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THE EXCLUSIVITY OF THE WORKMEN'S COMPENSATION REMEDY: THE EMPLOYEE'S RIGHT TO SUE HIS EMPLOYER IN TORT

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> Then answered him heedful Penelope: ". . . . First Heaven inspired my mind to set up a great loom within the hall and weave a robe, fine and exceedingly large; and to the men said I, 'Young men who are my suitors, though royal Odysseus now is dead, forbear to urge my marriage till I complete this robe' . . . Then in the daylight would I weave at the great web, but in the night unravel, after my torch was set."[1]

INTRODUCTION

Workmen's compensation in the United States has often borne a remarkable resemblance to the fabled robe of Penelope. Workers, whom the compensation statutes were intended to benefit, have on different occasions urged the courts both to spin and to unravel the web of compensation coverage. Although most injured workers seek cash and medical benefits under the compensation statutes, there are numerous cases in which the employee actually strives to disassociate his claim from the act and sue at common law. In these situations, it is the employer who argues for the application of the compensation act. Many studies have explored the growth and development of compensation as a system of dealing with the problem of industrial injuries,[2] but relatively little heed has been paid to the efforts of these workers to have their claims adjudicated according to common law principles rather than under workmen's compensation statutes.[3] The purpose of the article is to focus attention on these efforts.

The basic *quid pro quo* underlying the substitution of workmen's compensation for common law negligence required that the worker ac-

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1 Homer's Odyssey, XIX, 123, 137-42, 149-50 (Palmer Transl. 1891).

2 E.g., Brodie, The Adequacy of Workmen's Compensation as Social Insurance: A Review of Developments and Proposals, 1963 Wis. L. Rev. 57; Horovitz, Workmen's Compensation: Half Century of Judicial Developments, 41 Neb. L. Rev. 1 (1961).

3 See Schmidt & German, Employers' Misconduct as Affecting the Exclusiveness of Workmen's Compensation, 18 U. Pitt. L. Rev. 81 (1956); Notes, 1959 U. Ill. L.F. 655, 1954 Wash. U.L.Q. 105, 26 Ind. L.J. 280 (1951), 2 Ark. L. Rev. 130 (1948). The more fundamental issue of whether the worker should have a tort remedy *in addition to* his compensation remedy, is discussed in Marcus, Advocating the Rights of the Injured, 61 Mich. L. Rev. 921 (1963), and is not considered herein.

cept a smaller recovery under the new system, but that all work injuries be covered regardless of fault.[4] In place of the common law rule requiring the tortfeasor to render full reparation to the injured plaintiff, workmen's compensation holds the employer liable for cash benefits according to the extent of economic disability and limited to a certain percentage (usually from fifty per cent to sixty-six per cent) of the worker's pre-accident wage. However, in addition to the percentage limitation, a dollar maximum has been imposed on cash benefits. The low levels of this dollar ceiling prevent most workers from receiving benefits anywhere near the percentage maximums.[5] Thus, they present a major bar to the achievement of an equitable correlation between what the worker has lost and what he receives under workmen's compensation. For example, in case of permanent total disability, thirty-eight states have a ceiling of fifty dollars or less.[6] Death benefits are likewise limited by ceilings.[7] Moreover, while it is generally agreed that medical benefits under workmen's compensation should be unlimited,[8] the most recent study reveals that only twenty-four jurisdictions have compensation acts with no arbitrary limits as to duration and amount of medical care.[9] Five states actually cut off medical benefits at a ceiling of $2,000 or less.[10]

On the other hand, the past half-century has witnessed a marked shift in the balance of tort law as rules favoring the defendent have been subject to constant erosion.[11] As a result the probability of settlement or judgment in damage suits is much greater now than it was when the first

[4] General discussions of the history and goals of workmen's compensation may be found in Cheit, Injury and Recovery in the Course of Employment 10-13 (1961); Horovitz, Injury and Death Under Workmen's Compensation Laws 1-10 (1944); 1 Larson, Workmen's Compensation §§ 1-5 (1952, Supp. 1962) (hereinafter cited as Larson); Somers & Somers, Workmen's Compensation: Prevention, Insurance, and Rehabilitation of Occupational Disability 17-37 (1954). See also Brodie, supra note 2.

[5] See Skolnik, New Benchmarks in Workmen's Compensation, 25 Social Security Bull. 3, 8-13 (June 1962).

[6] U.S. Chamber of Commerce, Analysis Of Workmen's Compensation Laws 16 (Jan. 1962, Supp. Jan. 1963).

[7] In his comprehensive study of workmen's compensation in the United States, Professor Earl F. Cheit arrived at a complex formula representing the median net loss suffered by the survivors of the victims of fatal industrial accidents. In 1956, this loss, discounted to present value, amounted to $74,463 in California. Workmen's compensation benefits under the California statute replaced a mere 12.2% of this loss. On a national level, 33 states replace 20% or less of the estimated loss. See Cheit, supra note 4, at 62-88, 106-09.

[8] Id. at 40-42, and authorities cited therein.

[9] U.S. Bureau of Labor Standards, Dep't of Labor, Bull. No. 244, Cheit, Medical Care under Workmen's Compensation 4-5 (1962).

[10] Id. at 9, table 5.

[11] "The balance of power between respective advocates has been more nearly restored, and the doctrines so excessively overweighted in defendant's favor during the 1800's in most instances are being more fairly stated and employed." Green, The Thrust of Tort Law: Part I, The Influence of Environment, 64 W. Va. L. Rev. 1, 19 (1961).

compensation acts were passed.[12] Moreover, the level of jury verdicts has risen along with increasing wages, prices and medical costs.[13] A dramatic example of the gap between common law and workmen's compensation recoveries occurred several years ago. Two workers suffered similar injuries resulting in the amputations of both legs and the right arm. One of the victims worked for a railroad in Texas. Thus his remedy was provided by the Federal Employers' Liability Act under which tort damages are awarded. A jury returned a verdict of $157,400 (plus an additional amount for medical expenses), and a reviewing court held that the verdict was not excessive.[14] His companion in catastrophe was mangled by machinery at a plant in Minnesota. Covered by workmen's compensation, he was limited to a cash recovery of $15,000 against his employer.[15]

The possibility of future legislative improvement brings little comfort to the injured worker whose recovery will be based on present-day statutes. Hence, the worker and his counsel will often seek out supplementary or alternative remedies. For example, a common device employed in order to recover tort damages for industrial harm is the institution of a tort action against a third party whose negligence may have caused claimant's injuries. While the employer is still liable for workmen's compensation he may recover his payments out of the third-party award through various procedural devices provided by the acts.[16] The scope of the worker's third-party rights will depend upon the language of the particular statute and the attitude of the courts. Ac-

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12 Compare Dodd, Administration of Workmen's Compensation 3-11 (1936) (little chance of recovery for industrial injuries before passage of compensation acts) with Franklin et al., Accidents, Money and the Law: A Study of the Economics of Personal Injury Litigation, 61 Colum. L. Rev. 1, 13 (1961) (approximately 84% of all personal injury claims in New York City result in some recovery for plaintiff).

13 See Belli, The Adequate Award, 39 Calif. L. Rev. 1 (1951). For a discussion of award trends and a state-by-state tabulation of personal injury verdicts and settlements, see 4 Belli, Modern Trials §§ 51-202 (1959, Supp. 1961). Listings of recent awards may be found in 29 NACCA L.J. 409-38 (1963); 28 id. 498-528 (1962). See also Note, 76 Harv. L. Rev. 355, 356 n.3 (1962).

An important factor in the present level of damage awards is the willingness of juries in serious cases to allocate substantial sums for non-pecuniary loss such as physical pain, mental suffering and disability per se. See, e.g., Dagnello v. Long Island R.R. Co., 289 F.2d 797 (2d Cir. 1961), affirming 193 F. Supp. 552 (S.D.N.Y. 1960) ($97,000); Seffert v. Los Angeles Transit Lines, 56 Cal. 2d 498, 364 P.2d 337 (1961) ($134,000); Wolfe v. General Mills, Inc., 35 Misc. 2d 996, 231 N.Y.S.2d 918 (Sup. Ct. 1962) ($240,300). No benefits are awarded for this element of damage under workmen's compensation. Infra notes 100, 101.

14 Texas & New Orleans R.R. Co. v. Flowers, 336 S.W.2d 907 (Tex. Civ. App. 1960).

15 Orth v. Shiely Petter Crushed Stone Co., 258 Minn. 513, 104 N.W.2d 512 (1960). The employee had previously recovered a $20,000 settlement in a tort action against a third party whose negligence caused the injury. See 253 Minn. 142, 91 N.W.2d 463 (1958). Thus his total monetary recovery amounted to $35,000.

