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William J. Harte

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Workmen's Compensation

Off-Premises Assaults — Recovery by the Assaulted or the Aggressor

Introduction

The Workmen's Compensation Acts are society's attempt to remedy the new wrongs created by the prevalent economic system, industrialism, the necessary operation of which results in numerous employee injuries for which no fault can be found in the employer. The acts compel the profiting element in the industrialization, the employer, to care for the injured employee as a necessary business expenditure. He, in turn, can pass the burden to the public by increasing the price of his product.

At first glance, the application of the statutes seems quite simple. Essentially, once the employer-employee status is established, the injured employee is provided with an award as long as the injury or accident can be related to his employment. To use the terms of the typical statute, the injury or accident must "arise out of and in the course of" the employment. However, few phrases have proved as troublesome in construction and have been the focal point of so much litigation. At any rate, most courts do seem to agree that "arising out of" refers to causal connection of the employment with the injury, while "in the course of" indicates the time, place, and circumstances of the injury. The satisfaction of but one criterion is not sufficient for an award; most jurisdictions require fulfillment of both.

Some of the more troublesome cases of employee recovery occur when the employee is involved in a violent act with another employee or a third person. Here the "arising out of" or causal connection criterion looms as a compensation preventive. Place the employee off the employer's premises at the time of the injury and the possibility of recovery grows dimmer since this factual circumstance is confronted with the "course of" criterion.

The purpose of this discussion is to examine the court's treatment of cases within this area to determine the extent of recovery or its denial and the reasoning therewith. Concurrently, an attempt will be made to reflect and comment on the changing attitude of the courts in their conception of the acts. Specifically, then, the obstacles confronting an injured employee in this situation are attributable to the fact (1) that he is off the premises, (2) is the victim of the violent act of another, (3) which act may have been motivated by the employee's own aggression.

1 All the states have enacted such legislation, Mississippi being the last in 1948. Miss. Code Ann. § 6998-01 (1952).
3 1 Larson, Workmen's Compensation, 41-42 (1952).
4 Horovitz, supra note 2, at 666.
The Off-Premises Factor

Recovery for an assault which occurs off the employee's premises has, in most cases, been extremely difficult. The evident presumption claimed is that one's employment ends at the boundary of the employer's property, and any injury occurring beyond that point does not arise in the course of employment. This preventive is usually termed the "off-premises" rule.

The immediate difficulty presented by the rule is one of definition, or in other words, where precisely do the premises of the employer begin and end for the purposes of the act. Early courts tended to limit the term to the employer's property, holding that employment is suspended when the employee leaves the place of his actual employment. Modern authority would extend the term "premises" to include property leased or used by him, and even to employer-controlled parking lots. The harsh results of a strict application of the off-premises rule have persuaded some jurisdictions to formulate a "zone of danger" exception. If the employee, although off the employer's premises, is so close to the scene of his labor as to be within the zone of its danger, he may be compensated. However, notwithstanding these extensions, there still exists a kind of sacredness in the employer's premises in its relation to the "course of" employment.

It seems that courts adhere to the "course" test in off-premises cases in order to keep compensation within their conception of rational bounds. This proposition is exemplified by the case of Lampert v. Siemons, where an employee was assaulted by a striker while going to work. The court refused compensation on the ground that the injury did not arise in the course of employment. It said: "If the limits of his employment can be extended under such circumstances to cover the distance between his home and the factory, why cannot those limits also be extended to reach any place and any activity in which the workman may be after working hours?" The court then held that the employment ceased when the employee left the factory, thereby making the premises the measure of employment.

