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Workmen's Compensation - Aggressor Doctrine Challenged

Bert K. Robinson

consists of violation of a statute, a court must determine against what risks the statute was designed to protect. But absent a statute defendant might have violated the general duty of due care by obstructing the highway. The court would then have had to determine against what risks this nonstatutory duty was designed to protect.

By rejecting "proximate cause" in the instant case, it is submitted that the court was able to reach its decision by clearly discussing the reasons for it. It is recommended that this approach be used to decide negligence cases in the future.

Frank F. Foil

WORKMEN'S COMPENSATION — AGGRESSOR DOCTRINE CHALLENGED

Plaintiff took offense at being called "Shorty" by a fellow employee. During an ensuing exchange of harsh words plaintiff struck the other employee in the face with a pair of pants. The latter, uninjured, responded by hitting plaintiff, causing a brain injury. Plaintiff sued his employer's workmen's compensation insurer claiming compensation for the resultant injury. The defenses asserted were that the cause of plaintiff's injuries was his wilful intention to injure another and that plaintiff had been the aggressor. The court of appeal reversed the district court's decision for plaintiff.[1] On writ of certiorari, the Louisiana Supreme Court reversed. *Held*, neither ordinary fault nor the "aggressor doctrine" has any place in the application of the Louisiana Workmen's Compensation Act. In order to sustain the statutory defense of wilful intent defendant must prove that plaintiff entertained a wilful and premeditated intention to injure another. *Velotta v. Liberty Mutual Insurance Co.*, 241 La. 814, 132 So. 2d 51 (1961).[2]

Louisiana's workmen's compensation statute provides that an employee cannot recover compensation if his injury was caused by his own "wilful intention" to injure another.[3] The burden of

1. Velotta v. Liberty Mutual Insurance Co., 126 So. 2d 445 (La. App. 2d Cir. 1961).

2. The same case, reported at 134 So. 2d 570 (La. App. 2d Cir. 1961), deals with quantum of damages.

3. LA. R.S. 23:1081 (1950): "No compensation shall be allowed for an injury

proving this defense is upon the employer. Although in some compensation cases the courts have limited their inquiries to the question of wilful intent,[4] they have more commonly considered the nebulous tort concept of aggression.[5] As applied to workmen's compensation, this concept precludes recovery by the original assailant[6] unless he was sufficiently provoked[7] or had retired from the affray.[8]

In the instant case the Supreme Court recognized that the emotions of employees often cause friction between them.[9] This

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caused (1) by the injured employee's wilful intention to injure himself or to injure another, or (2) by the injured employee's intoxication at the time of the injury, or (3) by the injured employee's deliberate failure to use an adequate guard or protection against accident provided for him or (4) by the employee's deliberate breach of statutory regulations affecting safety of life or limb.

"In determining whether or not an employer shall be exempt from and relieved of paying compensation because of injury sustained by an employee for the causes and reasons set forth in this Section, the burden of proof shall be upon the employer."

4. Jenkins v. Cities Service Refining Corp., 44 So. 2d 719 (La. App. 1st Cir. 1950); Burkhardt v. City of Monroe, 37 So. 2d 601 (La. App. 2d Cir. 1948); Keyhea v. Woodward-Walker Lumber Co., 147 So. 830 (La. App. 2d Cir. 1933); Toney v. Geo. A. Fuller Co., 143 So. 541 (La. App. 1st Cir. 1932); Morris v. Young & DeBritton, 9 La. App. 180, 119 So. 277 (1st Cir. 1928); Fisher v. Sherrill Hardwood Lumber Co., 3 La. App. 595 (1st Cir. 1926).

5. Landry v. Gilger Drilling Co., 92 So. 2d 482 (La. App. 1st Cir. 1957); Cater v. Travelers Ins. Co., 83 So. 2d 514 (La. App. 2d Cir. 1955); Gross v. Great Atlantic & Pacific Tea Co., 25 So. 2d 837 (La. App. Orl. Cir. 1946); Pierson v. Sterling Sugars Inc., 149 So. 903 (La. App. 1st Cir. 1933); Garrett v. Texas-Louisiana Light & Power Co., 19 La. App. 858, 141 So. 809 (2d Cir. 1932).

At least one compensation case indicates that the claimant need not have been the aggressor in fact, but need only have led the other party "reasonably to believe" that claimant was the aggressor. Turner v. Baton Rouge Coca Cola Bottling Co., 15 So. 2d 153 (La. App. 1st Cir. 1943).

