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ARISING OUT OF—RIGHT OF AGGRESSOR IN ASSAULT TO RECOVER—ASSAULT AS AN ACCIDENT*

Fight rooted in the work, immaterial that injured man was the aggressor. Assault was accident from point of view of victim.

The boss shipper argued with a truck driver over the dilatory manner in which the driver was supposed to have done his work. The shipper was the first to raise his arm in a striking position, and was pushed over by the driver. The resulting fall was fatal to the boss shipper. Compensation was denied his widow on several grounds, mainly that there was no accident and the deceased was the aggressor.

Held error to deny compensation. From the point of view of the victim and in a popular sense the death was accidental. The defense of "aggression" is not found in compensation statutes, and its judicial insertion is error, whether applied to sportive assault (horseplay) or to this type of assault.

Newell v Moreau, 94 N.H. 439, 55 A. 2d 476 (Supreme Court of New Hampshire, July 2, 1947), per Kenison, J. *Discussion.* The subject of "aggressors" in assaults, whether sportive (horseplay) or malicious (ill-will attacks), is now demanding the serious attention of the Courts.

Sportive assaults (horseplay)

In the early days, when the words "arising out of the employment" were given a narrow and strict interpretation, it was easy to brush aside such assaults as non-compensable. Some of the early judges were actually shocked to hear a lawyer argue in favor of a worker injured as a result of horseplay. Thus in Wisconsin, an air hose was thrust playfully into an innocent victim's rectum. Said its highest court: "But how injuries resulting from such inexcusable and revolting horseplay as this can be said to be incidental to the employment we are unable to understand." (*Federal Rubber Mfg. Co. v Havolic*, 162 Wis. 341, 156 N.W. 143, 144 (1916))

Most courts fell into line—no compensation for any victim of horseplay, whether innocent, participant or aggressor. (Cor-

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onado Beach Co. v Pillsbury, 172 Cal. 682, 158 P 212, (1916)
 Pierce v Boyer - Van Kuren Lumber Co., 99 Neb. 321, 156 N.W
 509 (1916) Lee's Case, 240 Mass. 473, 476, 134 N.E. 268
 (1922))

And then (in 1920) a judge's judge, Mr. Justice Cardozo of the Court of Appeals of New York, had occasion to review a horseplay case. Two boys had thrown apples at each other, hitting an innocent non-participating victim, and blinding one of his eyes.

Said that most eminent jurist "English cases hostile to the award are inconsistent, it would seem, in principle with later rulings of the House of Lords (Thom v Sinclair) They are certainly inconsistent with the broader conception of employment and its incidents to which this court is now committed", that the true facts of factory life must be recognized, that the apple victim "was injured, not merely while he was in a factory, but because he was in a factory, in touch with associations and conditions inseparable from factory life. The risks of such associations and conditions were risks of the employment", that factories "have crowded contacts" and resulting injuries "are not measured by the tendency of such acts to serve the master's business", and that such horseplay arose out of the employment, as an incident thereof, and that innocent victims must be protected by compensation awards. (Leonbruno v Champlam Silk Mills, 229 N. Y 470, 128 N.E. 711, 13 A.L.R. 522 (1920))

The doctrine that horseplay arises out of the work-environment, and hence arises out of an incident of the employment, was thus given vitality by a great jurist.

It was this clarion call which appealed to court after court thereafter. To Mr. Justice Cardozo more than anyone else goes the great credit for saving at least the innocent victims of horseplay from the charity scrap-heap. Court after court saw 'the logic of his argument, and ruled as a matter of law, or took judicial notice of the fact, or said it was a matter of common knowledge, that factories and work-places have crowded contacts and resulting injuries are not to be measured by the tendency of the act to serve the master's purposes, and that injuries not arising from the work as such, but from the work-environment, were incidents of the employment. (Chicago I. & L. Ry

Co. v Clendennin, 81 Ind. App. 323, 143 N.E. 303 (1924)
Cassell v United States Fidelity & Guaranty Co., 115 Tex.
371,392, 283 S.W 127, 46 A.L.R. 1137 (1926) Maltais v
Equitable Life Assurance Society, 93 N.H. 237,242, 40 A. 2d
837 (1944))

And what is even more startling— courts which had already placed themselves on record against ever giving any awards in horseplay or “larking” cases began to recant’ *Stare decisis* yielded to the growing pressure of common sense and to the broadened construction of the words “arising out of” the employment.

