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Workmen's Compensation -- Right of an Aggressor in an Assault to Compensation

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Workmen's Compensation

RIGHT OF AN AGGRESSOR IN AN ASSAULT TO COMPENSATION

Introduction

Since the appearance of the Workmen's Compensation acts in our statutory law, the courts have been troubled with the problem of just how far they should go in concluding that a particular injury arose "out of and in the course of employment," the statutory language which is made the sole condition precedent to an award of compensation under the great majority of state and federal statutes.[1] Although it was early recognized that the statutes were enacted to eliminate the harsh common law defenses available to an employer when one of his employees sought to recover for an injury suffered in the course of his work,[2] the courts were not prone to grant an award where it was determined that the injured employee was at fault in some degree. It was very difficult for judges who had been schooled in the common law to impose liability without fault, despite the fact that they were specifically authorized to do so by statute.

With the passage of time and the increasing number of industrial accidents due in part to the rapid growth of American industry, the courts became more familiar with the underlying purpose of the Workmen's Compensation acts, which was to prevent injured workers from becoming public charges,[3] and began to interpret the acts so as to effectuate this purpose. The scope of this survey will be confined to a determination of just how far the courts have proceeded in finding that an injury suffered by an aggressor in an assault is an injury arising out of and in the course of employment.

Early Developments

In the early cases dealing with assaults, it was stipulated that the only factor which would serve to relieve the employer from liability for resultant injuries would be that the injured employee

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[1] Statutory provisions are summarized in 1 LARSON, WORKMEN'S COMPENSATION § 6.10 (1952).

[2] The three main defenses were: (1) the fellow-servant rule, (2) contributory negligence, and (3) assumption of risk. See discussion in Horovitz, *The Litigious Phrase: "Arising out of" Employment,* 3 NACCA L. J. 15, 19 (1949).

[3] See 1 SCHNEIDER, WORKMEN'S COMPENSATION § 1 (2d ed. 1932).

was the aggressor in the affray.[4] There seemed to exist, however, a great deal of uncertainty as to just what was sufficient to render a person an aggressor. When a subordinate employee called his foreman a liar, this was held to have precipitated the assault on the employee and was the basis for denying an award for the employee's resulting injuries.[5] In the converse situation, where the foreman used the abusive language and the employee struck the first blow, it was held that the injury caused by the retaliatory blow of the foreman was compensable.[6] Also, where two employees engaged in a quarrel over their duties and the injured party used strong language, his injury caused by the other employee's blow was held not to be compensable.[7] The reasoning of these decisions appears to be that the use of abusive language supports an ensuing assault, and the speaker of such language is thereby rendered the aggressor in a subsequent affray so as to preclude compensation for any injuries received as a result thereof. The better view would seem to be that a quarrel arising out of the work being done by two employees, resulting in an injury to one of them, should be regarded as bringing such injury within the coverage of the act.[8] In any event, mere strong or abusive language should never render the user thereof the aggressor in a subsequent fight,[9] nor should it warrant an assault by the injured employee.[10]

Where the assault is provoked by personal motives unrelated to the employment, the courts have had little difficulty in finding that an injury suffered by the aggressor has not arisen out of and in the course of employment.[11] This is rightly so. The Workmen's Compensation acts were obviously not intended to render every injury suffered by an employee while at work compensable. There must be some connection between the injury and the conditions of employment. It must appear affirmatively that, but for the employment, the conditions giving rise to the injury would not

4 Indian Territory Oil Co. v. Jordan, 140 Okla. 238, 283 Pac. 240, 241 (1929).

5 Knocks v. Metal Package Corp., 194 App. Div. 65, 185 N.Y. Supp. 309 (3d Dep't 1920).

6 Meucci v. Gallatin Coal Co., 279 Pa. 184, 123 Atl. 766 (1924). The court here did not discuss the aggressor defense, basing its award on the fact that the injury-producing quarrel occurred in the course of employment.