16 On third-party suits generally, see 2 Larson §§ 71-77. See also McCoid, The Third Person in the Compensation Picture: A Study of the Liabilities and Rights of Non-Employers, 37 Tex. L. Rev. 389 (1959).

cordingly, liberal interpretations of third-party provisions have enabled employees to recover against co-employees,[17] contractors and subcontractors,[18] and in two notable instances, the employer's compensation insurance carrier.[19]

[17] E.g., Allman v. Hanley, 302 F.2d 599 (5th Cir. 1962) (Federal Employees' Compensation Act); Ransom v. Haner, 362 P.2d 282 (Alaska 1961); Hockett v. Chapman, 69 N.M. 324, 366 P.2d 850 (1961). In jurisdictions where suits against co-employees are barred by statute, attempts to avoid the prohibition take the form of arguments that plaintiff-employee's injury was not work-connected, so that the compensation act is inapplicable and does not protect defendant-employee. E.g., Ferrell v. Beddow, 203 Va. 472, 125 S.E.2d 196 (1962); Sjostrom v. Sproule, 34 Ill. App. 2d 338, 181 N.E.2d 379 (1962); Bradley v. Frazier, 17 App. Div. 2d 235, 233 N.Y.S.2d 894 (1962). These cases have not been included in the present discussion.

[18] E.g., Butler v. King, 99 N.H. 150, 106 A.2d 385 (1954) (suit by employee of subcontractor against general contractor); Olsen v. Sharpe, 191 Tenn. 503, 235 S.W.2d 11 (1950) (suit by employee of general contractor against subcontractor). Tort actions arising from construction site accidents often turn on the exclusivity provisions of the applicable compensation statute, yet they are generally considered under the category of third party actions. The intricate web of relationships among contractors, subcontractors and their employees is beyond the scope of this article. Analyses of the important issues may be found in 2 Larson § 72.30; McCoid, supra note 16, at 407-25. On construction site actions generally, see Comment, 29 NACCA L.J. 74 (1963). Also excluded from the present discussion are the problems arising from tort actions brought by "borrowed" employees. See 1 Larson § 48.

[19] Fabricius v. Montgomery Elevator Co., No. 44/50905 (Iowa, Apr. 9, 1963); Smith v. American Employers' Ins. Co., 102 N.H. 530, 163 A.2d 564 (1960).

The land mark decision in this interesting area was the *Smith* case. The New Hampshire compensation statute allowed third party actions against "some person other than the employer." N.H. Rev. Stat. Ann. § 281:14 (1955). The court held that under this clause an injured employee might sue the carrier for failing to discover defects in a compressed air tank after the carrier had undertaken to make monthly inspections of the plant. The tank exploded, causing the employee to lose both her legs. As a result of the decision the New Hampshire Workmen's Compensation Act was amended to bestow upon compensation insurance carriers the employer's immunity from tort actions. N.H. Rev. Stat. Ann. § 281:14 (Supp. 1961). The *Smith* case was subsequently settled for $125,000. See Comment, 29 NACCA L.J. 260, 262 (1963).

Smith was distinguished in Mays v. Liberty Mut. Ins. Co., 211 F. Supp. 541 (E.D. Pa. 1962), in which the employer's immunity was extended to the compensation insurance carrier so as to bar a tort action based on the carrier's alleged breach of a duty to inspect the work premises. In Nelson v. Union Wire Rope Corp., 187 N.E.2d 425 (Ill. App. 1963), 18 plaintiffs brought tort actions for personal injuries and wrongful deaths arising from a construction site accident in which the cable of a hoist broke and the platform on which workers were riding plunged to earth from the sixth floor level. Verdicts totaling $1,569,400 were returned against the employer's compensation insurance carrier, which had been charged with a failure to inspect work equipment. On appeal, the judgment was reversed, the court holding that the type of inspection which might have prevented the tragedy was not within the scope of the services gratuitously undertaken by defendant, and that in any event neither plaintiffs nor the employer had placed any reliance upon defendant's performance of these services.

The *Fabricius* case followed *Smith* and criticized *Mays*. In holding the carrier as "person other than the employer" so as to be amenable to a third-party suit, the court observed: "The inspection undertaken by the insurer was not only for the benefit of the employees and employer, but also for its own pecuniary interests." As to the argument that a tort judgment against the carrier would curtail inspections by insurers and discontinue the writing of compensation insurance in Iowa, the court replied: "Plaintiffs answer is, no inspection is better than a negligent one. We are inclined to agree. We rather doubt that all insurers will leave the field."

Common law suits against carriers for aggravation of injuries during medical treat-

Additional tort remedies are provided in many of the compensation acts themselves. A number of statutes permit employees to sue in tort those employers who fail to comply with compensation coverage requirements, and deprive these employers of the common law defenses of contributory fault, assumption of the risk and the fellow-servant rule.[20] Specific provisions in many acts give special remedies to illegally employed minors who suffer work-connected injuries,[21] while some statutes allow employees to collect extra compensation from employers whose wilful misconduct allegedly brought about the injuries. Others give workers the right to recover compensation as well as to sue their employers in tort.[22]

Another method of securing full tort damages in lieu of the limited benefits under workmen's compensation is to outflank the exclusivity provisions of the statute, which generally provide that a covered employee who suffers a personal injury by accident arising out of and in the course of employment and resulting in disability has no other recourse against his employer save the compensation remedy.[23] If the worker can prove that he does not qualify for compensation coverage, it follows that he can fall back upon his common law right of action against the employer. Attempts to avoid workmen's compensation may be divided into two distinct categories. The first grouping contains the intentional tort cases, where the worker is often allowed his common law remedy even when compensation coverage is admitted. Here the main issue is one of justification. The second classification, the action for negligence, presents a more perplexing problem, for in these cases the web of compensation coverage must be unraveled. The difficulty is that it is not always easy to re-spin the threads.

INTENTIONAL TORTS

It has already been pointed out that several compensation acts contain specific provisions covering intentional injuries inflicted by the employer.[24] In the remaining jurisdictions, intentional torts by em-

ment have generally been barred by the compensation statute. Sarber v. Aetna Life Ins. Co., 23 F.2d 434 (9th Cir. 1928); Schulz v. Standard Acc. Ins. Co., 125 F. Supp. 411 (E.D. Wash. 1954); Noe v. Travelers Ins. Co., 172 Cal. App. 2d 731, 342 P.2d 976 (1959); Flood v. Merchants Mut. Ins. Co., 187 A.2d 320 (Md. 1963); Penn v. Standard Acc. Ins. Co., 4 App. Div. 2d 796, 164 N.Y.S.2d 618 (1957); Raines v. Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co., 391 Pa. 175, 137 A.2d 257 (1958); but see Groves v. Donohue, 118 N.W.2d 65 (Iowa 1962); Aetna Life Ins. Co. v. Watts, 148 Okla. 28, 296 Pac. 977 (1931).

20 See 2 Larson § 67.

21 See 1 id. § 47.52(a).

22 See 2 id. §§ 69-70.

23 See Horovitz, op. cit. supra note 4, at 321-23. The exclusivity provisions are not always limited to covered injuries. See Note, 40 Minn. L. Rev. 627 (1956). Their application to plaintiffs other than the employee is not discussed herein. See 2 Larson § 66.

24 See supra note 22. The most notable of these special provisions is the section in the Texas act which allows the survivors of an employee killed as a result of the em-

ployers, even though they arise out of and in the course of employment, have often been excepted from compensation coverage.

In the assault and battery cases, the majority rule is that the employee has an option between taking workmen's compensation and suing in tort.[25] Two distinct yet complementary approaches have been used to justify this exception. The first is unabashedly moralistic, and has evoked some notable judicial prose. "It would be abhorrent to our sense of justice to hold that an employer may assault his employee and then compel the injured workman to accept the meagre allowance provided by the Workmen's Compensation Law."[26] "[A]n employer cannot correct and punish with whips the mistakes of his employees committed in the course of their employment, and protect himself against civil liability for the results of his assaults under the coverage of our Workmen's Compensation Act."[27] The view that compensation is the exclusive remedy for intentional torts by an employer has been characterized as "a perversion of the purpose of the act,"[28] and "a travesty on the use of the English language."[29] Normally the author of an intentional tort is subject to punitive or exemplary damages.[30] If an employer who commits such a tort need pay only workmen's compensation, he has received a substantial windfall and has also escaped a deterrent against similar future behavior.

The second approach is that an intentional tort by an employer is not considered an "accident" within the meaning of the compensation act.[31] The term "by accident" is one of those litigious phrases which have been used in attempts to narrow the coverage of the compensation acts. Nevertheless, most jurisdictions have finally adopted the position that disability or death intentionally inflicted by a co-employee or a third person is compensable if the harm arose out of and in the course of the employment.[32] In intentional tort cases against employers, the

ployer's gross negligence to sue the employer for exemplary damages. See Phillips Oil Co. v. Linn, 194 F.2d 903 (5th Cir. 1952).

[25] Heskett v. Fisher Laundry & Cleaners Co., 217 Ark. 350, 230 S.W.2d 28 (1950); Conway v. Globin, 105 Cal. App. 2d 495, 233 P.2d 612 (1951); Boek v. Wong Hing, 180 Minn. 470, 231 N.W. 233 (1930); DeCoigne v. Ludlum Steel Co., 251 App. Div. 662, 297 N.Y. Supp. 636 (1937). Contra, W. B. Davis & Son v. Ruple, 222 Ala. 52, 130 So. 772 (1930) (dictum); Beck v. Hamann, 263 Wis. 131, 56 N.W.2d 837 (1953) (dictum).

