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# Reshuffling the Injured Worker's Rights Against Third Parties: One Step Forward—One Step Back

Edward J. Walters, Jr.\*

Due to the greatly reduced nature of workers' compensation benefits as compared to actual compensatory damages, the injured employee is ever searching for someone other than his employer who may be at fault and thus, responsible for his injuries and liable to him for full damages.

The "Great Compromise" of the 1914 Workers' Compensation Act authorized these "third party actions" under Louisiana Revised Statutes 23:1101 which today states, in pertinent part, as follows:

When an injury or compensable sickness or disease for which compensation is payable under this Chapter has occurred under circumstances creating in some person (in this Section referred to as "third person") other than those persons against whom the said employee's rights and remedies are limited in R.S. 23:1032, a legal liability to pay damages in respect thereto, . . . the payment or award of compensation hereunder shall not affect the claim or right of action of the said employee . . . against such third person . . . and such employee . . . may obtain damages from or proceed at law against such third person to recover damages for the injury, or compensable sickness or disease.<sup>1</sup>

Problems occur, however, when the party alleged to be at fault is the worker's direct employer or statutory employer. The reshuffling of the respective rights and responsibilities between the injured worker and these entities has produced a regularly recurring tug-of-war between the legislature and the Supreme Court.

## I. KIRKLAND: ONE STEP FORWARD

The Supreme Court's recent decision in *Kirkland v. Riverwood International U.S.A., Inc.*<sup>2</sup> expands the rights of an employee seeking recovery for an on-the-job injury. A brief look at the steps taken to reach the decision in *Kirkland* will be helpful.

### A. Thibodeaux: *The Birth of the Statutory Employer Defense*

A "Statutory Employer" is immune from suit by an injured worker. The statute giving rise to the "Statutory Employer" defense is purportedly found in

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1. La. R.S. 23:1101 (Supp. 1996).

2. No. 95-1830, 1996 WL 523694 (La. Sept. 13, 1996).

the language of Louisiana Revised Statutes 23:1061, which has remained virtually unchanged since the adoption of the Workers' Compensation Act. It provides, in pertinent part, as follows:

When any person, in this Section referred to as the "principal," undertakes to execute any work, which is a part of his trade, business, or occupation . . . and contracts with any person, in this Section referred to as the "contractor," for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him; and where compensation is claimed from, or proceedings are taken against, the principal, then, in the application of this Chapter reference to the principal shall be substituted for reference to the employer . . . .<sup>3</sup>

The rationale behind the statute was to prevent an employer from interposing an impecunious independent contractor or sub-contractor between itself and its injured employee in order to avoid compensation liability. The statute thus imposes compensation responsibility on an entity attempting such a ruse. Thus, a new legal entity—the "principal"—was created. The principal was responsible for the worker's compensation benefits if his contractors or subcontractors were unable to provide these benefits to the injured worker. The sole purpose behind the enactment was to protect the worker.

Nothing in the Act expressly provided, or even suggested, that a principal was entitled to tort immunity, even if the principal actually had to pay compensation benefits to an injured employee. In 1950, the Louisiana Supreme Court, and not the Legislature, granted such tort immunity to a principal for the first time. In *Thibodaux v. Sun Oil Co.*,<sup>4</sup> the court maintained an exception of no cause of action that limited an injured employee's remedy against a principal to workers' compensation. Absent from the opinion is any discussion of the fact that there is not even a suggestion in Louisiana Revised Statutes 23:1061 or Louisiana Revised Statutes 23:1032 of any grant of tort immunity to a principal, or of a principal's apparent ability to avoid any compensation liability by requiring its contractors to provide worker's compensation insurance for its workers, or the question of whether immunity should be conferred only if a principal actually pays compensation.

*Thibodaux* transformed Section 1061 from its intended purpose of protecting an injured worker to a defense which, if successful, could leave the principal

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3. La. R.S. 23:1061 (Supp. 1996).