In 1928 Wisconsin openly admitted its error, when an innocent victim sitting on a window sill was hit in the eye by a nail thrown in horseplay by a fellow employee. It overruled its *Havolic* case and granted an award. Horseplay was “inseparable from the natural bent of the human mind,” when people “are required to assemble for work.” (*Badger Furniture Co. v Industrial Commission*, 195 Wis. 134,137,138, 217 N.W 734 (1928))

In 1921 Nebraska had overruled her earlier cases, and came out in favor of an innocent victim of a compressed air hose. (*Socha v Cudahy Packing Co.*, 105 Neb. 691, 181 N.W 706 (1921))

In 1945 California had to admit error after 30 years of denying awards to all victims of horseplay. It now saw its mistake in not helping the innocent victim. (*Pacific Employees Ins. Co. v Industrial Accident Commission*, 26 Cal. 2d 286. 158 P 2d 9 (1945), per Edmonds, J)

And only recently, in 1948, Georgia joined the parade away from narrow compensation thinking, and stated that any cases contra to helping the innocent victim are to be considered overruled. (*Felton, J.*, in *American Mutual Liability Ins. Co. v Benford*, 47 S.W 2d 673, 676 (Ga. App. April 15, 1948))

However, while making a new rule for the innocent victim the courts began to issue dicta against the assailant, against the initiator of the assault, or as he was generally called, “aggressor.” The reason for the dicta against the aggressor was clear. In trying to make a new rule or exception palatable, it has for many years been customary for courts to throw a judicial bone of solace to the losing employer or insurer. The courts, faced by

the early general rule of non-compensability for assaults, sportive and otherwise, wished to reverse the rule for the innocent victim. It has been the history of law that when courts wish to make a change, they proceed cautiously, that they put boundaries around the change, and thereby issue dicta which give the loser some hope in future cases, thus making the decision presumably acceptable to both parties. Decisions in compensation cases are no different than decisions in other types of cases. Hence arose the exception to the new rule—that the aggressor could not recover. (See how dicta became law later in *Ackerman v Cardillo*, 78 App. D. C. 310, 140 F 2d 348 (1944), and *Borden Mills, Inc. v McGaha*, 161 Tenn. 376, 32 S.W 2d 1039 (1930))

The idea that aggressors cannot recover, as they cannot “profit by their own wrong” sounded logical. It was a popular tort phrase. It fitted snugly with the natural repugnance one has for a guilty party. Yet not a single act mentioned the defense of aggressors, not a single act denied compensation to negligent employees though they profited by their own culpability, but like many other court-created defenses, the theory began life as an easy way to sustain an award for the innocent victim and still leave some hope to the employer that he would not be overwhelmed by assuming liability for all injuries by assault. The phrase “excluding aggressors” had begun life, and as stated by Mr. Justice Frankfurter on a similar court-created problem, “its felicity leads to its lazy repetition, and repetition soon establishes it as a legal formula, indiscriminately used to express different and sometimes contradictory ideas.” (*Tiller v Atlantic Coast Line R. Co.*, 318 U.S. 54, 63 S. Ct. 444, 452 (1943), in discussing “assumption of risk”).

It is the horseplay itself that arises out of the employment, as an incident of the employment-environment. “Whether for aggressor or innocent victim, it is the same assault which arises out of employment. And the injury arises out of this assault. Therefore the injury—whether to aggressor or to innocent victim—arises out of employment. Thus to us is an unavoidable syllogism.” (Reis, J., in *Vollmer v City of Milwaukee*, Circuit Court, Dane County, Wisconsin, May 5, 1948)

No act contains the legislative defense that an “aggressor” or “participant” is not to recover in horseplay cases. Its insertion is purely judicial, justified by no legislative fiat, and sus-

tained only by the judge's feeling that culpable persons should not benefit by their own wrong—the very defense that all compensation acts reject. Negligence or guilt or assumption of risk or contribution are forever banned as defenses in compensation acts. (*Stark v State Industrial Accident Commission*, 103 Ore. 80, 204 P 151,156-157 (1922) Rutledge J., in *Hartford Accident and Indemnity Co. v Cardillo*, 72 App. D. C. 52, 112 F 2nd 11 (1940), certiorari denied, 310 U.S. 649, 60 S. Ct. 1100)

At first only Oregon resisted the easy insertion of moral or common law culpability into workmen's compensation cases. Since 1922 its courts have insisted that culpability is not a defense and awards have been given to all types of victims of horseplay (*Stark v State Industrial Accident Commission*, 103 Ore. 80, 204 P 151 (1922))