[26] Lavin v. Goldberg Bldg. Material Corp., 274 App. Div. 690, 693-94, 87 N.Y.S.2d 90, 93 (1949), appeal denied, 275 App. Div. 865, 89 N.Y.S.2d 523 (1949).

[27] Richardson v. The Fair, Inc., 124 S.W.2d 885, 886 (Tex. Civ. App. 1939).

[28] Boek v. Wong Hing, 180 Minn. 470, 471, 231 N.W. 233, 234 (1930).

[29] Stewart v. McLellan's Stores Co., 194 S.C. 50, 55, 9 S.E.2d 35, 37 (1940).

[30] See McCormick, Damages § 81 (1935).

[31] DeCoigne v. Ludlum Steel Co., supra note 25; Stewart v. McLellan's Stores Co., supra note 30; LePochat v. Pendleton, 187 Misc. 296, 63 N.Y.S.2d 313 (Sup. Ct. 1946), aff'd, 271 App. Div. 964, 68 N.Y.S.2d 594 (1947); Phelps v. Martin, CCH 1962 Workmen's Comp. L. Rep. ¶ 3522.

[32] Recent cases so holding include: Hall v. Clark, 360 S.W.2d 140 (Ky. 1962); Williams v. United States Cas. Co., 145 So.2d 592 (La. App. 1962); John Hancock Trucking Co. v. Walker, 243 Miss. 487, 138 So.2d 478 (1962); Meo v. Commercial Can

courts have nimbly sidestepped this enlightened position by postulating that the employer in his answer cannot plead that his intentional tort was an "accident." However, if the employee elected to bring a compensation claim for disability resulting from an intentional tort committed by the employer, such harm would be viewed as "accidental," and hence compensable.[33]

Finally, some mention should be made of the case of *Rumbolo v. Erb*,[34] in which a tavern employee was assaulted by his employer. A claim for workmen's compensation was dismissed on the novel ground that compensation procedures were ill-suited to assault cases because the latter often involve claim and counterclaim. Under compensation, the court noted, the employer would be unable to press a counterclaim that the employee assaulted him! Apart from this remarkable bit of ratiocination, the court also held that an assault does not constitute a risk of the employment. This approach, which occasionally pops up in the cases,[35] is incompatible with the generally accepted view that even the most unforeseeable injuries resulting from risks which could never have been reasonably contemplated may still be compensable if the employment in fact exposed the employee to those risks.[36]

The reasonableness of this option can be seen from the nature of the tort of battery, which concerns itself with the protection of both the physical integrity of the body and the wholly dignitary interest that the body be free of offensive contact.[37] If battery cases were completely excluded from compensation coverage,[38] a badly injured worker

Corp., 76 N.J. Super. 484, 184 A.2d 891 (Law Div. 1962); Mullins v. Tanksleary, 376 P.2d 590 (Okla. 1962); Turner v. State Compensation Comm'r, 126 S.E.2d 40 (W. Va. 1962); see generally, Horovitz, Assaults and Horseplay under Workmen's Compensation Laws, 41 Ill. L. Rev. 311 (1946).

[33] See Jones v. Jeffreys, 244 S.W.2d 924 (Tex. Civ. App. 1951); Pawnee Ice Cream Co. v. Cates, 164 Okla. 48, 22 P.2d 347 (1933).

[34] 19 N.J. Misc. 311, 20 A.2d 54 (1941).

[35] See, e.g., Barnes v. Chrysler Corp., 65 F. Supp. 806 (N.D. Ill. 1946); Fowler v. Southern Wire & Iron, Inc., 104 Ga. App. 401, 122 S.E.2d 157 (1961), rev'd, 217 Ga. 727, 124 S.E.2d 738 (1962).

[36] E.g., C. A. Dunham Co. v. Industrial Comm'n, 16 Ill. 2d 102, 156 N.E.2d 560 (1959) (death of airplane passenger in "Graham bombing"); Baran's Case, 336 Mass. 342, 145 N.E.2d 726 (1957) (employee accidentally shot by boys engaged in target practice in nearby house); DeNardis v. Stevens Constr. Co., 38 N.J. 300, 184 A.2d 417 (1962), affirming 72 N.J. Super. 395, 178 A.2d 354 (1962), affirming 66 N.J. Super. 304, 169 A.2d 232 (L. 1961) (irrational assault by co-worker).

[37] 1 Harper & James, Torts § 3.2 (1956).

[38] A supporting argument for this view (which apparently has never been seriously urged) is based on the fact that the common law defenses which the employer gave up as part of the quid pro quo underlying workmen's compensation are applicable only in negligence actions. See Prosser, Torts §§ 51, 55, 68 (2d ed. 1955). Hence, if intentional torts are covered by compensation, the employer gave up nothing in return for the advantage of limited recoveries, while the employee received nothing in return for the surrender of his common law remedy. On the other hand, workmen's compensation insurance has been held to cover cases in which the employer's liability was predicated on misconduct or illegality. Carmack v. Great Am. Indem. Co., 400 Ill. 93, 78 N.E.2d 507 (1948) (illegally employed minor); Stuart v. Spencer Coal Co., 307 Mich. 685, 12

would have no protection from an employer who turned out to be judgment proof. On the other hand, if the compensation act was held to be the exclusive remedy in these cases, the employee would be left without a remedy for non-disabling, intentionally inflicted harm. This suggests that if heed is to be given both to the policy inherent in workmen's compensation legislation that all industrial injuries be compensated, and to the high value that the tort of battery places upon the dignity of the individual, the worker's remedy should depend on the nature of the harm caused by the battery. But since both types of harm are often intertwined in assault and battery cases, and since it would be unduly burdensome to place upon the courts the task of deciding which of the two remedies is appropriate in a given case, the solution of giving the employee an option is a practical solution.

Intentional torts which primarily safeguard intangible interests have been completely excluded from the compensation acts.[39] Harm resulting from these torts can hardly be classified under the term "personal injury by accident," and only in the rarest instance would such harm bring about disability compensable under the acts. Hence it is reasonable to conclude that the compensation acts were never intended to replace these causes of action.

Employer misconduct, which technically may not constitute an assault and battery at common law yet evidences the kind of guilt to which courts have pointed in justification for allowing an employee to sue his employer in tort for battery, has at times formed the basis for attempts to avoid the compensation acts. In *Southern Wire & Iron, Inc. v. Fowler*,[40] a company president, having failed in his attempt to learn from an employee the names of other employees who attended a

N.W.2d 443 (1943) (similar); Janney v. Fullroe, Inc., 47 N.M. 423, 144 P.2d 145 (1943) (failure to provide safety devices); Georgia Cas. Co. v. Alden Mills, 156 Miss. 853, 127 So. 555 (1930). At common law an intentional tortfeasor may not insure himself against liability for his wilful or illegal acts. E.g., Isenhart v. General Cas. Co. of America, — Ore. —, 377 P.2d 26 (1962); see generally, McNeely, Illegality as a Factor in Insurance, 41 Colum. L. Rev. 26 (1941). Therefore, it is arguable that the creation of workmen's compensation as a system of social insurance contemplated the coverage of intentional harm.

[39] See, e.g., Braman v. Walthall, 215 Ark. 582, 225 S.W.2d 342 (1949); Powers v. Middlesboro Hosp., 258 Ky. 20, 79 S.W.2d 391 (1935). Further support for this position cames from dicta in two decisions in Massachusetts. Cohen v. Lion Prods. Co., 177 F. Supp. 486 (D. Mass. 1959), was a suit by decedent-employee's executors against the employer for, *inter alia*, intentionally causing emotional distress. Although dismissing the case on other grounds, Judge Wyzanski stated that the Massachusetts compensation statute did not prevent plaintiffs from suing because deliberate harassment and annoyance did not constitute a "personal injury." Reference was made to Madden's Case, 222 Mass. 487, 111 N.E. 379 (1916), which contains dictum that harm from libel, malicious prosecution, false imprisonment, right of privacy and alienation of affections would not be compensable because it was not a "personal injury by accident" as contemplated by the compensation statute. But see Zygmuntowicz v. American Steel & Wire Co. of N.J., 240 Mass. 421, 134 N.E. 385 (1922).