Comment, *Tort, Recovery by Aggressor for Personal Injuries Received in Encounter*, 12 LA. L. REV. 469, 470 (1952): "One who provokes a difficulty with another cannot recover damages for injuries inflicted upon him as a result thereof, even though the conduct of the one who inflicts the injuries was not justified in law."

1 LARSON, WORKMEN'S COMPENSATION LAW § 1.20 (1952): "Almost every major error that can be observed in the development of compensation law . . . can be traced either to the importation of tort ideas, or, less frequently, to the assumption that the right to compensation resembles the right to the proceeds of an insurance policy."

6. Courts considering compensation disputes have applied both civil and criminal concepts of aggression. Cater v. Travelers Ins. Co., 83 So. 2d 514 (La. App. 2d Cir. 1955); Morvant v. Aetna Casualty & Surety Co., 181 So. 595 (La. App. Orl. Cir. 1938).

7. Provocative words have been held sufficient "justification" for an attack. Cater v. Travelers Ins. Co., 83 So. 2d 514 (La. App. 2d Cir. 1955). *Contra*, Conley v. Travelers Ins. Co., 53 So. 2d 681 (La. App. 2d Cir. 1951).

8. Landry v. Gilger Drilling Co., 92 So. 2d 482 (La. App. 1st Cir. 1957) (recovery allowed if claimant retired from the affray and was attacked thereafter).

9. 241 La. at 824, 132 So. 2d at 54: "In the relationship between fellow employees, it is inevitable that their emotions will cause friction between them." The court also noted that recovery should not be barred by action "growing out of the duties of the employment and incidental and necessary relationship to other employees." *Ibid.*

accords with the present trend of authority that the desirable test for determining the right to compensation in the aggressor cases is whether the circumstances giving rise to the injury were typical of the working environment.[10] The court expressly dis-

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Louisiana courts have been slow to acknowledge that daily frictions between workingmen may cause dissension. Phelps v. United Carbon Co., 8 La. App. 128 (2d Cir. 1928). However, some cases have at least indicated that the courts realized daily working contact between enemies did not improve their relationship. Keyhea v. Woodward-Walker Lumber Co., 147 So. 830 (La. App. 2d Cir. 1933); Millspaugh v. Opelousas Cotton Gin Co., 139 So. 666 (La. App. 1st Cir. 1932).

