STATE OF LOUISIANA COMPENDIUM OF LAW

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Updated 2021

PRE-SUIT AND INITIAL CONSIDERATIONS

Pre-Suit Notice Requirements/Prerequisites to Suit

As a general rule, there are no prerequisites to suit regarding most causes of action in Louisiana. However, one important exception to this rule arises in suits for medical malpractice. The pre-suit requirement for an action against a qualified healthcare provider is governed by the Louisiana Medical Malpractice Act found at LA. REV. STAT. ANN. § 40:123.1 *et seq*. The Medical Malpractice Act requires plaintiffs to submit their claims to a medical review panel prior to filing suit in the court system. The review panel is designed to act as a filter to purge any unmeritorious claims. However, the Act does not prohibit a plaintiff from subsequently filing suit, even after an unfavorable decision from the panel.

Relationship to the Federal Rules of Civil Procedure

While many of Louisiana's Rules of Civil Procedure may be modeled after the Federal Rules, Louisiana has its own Code of Civil Procedure that is codified according to the Louisiana Civilian tradition.

Description of the Organization of the State Court System

A) Judges in Louisiana state courts are elected to the bench. LA. CONST. art. 5. A judge of the Supreme Court, a Court of Appeal, District Court, Family Court, Parish Court, or court having solely juvenile jurisdiction shall have been domiciled in the respective district, circuit, or parish for one year preceding election and shall have been admitted to the practice of law in the state for at least the number of years specified as follows:

(1) For the Supreme Court or a court of appeals: ten (10) years.

(2) For a District Court, Family Court, Parish Court, or court having solely juvenile jurisdiction: eight (8) years. LA. CONST. art. 5, § 24.

Additionally, the Constitution forbids a sitting judge from engaging in the practice of law while on the bench. *Id*.

B) The Louisiana Constitution provides that judicial power is vested in a Supreme Court, Courts of Appeal, District Courts, and other courts authorized by statute. LA. CONST. art. 5, § 1. There is one Louisiana Supreme Court. The Courts of Appeal are organized by five (5) geographic Circuits and review decisions from the lower courts in their geographic districts. The state is also divided into forty-two (42) judicial districts, with some districts comprised of more than one parish. Each judicial district is home to a state district court. State district courts have concurrent jurisdiction with Louisiana Federal Courts. In addition to the judicial district courts, many Louisiana parishes, and some cities, also have lesser courts of limited jurisdiction. The courts of limited jurisdiction include Parish Courts, City Courts, and Justice of the Peace Courts. These Courts do not offer the option of juries and all have various levels of monetary subject matter jurisdiction controlled by statute. The common element for all courts of limited jurisdiction is that the amount in controversy must be lower than the requisite for a jury trial at the district court level, fifty thousand dollars ($50,000).

C) In Louisiana, the nature and the amount of the principal demand shall determine whether any issue in the principal demand is triable by jury. LA. CODE CIV. PROC. ANN. art. 1732. A jury shall not be available in a suit where the amount of no individual petition's cause of action exceeds fifty thousand dollars ($50,000) exclusive of interest and costs. LA. CODE CIV. PROC. ANN. art. 1732. If the petitioner stipulates to damages under $50,000 less than sixty (60) days prior to trial, a defendant is still entitled to a trial by jury. LA. CODE CIV. PROC. ANN. art. 1732(1)(a).

D) Louisiana does not have a statute regarding alternative dispute resolution (ADR).

Service of Summons upon:

A) Service of summons upon an individual may be made by one so authorized, generally the sheriff or a private person appointed by the court. Louisiana law has recently been amended to allow for a private process server without first requiring the sheriff to attempt service. LA CODE CIV. PROC. ANN. art. 1293. The party making a motion to appoint a private process server shall include the reasons, verified by affidavit, necessary to forego service by the sheriff, which shall include but not be limited to the urgent emergency nature of the hearing, knowledge of the present whereabouts of the person to be served, as well as any other good cause shown. Service can also be made by domiciliary service by leaving the process at the dwelling or usual place of abode of the defendant, with a person of suitable age and discretion who resides in the domiciliary establishment. LA. CODE CIV. PROC. ANN. art. 1234.

B) Service of summons on a corporation can be made by personal service on its registered agent, or if there is no registered agent, on any officer, director, or employee of suitable age and discretion where the corporation regularly conducts business. Failing that, after certifying there was a diligent effort to serve, service may be made on the Louisiana Secretary of State. LA. CODE CIV. PROC. ANN. arts. 1261-62; LA. REV. STAT. ANN. § 13:3471.

C) Service of summons on a partnership may be made by personal service on a partner or on a partnership in commendam by personal service on a general partner; or failing that, after certifying a diligent effort was made, on any employee of the partnership or partnership in commendam. Service on an unincorporated association may be made by personal service on an agent, a managing official, or failing that, on any member. LA. CODE CIV. PROC. ANN. arts. 1263-64.

D) Service of summons on a limited liability company (domestic or foreign) can be made by personal service on an agent; or failing that, after certifying there was a diligent effort made to serve the agent, by personal service on any manager, or if none, any member; or personal service on any employee of suitable age and discretion where business is conducted. LA. CODE CIV. PROC. ANN. arts. 1266-67.

E) Service of summons on a political subdivision, public corporation, or state, parochial or municipal board or commission is made at its office by personal service upon the chief executive officer thereof, or in his absence upon any employee thereof of suitable age and discretion. A public officer, sued as such, may be served at his office either personally, or in his absence, by service upon any of his employees of suitable age and discretion. LA. CODE CIV. PROC. ANN. art.1265.

F) Service of summons on a non-resident motor vehicle operator who has used Louisiana's roads is governed by LA. REV. STAT. ANN. § 13:3474. A non-resident motorist can be served through the Louisiana Secretary of State and by mailing notice of service to the defendant, certified or registered mail, return receipt requested, to the address shown for the defendant on the accident report. LA. REV. STAT. ANN. § 13:3475.

G) Service of summons on a foreign or alien insurer transacting insurance business in Louisiana without a certificate of authority is governed by LA. REV. STAT. ANN. § 22:1907. Service may be made on these entities through the Louisiana Secretary of State.

H) Service of summons on an absent person, an incompetent person, or a non-resident may be made by personal service on an attorney at law appointed as a *curator ad hoc*.

I) A non-resident can also be served via the Louisiana Long-Arm Statute by mailing the citation and petition to the defendant, certified or registered mail, return receipt requested. The proof of receipt must then be filed into the record with an affidavit to evidence service. LA. REV. STAT. ANN. § 13:3204 (2008).

Liberative Prescription

A) The term "statute of limitations" is not used in the Louisiana Civilian tradition. The corresponding concept is termed "liberative prescription" and is defined as the barring of an action because of the passage of time. LA. CIV. CODE ANN. art. 3447. Liberative prescription commences to run from the day the cause of action arises and its judicial enforcement is possible. Further, liberative prescription ("prescription") can be suspended or interrupted. An interruption in prescription results in the prescriptive period commencing again and the time that has already accrued is not counted. LA. CIV. CODE ANN. art. 3466. Generally, prescription is interrupted by filing suit or acknowledgment by the party against whom prescription is running. LA. CIV. CODE ANN. arts. 3462-64.

B) Actions based in tort have a liberative prescription of one (1) year from the date the injury or damage is sustained. LA. CIV. CODE ANN. art. 3492. Actions for damage to an immovable prescribe one (1) year from the time the owner knew or should have known of the damage. LA. CIV. CODE ANN. art. 3493. An action against a home inspector for a claim related to a faulty home inspection must be brought within one (1) year of the date of the act or omission giving rise to the cause of action, with the exception of actions based on fraud. LA. REV. STAT. ANN. § 9:5608. Actions for damage which arise as a result of an act defined as a crime of violence under the Louisiana Criminal Code are subject to a liberative prescription of two (2) years. LA. CIV. CODE ANN. art. 3493.10.

C) The following actions have a liberative prescription of three (3) years and prescription commences when payment is eligible: annuities, arrearages of rent, money lent, open accounts, compensation for services rendered; action by a client against an attorney for return of papers. LA. CIV. CODE ANN. art. 3494; LA. CIV. CODE ANN. art. 3496.

D) The following actions have a liberative prescription of five (5) years: promissory notes, reduction of an excessive donation, annul a testament, rescind a partition, and arrearages of spousal support. LA. CIV. CODE ANN. art. 3497-98.

