Liability for Intentional Acts – Assaults, Fights, and Crimes

Gino R. Forte
Attorney
Gaudry, Ranson, Higgins & Gremillion, LLC
401 Whitney Ave, Suite 500
Gretna, LA 70056
Phone: (504) 376-1351
Email: gforte@grhg.net

I. Claims Arising from an Employee's Assault or Battery Upon a Co-Employee

A. Intentional Act Exclusion to the Louisiana Workers Compensation Act

Generally, an employee's exclusive remedy against his employer for an on-the-job injury is workers compensation.[1] An exception is made for intentional torts.[2] This exception to Louisiana Workers Compensation Act is found at La. R.S. 23:1032(B) and applies to an employee's assault or battery upon a fellow employee. The exception therefore allows the injured employee to bring an ordinary tort suit, outside of workers compensation, based on an "intentional tort" which is imputed to the employer. An employer may be vicariously liable for the intentional acts of its employees.[3] As a general matter, an employer's vicarious liability is based on Louisiana Civil Code Article 2320, which provides that "Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed." Seeking to impose vicarious liability against the employer is a way for claimants to recover more than what they would receive through workers compensation benefits in those unique circumstances of a fight or intentional act by a fellow employee.

[1] *Payne v. Tonti Realty Corp*., 888 So.2d 1090 (La. App. 5 Cir. 11/30/04).
[2] *Id* (citing La. R.S. 23:1032).
[3] *Payne* at 1094 (citing La. C.C. Art. 2320; *Craft v. Wal-Mart Stores, Inc*., 799 So.2d 1211 (La. App. 3 Cir. 10/31/01), *writ denied*, 811 So.2d 933 (La. 3/22/02)).

B. Illustrative Cases That Have Applied the Exclusion

In an analysis of vicarious liability for an employee's tortious actions, the courts must consider more than simply whether the employee was in the course and scope of employment at the time of the incident.[4] An employer is not vicariously liable merely because his employee commits an intentional tort on the business premises during working hours.[5] **Vicarious liability will attach in such a case only if the employee is acting within the ambit of his assigned duties and also in furtherance of his employer's objective**.[6] Intentional acts of violence occur at the workplace for a number of reasons, including personal animosity towards co-workers, domestic violence which is brought into the workplace, or other reasons unrelated to the employer or the work being performed. The case law on this subject is clear that the violence must be connected in some way to the work itself and "furthering" the "objective" of the employer.

In determining whether vicarious liability applies, the Louisiana Supreme Court's decision in *LeBrane v. Lewis* considered the following factors in holding an employer liable for a supervisor's actions in stabbing his fellow employee:

> (1) Whether the tortious act was primarily employment rooted;
> (2) Whether the violence was reasonably incidental to the performance of the employee's duties;
> (3) Whether the act occurred on the employer's premises; and
> (4) Whether it occurred during the hours of employment.[7]

In *Lebrane*, the court found that the four considerations had been met based on the unique circumstances.

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[4] *Payne* at 1094.
[5] *Id*.
[6] *Id* (citing *Baumeister* at 996).
[7] *Payne* at 1095 (citing *Lebrane* at 218).

In *Lebrane*, a supervisor told an employee to leave the premises because of his untrimmed hair, but the employee remained at the business.[8] The supervisor then told the employee that he was fired and rode with the terminated subordinate down an elevator, to escort him from the business property.[9] The two men engaged in a heated argument, after which they went outside and commenced fighting.[10] The supervisor then stabbed the employee as the employee tried to run away.[11] The tortious conduct of the supervisor was so closely **connected in time, place, and causation** to his employment-duties as to be regarded a risk of harm fairly attributable to the employer's business, as compared with conduct motivated by purely personal considerations entirely extraneous to the employer's interests.[12] Accordingly, it could be regarded as within the scope of the supervisor's employment, so that his employer was liable in tort to third persons injured thereby.[13]

In the *Quebedeaux* case, two chemical plant operators engaged in a heated argument and subsequent fight.[14] In that case, the plant worker Dandridge went behind his co-employee Quebedeaux while Quebedeaux was still sitting at a computer chair, grabbed him around the neck and caused him to fall to the ground.[15] Further, Dandridge testified that there was an ongoing problem between himself and Quebedeaux in that Quebedeaux would "take his time" about performing his job.[16] Dandridge stated

[8] See *Lebrane* at 217.
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] *See Lebrane* at 218.
[13] *Id*.
[14] *See Quebedeaux v. Dow Chemical Company*, 809 So.2d 983, 985-986 (La. App. 1st Cir. 5/11/01).
[15] *Id.*
[16] *Id*. at 987.