In 1944, New Hampshire rejected the defense of participation in horseplay (*Maltais v Equitable Life Assurance Society*, 93 N. H. 237, 40 A. 2d 837 (1944))

Finally, in 1948, all federal employees under the U. S. Employees' Compensation Act were declared protected in horseplay cases, including "aggressors", as horseplay is inseparable from the working-environment, and as much an incident of employment as slipping on the floor, or other personal incidents, such as smoking, resting, eating on the premises, etc. (*Williams v Navy Department*, Docket No. 68, decided January 6, 1948, U.S. Employees' Compensation Appeals Board, Federal Security Agency, Washington, D. C. See 1 NACCA Law Journal, pages 9, 105, May 1948)

New York, faced with its own prior decisions denying aggressors any compensation, adopted a curious compromise—if the horseplay was customary and known to the employer, it becomes a compensable incident even for the aggressor! (*Industrial Commissioner (Sigun) v McCarthy*, 295 N.Y. 443, 68 N.E. 2d 434 (1946) where waiters customarily engaged in bilateral horseplay This case was affirmed in principle in *Ognibene v Rochester Mfg. Co.*, 298 N.Y. 85, 80 N.E. 2d 749 (July 16, 1948), per Fuld, J., where a unilateral bit of horseplay (only one participant) resulted in injury It was recommitted to find out if these pranks were customary and known to the employer. Desmond, J., dissented "To say that this claimant by this trifling act of foolery stepped completely out of his role of work-

man and became aggressor in an encounter during which he was hurt, would be to magnify unfairly what was a most insignificant antic." There the employee hit his face on a truck, while ducking to avoid detection, after tossing a small piece of rubber at a stenographer).

In short, an aggressor who unilaterally fools for the first time, unknown to the employer, probably cannot collect in New York, but if he is a repeater, a customary violator known to the employer and engages in bilateral fooling, he is entitled to recover. The moral justification for holding an employer who permits horseplay to become a custom is apparent, but it is the *horseplay* which is *incidental* to the employment, incidental because men are brought into close contacts and horseplay results. And to distinguish between the types of victims of these horseplay incidents is to insert culpability into workmen's compensation acts in a new garb.

The 1948 New York position is an improvement over its old law, and avoids the necessity of "overruling" its old case—a hard task for so eminent a court. But it fails to give the full remedy for "aggressors" such as is now given in Oregon, New Hampshire, and to federal employees. What other states will do in sportive assaults in the future remains to be seen. The pathway at least has been well illuminated.

Malicious Assaults

In malicious assaults, it is easier for courts to see the relationship to the employment. An assault is clearly "rooted in" the work when men fight over the manner of doing the work, (*Hegler v Cannon Mills Co.*, 224 N. C. 669, 31 S. E. 2d 918,919 (1944), per Stacy, C.J.), or over the use of tools and facilities in doing the work, (*Schueler v Armour & Co.*, 116 Pa. Super, 323, 176 A. 527 (1935)—though decedent allegedly struck first), or because of labor troubles and strikes (*Corcoran v Teamsters & Chauffeurs Joint Council*, 209 Minn. 289, 297 N. W 4 (1941) per Gallagher, C. J. Accord *Aetna Casualty & Surety Co. v England*, 212 S.W 2d 964 (Tex. Civ. App. 1948), per Coe, C.J.)

Equally clear is it that assaults for purely personal reasons, even on the premises, where the opportunity for the assault was not enhanced by working conditions, have no causal relation to the employment. (Henderson, J., in *Rice v Revere Copper &*

Brass, 48 A. 2d 166 (Md. 1948), and Fishburne, J., in *Bridges v Elite, Inc.*, 212 S.C. 514, 48 S.E. 2d 497 (1948))

But one cannot deny that a fight "arises out of the employment" when the employment is a cause of the fight. Hence it has always been easier to see the causal relation in malicious assault cases than in cases of horseplay, where the relationship is only secondary—as an incident of placing men in close contact. It is only the working-environment and not the work itself which usually causes the horseplay. For that reason courts have found it easier to ignore the defense of aggressor in assault cases as distinguished from horseplay cases.

From the very start, therefore, a few courts have protested the insertion of the defense of aggressor in direct work-quarrels. Most compensation acts have the legislative defense disallowing compensation where the injury results from the wilful intention of the employee to injure himself or another, or where the injury results from his "serious and wilful misconduct."