4. 218 La. 453, 49 So. 2d 852 (1950).

immune both in tort and worker's compensation. As stated in Wes S. Malone & H. Alston Johnson, III, *Workers' Compensation Law and Practice*:<sup>5</sup>

It is one of the anomalies of Louisiana compensation law that an entire group of persons or entities who may never actually pay compensation to a claimant, or even be asked to do so, nonetheless enjoy complete immunity from suit in tort by such a claimant.

The key inquiry in *Thibodaux* was whether the contract work was part of the putative principal's "trade, business or occupation" or "so closely related thereto as to become an integral part thereof."<sup>6</sup> Thus the birth of the "integral relation" test, which was used to liberally construe tort immunity in favor of principals.<sup>7</sup>

In 1976, the Legislature added "principals" to the list of entities granted tort immunity, thereby codifying the *Thibodaux* case. Section 1032 was amended to read in part:

The rights and remedies herein granted to an employee or his dependent . . . shall be exclusive of all other rights and remedies of such employee . . . against his employer, or any principal or any . . . employee of such employer or principal . . . 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.<sup>8</sup>

#### B. Berry: Statutory Employer Clarified

The "integral relationship" test was clarified in *Berry v. Holston Well Service, Inc.*<sup>9</sup> In *Berry*, the Louisiana Supreme Court criticized the "integral relationship" test, noting that "[t]his almost limitless standard yielded inconsistent and often illogical results since almost everything could be said to be integrally related to the principal's trade, business or occupation."<sup>10</sup> The *Berry* court expressly abandoned the "integral relation" test and adopted a test "more in line with the purpose of sections 1032 and 1061."<sup>11</sup> The court enunciated a three-tier analysis for determining whether contract work is part of an alleged principal's trade, business or occupation:

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5. Wes S. Malone & H. Alston Johnson, III, *Workers' Compensation Law and Practice* § 364, in 13 Louisiana Civil Law Treatise (3d ed. 1994).

6. 218 La. at 455, 49 So. 2d at 854.

7. *Id.*

8. La. R.S. 23:1032 (1985) (emphasis added).

9. 488 So. 2d 934 (La. 1986).

10. *Id.* at 937.

11. *Id.*

1. Is the contract work specialized? Specialized work is, as a matter of law, not a part of the principal's trade, business, or occupation, and the principal is not the statutory employer of the specialized contractor's employees.
2. Where the contract work is non-specialized, the court must compare the contract work with the principal's trade, business or occupation. At this second step, the court should make the following inquiries:
  - (i) Is the contract work routine and customary? That is, is it regular and predictable?
  - (ii) Does the principal have the equipment and personnel capable of performing the work?
  - (iii) What is the practice in the industry? Do industry participants normally contract out this type of work or do they have their own employees perform the work?
3. Was the principal engaged in the work at the time of the alleged accident?<sup>12</sup>

C. *The 1989 Legislation: Statutory Employer Expanded or Restricted?*

Apparently unhappy with *Berry*, the Legislature amended Louisiana Revised Statutes 23:1061 in 1989 to add the following sentence, which directly tracks several of the factors enumerated in *Berry*:

The fact that work is specialized or nonspecialized, is extraordinary construction or simple maintenance, is work that is usually done by contract or by the principal's direct employee, or is routine or unpredictable, shall not prevent the work undertaken by the principal from being considered part of the principal's trade, business, or occupation, regardless of whether the principal has the equipment or manpower capable of performing the work.<sup>13</sup>

Was this an expansive change or a restrictive one? The majority of the Louisiana appellate courts and the federal Fifth Circuit adopted the view that the change was designed to overrule *Berry* and return to *Thibodeaux's* more liberal "integral relation" test.<sup>14</sup> There was no conflict in the Louisiana circuits until the court of appeal's decision in *Kirkland v. Riverwood International USA, Inc.*<sup>15</sup>

Commentators, however, correctly suggested that, even after the 1989 amendment to Louisiana Revised Statutes 23:1061, "[o]nly upon a thorough

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12. *Id.* at 938.

13. La. R.S. 23:1061 (Supp. 1996).

14. 218 La. 453, 49 So. 2d 852 (La. 1950).

