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Workmen's Compensation - Injury in Course of Employment - Necessity for Causal Connection between Injury and Employment

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WORKMEN'S COMPENSATION — INJURY IN COURSE OF EMPLOYMENT —NECESSITY FOR CAUSAL CONNECTION BETWEEN INJURY AND EMPLOYMENT The claimant, while on duty as a restaurant waitress, was shot and severely injured by a customer who had just been served by another waitress. The customer immediately committed suicide. No mention of motive for the shooting appeared in the opinion. The North Dakota Court *held,* that the shooting was an injury arising in the course of employment and therefore compensable under the Workmen's Compensation Act. *Lippman v. North Dakota Workmen's Compensation Bureau,* 55 N.W.2d 453 (N.D. 1952).

With this decision North Dakota assumes a unique postion of liberality in definition of a compensable injury. Cases of employees claiming workmen's compensation for assaults by fellow employees or third persons abound in the reports, but none other has been found where recovery was allowed without some, however slight, connection shown between the employment and the injury. The case is defensible because the North Dakota Workmen's Compensation Act covers any injury "arising in the course of employment." [1] Statutes in almost all other states [2] require not only that the injury arise "in the course of" the employment, but also that it "arise out of" the employment,[3] thus imposing a dual standard. An injury arises in the course of employment if it happens during work hours, at any place where the purpose of work may lead the employee [4] while he is engaged in any activity reasonably contemplated [5] by the employment. This requirement relates to time, place, and occupation.[6] Late cases are extremely liberal in defining "course of employment." [7] Not so easily established, however, is the second generally indispensable element, that the injury "arise out of" the employment. An injury arising out of the employment is one deriving its cause, origin, or source from some incident, condition, or risk identified with the employment [8] There

1. N.D. Rev. Code §65-0102 (8) (Supp. 1949). " 'Injury' shall mean only an injury arising in the course of employment including an injury caused by the willful act of a third person directed against an employee because of his employment. . . ."

2. Mr. Justice Minton was apparently contemplating a case such as the instant decision when he wrote: "Liability accrues . . . only if the death arose out of and in the course of the employment. This is a statutory provision common to all Workmen's Compensation Acts." O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504, 509 (1951) (dissenting opinion); Prosser, Torts 528 (1941).

3. For an exhaustive general discussion see 6 Schneider, Workmen's Compensation Text §1542 (1948).

4. Robbins v. Yellow Cab. Co., 85 Cal. App.2d 811, 193 P.2d 956, 958 (1948), "The employee must be engaged in the work he has been hired to perform; it must occur within the period of his employment and at a place where he may reasonably be for that purpose while engaged in the performance of his duties."

5. Nugent Sand Co. v. Hargesheimer, 254 Ky. 358, 71 S.W.2d 647 (1934) (employee bitten while away from usual working place at employer's request held covered by Workmen's Compensation Act).

6. *See* Hanson v. Robitshek-Schneider Co., 209 Minn. 596, 297 N.W. 19, 21 (1941); M & K Corp. v. Industrial Commission, 112 Utah 488, 189 P.2d 132, 134 (1948). Utah, like North Dakota, Pennsylvania, Texas and Washington, requires only a showing that the injury arose in the course of employment. 6 Schneider, Workmen's Compensation Text §1542 n. 1 (1948).

7. *E.g.,* Strauss v. Industrial Commission, 73 Ariz. 285, 240 P.2d 550 (1952) (any act "reasonably contemplated" by employment included); State Employees' Retirement System v. Industrial Accident Commission, 97 Cal.App.2d 380, 217 P.2d 992 (1952) (game warden asphyxiated with paramour in bed-equipped state car in wooded area, held within employment). *But cf.* Central Garage of LaSalle v. Industrial Commission, 286 Ill. 291, 121 N.E. 587 (1918) (illustrative of strict requirement in older cases).

