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EXCLUSIVE REMEDY/INTENTIONAL TORTS

I. THE STATUTORY BASIS FOR THE EXCLUSIVE REMEDY

La. Rev. Stat. 23:1032 Exclusiveness of rights and remedies; employer's liability to prosecution under other laws

A. (1)(a) *Except for intentional acts provided for in Subsection B, the rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights, remedies, and claims for damages, including but not limited to punitive or exemplary damages, unless such rights, remedies and damages are created by a statute whether now existing or created in the future expressly establishing same as available to such employee, his personal representatives, dependents, or relations, against his employer, or any principal or any officer, director, stockholder, partner, or employee of such employer or principal, for said injury, or compensable sickness or disease.*

(b) *This exclusive remedy is exclusive of all claims, including any claims that might arise against his employer, or any principal or any officer, director, stockholder, partner, or employee of such employer or principal under any dual capacity theory or doctrine.*

(2) *For purposes of this Section, the word "principal" shall be defined as any person who undertakes to execute any work which is a part of his trade, business, or occupation in which he was engaged at the time of the injury, or which he had contracted to perform and contracts with any person for the execution thereof.*

B. *Nothing in this Chapter shall affect the liability of the employer, or any officer, director, stockholder, partner, or employee of such employer or*

principal to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act.

C. The immunity from civil liability provided by this Section shall not extend to:

1. Any officer, director, stockholder, partner, or employee of such employer or principal who is not engaged at the time of the injury in the normal course and scope of his employment; and

2. To the liability of any partner in a partnership which has been formed for the purpose of evading any of the provisions of this Section.

[Amended by Acts 1976, No. 147 §1; Acts 1989, No. 454,§2 eff. Jan. 1, 1990; Acts 1995, No. 432, §1, eff. June 17, 1995]

II. EXCEPTION: INTENTIONAL ACTS

A. Section 1032 of the Louisiana workers' compensation law provides for the exclusive remedy of workers' compensation to employees and the exception for intentional torts.

La. R.S. § 23:1032(B) provides:

Nothing in this Chapter shall affect the liability of the employer, or any officer, director, stockholder, partner, or employee of such employer or principal to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act.

1. The intentional act exception was part of Act 147 of 1976. In its original draft, the bill contained an exception to the exclusive remedy provided by the Workers' Compensation Act for liability resulting from an "intentional or deliberate act." During House and Senate debate, versions which would have expanded the exception to include "gross negligence" as well as intent were rejected. In the final version, the language referred only to "intentional acts" and not to "gross negligence" or "deliberate acts."

B. Meaning of "Intentional" Act Under Louisiana Law

1. "Intentional" means that the defendant either desired to bring about the physical results of his act or believed they were substantially certain to follow from what he did.

Bazley v. Tortorich, 397 So.2d 475 (La. App. 1981).

2. The above language generally appears in petitions asserting intentional tort. If the petition contains the so-called *Bazley* language, then the petition is well pleaded for purposes of intentional tort (and cannot be dismissed by an exception of no cause of action).

C. Burden of Proof

1. Plaintiff must prove

   a. a specific intent on the part of defendant to cause harm to plaintiff; or

   b. that the conduct of defendant was such that the law will impute intent without reference to the subjective state of mind of the defendant.

   Maddie v. Plastic Supply and Fabrication, Inc., 434 So.2d 158 (La. App. 5th Cir. 1983), *writ denied*, 435 So.2d 445 (La. 1983).

2. The requisite intent need not be malicious. There does not have to be intent to inflict <u>any</u> actual damage or to inflict the <u>degree</u> of damage that actually resulted from the conduct. The Supreme Court has held that defendant is responsible for full damages resulting from intent to cause <u>offensive consequences</u>. (Intentional tort can result form intended act during horseplay among employees that caused unintended result.)

   Caudle v. Betts, 512 So.2d 389 (La. 1987).

3. Obviously, if plaintiff proves defendant's subjective intent to harm, he will prevail, but this virtually never happens in cases not involving traditional intentional torts such as assault and battery. It virtually never happens outside traditional tort cases because employees rarely intend to actually hurt another and if one did, it would require an admission by defendant of intent to harm.

4. To prevail under the second prong of the *Bazley* test, plaintiff must show a strong link between the defendant's conduct and plaintiff's injury. The conduct must be definite and identifiable. Setting in motion an activity or process that will likely or probably result in harm is not sufficient.