Quebedeaux would do his job when he decided to do it, rather than when the job needed to be done.[17] Dandridge testified that when Quebedeaux was asked to take the paperwork across the street, Quebedeaux first made a telephone call and then began a conversation about a recent hurricane.[18] Dow Chemical Company conceded in *Quebedaux* that it was vicariously liable, through the doctrine of *respondent superior*, for 65% of all damages sustained by the plaintiff as a result of the consequence of any physical injury caused by the battery.[19]

In the case of *Garcia v. Furnace and Tube Service*, the plaintiff questioned a fellow employee, Broussard, concerning negative comments that he allegedly made to a quality control officer, Hebert, regarding Garcia's work quality.[20] Broussard denied making any negative comments to Hebert and then a verbal argument ensued.[21] The two men faced off, but no physical blows were exchanged. Garcia told Broussard to "mind his own f – g business."[22] Garcia then walked off, picked up his tool box and got into a foreman's pick-up truck.[23] Broussard walked up to the truck, grabbed a metal pry bar from the side of the truck and began to swing at Garcia.[24] The defendant employer in that instance, Furnace and Tube, acknowledged that Broussard committed an intentional tort on Garcia

[17] *Id.*
[18] *Id.*
[19] *Id.* at 689.
[20] *Garcia v. Furnace and Tube Service, Inc.*, 921 So.2d 205, 208 (La. App. 2d Cir. 1/27/06).
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*

and that the initial verbal argument between the two men stemmed from Broussard's comments made to the quality control inspector regarding Garcia's workmanship.[25]

In the *Carnes* case, a Select Energy Services' employee named Carnes made complaints about his fellow employee, Wilson, including Wilson's failure to show up for work, Wilson's suspected drug use, and Wilson's hot temperedness. All of those complaints related to workplace safety and/or acts specifically prohibited by the company's employee handbook.[26] Following multiple complaints, Carnes demanded Wilson's termination or transfer. A supervisor removed Wilson from Carnes' crew and restricted Wilson from leaving the worksite for lunch.[27] Three weeks later, Wilson was put back on Carnes' crew and Wilson attacked Carnes.[28] The obvious reason for the physical attack on Carnes was that it was in direct response to complaints Carnes had made regarding Wilson's job performance and work place safety.[29] In addition to concluding that the altercation was employment-related, the Louisiana Second Circuit found that Select Energy might have prevented the attack had it not put Wilson back on Carnes' crew.[30] Carnes' supervisors were aware of the issues Carnes had with Wilson, as well as Wilson's propensity towards violence as Carnes testified that supervisors were aware of a previous shoving altercation initiated by Wilson against another employee.[31]

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[25] *Id.* at 210.
[26] See *Carnes v. Wilson*, 118 So.3d 1275, 1277 (La. App. 2d Cir. 7/3/13).
[27] *Id.*
[28] *Id.* at 1278.
[29] *Id.*
[30] *Id.*
[31] *Id.* at 1278-1279.

In the *Haynie* case, the subordinate employee Alford was working as a CNA at Twin Oaks Nursing Home when she struck her supervisor Haynie.[32] According to the record, Ms. Haynie, as the supervisor, approached Ms. Alford to instruct her to report to Ms. Haynie's office.[33] When Ms. Haynie turned around, Ms. Alford attacked her from behind, striking her three to four times in the head and neck. When questioned by the authorities, Ms. Alford, who had been written up for prior work-related problems, reported that she knew they were going to fire me so I gave them a damn good reason to. [34] Ms. Haynie suffered bruises, scratches, a black eye and soft tissue injuries.[35]

In *Garcia v. Lewis*, Garcia saw Lewis take three snow crabs legs from the buffet at their workplace, which was the El Dorado Casino.[36] El Dorado had a strict policy against theft, so Garcia reported the incident to the head chef, who in turn reported to Lewis' supervisor. The supervisor, Elizardo, then fired Lewis and asked that he clear out his locker. After Lewis went to clean out his locker, he retrieved brass knuckles and returned to the kitchen. He then beat Garcia in the head and neck and fled the kitchen, seriously injuring Garcia.[37] Lewis had amassed four minor fractions in his four months of employment and the plaintiff argued that the employer should have anticipated that he would react violently when fired and should have taken additional precautions, such as escorting Lewis out of the facility, according to the allegations of Garcia in his tort suit against Lewis, Lewis' employer (FSS), and El Dorado Casino. Lewis had also pled guilty

[32] See *Haynie v. Twin Oaks Nursing Home, Inc.,* 232 So.2d 3d 74, 76 (La. App. 5th Cir. 11/15/17).
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] See *Garcia v. Lewis*, 197 So.3d 738 (La. App. 2d Cir. 6/22/16).
[37] *Id.* at 739-740.

to illegal carrying of a firearm on school property three months before FSS had hired him. In that case, the Louisiana Second Circuit noted that Garcia's act of reporting Lewis' job performance, or failure to perform, may well have made Lewis' conduct "employment rooted."