8. Mailloux' Case, 105 N.E.2d 223 (Mass. 1952) (no recovery, risk not incidental to or connected with employment); Prosser, Torts 533 (1941).

must be a causal connection between the job and the injury.[9] The employment need not cause the injury in the sense of being a direct or proximate cause, but it must be a contributing factor[10] so that the injury may fairly be compensated as the legitimate fruitage of the employment.[11] The court in the instant case refused to distort the plain statutory language to include this nearly universal dual standard, but allowed recovery without any proof of causal connection between the employment and the injury.

Similar statutes have been otherwise interpreted.[12] The Ohio court construed the words "in the course of employment" as including by implication the complementary phrase "arise out of" and applied the dual standard requiring causal connection.[13] Intimating that recovery on a mere showing that the injury happened "in the course of" employment would be an unconstitutional contravention of the employer's rights, the court's decision apparently induced the legislature to amend the law in conformity with the dual standard.[14] Since the amendment, the requirement of causal connection has not been interpreted strictly in Ohio, and recovery has not been precluded in willful assault situations comparable to the instant case.[15] In Pennsylvania, where the statute allows recovery for injuries suffered "in the course of" employment, the injury need not grow out of the employment.[16] However, no willful assault is compensable if directed at the employee for personal reasons, and not for any motive connected with his employment.[17] In willful assault cases the Pennsylvania courts require the defendant employer to sustain the burden of proving the motive was personal in order to defeat recovery.[18]

The North Dakota statute applied in the main case includes as compensable "an injury caused by the willful act of a third person *because of his employment.*"[19] The defendant contended that the phrase "because of his employment" required the claimant to prove the assault was prompted by some provocation connected with the employment. The court

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9. "There must be some connection between the death and the employment. Not in any common law sense of causal connection but in the common-sense, everyday, realistic view." O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504, 509 (1951) (dissenting opinion).

10. Goodyear Aircraft Corp. v. Industrial Commission, 62 Ariz. 398, 158 P.2d 511 (1945) (explosion of cola bottle brought on employer's premises by claimant held compensable), *see* Breimhorst v. Beckman, 227 Minn. 409, 35 N.W.2d 719, 728 (1949) (waitress shot by spring gun burglar alarm).

11. Howard v. Dawkins Log & Mill Co., 284 Ky. 9, 143 S.W.2d 741, 743 (1940): "Compensation should be allowed for all such injuries inflicted by third persons . . . when the cause . . . sprouted from the performance of the servant's duties. . . ."

12. See 27 Tex. L. Rev. 571 (1949).

13. Fassig v. State, 95 Ohio St. 232, 116 N.E. 104 (1917), *see* industrial Commission v. Weigandt, 102 Ohio St. 1, 130 N.E. 38, 39 (1921).

14. Ohio Gen. Code §1465-37 *et seq.; See,* Malone v. Industrial Commission, 140 Ohio St. 292, 43 N.E.2d 266, 269 (1922) (Summary of Legislative History).

15. Huston v. Industrial Commission, 87 Ohio App. 33, 85 N.E.2d 531 (1949) (cab driver-manager shot while resisting restaurant holdup; recovery allowed).

16. *See* Hunter v. American Oil Co., 136 Pa. Super. 563, 7 A.2d 479, 483 (1939) (employee's body found in river, neither murder nor suicide being proven; held, compensable).

17. Pennsylvania Workmen's Compensation Act §411: "The term 'injury by an accident in the course of his employment,' as used in this article, shall not include an injury caused by an act of a third person intended to injure the employee because of reasons personal to him, and not directed against him as an employee or because of his employment."

18. See note 16 *supra.*

19. N.D. Rev. Code §65-0102 (Supp. 1949). (Italics added).

considered this claim unfounded..[20] Construing an identical phrase, the Mississippi court, just four months earlier, reached a directly contrary result, holding the words "because of his employment" to impose a distinct requirement that the claimant in an assault case show a causal connection between the willful act and the employment.[21] Since newspaper accounts of the shooting leading up to the instant North Dakota case described the assailant as a former suitor of the injured waitress,[22] it is remarkable that the court made no mention of the probability that the shooting was induced by a personal motive entirely unconnected with the employment.