   Dycus v. Martin Marietta Corp., 568 So.2d 592 (La. App. 4th Cir. 1990).

5. Substantially certain means "virtually sure," "nearly inevitable."

Tapia v. Schwegmann Giant Supermarkets, 590 So.2d 806 (La. App. 4th Cir. 1991); *Gallant v. Transcontinental Drilling Co.,* 471 So.2d 858 (La. App. 2d Cir. 1985); *Kirkland v. Keller*, 453 So.2d 667 (La. App. 5th Cir. 1984).

6. The burden of proof required can best be appreciated by considering case examples.

a. The Real Intentional Torts

i. Actions that constitute intentional tort (i.e., the traditional intentional torts) are: assault, battery and false imprisonment. The most common intentional tort is that of assault and/or battery committed by a co-employee of claimant.

Jones v. Thomas, 426 So.2d 609 (La. 1983); *Rennier v. Johnson*, 410 So.2d 1149 (La. App. 3d Cir. 1982), *writ denied,* 412 So.2d 1115 (La. 1982).

ii. Compare results in:

Citizen v. Daigle, 418 So.2d 598 (La. 1982).

As a "practical joke," employee pointed a rifle, which had been returned to employer as defective and tested to confirm it would not fire, at a co-employee. The rifle discharged injuring plaintiff. No intentional tort was found because battery was not intended. An assault (creation of a reasonable apprehension of harm) was intended. The court concluded plaintiff was not pursuing damages for the intended frightening but for the unintentional shooting.

Caudle v. Betts, 512 So.2d 389 (La. 1987).

Employer's president committed intentional tort of battery during horseplay while chasing and shocking co-employee with electrically charged condenser. The tortfeasor intended only to shock co-employee, not cause permanent neurological injury.

b. Negligence Claims Masquerading as Intentional Torts

Committing a deliberate act alone that has a high probability of causing harm but which does not suggest or imply intent to cause harm to a particular individual is insufficient.

i. Petitioner alleged that a co-employee intentionally ran a red light at an intersection after seeing no traffic, which resulted in a vehicular collision and plaintiff's injuries. The court directed a verdict denying liability because there had been no showing that defendant either "intended to cause the result or it was believed that the result was substantially certain to follow." This was notwithstanding the rather high probability that a collision could occur by running a red light.

   McQuire v. Honeycutt, 387 So.2d 674 (La. App. 3d Cir. 1980) *writ refused*, 397 So.2d 1364 (La. 1981) ("result correct").

ii. Mere knowledge and appreciation of a risk does not constitute intent.

   Tapia v. Schwegmann Giant Supermarkets, 590 So.2d 806 (La. App. 4th Cir. 1991); *Gallant v. Transcontinental Drilling Co.,* 471 So.2d 858 (La. App. 2d Cir. 1985).

iii. Allegations of deficiently designed machinery and disregarding OSHA safety provisions are insufficient.

   Cortez v. Hooker Chemical and Plastics Corp., 402 So.2d 249 (La. App. 4th Cir. 1981).

iv. Gross negligence in trying out an untested work procedure and disregard for safety regulations or safety equipment is not sufficient.

   Williams v. Gervais F. Favrot Co., Inc., 573 So.2d 533 (La. App. 4th Cir.); *Davis v. Southern Louisiana Insulations*, 539 So.2d 922 (La. App. 4th Cir. 1989).

v. Failure to maintain safe conditions at work or where an employer allows or requires employees to operate a dangerous piece of equipment is not an intentional tort.

   Dycus v. Martin Marietta Corp., 568 So.2d 592 (La. 4th Cir. 1990).

vi. The refusal to assist an employee in performing strenuous work is insufficient.

Tapia v. Schwegmann Giant Supermarkets, supra.

vii. The failure to provide sufficient training in the use of dangerous equipment with a history of malfunctioning is insufficient.

Maddie v. Plastic Supply and Fabrication, Inc., 434 So.2d 158 (La. App. 5th Cir. 1983), *writ denied,* 435 So.2d 445 (La. 1983) [plaintiff was injured by malfunctioning power saw]; *Carrier v. Grey Wolf Drilling Co*., 00-C-1335 (La. 1/17/01), 776 So2d 439.

viii. A reasonable expectation or anticipation of injury or death is insufficient.