[40] 217 Ga. 727, 124 S.E.2d 738 (1962), reversing 104 Ga. App. 401, 122 S.E.2d 157 (1961).

union organizational meeting, knowingly forced the recalcitrant employee to work with his hands in an acid vat. The employee was unaware of the dangerous propensities of the acid. The Georgia Supreme Court held, *inter alia*, that on these allegations no assault had been committed, and therefore the worker's exclusive remedy was under the compensation statute. This conclusion seems unduly narrow, and enables an employer to punish employees without the risk of having to pay a tort judgment. A better approach is that taken by the New York court which treated the intentional feeding of a poisoned pie to an employee as a common law assault and battery.[41]

In a slightly different category, tort actions alleging injuries caused by the employer's wilful misconduct have met with little success, either because all such injuries were held to be compensable under the statute,[42] or because there was no proof of a specific intent to harm the employee.[43] Thus, an allegation that an employer had intentionally and unlawfully removed safety guards from machines operated by plaintiffs for the purpose of increasing profits and production was held insufficient to remove plaintiffs' injuries from compensation coverage in the absence of an allegation that the employer had taken off the safety guards with a deliberate intent to harm the plaintiffs.[44]

Under those compensation acts which permit employees to collect compensation and also bring a tort action against the employer if they can prove that their injuries resulted from a deliberate intent to injure or kill on the part of the employer,[45] the courts have also refused to entertain the tort action in the absence of specific proof of the employer's intent to injure the particular plaintiff.[46] An exception has been made when the employer's conscious indifference to the physical safety of his men was so outrageous that an intent to injure could be readily

41 DeCoigne v. Ludlum Steel Co., supra note 25.

42 Pearson v. Rogers Galvanizing Co., 115 Ind. App. 426, 59 N.E.2d 364 (1945); Duncan v. Perry Packing Co., 162 Kan. 79, 174 P.2d 78 (1946); Roberts v. Barklay, 369 P.2d 808 (Okla. 1962); Kennecott Copper Corp. v. Reyes, 75 Nev. 212, 337 P.2d 624 (1959).

43 Breimhorst v. Beckman, 227 Minn. 409, 35 N.W.2d 719 (1949); Wilkinson v. Achber, 101 N.H. 7, 131 A.2d 51 (1957); Cummings v. McCoy, 192 S.C. 469, 7 S.E.2d 222 (1940). But see Castleberry v. Frost-Johnson Lumber Co., 283 S.W. 141 (Tex. 1926) (dictum).

44 Santiago v. Brill Monfort Co., 10 N.Y.2d 718, 176 N.E.2d 835, 219 N.Y.S.2d 266 (1961) (memorandum decision), affirming 11 App. Div. 2d 1041, 205 N.Y.S.2d 919 (1960), reversing 23 Misc. 2d 309, 201 N.Y.S.2d 167 (Sup. Ct. 1960); see also Artonio v. Hirsch, 3 App. Div. 2d 939, 163 N.Y.S.2d 489 (1957) (memorandum decision); cf. Keeley v. I.A.C., 55 Cal. 2d 261, 359 P.2d 34 (1961) (knowingly placing employee in situation of obvious danger and then taking no precaution to protect him held to be serious and wilful misconduct calling for penalty under statute).

45 2 Larson §§ 67-70.

46 Fryman v. Electric Steam Radiator Corp., 277 S.W.2d 25 (Ky. 1955); Jenkins v. Carman Mfg. Co., 79 Ore. 448, 155 Pac. 703 (1916); Biggs v. Donovan-Corkery Logging Co., 185 Wash. 284, 54 P.2d 235 (1936); Delthony v. Standard Furniture Co., 119 Wash. 298, 205 Pac. 379 (1922); Allen v. Raleigh-Wyo. Mining Co., 117 W. Va. 631, 186 S.E. 612 (1936).

inferred. In *Collins v. Dravo Contracting Co.*,[47] plaintiff alleged that the employer wilfully and deliberately allowed decedent to work under an overhanging bank which the employer obviously knew was about to collapse. The bank did in fact give way and decedent was buried alive. The court held that the allegations were sufficient. A similar result has been reached in the case of an employee shot by a spring gun set by his employer.[48]

An employer who knows for a fact that if certain conditions are allowed to exist or if certain changes are put into effect, harm will befall a particular employee or any one of a group of employees, is certainly not far removed, in terms of moral blameworthiness, from the boss who "clobbers" a worker with a baseball bat. A less solicitous attitude by the courts toward such employers should at least act as a deterrent to reckless industrial practices.

Perhaps the most difficult issue in the intentional tort cases is whether and to what extent an employer may be held liable for harm wilfully inflicted on employees by agents of the employing entity. Holding the employer vicariously liable for the intentional torts of his agents under *respondeat superior* has been criticized on the grounds that the indignation underlying the moralistic justification for granting an added remedy to employees in employer assault cases vanishes when it is not the employer himself who commits the intentional tort. Furthermore, "in all assault cases by one co-employee on another, of which there are hundreds, you would have only to show that the assailant was one notch higher on the totem pole than the victim, and the compensation act would go out the window."[49] On the other hand, this position in effect insulates corporate employers from intentional tort actions brought by employees.

It is submitted that the courts in dealing with this problem have taken a more flexible and equitable approach. For example, consider that one such use of *respondeat superior* is to hold a master liable for torts resulting from wrongful means employed by a servant to further the master's business.[50] Consequently, though it may be undesirable to allow suits against the employing entity whenever the assailant's position is merely "one notch higher" in the employment structure than that of the victim even if the assault was intended to promote the

[47] 114 W. Va. 229, 171 S.E. 757 (1933).

[48] Weis v. Allen, 147 Ore. 670, 35 P.2d 478 (1934).

[49] 2 Larson § 68.23. See also Schmidt & German, supra note 3, at 91; Note, 13 Vand. L. Rev. 523, 527 (1960). Suits based on the employer's negligence in hiring or retaining a dangerous co-employee who assaulted plaintiff-employee have been, of course, rejected because of the exclusivity of the compensation remedy. E.g., Durso v. Modern Biscuit Corp., 11 App. Div. 2d 1036, 205 N.Y.S.2d 923 (1960). But see Champlin v. Chemical Corn Exch. Bank, 158 N.Y.S.2d 138 (Sup. Ct. 1956); Wolfson v. Gershunoff, 277 App. Div. 1149, 101 N.Y.S.2d 411 (1950).

[50] Singer Sewing Mach. Co. v. Stockton, 171 Miss. 209, 157 So. 366 (1934).

employer's business, nevertheless, the solution some courts have adopted is not to bar all such suits, but rather to allow the action when there is a substantial identification between the assailant and the employer. Thus, in *Garcia v. Gusmack Restaurant Corp.*,[51] the assailant was the president and operator of a bar and grill. The employee was permitted to sue the corporate entity in tort since there was little actual difference between the assailant and the defendant. So too, an assault by a general manager has been imputed to a corporate employer.[52] However, note the distinction drawn by the South Carolina Supreme Court, which has allowed a tort action against a corporate employer when the assailant was a corporation manager,[53] yet held that the compensation act was exclusive when a mere foreman inflicted the injuries.[54] On the other hand, in several cases there is language indicating that wilful harm inflicted by a supervisory employee such as a foreman may be imputed to the corporation but only if the conduct resulting in the harm had been instigated or authorized by the employer.[55] Again, it would seem that such instigation or authorization might come from a corporate official. The rigidity of the view that intentional tort actions may be entertained only when the employer is an individual can produce results such as the refusal of the court in the *Fowler* case to impute to the corporate employer harm intentionally inflicted by the company president in furtherance of an anti-union policy.[56]

A second example of the use of *respondeat superior* in intentional tort cases is the rule that the torts incident to a custodial job where the use of force is a natural incident will be imputed to the master.[57] Several tort actions by employees against employers illustrate this principle. In *Barnes v. Chrysler Corp.*,[58] employees who were assaulted

[51] 150 N.Y.S.2d 232 (City Ct. 1954).

[52] Heskett v. Fisher Laundry & Cleaners Co., supra note 25. But see Echolds v. Chattooga Mercantile Co., 74 Ga. App. 18, 38 S.E.2d 675 (1946); McLaughlin v. Thompson, Boland & Lee, 72 Ga. App. 564, 34 S.E.2d 562 (1945); Zygmuntowicz v. American Steel & Wire Co., supra note 39.

[53] Stewart v. McLellan's Stores Co., supra note 29.

[54] Thompson v. J.A. Jones Constr. Co., 199 S.C. 304, 19 S.E.2d 226 (1942); cf. DeCoigne v. Ludlum Steel Co., supra note 25 (foreman as "officer"). In Thayer's Case, — Mass. —, 185 N.E.2d 292 (Mass. 1962), a provision in the compensation act allowing an employee to collect double compensation if his injuries resulted from the "serious and wilful misconduct" of a corporate agent "exercising the powers of superintendence" was held applicable to the misdeeds of a foreman. For cases awarding compensation to subordinate employees assaulted by their superiors, see 17 Negl. & Comp. Cas. Ann. (n.s.) 48, 84-91 (1945). Cf. Ransom v. Haner, 362 P.2d 282 (Alaska 1961) (supervisor as co-employee amenable to third party action).

[55] See Whittington v. Moore McCormack Lines, 196 F.2d 295 (2d Cir.), cert. denied, 344 U.S. 865 (1952); McGrew v. Consolidated Freightways, Inc., — Mont. —, 377 P.2d 350 (1963); cf. Richardson v. The Fair, Inc., supra note 27.

[56] Southern Wire & Iron, Inc. v. Fowler, supra note 40. The decision is criticized in Feild, Workmen's Compensation (Annual Survey of Ga. Law), 14 Mercer L. Rev. 244, 259-61 (1962).

[57] Chuck's Bar v. Wallace, 198 Okla. 152, 176 P.2d 484 (1946).

