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Horseplay by Employees

Michael Kaye*

THE TREND OF AUTHORITY is strongly in favor of eliminating the aggressor defense from Workmen's Compensation law.¹ The instigator, like the victim or participant in horseplay, is now likely to be compensated for his injuries resulting from sportive acts. This is looked on by the law as a reasonable consequence of the natural conditions of employment rather than as a deviation.² "Horseplay" is the colloquial term referring to sportive and playful acts often used legalistically to describe the conduct of employees who skylark or prank, doing injury to themselves or to others.³ Sportive conduct includes assaults with or without an instrumentality furnished by the employer,⁴ dur-

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¹ McCoy v. Easley Cotton Mills, 218 S. C. 350, 62 S. E. 2d 772 (1950); Joe N. Miles and Sons v. Myatt, 215 Miss. 589, 61 So. 2d 390 (1952); Newell v. Moreau, 94 N. H. 439, 55 A. 2d 476 (1947); Martin v. Snuffey's Steakhouse, 46 N. J. S. 425, 134 A. 2d 789 (1957); Verschleiser v. Joseph Stern Son, Inc., 229 N. Y. 192, 128 N. E. 126 (1920); Petro v. Martin Baking Co., 239 Minn. 307, 58 N. W. 2d 731 (1953); Ransom v. H. G. Hill Co., 205 Tenn. 377, 326 S. W. 2d 659 (1959); Malthais v. Equitable Life Ass. Soc., 93 N. H. 237, 40 A. 2d 837 (1944); Swift and Co. v. Industrial Comm., 287 Ill. 564, 122 N. E. 796 (1919); Conrad v. Cook-Lewis Foundry, 198 N. C. 723, 153 S. E. 266 (1930); Southern Cotton Oil Division v. Minnie Lee Childress, 237 Ark. 909, 377 S. W. 2d 167 (1964); Montpetit v. Standard Shade Roller Corp., 100 N. Y. S. 2d 640 (App. Div. 1950); Sinko v. Bethlehem Steel Co., 104 Pa. Super. 357, 159 A. 230 (1932); Piatek v. Plymouth Rock Provision Co., 15 App. Div. 2d 405, 224 N. Y. S. 2d 634 (1962).

² Secor v. Penn Service Garage, 19 N. J. 315, 117 A. 2d 12 (1955); East Ohio Gas Co. v. Coe, 42 Ohio App. 334, 182 N. E. 123 (1932); Crilly v. Ballou, 353 Mich. 303, 91 N. W. 2d 493 (1958); Piatek v. Plymouth Rock Provision, *supra* n. 1.

³ Hazelwood v. Standard Sanitary Mfg. Co., 208 Ky. 618, 271 S. W. 687 (1925); Blaine v. Huttig Sash and Door Co., 232 Mo. App. 870, 105 S. W. 689 (1926); Hughes v. Tapley, 200 Ark. 739, 177 S. W. 2d 429 (1944); McCoy v. Easley Cotton Mills, *supra* n. 1; J. C. Hamilton Co. v. Bickel, 174 Okla. 32, 49 P. 2d 1065 (1935); Michaux v. Gate City Orange Crush Bottling Co., 205 N. C. 786, 122 S. E. 406 (1934); Cassel v. United States Fidelity and Guaranty Co., 115 Tex. 371, 283 S. W. 127 (1926); Staten v. Long-Turner Construction Co., 185 S. W. 2d 375 (Mo. App. 1945); Tyler-Couch Construction Co. v. Elmore, 264 S. W. 2d 56 (Ky. 1954); Leonbruno v. Champlain Silk Mills, 229 N. Y. 470, 128 N. E. 711 (1920).

⁴ Ford v. United Fruit Co., 171 F. 2d 641 (9th Cir. 1948); United States Casualty Co. v. Hampton, 293 S. W. 260 (Tex. 1927); Chambers v. Union Oil Co., 199 N. C. 28, 153 S. E. 594 (1930); Hayes Freight Lines, Inc. v. Burns, 290 S. W. 2d 836 (Ky. 1956); Allsep v. Daniel Construction Co., 216 S. C. 268, 57 S. E. 2d 427 (1950); Southern Cotton Oil Division v. Minnie Lee Childress, *supra* n. 1; Diaz v. Newark Industrial Spraying, Inc., 60 N. J. S.

