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Repository Citation

Ronald R. Gonzales, *Emotional Stress - Now a Cause of Compensable Injury?*, 34 La. L. Rev. (1974)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol34/iss4/9>

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NOTES

EMOTIONAL STRESS—NOW A CAUSE OF COMPENSABLE INJURY?

No problem in recent years has given courts and commissions administering workmen's compensation more difficulty than the one presented where an employee experiences an emotional shock or strain in the course of his employment resulting in a physical collapse.¹ In 1963, the Louisiana supreme court in *Danziger v. Employers Mutual Insurance Co.*² held that such an employee would not be entitled to compensation benefits. It was reasoned that a disability due to emotional stress did not fall within the definition of "accident"³ and "injury"⁴ in the Workmen's Compensation Act. However, in 1972 the Louisiana supreme court in *Ferguson v. HDE, Inc.*⁵ overruled *Danziger* and granted compensation in a case where an employee suffered a cerebral hemorrhage after an argument with his employer over his paycheck. Although the court in *Danziger* had held that there was no "accident" under the Workmen's Compensation Act without a physical blow or stress,⁶ in *Ferguson* the court dispensed with this requirement as a prerequisite to recovery.⁷ Rather, all that is needed is an *event* that results in injury to a worker that is sufficiently related to the employment such that the event may be said to "arise out of" and occur in the "course of the employment."⁸

1. *The Work of the Louisiana Appellate Courts for the 1962-1963 Term—Workmen's Compensation*, 24 LA. L. REV. 244, 247-48 (1964).

2. 245 La. 33, 156 So. 2d 468 (1963).

3. LA. R.S. 23:1021(1) (1950): "'Accident' means an unexpected or unforeseen event happening suddenly or violently, with or without human fault and producing at the time objective symptoms of an injury."

4. LA. R.S. 23:1021(7) (1950): "'Injury' and 'Personal Injuries' includes only injuries by violence to the physical structure of the body and such disease or infections as naturally result therefrom. These terms shall in no case be construed to include any other form of disease or derangement, howsoever caused or contracted."

5. 270 So. 2d 867 (La. 1972).

6. An early case, *Johnson v. Zurich General Accident & Liability Insurance Co.*, 161 So. 667, 668 (La. App. 2d Cir. 1935), granted compensation to a nightwatchman so frightened by a practical joke that he died of heart failure. The court found that death was due to an accident "as if actual force had been used." Since the case involved both physical contact and emotional stress, Louisiana law on emotional stress was unclear until *Danziger* and *Ferguson*.

7. "Although he received no blow or trauma, and although he was not injured because of physical stress or strain, the medical testimony is clear that he suffered 'violence to the physical structure of the body,' without which he would not have been paralyzed." *Ferguson v. HDE, Inc.*, 270 So. 2d 867, 869 (La. 1972).

8. LA. R.S. 23:1031 (1950).

The necessity for a physical blow or force to fulfill the "accident" requirement present in most workmen's compensation statutes has been used in many jurisdictions as a means of preventing compensation awards in cases of emotional stress.⁹ This is particularly true in those cases in which the disability was not to any substantial degree employment-oriented.¹⁰ Courts had stressed the necessity of establishing an external event or occurrence rather than a mere showing that there was an unexpected change within the employee's body.¹¹ In England, where our workmen's compensation statutes originated, "accident" has meant simply an accidental result;¹² thus, there is an accident when a mishap results in an injury to the worker.¹³ The Louisiana supreme court in *Ferguson* expressly adopted the British meaning of "accident."¹⁴

Although *Ferguson* prevents the harshness of an automatic denial of compensation as in *Danziger*, it unfortunately gives little guidance in determining when a claimant suffers a *compensable injury* resulting from emotional stress. The decision does, however, redefine the term "accident," leaving only the determination of whether the claimant's disability was caused by an event which "arises out of" and occurs in the "course of the employment." In *Seals v. City of Baton Rouge*,¹⁵ a pre-*Danziger* decision, the First Circuit Court of Appeal does, however, give some guidance in this determination. There the court denied compensation to a police captain who died of a heart attack caused by mental worry over the probability of his forced retirement due to poor health. Rather than base its denial on a finding of no accident, the court held that "death caused from agitation over retirement and occurring while on vacation [neither] arises from performing services out of and incidental to his employment [nor] in the course of his employer's trade, business, or occupation."¹⁶

Seals indicates that the correct analysis in these emotional stress cases is whether the injury *arises out of* the employment situation. This determination poses two basic questions. The first addresses cause in fact; *i.e.*, whether the stressful situation could have causally

9. Larson, *The "Heart Cases" In Workmen's Compensation: An Analysis and Suggested Solution*, 65 MICH. L. REV. 441 (1967).

