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WORKMEN'S COMPENSATION--"ARISING OUT OF EMPLOYMENT"--DEATH RESULTING FROM VOLUNTARILY ARRANGED FIGHT

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WORKMEN'S COMPENSATION—"ARISING OUT OF EMPLOYMENT"—DEATH RESULTING FROM VOLUNTARILY ARRANGED FIGHT—On the first

day of his employment as a messenger boy, in the course of being instructed in his duties and shown over his route, the deceased met a fellow employee with whom he voluntarily arranged a fight. There was evidence that the fight was induced by the fellow employee's braggadocio as to his pugilistic ability which culminated in a challenge to the deceased. The encounter took place on a public street. The deceased sustained injuries therefrom which aggravated an existing infirmity and caused his death. From an award of death benefits by the Workmen's Compensation Board, the employer appealed. *Held*, affirmed. The evidence compelled no finding that the injury was occasioned by the deceased's wilful intention to bring it about or to inflict injury on his adversary but supported the finding that the fight out of which the injury arose was sufficiently related to the risks of employment. The desire for dominance and respect within the ranks of their fellow employees, rather than reasons which were personal, led to the fight. *Chanin v. Western Union Telegraph Company*, 271 App. Div. 763, 64 N.Y.S. (2d) 670 (1946).

The limits of the strict liability imposed on the employer by Workmen's Compensation find their expression in the provision common to most of the acts that in order for compensation to be awarded to a claimant for an injury sustained in an industrial accident, the injury must be one "arising out of and in the course of employment." [1] Though these statutory requirements are normally joined by "and," two distinct legal problems are involved.[2] While the elements entering into a definition of "course of employment" are substantially the same as those used to measure the scope of a servant's employment at common law, "arising out of" employment refers to the causal connection between the work and the injury.[3] But as Professor Prosser has observed, if the injury occurs in the course of the employment, it is rare that the employment cannot be regarded as a substantial factor in bringing it about.[4] In the principal case, therefore, the decedent's work was responsible, at least, for his presence at the time and place where the fight was precipitated. Obviously, a phrase such as "group dominance and respect" utilized by the court to express the rationale of the instant decision,[5] or the more fluid one of "working environment." [6] is capable of being established "as a legal formula, indiscriminately used to express different

[1] 64 N.Y. Consol. Laws (McKinney, 1946) § 10.

[2] 1 SCHNEIDER, THE LAW OF WORKMEN'S COMPENSATION, 2d ed., 734 (1932).

[3] PROSSER, HANDBOOK OF THE LAW OF TORTS 529 (1941).

[4] Id. 529, 533.

[5] Principal case at 671.

[6] See Horowitz, "Assaults and Horseplay under Workmen's Compensation Laws," 41 ILL. L. REV. 311 (1946). At p. 364, he states, "Apart from the question of aggressors or initiating participants, the doctrine that assaults arise out of the employment where the work or *working environment* is a contributing factor, has now been established, and represents the clear modern weight of opinion. . . . And an assault due to horseplay or larking may be as incidental to the working environment as a work-induced assault arising from anger or resentment." One may agree that a concept such as "working environment" is a useful one in this area, and yet admit that its very flexibility can lead to absurd results. Thus one could agree with Cardozo, J., in Leonbruno v. Champlain Silk Mills, 229 N.Y. 470, 128 N.E. 711 (1920), relied on by the court in the instant decision, and still clearly distinguish the principal case. Compare also the facts of Hartford Accident and Indem. Co. v. Cardillo, (App. D.C. 1940) 112 F. (2d) 11 with those of the principal case.