Reagan v. Olinkraft, 408 So.2d 937 (La. App. 2d Cir. 1981); *Eitmann v. West,* 411 So.2d 1127 (La. App. 4th Cir. 1982).

ix. Even conduct that can be considered reckless or wanton by an employer is not sufficient.

The court granted summary judgment in a case where plaintiff, a painter, requested a safety line to accommodate his work on a scaffold on the first day of the job. Plaintiff's supervisor refused the request, citing time requirements as an excuse. Plaintiff subsequently fell from the scaffold, sustaining injury and brought an intentional tort suit. The court recognized the difference between conduct that would, with reasonable probability, lead to an accident and conduct which was substantially certain to result in an accident. Finding even that a high degree of probability is not sufficient to conclude that the defendant actually intended the consequences of his act, the appellate court affirmed summary judgment dismissing the claim.

Taylor v. Metropolitan Erection Co., 496 So.2d 1184 (La. App. 5th Cir. 1986). See also, Temple v. J & S Communication Contractors et. al., 35,247-CW, 35,257-CW (La. App. 2d Cir. 1/25/02), 805 So2d 1263.

x. In evaluating the conduct at issue, the courts have recognized the significant difference between whether a fact is "substantially certain" or "reasonably probable." Certain is defined as incapable of failing, while probable deals with facts that arise from fairly, though not absolutely adequate, convincing, conclusive, intrinsic or extrinsic evidence or support.

Jacobsen v. Southeast Distributors, Inc., 413 So.2d 995 (La. App. 4th Cir. 1982), *writ denied,* 415 So.2d 953 (La. 1982).

c. Injury Is Substantially Certain to Occur

i. Ordering an employee into area of toxic fumes may be an intentional act (summary judgment for employer reversed).

Belgard v. American Freightways, Inc., 99-1067 (La. App. 3d Cir. 12/29/99), 755 So2d 982.

ii. Ordering employee to work in area exposed to carcinogens is an intentional act.

Abney v. Exxon Corp., 98-0911 (La. App. 1st Cir. 9/24/99), 755 So2d 283.

iii. Ordering employee to work on wet, slanted roof is an intentional act.

Clark v. Division Seven, Inc., 99-3079 (La. App. 4th Cir. 12/20/00), 776 So2d1272.

iv. Ordering employee to return to ditch that supervisor knew was in danger of caving in was intentional act.

Jones v. Thomas, 426 So2d 609 (La. 1983).

v. Forcing welders to work in unventilated area after they reported bloody noses and blurred vision was intentional act.

Abney v. Exxon Corp., 98-0911 (La. App. 1st Cir. 9/24/99), 755 So 2d 983, *writ denied*, 1999-3053 (La.) 753 So.2d 216.

D. Employer's Vicarious Liability for Intentional Acts of Employees

1. The Louisiana Supreme Court has held that an employer can be vicariously liable for both its own intentional acts and the intentional acts of its employees. All intentional acts are excluded from the general immunity of the Louisiana Workers' Compensation Law.

Jones v. Thomas, 426 So.2d 609 (La. 1983).

2. The following factors are considered in determining whether an employer will be

held vicariously liable for the intentional tortious acts of its employees:

a. For an employer to be vicariously liable for the tortious acts of its employees, the tortious conduct of the employee must be so closely connected in time, place and causation to his employment duties as to be regarded as a risk of harm fairly attributable to the employer's business as compared with conduct instituted by purely personal considerations entirely extraneous to the employer's interest;

b. An employer is not vicariously liable for the intentional acts committed by its employee unless such employee is acting within the ambit of his assigned duties and also in furtherance of his employer's objectives;

c. The courts analyze whether:

i. The tortious act was primary employment rooted;

ii. Whether the act was reasonably incidental to the performance of the employee's duties;

iii. Whether the act occurred on the employer's premises and whether it occurred during the hours of employment.

3. The courts have held that it is not necessary that all of the factors be met in order to find liability. Liability (at least theoretically) does not result merely because an employee commits an intentional tort on the business premises during working hours.

4. Case examples:

a. No Vicarious Liability:

Barto v. Franchise Enterprises, Inc., 588 So.2d 1353 (La. App. 2d Cir. 1991).

Plaintiff, Barto, was employed as a shift manager at the King's Highway Hardee's. While at work, Barto determined that $36.00 was missing from the cash register. He had seen a co-employee, Fletcher, leaving the office right before the money was noticed missing. Barto asked Fletcher to empty his pockets. Fletcher pulled out an 8-inch knife and began stabbing and beating Barto. The court concluded that the employer was not

vicariously liable for Fletcher's criminal assault and battery.

