of Employer A paid compensation benefits based upon the weekly wage payment to the decedent by Employer A. The decedent's spouse and children sought an increase to the applicable maximum, claiming that benefits should be based upon the combined weekly earnings of the decedent from both jobs. The insurer of Employer A interposed a plea of prematurity4 on the ground that it was paying maximum allowable benefits under the Act, since only the wage earned with Employer A should be considered. The trial court sustained the exception, and the court of appeal affirmed. The appellate court correctly observed that the decedent was not "jointly" employed at the job in which he was injured. Accordingly, the proper benefits were to be fixed according to the wage paid by the employer in whose service he was injured.

Had the decedent in Lott been jointly employed to perform a single task, the burden of compensation would be shared by his joint employers.15 This situation was presented in Fontenot v. Town of

12. LA. R.S. 23:1021(7) (1950 & Supp. 1968): "'Wages' means average weekly wage at the time of the accident. The average weekly wage shall be determined as follows: (a) If the employee is paid on an hourly basis, his hourly wage rate multiplied by the average actual hours worked in the four full weeks preceding the date of the injury or forty hours, whichever is greater . . . ." The inclusion of this definition in the Act by virtue of Act 25 of 1968 codified the jurisprudential position that a person working fewer than forty hours a week at an hourly rate was entitled to benefits as if he had been working forty hours a week. It also expressed the legislative intention that overtime, if any, should be included in calculation of benefits. Whether that overtime had to be in the employ of the same employer was not made clear, an ambiguity that led to some of the problems discussed in this symposium.
15. LA. R.S. 23:1031 (1950): "In case any employee for whose injury or death payments are due, is at the time of the injury, employed and paid jointly by two or
Kinder. The claimant worked at a trash dump owned by the town of Kinder. The town had an agreement with Allen Parish that the dump also would receive trash collected outside the town by parish employees. The agreement called for the parish to provide certain heavy equipment for use at the dump and to share the salaries of individuals who worked there. The claimant worked part-time at the dump (forty-eight hours a week, but only two weeks a month). The town paid him for one forty-eight-hour work period at $2.10 per hour; the parish paid him for the other forty-eight-hour work period at $2.00 per hour. He was injured while burning trash at the dump.

The court concluded that the claimant was jointly employed by the town and the parish. Under the circumstances, the Act required that the compensation benefits to which he was entitled be shared by the employers according to their "several wage liabilities." The process of decision in these cases, entirely proper in each instance, revealed some unresolved problems in other parts of the Act. The plaintiff in Lott, in the effort to convince the court to look to all sources of the worker's income to calculate benefits, cited the recent decision of Jones v. Orleans Parish School Board. The claimant in Jones was a school teacher who suffered injuries while attempting to break up a fight between two students. The evidence revealed that at the time of his injury, he not only was working as a teacher; he also was a car salesman. After the injury, he returned to selling cars.

The parties agreed that the plaintiff was only partially disabled under the Act, since he was able to return to gainful employment in some capacity. Such a person is entitled to two-thirds of the difference between "the wages" he was earning at the time of injury and "any lesser wages" which he "actually earns" in any week thereafter. The appellate court found the record inadequate on the

more employers subject to the provisions of this Chapter, such employers shall contribute to such payments in proportion to their several wage liabilities to the employee . . . ."

16. 377 So. 2d 554 (La. App. 3d Cir. 1979), cert. denied, 379 So. 2d 1102 (La. 1980).
17. The opinion does not state whether the injury occurred during a week in which he received a check from the town or one in which he received a check from the parish. In any event, this ought to be irrelevant. The employee could have received in each week that he worked 50% of what was owed him by one employer, and 50% of what was owed him by the other. The evidence seems clear that he was jointly employed by the two employers to perform the same task for each.
19. 370 So. 2d 677 (La. App. 4th Cir. 1979).

Compensation shall be paid under this Chapter in accordance with the following schedule of payments: . . . . (3) For injury producing partial disability . . . sixty-six
question of weekly wages and remanded the case for the purpose of taking additional evidence on the point. However, the court stated that determination of the difference in pre-injury earnings and post-injury earnings must be made by comparing all pre-injury earnings (teaching salary plus earnings from selling cars) to all post-injury earnings. The court in Lott rejected the analogy drawn by the plaintiff from the Jones decision, and in fact indicated its disapproval of the Jones rationale even in the context of partial disability.

The court's pronouncement in Jones deserves additional comment. Prior to 1975, the problem would have been rare, because partial disability cases themselves were so rare. The statute called for benefits based upon difference in wages in the case of partial disability; but total disability was so easy to establish that very few decisions of partial disability were rendered. The post-1975 statute should, in theory, produce more partial disability awards, since a worker able to return to some steady, gainful employment should be considered partially disabled.

Thus the question will become quite important: when we consider what the partially disabled worker used to make and what he now makes, should we consider all sources of income? The Jones court was of the opinion that a simple measurement of the "school teaching salary against present earnings as a car salesman . . . would unjustly penalize the plaintiff for moonlighting to pay his

and two-thirds per centum of the difference between the wages the employee was earning at the time of the injury and any lesser wages which the injured employee actually earns in any week thereafter in any gainful occupation for wages . . .

The definition of "wages" given in R.S. 23:1021(7) states only that "wages" means the hourly wage rate "multiplied by the average actual hours worked in the four full weeks preceding" the injury. Thus, one could argue, as Jones did, that the average actual hours worked at all employment would be a part of "wages."

21. The court specifically excluded from any consideration upon remand the amount of Jones' "pension" (presumably retirement benefits being received from the school board), as part of post-injury wages or earnings. In theory, this is not an amount which he "actually earns" in a given week after the injury. If it represents to some extent deferred earnings, he "actually earns" these sums prior to his injury and retirement. However, the question is not without considerable importance. If the Act is not a wage-protection plan, but merely a minimum protection of loss of earning capacity, should it attempt to replace earning capacity lost because of old age rather than work-related disability? Even though R.S. 23:1221(2) (1950 & Supp. 1968) requires that total disability benefits, for example, extend for the period of disability, is it wise to continue them to the age of eighty-five when other benefits are now available to replace lost earning capacity (i.e., Social Security payments, retirement benefits, etc.), and when earning capacity might in any event have been diminished or lost due to retirement, regardless of injury?