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ing actual working hours or in periods of enforced idleness,⁵ before or after the close of the working day.⁶

The current position of the courts in deciding cases of horseplay reveals an increased understanding of the meaning of Workmen's Compensation statutes as social legislation creating new substantive rights and not merely affording new remedial rights for old substantive rights.⁷ In *Crilly v. Ballou*⁸ a teenage claimant who had lost an eye through his horseplay while at work on a roofing and siding job was compensated. In observing that Workmen's Compensation rests on the idea of status, not implied contract, and in noting that the consuming public, not charity, must foot the bill for injuries incurred in industry, the court did not bar recovery because of the "mere human failings of the workmen." The court rejected the defense that the injury was not in the scope of employment.⁹ Course of employment describes life in the industrial age and involves the conditions and relationships which produce a product. This includes the effect of the environment on the employee.¹⁰

In the case of *Malthais v. Equitable Life Assurance Society*,¹¹ the claimant of a decedent who, in initiating horseplay with an airhose, caused his own death, received an award because death was held to be the result of a risk incident to the conditions of employment. Instigation of horseplay was not such serious misconduct as to take it out of the statute.

The "in-the-course" approach was adopted in the recent Tennessee case of *Ransom v. H. G. Hill Company*.¹² The instigator of horseplay recovered, as his act was held to be an insubstantial deviation and the result of conditions of environment. Conditions of employment which induce horseplay are not lim-

(Continued from preceding page)

424, 159 A. 2d 462 (1960); *Markell v. Daniel Green Felt Shoe Co.*, 161 N. Y. S. 1134, 116 N. E. 1060 (1917); *Piatek v. Plymouth Rock Provision Co.*, *supra* n. 1.

⁵ *Stockham Pipe Fitting Co. v. Williams*, 245 Ala. 570, 18 So. 2d 93 (1943); *Johnson v. Loew's, Inc.*, 180 N. Y. S. 2d 826 (App. Div. 1958).

⁶ *Johnson v. Loew's, Inc.*, *supra* n. 5.

⁷ *Childstrom v. Trojan Seed Co.*, 242 Minn. 471, 65 N. W. 2d 888 (1954).

⁸ *Supra* n. 2.

⁹ *Crilly v. Ballou*, *supra* n. 2, at p. 497.

¹⁰ *Id.*, at p. 505.

¹¹ *Supra* n. 1.

¹² *Ibid.*

ited to the pressures of a mill or factory grind. Enforced idleness may provoke horseplay, as in the 1960 case of *Johnson v. Loew's*,¹³ where the instigator recovered on the ground that momentary indulgence in some diversion may be expected of employees. In the *Diaz* case¹⁴ horseplay was viewed as a reasonable human reaction to working conditions, occurring during a minor deviation from the employment and therefore work connected. This is different from wilful or malicious assault, which would not be compensable.¹⁵ The *Diaz* case requires a realistic view of reasonable human reactions to working conditions and people encountered in the course of employment.¹⁶

The case for compensation is even stronger where the risk of injury from horseplay is increased because of the nature of the work and materials being used.¹⁷ Horseplay need not be limited to acts in conjunction with others, but can describe momentary and impulsive acts of the individual alone.¹⁸ The trend to allow recovery for these minor acts of deviation indicates judicial interest in the consequences rather than in the exact nature of the horseplay act.¹⁹ Where the consequence was not intended, the claimant should recover.²⁰

The test of relation to the employment was cited in the case of *Burns v. Merritt Engineering Co.*,²¹ where an employee, having been induced to violate a company rule against drinking, drank a chemical resembling liquor, and was thereby injured. Victimization by a prank was held to be recognized as a peril of service although success of the prank depended on the victim's

¹³ *Supra* n. 5.

¹⁴ *Supra* n. 4.