In the *Menson* case, the employee Taylor was working as a bus driver when he was told by his supervisor to make an additional trip.[38] After picking up several passengers, Taylor was so angry over having to drive the additional route that he became teary-eyed and pulled the bus over to the side of the road.[39] Menson, who was a route supervisor, saw the bus parked and confirmed with Menson that there was nothing wrong with the bus and that the bus was running well.[40] Taylor wanted to know why he had to make another trip, but Menson did not offer a reason.[41] Menson simply told Taylor to drive the bus and headed back towards his car.[42] Taylor then ran towards Menson screaming, grabbed Menson's neck, threw him to the ground, and jumped on his leg and knee. After analyzing the *LeBrane* factors, the *Menson* court found that the third and fourth factors were easily met, since the altercation occurred during work hours along the employer's transportation route. The court next had to determine whether Taylor's actions were primarily employment rooted.[43] In that case, Taylor's attack on Menson was clearly employment rooted. Taylor did not want to drive an additional route and Menson

[38] *See Menson v. Taylor*, 849 So.2d 836 (La. App. 1st Cir. 6/27/03).
[39] *Id* at 838
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.* at 840.

ordered him to drive the route.[44] The dispute directly arose out of Taylor's duty to provide transportation on behalf of its employer.[45]

In *Caudle v. Betts*, the CEO injured an employee as the result of a practical joke.[46] Betts was the president and principal shareholder of the automobile dealership where the plaintiff worked.[47] The practical joke involved using a charged condenser to shock employees at an office Christmas party and the person who committed the battery was the president of the company. The court found that Betts intended the contact with the employee to be offensive and at least slightly painful or harmful. Thus, the defendant should be responsible for the consequences of the act even if the defendant did not intend or could not reasonably expect.[48]

In the *Brumfield* case, Brumfield had addressed an employee of Coastal Cargo, Mr. Farrow, in a vile and derogatory way.[49] Farrow hit Brumfield in the head, according to Brumfield.[50] The court noted that an intentional tort committed by an employee during working hours will not render an employee vicariously liable unless the employee is acting within the "ambit" of his assigned duties and also in furtherance of his employer's objective."[51] There was a company policy against fighting and abusive language.[52] Mr. Farrow had also been instructed that it was not his position to deal with truck drivers and Farrow explained that the reason for the policy was because Coastal Cargo did not want

[44] *Id.*
[45] *Id.*
[46] See *Caudle v. Betts,* 512 So.2d, 389 (La. 1987).
[47] *Id.* at 390
[48] *Id* at 392
[49] See *Brumfield v. Coastal Cargo*, 768 So.2d 634, 636 (La. App. 4th Cir. 6/28/00).
[50] *Id.* at 638.
[51] See *Brumfield* at 640 (citing *Baumeistier v. Plunkett*, 673 So.2d 994, 996 (La. 5/21/96)).
[52] *Brumfield* at 641.

the lift operators to become familiar with the truck drivers or to grant them special favors.[53] The inference to be drawn, therefore, was that the possibility of fighting was a risk of harm attributable to Coastal Cargo's business, and the trial court found vicarious liability in that instance.

In *Benoit v. Capitol Manufacturing*, two employees had a dispute about whether or not the door to their workplace should be open or closed.[54] The attacker in that instance had used a makeshift tool, a stick used by the workers in the machine shop, to attack his co-employee. The court found that the battery using the stick was clearly "employment-rooted," because the issue was the temperature in the workplace.

In the *Miller* case, Miller and Keating were principal stockholders and executive officers in a small corporation that built steel frame homes.[55] After a disagreement between Miller and Keating, Miller left the employment of their corporation and resigned his position as vice president and construction superintendent. Three months later, Miller was brutally beaten with a pipe.[56] Keating and two other employees of the corporation had conspired to kill Miller in order to generate insurance proceeds for the benefit of the corporation.[57] The Louisiana Supreme Court found that Keating's conspiracy to kill Miller was related to Miller's former employment with the corporation and Miller's presumed non-loyal departure, and that the violence was in large part, although not exclusively, actuated by Keating's desire to improve the corporation's financial picture, an area of the corporation's concern which had been assigned to Keating, its president, from the

[53] *Id.* at 641.
[54] See *Benoit v. Capital Manufacturing Co.,* 617 So.2d 477 (La. 1993).
[55] See *Miller v. Keating*, 349 So.2d 265, 266 (La. 1977).
[56] *Id.*
[57] *Id.*

inception of the company.[58] The risk of harm faced by the plaintiff in that case was fairly attributable to Keating's employment to the corporation.[59]