22. W. Malone and A. Johnson, supra note 3, at § 275 n.65.
family expenses." At first glance, it does appear that such a measurement would not give Jones benefits based upon the difference between his former "wages" and his present "wages."

However, upon closer examination, the alleged unfairness is less apparent. The Act is not a wage-insurance plan. Rather, it is a legislative scheme intended to insure a basic minimum subsistence to persons now wholly or partially disabled from earning due to work-related injuries. This is apparent when one considers the plight of two injured workers now wholly disabled. Even if one earned $300 per week prior to his injury and the other $1,000 per week, they receive precisely the same benefit check: the statutory maximum. The higher-paid worker may argue that this is unfair, and he would be right if the legislative objective were a wage-replacement plan. But the legislative intent is to guarantee basic subsistence levels thought to be reasonable and economically feasible, not to replace wages at pre-injury levels. If the higher-paid worker wants a wage-replacement plan, he will have to purchase it in the private sector.

This basic premise suggests the answer to the court's dilemma in Jones. The employer in whose service the injury occurred (the school board) may properly be asked under the Act to pay benefits based upon a forty-hour work week. This will be the case, as we have seen, whether the employee worked two hours a week, or twenty hours a week, or actually worked forty hours each week. The definition of wages under the Act requires that minimum response. And if that employer requires or permits the employee to work more than forty hours a week, then the benefits may properly be based upon the actual number of hours worked. But such overtime will be a matter wholly within the control of the employer. If the employer only wishes the employee to work forty hours a week and concomitantly only desires the compensation exposure which that entails, then the employer can refuse any overtime employment. If the employer makes the business judgment that overtime is required or desirable and thus knowingly exposes himself to the additional compensation benefits, then he may properly be asked to pay benefits based upon hours beyond the normal forty-hour week.


24. Two-thirds of the average weekly wage of each worker would exceed the statutory maximum payable under the Act for injuries occurring between September 1, 1980 and September 1, 1981. Therefore, each is limited to the maximum. See LA. R.S. 23:1202 (Supp. 1975).


26. The premiums which may be charged the employer are calculated on the basis of the wage rate of each employee and the number of overtime hours (if any) that each
But if the employer is made to respond at the rate of sixty hours a week because the employee works forty hours a week for the employer and twenty hours a week for someone else, then the employer is being asked to compensate the employee for work hours over which he has virtually no control. He is in essence being asked to provide the employee with wage-protection insurance beyond the requirements of the Act.

In the specific factual situation present in Jones, the claimant should be entitled to the difference between the “wages” which he earned in the employ of the defendant employer (the school board) and the “wages” he actually earns in any given week thereafter. The Act guarantees that this will be a minimum of a forty-hour work week and any additional hours of overtime that Jones worked for the school board during the four weeks preceding injury. To the extent that Jones' employment with the school board has caused him to lose a portion of the basic earning capacity of forty hours (or actual hours worked with the permission of the school board in its employ), the Act grants him a remedy. But to the extent that Jones now “actually earns” the same wages that he previously earned with the school board (and therefore presumably has the same basic earning capacity7 which he had prior to his injury), the Act cannot assist him. To take account of all of his pre-injury earnings in the partial disability calculation would be to convert the Act into a wage-protection insurance policy.

DOMESTIC EMPLOYEES

Louisiana is among the overwhelming majority of jurisdictions which do not extend compensation benefits to domestic employees and other workers not employed in a trade, business, or occupation. In fact, only one state appears to cover such workers under its compensation act.8 In 1972, the National Commission on State

works. An employer who regularly pays overtime hours to his employees can expect that his compensation premiums will ultimately reflect this additional exposure.

27. “Earning capacity” and wages “actually earned” are not necessarily identical. Many compensation statutes use earnings as a measure of earning capacity because this normally is a simple and convenient method of calculation. But in times in which jobs are scarce and persons are working only a few hours a week, earnings would not be a good measure of capacity. And in some instances, feelings of loyalty or sympathy may lead an employer to pay wages which reflect a greater earning capacity than the employee actually has.

Workmen's Compensation Laws included in its nineteen recommendations the suggestion that states cover "household workers and all casual workers . . . at least to the extent they are covered by Social Security." Many of the recommendations have been implemented by the great majority of jurisdictions, but this recommendation has not met with any significant approval.

The result in Morgan v. Equitable General Insurance Company, decided during this past term, appears to indicate a change in Louisiana's position. But appearances can be deceiving. The claimant was employed as a domestic employee by the defendant's insured. Her duties included ordinary household chores as well as incidental care for an elderly blind person who lived in a small guest house on the insured's property. Her responsibilities in the latter regard encompassed cleaning the guest house, doing laundry for the resident, and delivering meals which she cooked in the insured's home.

The claimant injured her ankle during one such food delivery to the guest house. Though she returned to work after medical treatment, she found that she could not continue her employment. There seemed to be little dispute that she was rendered totally disabled by the incident.

The insured paid the claimant a weekly wage of $76.50 at the time of injury, approximately two-thirds of which came from the insured's funds and the remainder from funds available to the resident of the guest house. The claimant also was entitled to one meal a day and transportation to and from work.

The trial court held that the claimant was entitled to compensation benefits, and the appellate court amended the amount of benefits slightly but affirmed. The opinion does not reflect serious objection by the defendant on the question of basic coverage for domestic employees under the Act. And it must be conceded that the holding of both courts is that the claimant, even though a domestic employee, was entitled to compensation.