[58] 65 F. Supp. 806 (N.D. Ill. 1946).

and imprisoned by company guards as they were about to present work grievances to defendant's management were allowed to sue the corporation in tort. The court distinguished cases involving assaults by co-employees or foremen on the ground that they arose from normal job frictions. The same result has been reached in a Georgia case in which a supervisory employee accused a saleslady of stealing, and confined her in the basement of the store for five hours.[59] On the other hand, some early cases have held such injuries covered by the compensation statute.[60] The employer, by creating jobs which may involve the intentional use of force, exposes himself to much of the same moral indignation used to justify tort actions when he personally inflicted the intentional harm. Also, since a very limited number of employees are ordinarily charged with duties in which the use of force is inherent, there is little risk of a multiplicity of tort actions undermining the compensation act. Hence, it seems justifiable to allow tort actions in these cases.

A somewhat different type of intentional harm an employer may inflict results from deceit or misrepresentation. In *Flamm v. Bethlehem Steel Co.*,[61] plaintiff's allegation that he was deprived of compensation benefits through the conspiratorial submission of a false medical report by his employer and a doctor was held to state a good cause of action. The court reasoned that the exclusivity provisions of the applicable compensation statute (the federal Longshoremen's and Harbor Workers' Compensation Act) did not apply to a fraud perpetrated two years after the work-connected injury.[62] Plaintiff's measure of damages was the value of what he lost, *i.e.*, his compensation benefits.

Vicarious liability plays a role here also, for the Seventh Circuit has gone so far as to allow a tort action against an employer who did not participate in the deceit.[63] In that case the fraudulent misrepresentation of a company doctor who knew plaintiff's hip had been broken but gave him a clean bill of health was imputed to the employer under *respondeat superior*.

A common feature in these cases is that at the time of the suit, plaintiff was barred from seeking workmen's compensation because of the statute of limitations. Therefore, to maintain the suit the employee

[59] Smith v. Rich's Inc., 104 Ga. App. 883, 123 S.E.2d 316 (1961).

[60] Distephano v. Standard Shipbuilding Corp., 203 App. Div. 145, 196 N.Y. Supp. 452 (1922) (special police officer); Atolia Mining Co. v. I.A.C., 175 Cal. 691, 167 Pac. 148 (1917) (guard).

[61] 18 Misc. 2d. 154, 185 N.Y.S.2d 136 (Sup. Ct. 1959), aff'd, 10 App. Div. 2d 881, 202 N.Y.S.2d 222 (1960) (memorandum decision).

[62] See also Clark v. Ames, 144 Kan. 115, 58 P.2d 81 (1936) (dictum). Contra, Greenwalt v. Goodyear Tire & Rubber Co., 164 Ohio St. 1, 128 N.E.2d 116 (1955), noted, 40 Minn. L. Rev. 627 (1956).

[63] Woodburn v. Standard Forgings Corp., 112 F.2d 271 (7th Cir. 1940); cf. Ivanhoe v. Buda Co., 247 Ill. App. 336 (1928), 251 Ill. App. 192 (1929).

must show that within the statutory period, the employer's deceit kept him from obtaining compensation benefits.[64] The justification for permitting these suits is that otherwise the worker would have no remedy for his employment-connected injury.

Actually, a tidier solution would be to allow the worker to file for compensation, and hold that the employer was estopped from pleading the tardiness of the claim. In this way, the employee would lose nothing since his tort damages would be no more than his compensation benefits. Further he would retain certain of the advantages of workmen's compensation such as the possibility of reopening the claim in the event his condition should thereafter change for the worse.

If, however, the employer's deceit or intentional misrepresentation actually results in the infliction of a physical injury upon the employee or causes the employee to suffer the aggravation of an existing injury, the reasoning used to justify tort actions against employers in assault and battery cases would appear to be applicable. However compelling this argument may be, the statute may still present an obstacle. Thus, in *Buttner v. American Bell Tel. Co.*,[65] a California court dismissed an employee's deceit action against the employer for the latter's intentional misstatement of the nature of carbon tetrachloride, which misrepresentation caused the employee to be injured, since the California Labor Code specifically provided for increased compensation for injuries arising from an employer's wilful misconduct. While the basis of the decision may appear somewhat acceptable, it is arguable that a deceit action for full compensatory damages should lie when an employer intentionally fails to inform an employee of a hidden injury or disease and further harm results. Nevertheless, a decision from the Ninth Circuit barred a tort action (against the employer's compensation insurance carrier) on these facts.[66] The court held that the aggravation was covered under the compensation act.

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[64] Consider the case of Ragsdale v. Watson, 201 F. Supp. 495 (W.D. Ark. 1962), where the court dismissed a tort action by an injured employee against the employer's compensation insurance carrier, its agents and the treating physicians for conspiring to defraud plaintiff by intentionally submitting false and misleading medical reports at a compensation proceeding in which plaintiff was denied recovery. Plaintiff, though he knew of the fraud, had failed to bring it up during the compensation proceeding nor appeal the commission's finding to the circuit court. Cf. Dunn v. Travelers Ins. Co., 362 S.W.2d 412 (Tex. Civ. App. 1962).

[65] 41 Cal. App. 581, 107 P.2d 439 (1940).

[66] Sarber v. Aetna Life Ins. Co., 23 F.2d 434 (9th Cir. 1928). See also Bevis v. Armco Steel Corp., 86 Ohio App. 525, 93 N.E.2d 33 (1949), appeal dismissed per curiam, 153 Ohio St. 366, 91 N.E.2d 479, cert. denied, 340 U.S. 810 (1950), in which the worker alleged that his employer intentionally misrepresented the results of a medical examination which indicated that the worker had contracted silicosis. A tort action based on the aggravation of the silicosis was dismissed. See Note, 40 Minn. L. Rev. 627 (1956).

NEGLIGENCE ACTIONS

Thus far we have considered harm intentionally inflicted by an employer. However, assume the injured worker can point to mere negligent conduct on the part of the employer as the cause of his woe. Here it would seem that the employee should be barred from recovery at common law, for the workmen's compensation acts were designed to cover all work injuries. Thus, the employer, his agents or a third party may be at fault, the employee may bring on the harm through his own carelessness, or the injury may derive from the pure workings of fate without any human intervention. So long as the harm falls within the statutory terms, the compensation act will furnish an exclusive remedy.

The rub lies in the interpretation of the statutory terms. It is universally conceded that workmen's compensation does not purport to be general accident and health insurance.[67] Yet one of its greatest weaknesses as a piece of social legislation, limited to industrial disability, has been its failure to delineate the area of coverage with clear and unequivocally definitive language. Countless battles have been fought around the fringes of the phrase "personal injury by accident arising out of and in the course of employment, and resulting in disability." Employers and insurers alike have labored mightily for strict construction, while employees have sought a broad interpretation.[68] As a result, employees in many instances have found it profitable to take advantage of narrow interpretations successfully urged by employers, and to revert to their common law remedies.

A frequent example of this occurs in the contraction of disease cases where the worker sues in tort. Both judicial decisions and restrictive statutory language have at times placed diseases (both infectious and occupational) beyond the ambit of the term "personal injury by accident."[69] In these jurisdictions employees stricken with such diseases have been permitted to recover in tort from their employers, if the latter could be proved negligent.[70] The problem here is basically legislative in nature, and can best be solved by including all work-connected diseases within the meaning of accidental injury.

Damage to artificial parts of the body has also been excluded from

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[67] For a discussion of the reasons for maintaining a separate system for compensating industrial injuries, see Cheit, op. cit. supra note 4, at 144-46.

[68] See generally, Brodie, op. cit. supra note 2.

[69] See I Larson §§ 40-41.

[70] Compare Joyce v. Luse-Stevenson Co., 346 Mo. 58, 139 S.W.2d 918 (1940) (lobar pneumonia not an accident; compensation claim denied) with McDaniel v. Kerr, 364 Mo. 1, 258 S.W.2d 629 (1953) (lung abscess not an accident; tort action against employer permitted). See also Smith v. Garside, 76 Nev. 377, 355 P.2d 849 (1960); Muir v. Neisner Bros., 6 D. & C.2d 581 (Pa. C.P. 1955); Annot., 100 A.L.R. 519 (1936), supplemented, 121 A.L.R. 1143 (1939).

coverage under the term "personal injury."[71] Apart from the merits of this "island of immunity,"[72] it would seem clear that if, for example, a prosthesis is damaged but no injury to the body is suffered, the employee ought to be permitted to sue the employer in tort for property damage.[73] Similarly, an employee in New York should be able to bring a tort action against his employer for emotional harm precipitated by negligently inflicted emotional stress. The decisional law of that state has reached the anomalous point of allowing a negligence action but denying a compensation claim for this particular type of harm.[74]

One of the difficulties stemming from the phrase "arising out of" is the extent to which the consequences of an industrial injury should be compensable. The general rule which has emerged is that the aggravation of a work injury or the causation of a new and distinct injury is compensable if it is the direct and natural result of the original injury.[75] Thus, an employee who was forced to walk with a crutch because of a work-connected injury and who subsequently broke his left hip in a fall when the crutch slipped was allowed to recover compensation for the new injury.[76] This principle was used to bar a tort action by an employee against his employer when the former was injured at work and then was further injured when the ambulance which the employer furnished to take the employee to the hospital was involved in a traffic accident.[77] The second injury was held compensable.