7 Kimbro v. Black & White Cab Co., 50 Ga. App. 143, 177 S.E. 274 (1934).

8 Fey v. Bobrink, 84 Ind. App. 559, 151 N.E. 705, 706 (1926).

9 Levy v. World-Telegram, 255 App. Div. 237, 7 N.Y.S.2d 546, 547 (3d Dep't 1938).

10 Davis v. Robinson, 94 Ind. App. 104, 179 N.E. 797, 799 (1932).

11 Williams v. Industrial Comm'n, 63 Ohio App. 66, 25 N.E.2d 313, 315 (1939); McDevitt v. Checker Cab Co., 288 Pa. 394, 136 Atl. 230, 231 (1927); Wilkerson v. Industrial Comm'n, 71 Utah 355, 266 Pac. 270, 271 (1928).

have arisen.[12] The mere fact that the injury occurs on the employer's premises during working hours does not render it compensable. The traditional view has been that there must be a causal connection between the nature of the employment and the injury. Thus where an employee assaults another employee because of a purely personal matter, the causal connection is broken, and the resultant injury to the instigator is not covered by the act. In such cases there is no need to determine who struck the first blow and thereby became the aggressor.

In the early stages of the present problem some of the courts distinguished between assaults instigated to protect some interest of the employer and those started to protect some personal interest. An injury suffered by the instigator in the former class was held to be covered by the act,[13] while an injury suffered by the initiator in the latter class was not.[14] In *Scott v. Travelers' Ins. Co.*,[15] wherein recovery was allowed, the court was of the opinion that the aggressor should not be denied compensation in *every* case of assault. There are instances where an employee is required by the very nature of his employment to protect his employer's property from damage and in some cases from trespasses. The nature of the employee's duties in such circumstances would often necessitate the use of force, and this would technically make him the aggressor in a resulting affray. However, this should by no means take that employee out of the coverage of the act.[16] This is basic, since the act specifically covers injuries arising out of and in the course of one's employment, and in such a case as this, the instigating of an assault may well be part of a person's employment.

In spite of this seemingly sound reasoning, some courts have still refused compensation to an aggressor even when he was protecting his employer's interests in starting the fight.[17] The basis for such a decision appears to be that the injury results not from a risk incidental to the employment but rather from the injured employee's rashness in using such methods to further his employer's interests. The soundness of this reasoning is questionable. It has also been held that if an employee uses unlawful means to further his employer's business, a resulting injury is not compen-

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12 Winter v. United States Gypsum Co., 20 N.J. Misc. 425, 28 A.2d 545, 547 (Workmen's Comp. Bureau, Dep't Labor 1942).

13 Scott v. Travelers' Ins. Co., 49 Ga. App. 157, 174 S.E. 629, 636 (1934).

14 Plouffe v. American Hard Rubber Co., 211 App. Div. 298, 207 N.Y. Supp. 373 (3d Dep't 1925).

15 49 Ga. App. 157, 174 S.E. 629 (1934).

16 *Id.*, 174 S.E. at 633-36.

17 Triangle Auto Painting & Trimming Co. v. Industrial Comm'n, 346 Ill. 609, 178 N.E. 886, 889 (1931).

sable.[18]

The aggressor defense was applied in various ways in the early cases in which it arose, but almost all such cases led to the same conclusion; the courts simply would not allow an employee who started a fight to recover compensation for a resultant injury. It has been held that, in initiating the affray, the injured employee had left his status as an employee and had become a common criminal.[19] This basis for denying an award must be limited to special situations, for not every act of aggression amounts to such a serious crime as to take an employee out of his status as such. A more rational application of the aggressor defense is made in those cases where the court merely determines that the injury suffered by the employee who instigated the affray is not an accident arising out of his employment within the meaning of the act.[20] Injuries received by an aggressor have been analogized to injuries received as the result of horseplay and skylarking, in which cases compensation was originally denied,[21] although now generally allowed[22].