10. *Id.* at 468.

11. *Id.* at 444.

12. *Id.*; 1A A. LARSON, WORKMEN'S COMPENSATION LAW § 38.10 (1967).

13. Larson, *Range of Compensable Consequences in Workmen's Compensation*, 21 HASTINGS L.J. 609 (1970).

14. *Ferguson v. HDE, Inc.*, 270 So. 2d 867, 869 (La. 1972).

15. 94 So. 2d 478 (La. App. 1st Cir. 1957).

16. *Id.* at 485.

contributed to the disability.¹⁷ This involves the problem of medical causation with its difficult evidentiary consequences.¹⁸ The court must decide if the employee's injury resulted from some employment condition or the natural progression of a disease.

The second question is whether the causal part played by the employment is sufficient to warrant a legal remedy.¹⁹ An employee has tensions and stress from all aspects of his life—family, financial and social as well as from his employment.²⁰ The problem is whether the work tension caused the collapse or played only a minor part. Furthermore, the employee may be unusually susceptible to emotional stress because of past maladjustments for which the employer is not responsible.²¹ Finally, all persons have different tolerances to emotional stress.²² The inquiry then is whether the employer should be required to take his employee "as he finds him" as is done in cases where physical stress causes disability.²³

There are sound reasons for granting compensation in these situations,²⁴ particularly where the stressful situation producing injury is clearly job connected. The necessary nexus with the employment is perhaps easiest to find where a sudden emotional event precipitated the injury. In these cases it is plain that the flash, noise, or argument arose out of employment conditions and caused an emotional reaction that resulted in disability.²⁵ Employment connection is harder to find where the disability results only from prolonged worry and anxiety. These long term emotional reactions can produce damaging effects as

17. Larson, *The "Heart Cases" In Workmen's Compensation: An Analysis and Suggested Solution*, 65 MICH. L. REV. 441, 474 (1967).

18. *Id.* at 442; see also *The Work of the Louisiana Appellate Courts for the 1962-1963 Term—Workmen's Compensation*, 24 LA. L. REV. 244, 248 (1964).

19. *The Work of the Louisiana Appellate Courts for the 1962-1963 Term—Workmen's Compensation*, 24 LA. L. REV. 244, 248 (1964).

20. *Id.*; see W. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW & PRACTICE § 220 (Supp. 1964).

21. *The Work of the Louisiana Appellate Courts for the 1962-1963 Term—Workmen's Compensation*, 24 LA. L. REV. 244, 248 (1964).

22. *Id.*; see also W. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW & PRACTICE § 220 (Supp. 1964).

23. See *Behan v. John B. Honor Co.*, 143 La. 348, 78 So. 589 (1918); *Howell v. Clemons Bros. Lbr. Co.*, 32 So. 2d 60 (La. App. 1st Cir. 1947); *Custer v. Higgins Ind.*, 24 So. 2d 511 (La. App. Orl. Cir. 1946).

24. The most important reason for granting compensation in emotional stress cases is the economic reality of a physically disabled member of society. Prior to his injury, the employee was a contributing member of the work force. Instead of needing to rely on charity, this man should receive compensation if his disability is work-connected.

25. *The Work of the Louisiana Appellate Courts for the 1962-1963 Term—Workmen's Compensation*, 24 LA. L. REV. 244, 253-54 (1964).

serious as emotions evoked by sudden events.²⁶ The evidentiary burden of showing that worry and anxiety over one's employment caused the injury is more difficult. This burden could be overcome, however, by detailed evidence that the claimant was continuously concerned and dedicated to his work.²⁷

Two recent pre-*Ferguson* court of appeal cases, *Hackett v. Travelers Insurance Co.*²⁸ and *Johnson v. Hartford Accident and Indemnity Co.*,²⁹ provide an opportunity to illustrate this "arising out of the employment" analysis. In *Hackett*, the plaintiff suffered a traumatic psychosis resulting from shock sustained while present at a dynamite explosion that killed two men. In *Johnson*, the claimant suffered a nervous breakdown from the prolonged pressures and anxiety of working seven days a week as a traveling circulation representative of a daily newspaper. Although in both cases the disability was clearly employment related, compensation was automatically denied due to the *Danziger* rule. Instead, under the suggested analysis, once having found that the employment was a cause in fact of the injury, then one must only determine if this causation was sufficiently substantial to allow recovery.