¹⁵ *Secor v. Penn Service Garage*, *supra* n. 2; *Knickerbocker*, *Torts: Workmen's Compensation: Arising out of employment: Horseplay*, 34 *Cornell L. Q.* 460 (1949); *Cunning v. City of Hopkins*, 258 *Minn.* 306, 103 *N. W.* 2d 876 (1960).

¹⁶ 29 *NACCA L. J.* 239 (1962).

¹⁷ *Ibid.*; *Socha v. Cudahy Packing Co.*, 105 *Neb.* 691, 181 *N. W.* 706 (1921); *Johnson v. Loew's, Inc.*, *supra* n. 5; *Piatek v. Plymouth Rock Provision Co.*, *supra* n. 1, at p. 636.

¹⁸ *Shapaka v. State Compensation Comm'r.*, 146 *W. Va.* 319, 119 *S. E.* 2d 821 (1961); *Boyd v. Florida Mattress Factory, Inc.*, 128 *So. 2d* 881 (Fla. 1961); *Secor v. The Penn Service Garage*, *supra* n. 2; *Pederson v. Nelson*, 45 *N. Y. S.* 2d 784 (App. Div. 1944).

¹⁹ 16 *NACCA L. J.* 116 (1958).

²⁰ *Ibid.*

²¹ *Burns v. Merritt Engineering Co.*, 302 *N. Y.* 131, 90 *N. E.* 2d 739 (1951).

willingness to break a hard and fast rule.²² Relation to the employment replaced the older test of foreseeability.

The pre-requisite of employer knowledge has been considerably weakened.²³ As in previous cases cited, a participant in horseplay was compensated despite the fact that the employer had no knowledge of the incident.²⁴ The *Boyd* case²⁵ also refused to inject foreseeability into a non-fault.

The *Burns* case established as the sole criteria for compensation that the injury arise out of and in the course of employment. "Arising out of" refers to the origin and cause of the injury, and "in the cause of" refers to the time, place and circumstances under which the injury occurred.²⁶

Course of employment is limited by the employee's deviation; if the deviation is so extreme in time or place as to constitute an abandonment, the injury will not be compensated.²⁷

The fact, however, that an injury is coincidental or contemporaneous to employment is not alone a sufficient basis for an award.²⁸ Acts of the employer may be a deciding factor as well as acts of the employee. For example, in the *Hayes* case²⁹ the court, in 1956, held that an injury due to horseplay would be compensable if the employer knew and acquiesced in the conduct which resulted in the injury. The crucial test under the "arising out of" doctrine is whether the causal effect of the environment is nullified by influences originating outside the working environment.³⁰ Although unforeseen, an injury arises out of the employment if it is a natural or reasonable incident

²² *Ibid.*

²³ *Gregory v. Lewis Sales Co. and Travelers Insurance Co.*, 348 S. W. 2d 743 (Mo. App. 1961); *Piatek v. Plymouth Rock Provision Co.*, *supra* n. 1.

²⁴ *Ognibene v. Rochester Mfg. Co.*, 298 N. Y. 85, 80 N. E. 2d 749 (1948) (dissenting opinion); *Boyd v. Florida Mattress Factory, Inc.*, *supra* n. 18; *Diaz v. Newark Industrial Spraying, Inc.*, *supra* n. 4; *Contra, Greene v. Watson's Flagg Machine Co.*, 25 N. J. Misc. 146, 51 A. 2d 121 (Dep't. of Labor, Workmen's Compensation Bureau, 1947); *Industrial Comm'r v. McCarthy*, 295 N. Y. 443, 68 N. E. 2d 434 (1946); *Hayes Freight Lines, Inc. v. Burns*, *supra* n. 4; *Hazelwood v. Standard Sanitary Mfg. Co.*, *supra* n. 3; *Johnson v. Loew's, Inc.*, *supra* n. 5; *Piatek v. Plymouth Rock Provision Co.*, *supra* n. 1.

²⁵ *Boyd v. Florida Mattress Factory, Inc.*, *supra* n. 18.