If the industrial injury is aggravated because of negligent treatment by the employer's (or carrier's) doctor or nurse, again the rule is that the worsened condition is a compensable consequence of the original injury, so that a tort action against the employer will be barred.[78] One noteworthy exception is the California case in which a nurse who

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71 See 1 Larson § 42.12. But see Agostinho v. Kaiser Aluminum & Chem. Corp., 177 A.2d 630 (R.I. 1962).

72 See Comment, 29 NACCA L.J. 256 (1963).

73 Cf. Frontier Theatres, Inc. v. Brown, 362 S.W.2d 360 (Tex. Civ. App. 1962) (dictum).

74 Compare Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961) with Chernin v. Progress Serv. Co., 9 N.Y.2d 880, 175 N.E.2d 827, 216 N.Y.S.2d 697 (1961).

75 1 Larson § 13.11.

76 Chiodo v. Newhall Co., 254 N.Y. 534, 173 N.E. 854 (1930).

77 Governair Corp. v. District Court of Okla. County, 293 P.2d 918 (Okla. 1956).

78 Lindsay v. George Washington Univ., 279 F.2d 819 (D.C. Cir. 1960); Rickman v. E. I. Du Pont de Nemours & Co., 157 F.2d 837 (10th Cir. 1946) (worker choked and beaten by nurse in employer's hospital; tort action barred, but court took no position whether worsened condition compensable); Mohr v. United States, 184 F. Supp. 80 (N.D. Cal. 1960); Berry v. United States, 157 F. Supp. 317 (D. Ore. 1957); Nall v. Alabama Util. Co., 224 Ala. 33, 138 So. 411 (1931); Deauville v. Hall, 188 Cal. App. 2d 585, 10 Cal. Rptr. 511 (1961); Parchefsky v. Kroll Bros., 267 N.Y. 410, 196 N.E. 308 (1935); Young v. International Paper Co., 282 App. Div. 750, 122 N.Y.S.2d 39 (1953). Contra, Vesel v. Jardine Mining Co., 110 Mont. 82, 100 P.2d 75 (1940); Hull v. Hercules Powder Co., 20 N.J. Misc. 168, 26 A.2d 164 (1942); Robison v. State, 263 App. Div. 240, 32 N.Y.S.2d 388 (1942).

was injured on the job was negligently treated by her chiropractor-employer. The court held that when the employer decided to treat the industrial injury, the employment relationship terminated, and the nurse was allowed to maintain the tort action.[79]

When the negligent aggravation worsens an injury or condition unrelated to the employment, problems have arisen from attempts by workers to recover in tort. The decisions are not altogether clear as to whether such harm is within or without compensation coverage. Two leading cases have held that the employee's exclusive remedy is under workmen's compensation. In *Dudley v. Victor Lynn Lines, Inc.*,[80] a truck driver complained of a cold when he reported to work. Later that morning, after driving from New Jersey to Manhattan, he became very ill. His helper called one of the home terminal managers, who said he would send help. The driver's wife, notified by the helper, also called the manager, who assured her he would take care of everything. In fact, nothing was done, and shortly afterward the driver died. After a determination that the cause of death was a non-work-connected heart attack, the widow brought a tort action against the employer. The Supreme Court of New Jersey held that the employer's failure to furnish medical aid after promising to do so constituted negligence at common law, and that this negligence caused the employee's death. However, the court went on to postulate that the negligent conduct on the part of the employer arose out of the employment, so that the widow's exclusive remedy was under workmen's compensation. *Bauer v. Mesta Mach. Co.*[81] involved an employee who while on the job suffered a heart attack which did not arise out of his employment. A male nurse employed by defendant permitted him to remain in the company dispensary for two hours without calling a doctor, even though he complained of increasing chest pain, vomited freely and exhibited other signs of some serious ailment. Shortly thereafter, the employee died from a coronary occlusion. The Supreme Court of Pennsylvania sustained a demurrer to an action in trespass against the employer, and held that the negligence of the employer in not providing proper medical care constituted an "industrial accident." In both cases, claimants were required to show negligence on the part of the employer before they could recover under workmen's compensation.[82] On the other hand, in *Volk v. City of New York*,[83] a nurse who became sick because of something she ate while on duty and was injected with a decomposed

[79] Duprey v. Shane, 238 P.2d 1071 (Cal. Dist. Ct. App. 1952), aff'd on rehearing, 241 P.2d 78 (Cal. Dist. Ct. App. 1952), aff'd, 39 Cal. 2d 781, 249 P.2d 8 (1952).

[80] 32 N.J. 479, 161 A.2d 479 (1960), reversing, 48 N.J. Super. 457, 138 A.2d 53 (1958).

[81] 393 Pa. 380, 143 A.2d 12 (1958), 405 Pa. 617, 176 A.2d 684 (1962).

[82] See Comment, 15 Rutgers L. Rev. 366, 369 (1961).

[83] 284 N.Y. 279, 30 N.E.2d 596 (1940).

morphine solution at the nurses' infirmary, was permitted to sue her employer in tort. The court held that since her work did not increase the risk of the particular injury she suffered, the compensation act was inapplicable. A similar result has been reached in a suit under the Federal Tort Claims Act by a civilian government secretary who was improperly admitted to a government hospital for treatment of varicose veins and was injured by medical malpractice.[84]

A closely related line of cases are those in which the employer maintains a clinic, discovers by X-ray the existence of some non-industrial disease in an employee, and then negligently fails to disclose to the employee the existence of the disease. Tort actions are usually brought against the employer for the negligent aggravation of the employee's ailment. In some of these decisions no mention was made of the compensation act, presumably because it was not argued as covering the injury, and the employer was held for the breach of a common law duty to warn plaintiff of his condition.[85] In *Tourville v. United Aircraft Corp.*,[86] the Connecticut Workmen's Compensation Act was held to be the exclusive remedy for the aggravation of a non-occupational disease due to the employer's failure to warn the employee of tubercular symptoms disclosed by X-rays taken at the plant hospital. A New York trial court, when faced with a similar fact situation, permitted a tort action against an employer,[87] and an action for negligent failure to disclose tubercular symptoms was held maintainable under the Federal Tort Claims Act after plaintiff's claim for compensation was denied under the Federal Employees' Compensation Act.[88]

This temptation to bring tort actions when a non-work injury has been negligently aggravated is considerable, although there is the danger that if these cases are taken out of the compensation acts, then by the same token compensation must be denied to workers whose condition is aggravated without fault. There is risk, for example, that further harm from an industrial injury may occur despite careful treatment. The awarding of workmen's compensation in all these cases, however, may be justified by the proposition that the worsening of a degenerative condition because of a work-connected event or series of events is compensable, even though the original condition in no way relates to the employment.[89] Under this approach, it should make no difference whether a non-work-connected heart attack was aggravated by a trip

[84] Canon v. United States, 111 F. Supp. 162 (N.D. Cal. 1953).

[85] E.g., E. I. Du Pont de Nemours & Co. v. Brown, 102 F.2d 786 (3d Cir. 1939); Riste v. General Elec. Co., 47 Wash. 2d 680, 289 P.2d 338 (1955). See also Annot., 69 A.L.R.2d 1213 (1960).

[86] 262 F.2d 570 (2d Cir. 1959).

[87] Wojcik v. Aluminum Co. of America, 18 Misc. 2d 740, 183 N.Y.S.2d 351 (Sup. Ct. 1959.)

[88] Reid v. United States, 224 F.2d 102 (5th Cir. 1955).

[89] See Horovitz, supra note 2, at 10-12.

and fall as the employee made his way to the company first-aid station; by negligent treatment given by a company nurse; or by the failure of a supervisory employee to call a doctor after he had promised to do so. In the latter two instances it should not be necessary to make a finding of common law negligence prerequisite to a holding that the aggravation arose out of the employment. For example, in the *Dudley* case, the court first postulated that the employer had a common law duty to aid an employee stricken on the job, and then held that the breach of this duty satisfied the "arising-out-of" requirement of the compensation statute. It is suggested that in relating the employment to the aggravation, the claimant be obliged to show merely that the work-connected condition or conditions substantially contributed to the ultimate disability. The court in *Dudley* posed a hypothetical case of a coal miner who suffered a non-industrial heart attack while deep in a mine shaft, and died because of the inaccessibility of medical aid.[90] Under the proposed approach the miner's death would be compensable. Likewise, the failure of an employer to bring aid after promising to do so in a state which recognizes no common law duty on the part of employers to offer help to stricken employees might result in a compensable injury. Claimant need prove only that the employer's failure to provide the promised aid was causally related to the harm for which he seeks workmen's compensation. The same line of reasoning may also be used to justify an award of compensation in the X-ray cases. Also, in the cases dealing with aggravation by treatment administered by company nurses or doctors, claimants should be required to establish merely that the treatment substantially contributed to their worsened condition, and should be relieved of the burden of proving common law malpractice. The maintenance of a first-aid station, the furnishing of chest X-rays, and even the volunteering of medical help all fall under the general heading of gratuities supplied by the employer and ultimately redounding to the benefit of the employer by virtue of more efficient plant operation and personnel relations. This suggested approach affords a rational basis for the disposition of these cases, and in addition avoids an injection of tort principles into workmen's compensation.