A factual circumstance which has plagued the strict adherents of the "course" criterion occurs when an altercation in direct relation to the employment takes place on the premises but the assault is effectuated after the victim has left the premises. In Field v. Charmette Knitted Fabric Co., where the assault occurred five feet from the premises,
the court, in an opinion by Cardozo, C. J., held that no reasonable opportunity had been offered the victim to separate himself from the plant. "Continuity of cause has been so combined with contiguity in time and space that the quarrel from origin to ending must be taken as one." [Emphasis added.] Thus the weight of the causal requisite overcame the meager check of the "course" requirement. Later courts have accepted this rationale with mixed emotions. Some tend to limit Charmette strictly to its facts, evidently with a feeling akin to that in Lampert, i.e., that the ramifications of any extension might be catastrophic. However, others would extend Cardozo’s reasoning and minimize the "course" requirement to the extent that it is not so much where or when the assault took place, as it is that the employment-originated controversy subjected the employee to an unforeseen risk which brought about the injury. The continuing cause concept has also been followed in cases of off-premises injury after abduction from the premises, and a case involving a claimant who chased a culprit from the premises and was assaulted.

A factual situation which would easily fit into the Charmette rationale involves an off-premises assault of an employee by a striker or picket during a labor dispute. However, it seems the Lampert anxiety has carried the day in most of these cases; compensation has been granted only when the employment penumbra can be seen to follow the employee off the premises. Yet one recent case, in a well reasoned opinion, broadened its application of the "course of", adopted the Charmette deduction, and permitted compensation where the strikers

12 Collier's Case, 331 Mass. 374, 119 N.E.2d 191 (1954) (fifty-eight feet off the premises); Dicks v. Brooklyn Cooperage Co., 208 S.C. 139, 37 S.E.2d 286 (1946) (1/2 mile from the place of employment); Magill v. Cunard White Star, Ltd., 250 App. Div. 813, 294 N.Y. Supp. 156 (3d Dep't), aff'd per curiam, 275 N.Y. 568, 11 N.E.2d 757 (1937) (two months later while employee was off premises on lunch hour); Morgan v. Hoage, 72 F.2d 727 (D.C. Cir 1934) (assaulted preparing to go to work); Maguire v. James Lees & Sons, 273 Pa. 75, 116 Atl. 679 (1922) (500 feet off premises, however this case was decided before Charmette). In McGrinder v. Sullivan, 290 N.Y. 11, 47 N.E.2d 421 (1943), the Board had refused compensation since the claimant was four blocks from the premises. However, the court held that the issue of continuation was a debatable one, but did not have the power to change the Board's finding of fact. See Desmond, "Arising Out Of and In the Course Of Employment" in New York, 26 NOTRE DAME LAW. 462, 470 (1951).

13 Scholl v. Industrial Comm'n, 366 Ill. 588, 10 N.E.2d 360 (1937) (employee had responsibility of discharging others and was killed on way to work by one whom he had discharged). See also Cain v. Paramount Theatres Corp., 286 App. Div. 507, 142 N.Y.S.2d 210 (3d Dep't 1955) (1/2 block from premises); Appelford v. Kimmel, 297 Mich. 8, 296 N.W. 861 (1941) (few blocks).


16 Walsh v. Russoes Fifth Ave., 226 App. Div. 760, 41 N.Y.S.2d 145 (3d Dep't 1943); Merz v. Industrial Comm'n, 134 Ohio St. 36, 15 N.E.2d 652 (1938); Enterprise Foundry Co. v. Industrial Accident Comm'n, 206 Cal. 562, 275 Pac. 432 (1929). See also Brown v. General Drivers Union, 212 Minn. 265, 3 N.W.2d 423 (1942).

injured the employee after a long chase by car.¹⁸ This view reflects the more sensible approach since few cases present a stronger example of causal relation. The injured employee is performing a real service to the employer by turning against the union, especially in a labor crisis. A denial of compensation when the employee is performing such a service merely because he is some little distance off the premises seems absurd.

Courts have made various other inroads on the "off-premises" rule through numerous exceptions, based essentially on the ability of the court to connect the employment in some way with the activity of the assaulted employee off the premises. The required quantum of such connection cannot be arbitrarily established due to the many factual situations which have arisen; it can only be seen in a case by case approach.