Reeder v. Laks Corp., 555 So.2d 7 (La. App. 1st Cir. 1989), *cert denied*, 559 So.2d 142 (La. 1989).

A nursing home employer was found not to be vicariously liable for the intentional acts of a patient.

Baumeister v. Plunkett, 95-C-2270 (La 5/21/96), 673 So.2d 994.

The Louisiana Supreme Court reversed the Second Circuit Court of Appeal in its application of vicarious liability to the employer in a case involving the sexual assault against an employee by a supervisor.

Pye v. Insulation Technologies, Inc., 97-237 (La 5th Cir 9/17/97), 700 So.2d 892.

Fifth Circuit refused to find vicarious liability for an intentional injury by an employee against his supervisor. The court noted that the act must be employment rooted and the employer must derive some benefit from the act.

Craft v. Wal-Mart Stores, Inc., 01-564 (La. App. 3d Cir. 10/31/01), 799 So2d 1211.

Third Circuit held that fight between plaintiff and co-worker who pushed the plaintiff because he was blocking the door was not employment rooted.

Guy v. Mitchell and Fiberbond Corp., 35,713 (La. App. 2d Cir. 3/1/02), 810 So2d 1245.

Fight between plaintiff and co-employee after plaintiff told supervisor about comments made by aggressor/co-employee was not employment rooted.

b. Vicarious Liability Found:

Lebrane v. Lewis, 292 So.2d 216 (La. 1974).

Lebrane, a supervisor, fired a co-employee. Shortly thereafter, a fight broke out between the two and the supervisor stabbed the employee on the employer's premises. Using the above factors, the Supreme Court concluded that the fight was reasonably incidental to the performance of the supervisor's duties and the tort was committed within the course and

scope of the employment. As a result, the employer was held liable for the supervisor's criminal stabbing of the employee.

Note: *Lebrane* is distinguishable from the line of "bar room bouncer cases." In the "bouncer cases," a finding of vicarious liability follows more readily because it is quite foreseeable and expected that a bouncer will rough up people in discharging his duties. Even bouncers do not usually stab people, however.

Quebedeaux v. Dow Chemical Company, 2000 CA 0465 (La. App. 1st Cir. 05/11/01), 809 So2d 983, rehearing denied (7/6/01).

Plaintiff was attacked by defendant co-worker while on the job. The argument and fight arose out of a request by the plaintiff to the co-worker to take some paperwork across the street. Because of employer's policy regarding fighting, both men were terminated. The court found the fight to be employment rooted and found the employer liable for the intentional acts of its employee.

E. Insurance Considerations

1. Standard Exclusion in EL Policy

   a. The standard Workers' Compensation and Employer's Liability policy contains the following exclusion:

      This insurance does not cover bodily injury intentionally caused or aggravated by you.

   b. "You" within the meaning of this policy has been interpreted to refer to the named insured, but not employees of the named insured. This interpretation is actually consistent with the standard definition of "insured" in a Workers' Compensation/Employer's Liability policy.[1] Accordingly, the policy provides coverage to the named insured for claims that it is vicariously liable for the intentional acts of its employees.

      Lowe & Sons v. Great American Surplus, 572 So.2d 206 (La. App. 1st Cir. 1990); *Wainwright v. Moreno's, Inc.,* CA No. 90-1271 (La. App. 3d Cir. 1992).

2. Public policy generally forbids a person from insuring against his own intentional acts, but it does not forbid him from insuring against the intentional acts of

[1] You are insured if you are an employer named in (the schedule or information page). If that employer is a partnership, and if you are one of its partners, you are insured, but only in your capacity as an employer of the partnership's employees.

another for which he may be vicariously liable.

Lowe & Sons, supra.

3. The individual who allegedly committed the intentional act, most commonly, an assault and/or battery, is not covered by the policy even if that individual is a named insured, which is unlikely. However, from a practical standpoint, if the employee who allegedly committed the intentional act is not being defended, it may be prudent for the carrier to consider providing a courtesy defense in order to avoid inducing his cooperation with the plaintiff. It is recommended that such a defense be provided under a reservation of rights. In Louisiana, defending a party under a reservation of rights requires the appointment of separate counsel to avoid the potential conflict of interest by counsel representing the individual defendant and insurer which may deny coverage.