10. Generally, fault plays no part in the law of workmen's compensation. The elimination of contributory negligence as a defense is a prime example of this. MALONE, LOUISIANA'S WORKMEN'S COMPENSATION LAW AND PRACTICE § 32 (1951). Nevertheless, some twenty-three states allow the defense that when an employee was injured as a result of "wilfully intending" to injure another he cannot recover. Eight more states deny compensation for injury resulting from "wilful misconduct." 1 LARSON, WORKMEN'S COMPENSATION LAW § 11.15(d) (1952). Some courts have taken the position that although the employer has failed to establish that the claimant wilfully intended to injure another, yet the claimant's conduct was such that it did not arise out of the employment, and thus denied compensation. Stulginski v. Waterbury Rolling Mills Co., 124 Conn. 355, 199 Atl. 653 (1938); Fulton Bag & Cotton Mills v. Haynie, 43 Ga. App. 579, 159 S.E. 781 (1931). Perhaps because the defense of wilful intent to injure another is a concession to the fault principle, courts have not confined their considerations to that issue alone and have, whether consciously or not, employed the criminal and general tort concepts of the aggressor doctrine. 99 C.J.S. *Workmen's Compensation* § 265 (1958). In doing so, some courts have limited their inquiries to whether the claimant was the aggressor and have glossed over the wilful intent requirement. Fulton Bag & Cotton Mills v. Haynie, 43 Ga. App. 579, 159 S.E. 781 (1931); Fischer v. Industrial Comm., 408 Ill. 115, 96 N.E.2d 478 (1951); Jackson v. Comp. Com'r, 127 W. Va. 59, 31 S.E.2d 848 (1944). Fortunately the present trend appears to be toward ignoring the aggressor doctrine and considering only the specific statutory defense of wilful intent. Hartford Accident & Indemnity Co. v. Cardillo, 112 F.2d 11 (D.C. Cir. 1940), *cert. denied*, 310 U.S. 649 (1940); Johnson v. Safreed, 273 S.W.2d 545 (Ark. 1954), 15 NACCA L.J. 29; State Compensation Insurance Fund v. Industrial Accident Comm. & Paul J. Hull, 38 Cal. 2d 659, 242 P.2d 311 (1952), 9 NACCA L.J. 64, 13 OHIO ST. L.J. 543; David Dillon's Case, 324 Mass. 102, 85 N.E.2d 69 (1949), 3 NACCA L.J. 86; Petro v. Martin Baking Co., 58 N.W.2d 731 (Minn. 1953), 7 VAND. L. REV. 153; Newell v. Moreau, 94 N.H. 439, 55 A.2d 476 (1947); Martin v. Snuffy's Steak House, 134 A.2d 789 (N.J. 1957), 21 NACCA L.J. 164; Commission v. The Bronx Hospital, 97 N.Y.S.2d 120 (Sup. Ct. 1950), 5 NACCA L.J. 73; Schueller v. Armour & Co., 116 Pa. Super. 323, 176 Atl. 527 (1935); SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 6.8 (1950); Calamari, *Assaults by Fellow Employees Under the FELA and the Jones Act*, 28 FORDHAM L. REV. 449 (1959); Horovitz, *Assaults & Horseplay Under Workmen's Compensation Laws*, 41 ILL. L. REV. 311 (1947); 11 NACCA L.J. 19 (1953); 4 NACCA L.J. 19 (1949); 2 NACCA L.J. 26 (1948). The reasons for this apparent trend seem to be twofold: first, the realization that fault has no place in the workmen's compensation scheme; and second, the present propensity toward more liberal construction of workmen's compensation acts in favor of employees. The trend may be analogous to that in the "horseplay" cases. Notes, 34 NOTRE DAME LAW. 600 (1959), 15 RUTGERS L. REV. 139 (1960). The courts initially said that horseplay did not "arise out of" employment, but later held that horseplay accidents were indeed part of the industrial world. Similarly, with the aggressor defense, courts are tending to question the logic of making the outcome turn upon who struck the first blow. Johnson v. Safreed, 224 Ark. 397, 273 S.W.2d 545 (1954). Thus, for more than a decade some jurisdictions have acted upon the realistic notion that when industry calls men of all stations of life together, it creates many new frictions, and violence flares up expectably when accumulated strains finally overcome frayed patience. Hartford

approved the workmen's compensation cases that have applied the aggressor rule,[11] stating that "the mere fact that the employee seeking recovery may have been to blame for the fray is not adequate to meet the [statutory] test — there must be more."[12] Thus, it seems that the aggressor doctrine should now be inapplicable in Louisiana compensation disputes; when the statutory defense is raised the sole question should be whether there was a wilful intent on the part of the claimant to injure another. The court, indicating that wilful intent signified something akin to malice or premeditation,[13] rejected the idea that impulsive violence, *per se*, justifies application of the statutory defense. This accords with those authorities indicating that the intention of the legislatures, in enacting compensation statutes, was to prohibit the award of benefits only in cases in which the employee entertained a serious criminal intent.[14]

After stating that wilful intent is the sole test of recovery, the Supreme Court glossed its rule by saying that whether retaliation might reasonably be expected[15] from the attacked em-

Accident & Indemnity Co. v. Cardillo, 112 F. 2d 11 (D.C. Cir. 1940), *cert. denied*, 310 U.S. 649 (1940).

For a discussion of the Federal Employer's Liability Act, see Calamari, *Assaults by Fellow Employees Under the FELA and the Jones Act*, 28 FORDHAM L. REV. 449 (1959).

11. 241 La. at 821, 132 So. 2d at 53: "Although the results reached in these cases would not necessarily be erroneous, it would appear that the statutory provision involved does not require a resort to doctrines not there enunciated."

12. *Id.* at 822, 132 So. 2d at 54.

13. *Ibid.*: "Impulsive conduct, such as a push, shove, or a fist-blow, does not render the conduct of the employee sufficiently serious or grave, and there is no wilful intention to injure one's self or another under such circumstances."

14. *Id.* at 820, 132 So. 2d at 53: "The requirement of the statute setting forth the proof necessary for this special defense is a stern one, for 'wilful intention to injure' *undoubtedly* was added to the Workmen's Compensation Act to support the generally prevailing belief that no person should be rewarded for injuries which flow from his *criminal* conduct of a *serious* and wilful nature." (Emphasis added.) Johnson v. Safreed, 224 Ark. 397, 273 S.W.2d 545 (1954); Newell v. Moreau, 94 N.H. 439, 55 A.2d 476 (1947); MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 345 (1951); Horovitz, *Assaults and Horseplay Under Workmen's Compensation Laws*, 41 ILL. L. REV. 311 (1947); 99 C.J.S. *Workmen's Compensation* § 265 (1958).