One exception involves cases embodying injuries received by the employee while "going or coming" to the place of employment. The predominant notion regarding such an injury is that it is not protected by the act where no greater connection with the employment can be seen other than that the employment requires the trip.¹⁹ However, when the employee is asked to perform special services after the regular working hours and is injured on the return trip home, the "course of" requirement has been held to be satisfied.²⁰ Also, where the employer provides a motor vehicle for the journey,²¹ or when he attempts to provide protection for the employee during a labor dispute,²² the injury has been compensable.

The exception involving the greatest number of off the premises assault cases is that of an employee whose work necessarily includes or entirely consists of off the premises activity, usually the traveling man. The "in the course of" requirement is satisfied when the injury occurs within the period of employment, at a place where the employee may reasonably be and while the employee is reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.²³ Probably the clearest example of this proposition is the employee who is sent off the premises by the employer with special instruc-

²³ Foster v. Aines Farm Dairy Co., 263 S.W.2d 421 (Mo. 1953); 1 Larson, op. cit. supra note 3, at 193.
tions and is injured. Also deliverymen, traveling salesmen, insurance collectors, repair men, and taxi drivers fulfill the criterion if assaulted in performance of their off-premises employment duties.

A favorable contrivance utilized by the employer to counteract these exceptions is the defense of "deviation." Whenever the activity of the employee while off the premises deviates from that which is in furtherance of his employment, compensation may be denied for failure to fulfill the requisite "course of" criterion. When this occurs some courts confuse the usual conception of "in the course of" with the "arising out of" criterion and hold that the assault occurring while the employee is on this "deviation" has no causal connection with the employment, and compensation is denied. Thus, when an assault results from the employee's misconduct while working, or from his deviation from the employment to satisfy a personal desire, the injury has been held

25 Foster v. Aines Farm Dairy Co., 263 S.W.2d 421 (Mo. 1953) (milkman making deliveries); Brookhaven Steam Laundry v. Watts, 214 Miss. 569, 55 So. 2d 381 (1951), rev'd on other grounds, 59 So. 2d 294 (1952) (laundryman); Sanders v. Jarka Corp., 1 N.J. 36, 61 A.2d 641 (1948) (truck driver); Bluegrass Pastureland Dairies v. Meeker, 268 Ky. 722, 105 S.W.2d 611 (1937) (milkman); Hardt v. City Ice & Fuel Co., 109 S.W.2d 896 (Mo. App. 1937) (employee transporting money to the bank for the employer).
30 1 Larson, op. cit. supra note 3, at 265. However, the satisfaction of bodily needs by a traveling man ought not be considered such a deviation. 1 Larson, op. cit. supra, at 384; Wis. Stat. Ann. § 102.03(b) (1957). Contra, Barry v. Sanders Co., 211 Miss. 656, 52 So. 2d 493 (1951).
31 Kendrick v. State Highway Board, 62 Ga. App. 570, 8 S.E.2d 793 (1940) (assault resulted from salesman's conduct in forcing assailant's car from road) However, this reasoning was not followed in Augelli v. Rolans Credit Clothing Store, 33 N.J. Super. 146, 109 A.2d 439 (1954), where it was held that an employee's misconduct while driving did not remove him from the course of employment.
32 Hawkins v. Portland Gas Light Co., 141 Me. 288, 43 A.2d 718 (1945) (employee's curiosity drew him off premises to investigate rifle shots); Hopper v. Koenigstein, 135 Neb. 837, 284 N.W. 346 (1939) (serviceman repairing machinery in a tavern drank heavily with a customer in the bar who later assaulted him); Wimmer v. Hoage, 90 F.2d 373 (D.C. Cir. 1937) (auto salesman, while taking a prospective customer to view a truck, left auto in a state of intoxication to purchase cigarettes). This last case is rather farf选择了 since there was evidence to show that the salesman left the auto at the customer's request for cigarettes. See also Chatman v. Modern Builders, Inc., 86 So. 2d 350 (Miss. 1956) where the court could find no causal relation because, inter alia, the fatal assault occurred in the home of a truck driver who had stopped for lunch.
non-compensable because the "arising out of" requirement remains unsatisfied. This confusion is easily understandable since the line between the criteria is often indiscernible. "Course of" refers to employment. "Arising out of" connects the employment with the injury. Once it is found that an employee is no longer in the course of his employment, a discussion of the "out of" criterion seems superfluous.