4. The homeowners insurance policy does not provide coverage to an insured who engages in a fight with a co-employee. *Menson v. Taylor,* 99-0300 (La. App. 1st Cir. 4/14/00), 764 So.2d 1079, *Craft v. Wal-Mart Stores, Inc.*, 01-564 (La. App. 3d Cir. 10/31/01), 799 So2d 1211.

III. EMPLOYER LIABILITY FOR ARBITRARY ACTIONS

A. Tort Liability for Arbitrary Actions:

1. An employer may be liable in tort "when the employer intentionally and arbitrarily refuses to pay for medical benefits necessary to treat a compensable injury or disease, knowing that death to the employee is substantially certain to result from the arbitrary refusal". *Weber v. State of Louisiana* 93-C-0062 (La 4/11/94) 635 So.2d 188. The case involved a heart claim in which the employee was seeking approval for a heart transplant. This is not within the "intentional act" exclusion to the exclusive remedy provision of R.S. 23:1032, as the employer is not being accused of having intentionally caused the job accident. This is a tort action arising out of the administration of the workers' compensation claim which has previously been governed by the penalties and attorney's fees provisions of La. R.S. 23:1201.

   The court gave assurance that this was a "narrow exception" to the general rule that penalties and attorney's fees are the exclusive remedy for the employer's misconduct in handling the administration of compensable claims. However, in a footnote, the court reserved for another day the option to expand the tort remedy:

   > "We reserve for another day the decision on whether the exception would apply if the employer arbitrarily denies payment of necessary medical expenses despite knowledge that a **significant**

worsening of the employee's condition is substantially certain to follow the denial."

2. The issue of whether to expand the *Weber* decision beyond death claims was addressed by the Louisiana Supreme Court in *Kelly v. CNA Insurance Company*, 98-C-0454 (La 3/12/99) 729 So.2d 1033. In *Kelly* the Court held (based on the facts of this case) that the worker is limited to the remedies provided by the Louisiana Workers' Compensation Act. The plaintiff in *Kelly* worked for Shield Pack, Inc. as a products finisher and alleged that she had developed carpal tunnel syndrome after numerous years of repetitive use of her upper extremities. Benefits were initially paid under the Workers' Compensation Act but later terminated when the employer received a medical report stating that she could return to work in a modified position offered by the employer.

   The employee filed a workers' compensation claim and was awarded benefits as well as penalties and attorney fees. The plaintiff also filed a tort suit in district court against the employer and CNA, alleging that the defendants improperly terminated her workers' compensation and medical benefits and failed to pay medical expenses incurred for the treatment of her pain, which worsened her condition and caused depression and resulted in an attempted suicide. The defendants filed a peremptory exception of no cause of action, stating that plaintiff's claim is barred under the exclusive remedy statute. The trial court granted the exception, and an appeal was taken to the Second Circuit. The Court of Appeal held that there was a cause even if the failure to provide medical care did not result in the death of the employee.

   After reviewing the arguments the Court concluded that the Workers' Compensation Act provides the exclusive remedy to the plaintiff for the injuries she incurred. It should be noted that the Court did not rule out the possibility that, under a different set of facts, they may find that the denial of medical care would give rise to a tort remedy.

3. The courts have continued to hold the line on the attempt to bring the failure to approve surgery into the realm of negligence law. The courts have noted that the employee has a remedy to seek OWC supervision over the need for surgery [*Dupree v. Dixie Carbonic, Inc. and The Hartford,* 35,968 (La. App. 2d Cir. 5/10/02), 817 So.2d 484]. The plaintiff has been required to allege that the denial of the medical treatment resulted in substantial certainty of death [*Livaccari v. Alden Emergency, Inc*., 00 CW 0856 (La. App. 1st Cir. 12/1/00), 808 So.2d 383].

4. Question - Are claims of this nature covered under Part II of the Employers' Liability Policy or under the Commercial General Liability Policy? The CGL policy excludes claims by employees against the employer (insured) for injuries "arising out of the employment". These are claims for injuries that initially "arose" out of the employment, but are aggravated by post-accident claims administration by the employer or its third party administrator.

IV. PUNITIVE DAMAGES

A. Punitive damages were specifically denied to an employee under an amendment to Section 1032, effective 6/17/95. In 1996, the legislature removed any claims for punitive damages from the Civil Code, effective 4/16/95. In addition, the Louisiana Supreme Court in *Adams v. Merit Construction, Inc.,* 97-2005 (La. 5/19/98) 712 So.2d 88, reversed its previous decision in *Billiot v. B. P. Oil Co.,* 93-1118 (La. 9/29/94), 645 So.2d 604, which had recognized the right of an employee to file suit against his employer for punitive damages, which was the reason for the legislative amendment to Section 1032.

