



1968

Horseplay by Employees

Howard L. Oleck

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>

 Part of the [Torts Commons](#), and the [Workers' Compensation Law Commons](#)

How does access to this work benefit you? Let us know!

Recommended Citation

Howard L. Oleck, Horseplay by Employees, 17 Clev.-Marshall L. Rev. 438 (1968)

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

Horseplay by Employees

Howard L. Oleck*

A TENDENCY TO PLAY practical jokes is a characteristic that humans share with other simians, and the best joke (to anthropoids) is the *pratfall*—or the mirth aroused by the *discomfiture* of a fellow human. Nobody ever has surpassed, for bellylaugh purposes, the sight of a fellow man slipping on a banana peel, especially if the banana peel was deliberately placed so as to trip the victim. Whatever this may suggest as to the nobility of *homo sapiens*, few people will seriously deny the tendency of humans to play practical jokes on each other.

Shakespeare put it in these words: "I'll use you for my mirth, yea for my laughter. . . ." ¹ Mark Twain, that profoundly understanding student of human nature, said of it, "Everything human is pathetic. The secret source of Humor itself is not joy, but sorrow. There is no humor in heaven." ²

Rough, coarse or boisterous practical joking has been called *horseplay* since the year 1589. It was in that year that a stage play was presented in which one of the major parts was performed by an actual horse. ³ The resultant uproarious chaos on the stage (the horse not being a particularly gifted actor) inevitably was described by the theatrical critics (then, as now, eager to display *their own* literary talents) as a *horseplay*. Thereafter this felicitous term was happily applied to any kind of boisterously vulgar fun or conduct of "playful" nature—and still is so applied. ⁴

Horseplay, of course, often results in actual physical injury to the butt of the joke (no pun intended, even as to pratfalls), or at least mental embarrassment or worse mental suffering. This fact is so well known that one of the first cases recognizing the legally actionable nature of some kinds of *mental or emotional suffering* (despite the danger of fake claims) was one based on a practical joke. There, the joker amused himself by telling a woman that her husband had been badly injured in an accident, which was untrue. She suffered severe emotional shock and became very ill. The English court, outraged by such callous infliction

* Distinguished Professor of Law, Cleveland-Marshall Law School.

[Note: This is an unusual complete re-writing and expansion, into a technical law review article, of an article for laymen, on Employers' Liabilities for Horseplay by Employees, originally written by the same writer in 1966 for the Sunday Magazine Section of *The Plain Dealer* (of Cleveland).]

¹ Shakespeare, Julius Caesar, Act IV, Sc. 3, Line 49 (c. 1598-1600).

² Samuel L. Clemens, Vol. I, Pudd'nhead Wilson's New Calendar, ch. 10 (1894).

³ Onions (ed.), Oxford Universal Dictionary on Historical Principles, 924 (3rd rev. ed., with addenda, 1955).

⁴ Webster's New World Dictionary of the American Language, 702 (College ed., 1956).

of pain, awarded damages to the woman, when she later sued the comedian. This was the leading case to break through the long established refusal of courts to award damages for negligent infliction of purely mental suffering.⁵ Another typical case, in an American court, involved a plaintiff's foolish gullibility in heeding a fortune teller's story about buried treasure on her land. The defendants buried an old pot in the land, and then "discovered" it, and gave it to the plaintiff. She followed instructions found inside the pot cover, took the pot to her bank, and there opened it. The defendants had arranged for a crowd to be there, to mock and jeer the plaintiff. She sued for damages for her humiliation, and recovered judgment for her mental suffering.⁶

Planting of a false story about a man, who supposedly had committed suicide, led to the story's being passed on to the man's mother, by other people. The joker was sued for damages for negligent infliction of mental anguish, and had to pay for his joke, in a Canadian court.⁷

Reasonable foreseeability of some harm is enough to sustain tort liability, said an American court recently. In that case a man had set off a firecracker outside his mother-in-law's window, as a joke. She was startled, sprang up and ran, and tripped and fell. He was held liable for damages.⁸

The tortfeasor himself, of course, is and should be liable for negligent infliction of harm. But the problem is not so simple when third parties are involved. For example, should a city be held liable for boys' rough-housing in a municipal auditorium corridor (an impromptu hockey game) that led to a patron's being struck by a flying puck? The court said "no," as the city's agents had not had enough notice or time to put a stop to this horseplay.⁹ Similarly, a boy's camp was not held liable for some boys having suspended a bucket in a cabin roof, to fall on a victim's head, as a practical joke during an unsupervised rest period, for similar reasons of lack of knowledge of the dangerous joke.¹⁰

In a different vein, a court held that a girl riding in an automobile was not guilty of contributory negligence as a matter of law, in not strongly resisting the male driver's sudden kissing of her cheek while he was driving. This was a question for the jury, said the court, as to her

⁵ *Wilkinson v. Downton* (1897), 2 Q.B.D. 57. And see, for very similar facts and decision, *Savage v. Boies*, 77 Ariz. 355, 272 P. 2d 349 (1954).