E) All personal actions not subject to the above special liberative prescription periods are governed by ten (10) year liberative prescription. LA. CIV. CODE ANN. art. 3499. For example, actions on contracts, as a general rule, have a liberative prescription period of ten (10) years. However, there are special rules with regard to some contract issues: actions based on a vice of consent have a prescriptive period of five (5) years, actions for redhibition have prescriptive periods of either one (1) or four (4) years depending on the good faith or bad faith of the seller, and lesion beyond moiety has a prescriptive period of one (1) year that is also preemptive. Actions on money judgments prescribe in ten (10) years, unless revived. LA. CIV. CODE ANN. art. 3501. Actions on arrearages for child support are barred after ten (10) years. LA. CIV. CODE ANN. art. 3501.1.

F) In addition, Louisiana also has the doctrine of peremption. Peremption is defined as "a period of time fixed by law for the existence of a right." LA. CIV. CODE ANN. art. 3458. Peremption differs from prescription in that peremption is immune from the principles of suspension and interruption. LA. CIV. CODE ANN. art. 3461.

G) An action against professional engineers, surveyors, interior designers, and architects perempt in five (5) years. LA. REV. STAT. ANN. § 9:5607. Actions for legal malpractice perempt in three (3) years. LA. REV. STAT. ANN. § 9:5605.

Venue Rules

A) Venue is the term used for the parish in which the proceeding may properly be brought. Most venue rules are permissive, thus they can be waived if not raised prior to making a general appearance. Objections to venue are made by a timely filed declinatory exception of improper venue.

B) Venue is governed by a set of general rules found in LA. CODE CIV. PROC. ANN. art. 42. An action against an individual may be brought in the parish of the party's domicile if the party is domiciled in Louisiana, or the parish of his residence if he resides, but is not domiciled, in Louisiana. *Id.* If the party is a nonresident, but does have an agent for service of process in the state, the action may be brought in the parish of the agent's address. *Id.* If the nonresident does not have an agent for service of process, suit may be brought in the parish of plaintiff's domicile or where personal service of process on the defendant is made. *Id.* A suit against a domestic corporation can be brought in the parish of its registered office. *Id.* A suit against a foreign corporation licensed to do business in Louisiana may

be brought in the parish of its primary business office as designated in its application to do business, or, if there is no designation, in the parish of its primary place of business. *Id*. Suits against partnerships and unincorporated associations may be brought in the parish of the entity's principal business establishment. *Id.*

C) Louisiana does allow for direct actions against insurance companies. If the defendant is a domestic insurer, the action may be brought in the parish of its registered office. If the insurer is foreign, suit may be brought in East Baton Rouge Parish. *Id*.

D) Various exceptions to the general venue rules are located in LA. CODE CIV. PROC. ANN. arts. 71-85. Some of these exceptions include:

1) In tort suits, venue will be proper in the parish where the damage was sustained, in the parish where the wrongful conduct occurred, or in the parish where the defendant is domiciled. A suit to enjoin wrongful conduct must be brought in the parish where the wrongful conduct occurred or may occur.

2) Suits on health and accident policies of insurance may be brought where the insured is domiciled or where the accident or illness occurred. Suits on life insurance may be brought in the parish of the decedent's death, the parish where the decedent was domiciled, or the parish where any beneficiary is domiciled. Actions on other insurance policies, including uninsured motorist policies, may be brought where the loss occurred or where the insured is domiciled.

3) Actions on a contract may be brought in the parish where the contract was executed or the parish where the work or service was or was to be performed.

4) If the party was joined by the Louisiana Long-Arm Statute, venue is proper in the parish where the plaintiff is domiciled or in any other parish of proper venue.

E) The concept of *forum non conveniens* is utilized in Louisiana. This doctrine allows a court to transfer a suit, though venue is already proper, to a parish where suit might have been brought if necessary for the convenience of the parties and witnesses and in the interest of justice. LA. CODE CIV. PROC. ANN. arts. 124, 4852, 425. However, no suit brought in the parish of the plaintiff's domicile where venue is proper may be transferred for forum *non conveniens*. LA. CODE CIV. PROC. ANN. art. 123.

NEGLIGENCE

Comparative Fault/Contributory Negligence

A) In 1996, Louisiana moved from the solidarity theory of liability of joint tortfeasors to a comparative fault analysis. LA. CIV. CODE ANN. art. 2323. Prior to amendments to the Civil Code, joint tortfeasors were considered solidarily liable to the plaintiff. The rationale of this approach was that the joint tortfeasors were responsible for an indivisible harm against the plaintiff. Thus, each joint obligor was liable for the whole performance of the

obligation. The obligors, among themselves, were then responsible for contribution according to each party's percentage of fault. This approach was extremely plaintiff friendly, as the plaintiff was almost always fully satisfied. In fact, payment from one of several joint tortfeasors, as far as the plaintiff was concerned, relieved the remaining tortfeasors of liability. However, corporate defendants and insurers were uniquely at risk because they were the proverbial "deep pockets" to which plaintiffs often looked for satisfaction.

B) Solidarity also presented other problems as well. A unique problem was created by the settling tortfeasor. Even though the law treated the actions of multiple tortfeasors as "one wrong," Louisiana law evolved to accept partial settlements by allowing a plaintiff to automatically reserve his rights against the remaining tortfeasors. But the settling tortfeasor created problems regarding the rights of the remaining tortfeasors vis-a-vis each other. Prior to the 1996 reform, Louisiana law provided that settlement relieved the settling tortfeasor of liability for contribution to the non-settling tortfeasors. The quid pro quo for the non-settling tortfeasor was that he was entitled to a credit in the plaintiff's case against him for the contribution rights he would have enjoyed but for the settlement. Thus, the non-settling tortfeasor was required to plead and prove the fault of the settling tortfeasor to get the reduction in the plaintiff's claim against him.

C) Insolvency of a tortfeasor also created a problem in the pre-revision law. Societal policy was to protect the innocent plaintiff from the insolvency of a tortfeasor in a situation where multiple defendants were available for recovery. Generally speaking, the insolvency of any one joint tortfeasor was to be borne by the other solidarily joint tortfeasors according to their proportionate share of liability.

D) Under the current comparative fault doctrine, every defendant's liability is assessed individually. LA. CIV. CODE ANN. art. 2323. Thus, judges and juries are tasked with dividing 100% liability among the many defendants. This eliminated the problems of employer immunity, insolvent tortfeasors, and phantom parties as now each party was only responsible for his/her portion of the damages awarded attributable to his fault, regardless of the ability of the other defendants to pay the judgment. This means the plaintiff effectively absorbs the loss from "non-parties."

E) The move to comparative fault eliminated contributory negligence and assumption of the risk as defenses in all but two instances:

    a) Express consent, waiver, or release will usually bar recovery unless there is a public policy or law to the contrary. However, any clause that, in advance, limits a party's liability for physical injury is null. *Ramirez v. Fair Grounds Corp.*, 575 So. 2d 811 (La. 1991).
    b) Additionally, the plaintiff's involvement in an inherently risky activity (Ex., a spectator at a sporting event), usually acts to relieve the actor of liability.

Exclusive Remedy – Worker's Compensation Protections

A) Worker's compensation is the employee's exclusive remedy against his employer and its agents for personal injury caused by an accident arising out of and in the course of employment. LA. REV. STAT. ANN. § 23:1031 *et seq*. If the employee claims benefits under this act, he is entitled to compensation according to the statutory scheme regardless of fault. Benefits are available throughout the duration of the disability. The rate of compensation is two thirds (2/3) of the employee's weekly wage for total and permanent disability.

B) There are two exceptions to this "exclusive theory" protection afforded employers. First, an injury is not considered as 'arising out of the employment' of the plaintiff if the employee is engaged in horseplay at the time of the accident or if the injury arose from a dispute over matters unrelated to employment. LA. REV. STAT. ANN. § 23:1031 *et seq*. Second, regardless of the worker's compensation coverage, an employer is not immune from suit for intentional torts. However, a plaintiff cannot seek double recovery by suing the employer for an intentional tort and still recovering worker's compensation benefits. *Gagnard v. Baldridge*, 612 So. 2d 732 (La. 1993).

C) For worker's compensation to apply, the injury must be the result of an 'accident.' An accident is an unexpected or unforeseen actual, identifiable, precipitous event that happens suddenly. LA. REV. STAT. ANN. § 23:1021 *et seq*.

D) A gradual deterioration or progressive degeneration is not an injury caused by an accident such that worker's compensation applies. *Coats v. AT&T Co.*, 95-2670 (La. 10/25/96); 681 So. 2d 1243.