This difficulty of discernment has led some courts to question the necessity of both criteria since "an accident rising out of an employment almost necessarily occurs in the course of it, but the converse does not follow." One leading authority would merge both into a "work connection" test which includes both criteria despite the fact that he feels the present conception of "course of" is inappropriate.

A total abandonment of the "course" criterion seems unlikely due to its strong precedent and its specific inclusion in most of the statutes. However, the case law in the area reflects a general straining to circumvent the harsh results of a strict adherence to the "course" test. The Charmette rationale and the "zone of danger" rule directly attack a strict application of the "off-premises" rule; the various exceptions to the rule make it a nullity in the area of off-premises employment activity. Also, in virtually every case of off-premises injury, the court will strain to find some employment activity to support an award. Yet when no such activity can be seen or a "deviation" has occurred, compensation will be denied in most jurisdictions even though the injury clearly arises "out of" the employment.

The Assault Factor

If the claimant is fortunate enough to pass the off-premises obstacle, he is next confronted with the "arising out of" criterion in that his injury was caused by the violent act of another. When first presented with this problem, courts took a dim view of allowing recovery since they could not be persuaded to penalize the innocent employer for another's wilful act. However, today, virtually all jurisdictions have outgrown this impression and will permit compensation as long as the assault can be attributed to some facet of the employment.

The most prevalent theory of recovery in this area is through the use of the "risk" principle. If it can be proven that the employment has tinged the employee's activity with the danger of assault, recovery will be granted. Early jurisprudence in this area required the danger of assault to be an "increased risk." Risks peculiar to the employment were differentiated from those common to the public, with compensation being granted in the former case but not the latter. The majority of

33 Appelford v. Kimmel, 297 Mich. 8, 296 N.W. 861, 862 (1941) (dictum). In Buckner v. Quick Seal, Inc., 233 Mo. App. 273, 118 S.W.2d 100, 109 (1938), the court said, "[I]t is difficult to conceive of an accident arising out of the employment and not in the course of it."

34 1 LARSON, op. cit. supra note 3, at 442, 449 (1952).

35 See notes 12 and 16 supra.

jurisdictions now consider this distinction obsolete,\(^3\) and hold that as long as the employment created an actual risk from which the injury flows, it is compensable.\(^3\)

The risk of assault may stem from the fact that the employee is required to travel and brave certain "perils of the road." Consequently, injuries resulting from altercations between truck drivers after an accident,\(^3\) a controversy regarding the mismanagement of motor vehicles,\(^4\) an assault by a hitch hiker,\(^4\) murder by a highwayman,\(^4\) and even from a passenger demonstrating wrestling holds on a train\(^4\) have been compensable as being such "perils."

The nature of the work and its locale may also make the employee susceptible to the danger of assault. One evident class of such employees are those charged with keeping the peace. Since an assault is not an uncommon occurrence in their employment, compensation is usually allowed.\(^4\) Also taxi drivers,\(^4\) bill collectors and others required to carry money on their persons,\(^4\) and employees whose work requires their presence in a tavern\(^4\) or other hazardous locale\(^4\) have been compensated for resulting assaults.

\(^3\) However it does crop up occasionally. Scherr v. Siding & Roofing Sales Co., 305 S.W.2d 62 (Mo. App. 1957); Thornton v. R.C.A. Service Co., 188 Tenn. 644, 221 S.W.2d 954 (1949); Lexington Ry. System v. True, 276 Ky. 446, 124 S.W.2d 467 (1939); Borgeson v. Industrial Comm'n, 368 Ill. 188, 13 N.E.2d 164 (1938).