15. 658 So. 2d 715 (La. App. 2d Cir. 1995).

examination of the pre-*Berry* jurisprudence will the realization follow that a fact based analysis has and always shall guide the inquiry. Nevertheless, the uncertainty will continue until there has been a ruling on the test from Louisiana's highest court."<sup>16</sup>

*D. Kirkland's "New" Definition of Statutory Employer*

The Louisiana Supreme Court accepted the *Kirkland* case and broadened the test beyond that in *Berry*. In *Kirkland*, the defendant asserted that the plaintiff was performing work that was an "integral part" of the putative principal's "trade, business or occupation" so as to render the plaintiff a statutory employee whose exclusive remedy was in workers' compensation.<sup>17</sup>

As stated by the court in *Kirkland*,

[t]he starting point in our analysis is the statutory language of Section 1061, as amended in 1989. The amended section is silent as to the standard to be applied for determining statutory employer status. Nonetheless, given that the amendment closely tracks the factors this court laid out in *Berry*, the Legislature obviously intended to alter the *Berry* test. The question thus becomes whether the Legislature, as the federal appellate court and some of the state courts of appeal have held, intended to overrule *Berry* and to return to *Thibodaux's* more liberal integral relationship test, or whether the Legislature simply intended to abrogate the rigid and mechanical application of the three-tiered analysis set forth in *Berry* and return to the pre-*Berry* consideration of all relevant factors in determining statutory employer status under the totality of the circumstances.

....

The 1989 amendment does not prohibit the court's considering the factors enumerated in *Berry*; the amendment merely proscribes making any one of the factors conclusive of the determination of whether the contract work was part of the principal's trade, business or occupation. In effect, we interpret the 1989 amendment as intended to overrule *Berry*, but not intended to overrule this court's decisions, in the ten years preceding *Berry*, that the court was to consider all pertinent factors under the totality of circumstances.

We therefore hold that the appropriate standard under the amended Section 1061 for determining whether the contract work is part of the alleged principal's trade, business or occupation is for the court to consider all pertinent factors under the totality of the circumstances. The presence or absence of any one factor is not determinative, and the

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16. Janice M. Church, *Tort Immunity Revisited: What is the Present Test for Statutory Employer?*, 54 La. L. Rev. 587, 598 (1994).

17. No. 95-1830, 1996 WL 523694, at \*\*1 (La. Sept. 13, 1996).

presence of one factor may compensate for the lack of another. Among those factors to be considered in determining whether a statutory employment relationship exists are the following:

- (1) The nature of the business of the alleged principal;
- (2) Whether the work was specialized or non-specialized;
- (3) Whether the contract work was routine, customary, ordinary or usual;
- (4) Whether the alleged principal customarily used his own employees to perform the work, or whether he contracted out all or most of such work;
- (5) Whether the alleged principal had the equipment and personnel capable of performing the contract work;
- (6) Whether those in similar businesses normally contract out this type of work or whether they have their own employees perform the work;
- (7) Whether the direct employer of the claimant was an independent business enterprise who insured his own workers and included that cost in the contract; and
- (8) Whether the principal was engaged in the contract work at the time of the incident.<sup>18</sup>

The court thus broadened the test beyond that set forth in *Berry*, added several variables to the test not included in *Berry*, held that the determination of whether the contract work was part of the principal's "trade, business or occupation" is a factual issue based on the "totality of the circumstances" to be resolved on a case-by-case basis, and greatly reduced a defendant's opportunity to receive a summary judgment on the issue of statutory employer.

A totality of the circumstances inquiry is frequently difficult to accomplish on a motion for summary judgment, which requires a showing that there is no genuine issue of material fact that would defeat entitlement to judgment as a matter of law.

The decision in *Kirkland*, while not resulting in a true *quid pro quo* between the injured worker and the immunity-seeking principal, makes the test of what is the principal's "trade, business or occupation" more expansive and thus more beneficial to the injured worker seeking recovery from the principal. It is doubtful that *Kirkland* will survive the 1997 legislative session unscathed.

## II. CLOSING THE CAVALIER DOOR: ONE STEP BACK

In a large number of workplace accidents, the worker's employer, along with a "third party," is alleged to be partially at fault in causing the worker's injury.