A number of the Workmen's Compensation acts contain specific provisions to the effect that injuries received as a result of a wilful intention to injure another are not compensable.[23] Some statutes require that there be an attempt to injure another.[24] The only question to be determined in these states is whether the injury suffered was a result of the employee's wilful intention, or attempt, to injure another. Where the word "wilful" is used in the

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18 Wooley v. Minneapolis Equipment Co., 157 Minn. 428, 196 N.W. 477 (1923). This decision, however, must be confined to its facts, since it is apparent that the fatally injured employee was no longer furthering his employer's business when he accosted the stranger on the street.

19 Griffin v. A. Roberson & Son, 176 App. Div. 6, 162 N.Y. Supp. 313, 315 (3d Dep't 1916); McDevitt v. Checker Cab Co., 288 Pa. 394, 136 Atl. 230, 231 (1927); Curran v. Vang Constr. Co., 286 Pa. 245, 133 Atl. 261 (1926).

20 Fulton Bag & Cotton Mills v. Haynie, 43 Ga. App. 579, 159 S.E. 781 (1931).

21 Such cases are discussed in Merkel v. T. A. Gillespie Co., 10 N.J. Misc. 1081, 162 Atl. 250 (Sup. Ct. 1932).

22 See Horovitz, *Assaults and Horseplay Under Workmen's Compensation Laws*, 41 ILL. L. REV. 311, 324 (1946).

23 ALASKA COMP. LAWS ANN. § 43-3-7 (1949); ARK. STAT. ANN. § 81-1305 (Supp. 1953); FLA. STAT. § 440.09 (3) (1953); IDAHO CODE ANN. § 72-202 (1949); IOWA CODE ANN. § 85.16 (1949); LA. REV. STAT. ANN. § 23:1081 (1950); ME. REV. STAT. c.31, § 18 (1954); MISS. CODE ANN. § 6998-04 (1952); NEV. COMP. LAWS § 2681 (1929); N.Y. WORKMAN'S COMP. LAW § 10; N.C. GEN. STAT. § 97-12 (1950); N.D. REV. CODE § 65-0102 (8) (1943); OKLA. STAT. tit. 85, § 11 (1951); R.I. GEN. LAWS, c.300 art.II § 2 (1938); S.C. CODE § 72-156 (1952); TEX. STAT. REV. CIV. art. 8309 § 1 (1925); VT. REV. STAT. § 8103 (1947).

24 GA. CODE ANN. § 114-105 (1937); VA. CODE § 65-35 (1950).

statute it should be interpreted to require an element of deliberateness in the aggressor's act. In other words, the term should be limited to situations where the aggressor attacks another employee with the deliberate intention of inflicting harm on the latter. A blow struck in a heated argument which arises out of the work of two employees would not in itself evidence a wilful intention to injure another in this sense. In many such instances there is no intention whatsoever, the blow merely being the culmination of a heated verbal battle. It is apparent that the state of mind of the aggressor at the time he hit the other employee is difficult to determine; however, the subsequent acts of the aggressor will in many cases indicate what his intention was in striking the first blow. If it becomes necessary for the victim to slay his assailant or inflict serious bodily harm in order to protect himself from further injury, this would seem to evince a wilful or deliberate intention on the part of the assailant to injure his victim. This is the type of case in which the injury suffered by the assailant is rightly held not to be compensable under the statutes precluding "wilful" aggressors from recovery.

An uneffected threat should never be considered as a wilful intention to injure a fellow employee.[25] The burden is on the employer to show that the injured employee suffered his injury as a result of his wilful intention to injure another. Thus, where it is affirmatively shown that the deceased employee was killed in self-defense as a result of his attack on a fellow employee, compensation is rightly denied.[26]

Even where the claimant was not the aggressor but was the other employee whom the aggressor attacked, the injury received by the claimant was held not to be compensable because the subsequent assault on the technical aggressor was viscious and evidenced a wilful intention to injure another.[27] Also, where an employee was instructed by his employer to carry a gun and he shot a striker who was coming after him evidently to cause injury, the ensuing death of the employee was held not to be an accident arising out of the employment within the meaning of the Workmen's Compensation act. Although the deceased employee was apparently acting in self-defense, the court felt that he used excessive force in repelling his attacker.[28]

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25 Keyhea v. Woodard-Walker Lumber Co., 147 So. 830, 833 (La. App. 1933). *But see* Garrett v. Texas-Louisiana Power Co., 19 La. App. 858, 141 So. 809 (1932).