C. Cases In Which the Exclusion Was Not Applied

There are also many cases in which the plaintiffs have claimed the intentional tort exception but were denied. In the Fifth Circuit case of *Payne,* the jury found, and the Fifth Circuit affirmed, that the employee, Green, intentionally drove a golf cart into a fellow employee, Payne.[60] The court found no evidence that the root cause of the contact between Green and Payne was employment related or that Green's contact with Payne was within **the ambit of her assigned duties** and in furtherance of her employer's objective."[61]

In *Baumeister*, the Louisiana Supreme Court found that a hospital was not vicariously liable for a sexual assault by a nursing supervisor upon a technician during a work break.[62] In that case, the court of appeals had been persuaded by the fact that the attacker had supervisory authority over the victim, and their employment placed both of them at the site of the incident.[63] However, the Louisiana Supreme Court noted that the particular facts of each case must be analyzed to determine whether the employee's tortious conduct was within the course and scope of his employment.[64] The supervisor in *Baumeister* forced himself on top of the plaintiff in a break room without saying anything

[58] *Id.* at 269.
[59] *Id.*
[60] *Payne* at 1097.
[61] *Id* (citing *Baumeister* at 996; *Craft* at 1215).
[62] *Baumeister* at 995.
[63] *Id* at 996.
[64] *Id* at 997 (citing *Scott v. Commercial Union Ins. Co*., 415 So.2d 327, 329 (La. App. 2 Cir. 1982)).

to the plaintiff.[65] The likelihood that a nursing supervisor will find an employee alone in the nurse's lounge and sexually assault her was simply not a risk fairly attributable to the performance of the supervisor's duties.[66]

In a Fourth Circuit case, a Tenneco worker was shot and killed by a striking Tenneco worker during a union picketing at Tenneco's Chalmette facility.[67] The court held that the claim of the plaintiff's family against Tenneco did not fit within the intentional tort exception to the Louisiana Workers Compensation statute.[68] There was absolutely no evidence that either Tenneco or its executive officers committed an intentional tort upon the decedent.[69]

In *Barto v. Franchise Enterprises*, the Second Circuit found that the employer was not vicariously liable for an attack by an employee on his supervisor when the supervisor discovered that the employee had taken money from the restaurant where they worked.[70] The attacker in that case was a cook at the Hardee's fast-food restaurant and the assault on his supervisor was not incidental to the attacker's employment duties as a cook.[71] Applying the *Lebrane* factors, the Louisiana Supreme Court found that employer was not vicariously liable for criminal assault and battery and granted the defendant's motion for summary judgment.[72]

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[65] *Baumeister* at 999.
[66] *Id*.
[67] *Hurst v. Massey*, 570 so.2d 560, 563 (La. App. 4 Cir. 11/15/90).
[68] *Id* at 565.
[69] *Id*.
[70] *See Barto* at 1357.
[71] *Id* at 1357.
[72] *Id*.

In *Pye v. Insulation Technologies, Inc*., an employee attacked his supervisor after the supervisor had reprimanded him.[73] The employer was found to not be vicariously liable because the employer derived no benefit from the employee's act of hitting the supervisor and the act was extraneous to the employer's interests.[74]

> The likelihood that an employee would come up behind a supervisor and strike him in the face with a piece of driftwood is simply not a risk fairly attributable to the performance of the employee's duties. An asbestos worker's duties do not include battery on a co-employee. Nor should the employer have foreseen such conduct on the job-site during working hours. Viledo's actions were therefore not reasonably incidental to the performance of his employment.[75]

The Louisiana Fifth Circuit found, agreeing with the trial court, that the plaintiff failed to establish that the worker's tortious act was employment rooted.[76]

In *Ryback v. Belle*, an employee accidentally closed a freezer door while another employee was inside.[77] The other employee got out of the freezer and attacked the co-employee.[78] The plaintiff in that case did not resist or attempt to fight with the attacker.[79] The First Circuit affirmed a jury determination that the attack was not incidental to the employee's duties and was not primarily employment rooted.[80] The likelihood that the employee would become enraged and attack the co-employee, after being accidentally locked in the freezer, was not a risk fairly attributable to the performance to the employee's duties.[81] Therefore, the employer was not vicariously liable.[82]

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[73] *Pye v. Insulation Technologies, Inc*., 700 So.2d 892, 893 (La. App. 5 Cir. 9/17/97).
[74] *Id* at 894.
[75] *Pye* at 894.
[76] *Id*.
[77] 753 So.2d 383 (La. App. 1 Cir. 2/18/00).
[78] *Id* at 385.
[79] *Id.*
[80] *Id* at 387.
[81] *Id.*
[82] *Id*.