⁶ *Nickerson v. Hodges*, 146 La. 735, 84 S. 37, 9 A.L.R. (1920); Noted, 34 Harv. L.R. 337 (1920).

⁷ *Bielitzki v. Obadisk*, 15 Sask. 153, 65 D.L.R. 627, 23 A.L.R. 351 (1922); Noted, 22 Columbia L.R. 86 (1922); 35 Harv. L.R. 348 (1922).

⁸ *Slaughter v. Slaughter*, 142 S.E. 2d 683 (No. Car. 1965). And see (sudden sounding of auto horn in driveway is actionable) *Brouillette v. City Bldg. Supply*, 174 S. 2d 658 (La. 1965).

⁹ *Aaser v. City of Charlotte*, 144 S.E. 2d 610 (No. Car. 1965).

¹⁰ *Kosok v. Y.M.C.A. of Greater N.Y.*, 264 N.Y.S. 2d 123 (1965).

alleged contributory negligence; though the driver's antic clearly was negligent.¹¹ So, too, a "humorous" cutting-off of another car by a driver did not amount to *intention* to cause the resulting accident, but was negligence to which automobile liability insurance would apply.¹²

The Master and Servant Cases

A principal type of practical joke (horseplay) injury is that caused by workmen trying to lighten the dull routine of work by playful fun making. This involves the well established liability of a master for the torts of his servant done *in the course and scope of the employment*.¹³ It also involves the well-known limitation on *respondeat superior* that results when an employee in effect abandons his employment by making a *detour* from his business route, or by engaging in "a frolic of his own."¹⁴ This body of law has been greatly limited and changed (but not totally abolished) by enactment of statutes, such as workmen's compensation laws, that impose liability on the employer for almost anything done in the course and scope of employment.¹⁵ And, of course, old master-and-servant law still applies to many classes of cases which are excluded from (or not covered by) workmen's compensation rules.¹⁶

The nature of the impact of workmen's compensation law on a master's liability for torts of his servant is clearly indicated by a Pennsylvania decision of 1965. Pennsylvania's courts are hardly noted for their forward-looking or paternalistic tendencies regarding working people. In this case an employee, fired from his job, shot and killed the foreman who had discharged him. This murder was done during business hours, at a pier used by the company (a stevedore company) for employment "shape-ups." This certainly was "a frolic of his own" of the employee who did the shooting. Nevertheless, the victim's widow was granted compensation, as for an injury suffered in the course and scope of employment. Or, put otherwise, the murderous employee's act was not held to be abandonment of his employment such as to relieve the

¹¹ *Hodges v. Nofsinger*, 183 S. 2d 14 (Fla. 1966).

¹² *Murray v. Landenberger*, 5 Ohio App. 2d 294, 215 N.E. 2d 412 (1966).

¹³ For full discussion and cases, see, Prosser, *Torts*, 472 et seq. (3rd ed., 1964); *Restatement of Agency* (2d) 220 (1) et seq.; Anno., 19 A.L.R. 226 (1922); 20 A.L.R. 684 (1923); 75 A.L.R. 725 (1931).

¹⁴ *Joel v. Morrison* (1834), 6 C.&P. 501, 172 Engl. Rep. 1338; *op. cit. supra*, n. 13; James, *Vicarious Liability*, 28 *Tulane L.R.* 161 (1954); Tiffany, *Agency* 106 (2d ed. 1924); Smith, *Frolic and Detour*, 23 *Columbia L.R.* 444, 716 (1923).

¹⁵ See, generally, Schneider, *Workmen's Compensation* (3rd ed., 1939, plus supplements to date) 16 vols.; Larson, *Workmen's Compensation* (1952, plus supplements to date) 2 vols.; Somers & Somers, *Workmen's Compensation* (1954).

¹⁶ See, Prosser, *Torts*, 556 et seq. (3rd ed., 1964) for various illustrations and citations, including such other, special statutes as F.E.L.A. or railroad statutes and the like. And see, as to the Federal Employer's Liability Act, Richter & Forer, article, 67 *Harv. L.R.* 1003 (1954); McCord, *The Federal RR. Safety Acts & the F.E.L.A.*, 17 *Ohio St. L.J.* 494 (1956).

employer of liability. It was enough that the foreman was shot while "on the job."¹⁷

The unpredictability of court decisions in horseplay cases is well illustrated by a rather ribald incident from Wisconsin:

A man was standing on the running board of a truck which was going thirty miles an hour. He was shouting, "Look! No Hands!" and he was urinating. Suddenly the truck hit a bump and he was pitched off. He was badly injured. A few days later he filed a claim against his boss, for workmen's compensation.