26 Pierson v. Sterling Sugars, Inc., 149 So. 903 (La. App. 1933).

27 Stein v. Williams Printing Co., 195 App. Div. 336, 186 N.Y. Supp. 705 (3d Dep't 1921).

28 Liberty Mut. Ins. Co. v. Reed, 56 Ga. App. 68, 192 S.E. 325 (1937).

Toward the end of the nineteen thirties, the courts were already talking in terms of disregarding the technical distinction as to who was the aggressor in an assault. So long as the altercation arose from the work of the participants, any injury caused thereby was an injury arising out of and in the course of employment, and hence was compensable.[29] In a work-connected assault, the fact that the injured employee threw the first punch should not preclude an award of compensation. Although not dealing expressly with the problem, one court indicated that the aggressor defense would no longer be conclusive under the Workmen's Compensation act.[30] If a court should determine that the aggressor defense is conclusive, it would then be faced with the very difficult problem of defining just what an aggressor is and what acts amount to aggression.[31] It is apparent from the foregoing cases that no universal standard could be formulated. This would mean that it would be up to the court to decide in each set of circumstances whether, in its opinion, the injured employee was the aggressor. The unfavorable results from such a procedure are quite evident from the complete lack of uniformity in the decisions discussed above. The only sound solution would be to abolish the aggressor defense in work-connected assault cases. The modern trend is in this direction.

Modern Trend

The turning point of the outlook of the courts on the defense of aggression can probably be attributed to the discussion of the problem in the case of *Hartford Accident and Indemnity Co. v. Cardillo*.[32] This was a proceeding under the Longshoremen's and Harbor Workers' Compensation Act.[33] The court expressly found that the injured employee was not the aggressor in the assault, but it went on to discuss the aggressor defense at length. The Longshoremen's and Harbor Workers' Act contains a provision similar to many of the state acts[34] to the effect that no injury is compensable which is caused by the employee's wilful intention to injure another. The court refused to read the aggressor defense into this part of the act and, in interpreting this provision, said:[35]

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29 Schueller v. Armour & Co., 116 Pa. 323, 176 Atl. 527, 529 (1935).

30 Stulginski v. Waterbury Rolling Mills Co., 124 Conn. 355, 199 Atl. 653, 658 (1938).

31 *Ibid.*

32 112 F.2d 11 (D.C. Cir. 1940), *cert. denied,* 310 U.S. 649 (1940).

33 44 STAT. 1424 (1927), 33 U.S.C. § 901 (1946). This is the federal counterpart of the state Workmen's Compensation acts. It was made applicable to the District of Columbia in 1928. 45 STAT. 600 (1928).

34 See note 23, *supra.*

35 112 F.2d at 17.

> This provision, reinforced by the statutory presumptions and the Act's fundamental policy in departing from fault as the basis of liability and of defense, except as specified, is inconsistent with any notion that recovery is barred by misconduct which amounts to no more than temporary lapse from duty, conduct immediately irrelevant to the job, contributory negligence, fault, illegality, etc., unless it amounts to the kind and degree of misconduct prescribed in definite terms by the Act. It is entirely inconsistent with reading into the statute the law of tort causation and defense, where liability is predicated on fault and nullified by contributory fault.

The court emphasized the fact that the act was passed to do away with the common law notions of liability and defense. If the aggressor defense were to be adhered to this would bring back one of the common law defenses which such acts were meant to abrogate.