30. 383 So. 2d 1067 (La. App. 3d Cir. 1980).
31. The trial court had concluded that the claimant was a hourly-wage employee at a rate of $2.20 per hour, and multiplied that rate by forty hours under the authority of R.S. 23:1021(7) to obtain an average weekly wage. The insured's wife had testified that she attempted to pay a weekly sum which, when combined with meals and transportation provided, would equal the then minimum wage of $2.20 per hour. The appellate court reasoned that the claimant was paid a weekly wage, and that no calculation under R.S. 23:1021(7) (1950 & Supp. 1968) was required for such a person. Thus it awarded benefits based upon the monetary weekly wage plus the value of the meals and transportation. This had the ultimate effect of reducing the claimant's weekly benefit from the then statutory maximum of $85.00 to $69.00.
Nevertheless, the case is an unusual one and should not be regarded as authority for expansion of the Act to domestic employees. Though the opinion does not reflect it, the insured owned some rental property. He employed a handyman to maintain the property, and purchased compensation insurance from the defendant to cover the handyman’s employment. The claimant’s salary also was listed as a part of the payroll for premium and audit purposes, though she worked at the rental property only on a very sporadic basis. The existence of the policy and the listing of the claimant’s salary led the plaintiff to argue that R.S. 23:1166 would not permit the insurer to deny compensation coverage:

When an insurance company issues a policy of insurance to an employer covering claims for injuries to employees that may arise within the scope of the employer’s business, the insurance company shall be estopped to deny liability on the grounds that the employment was not hazardous and during the period such insurance is in effect, claims for injuries occurring during such period by such employees against the employer or the insurance company shall be exclusively under the workmen’s compensation act.

The same insurance policy contained liability coverage for tort claims. After the defendant had argued in the trial court that no compensation coverage was available for the claimant, and had urged that same argument in brief in the court of appeal, the claimant filed a separate tort suit against the defendant. Subsequently, the defendant abandoned by written motion its appeal on the issue of coverage under the Act, limiting its appeal to the question of amount of benefits. No doubt the defendant thought that compensation liability would be less expensive than the threatened tort liability in the pending lower court litigation. Since there was an abandonment of the assignment of error on the coverage issue, the appellate court affirmed the trial court’s holding on that point without discussion. The parties subsequently agreed on a discounted lump sum payment of the compensation due, and the tort suit was dismissed.

Under the peculiar circumstances, the result may have been just. But neither the cited portion of the Act nor a recent amendment should be taken as extending coverage to domestic employees. Such an important extension should be legislative in nature and clear in intendment. The cited portion of the Act was passed at a time when coverage extended only to hazardous businesses. If an insurer had collected premiums from an employer on the basis that the business was hazardous and was covered, it was estopped from denying that character of the business in litigation. But the section
applies to "claims for injuries to employees that may arise within the scope of the employer's business." To read the section as argued by the plaintiff in Morgan would deprive the employer or his insurer of the defense that the specific injury in a given case is not traceable to the employer's business. This is a legitimate argument, and the purchase of an insurance policy should not prevent such an argument. The claimant in Morgan was not engaged in the business of her employer at the time of her injury. She was performing a purely domestic chore, and it does not appear that she had only temporarily been delegated to that task and diverted from regular employment in an ongoing business.

A recent amendment to the Act, however, also might be read to extend coverage to domestic employees. R.S. 23:1035, a remnant from the pre-1975 Act, is the basic coverage provision, stating that the compensation statutes "shall also apply to every person performing services arising out of and incidental to his employment in the course of his employer's trade, business or occupation . . ." Act 465 of 1979 added to that section the provision that the statutes

32. This was the case, for example, in Whitney v. United States Fidelity & Guar. Ins. Co., 373 So. 2d 728 (La. App. 2d Cir. 1979), cert. denied, 376 So. 2d 320 (La. 1979) (Summers, Marcus and Blanche, JJ., dissenting), also decided during this past term. The claimant was employed part-time by a furniture company to do carpentry and security work. The president of the company instructed the claimant to accompany him on a hunting trip in order to make necessary repairs to a camphouse on property leased to the president and others. Plaintiff was injured on the trip, not while doing the repairs but while accompanying the president and others on a quail-hunting venture. Plaintiff testified that he was accompanying the president on the quail-hunting venture to become familiar with the property so that he might later entertain any other guests in the president's absence. He was held entitled to compensation on the ground that the injury was incidental to his employment and at the direct instructions of his employer. See W. Malone and A. Johnson, supra note 3, at § 16.

33. Prior to its amendment in 1979, the section in its entirety read:

The provisions of this Chapter shall also apply to every person performing services arising out of and incidental to his employment in the course of his employer's trade, business, or occupation, except that the bona fide president, vice-president, secretary, and treasurer of a corporation who owns not less than ten percent of the stock therein, or a partner with respect to a partnership employing him may by written agreement elect not to be covered by the provisions of this Chapter. Such an election shall be binding upon the employing corporation or partnerships and the widow, relatives, personal representative, heirs, or dependents of the officer or partner so electing. No salary or compensation received by any such bona fide corporate officer or partner so electing or a sole proprietor shall be used in computing the premium rate for workmen's compensation insurance.

shall apply to every person performing services arising out of and incidental to his employment in the course of "his own trade, business or occupation . . . ." The argument could be advanced that a domestic employee is conducting his own "business" of domestic services, and any injuries in "his own" business should be compensable. Though the wording of the amendment is susceptible of such an interpretation, this was almost certainly not the legislative intention.

The title to House Bill 984, which became Act 465, stated that its object was "to provide that a person in the course of his own trade, business, or occupation or a sole proprietor may elect not to be covered by workmen's compensation . . . ." Any salary paid to a person so electing would not be included in the calculation of premiums for compensation coverage for such a business. This is a legislative permission for such a person to bear his own accident costs rather than to have them borne by his own business. The only logical conclusion is that such a person is already covered under the Act because he is "employed" by a separate legal entity, but now wishes for financial reasons to opt out of coverage. A domestic employee cannot cogently argue that he or she is "employed" in his or her own trade or business, since a contract of employment requires the agreement of two natural or legal persons. The amendment could have been better drafted, making it clear that its only intent was to permit otherwise covered persons to exclude coverage and not to extend coverage to persons not presently covered under the Act.