and sometimes contradictory ideas." [7] Suppose a dare from a construction worker to another to do trapeze artistry on a half completed building, a loss of balance and a fall; does the resultant injury "arise out of" the employment? But certainly the strict liability of Workmen's Compensation was not intended to provide for a general scheme of health and accident insurance.[8] Therefore "arising out of" the employment has rational significance not in that it relates to causation in fact but in that the injury to be compensable must arise out of conditions and hazards which are peculiar to the employment as distinct from the general hazards of life.[9] Thus, the instant decision may raise a serious question whether an injury received from a voluntarily arranged fight, originating, not in a work quarrel, but in contests of group respect and dominance among fellow employees, is the type of risk intended to be protected by the statute. Though the tendency of the courts in compensation cases involving assaults and horseplay has been to give an increasingly liberal interpretation to "arising out of" the employment,[10] certainly, considerations of basic statutory policy are still

[7] See concurring opinion of Justice Frankfurter in Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54 at 68, 63 S. Ct. 444 (1943), discussing the doctrine of "assumption of risk." See Horowitz, "Assaults and Horseplay under Workmen's Compensation Laws," 41 ILL. L. REV. 311 at 324 (1946).

[8] PROSSER, HANDBOOK OF THE LAW OF TORTS 533 (1941). See also 1 SCHNEIDER, THE LAW OF WORKMEN'S COMPENSATION, 2d ed., 735, 736 (1932).

[9] PROSSER, HANDBOOK OF THE LAW OF TORTS 533, 534 (1941).

[10] For a recent discussion of the decisions in this field, see Horowitz, "Assaults and Horseplay under Workmen's Compensation Laws," 41 ILL. L. REV. 311 (1946). If the assault originates in a quarrel over work, most modern courts would fasten their attention on whether the workman claimant was the aggressor—if so, compensation is denied.

See Marion County Coal Co. v. Industrial Commission, 292 Ill. 463, 127 N.E. 84 (1920); Gray's Case, 123 Me. 86, 121 A. 556 (1923); Fulton Bag & Cotton Mills v. Haynie, 43 Ga. App. 579, 159 S.E. 781 (1931); Hill v. Liberty Motor and Engineering Corp., (Md. App. 1946) 45 A. (2d) 467; Horvath v. La Fond, 305 Mich. 69, 8 N.W. (2d) 915 (1943); Ackermon v. Cardillo, (App. D.C. 1944). 140 F. (2d) 348. For a criticism of the limitation suggested by these cases see Horowitz in the above-cited article. See also Milton v. T. J. Moss Tie Co., (La. App. 1944) 20 S. (2d) 570. As to the problem involved in determining who is the aggressor see York v. City of Hazard, 301 Ky. 306, 191 S.W. (2d) 239 (1945); Fey v. Bobrink, 84 Ind. App. 559, 151 N.E. 705 (1926); Rydeen v. Monarch Furniture Co., 240 N.Y. 295, 148 N.E. 527 (1925); Fried v. U.S. Fid. & Guar. Co., 192 Ga. 492, 15 S.E. (2d) 704 (1941). Examine also Hartford Accident Co. v. Cardillo, (App. D.C. 1940) 112 F. (2d) 11. For cases denying compensation when the assault arises out of a work matter, see Dallas Mfg. Co. v. Kennemer, 243 Ala. 42, 8 S. (2d) 519 (1942); Addington v. Hall, 160 Kan. 268, 160 P. (2d) 649 (1945). Compensation is denied where the assault is unconnected with the work but is motivated by reasons which are personal. See Dodson v. F. W. Woolworth Co., 118 Neb. 276, 224 N.W. 289 (1929); John H. Kaiser Lumber Co. v. Industrial Commission of Wisconsin, 181 Wis. 513, 195 N.W. 329 (1923); Schlener v. American News Co., 240 N.Y. 622, 148 N.E. 732 (1925); Talge Mahogany Co. v. Beard, 90 Ind. App. 611, 169 N.E. 540 (1930); Elrod v. Union Bleachery, 204 S.C. 481, 30 S.E. (2d) 73 (1944). Does the principal case belong in this category? For cases involving assaults not by fellow employees but by strangers, representative samples are found in Baum v. Industrial Commission, 288 Ill. 516, 123 N.E. 625 (1919); and State ex rel. Anseth v. District

crucial—is this the type of "work loss" incident to modern industrial and commercial civilization which the legislature intended to shift to "those who are better able and who ought to bear it . . . by imposing liability upon the employer who, in turn, adds it to the cost of production and then passes it on to the consumer"? [11] The principal case is also of interest by reason of the ancillary question of statutory interpretation presented under the New York Act which provides that there shall be no liability when the injury is caused by the "*wilful intention* of the injured employee to bring about the injury or death of himself or another." [12] Since the fight was not a sudden contest, but was in its deliberation seemingly wilful, the instant decision is apparently in conflict with other New York authority on this issue.[13]

John F. O'Connor, S.Ed.