E) An injury for purposes of worker's compensation can be a purely mental injury, but this must be proven by clear and convincing evidence. LA. REV. STAT. ANN. § 23.1021.

F) An issue that arises in a worker's compensation setting is, "who exactly is the employer?" Employers include:

   a) Payroll employer.

   b) Borrowed employee. If an employee is borrowed by another employer, both employers become liable for compensation for his torts. *LeJeune v. Allstate Ins., Co*., 365 So. 2d 471 (La. 1978).

   c) Statutory employer. Louisiana operates under the two contract theory for instances when an employer hires an independent contractor. If the owner contracts with a general contractor, who in turn contracts with a subcontractor, the general contractor will be considered the employer for the purposes of worker's compensation.

   d) However, if a person hires an independent contractor specifically for his trade, business, or occupation, then that person will be considered the statutory employer of the contractor's employees. LA. REV. STAT. ANN. § 23:1061.

G) An injured employee may sue a third party tortfeasor even if the plaintiff is receiving worker's compensation benefits. However, the employer's fault is considered in the suit and may act to reduce the employee's recovery.

Joint and Several Liability

Louisiana's move to comparative fault has eliminated the traditional issues of joint and several liability among tortfeasors.

Strict Liability

A) The move to comparative fault has all but eliminated strict liability in all but the most stringent cases. For example, there is still absolute liability for ultra-hazardous activities such as: blasting with explosives, demolition, pile driving, storing toxic gases, and crop dusting. In these instances, a plaintiff need only prove causation and damages. *Kent v. Gulf State Utils.*, 418 So. 2d 493 (La. 1982).

B) LA. CIV. CODE ANN. art. 2321 extends strict liability to damage caused by dogs as long as the plaintiff's injuries "could have been prevented" by the owner and "did not result from the injured person's provocation of the dog." *See Pepper v. Triplet*, 03-0619 (La. 1/21/04); 864 So.2d 181. Although a landlord is strictly liable for vices or defects of his building, he is not strictly liable to a third person for injuries caused by his tenant's animal. The strict liability of the animal owner under LA. CIV. CODE ANN. art. 2321 is not imputed to a non-owner. *Windham v. Murray*, 2006-1275 (La. App. 4 Cir. 5/30/07); 960 So. 2d 328, 332; *Turnbow v. Wye Electric, Inc.*, 38,948 (La. App. 2 Cir. 9/22/04); 883 So. 2d 469, 471-72; *Murillo v. Hernandez*, 00-1065 (La. App. 5 Cir. 10/31/00); 772 So. 2d 868, 871. Nonetheless, a landlord may still be held liable for negligence under LSA-C.C. arts. 2315 and 2316 if there is a violation of a duty and that violation is the cause-in-fact of an injury. Where the landlord had actual knowledge of the animal's vicious propensity, a duty of care arises which may lead to liability pursuant to LSA-C.C. art. 2316 for violation of that duty. *Windham*, 960 So. 2d at 332; *Turnbow*, 883 So. 2d at 472; *Murillo*, 772 So. 2d at 871; *Bradford v. Coody*, 2008-1059 (La. App. 1 Cir. 12/23/08); 6 So. 3d 815.

Willful and Wanton Conduct

Willful and wanton conduct has taken on the same meaning as gross negligence in Louisiana. *Falkowski v. Maurus*, 637 So. 2d 522 (La. App. 1st Cir. 1993). Gross negligence is a completely separate standard than mere negligence and certain situations require a showing of gross negligence, as opposed to the ordinary negligence analysis. It is often defined in terms of "the want of even the slightest care and diligence. It is the want of that diligence which even careless men are accustomed to exercise." *State v. Vinzant*, 7 So. 2d 917 (1942). For example, the driver of an emergency vehicle responding to an emergency can only be held liable on a showing of gross negligence. *Falkowski*, 637 So. 2d at 527.

DISCOVERY

Electronically Stored Information Amendments

In 2007, the Louisiana Legislature enacted changes to its discovery statutes regarding electronically stored information. The 2007 Amendments were enacted by Act No.140 and became effective on August 15, 2007. The 2007 Louisiana amendments are comparable to the 2007 federal rule amendments with some notable differences.

The first statute amended to deal with Electronically Store Information in 2007 is Louisiana Code of Civil Procedure article 1424. The phrase "electronically store information" was added to paragraphs A and B which deal with material that shall not be produced absent a showing that, without such a production, the requesting party will suffer prejudice, cause undue harm, or injustice. Paragraph C adopts language from Federal Rule of Civil Procedure 26(b)(5) relating to asserting privileges during discovery. Paragraph D was added and tracks the language of Federal Rule of Civil Procedure 26(b)(5) relating to the assertion of a privilege during discovery. Both rules require that the party making an inadvertent disclosure to take "reasonably prompt measures" to notify the receiving party after learning of an inadvertent disclosure. Article 1424(D) also goes one step further with the incorporation of Louisiana Rule of Professional conduct 4.4(b) which states that "even without notice of the inadvertent disclosure from a sending party, if it is clear that the material received is privilege and inadvertently produced, the receiving party shall return it to promptly safeguard the material and shall notify the sending party of the material received, but with the option of asserting waiver."

Paragraph E was added to Louisiana Code of Civil Procedure article 1425. This paragraph now protects from discovery drafts of required expert reports and communications with testifying experts that would reveal the attorney's mental impression, opinions or trial strategy that are electronically stored information.

Louisiana Code of Civil Procedure articles 1460-1462 adopt the majority of the new procedures regarding electronically stored information contained in Federal Rules 33 and 34. Electronically Stored Information has been added as a category of discoverable information and treats the production of electronically stored information as a separate type of discovery. Article 1461 now allows a party to request the form or forms for which electronically stored information is to be produced. Article 1461 also adopted Federal Rule 26(b)(2)(B) which protects a responding party from having to produce electronically stored information from sources that are not reasonable accessible due to cost or undue burden.

In regard to responding to interrogatories, Louisiana Code of Civil Procedure article 1460 is consistent with the revised Federal Rule 33. The new amendment recognizes the option of a party served with burdensome interrogatories to make reference to and then produce "business records" for inspection, in lieu of answering interrogatories, and now includes electronically stored information. Louisiana Code of Civil Procedure article 1458 requires that the party answering interrogatories "verify he has read and confirmed the answers and objections." Article 1458.

Federal Rule 34 authorizes the party seeking electronically stored information to enter upon property of the responding party to "test and sample" an "object or operation" within the responding party's "operation or control." Louisiana Code of Civil Procedure article 1461 and 1462(E) differ from Rule 34 in that the responding party is first given an opportunity to respond by producing the requested electronically stored information. 1462(E) also requires the requesting party to show "good cause" for accessing the responding party's computer.

Note that Louisiana courts do not require the parties to incur the time and expense of discovery conferences and plans as outlined in Federal Rule of Civil Procedure 26(f). Louisiana has also not adopted provision that follow Rules 16(b)(5), 26(f) and 37, which concern the preservation of evidence and resulting sanctions when ESI has been destroyed. Louisiana courts rely on Louisiana Code of Civil Procedure articles 1551 (pre-trial orders), 1469 and 1471 (discovery sanctions) to deal with preservation and spoliation matters at this time. Louisiana has also not adopted the "good faith" standard for Federal Rule of Civil Procedure 37. In terms of sanctions for spoliation of evidence, Louisiana requires a showing of intentional misconduct, rather than mere negligence. *Reynolds v. Bordelon*, 2014-2362 (La. 6/30/15), 172 So. 3d 589; *Tomlinson v. Landmark Am. Ins. Co.*, 2015-0276 (La. App. 4 Cir. 3/23/16), 192 So. 3d 153.

Expert Witnesses

A) **Forms of disclosure – reports required.** A party may require any other party, through interrogatories or by deposition, to disclose the identity of each person who may be used at trial to present expert testimony. LA. CODE CIV. PROC. ANN. art. 1425. Upon contradictory hearing, an order may be entered requiring that each party that has retained or employed a person to provide expert testimony provide a written report prepared and signed by the witness. *Id.* The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore and the data or other information considered by the witness in forming their opinion. *Id.* The parties may agree to include in the report the witness' qualifications, including a list of all publications authored by the witness in the preceding ten years. In the absence of a Scheduling Order or other instructions by the trial court, the disclosure of the expert shall be made at least ninety days before the trial date or the date the case is to be ready for trial. *Id.*

   Facts and opinions of experts retained but not expected to testify at trial, are only discoverable in exceptional circumstances where it is impractical to obtain the facts or opinions on the same subject by other means. This applies unless the expert is an examining physician.