Nothing in this discussion is intended as a statement on the wisdom of excluding domestic employees from compensation coverage. This is a serious problem affecting a segment of society least able to bear its own accident costs. But the solution should be direct legislative response, not indirect or jurisprudential resolution.

ACCIDENT: IDIOPATHIC FALLS

The decision in Guidry v. Serigny appears to commit the Supreme Court of Louisiana to the view that an idiopathic fall squarely within the course of employment also arises out of employment and therefore is compensable. The plaintiff was employed as a cook in the defendant's restaurant. On the way to the kitchen from a

34. 1979 La. Acts, No. 465 (Secretary of State’s Official Publication). This intent seems even clearer at several other points in the Act, at which the reference to persons who may opt out of coverage is to “sole proprietorships” or to “sole proprietors.” No additional reference is made in those portions to a person employed in “his own” trade.

35. 378 So. 2d 938 (La. 1979).
storage area, she fell and suffered a back injury. The cause of her fall was never conclusively determined. It might have been due to the slipperiness of a newly waxed floor, or to a heart attack, or even to a fainting spell. Both the trial court and the appellate court found that the fall was not a result of wax on the floor, but a result of some physical problem of the plaintiff not brought on or in any way connected with her employment. Accordingly, compensation was denied.36

The supreme court reversed, reasoning that the fall itself was the accident suffered by the claimant and that the precise cause of the fall was immaterial.37 Since the accident occurred squarely within the course of the claimant's employment, she was entitled to the benefits of the liberal arising-out-of test developed following Kern v. Southport Mill.38 She was actively engaged in her employer's business, and the necessities of that business required that she be at the place of her injury. Accordingly, the court held that her injury arose out of her employment as well.

Intermediate appellate decisions in Louisiana have been ambiguous over the years on the basis for granting compensation in such cases. Most cases used an "increased risk" test. If a worker suffered an injury initiated by some idiopathic physical problem, he would be entitled to compensation if he could show that the physical environment in which he worked contributed to the ultimate injury in some way. Such cases are cited by the court in Guidry: burns suffered when an epileptic seizure caused a night watchman to fall into a fire; burns suffered when an epileptic seizure caused a night watchman to fall into a fire;39 injuries suffered when a worker being transported tried some chewing tobacco (to which he was unaccustomed), became dizzy, and fell from the truck;40 and death in an automobile collision following the diabetic coma of a traveling salesman susceptible to such problems.41 In each situation, it could cogently be argued that the

37. The court remanded the case for the taking of additional evidence on the extent of the claimant's disability.
38. 174 La. 432, 141 So. 19 (1932). The court in Kern reasoned that whether an accident arises out of employment must be determined by time, place, and circumstance. It concluded that an accident arises out of employment if the employee was engaged about his employer's business at the time of injury and the necessities of the employer's business required that he be at the place of the accident at the time of its occurrence. This has subsequently been referred to as the time-place rule of Kern, though it might just as well have been called a positional-risk approach. See W. Malone and A. Johnson, supra note 3, at §§ 191-92, 382-92.
environment in which the worker found himself "caused" the actual injury, or at least aggravated it.

The same argument could have been advanced in the Guidry case. It might have been contended that the "cause" of the plaintiff's injury was that the employer's floor was so hard that a back injury occurred, or perhaps that the plaintiff struck some cooking equipment on her way down. But the supreme court did not base its decision on that ground. It simply held that although a fainting spell or attack idiopathic to the plaintiff may have caused her to fall, it was the fall itself that caused her injury, without reference to her environment.

The result in Guidry is unremarkable, and probably could just as easily have been reached on an "increased risk" argument. But the absence of such language in the opinion suggests that the court may have adopted a "positional risk" concept in such cases consistent with its approach in other areas of compensation law. If the employee is squarely within the course of his employment, one may except to find that virtually any risk will be regarded as compensable. This probably has been the case ever since the wandering tornado happened upon the plaintiff's decedent squarely in the course of his employment in Harvey v. Caddo De Soto Cotton Oil Co. in 1941. The court's adoption of such an approach in idiopathic fall cases minimizes the danger that an employee subject to such problems would be denied compensation on the pretext that the "accident" is not work-related, when the real reason would be a feeling that the employee is somehow "at fault" for being susceptible to such falls in the first place.

Employee "fault" of the non-intentional variety has no place in the Act. Louisiana has long been committed to the proposition that when the predisposition of an employee combines with a work accident to produce disability that would not have occurred in the case of a healthy employee, he is nonetheless entitled to benefits based upon that disability. It is consistent that the court should also hold that when the predisposition of an employee helps to cause the work accident, the resulting disability is compensable. The employer does

42. W. MALONE AND A. JOHNSON, supra note 3, § 191 at 382-419. When the worker finds himself only marginally in the course of his employment, a different result might be appropriate. If the worker in question is provided car fare home as a part of her wages, and suffers her fall as she alights from the bus in front of her house, it might be unfair to assign responsibility for this risk to the employer.
43. 199 La. 720, 6 So. 2d 747 (1942).
take the worker as he finds him, whether the worker's condition tends to produce accidents or tends to make the results of accidents more severe when they actually occur.

RIGHTS AGAINST THIRD PERSONS

Two cases decided by the supreme court during this term dealt with the rights of the employer and the employee against a third party tortfeasor. In *Allstate Insurance Company v. Theriot*, a worker (Moore) was returning from medical treatment for a work-related injury. He was injured in an automobile accident, allegedly through the negligence of the defendant (Theriot). The compensation carrier filed suit against Theriot within a year of the accident, alleging that it had been required to pay additional compensation benefits because of aggravation of the work-related injury through Theriot's negligence. More than two years after the accident, Moore intervened in the suit, seeking tort damages against Theriot.