As David Robertson stated in his book, *The Louisiana Law of Comparative Fault: A Decade of Progress*:

By the great weight of authority under article 2324 as it stood before the 1987 amendment, it was improper to assign a percentage of fault to the plaintiff's employer. The reasoning was straightforward: The

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18. *Id.* at \*\*7-8.

employer could not be held liable to the plaintiff for contribution, so that its fault was simply irrelevant. To reduce the plaintiff's recovery in an amount reflecting a percentage of fault allocated to the employer would be functionally equivalent to imputing the employer's negligence to the plaintiff, an unwarrantable outcome. . . . Because the employer's fault could have no legitimate impact on the rights of plaintiff, defendant, or intervenor, the courts concluded employer fault should be kept out of the case.<sup>19</sup>

In *Cavalier v. Cain's Hydrostatic Testing, Inc.*,<sup>20</sup> the court outlined the legislative history of how, with the advent of comparative fault, quantification of employer fault arrived on the legal scene:

Prior to the advent of comparative fault, quantification of the fault of these parties . . . was never an issue. In the case of joint tortfeasors each was liable to the plaintiff for the whole of the plaintiff's damages, and contribution among joint tortfeasors was by equal portions according to the number of tortfeasors.<sup>21</sup>

Any fault on behalf of the worker's employer was not considered. As the *Cavalier* court noted, "if the plaintiff was at fault, recovery was totally barred regardless of the plaintiff's degree of fault."<sup>22</sup>

Now, under comparative fault principles, negligence by the plaintiff of less than one hundred percent merely reduces the amount of his recovery. The amended Louisiana Civil Code article 2323 simply provided that the contributory negligence, instead of defeating recovery, would only reduce the amount of damages in proportion to the "degree or percentage of negligence attributable to the person suffering the injury, death or loss."<sup>23</sup>

*Cavalier* further held:

In the same 1979 act, the Legislature also amended former La.Code Civ.Proc. art. 1811 relative to special verdicts. The amended Article 1811B required the court, in cases to recover damages for injury, death or loss, to submit written questions to the jury inquiring as to the causation and degree of fault of each party defendant and, "[i]f appropriate, whether another involved person . . . was at fault," as well as that person's causation and degree of fault.

Article 1812C does not expressly require quantification of the fault of employers or of any non-parties. Rather, Article 1812C(2) permits

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19. David Robertson, *The Louisiana Law of Comparative Fault: A Decade of Progress* 51 (1991).

20. 657 So. 2d 975 (La. 1995).

21. *Id.* at 979.

22. *Id.* at 976.

23. La. Civ. Code art. 2323.



quantification of the fault of "another person, whether party or not," if such quantification is appropriate. The term "[i]f appropriate," used in both Article 1812C(2) and 1812C(3), clearly means if there is evidence from which reasonable minds could conclude "another person" or the plaintiff was at fault. However, since the Legislature did not specify which non-parties should have their fault quantified by the jury, the appropriateness, and indeed the necessity, of quantifying the fault of a particular non-party as a substantive requirement of the overall statutory scheme of comparative fault is inherently a question to be decided by the courts.<sup>24</sup>

In *Guidry v. Frank Guidry Oil Co.*,<sup>25</sup> the court first considered the question of whether to quantify the fault of non-parties. In *Guidry*, the jury had quantified the fault of the plaintiff's employer. The court discussed the fact that there was no statutory requirement for quantifying comparative fault of employers and declined to include employers as non-parties whose fault was appropriate for quantification.<sup>26</sup>

*Guidry* was later overruled by *Gauthier v. O'Brien*.<sup>27</sup> Noting that quantifying the employer's fault pursuant to Louisiana Code of Civil Procedure article 1812C will "serve to implement Louisiana's comparative fault scheme," the court concluded that "the last sentence of [La. Civ. Code art. 2324B] suggests that fault will be allocated to immune employers . . ."<sup>28</sup> Overruling *Guidry*, the court held that Article 2324B made the quantification of employer fault mandatory.