B) **Rebuttal witnesses**. The trial judge has great discretion in conducting a trial. This discretion includes the order of presentation of witnesses, as well as the admissibility of a witness' testimony. LA. CODE CIV. PROC. ANN. arts. 1551, 1632. Thus, close attention should be paid to the pre-trial order, which may require the disclosure of the identity of any rebuttal witnesses. However, as a general rule, rebuttal witnesses are not required to be listed in the pre-trial order, and thus not required to be disclosed prior to trial. *LeBlanc v. Cont'l Grain Co., Inc.*, 95-813 (La. App. 5 Cir. 3/13/96); 672 So. 2d 951.

C) **Discovery of expert work product.** Expert work product, in the form of any writing or electronically stored information, obtained or prepared in anticipation of litigation shall not be disclosed under Louisiana's work product privilege if that information reflects the mental impressions, conclusions, opinions, or theories of the expert. LA. CODE CIV. PROC. ANN. art. 1424; *Katz v. Allied Van Lines*, 431 So. 2d 1099 (La. App. 4th Cir. 1983).

Non-Party Discovery

In Louisiana, a subpoena requires the object of the subpoena to attend a hearing, trial, or deposition. The subpoena is issued under the seal of the Court and shall state the name of the court, title of the action, and shall command the attendance of the witness at a time and place specified. LA. CODE CIV. PROC. ANN. art. 1351. The subpoena power of the court is limited to witnesses, whether a party or not, who reside or who are employed in this state. The party making out the subpoena is required to pay expenses for any witness living outside the parish where the subpoena is issued or more than twenty five miles from the courthouse. LA. REV. STAT. ANN. § 13:3661.

A subpoena duces tecum may order a person to appear and/or produce at trial or hearing books, papers, documents, or any other tangible things in his possession or under his control, if a reasonably accurate description thereof is given. The court issuing the subpoena may vacate or modify the subpoena if it is unreasonable or oppressive. LA. CODE CIV. PROC. ANN. art. 1354.

A subpoena shall be served and a return thereof made in the same manner and with the same effect as a service of and return on a citation. Additionally, service may be made by personal service on the witness' attorney of record. LA. CODE CIV. PROC. ANN. art. 1355.

A person, who, without reasonable excuse, fails to obey a subpoena may be adjudged in contempt of the court which issued the subpoena. LA. CODE CIV. PROC. ANN. art. 1357. The court may also order a recalcitrant witness to be attached and brought to court forthwith or on a designated day. *Id.*

Privileges

A) **Attorney-client.** The attorney client privilege shields from public disclosure a client's communications with his attorney, thereby helping to provide effective legal representation. LA. CIV. L. TREATISE, EVID. & PROOF § 8.6 (2008). The privilege belongs to a party who has obtained legal services or who has consulted with a lawyer with a view of obtaining legal services from that lawyer. The privilege applies to any confidential communication made for the purpose of the rendition of those services and to the attorney's perceptions and observations of the condition of the client in connection with a communication. The privilege is not limited to direct communication between the client and the lawyer, but also extends to their representatives, which may include experts engaged by the attorney or the client in the pursuit of the litigation.

The attorney client privilege extends only to communication between the attorney and the client, and not to information gathered by the attorney from other sources. If the

information is contained in a "writing", it may be privileged from discovery as part of the attorney's work product privilege. *Id.*

B) **Statements.** The work product privilege does not extend to statements given by a witness, when sought by that witness. LA. CIV. L. TREATISE, EVID. & PROOF § 8.6 (2008).

Under the work product privilege, only writings are protected from discovery. Thus, audio tape recordings of statements are not protected by the work product privilege because they are not "writings." *Landis v. Moreau,* 00-1157 (La. 2/21/01); 779 So. 2d 691. As for transcripts of statements, the courts will follow the work product analysis, first asking whether the writings were prepared by the adverse party, his attorney, surety, indemnitor, expert, or agent; and then determine if the statement was prepared in anticipation of litigation. Only if both answers are 'yes', should the issue of unfair prejudice be broached. *Id*.

Typically, witness statements are not protected by a privilege as most witness statements fail the second prong of the test, i.e. they are not taken in anticipation of litigation or trial. Statements taken soon after an incident occurs as part of the investigation of that incident are not protected by the work product privilege. LA. CIV. L. TREATISE, EVID. & PROOF § 8.6 (2008).

C) **Work product.** Work product is defined as writings prepared by a party or his attorney in anticipation of litigation or in preparation for trial. Work products are not discoverable, unless denial will cause unfair prejudice, undue hardship, or injustice to the party seeking discovery. This privilege only applies to writings, not video tapes or other tangible things. Thus, surveillance films, for example, are discoverable. However, a defendant is not required to produce a surveillance film until after the plaintiff's deposition is taken. LA. CIV. L. TREATISE, EVID. & PROOF § 8.6 (2008).

A judge may waive the work product privilege if the requesting party can show a substantial need and an inability to obtain the information from other means without undue hardship. Even if such a showing is made, those portions of the 'work product' containing the mental impressions, conclusions, opinions and legal theories of an attorney remain privileged. LA. CIV. L. TREATISE, EVID. & PROOF § 8.6 (2008).

Requests to Admit

Requests for admission of fact may be served on an adverse party. LA. CODE CIV. PROC. ANN. art. 1466. The requests may be made regarding the truth of any relevant matters of fact, including the genuineness of any documents described in the request. The requests may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the petition upon that party. *Id.*

The subject of the request for admission of fact is deemed admitted unless, within thirty (30) days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer

or objection addressed to the matter, signed by the party or his attorney. LA. CODE CIV. PROC. ANN. art. 1467. If objection is made, the reasons thereof shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannon truthfully admit or deny the matter. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny the request unless he states that he has made a reasonable inquiry and that the information known or readily available by him is insufficient to enable him to admit or deny the request. *Id*.

Any matter admitted is conclusively established unless the court on a motion permits the withdrawal or amendment of the admission. LA. CODE CIV. PROC. ANN. art. 1468. An admission in one proceeding is only good for that proceeding.

EVIDENCE, PROOFS & TRIAL ISSUES

Accident Reconstruction

In Louisiana, accident reconstruction testimony is governed by the general evidence laws as set forth in the Louisiana Code of Evidence. In order to present accident reconstruction testimony, a witness must be qualified as an expert in the field of accident reconstruction. Although the U.S. Fifth Circuit is unsure that an "expert" field in accident reconstruction even exists, the Courts will look to one of the following criteria to determine if an individual will qualify as an expert in accident reconstruction: (1) if the witness has held a professorial rank or taught any course that involved accident reconstruction; (2) if the witness has a degree in accident reconstruction; (3) if the witness is certified by the Association of Accident Reconstructionists; (4) or if the witness had conducted any studies or experiments in the field. *Wilson v. Woods*, 163 F.3d 935 (5th Cir. 1999).

All other issues regarding accident reconstruction are decided by the presiding judge according to the rules of Louisiana Rules of Evidence. Louisiana requires the judge to act as a "gatekeeper" regarding expert testimony and is charged with excluding that which is not wholly adopted by the scientific field pursuant to *Daubert*. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786.

Appeal

A) **When Permitted.** An appeal may be taken from a final judgment whether rendered after a hearing or by default, or from a judgment reformed in accordance with a remittitur or additur. The Courts of Appeal permit appeal as of right in civil matters. In the case of remittiturs or additurs, the Court of Appeal may consider the reasonableness of the underlying jury verdict. In addition to final judgments, interlocutory judgments are also appealable, but only when provided expressly by law. LA. CODE CIV. PROC. ANN. art. 2083. Non-appealable judgments or orders that are interlocutory may be reviewed under the Court of Appeal's supervisory writ procedure. However, an appeal cannot be taken by a party who confessed to judgment in the trial court or who voluntarily acquiesced in the taking of the judgment.

B) **Timing.** There are two general time periods for appeals in Louisiana. The first type of appeal is a "suspensive appeal," which must be taken within thirty (30) days from

expiration of the delay for requesting a new trial or judgment notwithstanding the verdict, or from the denial of a motion for a new trial timely applied for, or from Article 1914 notice of the court's refusal to grant a new trial. LA. CIV. PROC. ANN. art. 2123. The second type of appeal is a "devolutive appeal," which must be taken within sixty (60) days from the expiration of the time for filing a motion for a new trial or judgment not withstanding the verdict or from the denial of new trial timely applied for, or through Article 1914 notice of the court's refusal to grant a new trial. LA. CIV. PROC. ANN. art. 2087.