Another problem in the "arising-out-of" area is illustrated by *Dolan v. Linton's Lunch*,[91] in which an employee was attacked by a fellow worker. Dolan sued his employer in tort for failing to provide a safe place to work, and because the compensation statute specifically exempted from coverage injuries caused by assaults perpetrated by co-employees and motivated by personal reasons, the suit was permitted. The view that privately motivated assaults per se should be

[90] Dudley v. Victor Lynn Lines, Inc., 32 N.J. at 487, 161 A.2d at 486 (1960).
[91] 397 Pa. 114, 152 A.2d 887 (1959).

excluded from compensation coverage fails to take into account the fact that the employment might still substantially contribute to the injuries in these cases.[92] Also, there is something anomalous in barring these cases from workmen's compensation and then allowing a tort action based on the failure to provide a safe place to work. A more logical approach was followed in a recent Nevada case involving a cocktail waitress in a Las Vegas casino who was shot while at work. She brought a tort action against her employer, who claimed that the injury was covered under workmen's compensation. The court, in reversing a summary judgment for the employer, held that it was a question of fact whether the waitress was injured because of who she was or where she was.[93] If the latter were found to be true, the compensation act would apply.

The "course-of-employment" test presents another area of judicial interpretation which is often the subject of dispute. To determine the inclusiveness of a compensable event, a tripartite test is applied. The injury must arise (1) within the time limits of the job, (2) within the space limits of the job, and (3) during an activity whose purpose is connected with the employment.[94]

With respect to the first requirement, workers whose employment terminated under less than agreeable circumstances, *e.g.*, a fight with the foreman, have on occasion attempted to sue the employer in tort for injuries sustained during the scuffle. However, the rule that a discharged employee has a *reasonable time* to leave the premises before he is considered not in the course of his employment has been used to hold the compensation act exclusive.[95] A similar *reasonable time* test is applied in cases of injuries occurring after an employee arrives on the business premises but before he actually commences work. One such case involved a woman employee who, after donning her work clothes in a company lounge, fell and injured herself while walking downstairs to punch in on the time clock. In a tort action for damages, the court in applying the test found for the employer.[96]

Cases involving the space limits of a job turn on the court's view of how far from the employment premises a worker may go before he loses the protection of the compensation act.[97] On the other hand, in

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[92] See 1 Larson § 11.23; cf. Williams v. United States Cas. Co., 145 So. 2d 592 (La. App. 1962).

[93] McColl v. Scherer, 73 Nev. 226, 315 P.2d 807 (1957).

[94] 1 Larson § 14.

[95] Peterson v. Moran, 111 Cal. App. 2d 766, 245 P.2d 540 (1952); Gardner v. Stout, 342 Mo. 1206, 119 S.W.2d 790 (1938); McCune v. Rhodes-Rhyne Mfg. Co., 217 N.C. 351, 8 S.E.2d 219 (1940); cf. Perry v. Beverage, 121 Wash. 652, 209 Pac. 1102 (1922).

[96] Gordon v. Arden Farms Co., 53 Wash. 2d 41, 330 P.2d 561 (1958).

[97] Compare Lawson v. Village of Hazelwood, 356 S.W.2d 539 (Mo. App. 1962) (sidewalk leading to parking lot) and Wilburn v. Boeing Airplane Co., 188 Kan. 722, 366 P.2d 246 (1961) (street adjacent to plant) with Vardzel v. Dravo Corp., 402 Pa.

respect to the third requirement, if an activity benefits the employer directly or indirectly, it is considered to be in the course of the employment despite the fact that it is unrelated to the particular task an employee was hired to perform.[98] Thus, whether or not tort actions are allowed will depend upon a finding of employer benefit or lack thereof.[99]

A further requirement of compensation acts is that monetary benefits under workmen's compensation be calculated on the basis of economic incapacity (either actual or presumed).[100] It is well settled that an industrial injury which does not economically disable a worker, yet inflicts upon him harm such as pain, impotency or disfigurement, may not form the basis of a tort suit against the employer.[101] A similar result has been reached in tort actions where the worker seeks recovery for a degree of disability which is not statutorily compensable.[102] Since workmen's compensation was intended to be the exclusive remedy for all work-connected injuries, these decisions cannot be faulted, and any resulting inequities are curable only through legislative change.

Various exemptions relating to employment status have been written into the compensation acts.[103] When plaintiff does not qualify as defendant's employee under the statute, the exclusivity provisions of the act will not bar the suit.[104] A notable aspect of this fringe area is the effort made in some cases to nullify the employment relationship on grounds of illegality. Perhaps the most extreme example is the unsuccessful attempt of a taxi driver who, in suing the employer in tort, argued his employment came to an end because of illegality when he drove his cab faster than the speed limit.[105] The courts have on the whole been unreceptive to these contentions, which could also be used

19, 165 A.2d 622 (1960) (parking lot) and Wicks v. Cuneo-Henneberry Co., 319 Ill. 344, 150 N.E. 276 (1925) (public sidewalk outside plant).

98 1 Larson § 20.10.

99 Compare Brooks v. Dee Realty Co., 72 N.J. Super. 499, 178 A.2d 644 (1962), and Daniels v. Krey Packing Co., 346 S.W.2d 78 (Mo. 1961) with Lyday v. Holloway, 293 P.2d 348 (Okla. 1956).

100 See generally, 2 Larson §§ 57.00-58.32.

101 E.g., Shaw v. Salt River Valley Water Users Ass'n, 69 Ariz. 309, 213 P.2d 378 (1950); Breimhorst v. Beckman, 227 Minn. 409, 35 N.W.2d 719 (1949); Hyett v. Northwestern Hosp., 147 Minn. 413, 180 N.W. 552 (1920). A number of compensation statutes expressly provide for cash benefits for disfigurement. See 2 Larson § 65.30.

102 See 2 Larson § 65.40.

103 See 1 id. §§ 49-56.

104 E.g., Edwards v. Hollywood Canteen, 160 P.2d 94 (Cal. Dist. Ct. App. 1945), aff'd, 27 Cal. 2d 802, 167 P.2d 729 (1946) (patriotic volunteer); Scott v. Many Motor Co., 140 So. 2d 778 (La. App. 1962) (casual employee; case dismissed on other grounds); MacMullen v. South Carolina Elec. & Gas Co., 312 F.2d 662 (4th Cir. 1963); Statham v. Blaine, 234 Miss. 649, 107 So. 2d 93 (1958) (magazine sellers). But see Dobbins v. S.A.F. Farms, Inc., 137 So. 2d 838 (Fla. App. 1962); Carraway Methodist Hosp. v. Pitts, 256 Ala. 665, 57 So. 2d 96 (1952).

105 Plick v. Toye Bros. Auto & Taxicab Co., 13 La. App. 525, 127 So. 59 (1930).

against an employee whose injury was not caused by the employer's negligence.[106]

Where adverse judicial precedents bar recovery under workmen's compensation, the injured worker has little recourse other than to attempt a recovery from his employer in tort. For example, the Pennsylvania compensation statute has been interpreted as excluding company parking lot injuries from coverage on the ground that such harm does not arise in the course of employment.[107] Hence an employee whose injuries were sustained in the company parking lot has been permitted to bring a negligence action against his employer.[108]

However, if the case is one of first impression, by bringing a tort action rather than a compensation claim, a worker risks making bad compensation law. As an illustration, consider the Kansas case of the pistol range instructor who suffered loss of hearing from his constant exposure to loud noises. The progressive view is that gradual injury from such exposures constitutes a "personal injury by accident."[109] But since the Kansas court had never passed on this question, the employee chose to sue his employer in tort, arguing, from what would normally be the employer's point of view, that gradual injuries were not covered by workmen's compensation. The court applied the liberal rule of construction to the phrase "personal injury by accident," and held that the worker's exclusive remedy was under the compensation act.[110] Despite such results, claimants' counsel should not be criticized in these cases, for their function is not to make good compensation law, but to secure the best possible recovery for their clients. What then can be said for the desirability of a double standard? Under the settled rule of construction that compensation acts should be broadly and liberally interpreted in favor of the injured worker, may a court point to the humanitarian purposes of the statute to justify a finding that a particular injury was *not* work-connected, and that the worker might bring a tort action against his employer?

In *Scott v. Pacific Coast Borax Co.*[111] plaintiff was working on the 6:00 a.m. to 2:30 p.m. shift at a hotel and coffee shop. He stayed on the premises after work to perform tasks unrelated to his employment. At 5:00 p.m. a co-employee on the afternoon shift asked plaintiff to help

[106] See 1 Larson § 47.53.

[107] Eberle v. Union Dental Co., 390 Pa. 112, 134 A.2d 559 (1957); Young v. Hamilton Watch Co., 158 Pa. Super. 448, 45 A.2d 261 (1946).

[108] Vardzel v. Dravo Corp., 402 Pa. 19, 165 A.2d 622 (1960).

[109] See 1 Larson § 39.10; see also Shipman v. Employers Mut. Liab. Ins. Co., 105 Ga. App. 487, 125 S.E.2d 72 (1962).