²⁶ *Supra*, n. 21; and, *Louisville & Jefferson County Air Board v. Riddle*, 301 Ky. 100, 190 S. W. 2d 1009 (1945).

²⁷ 26-27 *NACCA L. J.* 248, 252 (1960-1961); *Secor v. Penn Service Garage*, *supra* n. 2.

²⁸ *Fazio v. Cardillo*, 109 F. 2d 835, 836 (D. C. Cir. 1940).

²⁹ *Hayes Freight Lines, Inc. v. Burns*, *supra* n. 4.

³⁰ *Foster v. Aines Dairy Farm Co.*, 263 S. W. 2d 421, 429 (Mo. 1953).

of the employment.³¹ The vital question becomes: "Was the injury caused by a work-induced assault?"³² If the reasonable man can see a connection between the working environment and the resulting injury, the assault arises out of employment and is compensable.³³ The causal connection is sufficiently demonstrated when the work places the instrumentality in the hands of an employee,³⁴ or through judicial notice of the risks of close association as including the risk of pranks.³⁵

Most significant of the broadened approach of horseplay cases is the trend toward eliminating the aggressor defense. Under the aggressor defense prevailing in a diminishing number of jurisdictions,³⁶ fault concepts sometimes find their way into the compensation statutes. New York courts have allowed recovery only where the horseplay has become a regular incident of employment, and the employer has actual or constructive notice.³⁷ There is, however, recent authority to the effect that such knowledge is no longer a prerequisite.³⁸ Another approach lumps assault and horseplay together, raising the question whether or not the nature and conditions of the employment caused the act to occur.³⁹ Larson has viewed the aggressor cases as an in-the-course problem distinguishable from assault cases, the question being, was there substantial deviation from the course of employment?⁴⁰

³¹ *Malthais v. Equitable Life Assurance Society*, *supra* n. 1.

³² Horovitz, *Assaults and Horseplay under Workmen's Compensation Laws*, 41 Ill. L. Rev. 311, 331 (1946).

³³ *Id.* at 334; *York v. City of Hazard*, 301 Ky. 306, 191 S. W. 2d 239, 241 (1945); *Ashley v. F-W Chevrolet Co.*, 222 N. C. 25, 21 S. E. 2d 834 (1942); *Caswell's Case*, 305 Mass. 500, 26 N. E. 2d 328 (1940); *Hanson v. Robitshek-Schneider Co.*, 209 Minn. 596, 297 N. W. 19 (1941).

³⁴ Citations in note 17, *supra*.

³⁵ *Diaz v. Newark Industrial Spraying, Inc.*, *supra* n. 4; *Penzara v. Maffia Bros.*, 307 N. Y. 15, 119 N. E. 2d 570 (1954) (dissenting opinion); *Southern Cotton Oil Div. v. Minnie Lee Childress*, *supra* n. 1; *North End Foundry Co. v. Industrial Comm'r*, 251 Wis. 332, 29 N. W. 2d 40 (1947).

³⁶ *Pacific Employers' Ins. Co. v. Division of Industrial Accidents & Safety*, 209 Cal. 656, 289 P. 619 (1930), overruled on another point (California compensates only the innocent victim).

³⁷ *Industrial Comm'r v. McCarthy*, *supra* n. 24; *Lang v. Franklin Ry. Supply Co.*, 272 App. Div. 988, 73 N. Y. S. 2d 1 (1947), motion for leave to appeal denied, 297 N. Y. 1036, 77 N. E. 2d 524 (1948); *Paderson v. Nelson*, *supra* n. 18; *Ognibene v. Rochester Mfg. Co.*, *supra* n. 24.

³⁸ *Piatek v. Plymouth Rock Provision Co.*, *supra* n. 1.

³⁹ 26-27 NACCA L. J. 248 (1960-1961).

⁴⁰ 1 Larson, *Workmen's Compensation Law* § 23.60 (1965).