Supervisory writs may also be taken before or during trial. Writs may be taken on an interlocutory judgment within thirty (30) days from the date of the ruling at issue.

Biomechanical Testimony

Biomechanical experts are allowed to testify in Louisiana regarding the application of mechanics to the study of human movement, particularly the study of internal and external forces acting on the human body. *Pinkins v. Cabes*, 98-1803 (La. App. 4 Cir. 1/27/99), 728 So. 2d 523.

Biomechanical experts are held to the normal standards regarding expert testimony and must satisfy *Daubert* in order to properly qualify to testify.

Collateral Source Rule

Louisiana recognizes the collateral source rule, under which a tortfeasor may not benefit, and an injured plaintiff's tort recovery may not be reduced, if the plaintiff recovers or receives benefits from sources independent of the tortfeasor's contribution. *Bozeman v. State*, 03–1016 (La.7/2/04), 879 So.2d 692, 698; *Louisiana Dep't of Transp. and Dev. v. Kansas City Southern Ry. Co.*, 02–2349 (La.5/20/03), 846 So.2d 734, 739; *Diggs v. Tillman*, 2007 1041 (La. App. 1 Cir. 3/26/08); 985 So. 2d 767.

Convictions

Rule 609 of the Louisiana Code of Evidence allows for a party to attack the credibility of a witness in civil cases. However, no evidence of the details of the crime of which the witness was convicted is admissible. The name of the crime and the date of conviction is admissible if the crime was a felony, meaning a crime punishable by death or imprisonment in excess of six months, and the court determines that the probative value of the information outweighs its prejudicial effect on the party. Evidence of a crime is also admissible, regardless of its status as a felony, if the crime involves dishonesty or a false statement. Evidence of a conviction is not admissible if a period of more than ten years has elapsed since the date of the conviction.

Day in the Life Videos

Day in the life videos are sometimes used by plaintiff's counsel to describe a normal day in the life of the plaintiff. These videos are admissible in Louisiana courts as long as they do not violate Rule 403 of the Louisiana Code of Evidence, which provides that evidence will not be admitted if its prejudice outweighs its probative value.

Dead Man's Statute

The Dead Man's Statute prohibits the use of parol testimony to prove the obligation of a deceased person if the claim has not been asserted within one year of the death. LA. REV. STAT. ANN. § 13:3721. The purpose of the statute is to avoid placing the decedent's estate or his/her heirs at a disadvantage in a dispute over a claim in which the decedent's testimony has been lost by his death. The statute primarily is aimed at monetary claims against the estate, and does not apply generally to claims to property or to tort actions.

Medical Bills

Generally, a plaintiff's medical bills are admissible as damages evidence, regardless if the bills were paid partially or in full by an insurance company. However, these bills and records are not relevant to prove the receipt of benefits as this would run afoul of Louisiana's collateral source jurisprudence. To be admissible, the plaintiff must prove that (1) he or she has paid or become liable to pay a medical bill, that (2) he or she necessarily incurred the medical expenses because of injuries resulting from the defendant's negligence, and that (3) the charges were reasonable for services of that nature.

Offers of Judgment

An offer of judgment in Louisiana does not admit liability and is statutorily mandated through LA. CODE CIV. PROC. ANN. art. 970. Article 970 provides that if the final judgment obtained by the plaintiff-offeree is at least twenty-five percent less than the amount of the offer of judgment made by the defendant-offeror or if the final judgment obtained against the defendant-offeree is at least twenty-five percent greater than the amount of the offer of judgment made by the plaintiff-offeror, the offeree must pay the offeror's costs, exclusive of attorney fees, incurred after the offer was made, as fixed by the court.

Offers of Proof

When a judge sustains an objection which restricts the ability of a party to introduce evidence, counsel may make an "offer of proof." The offer of proof provides the attorney with an opportunity to place into the record the testimony which would have been elicited had the objection not been sustained. Offers of proof are required to prove your case at the appellate level if such testimony is crucial to a different outcome.

Offers of proof are governed by LA. CODE EVID. ANN. Art. 103(A)(2). This rule states that an error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and when the ruling is one excluding evidence, the substance of the evidence was made known to the court by counsel.

Prior Accidents

A showing of prior accidents can be relevant to demonstrate whether a party could foresee a risk of harm and consequently be held liable. *Lang v. Prince*, 447 So. 2d 1112 (La. App. 1st Cir. 1984). The party seeking to admit evidence of prior accidents must demonstrate the similarity between the accident at bar and prior accidents. This type of evidence is subject to the court's relevancy test in that its probative worth should be balanced with any possible prejudice to the parties.

Relationship to the Federal Rules of Evidence

Louisiana uses the Louisiana Code of Evidence, which adopts the majority of the Federal Code of Evidence. Although the Federal Code is the basis for the Louisiana Code, Louisiana still retains minor differences, such as open cross examination.

Seat Belt and Helmet Use Admissibility

LA. REV. STAT. ANN. § 32:295.1 requires, subject to certain limitations and exclusions, that all drivers and passengers in motor vehicles wear seat belts for personal safety. Although this requirement is statutorily mandated, La. REV. STAT. ANN. § 32:295.1(E) does not allow the introduction of evidence of failure to wear a seat belt as evidence of comparative negligence in causing the injury. *Bouley v. Guidry*, 04-469 (La. App. 3 Cir. 9/29/04); 883 So. 2d 1099.

Conversely, evidence of the failure to wear a helmet while riding a motorcycle, motor driven cycle, or motorized bicycle (which is a violation of LA. REV. STAT. ANN. § 32:190) is admissible to prove comparative fault. *Landry v. Doe*, 597 So. 2d 14 (La. App. 1st Cir. 1992). There is no specific exception in LA. REV. STAT. ANN. § 32:190 which provides for the exclusion of such evidence and Louisiana courts have consistently taken into account the failure of one to wear a helmet to determine comparative fault.

Spoliation

Spoliation occurs when one destroys evidence, and that destruction creates an inference that the destroyed evidence is unfavorable to the destroyer.

Louisiana courts have only recently begun to recognize a tort claim for spoliation of evidence. Most Louisiana courts have found that a plaintiff asserting a claim for spoliation of evidence must allege that the defendant intentionally destroyed evidence; allegations of negligent conduct are insufficient. *Barthel v. State*, 2004 1619 (La. App. 1 Cir. 6/10/05); 917 So. 2d 15, 20; *Desselle v. Jefferson Parish Hosp. Dist. No. 2*, 04-455 (La. App. 5 Cir. 10/12/04); 887 So. 2d 524, 534; *Quinn v. RISO Invs., Inc.*, 2003-0903 (La. App. 4 Cir. 3/3/04); 869 So. 2d 922, 927, *writ denied*, 876 So. 2d 808 (La. 2004); *Burge v. St. Tammany Parish*, 336 F.3d 363, 374 (5th Cir. 2003); *Catoire v. Caprock Telecomms. Corp.*, 2003 WL 21223258 (E.D. La. 2003).

The Louisiana Supreme Court recently held that no cause of action exists for the negligent spoliation of evidence. *Reynolds v. Bordelon*, 2014-2362 (La. 6/30/15), 172 So. 3d 589. "Regardless of any alleged source of the duty, whether general or specific, public policy in our

state precludes the existence of a duty to preserve evidence. Thus, there is no tort." *Id.* Reaffirming the principles articulated in *Reynolds*, the Louisiana Fourth Circuit explained that a showing of intentional misconduct is required to sustain a spoliation claim. *Tomlinson v. Landmark Am. Ins. Co.*, 2015-0276 (La. App. 4 Cir. 3/23/16), 192 So. 3d 153. The Louisiana Fourth Circuit noted that the *Reynolds* "Court implicitly **rejected** a standard whereby a party who knew or should have known that his conduct would result in harm would be liable for spoliation." *Id.* (**emphasis** added).

Subsequent Remedial Measures

Subsequent remedial measures are actions taken by a defendant to cure a dangerous situation which was made known by a previous accident or injury. Louisiana does not allow the introduction of subsequent remedial measures which, if taken previously, would have made the event less likely to occur, if the evidence is offered to prove negligence or "culpable conduct" in connection with the event. LA. CODE EVID. art. 407. The article does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, authority, knowledge, control, the feasibility of precautionary measures, or for attacking credibility.

The basis for Louisiana's policy is to encourage persons to make things safer after an accident, regardless of whether the accident was caused by fault.