\(^8\) State Compensation Ins. Fund v. Industrial Comm'n, 80 Colo. 130, 249 Pac. 653 (1926).

\(^9\) Buckner v. Quick Seal, Inc., 233 Mo. App. 273, 118 S.W.2d 100 (1938).

\(^10\) Town of Granite v. Kidwell, 263 P.2d 184 (Okla. 1953); Daugherty v. City of Monett, 238 Mo. App. 924, 192 S.W.2d 51 (1946).


\(^13\) Christiansen v. Hill Reproduction Co., 262 App. Div. 379, 29 N.Y.S.2d 24 (3d Dep't 1941), aff'd per curiam, 286 N.Y. 690, 39 N.E.2d 300 (1942). But see Scherr v. Siding & Roofing Sales Co., 305 S.W.2d 62 (Mo. App. 1957) where claimant could prove no unusual risk; Hopper v. Koenigstein, 135 Neb. 837, 284 N.W. 346 (1939) where even though the hazard had existed, the assault was caused by the employee's relationship with a customer.

\(^14\) Gargano v. Essex County News Co., 129 N.J.L. 369, 29 A.2d 879, aff'd per curiam, 130 N.J.L. 559, 33 A.2d 905 (1943) (employee required to walk through a lonely street at a late hour); Hanson v. Robitshek-Schneider Co., 209 Minn. 596, 297 N.W. 19 (1941) (two block walk to car at night in rougher section of town).
Cases which need little elucidation regarding their work-connection are those involving assaults on employees during labor disputes. Motive for the assault is commonly found in the employee's refusal to adopt union policy and his subsequent acceptance of work during a strike. Under these conditions, an assault is an obvious hazard, and the "arising out of" requirement is rarely disputed. As was stated above, however, compensation may be denied for failure to satisfy the "course of" requisite.

Courts have been somewhat reluctant to permit compensation awards where the risk facet is not present. Except in the "perils of the road" and hazardous location cases discussed above, compensation for assaults which find their motivation in the personal affairs of the participants is usually not granted since the resulting injuries are said to have no relation to or origin in the employment. Specific statutory prohibitions exist in eight jurisdictions but their phraseology seems to bring them within the usual rule. However, if it can be seen that the assault found its cause in the work or the manner of performing it, compensation is permitted since it may reasonably be termed "incidental to the employment." As can well be imagined, the nebulosity of this phrase has created vague and conflicting precedent in its application; it can be extended or contracted at the will of the court. Early courts gave it an extremely strict construction with a view reflecting only the manner of performing the work.

A new theory regarding the phrase "incidental to employment" has arisen which contemplates the work-environment with which the employee must cope. This theory was first proclaimed by Judge Cardozo in Leonbruno v. Champlain Silk Mills, a case involving an injury to the claimant due to the "horseplay" of a fellow servant. The court held that "the claimant was injured ... because he was in a factory, in touch with associations and conditions inseparable from factory life." Horseplay is one of those conditions and is therefore another risk of employment.