In *Francioni v. Rault*, an employer was not held liable for an employee's act of assault and murder of a co-employee.[83] It was established that the co-employee was killed because she had discovered that her co-worker Rault (convicted murderer), had been embezzling from the company.[84] In affirming the employer's motion for summary judgment, the court found that Rault's function as the company's accountant did not include the embezzlement of money, thus, the murder was not employment rooted.[85] Rault's conduct was found to be motivated by purely personal considerations entirely extraneous to the employer's interests.[86] Even though the murder occurred entirely outside of the employment premises and working hours, this was not the determining factor of liability. As the court stated, "More important than time and location of the act is the fact that, at the time of the murder, Rault was not in the course of carrying out his employment duties."[87]

In *Tampke v. Findley Adhesives, Inc.*, an employee's widow and children sought damages against the employer for the murder of Thomas Tampke, plant manager and chief of sales at Findley Adhesives.[88] The co-employee, who was involved in a hit and run accident while driving a company truck, was fired by the plant manager after discussing the accident.[89] Immediately thereafter, an argument ensued and the manager was struck and killed by his co-employee.[90] In finding the employee's dismissal to be the main reason for the assault, the court held that the incident could not be regarded as a

[83] 570 So. 2d 36 (La. App. 4th Cir.1990), *writ denied*, 575 So. 2d 371 (La. 1991).
[84] *Id* at 37-38.
[85] *Id* at 38.
[86] *Id*.
[87] *Id* at 38.
[88] *See* 489 So.2d 299 (La. App. 4 Cir. 1986).
[89] *Id* at 300.
[90] *Id.*

"risk of harm fairly attributable to the employer's business."[91] Specifically, the Fourth Circuit reasoned that the employee's tortious actions could not possibly benefit his employer's objectives, in that he actually deprived his former employer of one of its most valued employees.[92] In conclusion, the court found that the employee's attack was clearly motivated by personal considerations.[93]

D. Managing Risk of Employee Misconduct

Four methods for employers to reduce the risk of workplace violence include:

1. Continuously screen workers. It should be noted that some states have "ban the box" laws which prohibit employers from asking about a job candidate's criminal history until they make a condition offer.[94]
2. Limit access. Companies should consider granting unrestricted access to the worksite only to employees and visitors who have successfully completed the organization's background check.
3. Limit discrimination while, at the same time, assessing the individual candidate's criminal history and how it relates to the job.
4. Monitor for substance abuse. Employee drug and alcohol testing can reduce risk of violence resulting from impulsive behavior.

II. Liability for Criminal Acts on Business Property

For the property owner (i.e. shopping centers, apartment complexes, casinos, and hotels), there is the risk of a criminal act being committed on the property against a

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[91] *Id*.
[92] *Id.*
[93] *Id*.
[94] Article by Society for Human Resources Management, www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/reducing-the-risk-violence-in-the-workplace.aspx.

customer and create, at least arguably, liability against the business and/or property owner.

As a general matter, business owners are not the insurers of their patrons' safety. However, the courts have found that business owners have a duty to implement reasonable measures to protect their patrons from criminal acts when those acts are foreseeable.[95] In the Louisiana Supreme Court case of *Posecai*, the plaintiff was robbed at gunpoint of her jewelry in the parking lot of Sam's Club.[96] It was 7:20 p.m. in July and was not dark outside.[97] The store's security guard was inside the store at the time to guard the store's cash.[98] The plaintiff's expert opined that the robbery could have been prevented by an exterior security presence.[99] There had been three robberies or "predatory offenses" between 1989 and June 1995 and the store was behind a neighborhood which was known for being a high-crime area.[100] The plaintiff in *Posecai* contended that Sam's was negligent in failing to provide adequate security in the parking lot.[101]

A balancing test should be used in deciding whether a business owes a duty of care to protect its customers from the criminal acts of third parties.[102] The foreseeability of the crime risk on the defendant's property and the gravity of the risk determine the existence and the extent of the defendant's duty.[103] The greater the foreseeability and

[95] *Posecai v. Wal-Mart Stores, Inc*., 752 So.2d 762, 766 (La. 11/30/99).
[96] *Id* at 764.
[97] *Id*.
[98] *Id*.
[99] *Id*.
[100] *Id*.
[101] *Id* at 765.
[102] *Posecai* at 768.
[103] *Id*.

gravity of the harm the greater the duty of care that will be imposed on the business.[104] A very high degree of foreseeability is required to give rise to a duty to post security guards.[105] A lower degree of foreseeability may support a duty to implement lesser security measures such as using surveillance cameras, installing improved lighting or fencing, or trimming shrubbery.[106] The plaintiff has the burden of establishing the duty the defendant owed under the circumstances.