Use of Photographs

Photographs are demonstrative evidence and are used to aid the jury in understanding or better visualizing oral testimony. Photographs include still photographs, X-ray films, video tapes, motion pictures, and their equivalents. LA. CODE EVID. ANN. art. 1001(2). Generally, original photographs are required and must be authenticated and relevant in order to be introduced into evidence at trial. Unless stipulated to, authentication is required by the person who took the photograph in order for the photograph to be admitted. Photographs are admissible when they are shown 1) to have been accurately taken, 2) to be a correct representation of the subject in controversy, and 3) shed light upon the matter before the court. *Satterly v. Louisiana Indem. Co.*, 704 So. 2d 882, 885-886 (La. App. 3 Cir. 1997).

DAMAGES

Caps on Damages

In most personal injury settings, there are no statutory caps on damages. Louisiana does offer some implicit limits on damages in the form of comparative fault, whether the plaintiff made efforts to mitigate damages, and whether any collateral payments were received.

Additionally, statutorily Louisiana law provides a $500,000 cap on civil liability for non-economic losses (pain and suffering, disfigurement, etc.) in medical malpractice cases on a per-medical provider basis. LA. REV. STAT. ANN. § 40:1231.2 (2010); *Williams v. Kushner*, 549 So. 2d 294 (La. 1989). In order to qualify for this cap, the medical treatment provider must be a "qualified treatment provider" according to the Louisiana Medical Malpractice Act. The Louisiana

Governmental Claims Act also limits recovery for general damages against governmental defendants to $500,000.

Burden of Proof

In a suit for damages, it is the plaintiff's burden to prove that the damage suffered was a result of the defendant's fault. *Wainwright v. Fontenot*, 00-0492 (La. 10/17/00); 774 So. 2d 70. Plaintiffs must prove by a preponderance of the evidence that the claimed injuries result from the accident at issue. *Bruce v. State Farm Ins. Co.*, 37,704 (La. App. 2 Cir. 10/29/03); 859 So. 2d 296, 302.

Calculation of Damages

Damages in the area of personal injury are generally divided up into two categories: special and general. Special damages include but are not limited to lost wages and medical expenses, loss of support, funeral expenses, loss of services and society, benefits, property losses or damages, and other economic type losses. *See Smith v. Davill Petroleum Co., Inc.*, 97 1596 (La. App. 1 Cir. 12/9/98); 744 So. 2d 23. Special damages must be specifically alleged. La. CODE CIV. PROC. art. 861.

General damages are more difficult to calculate because determining the value requires a subjective analysis for each loss, which varies case by case. General damages are those which flow naturally and necessarily from a wrongful act, and are conclusively presumed to have been foreseen or contemplated by the defendant. General damages involve physical and mental pain and suffering, inconvenience, loss of intellectual gratification or physical enjoyment, and other factors that affect the victim's life, and other losses of lifestyle that cannot be measured definitively in terms of money. 1 LA. PRAC. PERS. INJ. § 5:7 (2011 ed.).

Available Items of Personal Injury Damages

A) **Past medical bills**. Plaintiffs are entitled to recover the reasonable value of all medical expenses that have been incurred and that are reasonably certain to be incurred in the future as a result of the injury. Evidence of the medical expenses must be shown. *Jones v. Rapides Gen. Hosp.*, 598 So. 2d 619 (La. App. 3d Cir. 1992). However, the plaintiff must prove that, more probably than not, medical treatment was necessitated by trauma suffered in the accident. *Este' v. State Farm Ins. Cos.*, 96-99 (La. App. 3 Cir. 7/10/96); 676 So. 2d 850. The diagnosis and opinions of a plaintiff's treating physician and specialists to whom referred by the treating physician are entitled to more weight than that of those doctors examining the plaintiff for consultation for litigation purposes only. *Ogeron v. Prescott*, 93-CA-926 (La. App. 5 Cir. 4/14/94); 636 So. 2d 1033 (citing *Schouest v. J. Ray McDermott & Co., Inc.*, 411 So. 2d 1042, 1044 (La. 1982)).

   The tortfeasor is also required to indemnify the cost of overtreatment or unnecessary medical treatment unless the overtreatment was incurred in bad faith. *Yee v. Imperial Fire & Cas. Ins. Co.*, 44,802 (La. App. 2 Cir. 10/28/09); 25 So. 3d 872. The reason for this rule is that as between the victim and the tortfeasor, the basic cause for the excessive expenses of treatment is attributable to the party whose fault caused the injury rather than the victim.

Spangler v. Wal-Mart Stores, Inc., 95 2044 (La. App. 1 Cir. 1991); 673 So. 2d 676. An injured victim is not required to choose the best means of treatment or select the most skilled and competent physician. *Use v. Use*, 94 0972 (La. App. 1 Cir. 4/7/95); 654 So. 2d 1355 (citing *Druilhet v. Trinity Universal Ins. Co.*, 361 So. 2d. 40 (La. App. 3d Cir. 1978)).

B) **Future medical bills**. Future medical expenses are a component of special damages and must be proven by a preponderance of the evidence. *Phillips v. Osmun*, 07-50 (La. App. 3 Cir. 10/24/07); 967 So. 2d 1209. Future medical expenses may be the product of the original injury or may result from an increased susceptibility to future injury because of the accident in question. An open-ended award of future medical expenses in an indefinite amount is permissible. *LaCombe v. Dr. Walter Olin Moss Reg'l Hosp.*, 92-573 (La. App. 3 Cir. 4/7/93); 617 So. 2d 612. "Having established the need for future medical treatment, the testifying physician can then offer an opinion as to the probable costs. Economists can, if necessary, also be called to testify to the probable effect of inflation on such costs." 1 LA. PRAC. PERS. INJ. § 5:58 (2011 ed.)

C) **Hedonic damages**. Hedonic damages are referred to as "loss of the enjoyment of life or lifestyle" in Louisiana. The Louisiana Supreme Court has never ruled on the appropriateness of awarding *hedonic damages* for loss of enjoyment of life, although most Louisiana Circuits have recognized separate damages for hedonic damages. Courts have held that these damages are not duplicitous of pain and suffering.

The First Circuit has emphasized that the jury must be properly instructed on loss of enjoyment of life. That court must examine how much "enjoyment" the plaintiff was getting out of life before the accident. *Matos v. Clarendon Nat'l. Ins. Co.*, 2000 2814 (La. App. 1 Cir. 2/15/02); 808 So. 2d 841, 847. The Second Circuit has ruled that a plaintiff is entitled to recover damages for loss of enjoyment of life if he proves that his lifestyle was detrimentally altered or if he was forced to give up activities because of his injury. *Bruce v. State Farm Ins. Co.*, 37,704 (La. App. 2 Cir. 10/29/03); 859 So. 2d 296, 306. The Third Circuit has held that loss of social and recreational activities may properly be considered as one of the components of an award for general damages. *Squibb v. Century Group, Inc.*, 01-1527 (La. App. 3 Cir. 4/17/02); 824 So. 2d 361, 370. Likewise, the Fifth Circuit has held that jurisprudence recognizes a claim for loss of enjoyment of life as a separate element of compensable general damages. *Hebert v. Old Republic Ins. Co.*, 01-355 (La. App. 5 Cir. 1/29/02); 807 So. 2d 1114, 1127. Only the Fourth Circuit has held that *hedonic damages* are erroneous as a matter of law. *JCM Constr. Co., Inc. v. Orleans Parish Sch. Bd.*, 2002-0824 (La. App. 4 Cir. 11/17/03); 860 So. 2d 610, 642. The Louisiana Supreme Court has given its blessing to "loss of enjoyment of life" as "a separate item on a jury verdict form." *McGee v. A C & S, Inc.*, 05-1036 (La. 7/10/06); 933 So. 2d 770.

D) **Disfigurement**. Louisiana recognizes disfigurement as a type of compensable harm. Damages for such should be distinguished from damages for past and future pain and suffering and loss of enjoyment of life and properly relate to permanent physical injury. *Brown v. S. Baptist Hosp.*, 96-1990 (La. App. 4 Cir. 4/15/98); 715 So. 2d 423. Scarring, loss of a limb, paralysis, or any other changes in the plaintiff's physical appearance (whether temporary or permanent) usually causes extraordinary pain and

suffering in the forms of humiliation, embarrassment, insecurity, or worry and warrants recovery of disfigurement damages. RUSS HERMAN, LOUISIANA PRACTICE SERIES § 5:126 (West 2008).