Compensation cannot be granted in every case where an employee is injured by emotional stress. To do so would make the employer an insurer of the employee, which is not the purpose of the Compensation Act.³⁰ Professor Malone recommends that compensation be denied except in those cases where the nature of the job or employment conditions play a *dominant role* in bringing about the nervous tensions that cause the injury.³¹ He favors this approach over the "precipitating factor" test used in physical stress cases where employment conditions need only contribute in the slightest to the disability.³² This recommendation properly treats emotional stress

26. Page, *Workman's Compensation Law—Reviews of Leading Current Cases*, 28 NACCA L.J. 296, 309 (1961-62).

27. See *Insurance Dept. v. Dinsmore*, 233 Miss. 569, 102 So. 2d 691, *aff'd on rehearing*, 233 Miss. 569, 104 So. 2d 296 (1958). An argument can also be made that the employer benefits directly from the worry and anxiety of an employee who is a perfectionist or who works harder than required. The employer enjoys the fruits of this man's performance so he should be held to compensate the employee if job pressures, executive worry, or prolonged periods of stress cause his breakdown.

28. 195 So. 2d 758 (La. App. 3d Cir. 1967).

29. 196 So. 2d 635 (La. App. 3d Cir. 1967).

30. *Seals v. City of Baton Rouge*, 94 So. 2d 478, 484 (La. App. 1st Cir. 1957).

31. *The Work of the Louisiana Appellate Courts for the 1962-1963 Term—Workmen's Compensation*, 24 LA. L. REV. 244, 249 (1964); see W. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW & PRACTICE § 220 (Supp. 1964).

32. See *Kern v. Southport Mill*, 174 La. 432, 141 So. 19 (1932).

cases as an "arising out of the employment" problem, and limits the requirement that the employer take his employee "as he finds him."³³ Applying this suggestion to *Hackett* and *Johnson*, the claimants would thus have to prove that employment conditions were the *dominant force* in producing the stress and anxiety which caused the resulting injuries.³⁴

Each emotional stress case must be decided on its own particular facts. The decision can best be made after a determination of "[w]hether there is a sufficient causal relation between the work-connected stressful situation and the emotional reaction, and be-

33. *The Work of the Louisiana Appellate Courts for the 1962-1963 Term—Workmen's Compensation*, 24 LA. L. REV. 244, 249 (1964); see W. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW & PRACTICE § 220 (Supp. 1964).

34. Two other tests have been used principally by courts in New York in emotional stress cases. The first is the requirement that the injury producing stress be greater than the "wear and tear" of ordinary non-employment life. See, e.g., *Mulholland v. New York St. Dept of Pub. Wks.*, 34 App. Div. 2d 1083, 312 N.Y.S.2d 687 (1970); *Ferreri v. General Auto Dr. Sch., Inc.*, 26 App. Div. 2d 601, 271 N.Y.S.2d 421 (1966); *Larson, The "Heart Cases" In Workmen's Compensation: An Analysis and Suggested Solution*, 65 MICH. L. REV. 441, 462 (1967). The other test is that the stress be greater than that endured by other employees similarly situated. See also *Master of Zyglar v. Tenzer Coat Co.*, 19 App. Div. 2d 660, 240 N.Y.S.2d 543 (1963), *aff'd*, 15 N.Y.2d 562, 254 N.Y.S.2d 537, 203 N.E.2d 217 (1964); *Cramer v. Barney's Cloth. Store*, 15 App. Div. 2d 329, 223 N.Y.S.2d 813 (1962), *aff'd*, 13 N.Y.2d 711, 241 N.Y.S.2d 844, 191 N.E.2d 901 (1963).