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49 See notes 16, 18 supra.
50 Foster v. Aines Farm Dairy Co., 263 S.W.2d 421 (Mo. 1953); Jackson v. Wilson, 84 Ga. App. 684, 67 S.E.2d 161 (1951); Bluegrass Pastureland Dairies v. Meeker, 268 Ky. 722, 105 S.W.2d 611 (1937).
51 The usual phraseology is: "shall not include an injury caused by the act of a third person or fellow employee intended to injure the employee because of reasons personal to him, and not directed against him as an employee, or because of his employment." ALA. CODE tit. 26, § 262 (Supp. 1955); MIIIN. STAT. ANN. § 176.011 (16) (Supp. 1957); PA. STAT. ANN. tit. 77, § 411 (1952); TEX. REV. Civ. STAT. ANN. art. 8309, § 1 (1956); Wyo. COMP. STAT. ANN. § 72-104(b) (Supp. 1957). Some states require the act causing injury to be wilful. DEL. CODE ANN. tit. 19, § 2301 (1953); GA. CODE ANN. § 114-102 (Supp. 1955); IOWA CODE ANN. § 85.61(5) (Supp. 1955).
52 York v. City of Hazard, 191 S.W.2d 239 (Ky. App. 1946).
54 229 N.Y. 470, 128 N.E. 711 (1920).
This work environment approach was accepted by Mr. Justice Rutledge in formulating his "stress and strain" rule in Hartford Acc. & Indemnity Co. v. Cardillo, a case involving an assault caused by one employee's repeated use of the nickname "Shorty" when addressing another employee, which the other disliked. Rutledge's conception of employment included the notion that work placed men under "strains and fatigue from human and mechanical impacts, creating frictions which explode in myriads of ways . . . ." Employees do not discard their human characteristics upon assuming employment; they are accompanied by the normal human failings composited in human nature, e.g., personal animosities, funmaking, emotional flare-ups, etc. Consequently, when the accumulated pressure of work environment sets off a quarrel which leads to an assault and injury, it may be compensable as finding its cause in a risk of employment, despite the fact that the final cause is personal. Employment has sufficiently contributed to the injury.

The Cardillo rationale has been met with mixed feelings. Some courts refuse its reasoning or misconstrue it. Others not only accept it, but would extend it to formulate the "positional" or "but for" test for compensation, whereby sufficient causal connection is found in the mere fact that the employment requires the employee's presence at the place of injury. This is probably the furthest extension of the "arising out of" requisite; however, its simple requirement of locality, when met, does not preclude the establishment of other defenses by the employer, e.g., the aggressor defense, and the "personal motivation" defense. On the other hand the test would grant compensation in cases of assault by an insane person, a robber, or simply for an assault the cause of which cannot be shown. Formerly these claimants had been denied

56 Id. at 17.
57 It seems that dicta in the Cardillo case would include compensation for injuries resulting from such human characteristics as curiosity. This dicta was not followed in Hawkins v. Portland Gas Light Co., 141 Me. 288, 43 A.2d 718 (1945). But see Stewart v. Chrysler Corp., 350 Mich. 596, 87 N.W.2d 117 (1957) (dictum).
58 Goodland v. L.S. Donaldson Co., 227 Minn. 583, 36 N.W.2d 4 (1949); Fried v. U.S. Fidelity & Guaranty Co., 192 Ga. 492, 15 S.E.2d 704 (1941). In neither of these cases was the Cardillo case mentioned.
59 Brookhaven Steam Laundry v. Watts, 214 Miss. 569, 59 So. 2d 294 (1952). This court evidently considers the Cardillo holding as necessitating no causal relation between injury and employment.
62 Livingston v. Henry & Hall, supra note 61 at 895.
64 Thornton v. R.C.A. Service Co., 188 Tenn. 644, 221 S.W.2d 954 (1949).
65 Scott v. Shinn, 171 Tenn. 478, 105 S.W.2d 103 (1937).
compensation because it was felt that the employment's requirement of presence was not a sufficient connection with the injury. Further, in the case of unexplained assaults, the burden of proof is usually placed on the claimant to show such connection. Consequently, when a factual circumstance creates two inferences of equal weight, one for compensation and the other for its denial, compensation has been denied. The positional test would help strengthen the inference for recovery.