The trend toward including the horseplay aggressor has been influenced by assault cases. The leading case of *Cunning v. City of Hopkins*⁴¹ awarded compensation to an employee on the basis of the earlier assault case of *Petro v. Martin Baking Co.*⁴² In the *Petro* case the court refused to deny recovery to the claimant of an employee killed in a work connected quarrel, despite the fact that he was the aggressor. The injuries were held to have arisen from the employment because the dispute stemmed from the environment and its associations.⁴³ Recognizing that the *Petro* decision had eliminated aggression in assault cases, the *Cunning* case declared that an employee's failure to realize the consequences of his foolish acts should not bar recovery,⁴⁴ and compensated a college student who injured himself while playfully obstructing the vision of the driver of a truck in which he was riding. The court declared that the injury arose out of the employment since transportation was furnished by the employer as an incident of the employment. The horseplay did not amount to wilful misconduct and emphasis was laid not on who initiated the incident but whether the nature of the incident was such that it arose out of the employment.⁴⁵

Reinterpretation of the words "arising out of" and a more reasonable attempt at understanding human behavior have, it appears, led to the downfall of the aggressor-defense doctrine. To say that an accident arose out of the employment is to say that the work required the employee's presence at the point of peril, that the work placed him in a position of danger.⁴⁶

It should not matter if that precise danger was foreseeable or peculiar to the particular situation.⁴⁷ It would appear, however, that cases such as *Cunning*, while ostensibly based on the "arising out of employment" theory, are in fact using the course of employment tool. This ambiguous application of concepts may become the Pandora's box of hairline distinctions and exceptions that have plagued the compensation of participant and aggressor in horseplay compensation cases since the early decision of *Leon-*

⁴¹ *Supra* n. 15.

⁴² *Supra* n. 1.

⁴³ *Ibid.*

⁴⁴ *Cunning v. City of Hopkins, supra* n. 15.

⁴⁵ *Ibid.*

⁴⁶ 5 NACCA L. J. 60 (1950).

⁴⁷ *Ibid.*

bruno v. Champlain Silk Mills.⁴⁸ Under the "arising out of" concept the working environment need not be the proximate cause of the injury, but may be only one of many causes.⁴⁹ Literal minded judges may mistake the letter of the law for its spirit. An example of such a decision is *Whitehouse v. R. R. Dawson Bridge Co.*⁵⁰ in which the decedent's claimant was denied compensation on the grounds of substantial deviation. At the worksite, but having no duties to perform, the decedent jumped into a stream to ride a log, and drowned. The court denied recovery because no duties of employment were involved.⁵¹ But was it not the employment that had brought Whitehouse to the point of peril? The injury undoubtedly arose at the time, place, and circumstances of the employment.

Wilful assaults and criminal conduct are held not to arise out of employment.⁵² Where horseplay ends in wilful assault, is injury or death compensable as horseplay or non-compensable as wilful assault?⁵³ Where an employee left a cafeteria, in which he worked, to engage (as a result of a personal quarrel engendered by horseplay) in a fight in the lavatory with a boy working there, the court held that the injury did not arise out of the employment. The court recognized that the incident grew out of horseplay, but failed to see any causal connection to the employment.⁵⁴ Where the employee at the moment of injury was not engaged in the duties of his employment, it has been held that the injury did not arise out of the employment.⁵⁵ This is consistent with the aggressor doctrine policy of subjectively compensating the victim and non-participant in horseplay, and denying the instigator who turned from his work to frolic.

In *Favre v. Werk Press Cloth Mfg. Co., Inc.*⁵⁶ the claimant

⁴⁸ *Supra* n. 3

⁴⁹ *Gregory v. Lewis Sales Co.*, 348 S. W. 2d 743, 746 (Mo. App. 1961).

⁵⁰ 382 S. W. 2d 77 (Ky. 1964).

⁵¹ *Ibid.*

⁵² *Long v. Schultz Shoe Co.*, 257 S. W. 2d 211, 213 (Mo. App. 1953).

⁵³ *Mutual Implement & Hardware Ins. Co. v. Pittman*, 214 Miss. 823, 59 So. 2d 547, 548 (1952) (Where horseplay ended in wilful assault, the court found a reasonable relation to the employment).