V. NON-COMPENSABLE = TORT

A. An early Louisiana Supreme Court decision in 1918 provided support for a negligence action if the injury was not covered by the Act [*Boyer v. Crescent Paper Box Factory*, 78 So. 596]. The case involved a claim for disfigurement before compensation law provided benefits for this injury.

B. The death of unborn child following the mother's accident at work was recognized by the Fourth Circuit as a proper negligence cause of action against the employer [*Adams v. Denny's Inc.*, 464 So.2d 876 (1985)].

C. Non-compensable mental stress claim allowed as negligence action [*Spillman v. South Central Bell*, 518 So.2d 994 (La 1988) and *Samson v. South Central Bell*, 205 So.2d 496 (1st Cir. 1967)]. These were claims for mental/mental disabilities before the Louisiana Supreme Court and the 1989 legislative amendments to the definition of "accident" declared that such claims were compensable.

D. Non-compensable hearing loss was allowed as a negligence action by the Third Circuit [*Connor v. Naylor Industries*, 579 So.2d 1226 (1991)]. This was a gradual hearing loss and not a sudden hearing loss as required by the 1983 amendments to Section 1221(4).

E. Non-compensable heart attack was allowed as a negligence action [*Hunt v. Milton Womack, Inc.,* 616 So.2d 759 (La App 1st Cir. 1993), *writ denied* 623 So.2d 1309 (La. 1993); *Estate of David R. Williams v. Louisiana Office of Risk Management*, 634 So.2d 1260 (La. App. 3d Cir. 1994); *Ellis v. Normal Life of Louisiana,* 93-CA-1009 (La. App. 5th Cir. 5/31/94) 638 So.2d 422; and given encouragement by the Louisiana Supreme Court in a footnote (note 17) to a decision in which they affirmed the denial of a heart claim under the new standard established in the 1989 law changes, *Charles v. The Travelers Insurance Co.*, 93-C-0900 (La 11/29/94), 627 So.2d 1366].

F. In *O'Regan v. Preferred Enterprises, Inc*., 98-1602 (La 3/17/00), 758 So.2d 124, the Louisiana Supreme Court held that the plaintiff could seek tort damages against her employer because the condition that she allegedly developed from exposure to chemicals at work, myelodysplasia, was not accepted as an "occupational disease" in her workers'

compensation claim.

G. Against the Tide - The Second Circuit REJECTED an employee's negligence action against the employer for his non-compensable "loss of taste" [*Swilley v. Sun Oil Company*, 506 So.2d 1363 (1987)]. In light of the comments made by the Louisiana Supreme Court in the *Charles* decision and the opinion in *O'Regan,* it is unlikely that this decision will have precedential value in the future.

H. Defamation claims are not precluded by exclusive remedy [*City of Natchitoches v. Employers Reinsurance Corp., et al*, 2002-0147 (La. App. 3d Cir. 06/05/02), 819 So. 2d 413]. Nor are discrimination claims limited by the exclusive remedy provisions [*Delany v. City of Alexandria,* 2001-CC-1076 (La. 11/28/01), 800 So.2d 806].

VI. NEUTRAL RISKS = TORT

A. Since the establishment of the Workers' Compensation Act, the Louisiana courts have struggled with the question of how to define the term "arising out of" in the statutory provision requiring an accident to have "arisen out of " the employment before the employee can be entitled to workers' compensation benefits. Where there is a finding that the injury was in the course of the employment (i.e., time and place of employment) AND "arises out of" the employment, there is a duty to pay workers' compensation benefits (La. Rev. Stat. 23:1035) and the employer is granted the exclusive remedy shield from tort actions by the employee (La. Rev. Stat. 23:1032).

INCREASED RISK - The more restrictive approach which limited the claims that would fall under the workers' compensation law was initially adopted by the Louisiana Supreme Court in *Myers v. Louisiana Railway and Navigation Company*, 74 So 2d 256 (La. 1917). The court held that an accident did not "arise out of" the employment unless the injury was caused by an **increased risk** to which the employee, as opposed to the general public, was subjected to as a result of his employment. Hence, if the job did not increase the risk, it would be regarded as a **"neutral risk"** and no compensation would be awarded.