The full effect of this decision, unfortunately, was not to be felt in the state courts until almost ten years later. In the meantime the courts continued to engage in judicial legislation by denying awards of compensation where it was found that the injured employee had been the instigator of the altercation.[36]

There was still little difficulty in determining that an injury suffered by an aggressor did not arise out of or in the course of his employment where the assault was instigated solely for the personal motive of the aggressor. The reasoning of the court in one case[37] attempts to justify the conclusion that, unless the employee is required by the duties of his employment to use force, any injury suffered as a result of his use of force arises out of a purely personal matter and is not compensable. This seems inherently unsound and shows the inability of some courts to realize that in the majority of these cases the assault is directly attributable to the working environment. Whether an employee is protecting an interest of his employer, or enforcing some rule of his employer, should only be considered as one of the factors in determining whether the resulting injury was caused by the working conditions of the injured employee. To say that every assault which is not required by one's duties, or is not engaged in for the interest of the employer, is the emanation of a purely personal motive is to misconceive the entire problem. It is the work which brings the combatants together; it is the work which in most cases gives rise to a verbal dispute resulting in an affray wherein one employee is injured. It seems entirely illogical and unreasonable to say

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[36] Horvath v. La Fond, 305 Mich. 69, 8 N.W.2d 915 (1943); Brown v. Philmac Sportswear Co., 23 N.J. Misc. 378, 44 A.2d 805 (Workmen's Comp. Bureau, Dep't Labor 1945).

[37] Jackson v. State Compensation Comm'r, 127 W.Va. 59, 31 S.E.2d 848 (1944).

that if the injured employee is the one who landed the first punch he cannot recover, whereas if the injured employee was the recipient of the first blow he can recover. The first blow may do little or no damage, yet this precludes the initiator thereof from any form of relief if the victim retaliates and inflicts a severe injury on the technical aggressor. There is nothing in the acts which requires such a result.

Of course, it is not disputed that if the quarrel is over a purely personal matter,[38] or if the injured employee has stepped outside of his employment in engaging in a quarrel,[39] compensation is rightly denied for any resulting injury.

The courts are still in conflict as to whether strong language makes an employee an aggressor in a subsequent fracas, and whether such language warrants an assault by an employee who is injured as a result thereof. It was held that an injury received by a worker who provoked an assault by the use of abusive language coupled with threatening gestures was not the result of an accident arising out of the employment.[40] In making such a decision it is apparent that the court reverted to the common law theory of contributing fault, one of the main defenses that the acts were intended to abolish. In a better reasoned case,[41] an award was granted where the injured employee used insulting and abusive language thereby causing a fellow worker to assault him; the court specifically held that the use of such language was not sufficient to make the speaker the aggressor in the resulting assault.

The courts of the states which have specific provisions precluding compensation for an injury caused by a wilful intention to injure another[42] are still reading the aggressor defense into these provisions. A claimant who was impliedly accused of theft by a fellow employee, and who thereupon struck his accuser,

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38 Monte v. General Motors Corp., 24 N.J. Misc. 383, 49 A.2d 591 (C.P. 1946).

39 Armour & Co. v. Industrial Comm'n, 397 Ill. 433, 74 N.E.2d 704 (1947); Vollmer v. Milwaukee, 254 Wis. 162, 35 N.W.2d 304 (1948).

40 Lindsay v. Hoffman Beverage Co., 19 N.J. Misc. 356, 19 A.2d 824, 827 (Workmen's Comp. Bureau, Dep't Labor 1941). See also, Container Corp. of America v. Industrial Comm'n, 401 Ill. 129, 81 N.E.2d 571 (1948), wherein recovery was disallowed because prior threat of deceased employee to cut another employee's throat was considered sufficient to make the speaker thereof the aggressor.

41 York v. City of Hazard, 301 Ky. 306, 191 S.W.2d 239 (1945); *accord*, Conley v. Travelers Ins. Co., 53 So. 2d 681 (La. 1951); Stephens v. Spuck Iron & Foundry Co., 358 Mo. 372, 214 S.W.2d 534 (1948); Gerard v. American Can Co., 32 N.J. Super. 310, 108 A.2d 293 (App. Div. 1954).