"We certainly won't pay," said the boss. "You were violating not one but two criminal statutes, aside from being an absolute damfool, when you got hurt. It is against the law to stand on the running board of a moving truck. And what you were doing violated the law against indecent exposure. Do you expect to get paid for that?"

So this fellow sued him, and the high court of the State of Wisconsin said solemnly, "Yes. In answering a call of nature, an employee does not take himself out of the course of his employment."¹⁸

Injuries to innocent bystanders who are *outsiders*, caused by horseplay of employees at or near their work, are not common, but they do occur. For example, in an Indiana case, several employees were outside the plant where they worked, during their lunch hour. They knocked down a passing pedestrian while they were rassing around. The boss was not required to pay damages to the pedestrian. The workmen clearly were "off on a frolic of their own."¹⁹

Cases of office workers shooting paper clips with rubber bands, and injuring their own eyes with rebounds, seem to occur constantly. Workmen's compensation may be granted today, though the injuries nearly amount to self-inflicted wounds.²⁰

Horseplay cases usually involve thoughtless playfulness on the job—momentary foolery to relieve the tedium of work—with unexpected disaster following. For instance, men working with airhoses seem to be fascinated by their potential for fun. Skylarking with airhoses seems to occur often. In an Arkansas case, two men were cleaning out a soybean storage shed, using an airhose. One of them, in the delicate language of the Arkansas court, "introduced air into the body" of the other, causing death. Funneeee! The dead man's widow was granted death benefits under the workmen's compensation law. In a very similar 1962 New York case, an airhose was similarly used in lunch hour horseplay. The less chintzy New York court bluntly said that air had been shot into the

¹⁷ Cox v. Universal Terminal & Stevedoring Co., 212 A. 2d 909 (Penna. 1965).

¹⁸ Karlslyst v. Industrial Commission, 11 N.W. 2d 179 (Wis. 1943).

¹⁹ Reinhart v. Ideal Pure Milk Co., 193 N.E. 2d 655 (Ind. App. 1963).

²⁰ Matter of Johnston v. Lowe's, Inc., N.Y. App. Div., 3rd Dept., Apr. 28, 1960, reported in N.Y. Times, p. 1 (Apr. 29, 1960) (3 to 2 decision). *Contra*: Horn v. Broadway Garage, 186 Okla. 535, 99 P. 2d 150 (1940).

victim's anus, causing perforation and death. Compensation was awarded here, too, even though the aggressor in the horseplay had become the victim. Both deaths were held to have been suffered "in the course and scope of the employment."²¹

The idea is that a certain amount of relaxation from strict attention to the job is a necessary and tolerable thing, even if it is rough, coarse or boisterous play.

A very common practical joke is the pulling of a chair out from under somebody who is about to sit down. The not-very-noble human animal gets a big kick out of seeing a fellow human fall on his rump. The pratfall is standard American humor.

In a Michigan case an employee pulled a chair out from under a buddy on the job. The victim suffered unfunny injury as a result. The boss knew of the comedian's tendency to play practical jokes, from prior incidents, but had kept him on just the same. The court held the employer liable for failure to assure the injured man "a safe place to work."²²

But in another chair-pulling case, in Missouri, in the same year, the boss was not held liable. Here, a salesman of his, while calling on a customer, was dumped by a newsboy at the office of the customer. Certainly a salesman making a business call would seem to be "in the course of his employment." "True, true," said the court, "but the injury was not one *arising out of the employment*." No compensation was allowed. If this seems a rather subtle distinction, cheer up, you have lots of company.²³

In early workmen's compensation laws, injuries caused by horseplay did not qualify a worker for compensation. Mishaps caused by machines could qualify as accidents, but not those caused by fellow-employees. Just as *intentional* assaults by co-employees usually were ruled out as personal matters, so were playful injuries.

Assault "frolics" are particularly confusing. In a 1965 Georgia case a worker quarreled with a co-worker, and shot him. The claimant was not the aggressor, and was granted compensation benefits.²⁴ A Kentucky court held likewise,²⁵ and so did a Pennsylvania court,²⁶ and a Massa-

²¹ *Piatek v. Plymouth Rock Provision Co.*, 15 A.D. 2d 405, 224 N.Y.S. 2d 634 (1962); *Southern Cotton Oil Div. v. Childress*, 377 S.W. 2d 167 (Ark. 1964). And for other airhose cases, see, *Larson, Workmen's Comp.*, § 23.50, n. 25, 26 (1966 rev.).

²² *Dull v. N.Y.C. R.R.*, 196 F. Supp. 120 (D.C. Mich. 1961). And see, *Loftus, Employer's Duty to Know Deficiencies of Employees*, 16 Clev-Mar. L. R. 143 (1967).