Court of Koochiching, 134 Minn. 16, 158 N.W. 713 (1916). Similar problems exist where there is horseplay. Compensation is generally allowed when the claimant is not a participant in the horseplay. Leonbruno v. Champlain Silk Mills, 229 N.Y. 470, 128 N.E. 711 (1920), is the leading case. There the New York Court of Appeals, speaking through Cardozo, J. held that the non-participating claimant who was hit in the eye by an apple thrown by another was entitled to compensation because the claimant "was injured not merely while he was in a factory, but because he was . . . in touch with associations and conditions inseparable from factory life, the risks of such association and conditions were risks of the employment." See also Badger Furniture Co. v. Industrial Commission, 195 Wis. 134, 217 N.W. 734 (1928); Pacific Employers Ins. Co. v. Industrial Accident Commission, 26 Cal. (2d) 286, 158 P. (2d) 9 (1945); Gates Rubber Co. v. Industrial Commission, 112 Colo. 480, 150 P. (2d) 301 (1944). Compensation has been granted, however, where the claimant instigated the horseplay. See East Ohio Gas Co. v. Coe, 42 Ohio App. 334, 182 N.E. 123 (1932) noted in 46 HARV. L. REV. 166 (1932). Although the Ohio statute required that the injury merely be "in the course" of the employment, omitting the phrase "arising out of," the note writer suggested that "this statutory difference lacks significance since the Ohio courts apply the orthodox causal connection test." Industrial Comm. v. Weigandt, 102 Ohio St. 1 at 7, 130 N.E. 38 (1921), was cited by the note writer for this conclusion. Although the more liberal courts have recognized that certain kinds of horseplay are normally to be expected, many courts have considered that it is unrelated to the employment, and that the risk is foreign to the work. See Payne v. Industrial Commission, 295 Ill. 388, 129 N.E. 122 (1920); Washburn's Case, 123 Me. 402, 123 A. 180 (1924); Hughes v. Tapley, Admix., 206 Ark. 739, 177 S.W. (2d) 429 (1944); Barrentine v. Dierks Lumber and Coal Co., 207 Ark. 527, 181 S.W. (2d) 485 (1944). Another line of cases make the distinction that if the "horseplay" was of a type habitually indulged in by workmen with the consent or knowledge of the employer, injuries sustained "arise out of the employment." See Horn v. Broadway Garage, 186 Okla. 535, 99 P. (2d) 150 (1940); Peterson's Case, 138 Me. 289, 25 A. (2d) 240 (1942); Glenn v. Reynolds Spring Co., 225 Mich. 693, 196 N. W. 617 (1924); Stuart v. Kansas City, 102 Kan. 307, 171 P. 913 (1918); White v. Kansas City Stockyards, 104 Kan. 90, 177 P. 522 (1919).

[11] HARPER, TORTS 413 (1933).

[12] (Italics supplied.) 64 N.Y. Consol. Laws (McKinney, 1946) § 10. See also the remarks of Rutledge, J., in Hartford Accident and Ind. Co. v. Cardillo, (App. D.C. 1940) 112 F. (2d) 11 at 17, concerning a comparable provision in the Longshoremen's and Harbor Workers Compensation Act. Apparently, on the facts of the principal case, Justice Rutledge would emphasize this aspect of the statute.

[13] See Stillwagon v. Callan Bros., Inc., 183 App. Div. 141, 170 N.Y.S. 677 (1918).