42 See note 23, *supra*.

was denied recovery for injury received from the accuser's retaliatory blow. The fact that the claimant struck the first blow brought him within the exception set out in the act.[43] The court recognized the fact that certain words may be of such a provocative character as to justify an assault if they were spoken under the circumstances that would create an expectancy of physical retaliation; but it was held that an accusation of theft by implication was not in this class of words.

Under the provisions of the statutes referred to in the preceding paragraph, whether the injured employee was the aggressor is held to be a question of fact. If it be determined that he was the aggressor it becomes unnecessary to decide whether he was injured in the course of his employment.[44] It is submitted that this is a wrong interpretation of this statutory exception. Nowhere in these statutes can be found the specific defense of "aggression." Had the framers wished to include this in the exception provisions, it seems they would have done so in express terms. Not every act of aggression can be justly classified as evidence of a wilful intention to injure another. To so hold is to misinterpret the act, and to disregard its remedial nature.

The Texas act provides that an injury within the meaning of the act shall not include an injury caused by the employee's wilful intention to injure another.[45] In determining whether an assault is unlawful within the meaning of the act, the courts look to the penal code.[46] Two other courts, although not directly concerned with the question, have indicated quite clearly that the aggressor defense would still be followed in their respective states.[47]

The first case in which the aggressor defense was fully considered and unqualifiedly discarded was the case of *Newell v. Moreau*.[48] The court discussed the question of whether assaults and their resultant injuries were accidental and concluded that since such events were sudden and unexpected they were truly accidental. Compensable injuries caused by assaults were expressly

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43 Gross v. Great Atlantic & Pacific Tea Co., 25 So. 2d 837 (La. 1946).

44 Burkhardt v. City of Monroe, 37 So. 2d 601 (La. 1948).

45 TEX. STAT. REV. CIV., art. 8309, § 1 (1925).

46 Federal Underwriters Exchange v Samuel, 138 Tex. 444, 160 S.W.2d 61, 64 (1942).

47 Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So. 2d 251, 254 (1944); Staten v. Long-Turner Constr. Co., 185 S.W.2d 375, 381 (Mo. 1945).

48 94 N.H. 439, 55 A.2d 476 (1947). The defense had previously been discarded in Haas v. Brotherhood of Transportation Workers, 158 Pa. Super. 291, 44 A.2d 776 (1945), but it seems the court meant to confine the holding to situations such as that presented to it by that case.

limited to work-connected assaults and rightly so. The act in this state provided that injuries received as a result of serious or wilful misconduct were not compensable; a simple assault or battery was held not to amount to such unlawful conduct. As to the discarding of the aggressor defense, the court stated:[49]

> 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 . . . and we see no reason for its judicial insertion in this assault.

The court concluded by stating that it was basing its decision partly on the reasoning of the case of *Hartford Accident and Indemnity Co. v. Cardillo*.[50]

Thus the state courts were beginning to take cognizance of the sound reasoning put forward by the court in the *Hartford* case for abolishing the aggressor defense. For these courts, the fact that the claimant strikes the first blow is no longer the only test as to whether his injury comes within the purview of the act.[51] So long as the assault arises out of the nature and conditions of the employment, and the injured employee's action does not amount to serious and wilful misconduct, relief will be granted. Of course if the assault is purely personal no relief is accorded.[52] The relation of the employment to the injury must be that of "cause to effect."[53] If this relation is established it is not necessary to determine which employee threw the first punch. The act provides for relief where the injury arises out of the employment; thus, where this is shown, the fact that the injured employee commenced the altercation will not serve to bar him from his statutory right to compensation.

The position hitherto taken by the New York courts has been completely discarded as the result of a recent case.[54] Although the New York Workmen's Compensation Act contains a provision that no compensation will be allowed for an injury occasioned by the employee's wilful intention to injure another,[55]

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49 55 A.2d at 479-80.

50 112 F.2d 11 (D.C. Cir. 1940), *cert. denied*, 310 U.S. 649 (1940), discussed *supra*.