²³ *Gregory v. Lewis Sales Co.*, 348 S.W. 2d 743 (Mo. App. 1961).

²⁴ *Commercial Construction Co. v. Caldwell*, 140 S.E. 2d 298 (Ga. 1965).

²⁵ *Hall v. Clark*, 360 S.W. 2d 140 (Ky. 1962).

²⁶ *Dolan v. Linton's Lunch*, 152 A. 2d 887 (Penna. 1959).

chusetts court.²⁷ But Tennessee²⁸ and New York²⁹ courts said that an assault is a purely personal project, not part of the course and scope of employment ordinarily.

In the celebrated New York case of *Leonbruno v. Champlain Silk Mills*, the great Justice Cardozo, in 1920, began the modern view of horseplay injury cases. He viewed them as an inevitable part of work, especially group work in factories, saying:

Whatever men and boys will do, when gathered together in such surroundings, at all events if it is something reasonably to be expected, was one of the perils of his service. . . . The claimant was injured, not merely while he was in a factory, but because he was in the factory, in touch with associations and conditions inseparable from factory life. The risks of such associations and conditions were risks of the employment.³⁰

Soon afterward, in another New York case, the rule was limited to injuries to *victims* of horseplay. An aggressor, or *instigator* of horseplay was barred from compensation if he got hurt. And this is still the rule in many (probably in most) states.³¹

Predictability is a major factor. Human curiosity, for example, is something that an employer ought to expect, and ought to guard against. In a South Carolina case a garage attendant, washing a sheriff's car, found in it what looked like a fascinating kind of billy club. He plucked at a cotter pin in it. When the pin came out he soon discovered what the thing was. It was a tear gas bomb that went off and nearly blinded him. He was awarded compensation because curiosity about strange objects was something to be expected; but an exactly similar occurrence in Wisconsin resulted in denial of workmen's compensation benefits.³²

A "deviation" from work, of course, may amount to abandonment of employment (and thus, of employee benefits). A worker hardly can be said to have "abandoned the employment" in many such situations, when the deviation is brief. But it is something else again, if his action can reasonably be described as "a frolic of his own." If he distinctly has forgotten all about the job, and is off on a project of his own, he will get no compensation if an injury occurs. For example, a Kentucky bartender got into an argument with a customer about who was the smartest one in the tavern. They started an I.Q. test of their own, and the

²⁷ *Rego v. Thomas Bros. Corp.*, 164 N.E. 2d 144 (Mass. 1960).

²⁸ *White v. Whiteway Pharmacy*, 360 S.W. 2d 12 (Tenn. 1962).

²⁹ *Matter of Pryor v. Presbyterian Home for the Aged*, 9 N.Y. 2d 869, 175 N.E. 2d 823 (1961).

³⁰ *Leonbruno v. Champlain Silk Mills*, 229 N.Y. 470, 128 N.E. 711 (1920).

³¹ See cases and discussion in, 2 *Larson, Workmen's Compensation*, Secs. 23.20 et seq. (1961, with 1968 cum. supp.); 99 C.J.S., Sec. 225, *Skylarking and Practical Joking*. And as to the view of "aggressors" in assault cases, see *supra*, n. 24-29.

³² *Maahs v. Industrial Comm.*, 130 N.W. 2d 845 (Wis. 1964).

minion of Bacchus won. But the patron was a sore loser and invited the barkeep outside for a continuation of the debate about who was the best man. In the exchange outside, the bartender was badly mauled. He filed a claim for workmen's compensation. No award was granted. He was "off on a frolic of his own" and had abandoned his employment.³³

When a volunteer fireman fooled around with a visiting fire chief who also was the town policeman, he brushed the chief's cheek playfully with a piece of paper and then stuffed it into the chief's pocket. The chief was a good sport and playfully pulled his gun, which he also brandished playfully. It fired, and the fireman was hit. Even though he was the instigator, he got a compensation award.³⁴

But in another case, in a Miami city office building an employee saw a policeman take off his gun belt, remove the bullets from the gun, and leave the weapon on a table while he went to another room. The employee picked up the gun and amused the rest of the office help by playing Russian Roulette with the empty gun. He put no bullets into the gun. However, the officer had missed one while emptying the gun. Our hero blew his own brains out, and his widow filed a claim for death benefits. No award was granted. He had abandoned his employment, said the Florida court.³⁵

"Course and scope" clearly were exceeded when a ranch worker trespassed into the owner's home, found an "aerosol" can, opened it out of curiosity, and had one eye blinded by a squirt of cleaning fluid from the can.³⁶