E) **Loss of normal life.** "Loss of enjoyment of life" damages, as recognized by Louisiana law, are included in general damages. *Stevenson v. La. Patient's Comp. Fund*, 97-709 (La. App. 5 Cir. 4/9/98); 710 So. 2d 1178. Compensation for loss of enjoyment of life and compensation for present and future physical and mental pain and suffering are separate elements of damages that may be caused by a single injury. *Myers v. Broussard*, 96-1634 (La. App. 3 Cir. 5/21/97); 696 So. 2d 88. The proper distinction is that loss of enjoyment of life is something taken away from the victim; where physical pain and suffering (from the pain) mental anguish (fear, fright, concern) and physical disfigurement are something done to the victim. Each should be compensable because the damage is distinct and discernable. 1 LA. PRAC. PERS. INJ. § 5:124 (2011 ed.).

F) **Disability**. Disability is defined as the inability to perform some function; or an objectively measurable condition of impairment, either physical or mental. Louisiana law recognizes disability damages as a form of general damages. *Bowie v. Young*, 01-715 (La. App. 3 Cir. 3/20/02); 813 So. 2d 562, *writ denied*, 02-1079 (La. 6/21/02); 819 So. 2d 335; *Wood v. Am. Nat'l Prop. & Cas. Ins. Co.*, 2007-1589 (La. App. 3 Cir. 12/23/08); 1 So. 3d 764.

G) **Past pain and suffering**. In assessing damages in a personal injury case, Louisiana courts consider the severity and duration of the injured party's pain and suffering. *LeBlanc v. Stevenson*, 00-0157 (La. 10/17/00); 770 So. 2d 766. Specific evidence of every aspect of the pain and mental anguish should be offered into evidence. 1 LA. PRAC. PERS. INJ. § 5:105 (2011 ed.).

H) **Future pain and suffering**. Future pain and suffering damages may be awarded for potential flare-ups of soft-tissue injuries, humiliation and anxiety over scarring or permanent limp, headaches, and chronic back pain, among others. Counsel should offer medical opinion evidence of the probability and duration of these continued symptoms to prove the future pain and suffering. 1 LA. PRAC. PERS. INJ. § 5:114 (2011 ed.). Louisiana courts have discretion to assess these damages when they are incapable of precise measurement. LA. CIV. CODE ANN. art. 1999 (2008); *Birdsall v. Reg'l Elec. & Constr., Inc.*, 97 0712 (La. App. 1 Cir. 4/8/98); 710 So. 2d 1164.

I) **Loss of society**. In a wrongful death action, Louisiana courts may award damages to the claimant for loss of the decedent's love, affection, society, and companionship. The claim depends on evidence of the relationship between the decedent, which may consist of evidence of the affection they displayed toward each other, the companionship they shared, the moral support they offered each other, and specific incidents of this relationship. *Broussard v. Med. Protective Co.*, 06-331 (La. App. 3 Cir. 2/21/07); 952 So. 2d 813.

Loss of consortium damages are generally reserved for spousal relationships and include loss of society (general love, companionship, and affection), sex, service, and support.

Lonthier v. N.W. Ins. Co., 85-1137 (La. App. 3 Cir. 11/5/86); 497 So. 2d 774, 776; *Billiot v. K-Mart Corp.*, 99 CA 1569 (La. App. 1 Cir. 6/23/00); 764 So. 2d 329.

J) **Lost income, wages, and earnings**. A claimant is entitled to recover the reasonable value of lost time from work, wages, commissions, bonuses, and all other earnings and fringe benefits that the claimant has lost or probably will lose. *LeBlanc v. Steptore*, 98-808 (La. App. 3 Cir. 12/9/98); 723 So. 2d 1056. The parents of an injured child can recover in their own name for loss of earnings and services that the child contributed to the family unit. *Wellborn v. Sears, Roebuck & Co.*, 970 F.2d 1420 (5th Cir. 1992).

Lost Opportunity Doctrine

The lost opportunity doctrine, also referred to as the Lost Chance Doctrine, is a compensable damage in medical malpractice cases. "The issue in lost chance of survival cases is whether the tort victim lost any chance of survival because of the defendant's negligence and the value of that loss." *Smith v. State Dep't. of Health & Hosps.*, 95-0038 (La. 6/25/96); 676 So. 2d 543. In a loss of chance of survival action, the fact finder is to focus on the chance of survival lost on account of medical malpractice as a distinct compensable injury and to value the lost chance as a lump sum award based on all the evidence in the record, as is done for any other item of general damages. *Hargroder v. Unkel*, 39,009 (La. App. 2 Cir. 10/29/04); 888 So. 2d 953.

Mitigation

In Louisiana, an injured party must act reasonably and has a duty to minimize the resulting injuries or loss. *Adams v. Chenault*, 36,729 (La. App. 2 Cir. 1/29/03); 836 So. 2d 1193. To mitigate damages, an accident victim need not make extraordinary or impractical efforts, but, rather, must undertake those which would be pursued by a person of ordinary prudence under the circumstances. *Leaman v. Cont'l Cas. Co.*, 2000-0292 (La. App. 4 Cir. 9/26/01); 798 So. 2d 285, 292.

To establish that an injured party has failed to mitigate damages, the party seeking to prove a failure to mitigate damages must demonstrate: (1) that the injured party's conduct after the accident was unreasonable; and (2) that the unreasonable conduct had the consequence of aggravating the harm. *Hunt v. Long*, 33,395 (La. App. 2 Cir. 6/21/00); 763 So. 2d 811. A plaintiff's failure to mitigate damages, when the plaintiff could have done so, may reduce the plaintiff's damages. *Barsavage v. State Through Dep't. of Transp. & Dev.*, 96 0688 (La. App. 1 Cir. 12/20/96); 686 So. 2d 957.

There is a split of authority as to whether failing to follow a physician's recommendation constitutes a failure to mitigate, particularly when the plaintiff claims insufficient financial ability to pay for the recommended treatment. In *Britt v. City of Shreveport*, the Second Circuit held that a "[m]otorist, who sustained neck and back injuries when a large limb of a tree, that city employees were trimming, fell and landed on top of her vehicle, failed to reasonably mitigate her damages, and thus, her damages award would be reduced. The motorist never commenced the physical therapy program recommended by her physical therapist, and while one could sympathize with motorist's trepidation of the lumbar and cervical surgeries, as well as the subsequent physical

therapy regimen, such trepidation did not justify motorist's refusal to submit to the necessary treatment." *Britt v. City of Shreveport*, 45,513 (La. App. 2 Cir. 11/3/10); 55 So. 3d 76.

However, in *Moody v. Cummings*, the Fourth Circuit held that an "[o]ncoming motorist did not fail to fulfill his duty to mitigate his damages allegedly sustained in a vehicle collision with a backing motorist when he failed to take prescribed medication or undergo recommended arthroscopic knee surgery and epidural cervical injections prior to trial, where the oncoming motorist did not have adequate financial reserves to support himself during the post-surgery recovery period. Further, he was advised that the injections would only provide temporary relief, and his job restrictions prohibited his use of prescription pain medication. *Moody v. Cummings*, 2009-1233 (La. App. 4 Cir. 4/14/10); 37 So. 3d 1054, *writ denied*, 2010-1106 (La. 9/3/10); 44 So. 3d 686.

Punitive Damages

A) **When may be brought.** Punitive damages generally are not recognized in Louisiana in personal injury actions. However, they are available if authorized by a specific statute:

1) LA. CIV. CODE ANN. art. 2315.4: Punitive damages are allowed for injuries caused by a wanton or reckless disregard for the rights and safety of others by a defendant, whose intoxication while operating a motor vehicle was a cause-in-fact of the resulting injuries. To prove that injuries are caused by intoxicated driver's actions in wanton or reckless disregard for rights and safety of others, no evidence of specific action on the driver's part is necessary but, rather, plaintiff must only prove general state of mind and conscious indifference to consequences. *Hill v. Sampson*, 24,787 (La. App. 2 Cir. 11/5/93); 628 So. 2d 81. The necessary level of conduct typically considered "wanton and reckless" is somewhere between an intent to do wrong and mere negligence. *Blackshear v. Allstate Ins. Co.*, 1994-765 (La. App. 3 Cir. 12/7/94); 647 So. 2d 589. Actions knowingly taken which would likely cause injury to another fall within "wanton and reckless" category. *Id.* Simple proof that a person was driving under the influence of alcohol and that he might have been impaired, by itself, will not always be sufficient to establish "wanton and reckless" element necessary to recover exemplary damages for an accident. Rather the facts and circumstances of each case, including but not limited to the defendant's blood alcohol level, evidence of the effect of alcohol on the specific defendant, and consequences of alcohol consumption must be considered in determining the necessary "wanton and reckless" element. *Bourgeois v. State Farm Mut. Auto. Ins. Co.*, 562 So. 2d 1177 (La. App. 4th Cir. 1990), *writ denied*, 567 So. 2d 611. Punitive damages are allowed even where the only injury is to property. The rationale is that punitive damages are designed to dissuade certain types of conduct.