The foreseeability and gravity of the harm are determined by the facts and circumstances of the case. The most important factor to be considered is the existence, frequency and similarity of prior incidents of crime on the premises, but the location, nature and condition of the property should also be taken into account.[107] The Louisiana Supreme Court in *Posecai* noted that there were only three predatory offenses on Sam's premises in the six and a half years before the robbery, only one of which involved a customer being robbed, which indicated a low crime risk.[108] It was held that Sam's did not possess the requisite degree of foreseeability for the imposition of a duty to provide security patrols in its parking lot.[109] Sam's owed no duty to protect Ms. Posecai from the criminal acts of third parties under the facts and circumstances of the case.[110]

Only when the owner or management of a business has knowledge, or can be imputed with knowledge, of a third person's intended criminal conduct that is about to occur, and which is within the power of the owner or management to protect against, does

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[104] *Id*.
[105] *Id*.
[106] *Id.*
[107] *Posecai v. Wal-Mart Stores, Inc*., 752 So.2d 762 (La. 1999).
[108] *Id*.
[109] *Id* at 769.
[110] *Id*.

such a duty towards a guest arise.[111]

The Louisiana Supreme Court in *Pinsonneault* addressed a case in which escaped prisoners robbed and murdered a night depository patron of a bank.[112] The Supreme Court held that the bank had a duty to provide a **reasonably safe place** for the patron to conduct normal banking business but the evidence was sufficient to support the finding that the bank security measures were reasonable, and thus the bank did not breach that duty of security.[113] The 23-year-old victim was fatally shot when he was attempting to deposit his employer's receipts into the night deposit box of a bank box in Leesville.[114] The Louisiana Supreme Court noted that Merchant's Bank, through its own security manual, recognized a duty to provide a reasonably safe place for its patrons to conduct normal banking business.[115] In fact, not only did the bank recognize a duty to its patrons through the adoption of a written security plan, it took affirmative steps in furtherance of that plan, providing lighting at its night-time depository, erecting fencing along vulnerable perimeters and setting up a schedule for the installation of modern surveillance cameras at each of its branches.[116]

In the *Pinsonneault* case, the plaintiff retained an expert who opined that the defendant bank's security measures fell below the accepted standard of care, including its lighting and landscaping.[117] The plaintiff's expert opined that the light in the back parking lot and driving area of the bank branch where the night depository was located

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[111] *Banks v. Hyatt Corp*, 722 F.2d 214, 220 (5th Cir. 1984).
[112] See *Pinsonneault, et al v. Merchant's and Farmer's Bank and Trust Co., et al*, 816 So.2d 270 (La. 4/3/02).
[113] *Id*.
[114] *Id* at 272.
[115] *Id.* at 279.
[116] *Id.*
[117] *See Pinsonneault* at 279

fell below the minimum standards.[118] There was testimony from the employee of a nearby business that she could see the assailant as he fled, discern what he was wearing and tell that he had something silver on his hip. The trial court in *Pinsonneault* found that the rear of the bank was lighted "so that it was possible to see someone."[119] The *Pinsonneault* court was not persuaded that the lighting, landscaping, or lack of security cameras and fencing was the cause of the attack on the decedent, or that the attack was foreseeable such that the bank was obligated to engage in additional security measures.[120]

In the *Marmer* case, involving a casino in New Orleans, the plaintiff was attacked by someone inside of the casino men's room.[121] The person who attacked Mr. Marmer, identified as Mr. Lucas, was apprehended and detained by the casino security personnel and then arrested by the New Orleans Harbor Police.[122] In granting a motion for summary judgment in favor of the casino, the court noted testimony that the casino received no reports that Mr. Lucas was acting in a suspicious or threatening manner; that seven security officers were working aboard the vessel during the day shift on the date of the incident; that at least one security officer was assigned to each floor, one security officer posted at the boarding structure, and others were assigned as rovers, moving to different areas of the vessel routinely making rounds throughout the gaming areas, restrooms, stairways and exterior decks to insure the safety and security of the vessel; that prior to and subsequent to the incident, no one had ever been harassed, attacked or assaulted

[118] *Id*.
[119] *See Pinsonneault* at 280.
[120] *Id.* at 282.
[121] See *Marmer v. Queen of New Orleans at the Hilton*, 87 So.2d 1115, 1116 (La. App. 4th Cir. 5/16/01).
[122] *Id.*

in the vessel's restrooms, and that the restrooms were frequently checked by the security department for potentially hazardous conditions and for safety reasons.[123]