Too much is too much. An executive in a New York hotel on a business trip, picked up a couple of babes in the cocktail lounge, got gassed with them, and then showed off by walking on the lobby balcony rail. He fell into the lobby, doing himself no good at all, and then filed a claim for workmen's compensation. That definitely was not in the course and scope of his employment, according to the New York court.³⁷

But, contrariwise, a Connecticut workman who was teased by his supervisor, who called him "a queer," promptly belted the foreman. He was just as promptly canned by the roguish straw boss, and filed a claim for unemployment compensation. He got it, too. The court said that his reaction was a natural impulse, and not deliberate abandonment of the job.³⁸

In one rather extreme case, an Illinois court said that a hotel was liable for the conduct of a bellhop who often got juiced while on the job,

³³ *Creekmore v. Workmen's Comp. Board*, 382 S.W. 2d 196 (Ky. 1964).

³⁴ *County Comr's. of Anne Arundel County v. Cole*, 206 A. 2d 553 (Md. 1965).

³⁵ *City of Miami v. Granlund*, 153 S. 2d 830 (Fla. 1963).

³⁶ *Callahan v. Martin K. Eby Construc. Co.*, 391 P. 2d 315 (Kans. 1964).

³⁷ *Hancock v. Ingersoll-Rand Co.*, 249 N.Y.S. 2d 243 (App. Div. 1964).

³⁸ *Guest v. Admin., Unemploy. Comp. Act, Conn.*, 174 A. 2d 545 (Conn., 1961).

as the manager well knew. The hotel did not fire him, and one day he took a passkey, while thoroughly tanked, went into the room of a lady guest, and got fresh with her. Well, not exactly *fresh*; he raped her. She sued the hotel. You would think that this was "a frolic of his own," if ever there was one. But the court said that the employer who overlooks continued misconduct of an employee should foresee an ultimate mess, and should be held responsible for it.³⁹

The better view of the employer's knowledge of employees' propensities seems to be that of New York, of which it was said (in a fire-cracker case):

. . . In some jurisdictions, particularly New York, a participant may recover if the horseplay was a regular incident of the employment as distinguished from an isolated act. The question is "whether claimant's act—which resulted in his injury—was a single, isolated act or one of a series of similar incidents generally participated in, to the employer's knowledge, by employees, sufficient to regularize such conduct and stamp it as part and parcel of the employment." *Ognibene v. Rochester Mfg. Co.*, 298 N.Y. 85, 80 N.E. 2d 749, 750, noted 34 Corn. L.Q. 460; *Larson, Workmen's Compensation Law*, Sec. 23.41. The employer's knowledge of the practice, actual or constructive, is important. Liability under the Workmen's Compensation Act is not based on the negligence of the employer in failing to stop the horseplay. The knowledge or acquiescence in the practice is material only as it sheds light upon the question of whether the injury may be said to arise out of the employment. If the employer could reasonably expect, with his knowledge of the situation, that an injury might result to an employee from the horseplay, the injury may be said to arise out of the employment. . . .⁴⁰

A Kentucky court put the same problem this way (where a store attendant poured lighter fluid on a sleeping customer, and then set it afire):

. . . This case is not within the principle, as the appellant contends it is, that a master is not legally liable for a wrongful act of his servant which was outside the scope of his employment or not within the contemplation or the service of his employment. The case is under the rule that where an employer leaves one in charge of his business during his absence and that one wrongfully does something to injure a patron, which the employer has reason to know he may do, the employer is liable therefor. He is deemed to have delegated his obligation to protect and not to harm the patron. The appellant's liability clearly comes within the latter rule. . . .⁴¹

³⁹ *Danile v. Oak Park Arms Hotel, Inc.*, 203 N.E. 2d 706 (Ill. App., rehearing denied 1965). And see the Loftus article, *op. cit. supra* n. 22, as to an employer's duty to know his employees' deficiencies.

⁴⁰ *Hayes Freight Lines v. Burns*, 290 S.W. 2d 836 (Ky. App., 1956); cf., *Socha v. Cudahy Packing Co.*, 13 A.L.R. 513; 58 Am. Jur., *Workmen's Compensation*, Sec. 269; Anno., 159 A.L.R. 319, 337.

⁴¹ *Spears v. Burchett*, 289 S.W. 2d 731 (Ky. App. 1956); Anno., 40 A.L.R. 1333.