This clearly bars the employee who engages in a premeditated and deliberate assault. But it does not apply to assaults which are the result of impulsive, thoughtless, or unintentional acts (even though in anger or with ill-will), often trivial in origin, although the result may be serious, or even fatal. The "explosive point is merely the culmination of antecedent pressures" in many instances, and far from the deliberate act needed for wilful misconduct or wilful injury (Rutledge, J., in *Hartford Accident & Indemnity Co. v Cardillo*, 72 App. D. C. 52, 112 F. 2d 11 (1940), certiorari denied, 310 U.S. 649, 60 S. Ct. 1100. See also discussion and cases in *Assaults and Horseplay under Workmen's Compensation Laws*, 12 *Law Society Journal*, pages 217-221 (August, 1946))

But this protestation against the insertion of the defense of aggressor in compensation cases was often only by way of dictum. (1930 N.C.—*Conrad v Cook-Lewis Foundry Co.*, 198 N.C. 723, 153 S.E. 266, dictum that only wilful intention to injure is a bar. 1937 Texas—*Traders & General Ins. Co. v Mills*, 108 S.W. 2d 219,224 (Tex. Civ. App. 1937)—"immaterial as to which one of them was the aggressor" on the facts. 1945 Pa.—*Haas v. Brotherhood of Transportation Workers*, 158 Pa. Super.

291, 44 A. 2d 776,780—janitor struck first yet received an award)

And it has remained for the principal case, with Mr. Justice Kenison speaking for the New Hampshire Supreme Court, to face the issue of aggressor in a direct, frontal attack. He was fortunate in one respect—there were no previous New Hampshire Supreme Court cases *contra* to bother him. He could view the case in the light of current thinking in workmen's compensation. Nevertheless, the highest court in New Hampshire had a ruling below (against the worker) to overcome. Said Kenison, J.—

“Compensation was also denied because Newell was an ‘aggressor’ There is much conflict in the decisions on this point (112 A.L.R. 1258,1270) but the trend of the modern authority is to allow recovery In order not to bludgeon the bar into insensibility by copious citations and prolix footnotes we refer to the discussion and collection of cases in the articles cited in the first part of the opinion. The defense of ‘aggression’ is not to be found in our statute or in other compensation laws. By the application of tort reasoning the defense has been judicially inserted in some compensation cases. We have already refused to read in a similar defense in sportive assaults (*Maltais v Assurance Society*, 93 N.H. 237) and we see no reason for its judicial insertion in this assault. In reaching this result we have endeavored to follow the able reasoning of three leading cases in Workmen's Compensation Law, Cardozo, J., in *Leonbruno v Mills*, 229 N. Y 470, Rutledge, J., in *Hartford etc. Co. v Cardillo*, 122 F 2d 11, and Marble, C. J. in *Maltais v Assurance Society*, *supra*. Plaintiff is entitled to compensation in accordance with R.L., c. 216. Exceptions sustained.”

And he added another sobering thought on the subject—that there is no distinction between aggression in assaults and aggression in horseplay cases. The principle was the same.

“While it is true that the assault in the *Maltais Case* (93 N.H. 237) was sportive in nature, the reasoning of that decision is not so limited. An assault whether by design or in sport is in the course of the employment, where, as here, it was caused by or resulted from working conditions.”

Assault as an "accident"

He disposed of the insurer's contention that an assault by design could not be "by accident" in the following language —

"It is argued that Newell's death was not 'by accident' within the meaning of R.L., c. 216, s. 2. The trend of the recent cases regards assaults by design as accidents. From the point of view of the victim and in a popular sense, (*Moore v. Company*, 88 N.H. 134,138) Newell's death was sudden, unexpected and truly accidental. The majority of the cases, particularly those decided in the last three years, support this view Horovitz, 'Modern Trends in Workmen's Compensation', 21 Ind. L. J. 473, 491-493 (1946), *Duncan v Perry Packing Co.*, (Kan. 1946), 174 P (2d) 78, *Hagger v Wortz Biscuit Co.*, (Ark. 1946), 196 S.W (2d) 1, *Kaiser v Reardon Co.*, (Mo. 1946), 195 S.W (2d) 477, *Echols v Company* (Ga. App. 1946), 38 S.E. (2d) 675,678."

Clearly, from the point of view of the victim, the injury is unexpected and accidental in nature.