The *Cavalier* court disagreed:

While employers cannot be joined as defendants or third party defendants, there is no compelling reason . . . that makes it necessary or appropriate to require quantification of employer fault. Moreover, employers not only are immune from liability in the third party action by virtue of the compensation bargain, but also are granted a lien on the employee's recovery against third parties. If employer fault were quantified, the tort victim not only would suffer a reduction in the percentage of tortfeasor fault available for recovery, but also would suffer an additional reduction because of the priority of the at-fault employer's statutory lien on the recovery proceeds which now are reduced from one hundred percent to fifty percent from any one of multiple tortfeasors.

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24. 657 So. 2d at 979-81.

25. 579 So. 2d 947 (La. 1991).

26. *Id.* at 954.

27. 618 So. 2d 825 (La. 1993).

28. *Id.* at 831.

We conclude that while quantification of the fault of a non-party settling tortfeasor is entirely appropriate and was probably contemplated by La.Code Civ.Proc. art. 1812C, quantification of the fault of an employer is not necessary or appropriate under Article 1812C in an action against a third party tortfeasor.

...  
We reconsider and reject the holding in *Gauthier* relative to mandatory quantification of employer fault. Neither the pre-1987 nor the post-1987 version of Article 2324B requires the quantification of employer fault.

...  
The mention in the last sentence of Article 2324B of a joint tortfeasor's "immunity" as one of the factors that does not increase another joint tortfeasor's liability from joint to solidary certainly is not indicative of a legislative intent to make quantification of employer fault mandatory. Indeed, the last sentence of Article 2324B, in referring to the immunity of certain persons (perhaps certain family members whom the plaintiff cannot sue, but who may be joined in the action by third party demand for contribution), does not suggest, one way or the other, whether quantifying employer fault is necessary or appropriate in the overall comparative fault system. We therefore overrule the holding of *Gauthier* that quantification of employer fault either is suggested by La.Code Civ.Proc. art. 1812C or is made mandatory by La.Civ.Code art. 2324B.<sup>29</sup>

*Cavalier* lived barely a year. In 1996, Louisiana Revised Statutes 23:1104 was amended to read as follows:

In a suit brought pursuant to R.S. 23:1101, the fault of persons immune from suit in tort under R.S. 23:1032 shall be assessed as a percentage of the aggregate fault of all persons causing or contributing to the employee's injury, and the fault so assessed shall not be reallocated to any other person or party. The recovery had in such a suit by the employer or any other person having paid or having become obligated to pay compensation shall be reduced by the fault so assessed. This reduction is in addition to but not duplicative of any reduction made pursuant to Civil Code Articles 2323, 2324, and 2324.2 and R.S. 23:1101(B).<sup>30</sup>

The legislature also amended Civil Code article 2323(A) to require a determination of the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss "regardless of whether the person is a

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29. 657 So. 2d at 982-84.

30. La. R.S. 23:1104 (as enacted by 1996 La. Acts No. 15).

party to the Action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. . . ."<sup>31</sup>

In addition, Code of Civil Procedure article 1812(C) was amended to require a mandatory allocation of fault to immune entities such as an employer, as follows:

Art. 1812. Special Verdicts

....

C. In cases to recover damages for injury, death, or loss, the court at the request of any party shall submit to the jury special written questions as to

....

(2)(a) If appropriate under the facts adduced at trial, whether another party or non-party, other than the person suffering injury, death, or loss, was at fault, and if so (i) whether such fault was a legal cause of the damages, and, if so (ii) the degree of such fault express in percentage.  
(b) For purposes of this Paragraph, non-party means a person alleged by any party to be at fault, including but not limited to (i) a person who has obtained a release from liability from the person suffering injury, death, or loss, (ii) a person who exists but whose identity is unknown, or (iii) a person who may be immune from suit because of immunity granted by statute.<sup>32</sup>

The tug-of-war continues and only time will tell which end of the rope has the most strength.

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31. La. Civ. Code art. 2323 (as enacted by 1996 La. Acts No. 3).

32. La. Code Civ. P. art. 1812 (as enacted by 1996 La. Acts No. 65).