2) LA. CIV. CODE ANN. art. 2315.7: Punitive damages are also allowed for the criminal sexual abuse of a victim seventeen (17) years old or younger, if injuries were caused by a wanton and reckless disregard for the rights and safety of the victim.

B) **Standard.** In the absence of a specific statutory provision allowing for punitive damages, only compensatory damages may be recovered. *Devillier v. Fid. & Deposit Co. of Md.*, 97-1200 (La. App. 3 Cir. 3/6/98); 709 So. 2d 277. "Wanton and reckless disregard" is the common standard posed by the two statutes.

C) **Insurable.** Liability for punitive damages may be specifically excluded. Insurance policies, such as one that is being relied on by a personal injury claimant, may contain an exclusion for punitive damages. 1 LA. PRAC. PERS. INJ. § 5:164 (2011 ed.). Policy language such as the following has been held by Louisiana courts to exclude coverage for punitive damages: "Bodily injury or property damage must be caused by an accident and arise out of the ownership, maintenance, or use of an uninsured auto. We will not pay any punitive or exemplary damages." *Pike v. Nat'l Union Fire Ins. Co.*, 2000-1235 (La. App. 1 Cir. 6/22/01); 796 So. 2d 696, 699.

D) **Caps.** The trier of fact has broad discretion in assessing punitive damages. *Galjour v. Gen. Am. Tank Car Corp.*, 764 F. Supp. 1093 (E.D. La. 1991). Generally, it will be reversed only for an "excessive" award where it appears that the judgment was the result of "passion, prejudice, or corruption." An award is disproportionate to the injury sustained if it is so large that it shocks the judicial conscience or indicates passion, prejudice, corruption, bias, or another improper motive. *Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888 (5th Cir. 1994).

E) **Punitive damages and vicarious liability.** There is a split in the Louisiana Courts of Appeal with regard to vicarious liability for employers. The *Berg* court did note the two Fourth Circuit decisions finding that an employer can be held liable for punitive damages, but went on in a footnote to make clear that it was reserving judgment on this issue. The footnote specifically advised that "[w]e express no view on whether punitive damages can be imposed against a party who is vicariously liable for general damages resulting from conduct of an intoxicated person, such as an employer." *Berg v. Zummo*, 00-1699 (La. 4/25/01); 786 So. 2d 708, 708. In *Ross v. Conoco*, 2002-0299 (La. 10/15/02); 828 So. 2d 546, which was decided eighteen months after *Berg*, the Louisiana Supreme Court appears to have rejected the reasoning of the Fourth Circuit jurisprudence holding employers vicariously liable for punitive damages. The *Ross* court reversed the Third Circuit Court of Appeal's finding that the co-conspirators could be liable for punitive damages.

Prior to *Berg*, *Ross*, and the Fourth Circuit cases, a decision was rendered by the United States District Court for the Eastern District of Louisiana concluding that an employer could not be held vicariously liable for punitive damages under LA. CIV. CODE ANN. art. 2315.4 and *Smith v. Zurich Am. Ins. Co.*, 1996 WL 537746 (E.D. La. 1996).

In the most recent decision the First Circuit Court of Appeal, in *Darby v. Sentry Ins.*, 2007 0407 (La. App. 1 Cir. 3/23/07); 960 So. 2d 226, reiterated the *Berg* court's reservation that holding an employer vicariously liable for punitive damages "may be contrary to the principle of strict construction of punitive statutes, we leave analysis for another day." However, it then went on to reiterate that an employer cannot be held liable for punitive

damages via a civil conspiracy allegation nor can the employer be held liable for punitive damages under a negligent entrustment theory.

The applicable jurisprudence certainly demonstrates that the question of whether an employer can be held vicariously liable for punitive damages is still up in the air in Louisiana and that there appears to be strong support for the proposition that an employer cannot be held liable for such damages.

Recovery of Pre and Post Judgment Interest

In Louisiana, if the plaintiff fails to request interest and no statutory authority provides for interest, no interest may be awarded. *Shell Pipe Line Corp. v. Sarver*, 442 So. 2d 884 (La. App. 3d Cir. 1983). However, when the claimant's petition includes a prayer for legal interest, legal interest should be included in the judgment. *Lennix v. St. Charles Grain Elevator Co.*, 439 So. 2d 1249 (La. App. 5th Cir. 1983). Under the provisions of Louisiana Civil Code article 2001, "[i]nterest on accrued interest may be recovered as damages only when it is added to the principal by a new agreement of the parties made after the interest has accrued." Therefore, only simple interest may be recovered on judicial judgments. Judicial interest is calculated from the date of judicial demand through judgment.

Recovery of Attorney's Fees

As a general rule, attorney's fees are not recoverable in Louisiana save for certain situations provided by statute or contract. *Trahan v. Savage Indus., Inc.*, 96-1239 (La. App. 3 Cir. 3/5/97); 692 So. 2d 490. "However, attorney's fees may be recoverable as an element of tort damages when such fees are incurred in avoiding or reducing harm from the tortfeasor's conduct, such as in defense of a malicious criminal prosecution." 1A LA. CIV. L. TREATISE, CIV. PROC. - SPECIAL PROCEED. § 10.2 (2011 ed.). In *Ross v. Sheriff of Lafourche Parish*, 479 So. 2d 506 (1st Cir. 1985), a plaintiff who prevails in his action for false arrest may recover as compensatory damages the attorney's fees incurred as a result of the criminal prosecution for resisting the arrest. "Although . . . false arrest and malicious prosecution are distinct and separate torts, each presenting separate theories of recovery, we fail to see why attorney's fees as an item of compensatory damages should not be allowed in either case." *Ross*, 479 So. 2d at 513; s*ee also Ramp v. St. Paul Fire & Marine Ins. Co.*, 263 La. 774, 269 So. 2d 239 (1972); *Priority E.M.S. v. Crescent City E.M.S.*, 2002-3111 (La. 2/21/03); 837 So. 2d 632 (where there is fraud in the confection of a contract, a party may recover attorney's fees under LA C.C. Art. 1958; however, under LA. C.C. art. 1997, a party may not recover attorney's fees where the fraud is in the performance of the contract).

An action in redhibition provides for attorney's fees and damages. LA. CIV. CODE ANN. art. 2545 (2011). Another instance can be found in the Louisiana Code of Civil Procedure article 3506, dealing with a motion to dissolve the wrongful issuance of a writ of attachment or sequestration. This article gives the court discretion to award attorney fees as an element of damages. LA. CODE CIV. PROC. ANN. art. 3506. Further, a seller or provider of services may also recover attorney's fees by complying with R.S. 9:2781, which provides that if the buyer/debtor fails to pay the outstanding balance of an open account within thirty (30) days after receipt of written demand, the seller/provider may recover attorney's fees in a subsequent suit on the account.

Settlement Involving Minors

A settlement agreement is a contract. In Louisiana, all persons have capacity to contract, except unemancipated minors. LA. CIV. CODE ANN. art. 1918. A fully emancipated minor has full contractual capacity. LA. CIV. CODE ANN. art. 1922. A contract made by a person without legal capacity is relatively null and may be rescinded only at the request of that person or his legal representative. LA. CIV. CODE ANN. art. 1919.

LA. CODE CIV. PROC. ANN. art. 4272 provides for the court approval of payments to a minor as a result of a judgment or settlement and a determination that the settlement or judgment is in the best interest of the minor. The court shall consider factors such as the age and life expectancy of the minor, the current and anticipated needs of the minor, the income and estate tax implications, and the present value of the proposed payment. An exception to this rule exists for a natural tutor. A natural tutor may perform or discharge any act affecting the right or interest of a minor which involves less than $10,000.00 "actually received by the minor, notwithstanding court costs, attorney fees, and other expenses" this includes entering into settlements. LA. REV. STAT. ANN. § 9:196.

Taxation of Costs

Unless the judgment otherwise provides, court costs shall be paid by the party cast in judgment. LA. CODE CIV. PROC. ANN. art. 1920. However, courts have great discretion with regard to costs and can render judgment for costs against any party, as it considers equitable.

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.