Some courts view almost any horseplay as abandonment of employment, sometimes. They say that *any* such conduct is purely personal, and not binding on the employer.⁴²

But these cases usually involve the question of whether or not the employer knew, or reasonably should have known, of horseplay tendencies, and had reasonable opportunity to do something about it.⁴³ Where an employer had forbidden horseplay, and a worker "goosed" a co-worker who then hit him with a hot scraper, nevertheless compensation was granted to the aggressor.⁴⁴

In a burn case in New Jersey, one man in a factory squirted water on another, and the other threw lacquer thinner back, without thinking. A nearby flame ignited the playful fellow. But he received workmen's compensation, even though he was the instigator.⁴⁵

Gas station antics were involved in a Georgia case, where the station attendants were whooping it up and shouting; to attract cars in, they said. One passing motorist, distracted by the uproar, piled up his car, and sued the station owner. No, said the court, the owner could never have foreseen such wild goings on.⁴⁶

In instigator-injuries, most states allow awards where the boss tended to tolerate horseplay. In a New York case a group of waiters in a restaurant were in the habit of playfully jostling each other as they passed and repassed the door between the kitchen and the dining room. The boss had never raised any objection, seeming to think the frolicking to be good for morale. Eventually one of the waiters was stabbed by a knife which was in a tray carried by one of the playful garçons. He got workmen's compensation.⁴⁷

If the kind of work being done is pretty sure to lead to horseplay, the boss usually is liable even for the first bit of rough-housing. When a Michigan grower hired a bunch of young boys to pick ripe tomatoes, it took no crystal ball to foresee that sooner or later a tomato would be thrown.⁴⁸ In a Colorado case some pistol-packing ranch hands were playfully teased into a quick-draw match. The instigator drew his gun so

⁴² Great A. & P. Tea Co. v. Aveilhe, 116 A. 2d 162 (Mun. App., D.C.); and see, 57 C.J.S., Master and Servant, Sec. 574c, p. 327; Restatement, Agency Sec. 235(a); and many cases cited in principal case.

⁴³ Evanish v. V.F.W. Post No. 2717, 130 N.W. 2d 331 (Minn. 1964) (firecracker thrown by bartender); and, matter of Bennett v. Dreier Steel Co., Inc., 9 N.Y. 2d 668 (1961), affg. 8 A.D. 2d 178; but see Larson, *op. cit. supra*, at § 11.32 (b).

⁴⁴ McKenzie v. Brixile Mfg. Co., 166 A. 2d 753 (N. J. 1961), affg. 161 A. 2d 276 (N.J. App. 1960).

⁴⁵ Diaz v. Newark Industrial Spraying, Inc., 159 A. 2d 462 (N.J. App. 1960).

⁴⁶ Gulf Oil Corp. v. Johnson, 140 S.E. 2d 857 (Ga. 1965).

⁴⁷ Industrial Commr. v. McCarthy, 295 N.Y. 443, 68 N.E. 2d 434 (1946).

⁴⁸ Crilly v. Ballou, 353 Mich. 303, 91 N.W. 2d 493 (1958).

fast that he shot himself. This was so silly that no compensation was allowed.⁴⁹

In the same vein, a South Carolina court held the boss to be not liable when his workmen, fixing a coin-operated machine at a restaurant, put a cage outside with a sign on it: "Danger, Mongoose," and turned a trick mongoose loose on a patron, scaring her into fits. This was a departure from employment, said the court, and practically an assault; so the boss was not liable.⁵⁰

In a Kentucky case, an old customer of a store came in and, for fun, shouted "This is a holdup." The store employee reacted like a mongoose—sprang for a gun, and shot the comedian. The store owner was held liable.⁵¹

It's kind of confusing, isn't it! If there is one thing that the average man wants to see in a law, it is clarity. How can people obey the law if nobody knows what it is? That "course and scope of employment" bit sounds reasonable and simple; only it ain't, as you can plainly see.

The main idea of the better rule seems to be that sportive conduct by employees will be viewed as a natural part of the job, if it somehow seems clearly related to the employment. In fact, victimization by pranks is recognized as an almost inevitable part of holding down a job.

Liquor, the most potent stimulant of foolishness known to man (next to sex), led to two other cases in New York, in the same year, that neatly split the legal hair of "employment." In one, at an end-of-run cast drinking party in a theatre, a dancer was injured by a drunk and was awarded compensation.⁵² In the other, at an office Christmas party, two employees had a drinking contest and one drank himself to death. The trial court refused to grant death benefits to his widow, saying that such concentrated guzzling was too personal a project to qualify as part of the employment. But the appellate court reversed this blue-nosed opinion.⁵³

Curiosity also may be tolerable, on the job. So said a Maryland court when a girl, sent aboard a ship to do some work, became curious about a hole in the cabin wall. She looked into it, just in time to have a dumbwaiter therein descend on her noggin. She was awarded workmen's compensation.⁵⁴ But an employee's visit to see a new company lounge under construction was held to be deliberate abandonment of

⁴⁹ McKnight v. Houck, 286 P. 279 (Colo. 1930).

⁵⁰ Lane v. Modern Music, Inc., 136 S.E. 2d 713 (So. Car., 1964).