The trial court sustained a peremptory exception of no right or no cause of action to Allstate's petition, and one of prescription as to the intervention. The appellate court affirmed the dismissal of Allstate's petition and held that Moore's intervention also should be dismissed because the principal demand had been dismissed for failure to state a cause of action. Thus the appellate court did not reach the prescription question with reference to the intervention. The supreme court, by a narrow margin, denied a writ with reference to the principal demand, but granted a writ to review the

45. 376 So. 2d 950 (La. 1979).
47. There were three dissents to the writ denial as to Allstate. Allstate Ins. Co. v. Theriot, 366 So. 2d at 559 (La. 1979) (Tate, Calogero, and Dennis, JJ., dissenting). Though the court of appeal had not reached the prescription question due to its disposition of the case, the supreme court granted certiorari to review that question as well. See LA. CONST. art. V, § 5(F).

The fact that the supreme court denied a writ on the issue of whether Allstate's petition stated a cause of action may be taken as weak approval of the proposition that an employer or insurer might not be liable in compensation for any aggravation of a work-related injury by the independent negligence of a third person, even though that negligence might have occurred in the course of medical treatment of the original injury. The fact that the court denied a writ to review the decision that such additional benefits may be recovered from the third person suggests either that (a) the court believes that such benefits for the aggravation should not be recoverable from the employer or insurer in the first place; or (b) if recoverable, they should remain with the employer or insurer and not be shifted to the tortfeasor; or (c) the case was not an appropriate one in which to deal with the issue.

The question of benefits for aggravation of a work-related injury by the negligence of a third person has divided other jurisdictions. Compare Immer & Co. v. Brosnahan, 207 Va. 720, 152 S.E.2d 254 (1967) (compensation awarded for injuries suffered in
dismissal and prescription questions with reference to the intervention. 48

The supreme court first held that the intervention did not fall with
dismissal of the main demand, a ruling not here pertinent. Then it
approved its earlier position in National Surety Corp. v. Standard
Accident Insurance Company 49 that a timely suit by a compensation
carrier for reimbursement of compensation paid to an injured em-
ployee interrupts prescription running against the employee's own
tort action.

This seems to be a correct result, though the issue is a close
one. The court in the instant case repeats the language of National
Surety that "there is only one principal cause of action" when a tort-
feasor injures an employee. Later the court refers to the rights of
the employer or insurer and those of the employee as being the
same cause of action, but places the word "same" in quotation
marks. Both of these references suggest some confusion as to the
number of "causes of action" which might have been created by
the tortfeasor's conduct. Indubitably the court discusses the issue with
the thought that its resolution holds the key to solving the problem
of prescription. Perhaps this reliance is misplaced.

Insofar as the question of single versus multiple causes of action
is concerned, plausible authority exists to support both sides of the
issue. When the compensation act was first passed, the rights of the
employer were based on the principle of subrogation. 50 It probably
would have been appropriate then to refer to a single cause of action,
a portion of it having been granted to the employer by subrogation
upon payment of the compensation benefits due. Shortly thereafter,
the reference to subrogation was deleted. 51 The injured employee
and the employer are now each entitled to proceed against a third
person in whom there has been created "a legal liability to pay dam-
ages . . . ." With reference to the employee, the language may be

49. 247 La. 905, 175 So. 2d 263 (1965).
50. 1914 La. Acts, No. 20 section 7 provided that the employer having paid com-
penstation, or having become obligated to do so "shall be subrogated to the rights of
the injured employee" to recover against third persons.
51. Act 247 of 1920 amended that portion of the statute referring to the
employer's rights against third persons so that it read almost identically to its present
reading (codified as La. R.S. 23:1101 (1950 & Supp. 1976)), which is: "Any person hav-
ing 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."
superfluous. He already had that right prior to the compensation Act, and unless the Act took that right away from him, he should be entitled to assert it. As for the employer, the Act is the source of a new right, as it was the source of a new responsibility. The employer's damage for which he seeks reimbursement is not caused solely by the conduct of the tortfeasor. It is caused by the conduct of the tortfeasor and the requirement of the compensation Act that under certain circumstances he pay designated benefits to the injured worker. In fact, were it not for the compensation Act, the employer probably would have no cause of action against the tortfeasor at all.

If one focuses primarily on the conduct of the tortfeasor and reasons that a single act on his part has caused two different types of damage, or damage to different individuals, one might argue that there is but one cause of action. If one focuses primarily on the source of the rights of the two plaintiffs, the argument might be advanced that the employee's action arises purely out of tort law, and the employer's action out of a combination of tort and compensation law. This suggests support for a multiple cause of action theory.

But the real purpose of prescription statutes is not to resolve fine questions concerning causes of action. Rather, such statutes exist to encourage prompt resolution of disputes by giving adequate notice to the proposed defendant and by avoiding undue prejudice in his defense of the claim made against him. This policy was recognized by the court in the Theriot decision. When either the employer or the employee timely sues on the basis of an injury which was covered by the compensation Act, the defendant should be aware that the law provides a remedy for the other. Not only are the two possible plaintiffs related by a contract of employment, but their potential award will be based upon a division of what the proper tort damages would be if the compensation Act never existed.

52. There is also support for this theory in other parts of the statute. If there is only a single cause of action, why would the statute provide that the employer or employee "may" intervene in the other's litigation? See La. R.S. 23:1102 (1950). Why should we not require intervention, since otherwise this "single" cause of action might be subjected to differing judicial resolutions?

53. "The fundamental purpose of prescription statutes is only to afford a defendant security of mind and affairs if no claim is made timely, and to protect him from stale claims and from the loss or non-preservation of relevant proof . . . ." Allstate Ins. Co. v. Theriot, 376 So. 2d 950, 954 (La. 1979).