In other states the rule is well established that an assault induced solely by personal ill will is not compensable [23] because not traceable to risks incidental to the employment,[24] but attributable to animosity likely to assert itself at any time and in any place.[25] It makes no difference that the assault is perpetrated by a fellow employee [26] while both victim and assailant are at work [27] because the test is whether the motive is purely personal or is business inspired. If the assault is committed because of personal anger, hatred, revenge, or lust [28] entirely foreign to the employment, the injury is generally treated as the independent act of the assailant and not one arising out of the employment.[29] These courts refuse to pervert the theory underlying workmen's compensation by character-

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20. *See* Lippman v. North Dakota Workmen's Compensation Bureau, 55 N.W.2d 453, 549 (N.D. 1952).

21. Brookhaven Steam Laundry v. Watts, 59 So.2d 294 (Miss. 1952) (laundry delivery man shot by customer while there for joint purposes of picking up cleaning and furthering illicit affair with customer's wife; the court first awarded compensation but thereafter reversed itself).

22. Grand Forks Herald, Nov. 1, 1952, page 10. (Morning Ed.); *cf.* Rocky Mountain Fuel Co. v. Kruzic, 94 Colo. 398, 30 P.2d 868 (1934) (award denied where claimant failed to show motive of shooting, the court commenting that the case was singularly lacking in evidence that apparently could have been produced).

23. Goodland v. L.S. Donaldson Co., 227 Minn. 583, 36 N.W.2d 4 (1949) (truck-driver excited personal animosity of motorman by insulting remarks); Brookhaven Steam Laundry v. Watts, 59 So.2d 294 (Miss. 1952) (love triangle); Ramos v. Taxi Transit Co., 276 App. Div. 101, 92 N.Y.S.2d 744 (1949) (cab driver murdered by wife's former rejected suitor); *cf.* Royal Indemnity Co. v. Industrial Accident Commission, 192 Cal. 675, 221 Pac. 371 (1923) (chauffeur shot by cook who committed suicide, refused award though no specific personal motive appeared).

24. Harden v. Thomasville Furniture Co., 199 N.C. 733, 155 S.E. 728 (1930) (watchman shot by off duty employee because of personal domestic troubles, held, injury was noncompensable); Hopson v. Hungerford Coal Co., 187 Va. 299, 46 S.E.2d 392 (1948) (employee killed by asylum escapee; claimant failed to prove connection with employment).

25. Bridges v. Elite, Inc., 212 S.C. 514, 48 S.E.2d 497, 499 (1948). In this case a restaurant waitress was shot by a spurned lover who immediately killed himself. The court stated: "The fact that she met her violent death on the employer's premises was purely coincidental. The conclusion is inescapable that Smawley intended to kill Eula May Bridges whenever and wherever he met her. She was not exposed to his attack by anything connected with her employment. No other employee was subject to the hazard which confronted her. The causative danger was peculiar to her and not to her work." On its facts this case appears directly contra to the principal decision.

26. Cyrus v. Miller Tire Service, 208 S.C. 545, 38 S.E.2d 761 (1946) (fatal dispute over three cents); American General Ins. Co. v. Williams, 32 Tex. App. 683, 227 S.W.2d 788 (1950) (killing arose from crap game scuffle).

27. Scholtzhauer v. C. & L. Lunch Co., 233 N.Y. 12, 134 N.E. 701 (1922) (waitress shot by dishwasher after refusing "date"); Elrod v. Union Bleachery, 204 S.C. 481, 30 S.E.2d 73 (1944) (decedent clubbed to death for flirting with co-worker's wife).

28. State v. District Court, 140 Minn. 470, 168 N.W. 555 (1918) (county schoolteacher raped). *But cf.* Giracelli v. Franklin Cleaners & Dyers, 132 N.J.L. 590, 42 A.2d 3 (1945) (rape of salesgirl left alone in building compensable).