⁵¹ Frederick v. Collins, 378 S.W. 2d 617 (Ky. App. 1964).

⁵² Ex rel. John Martin v. C. A. Production Co., N. Y. App. Div., 3rd Dept., Aug. 13, 1959, reported in N. Y. Times, p. 12 (Aug. 14, 1959).

⁵³ Herman v. Greenpoint Barrell & Drum Reconditioning Co., 7 N.Y. 2d 786, 163 N.E. 2d 343 (1959).

⁵⁴ Bethlehem Steel Co. v. Parker, 64 F. Supp. 615 (D. C., Md., 1946).

employment, in the same state.⁵⁵ Make sense out of that contradiction, if you can.

Michigan held the throwing of a firecracker by an employee to be not course of employment, when the noise deafened a fellow worker; and an insurance policy was said to be not applicable to such injury.⁵⁶ And a worker deliberately jaywalking across a busy street, from the company parking lot to the office entrance, and getting clobbered by a car, was said to be not in the course of employment, in Georgia.⁵⁷

Some cases are hard to swallow—like the Minnesota decision that a public skating rink operator had no particular duty to have its employees stop boys from “horsing around” by playing rough-house hockey on the ice⁵⁸; or, the Louisiana benevolence towards a swimming pool lifeguard who was too careless to stop swimming races that caused injury to a non-participant.⁵⁹

More often, today, employers feel that they must tolerate workers' foolery and carelessness. As to workmen, it surely is true that “a good man, nowadays, is hard to find.” This is why, for example, a stupid employee's throwing of his drink into a co-worker's face was deemed quite alright, even though he was pushed through a glass door in reprisal. These were ranch hands in a California bunkhouse—and permissiveness seems to be the rule of the day, especially in golden California.⁶⁰

It now seems that refusal of benefits to the *aggressor* is on the way to becoming the minority view.⁶¹ Even in the usually conservative southern states, the aggressor in horseplay injuries now usually is treated as having suffered injury “in the course and scope of employment,” and gets compensation.⁶² The same is true of minor deviations from the job, such as “quick-draw” contests of policemen⁶³; but not for even minor disobedience of instructions, such as riding in an elevator (for curiosity) where a house cleaner had been told to stay only in areas designated for his cleaning work assignment.⁶⁴

It seems that what is really in the minds of the judges is the question whether or not an injured employee quite clearly had brought his fate

⁵⁵ Coates v. J. M. Bucheimer Co., 218 A. 2d 191 (Md. 1966).

⁵⁶ Morrill v. Gallagher, 122 N.W. 2d 687 (Mich. 1963).

⁵⁷ Pacific Indemnity Co. v. Eberhardt, 130 S.E. 2d 136 (Ga. App. 1963).

⁵⁸ Diker v. City of St. Louis Park, 130 N.W. 2d 113 (Minn. 1964).

⁵⁹ Benoit v. Hartford Acc. & Indem. Co., 169 S. 2d 925 (La. 1965).

⁶⁰ Argonaut Insur. Co. v. Workmen's Comp. Appeals Board, 55 Cal. Rptr. 810 (Cal. App. 1967).

⁶¹ See, Taylor v. Traders & Genl. Ins. Co., 164 S. 2d 905 (Miss. 1964); Southern Cotton Oil Co. v. Childress, 377 S.W. 2d 167 (Ark. 1964); Mercier's Case, 214 N.E. 2d 279 (Mass. Super. 1966); and see cases cited in 1 Larson, Workmen's Compensation, § 23.50 et seq. (1968 suppl. cases). But see, below, the still-prevailing view (e.g., as in Ohio), that refusal of benefits to the aggressor is the majority rule.

⁶² Ibid., and see, Ransom v. H. G. Hill Co., 326 S.W. 2d 659 (Tenn. 1959).

⁶³ Employers Liab. Ins. Corp. v. Dull, 415 P. 2d 821 (Alaska 1966).

⁶⁴ Hills v. Servicemaster of Conn. River Valley, Inc., 230 A. 2d 604 (Conn. 1967).

on himself. This is the same kind of thinking that used to bar an award to the *instigator* of skylarking on the job. But if horseplay is recognized as natural and inevitable, why penalize the victim for doing what the law expects him to do and allows him to do? The purpose of compensation law is to protect workers from the dangers inherent in modern group work, including the dangers caused by the nature of man himself.

Science says that man is descended from the monkeys, the great jokers of the animal kingdom. We should not be at all surprised that men are fond of fun, play and *horseplay*. We certainly ought not to penalize them for inevitably following what is one of their best instincts—the instinct for fun and laughter.

Of course, an employee or outsider can sue the employee whose foolish action injured him, under the law of most states. But such lawsuits are rare. The employer, and his insurance company, are much more likely to be financially able to pay. Anyhow, the cost of insurance is passed on to the consumer in higher prices of goods and services.