⁵⁴ *Fazio v. Cardillo*, *supra* n. 28.

⁵⁵ *Stockham Pipe Fittings Co. v. Williams*, 245 Ala. 570, 18 So. 2d 93 (1943); *Borden v. Archer Daniels Midland Co.*, 187 Minn. 600, 246 N. W. 254 (1953); *Ognibene v. Rochester Mfg. Co.*, *supra* n. 24 (Claimant required to be engaged in his work for compensation).

⁵⁶ 152 So. 694 (La. App. 1934).

was an innocent victim of the horseplay of other employees. He was compensated in that his injury arose out of the employment, the necessity of association with co-workers due to the employment providing the necessary causal connection. The court laid down tests for determining whether the injury arose out of the employment: (1) whether or not the employee was engaged in the employer's business at the time; (2) whether the necessities of the employer's business required the employee to be at the place at the time of injury. (The court in a dictum stated that the fact that the injury might have occurred had the employee gone to the same place for his own purposes was immaterial.⁵⁷) These tests relate more to time and place—to course of employment—than to causation.

By relying on the course of employment criterion rather than that of "arising out of," the test of compensability will be substantial deviation in time and place rather than the vagaries of causal connection. This will be more compatible with the doctrine of horseplay which, since the *Leonbruno* case, by definition arises out of the conditions of employment. Since horseplay is a form of assault but not a wilful assault, there is no need to scrutinize the facts to find whether it arose out of the employment. The court need only consider whether the act of horseplay was more than an impulse, a momentary and inconsequential deviation from the course of employment.

The modern view of horseplay exhibits an increasing tendency to treat victims, participants, and instigators of horseplay as equally compensable. These cases tend to reject common law reasoning of foreseeability and fault, and award recovery where the injury arises out of the course of employment, irrespective of fault. In New Jersey, the harshest view which previously denied compensation in all horseplay cases⁵⁸ has, in the *Diaz*⁵⁹ and *Secor*⁶⁰ cases, shown strong signs of recognizing horseplay as a fact of employment. The New York view also has disengaged itself from requiring outmoded common law tests such as custom

⁵⁷ *Id.* at 696.

⁵⁸ *Budrevie v. Wright Aeronautical Corp.*, 24 N. J. Misc. 24, 45 A. 2d 453 (C. P. 1946), appeal dismissed 135 N. J. L. 46, 50 A. 2d 147 (Sup. Ct. 1946), aff'd 136 N. J. L. 198, 55 A. 2d 10 (Ct. Err. & App. 1947); *Hully v. Moosbrugger*, 88 N. J. L. 161, 95 A. 1007 (Ct. Err. & App. 1915); *Savage v. Otis Elevator Co.*, 136 N. J. L. 419, 56 A. 2d 595 (Sup. Ct. 1948).

⁵⁹ *Supra* n. 4.

⁶⁰ *Supra* n. 2.

and foreseeability.⁶¹ California remains the most conservative forum, compensating only the innocent victim.⁶² The Ohio rule,⁶³ however, is in accord with the general rule, holding that playful, sportive acts of employees are reasonably to be expected from the association of men in common work. Where the employment through the environment has a causal connection with an injury to an employee, suffered in the course of employment, he is entitled to compensation. Though the leading Ohio decision requires the employee to be actually engaged in his work, this case compensated the instigator of horseplay, and rejected the aggressor defense.

History

Is the modern doctrine of horseplay just? Should the skylarking, trouble-making employee profit from his wrongs? The early legal attitude towards horseplay followed the English cases which denied compensation to the innocent or non-participating victims of horseplay.⁶⁴ English courts had reasoned that injuries sustained by a servant while engaged in the actual work assigned to him did not arise out of the employment if due to the acts of fellow servants who were themselves outside the course of employment. Acts causing injury by a fellow servant, done through spite, malice, or a spirit of fun, or in the act of "larking," did not arise out of the employment. This was the widely held American view until the now famous decision of *Leonbruno v. Chamberlain Mill*. Some courts attempted to avoid the general rule of non-liability for skylarking by finding exceptions where the employer had notice, or where the custom of horseplay existed.⁶⁵ Judge Cardozo's pronouncements in the *Leonbruno* case,⁶⁶ while liberalizing the horseplay concept, also accounts for the refraction of the doctrine into rules of compensation differing when the claimant is victim, participant, or instigator. Cardozo recognized that risk of injury in the factory was not an element measured by the tendency of an act to serve

⁶¹ *Piatek v. Plymouth Rock Provision Co.*, *supra* n. 1.