Indeed, the overwhelming weight of modern authority so holds both in the United States and in England. (*Anderson v Hotel Cataract*, 70 S.D 376, 17 N.W 2d 913 (1945) *Daugherty v City of Monnett*, 238 Mo. App. 924, 192 S.W 2d 51 (1946) *Smith v. Stepney Corporation* (1929), 22 B.W.C.C. 451, W.C. and Ins. Rep. 349)

Awards to aggressors

Even before the instant case many courts made awards to aggressors—but did it not by facing the legal issue, but by ignoring or overlooking the fact of aggression. (*Chanm v Western Union Telegraph Co.*, 271 App. Div 763, 64 N.Y.S. 2d 670 (1946), *Geltman v Reliable Linen & Supply Co.*, 128 N.J.L. 443, 25 A. 2d 894,897 (1942) *So. Pac. Co. v Sheppard*, 29 F Supp. 376 (1939)—a typical longshore brawl, "inseparable from a longshoreman's life", per Kennerly, District Judge, affirmed in 112 F 2d 147 (5 Cir. 1940), per McCord, Circuit Judge. *Shultz v Chevrolet Motor Co.*, 256 Mich. 393, 239 N.W 894 (1932)).

Other courts, wishing to make an award, engaged in metaphysics and hairline distinctions in attempting to prove that the injured man, although a participant, was in fact not the aggressor. If he swore first, and the other fellow punched first, he

won because he was not the aggressor in the fisticuffs. (York v City of Hazard, 191 S.W 2d 239,241 (Ky 1945), Fey v Bobrunk, 84 Ind. App. 559, 151 N.E. 705,706 (1926), Rydeen v. Monarch Furniture Co., 240 N.Y 295, 148 N.E. 527 (1925), per Crane, J., (Cardozo, J., concurring), reversing 212 A. D. 843, 207 N.Y.S. 911 (1925)) If he struck first then the other fellow by using vile language or being overly-playful caused the fight and was the aggressor¹ (Haas v Brotherhood of Transportation Workers, 158 Pa. Super. 291, 44 A. 2d 776 (1945), Verschleiser v Stern & Son, 229 N.Y 192, 128 N.E. 126 (1920)) Or, if he really punched or threw first, the punch or missile did no harm—it was the other fellow's punch or missile which did the damage¹ (Stulginski v Waterbury Rolling Mills Co., 124 Conn. 355, 199 A. 653,657,658 (1938)—aggression not necessarily fatal, per Maltbie, C. J Chicago R. I. & P Ry Co. v Ind. Comm., 288 Ill. 126, 123 N.E. 278 (1919), certiorari denied, 250 U.S. 670, 40 S. Ct. 15 (1919))

And when recently Judge Reis of the Circuit Court of Dane County, Wisconsin, said the evidence showed the injured party was the aggressor, but that aggressors in work-made fights are entitled to recover, the highest court of Wisconsin avoided passing on the issue, by stating that the industrial commission found as a fact that the injured party was not the aggressor, so no ruling of law on aggressors was necessary (North End Foundry Co. v Staub, 251 Wis. 332,334, 29 N.W 2d 40 (1948))

But the question of aggression will continue to rear its head and has already rolled over into the field of admiralty When that occurred in 1948, the very able United States Circuit Court of Appeals for the Second Circuit referred to the instant New Hampshire case as “the persuasive decision, allowing compensation to the aggressor.” Said Clark, Circuit Judge, in Kable v. United States, 169 F 2d 90, 93-94 (2 Cir. July 31, 1948), after stating that the admiralty right of maintenance and cure is a broader liability than imposed by modern workmen s compensation acts:—“Yet under those acts recovery is increasingly allowed for injuries sustained as a result of fighting without making too fine a point as to who was the aggressor. See the leading case, also by Justice Rutledge before going to the Supreme Court, Hartford Accident & Indemnity Co. v Cardillo,

72 App. D.C. 52, 112 F. 2d 11, certiorari denied 310 U.S. 649, 60 S. Ct. 1100, or the persuasive decision in *Newell v. Moreau*, 94 N.H. 439, 55 A. 2d 476, allowing compensation to the aggressor, also cases such as *Chanin v. Western Union Telegraph Co.*, 271 App. Div. 763, 64 N.Y.S. 2d 670, *Corbett v. Biewener*, 270 App. Div. 782, 59 N.Y.S. 2d 359, and the comprehensive discussion in *Horovitz, Assaults and Horseplay under Workmen's Compensation Laws*, 41 Ill. L. Rev. 311."

New Hampshire has met the challenge, with commendable courage of its convictions. It remains for other great courts to think the matter through without the fetters of outmoded, ancient thinking, and to give the aggressor, short of one guilty of intentional or wilful misconduct, the right to workmen's compensation when the injury arises from an assault rooted in the employment and not in a purely personal matter.