Examples of *serious* criminal conduct: Jenkins v. Cities Service Refining Corp., 44 So. 2d 719 (La. App. 1st Cir. 1950) (45 minutes after verbal exchange employee attacked fellow employee with a pipe); Morris v. Young & DeBritton, 9 La. App. 180, 119 So. 277 (1st Cir. 1928) (without provocation foreman shot employee).

15. The court speaks only of *retaliation* in its statement of the "reasonable expectation" test. In this, the court ignores those injuries incurred when an employee with a wilful intent to injure another is injured by an inanimate object or a third person, rather than by retaliation of the proposed victim of the attack.

Suppose that employee *A* does some act of serious criminal aggression toward *B*. Assume also that *B* could be expected to react only mildly because of some physical handicap. But, by use of some weapon, he reacts quite violently. Since one could not reasonably foresee this excessive violence, *A* will not be denied the benefit of

ployee is the measure of the aggressor's intent.[16] This is unfortunate in that it tends to lead the court's inquiry away from the primary consideration of wilful intent. The "reasonable expectation" test may already have had this ill effect. In *Garner v. Avondale Marine Ways, Inc.*,[17] an employee attempted to move a scaffolding upon which the plaintiff was standing. Plaintiff immediately hit the employee, who responded by tackling plaintiff and injuring him. The court of appeal cited and distinguished the instant case, *then* dubbed the claimant the aggressor. Rather than simply inquiring whether the claimant wilfully intended to injure another, the court directed primary attention to whether claimant reasonably expected retaliation. Finding that he did, the court considered the "wilful intent" defense sustained.[18]

It is submitted that the instant decision was correct. The court properly recognized that the basic policy underlying workmen's compensation is the elimination of fault as the basis for denying recovery except as *expressly* provided by statute. Resort by the court of appeal in the *Garner* case to the Supreme Court's "reasonably expected retaliation" language has shown, however, that the instant decision may be interpreted as *not* eliminating the aggressor doctrine in compensation litigation. It is respectfully submitted that this language is dictum and should not be employed in future decisions. The statutory defense of wilful intent should be interpreted to deny recovery only in those cases

compensation under the enunciated test. It would seem that the Supreme Court did not intend this result.

16. 241 La. at 822, 132 So. 2d at 54: "The test should involve an inquiry into the existence of some premeditation and malice on the part of the claimant, coupled with a reasonable expectation of bringing about a real injury to himself or another. If the retaliation which flows from his misconduct is not such as could be ***reasonably expected***, his intention could not be held to envision that result and hence is not within the purview of the quoted provisions of the Act." (Emphasis added.)

The "reasonably expected retaliation" test was apparently borrowed from the field of torts. Azevedo v. Frasca, 128 So. 2d 274 (La. App. 1st Cir. 1961); Dittman v. Long, 114 So. 2d 44 (La. App. 1st Cir. 1959); Davis v. Maddox, 100 So. 2d 905 (La. App. 1st Cir. 1958); Smith v. Parker, 59 So. 2d 718 (La. App. 2d Cir. 1952); Britt v. Merritt, 45 So. 2d 902 (La. App. 2d Cir. 1950).

17. 134 So. 2d 703 (La. App. 4th Cir. 1961).

18. *Id.* at 707: "[P]laintiff was *not only the aggressor* but . . . he had a 'reasonable expectation of bringing a real injury' to him when he struck [the other employee]. . . . Furthermore, [the other employee's] retaliation . . . was in fact much less than plaintiff 'could reasonably expect' and his intention could clearly 'envision' even greater retaliation." (Emphasis added.) Instead of accepting the rationale of the Supreme Court in the instant case, the court in *Garner* said, *id.* at 707: "We have given careful consideration [to it] . . . and our appreciation of it is that the words premeditation 'tinged with some degree of malice' were ***used by the court simply as denoting the opposite of*** 'impulsive or as a result of an instinctive act.'" (Emphasis added.) It is respectfully submitted that the *Garner* case is discordant with the rationale of the instant case.

in which the claimant is guilty of serious criminal conduct. If the Supreme Court is to be successful in eliminating the aggressor doctrine in workmen's compensation, the court's next decision dealing with the issue must be more explicit.

Bert K. Robinson