POSITIONAL RISK - The increased risk doctrine was apparently abandoned by the Louisiana Supreme Court in favor of the "positional risk" doctrine in *Kern v. Southpor Mill*, 141 So.2d 19 (La. 1932). Under the positional risk doctrine, an employee would be entitled to recover workers' compensation benefits if his injury occurred at work and was not caused solely by purely **personal risks** (e.g., employee dies of a heart attack at work without any work event tied to the occurrence). Thus, an employee driving a truck to deliver the employer's merchandise who is injured in an auto accident would be regarded as having suffered an injury "arising out of" the employment even though the risk of being in an auto accident is no greater for the employee than it is for any other member of the general public. However, the employer's business placed the employee in the "position of risk" at the time, thus, the accident "arises out of" the employment.

B. It would appear that the Louisiana Supreme Court has returned to the **increased risk** doctrine of the *Myers* decision of 1917. Thus, if the injury is the result of a **"neutral risk"** the employee would not be entitled to worker's compensation benefits AND the employer would not be entitled to the protection of the exclusive remedy law. This was recently demonstrated in the case of *Mundy v. Department of Health and Human Resources*, 593 So.2d 346 (La 1992). The employee arrived on her employer's premises to work as an LPN. She entered an elevator in the employer's building and was stabbed by an unknown assailant. The Louisiana Supreme Court held that she had not arrived at the floor where her duties were to begin and thus she was not in the course of her employment at the time of the accident and that the risk of being assaulted was not increased by her position as an employee since she was in an elevator used by the general public. Finding only a weak showing that the accident was in the course of the employment (place, but not time as she had not begun her job assignment) and that it did NOT arise out of the employment, the court concluded that the claimant could sue her employer for negligence.

C. Another example of the return of the **"increased risk"** doctrine is the Fifth Circuit decision in *Hanewinckel v. St. Paul's Property & Liability Insurance Co*., 611 So.2d 174 (La. App. 5th Cir. 1992), *cert denied*, 614 So.2d 65 (La 1993). The employee in this case arrived one morning for work at her employer's parking lot (located on the employer's property). As she exited her car, she was beaten during an attempted rape. Citing the *Mundy* decision, the court permitted the plaintiff to sue her employer for its negligence in failing to provide security. The court reasoned that the risk of injury was no greater for this plaintiff as an employee than it was for any member of the public (apparently rejecting the "positional risk doctrine").

D. Contrast the reasoning of the *Mundy* decision with the holding in *Stewart v. Louisiana Plant Services, Inc.*, 611 So.2d 682 (La. App. 4th Cir. 1993), where the employee sought to establish that his injuries arose out of and in the course of employment so he could recover workers' compensation benefits. The plaintiff, a security guard, was mugged after leaving a bus stop on route to his place of employment. The Fourth Circuit found the injury compensable under the "threshold doctrine" despite the protest of the dissenting judge who noted that the same, if stronger, case could have been made in *Mundy.*

VII. EMPLOYEE AS GUEST PASSENGER = TORT

A. Employees injured in company vehicles have seldom had difficulty establishing a right to workers' compensation benefits. The usual basis for denying such injuries would be if the employee were using the vehicle for personal use and not during his employment hours or if he were to deviate from the permitted use of the vehicle. We are not certain whether the cases that follow indicate a TREND, but they do seem to fit a pattern of judicial gymnastics in logic for the purpose of establishing employers' tort liability when

an employee is injured.

B. The use of a company truck on a lunch break or leaving the job site was found NOT to be in the course and scope of employment in *Hill v. West American Ins. Co.* 93-915, 93-932 (La. App. 3d Cir. 5/19/94), 635 So.2d 1165. The plaintiff/employee was working in a remote area and was driven by a co-employee in a company truck to get lunch. The employee was permitted to assert a negligence action against the employer's auto insurer.

C. In *Dupre v. Exxon Pipeline Company*, 93-1528 (La. App. 3d Cir. 6/1/94), 638 So.2d 1118, the employee of a sub-contractor was a passenger in a truck owned by Exxon and driven by an Exxon employee. After they completed the work, the plaintiff was being transported from the job site back to the Exxon office, where his personal vehicle was parked. The court allowed the employee to sue Exxon (statutory employer) for the driver’s negligence because the court found that the plaintiff had completed his work and was no longer "in the course of his employment".