29. Harden v. Thomsville Furniture Co., 199 N.C. 733, 155 S.E. 728 (1930) (shooting entirely foreign to employment).

izing personal revenge for private reasons as an industrial risk.[30] Exceptional is the case where the employer knows of the personal enmity and in spite of that knowledge exposes the employee to special danger of the assault. An employer who so endangers his employee is held liable.[31]

Even in cases where no motive for the assault is shown, as in the instant case, most courts have refused recovery [32] basing denial on the claimant's failure to demonstrate a causal relation justifying the inference that the injury arose out of the employment.[33] Some courts base an exception in favor of night watchmen murdered for no ascertainable motive upon the lonely nature of the job and its inherent dangers to the employee.[34] In contrast to cases denying recovery where no motive for the assault appears are those allowing recovery where an employee at work in a public place is assaulted by an insane person.[35] The rationale of these latter decisions is that working in a public place requires the employee to expose himself to all types of people, including the insane. Actually the courts have applied what may be termed a "but for" test, reasoning that the employee would not have been present at the place where the insane person struck, were it not for the employment.[36] It would appear more logically consistent to deny recovery where no rational motive appears if recovery is to be denied where no motive whatever appears.[37]

If the claimant can demonstrate that the circumstances or environment of the employment increased the likelihood of an assault, his injuries are generally compensable, although the motive may be clearly personal.[38] Sufficient causal relation is established by showing that some incident of the employment provided the assailant an unusual opportunity to strike without risk of apprehension.[39] But if the employee himself contributes

30. See Ramos v. Taxi Transit Co., 276 App. Div. 101, 92 N.Y.S.2d 744, 751 (1941) (grudge shooting).

31. Berrisi v. Ryan 242 App. Div. 279, 275 N.Y.S. 370 (1934) (employer deliberately increased peril).

32. Ries v. De Bord Plumbing Co., 186 S.W.2d 488 (Mo. App. 1945) (assault by unknown assailant for reason never discovered); Coco v. Wilbur, 104 N.J.L. 275, 140 Atl. 790 (1928) (berry picker shot by unknown killer).

33. Rocky Mountain Fuel Co. v. Kruzic, 94 Colo. 398, 30 P.2d 868 (1934); Giles v. W.E. Beverage Corp., 133 N.J.L. 137, 43 A.2d 286 (1945) (liquor store manager shot counting day's receipts but nothing stolen); *cf.* Brown v. General Drivers Union No. 544, 212 Minn. 265, 3 N.W.2d 423 (1942) (failure to connect union leader's murder with job hazard).

34. Cole v. I. Lewis Cigar Mfg. Co., 3 N.J. 40, 68 A.2d 737 (1949) (only property stolen was murdered watchman's money); Rathburn v. Sussman Brothers & Co., 127 Pa. Super. 104, 193 Atl. 488 (1937) (watchman shot in attempt to rob him). *Contra:* Howard v. Dawkins Log & Mill Co., 284 Ky. 9, 143 S.W.2d 741 (1940) (no motive revealed).

35. Louie v. Bamboo Gardens, 67 Idaho 469, 185 P.2d 712 (1947) (dishwasher shot because of assailant's insane delusion); Katz v. A. Kadans & Co., 232 N.Y. 420, 134 N. E. 330 (1922) (stabbing by insane man compensable as street risk).

36. *See* Hartford Accident & Indemnity Co. v. Hoage, 85 F.2d 417, 418 (App.D.C. 1936) (crazed stranger knifed cook in restaurant); *accord*, London Guarantee & Accident Co. v. McCoy, 97 Colo. 13, 45 P.2d 900 (1935) (applied "but for" test where employee went to insane man's home to make business telephone call).

37. *Cf.* Hopson v. Hungerford Coal Co., 187 Va. 299, 46 S.E.2d 392 (1948) (failure to connect insane attack to employment prevented recovery).