The distinction between the two is clear in cases where the employee is engaged in a dangerous occupation like a policeman. Many of the duties of a policeman involve emotional stress greater than the "wear and tear" of ordinary life; but a high speed chase for one officer is not unusual when compared to the work of other policemen. See *Eschenbrenner v. Employers Mut. Cas. Co.*, 165 Neb. 32, 84 N.W.2d 169 (1957). The "other employee" test clearly places a greater burden on the claimant, particularly those engaged in non-sedentary employment. One problem with both these tests is that there is no way to measure the amount of emotional tension common to all jobs. See *Larson, The "Heart Cases" In Workmen's Compensation: An Analysis and Suggested Solution*, 65 MICH. L. REV. 441, 462 (1967). The principal reason for not using these tests, however, is that they continue to approach emotional stress cases from the point of view of trying to find an accidentally caused injury rather than as an "arising out of the employment" problem.

A review of jurisprudence from other states with workmen's compensation statutes that require an "accident" like Louisiana's reveals that no test is uniformly used in deciding to grant or deny compensation. Some states still base a denial of compensation in emotional stress cases on a finding that no "accident" occurred. See, e.g., *Whiting-Turner Cont. Co. v. McLaughlin*, 11 Md. App. 360, 274 A.2d 390 (1971); *Weinstein v. Apex Dress Co.*, 25 N.Y.2d 947, 305 N.Y.S.2d 157, 252 N.E.2d 634 (1969); *Toth v. Standard Oil Co.*, 160 Ohio St. 1, 113 N.E.2d 81 (1953). Maryland and New York require an unusual event for there to be an "accident" and these states find nothing unusual about arguments at work that result in disability. However, even these states found that worry and anxiety over performing satisfactorily at work and keeping up with increased work loads were sufficiently unusual to qualify as "acci-

tween the reaction and the physical harm."³⁵ The "arising out of the employment" analysis fulfills this inquiry, while the use of the meaning of "accident" to grant or deny compensation simply avoids a determination of causation.³⁶ As a result of *Ferguson*, Louisiana courts can now concentrate on deciding whether the injury "arose out of" and occurred in the "course of the employment," thus permitting the needed flexibility in their decisions.³⁷

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STATE V. DOUGLAS: JUDICIAL "REVIVAL" OF AN UNCONSTITUTIONAL STATUTE

Defendant, after a trial by jury, was convicted of inciting to riot.¹ The trial court denied defendant's motion for a directed verdict,² citing its lack of authority.³ On appeal, the Louisiana supreme court

dents." *See, e.g.*, *Matter of Kilmas v. Trans Carib. Air.*, 10 N.Y.2d 209, 219 N.Y.S.2d 14, 176 N.E.2d 714 (1961); *Schechter v. State Ins. Fund.*, 6 N.Y.2d 506, 190 N.Y.S.2d 656, 160 N.E.2d 901 (1959). *See also* *J. Norman Geipe, Inc. v. Collett*, 172 Md. 165, 190 A. 836 (1937).

Other courts have simply denied compensation on a finding that the employment's connection with the injury was not proven. *See, e.g.*, *Jacobs v. Goodyear Tire & Rub. Co.*, 196 Kan. 613, 412 P.2d 986 (1966); *Brundage v. K.L. House Const. Co.*, 74 N.M. 613, 396 P.2d 731 (1964); *Shea v. Youngstown Sheet & Tube Co.*, 139 Ohio St. 407, 40 N.E.2d 669 (1942).

On the other hand, some decisions have found the necessary employment connection to grant compensation. *See, e.g.*, *Travelers Ins. Co. v. Neal*, 124 Ga. App. 750, 186 S.E.2d 346 (1971). These courts have in effect held that the injury "arose out of" and in the "course of the employment."

35. Page, *Workmen's Compensation Law—Reviews of Leading Current Cases*, 28 NACCA L.J. 296, 306 (1961-62).

36. Comment, 70 YALE L.J. 1129, 1140 (1961).

37. *The Work of the Louisiana Appellate Courts for the 1962-1963 Term—Workmen's Compensation*, 24 LA. L. REV. 244, 249-50 (1964).

1. LA. R.S. 14:329.2 (Supp. 1969).

2. LA. CODE CRIM. P. art. 778.

3. The trial court was undoubtedly basing its ruling on *State v. Hudson*, 253 La. 992, 221 So. 2d 484 (1969), and cases following that decision in which Code of Criminal Procedure article 778 was declared to be of no effect due to its conflict with article XIX, section 9 of the Louisiana constitution which states in part that "[t]he jury in all criminal cases shall be the judges of the law and of the facts on the question of guilt or innocence, having been charged as to the law applicable to the case by the presiding judge."