As noted by the Louisiana Fourth Circuit in the case of *Dye*, in which a customer of Schwegmann's grocery store in eastern New Orleans was murdered in the parking lot during the day, security guards are not policemen.[124] They cannot prevent all harm, nor can they physically keep potential criminals away from the premises.[125] The general duty of reasonable care does not extend to protecting patrons from the **unanticipated criminal acts of third parties**.[126] In the *Dye* case, the armed robbery and murder occurred in the afternoon in the "main parking lot" of a large grocery store.[127] The plaintiffs in *Dye* alleged that the defendant breached a duty to provide adequate security, hire security guards with professional training, properly train the guards, post armed guards in the parking lot, provide adequate security in the parking lot, and other acts of negligence.[128]

In the two years before Ms. Dye's death, there had been 22 armed robberies at the store.[129] The store's security chief testified that they kept between four and eight guards outside.[130] On the day of the shooting, there were four guards assigned to patrol outside the store but only one was outside at the time of the shooting because one was

[123] See *Marmer* at 1120-1122.
[124] See *Dye v. Schwegmann Bros. Giant Supermarkets, Inc.,* 627 So.2d 688, 694 (La. App. 4th Cir. 1993).
[125] *Id.*
[126] See *Hickman ex rel Hamlin v. Chevron USA, Inc.*, 2007 WL 4465694, *3 (La. App. 1st Cir. 12/21/07) (citing *Taylor v. Stewart,* 672 So.2d 302, 306 (La. App. 1st Cir. 4/4/96); *Rhodes v. Winn-Dixie Louisiana, Inc.*, 638 So.2d 1168, 1171 (La. App. 1st Cir. 6/24/94))[emphasis added]
[127] *Dye* at 697.
[128] *Id.*
[129] *Id* at 693.
[130] *Id.*

inside completing a report, another had not yet come on duty, and a third was sent to another store to fill an illness vacancy.[131] Finally, there was a security officer riding a motor scooter through parking lot who passed the area of the shooting only minutes before, which was verified by an independent witness, but that officer drove the scooter to the store front to take a break and wait for another employer to relieve her.[132]

Considering that a security officer had passed the area only minutes before, the Louisiana Supreme Court in *Dye* found that it was unlikely that more security guards would have deterred a determined criminal from the robbery and murder.[133] It would be impractical to employ a security force so large that every aisle would be insured of safety at every moment.[134] Based on testimony by Schwegmann's personnel, and verified by an independent witness, it was clear that the store performed the assumed duty of providing security with due care.[135]

The courts have found defendants negligent where a security officer does not properly carry out his/her duties. The most notable of these cases, *Harris v. Pizza Hut*, involved a shooting at a pizza restaurant in New Orleans.[136] In that case, a New Orleans Police Department officer was working a security detail at a Pizza Hut restaurant between 9:00 p.m. and 1:00 a.m. in a high-crime area.[137] There had been 20 armed robberies of the same restaurant.[138] The officer was seated inside of the restaurant, eating a salad, and talking to a customer about a book the officer had brought with him, when a masked

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[131] *Id*.
[132] *Id*.
[133] *See Dye* at 695.
[134] *Id*.
[135] *Id*.
[136] *See Harris v. Pizza Hut of Louisiana, Inc*., 455 So.2d 1364, 1366-67 (La. 1984).
[137] *Id*.
[138] *Id*.

gunman walked in at 10:00 p.m. with a shotgun.[139] Although the officer had his hand on his gun, the robber (who was serving time at Angola by the time of the civil case) testified that he had the "ups on him."[140] After the officer moved to his right, the shotgun was fired and killed a customer in the line of fire.[141]

The jury in the *Harris* case found that the officer was not visible to the robbers when they walked in and should have been positioned at the entrance, which was supported by expert testimony in the matter.[142] Also, the jury found that the officer should not have moved, which the experts opined was contrary to what his trained reaction should have been.[143] The Louisiana Supreme Court agreed with the trier of fact, that the officer's actions were contrary to his training and he was therefore negligent.[144] Also, the main purpose of having the NOPD officer was as a deterrent and if the officer had been visible to the robbers, it is reasonable to conclude that the robbery would not have been attempted.[145] The officer's negligence was imputed to the restaurant which hired him. The officer was hired to deter crime and not hired to take a salad break during the period of greatest danger at the restaurant.[146]

B. Common Security Measures to Minimize Risk

A. Cameras – Investigative tool and as deterrent

B. Lighting – number and power of lights

C. Private Security Services

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[139] *Id* at 1367.
[140] *Id* at 1368.
[141] *Id*.
[142] *Harris* at 1368.
[143] *Id*.
[144] *Id* at 1370-1371.
[145] *Id.*
[146] *Id* at 1372.