[110] Winkelman v. Boeing Airplane Co., 166 Kan. 503, 203 P.2d 171 (1949). For other examples of good compensation law made in negligence actions brought by employees, see Carraway Methodist Hosp. v. Pitts, supra note 104; Dobbins v. S.A.F. Farms, Inc., supra note 104; King v. Monsanto Chem. Co., 256 F.2d 812 (8th Cir. 1958).

[111] 140 Cal. App. 2d 173, 294 P.2d 1039 (1956).

him repair a gasoline pump. While rendering assistance, the pump exploded and plaintiff was injured. His tort action against the employer was dismissed, the court holding that the compensation act was plaintiff's exclusive remedy. In support of its construction of the compensation statute, the court, echoing the sentiments expressed in similar decisions,[112] stated:

> Though it may be more opportunistic for a particular plaintiff to seek to circumscribe the purview of compensation coverage because of his immediate interest and advantage, the courts must be vigilant to preserve the spirit of the act and to prevent a distortion of its purposes.
>
> . . . .
>
> [T]he rules we lay down in this particular case must be salutary and consonant with the spirit and purpose of the Compensation Act, since they will govern other cases where the Act will provide the worker disabled by industrial injury with his sole remedy.[113]

On the other hand, in *Summer v. Victor Chem. Works*,[114] an employee suffered an industrial injury from exposure to phosphorous fumes. His employer had elected not to be covered by the Montana Occupational Disease Act. Bringing an action in tort, the employee urged that his injury was compensable only under the Occupational Disease Act, and since the employer had rejected coverage, a common law action could be maintained. The employer argued that plaintiff's remedy was under the Montana Workmen's Compensation Act, which should be construed broadly to cover disability from occupational diseases not compensable under the Occupational Disease Act. The court rejected the employer's plea for a "broad" interpretation of the acts, and held that the employee might sue the employer in tort. It is possible to rationalize this attitude as encouraging employers to elect coverage under the Occupational Disease Act. Raising the same issue, *Desousa v. Panama Canal Co.*[115] involved an employee who had to ride to work on a train operated by his employer. Injured in a derailment, he sued his employer in tort, claiming that he had purchased ordinary, second-class tickets. The employer contended that he was riding on a special commuter pass, and that since transportation to the job was furnished by the employer, the trip was thereby in the course of the employment. Hence the employer argued that as a matter of law, under a

[112] See Carraway Methodist Hosp. v. Pitts, supra note 104; Freire v. Matson Nav. Co., 19 Cal. 2d 8, 118 P.2d 809 (1941); Wilburn v. Boeing Airplane Co., supra note 97; Winkelman v. Boeing Airplane Co., supra note 110.

[113] Supra note 111, at 178, 184, 294 P.2d at 1043, 1046.

[114] 298 F.2d 66 (9th Cir. 1961).

[115] 202 F. Supp. 22 (S.D.N.Y. 1962).

broad construction of the statute, the Federal Employees' Compensation Act was plaintiff's exclusive remedy. The court observed that it would be "patently unjust" to apply broad rules of compensation coverage in the case, and in denying the employer's motion for a summary judgment, held that there was an issue of fact as to whether plaintiff had been in the course of his employment when he was injured. Finally, some sort of a double standard seems to have evolved in the Kansas decisions which have allowed illegally employed minors both to sue the employer for negligence and to recover workmen's compensation.[116] But here the courts may have been expressing a strong policy of protecting minors in industry.

Clearly untenable is the notion that there be two sets of interpretations for the substantive provisions of the compensation statutes, the one applicable when the worker seeks compensation benefits and the other designed for use when the worker sues his employer in tort. Because of the firm underlying policy that workmen's compensation provides recovery for all industrial injuries, the concern of the courts to formulate broad rules of coverage without regard to the interests of an individual worker who might be better off suing his employer in tort is well taken.

Yet in some instances, a court need not close its eyes completely to the merits of allowing the employee to sue at common law. Policy grounds, which might explain *Summer*[117] and the Kansas cases on illegally employed minors,[118] present one justification for leaning toward the non-applicability of compensation coverage. When prior, in-point decisions deny compensation coverage for the type of injury forming the basis of plaintiff's claim, a court would be justified in following the restrictive statutory construction and permitting the common law suit. The way would still be open to the court, in a subsequent claim by an employee for workmen's compensation, to re-examine its interpretation of the act, and perhaps adopt a more liberal view. Finally, when a close question of fact presents itself and there is very little chance that the numerous factors involved would ever recur in another industrial-injury case, a court could reasonably take into account the discrepancies between tort and workmen's compensation recoveries, and permit the common law action or submit the issue of compensation coverage to a jury.

It should not, of course, be assumed that once the employee avoids the compensation act, a tort recovery is assured. The decision whether to sue in tort or file a compensation claim is fraught with potential peril.

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[116] Lee v. Kansas City P.S. Co., 137 Kan. 759, 22 P.2d 942 (1933); Dressler v. Dressler, 167 Kan. 749, 208 P.2d 271 (1949). The cases are discussed in 1 Larson § 47.52(b).

[117] Supra note 114.

[118] Supra note 116.

Consider the Nebraska case in which a thirty-three year old employee, diving into shallow water at a recreational lake maintained by his employer for the optional use of employees, sustained a fracture of the sixth cervical vertebra rendering him a quadriplegic. If the injured worker brought a compensation claim, his maximum recovery for permanent, total disability would have been $37 a week for the first 300 weeks, $27.50 a week thereafter for the rest of his life,[119] and full medical benefits.[120] However, there is considerable controversy as to whether, and to what extent, recreational injuries are covered by workmen's compensation.[121] Thus a compensation claim would have been stoutly resisted, and the issue in all probability would have been taken to the Nebraska Supreme Court. Consequently, the worker and his counsel elected to sue in tort, alleging that the employer was negligent in not furnishing a safe place to dive and in failing to provide adequate warning as to the depth of the water. A jury returned a $379,500 verdict, but on appeal the judgment was reversed.[122] Not only was the court unable to find negligence, but it concluded that plaintiff had assumed the risk. The opinion made no mention of compensation coverage, so unless the trial court made a final determination that the compensation act was inapplicable, a claim for workmen's compensation presumably might be brought. But if the issue of compensation coverage had been raised on appeal, and it had been decided that plaintiff had a cause of action in tort rather than a compensable injury, plaintiff would have found himself in the irreconcilable position of having no remedy for his devastating injuries.[123]

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[119] U.S. Bureau of Labor Standards, Dep't of Labor, Bull. No. 161, State Workmen's Compensation Laws 42 (May 1960).

[120] Id. at 24.

[121] See 1 Larson § 22.

[122] Lindelow v. Peter Kiewit Sons, 174 Neb. 1, 115 N.W.2d 776 (1962).

[123] The employee who brings a tort action against his employer must face up to the perils of election. His remedy against the employer is alternative, rather than cumulative. Thus, if he accepts compensation benefits, he cannot then bring a tort claim based on the same injury. Carter v. Superior Court, 142 Cal. App. 2d 350, 298 P.2d 598 (1956); Jones v. Jeffreys, 244 S.W.2d 924 (Tex. Civ. App. 1951). If the employee brings a compensation claim and a final decision is made that his harm was not work-connected, this finding will be res judicata in a subsequent tort action, so that the employer will be precluded from arguing that the compensation act is exclusive. Palm Beach Co. v. Crum, 262 F.2d 586 (6th Cir. 1958); Hines v. Continental Baking Co., 334 S.W.2d 140 (Mo. App. 1960); Miller v. St. Regis Paper Co., 59 Wash. 2d 914, 374 P.2d 675 (1962), reversing the departmental opinion, 159 Wash. Dec. 89, 366 P.2d 214 (1961). But see Demkiw v. Briggs Mfg. Co., 347 Mich. 492, 79 N.W.2d 876 (1956); Totten v. Detroit Aluminum & Brass Corp., 344 Mich. 414, 73 N.W.2d 882 (1955). Likewise, a judicial determination that the exclusivity provisions of the compensation statute required the dismissal of a tort action brought by a worker against his employer is binding upon the compensation tribunal in any subsequent proceedings. Garrigus v. Kerns, 130 Ind. App. 133, 178 N.E.2d 212 (1961). See also Scott v. I.A.C., 46 Cal. 2d 76, 293 P.2d 18 (1956), vacating 283 P.2d 323 (Cal. Dist. Ct. App. 1955). The subject is treated exhaustively in 84 A.L.R.2d 1036 (1962).

Conclusion

As long as benefit levels remain inadequate and gaps in coverage exist, workers will continue in their efforts to sue employers in tort whenever possible. Improvements in the compensation statutes can serve to diminish these suits, and thus reduce not only the possibility of an injured worker being left without a remedy because of an unfavorable holding on the issue of the employer's negligence, but also the risk of judicial decisions preventing recovery under workmen's compensation when the injury occurs through no fault of the employer.

The attacks on the exclusivity provisions of the compensation acts reflect a discontent with the present state of workmen's compensation, and present a challenge to the fundamental premise that all work injuries should be compensated under the acts. If genuine reform is not forthcoming, occasional attempts to avoid compensation coverage may be overshadowed by concerted efforts to bring about radical change in the basic structure of our system of providing for the victims of industry.