The law as to horseplay, that used to protect the boss, now is tending to protect the employee, even where the worker has been such a damfool that most people would have no sympathy for him. But many courts still say that the ultimate in social protectiveness is a rule that even asinine horseplay on the job may be covered by workmen's compensation, or by liability of the boss if outsiders are injured.

Ohio's decisions typify the schizophrenic view of employees' horseplay that still is followed by the majority of the states; that is, that horseplay injury on the job generally is compensable as to innocent workers but not as to the aggressor or instigator employee.⁶⁵ Curiously, the early Ohio cases said that sportive acts are a normal part of the environment of workmen on the job, and thus *do* entitle them to compensation if injury results.⁶⁶

But since 1934 Ohio has taken a quite puritanical view. In that year, an Ohio appellate court ruled that sportive acts are *not* part of the job, and no compensation will be granted if injury results. In that case, two freight handlers, waiting for more freight to be handled by them, fooled around by throwing each other's hats on the ground. Then, in one grab at a hat, the victim's eye was scratched, and he lost the sight of that eye. No award was allowed.⁶⁷

Thereafter, the Ohio decisions became even more bluenosed. A friendly boxing scuffle by co-workers, in a 1939 case, begun in fun, degenerated into a fight in earnest, and ended with the stabbing of one of the men. No workmen's compensation benefits were allowed.⁶⁸ A de-

⁶⁵ Annot., 99 C.J.S. 225, Skylarking and Practical Joking.

⁶⁶ East Ohio Gas Co. v. Coe, 42 Ohio App. 334, 182 N.E. 123 (1932).

⁶⁷ Industrial Comm. v. Bankes, 127 Ohio St. 517, 189 N.E. 437 (1934).

⁶⁸ Williams v. Industrial Comm., 63 Ohio App. 66, 25 N.E. 2d 315 (1939).

parture from routine was held to be abandonment of the job, and not covered by workmen's compensation.⁶⁹ A small airline's pilot who "buzzed" a boat in order to break the droning monotony of an over-water flight, and crashed in the process, more recently, was held to have abandoned his employee rights by this sportive deviation from routine chauffeuring.⁷⁰ And this same disapproving view of human foibles has been followed in other Ohio cases.⁷¹

Northern Ohio, particularly, which was settled by Connecticut Yankees, still usually clings to the early New England view of stiff sobriety as virtue and of gayety as a product of the devil. This anachronism is all the more curious in that so many northern Ohio people today are descendants of eastern and southern European immigrants or of southern Negroes, or are themselves immigrants of both types. Apparently, in their zeal to adapt to the local environment, the newcomers outdo the old inhabitants in their zealous affirmation of the self-righteous *Puritan Ethic* of the transplanted early New Englanders.

It is odd, indeed, that the more compassionate and tolerant view of human nature (especially of workmen's propensities) should develop in the southern states primarily, as has been happening recently. The south, usually viewed as positively reactionary, let alone conservative, is more humane and kindly in this respect than the north which boasts of its liberal atmosphere.

In the last analysis, the famous old test of whether or not the employee was off "on a frolic of his own"⁷² is only part of the test of employee status in a horseplay case. Really, it boils down to whether or not the risk of such a deviation from routine work ought to have been considered to be a part of the enterprise.⁷³ It has been suggested that modern insurance coverage has much bearing on the question, but that is only a side issue.⁷⁴ Simple, reasonable knowledge of human nature, and of the degree of temptation to "goof-off" in a particular kind of work or situation, might be better tests. But the best test of all is that of *human nature alone*. That test tells us, clearly, that man's propensity for horseplay is universal and omnipresent. It never really ought to surprise any employer. Therefore, it is an inherent part of almost any employment of almost any human being. There is no such thing as "unexpected horseplay."

⁶⁹ *Ashbrook v. Industrial Comm.*, 136 Ohio St. 115, 24 N.E. 2d 35 (1939).

⁷⁰ *Ruffi v. American Fly Away Service*, 104 N.E. 2d 37 (Ohio App., 1950).

⁷¹ *Rogers v. Allis-Chalmers Mfg. Co.*, 153 Ohio St. 513, 92 N.E. 2d 677 (1950), 18 A.L.R. 2d 1363; *Thornberry v. Oyler Bros. Inc.*, 164 Ohio St. 395, 131 N.E. 2d 383 (1955).

⁷² *Baron Parke*, in *Joel v. Morrison* (1834), 6 C. & P. 501, 172 Eng. Rep. 1338.

⁷³ *Ryan v. Western Pacific Insur. Co.*, 242 Ore. 84, 408 P. 2d 84 (1965).

⁷⁴ *Morris*, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 Yale L. J. 554 (1961).