54. The theory of the Act is that any damages recoverable from the tortfeasor would be subjected first to the claim of the employer or insurer for reimbursement. The remainder would be available to the injured employee. Thus, the tortfeasor pays normal tort damages despite the existence of the Act; the employer takes a portion for reimbursement; and the employee receives normal tort damages, partially in compen-
Their claims can thus be distinguished from the legitimate hypothetical problems worrying the dissenters.\textsuperscript{55}

If the rule with reference to interruption of prescription is seen primarily in terms of adequate notice and no undue prejudice, then abuses can readily be corrected. If the employer or insurer timely sues and the employee intervenes five years later (or initiates a separate suit after the first is completed), the defendant may in appropriate circumstances urge that he will be prejudiced in his defense of the case. If he can show prejudice, and if the late party can show no reasonable excuse for the delay, then the claim should be dismissed.

The discussion about one cause of action or multiple causes of action also played a role in the decision in \textit{Roche v. Big Moose Oil Field Truck Service}.\textsuperscript{56} Both the employer and the employee's beneficiaries timely filed suits arising out of conduct chargeable to the defendant. The employer sought reimbursement for death benefits paid under the Act; the employee's family sought wrongful death damages. The employer's suit was filed one day before the family's suit. The appellate court has ruled that since the employer's suit was pending at the time the family's suit was filed, the latter suit would have to be dismissed and the family should intervene in the employer's suit.\textsuperscript{57} The supreme court reversed, holding squarely for the first time that the employee or his family is not required to intervene in the employer's pending action.

The court conceded that its ruling was inconsistent with the treatment accorded to an employer's suit when the employee's suit is pending. In \textit{Todd-Johnson Dry Docks, Inc. v. City of New}

\textsuperscript{55} Citing the brief of defendants, one of the dissenting justices wondered about the disposition of the claims of fifty bus passengers injured through the negligence of the bus driver. If only one passenger sues timely, would prescription be interrupted so long as that one suit is pending? That hypothetical situation can properly be distinguished from the one present in \textit{Theriot}. Notice that there were injuries to one bus passenger and what the extent of those injuries might be is not notice that there are necessarily injuries to others, or what the extent of those injuries might be. The passengers are not previously related by contract, and their contract is not subject to a special statute such as the Compensation Act which assigns certain responsibilities and rights to them because of the contract. When the tortfeasor injures an individual and is sued by either the employer or the employee alleging the contract of employment and coverage of the Act, he knows that the Compensation Act gives or protects certain rights in the other party to that contract.

\textsuperscript{56} 381 So. 2d 396 (La. 1980).

\textsuperscript{57} Roche v. Big Moose Oil Field Truck Serv., 371 So. 2d 1374 (La. App. 3d Cir. 1979).
Orleans, it was held by an appellate court in 1951 that an employer which failed to intervene in the pending suit of its employee could not later bring an independent tort action for reimbursement. This ruling was almost certainly based upon the notion that the action of the employer and the employee were the same; the court commented that the employer's rights were based upon subrogation to a part of the employee's action. This was a particularly curious ruling, since the Act then stated (and now states) only that either claimant is required to notify the other of the suit and that the other "may intervene."

It is correct for the supreme court to conclude in the light of that statutory language that the employee cannot be compelled to intervene. The statute is clearly permissive, not mandatory. In fact, unless the statute is amended, the earlier decisions requiring an employer to intervene should be overruled. If judicial economy dictates that the two claims be litigated together, as appears appropriate, then one of two legislative actions should be taken. Either the Act should be amended to require intervention rather than merely to permit it, or the Code of Civil Procedure should be amended to provide for consolidation of cases pending in different courts.

EXCLUSIVE REMEDY: DUAL CAPACITY OF EMPLOYER

The complexity of modern business organizations makes it possible that an employer might have more than one capacity. The manufacturer of vacuum cleaners, for example, may employ an individual

59. Todd-Johnson Dry Docks, Inc. v. City of New Orleans, 55 So. 2d 650, 656 (La. App. Orl. Cir. 1951). The court did not observe that the specific reference to subrogation in the Act had been deleted thirty years prior to its opinion. See text at notes 41-42, supra.
60. LA. R.S. 23:1102 (1950): "If either the employee or his dependent, or the employer, brings suit against a third person . . . , he shall forthwith notify the other in writing of such fact and of the name of the court in which the suit is filed, and such other may intervene as party plaintiff in the suit."
61. See LA. R.S. 1:3 (1950): "The word 'shall' is mandatory and the word 'may' is permissive."
63. The only present provision for consolidation is found in Code of Civil Procedure article 1561, which is limited to matters pending in the same court: "When two or more separate suits involving a common issue of law or fact are pending in the same court, the court, at any time prior to trial, may order the consolidation of the suits for trial or may order a joint trial of any of the common issues." The court in Roche eschewed a jurisprudential resolution of the multiple-court consolidation question.
to clean the executive suite at night. Of course, the manufacturer's brand of vacuum cleaner would be used. If the employee is injured by a defect in the vacuum cleaner or negligence in its manufacture, may he sue the manufacturer (his employer) in tort?

Jurisdictions have divided on the resolution of such questions. During this term, a Louisiana appellate court faced the question for the first time, albeit in a case in which the issue was fairly easy to decide. In Wright v. Moore, the plaintiff was a nurse employed by the Louisiana Department of Health and Human Resources. While in the course of her employment, she was injured in an automobile accident. The state of Louisiana, through the Department of Transportation and Development, was among the defendants named in her tort suit, on the ground that a malfunctioning traffic signal under the supervision of that department was in part responsible for the collision. After answering, the state moved for summary judgment on the basis that the plaintiff's exclusive remedy was in compensation since she was an employee of the state through another division. The motion was granted by the trial court, and that ruling was affirmed by the appellate court.

The court recognized that if an employer had more than one capacity, it might be appropriate to assign responsibility in tort in the capacity which was separate from that of the employer/employee relationship. But the court reasoned that the state had only a single capacity: providing essential state services. Although separate functions were involved in the two departments (health service and traffic control), they were related in the discharge of the state's governmental mission.