51 Dillon's Case, 324 Mass. 102, 85 N.E.2d 69, 71-72 (1949).

52 Willis v. Taylor & Fenn Co., 137 Conn. 626, 79 A.2d 821 (1951); Rothfarb v. Camp Awanee, Inc., 116 Vt. 172, 71 A.2d 569 (1950).

53 Dillon's Case, 324 Mass. 102, 85 N.E.2d 69, 72 (1949).

54 Commissioner v. Bronx Hospital, 276 App. Div. 708, 97 N.Y.S.2d 120 (3d Dep't 1950).

55 N.Y. WORKMEN'S COMP. LAW § 10.

the court recognized that this provision does not include the aggressor defense, whether the aggression be in cases of horseplay or malicious assaults. If the assault is work-connected it becomes immaterial whether the injured employee is regarded as the instigator of the dispute or as the innocent victim thereof. The act does not incorporate the theory that those at fault should not be awarded any relief and the courts are not justified in reading such a defense into the act. The court made its position very clear when it stated:[56]

> The victim of work-inducted assults should be given compensation rights, without importing narrow common law rules barring an aggressor, and without indulging in mental gymnastics to determine who struck the first blow. Using the word "aggressor" as a defense to an award is to bring back into the compensation law common law defenses which have been outlawed.

This position was reaffirmed in a later case, wherein it was contended that the claimant was the aggressor.[57] The court upheld the award on the basis that the issue of fact whether the injury was sustained in the course of and arising out of the employment was determined in favor of the claimant and was supported by sufficient evidence.[58]

Regardless of the trend in the opposite direction, the courts of Louisiana, which has a statutory provision similar to that of New York, still continue to read the aggressor defense into the compensation act.[59] Illinois refuses an award where the injured employee is found to be the aggressor on the ground that the injury risk in such a case is not incidental to the employment but is directly attributable to the employee's act of aggression.[60] In two recent New Jersey cases[61] although the court specifically found that the injured employee was not the aggressor, it was indicated that had he been, he would have been barred from any relief.

Notwithstanding these repeated conflicts in the cases, the ma-

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56 Commissioner v. Bronx Hospital, 276 App. Div. 708, 97 N.Y.S.2d 120, 122-23 (3d Dep't 1950).

57 Young v. Famous Trading Corp., 283 App. Div. 753, 128 N.Y.S.2d 163 (3d Dep't 1954), *aff'd*, 123 N.E.2d 254 (1954).

58 *Ibid.* It is interesting to note that the employer also contended the claimant had quit his job and then returned to the employer's premises to engage in the affray.

59 Jenkins v. Cities Service Refining Corp., 44 So. 2d 719 (La. 1950).

60 Fischer v. Industrial Comm'n, 408 Ill. 115, 96 N.E.2d 478 (1951).

61 Cierpial v. Ford Motor Co., 16 N.J. 561, 109 A.2d 666, 668 (1954); Augelli v. Rolans Credit Clothing Store, 33 N.J. Super. 146, 109 A.2d 439, 441 (1954). In the latter case it was necessary for the court to reverse a finding of the director that the blowing of a horn was an act of aggression!

jority of the courts which have been presented with the issue in recent years have abolished the previously followed aggressor defense or have refused to adopt it. One court disposed of this defense by stating that the act was intended to impose liability on the employer for injuries suffered in the course of employment regardless of fault. Thus the charge of aggression could not be a defense since it amounts to little more than a claim that the injured employee was at fault.[62] The court went a little further in its attempt to discard the aggressor defense in compensation cases. It analogized a work-connected assault, where the aggressor is injured and seeks an award under the act, to the respondeat superior cases where an employee assaults a third party during a dispute arising out of the work.[63] In the latter case it is held that the employee is acting within the scope of his employment when committing the assault;[64] therefore it seems to follow that an injury received while committing the assault is an injury arising in the course of employment and is compensable. The court concluded its opinion by stating:[65]

> There is no basis for distinguishing between the case where the employee initiated the assault and where he did not or that of an aggressor and non-aggressor, except in one the employee is at fault and in the other he is not. As seen, this cannot be valid distinction, because the fault of the employee is no bar to recovery. . . .