38. Robertz v. Board of Education, 134 N.J.L. 444, 48 A.2d 847 (1946) (teacher assaulted leaving night meeting of student club, held that night services as faculty advisor increased hazard); Huston v. Industrial Commission, 87 Ohio App. 33, 85 N.E.2d 531, 532, (1949). "There was causal connection . . . through the activities, conditions, and environments of the employment."

39. Hanson v. Robitshek-Schneider Co., 209 Minn. 596, 297 N.W. 19 (1941) (salesman attacked leaving night work in area of city where crime was prevalent, motive personal robbery).

to increasing the hazard of the attack, recovery may be refused.[40] Clearly compensable are assaults originating in disputes concerning the employer's business or the employee's duties.[41] Indeed compensation has been awarded where the assault was motivated by a mixture of personal grudge and employment difficulties.[42]

These cases illustrate the metamorphic development of modern liberality which finds recovery taken for granted today in cases where no award would have been possible only twenty-five years ago.[43] This broadened viewpoint was acknowledged in a recent California case involving a bar maid shot by an irate wife who intended to shoot her husband but missed the mark.[44] Although the present decision may be criticized as compelling an employer to insure his employees against every risk of life,[45] the opinion presents a sound legal interpretation of the standard implied in the statutory phrase "course of employment." The rule deducible is that no proof of causal connection between employment and injury is requisite to recovery. If causal connection is to be a qualification for recovery in North Dakota, as in other states, the change must come from the legislature. Absent legislative intervention North Dakota's definition of compensable injury must be ranked among the most liberal in an era of liberality.

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40. Hopper v. Koenigstein, 135 Neb. 837, 284 N.W. 346 (1939) (compensation refused where employee drank with man who finally killed him, intoxication increased the hazard). This case seems inconsistent with the basic purpose underlyinig workmen's compensation statutes, since the statutes were intended to contravene the defenses of contributory negligence, assumption of risk, and the negligence of a fellow servant.

41. Kentucky Flourspar Co. v. Wolford, 262 Ky. 471, 92 S.W.2d 753 (1936); Grant v. Grant Casket Co., 137 N.J.L. 463, 60 A.2d 817 (1948) (labor relations manager assaulted by union officer who resented management policy); Sanders v. Jarka Corp., 1 N.J. 36, 61 A.2d 641 (1948) (post-accident argument incited assault of truckdriver); Anderson v. Hotel Cataract, 70 S.D. 376, 17 N.W.2d 913 (1945) (co-employee's disparagement of decedent's work led to fight).

42. Liberty Mutual Insurance Co. v. Hughes, 238 S.W.2d 803 (Tex. 1951) (combined employment jealousy and personal enmity); *see* Perez v. Fred Harvey, Inc., 54 N.M. 339, 224 P.2d 524, 526 (1950).

43. *Cf.* Royal Indemnity Co. v. Industrial Accident Commission, 192 Cal. 675, 221 Pac. 371 (1923) (chauffeur sent to investigate noises killed by cook); Mercantile Commercial Bank v. Koch, 83 Ind. App. 707, 150 N.E. 25 (1925) (stockholder-employee killed for inducing discharge of murderer's sister).

44. Industrial Indemnity Co. v. Industrial Accident Commission, 95 Cal. App.2d 443, 214 P.2d 41 (1950); *cf.* Fidelity & Casualty Co. v. Barden, 79 Ga. App. 260, 54 S.E.2d 443 (1949) (car hop accidentally shot in transaction personal to another employee, held, compensable).

45. *See* Tweten v. North Dakota Workmen's Compensation Bureau, 69 N.D. 369, 380, 287 N.W. 310 (1939), "The Workmen's Compensation Act does not provide for general health insurance or for general accident insurance." See also Prosser, Torts 533 (1941), "But the strict liability imposed by workmen's compensation never was intended to provide general health or accident insurance against such events. Its purpose is limited to protection against the risks of the employment."