A review of the cases reflects the semantic difficulty the courts have met in describing the degree of causal connection necessary for compensation. Some courts speak of proximate cause when discussing this connection, while others phrase it as a contributing proximate cause. Another court completely rejects the proximate cause concept holding that the new standard called for in the statute ("arising out of") expresses a "factor of source or contribution rather than cause in the sense of being proximate or direct." Consequently, other courts following this reasoning, phrase the connection as "contributing cause." This latter expression seems to be consonant with the spirit of the acts, since the term "proximate" connotes common law conceptions completely foreign to the purpose of Workmen's Compensation. Yet the term "contributory" does not definitively solve the difficulty of degree.

Despite the notable theoretical advances in the courts' treatment of cases involving assaults, it must be noted that each extension is couched in the terms of the rules used in prior cases. The Champlain, Cardillo, and "positional test" cases continue to premise recovery on a "risk" of employment. Progress has been made by extending the term "risk" to include whatever wrong the court deemed necessary to compensate. Nothing but the courts' own non-volition seems to impede further extension.

The Aggressor Factor

Formerly, when it was found that the claimant was himself the motivating actor in the assault, courts stamped him as an aggressor and withheld compensation. The term aggressor, as it was first contemplated, assumed much less of an act of aggression than a physical blow; verbal epithets were sufficient to preclude recovery. Most states have specific statutory defenses precluding recovery where the injury is caused by the employee's "wilful intent to injure another" or his "wilful misconduct."

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69 Borgeson v. Industrial Comm'n, 368 Ill. 188, 13 N.E.2d 164 (1938); Scott v. Shinn, 171 Tenn. 478, 105 S.W.2d 103 (1937).
70 Hanson v. Robihshek-Schneider Co., 209 Minn. 596, 297 N.W. 19, 21 (1941).
73 See 1 Larson, op. cit. supra note 3, at 27.
There seems to be a general constraint in litigating a claim involving an off-premises aggressor. The few cases which have been reported follow the general rule. However, other cases involving an "aggressor" reflect a modern trend for compensation. An increasing number of jurisdictions have found fault with the defense and have repudiated it. Many jurisdictions retaining the defense have lightened its effect by requiring something more than abusive language or an impulsive first blow to constitute aggression. As is the usual case, some courts adhere to the old rule.

The recent growth in the number of jurisdictions rejecting the defense (all within the last ten years) reflects the strength of the trend. On the other hand, although the trend favors an abandonment of this defense, there is no indication that the wilful assailant will be compensated. Each jurisdiction, while renouncing the defense, affirms its intention to deny compensation whenever it finds wilfulness. Where there is no statutory provision, the "arising out of" criterion will work as a bar. However, a premium is placed on the violence of the act and its antecedent deliberation; a light blow will not be deemed wilful even in face of the statutory defense.

The movement then is not to recompense the wrongdoer, but simply to remove obsolete notions of common law not contemplated by the framers of the act. Nowhere in the statute does the term "aggressor" appear. For a court to use the term as an instrument to withhold compensation on the theory that the claimant "got what he was looking for" is to take a myopic view of the statute's purpose. This theory would introduce again the preventive concept of "fault" or "blame," which is precisely contrary to the legislative intent. Rather, the court should

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74 Aetna Cas. & Surety Co. v. Cazebon, 11 So. 2d 118 (La. App. 1942) (provocative words); Fried v. U.S. Fidelity & Guaranty Co., 192 Ga. 492, 15 S.E.2d 704 (1941) (although the aggressor defense was not mentioned, the facts indicate that the claimant's abusive language motivated the assault); Liberty Mut. Ins. Co. v. Reed, 56 Ga. 58, 192 S.E. 325 (1937) (employee fired pistol first during labor dispute); Wooley v. Minneapolis Equipment Co., 157 Minn. 428, 196 N.W. 477 (1923) (decedent started street brawl).


examine the factual situation to determine employment connection and ought not cease its consideration at the first instance of aggression by the claimant.

**Conclusion**

The off-premise and assault factors within this discussion present an interesting interplay between both the "out of" and "course of" criteria within the same litigation. The recent cases indicate great progress in the treatment of the assault factor through the *Cardillo* rationale and the new concept of the term "aggressor." On the other hand, the courts' treatment of the off-premise factor and its general policy relative to the "course of" requirement leave much to be desired.