D. Off-Duty Police Officers

E. Signage (i.e. premises monitored)

III. Insurance Coverage

Liability policies generally exclude coverage for bodily injury and property damage which are intentionally inflicted.[147] Such an exception to coverage may appear as a specific exclusion. Under homeowners policies, the exclusion is typically referred to as the "intentional injury" exclusion whereas under commercial general liability (CGL) policies it is commonly referred to as the "assault and battery" exclusion.

The Louisiana Supreme Court has held that the injury is "intentional" only when "the person who acts either consciously desires the physical result of his act, whatever the likelihood of that result happening from his conduct; or knows that the result is substantially certain to follow from his conduct, whatever his desire may be as to the result."[148] In the case of an insured who struck the plaintiff ten to fifteen times with his fists and kicked him, the insured tried to explain his conduct as a "furious frenzy."[149] The Louisiana Supreme Court held that the injuries resulting from such conduct are either intended by the insured or the insured must know that such injuries are substantially certain to result.[150] Therefore, the intentional injury exclusion barred coverage.[151]

If an insured is in actual danger or reasonably believes he is in danger and takes appropriate action in self-defense, then such insured is not liable to the person injured by his actions.[152]

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[147] *See* 15 La. Civ. L. Treatise, Insurance Law & Practice §5.5 (4th ed.)
[148] *See Pique v. Saia*, 450 So.2d 654, 655 (La. 1984).
[149] *See Yount v. Maisano*, 627 So.2d 148 (La. 1993).
[150] *Id*.
[151] *Id*.
[152] 15 La. Civ. Law Treatise at Sec. 5.5.

In *Great American Insurance Company v. Gaspard*, an arsonist set fire to his store in a strip shopping center.[153] The lower courts found that arsonist's liability policy covered the damages awarded to the other businesses in the same strip center because the insured only intended to damage his own store. However, the Louisiana Supreme Court held that the subjective intent of the insured, as well as his reasonable expectations as to the scope of his insurance coverage, will determine whether an act is intentional. From the large amount of gasoline used, the court concluded that the arsonist either intended damage to the other businesses or had a subjective belief that such a result was substantially certain to follow. Additionally, no reasonable policyholder could expect an insurance policy to cover his criminal act of arson.

The courts have determined in some cases that fighting was covered because the determination of the insured's intent was a genuine factual issue. For example, when the mother of a little league basketball player became angry and pointed her finger into the chest of another player. The plaintiff claimed that the little league player suffered nightmares. The defendant insurer filed for a motion for summary judgment on the basis that the act was intentional and therefore not covered under the personal liability coverage of her homeowner's policy. The appellate court found that issues of fact were present to preclude summary judgment.[154] In a case where "inappropriate comments and inappropriate bodily contact" were alleged, the court reversed summary judgment in favor of the defendant's insurer, finding disputed factual issues: (a) whether there was an 'occurrence'; (b) whether there was a "bodily injury" under a definition that excluded

[153] *See Great American Ins. Co. v. Gaspard*, 608 So.2d 981, 985 (La. 1992)
[154] *See Norwood v. Van Veckhoven*, 792 So.2d 836 (La. App. 2 Cir. 2001).

"emotional distress, mental anguish, humiliation, etc." and (c) whether bodily injury was "intended by the insured" or "willful and malicious."[155]

Some polices contain an express exclusion for assault and battery, whether or not committed by or at the direction of the insured.[156] This exclusion has been held effective to preclude coverage regardless of whether the insured was a participant in the altercation.[157] For example, the Louisiana Supreme Court has found the assault and battery exclusion enforceable where a plaintiff was shot by a robber in the parking lot of a restaurant.[158] In that case, the plaintiff sued the guard service and its insurer. The insurer's CGL policy contained a broad exclusion for "assault and battery committed by any insured, any employee of any insured, or any other person, whether or not committed by or at the direction of any insured," and for "failure to suppress or prevent assault and battery."[159] In that instance, the insured could have purchased coverage for assault and batteries for an addition premium. The exclusion was enforceable.

Questions Are Welcome Any Time:

Gino R. Forte
Attorney
Gaudry, Ranson, Higgins & Gremillion, LLC
401 Whitney Ave, Suite 500
Gretna, LA 70056
Phone: (504) 376-1351
Email: gforte@grhg.net

[155] *See* 15 La. Civ. Law Treatise at Section 5.5 (citing *Love v. Sirey*, 119 So.3d 732 (La. App. 5 Cir. 2013).
[156] *Id* (citing *Taylor v. Duplechain*, 469 So.2d 472 (La. App. 3 Cir. 1985).
[157] *Id* (citing *Hickey v. Centenary Oyster House*, 719 So.2d 421 (La. 1998).
[158] *Id.*
[159] *Id.*