The Nebraska courts indicate that the aggressor defense is no longer available in compensation cases.[66] The first time a Minnesota court was faced with the question of whether an aggressor in a work-connected altercation could recover compensation for injuries suffered, it decided the issue in favor of the aggressor.[67] The court believed that it would not be a reasonable distinction to say that an injury suffered by a victim of an assault arose out of the employment and that an injury suffered by the aggressor did not so arise. The Minnesota act does not provide that an act of aggression bars relief and it would be an usurpation of the legislative function for the court to read such a defense into the statute. The court, to support its decision, fell back on the time-honored principle, relied on so often in interpreting statutes, that it is up to the legislature to say whether contributory fault shall

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62 State Compensation Ins. Fund v. Industrial Acc. Comm'n, 38 Cal. 2d 659, 242 P.2d 311 (1952).

63 *Id.* 242 P.2d at 313.

64 Carr v. Wm. C. Crowell Co., 28 Cal. 2d 652, 171 P.2d 5, 6 (1946).

65 242 P.2d at 318.

66 Myszkowski v. Wilson & Co., 155 Neb. 714, 53 N.W.2d 203, 208 (1952).

67 Petro v. Martin Baking Co., 239 Minn. 307, 58 N.W.2d 731 (1953).

bar relief.[68]

The Arkansas statute contains the familiar provision that no injury shall be compensable if it is caused by the injured employee's wilful intention to injure another.[69] In construing this provision the court interpreted "wilful" to denote an element of premeditation or deliberateness in attempting or intending to injure another. Thus, where a blow is struck in a heated quarrel, such blow is not sufficient to bar the striker thereof from relief for an injury subsequently inflicted upon him.[70] The court mentioned the fact that the majority of the jurisdictions which have considered this question have not barred relief on the basis of the claimant having been the aggressor.[71] That this is the present situation of the law is evident from the above discussion.

Conclusion

This field of Workmen's Compensation law has been greatly liberalized in recent years, as evidenced by this discussion. The fact that the injured employee was technically the aggressor in an assault, whether it arose out of the employment or was personal only, was sufficient to bar any form of relief in the early stages of development. The courts at first were paying too much attention to the question of who struck the first blow. The true test in all Workmen's Compensation cases is threefold: (1) whether the injury arose out of the employment, (2) whether the injury is one contemplated by the act, and (3) whether the injury arose in the course of employment.[72] In none of the state statutes does the defense of "aggression" appear. Why should the courts persist in reading the aggressor defense into the statutes? It certainly seems reasonable that had the framers of the acts intended compensation to be denied an aggressor they would have included this defense among those which are specifically enumerated in the acts. This is an obvious instance in which the rule of statutory construction known as *expressio unius est exclusio alterius* could be applied logically.

Courts are prone to find that the victim of an assault can recover compensation for his injuries where it is determined

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68 *Id.* 58 N.W.2d at 736.

69 ARK. STAT. ANN., § 81-1305 (Supp. 1953).

70 Johnson v. Safreed, 273 S.W.2d 545 (Ark. 1954).

71 *Id.* 273 S.W.2d at 547.

72 Monte v. General Motors Corporation, 24 N.J. Misc. 383, 49 A.2d 591. 593 (C.P 1946).

that the risk of such injuries was incidental to the employment. This is saying no more than that the injuries arose out of and in the course of employment. Why should a court hold that an injury received by the victim of a work-connected assault is one which has arisen out of the employment, and at the same time hold that an injury received by the instigator of the same assault is not an injury arising out of the employment? The distinction is illogical, unreasonably harsh and not in conformity with the purpose of the Workmen's Compensation legislation in general.

It is submitted that the modern trend of the cases is indicative of a further departure by the courts from a reliance on the strict principles of the common law when enforcing the acts. It is to be hoped that the rest of the courts will soon fall in line with this trend.

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