It is evident that there has been a determined erosion of the traditional concept of the "course of" requirement in close cases where a strict adherence would deny compensation. Indeed, one jurisdiction would limit it to a mere aid in determining causal connection, while another removes it entirely and adds a new test. Still another jurisdiction by a peculiar analysis would remove the requirement in cases of persons assaulted because of their employment. The present disagreement seems to be indicative of each court's philosophy of the acts. Those undercutting the strict view of "course of" feel they are giving the statute the liberal construction intended by its creators. Those advocating the usual view believe the legislature alone should author such an extension. Current authorities look with disfavor upon the criterion's present construction and question its necessity. Most courts, however, have adamantly retained the older theory, evidently motivated by the parade of horribles seen in the *Lampert* case. The strong precedent of the majority indicates a change is not forthcoming.

This is unfortunate since the prevalent view of "course of" would apply the criterion as if it were in a vacuum, that is, with no relation to its twin, "arising out of." Such a view seems inconsistent with reality since the two at times are so inextricably interwoven as to appear in-

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80 Wyo. COMP. STAT. ANN. § 72-104(a) (Supp. 1957). The test here is "injuries . . . as a result of their employment." However subsequent language in the statute qualifies the test to such an extent as to bring it within the usual conception of "course of."

81 Lippman v. Workmen's Compensation Bureau, 79 N.D. 248, 55 N.W.2d 453 (1952). This statute, N.D. Rev. Code § 65-0102(8) (Supp. 1957), requires only the "course of" criterion to be fulfilled; the "out of" requirement was omitted by legislative policy. However, this court by judicial interpretation requires the fulfillment of what is usually considered the "out of" requirement alone for recovery in this area.


83 1 LARSON, op. cit. supra note 3, at 451; Horovitz, supra note 2, at 777; Rodes, Workmen's Compensation, 11 RUTGERS L. REV. 146 (1956).

84 See note 12 supra.
distinguishable.85 Also, the basic purpose of the Act—compensation for work-connected injury—would seem to warrant something more. Therefore, a sensible approach would be to formulate a conception of "in the course of" which contemplates the "out of" criterion and may be viewed in its light.

Specifically then, a distinction within the criterion itself should first be made. When a court is presented with a factual situation which indicates that the activity of the employee is totally divorced from the employment and any employment risk, the court ought then apply the criteria separately. However, if it can be seen that the employment contemplates the risk of injury when the activity of the employee is not in furtherance of the employer's business, the contrary view should be taken. For example, if A has the duty of discharging employees in X firm, and immediately before leaving for a vacation in Florida, discharges B, who in anger follows A to Florida and kills him, this injury should be compensable. It is true that A's activity in Florida does not aid X's business endeavors; however, when such activity is coupled with the risk of assault engendered from the discharge, the activity should be considered within the course of employment. The risk of injury, accompanying the employee from the usual hours and place of employment, transforms his activity wherever he travels into "course of" activity, the Lampert fear notwithstanding.86

The "out of" criterion should be treated similarly. This is exemplified by the "positional test" now employed in a number of jurisdictions to determine causality.87 This reasoning places great significance on the employee's activity at the time of injury and would permit compensation where the employment required the employee's presence at the place of the injury. Similar reasoning is employed in those jurisdictions which permit compensation when the employment presents a greater opportunity for the infliction of injury.88

One may question whether such extensions were contemplated by the authors of the acts. The underlying purpose of the acts requires an affirmative answer. The statutes were designed to compensate employees whose injuries could be attributed to the system they served, regardless of fault. Once this determination is made, the courts ought not develop stringent rules which tend to circumvent or deter the fruition of this legislation.

William J. Harte

85 RIESENFELD, MODERN SOCIAL LEGISLATION 235 (1950).
87 See note 61 supra.