This result seems correct. The concept of the compensation statutes is to provide a prompt but limited recovery to an injured worker from his employer, leaving the worker free to seek more extensive damages from a "third party" tortfeasor. The amount of compensation paid by the employer is theoretically to be borne by those who purchase the product he makes or the service he provides. If the business of the employer is clearly divided into two unrelated capacities, one in which the worker is employed and the other in which he happens to be injured, it would be appropriate to cast the loss ultimately on the unrelated capacity. To the extent

64. 380 So. 2d 172 (La. App. 1st Cir. 1979). Accord: McGuire v. Honeycutt, 387 So. 2d 674 (La. App. 3d Cir. 1980) (employee of Department of Corrections cannot sue the state through Military Department in tort for negligence of employee of the latter).

65. The court also cited the discussion in 2 A. Larson, THE LAW OF WORKMEN'S COMPENSATION, § 72.80 (1976), which is a thorough analysis of the dual-capacity concept and the decisions dealing with it in the various jurisdictions.
that the consumers in one capacity can be wholly distinguished from those in the other, it is proper to assign the loss so that it can be spread among those who purchase the product "causing" the injury.

Of course, if the capacities cannot easily be separated, no particular advantage exists in attempting to divide them. In Wright, only one service was being provided, and only one group was paying for it. Any tort damages awarded to the plaintiff would ultimately have been paid for by the group of persons who pay taxes to the state.66

Other situations are more difficult to resolve. Suppose an individual operates a drugstore and, a few doors down the block, a laundromat. If a drugstore employee is delivering an item and is injured by a swinging door as he passes the laundromat, may he sue his employer in tort in his "capacity" as laundromat owner? It could be argued that the consumers of laundromat services should properly bear that loss and can be distinguished from the consumers of drugstore services.67

Or suppose the manufacturer mentioned earlier in this section manufactures lawnmowers, but has made a few vacuum cleaners for use around the plant. If these vacuum cleaners are not made for sale to the public, then it is plausible to argue that no tort suit against the employer should be permitted if a cleaning employee is injured. The manufacturer does not have a separate "capacity" as manufacturer of vacuum cleaners, and no group exists other than lawnmower purchasers to bear such a loss.

This should point us toward a conclusion regarding the hypothetical situation which opens this section. If an employee is injured while using a product also made available to the public, then it might be argued that he should not be deprived of his remedy as a member of the public simply because he happens to be employed in an entirely separate capacity. But in the example presented, it appears that the same group of persons will pay for his tort damage as

66. Thus it might be argued that if in Wright, the municipal government was responsible for the traffic signal which led to the injury of a state employee, a different result should follow. The group of persons who pay municipal taxes would be asked to bear this loss instead of the persons who pay state taxes. But even this distinction might prove too fine to be acceptable.

67. This seems to be a case in which it would be proper to permit the tort suit. However, in Hudson v. Allen, 11 Mich. App. 511, 161 N.W.2d 596 (1968), the court held that the employer was immune in tort in just this factual situation. It was probably important that though the businesses were separate in appearance to the public, they were wholly owned by the same individual, who kept all the records in common and paid taxes incurred in the operation of either business under the name of the drugstore. It might be argued, then, that the laundromat was not a separate capacity, but only another portion of the business premises separated by a short distance.
would pay for his compensation loss: those who purchase vacuum cleaners. This would suggest that compensation should be exclusive. 68

The court in *Wright* appears to have taken a sensible view in applying the dual-capacity test. Louisiana courts should approach such suits with care and, before permitting an employer to be cast in tort, should attempt to identify clearly the two "capacities" of the employer and to distinguish the two groups of persons whom he serves. If it appears that the same group which would bear the compensation loss will also bear the tort loss, then probably the employer does not actually have two "capacities" and should not be cast in tort.

**CONFLICT OF LAWS**

The claimant in *Jerry v. Young's Well Service* 69 was injured in Louisiana during the course of his employment for an Arkansas corporation. He brought suit in Louisiana, seeking benefits under the Louisiana Act. The compensation carrier for the employer brought a third-party demand against another Arkansas corporation and its insurer, alleging that the claimant had been injured in Arkansas two weeks prior to the Louisiana injury while the claimant was in the

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68. California reached an opposite conclusion in a similar case. In *Douglas v. E. & J. Gallo Winery*, 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977), it was held that employees of a scaffolding manufacturer stated a cause of action in tort for damages suffered when the scaffolding on which they were working collapsed. The *Douglas* court cited an earlier California decision with a similar result, *Duprey v. Shane*, 39 Cal. 2d 781, 249 P.2d 8 (1952). The claimant was an employee of a chiropractic clinic and was injured during her employment. The defendant chiropractor, also an employee of the clinic, undertook to treat her and allegedly did so in a negligent fashion. The claimant's tort suit against the clinic under these circumstances was held to state a cause of action, and the award in her favor was affirmed. The *Douglas* court distinguished two cases not permitting a tort suit against the employer in instances in which it was not shown that the injuring object was for sale to the public. *Shook v. Jacuzzi*, 59 Cal. App. 3d 978, 129 Cal. Rptr. 496 (1976); *Williams v. State Comp. Ins. Fund*, 50 Cal. App. 3d 116, 123 Cal. Rptr. 812 (1975).

See generally Comment, *Workmen's Compensation and Employer Suability: The Dual-Capacity Doctrine*, 5 St. Mary's L.J. 818 (1974) (suggesting that the California approach in *Duprey* has the laudatory result of deterring future similar conduct by the tortfeasor). So long as there is genuine "wrongdoing" involved, this may be accurate. But when liability is assigned to the employer only because of a "defect" in the product not traceable to "wrongdoing," this argument loses some of its strength. The matter then becomes similar to the issue faced by the Illinois court in *Eager v. Nathan*, 14 Ill. App. 2d 418, 144 N.E.2d 629 (1957), in which the court refused to permit an employer to shift his compensation loss to a tavern owner under the "no-fault" Dram Shop Act when a clerk in the employer's hotel was shot by persons to whom the defendant had sold liquor.

69. 375 So. 2d 186 (La. App. 2d Cir. 1979).
employ of that corporation and that the combination of the two in-
juries resulted in the disability. The third party demand sought con-
tribution from the Arkansas corporation. The parties stipulated that
the claimant's original employer (Arkansas injury) was not licensed
to do business in Louisiana, had no agent for service of process here,
and had done work in Louisiana only on one occasion. The parties
also stipulated that the claimant was not a Louisiana domiciliary at
the time he worked for either employer, and that the claimant never
worked in Louisiana for the original employer.

On these facts, the trial court sustained exceptions to the third-
party demand on the ground that it lacked personal jurisdiction over
the original employer, and on the ground that there was no right of
direct action against the compensation carrier of the original em-
ployer. Exceptions based on lack of subject matter jurisdiction were
overruled.

The court of appeal reversed in part, sustaining the exceptions
based upon subject matter jurisdiction and overruling those based
upon lack of personal jurisdiction. The result, however, was the
same: dismissal of the third-party demand for contribution.

The appellate court correctly observed that Louisiana tradi-
tionally has not applied Louisiana law to a compensation contro-
versy when both the employment contract and the injury occurred
outside of this state. Even the expanded test for application of
Louisiana law found in recent amendments to the Act probably
would not require a different result, since it hardly could be argued
that the claimant's employment was "principally localized" in this
state.

The court then turned its attention to the question of whether it
might apply some other state's law to the controversy. The court
properly recognized that in an occasional case, a Louisiana forum
could apply another state's compensation law if it could give the
claimant a complete recovery and if the administration of the other
state's law was compatible with the procedures of the Louisiana
forum. The compensation statutes in Arkansas, in common with

70. See W. Malone and A. Johnson, supra note 11, at § 407.
the application of Louisiana law to an out-of-state injury when the contract of hire was
"made in this state" or when the worker's "employment is principally localized in this
state."
72. See, e.g., Smith v. Globe Indem. Co., 243 So. 2d 882 (La. App. 1st Cir. 1971);
denied, 247 La. 613, 172 So. 2d 700 (1965). On this basis, the court refused to apply
Mississippi law in Woodham v. Travelers Ins. Co., 161 So. 2d 368 (La. App. 3d Cir.),
cert. denied, 246 La. 88, 163 So. 2d 360 (1964), concluding that the Mississippi remedy
most states, are administered primarily by an administrative commission. This is an approach largely foreign to Louisiana judges and lawyers, and the court concluded that it would be inappropriate to apply Arkansas law in a Louisiana forum. Thus it concluded that the court lacked "subject matter jurisdiction" over the third-party demand, requiring its dismissal.\(^3\)

The court made short shrift of another argument of the third-party plaintiff which probably deserved more attention. The third-party plaintiff argued that its contribution demand was not based in either the Louisiana Act or the Arkansas Act, but rather in the articles of the Civil Code relative to contribution among solidary obligors.\(^4\) Louisiana courts have recognized a right of contribution between two employers (or their insurers) when injuries in the separate employment of each have combined to produce the final disabling result in the employee.\(^5\) This right of contribution has no basis in the compensation Act itself. It is equitable in nature and of jurisprudential creation, having its only conceivable statutory basis in the Civil Code. The appellate court rejected this argument, noting in passing that the case cited by the third-party plaintiff in support of the proposition concerned injuries which were both compensable under the Louisiana Act.\(^6\)

The court was more distrustful of its adjudicatory powers than it should have been. On two different grounds, it might have decided that it had authority to resolve the third-party demand. In the first place, it easily could have accepted the claim of the third-party plaintiff that only Louisiana law was at issue on the actual contribution claim between the employers or their insurers. Though Arkansas law would have to be applied to determine the extent of the obligation of the original employer to the claimant, Louisiana law governing solidary obligors would govern their relationship to each other.

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was so intertwined with the Mississippi procedure that a Louisiana court could not fairly resolve the case.

73. **La. Code Civ. P. art. 2:** "Jurisdiction over the subject matter is the legal power and authority of a court to hear and determine a particular class of actions or proceedings, based upon the object of the demand, the amount in dispute, or the value of the right asserted." The issue in *Jerry* was not so much the authority of the court to determine the case, but rather its reluctance to apply the law of another state to do so.

74. **La. Civ. Code art. 2103.**


76. *Lum v. Tri-State Ins. Co.,* 252 So. 2d 157 (La. App. 2d Cir. 1971) (a case in which an actual contribution demand was at issue).
In the second place, the court could have recognized that reluctance to apply another state’s law in a Louisiana forum (especially one administered by a commission) is primarily for the protection of the worker himself. If Arkansas has a complete scheme for protection of the worker, probably including rehabilitation and continuing supervision not available in Louisiana, then it might be unwise for Louisiana to attempt to apply that scheme in a local forum. But the issue before the court in Jerry was not protection of the worker; it was allocation of loss between employers after protection of the worker.\(^{77}\)

The policy which would lead a Louisiana court to reject a piecemeal application of another state’s law in order to avoid unfair treatment of a worker need not guide the court’s decision on allocation of costs between employers. The court therefore could have applied only Arkansas substantive law to the third-party demand, both as to the extent of the obligation issue and as to the contribution issue.

In either event, the court could have permitted the third-party plaintiff to litigate the contribution issue in the Louisiana forum to which it was brought by the claimant. And this could have occurred without prejudice to any rights of the claimant, or partial borrowing of another state’s law.\(^{78}\)

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77. It may have been significant that the contribution demand was between two Arkansas employers, made to litigate in Louisiana only because the claimant’s injury occurred here and he preferred Louisiana benefits. Perhaps the court would have been more inclined to permit litigation of the contribution suit here if the third-party plaintiff had been a Louisiana employer. In that instance, Louisiana has a stronger argument both to hear the case and to apply Louisiana law to the third-party demand for contribution.

78. As it turned out, the claimant pursued his claim in an Arkansas suit but lost on the merits. Thus the third-party demand became moot in any forum.