⁶² *Pacific Employers' Ins. Co. v. Industrial Acc. Comm'r.*, 26 Cal. 2d 286, 158 P. 2d 9 (1945).

⁶³ *East Ohio Gas Co. v. Coe*, 42 Ohio App. 334, 182 N.E. 123 (1932).

⁶⁴ *Armitage v. Lancashire & Yorkshire Ry. Co.* (1902) 2 K. B. 796.

⁶⁵ *Markell v. Daniel Green Felt Shoe Co.*, *supra* n. 4; *Hazelwood v. Standard Sanitary Mfg. Co.*, *supra* n. 3.

⁶⁶ *Leonbruno v. Champlain Silk Mills*, 229 N.Y. 470, 128 N.E. 711 (1920).

the master's business. Furthermore, liability, he believed, was not contingent on fault of the master or his representatives.⁶⁷ Cardozo discarded the agency and master-servant doctrine, for the broader "course of employment" base. The innocent victim recovered "because he was in a factory in touch with associations and conditions, inseparable from factory life. The risks of such associations and conditions were risks of the employment."⁶⁸

Since Cardozo's opinion, courts have sought to compensate only the innocent victim.⁶⁹ In speculating on the cause of this result Horowitz has said that Cardozo, seeking to make a new rule, followed the custom of "throwing a bone" to the losing employer, thereby advancing change cautiously.⁷⁰ Subsequently, the aggressor was denied recovery, so that he could not profit from his wrong.⁷¹ Cardozo's felicity, in the words of Frankfurter "led to lazy repetition,"⁷² so that a legal formula for the decision of horseplay cases was quickly established. Refusal of compensation where the claimant was an instigator was reinforced by reasoning indicative of the common law precept that one must not profit from his own wrong. The employee was not performing a duty of the employment;⁷³ he was not hired to start trouble;⁷⁴ he was not advancing any interest of the employer;⁷⁵ he was acting for his own wrongful purposes;⁷⁶ he had abandoned the employment.⁷⁷ Horowitz has characterized the numerous methods of sustaining the aggressor defenses as two: (a) silence on the issue, or (b) metaphysics and hairline distinctions.⁷⁸

Following the *Leonbruno* case the innocent victim of horseplay usually found relief in state and federal courts. This new

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Horowitz, *supra* n. 32.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² *Tiller v. Atlantic Coastline R.R.*, 63 S. Ct. 470, 87 L. Ed. 608 (1943).

⁷³ *Stillwagon v. Callan Bros., Inc.*, 183 App. Div. 114, 170 N. Y. S. 677 (1918).

⁷⁴ Ibid.

⁷⁵ *Marion County Coal Co. v. Industrial Comm.*, 292 Ill. 463, 127 N. E. 84, 85 (1920).

⁷⁶ Ibid.

⁷⁷ *Armour and Co. v. Industrial Comm.*, 397 Ill. 433, 74 N. E. 2d 704, 706 (1947).

⁷⁸ Horowitz, *supra* n. 32, at 359.

view was clearly seen in the 1925 case of *Kansas City Fibre Box Co. v. Connell*.⁷⁹ In this case the court read the Workmen's Compensation statute as intending to impose a duty of care on the employer, so that he would prevent horseplay. The majority rejected the view of the dissent which sought to deny the award since the claimant had failed to show evidence of custom or habit, or employer's knowledge. Furthermore, the claimant had participated voluntarily, and the injury was a direct result of the skylarking.

Where horseplay had ceased and a participant (although not the instigator) was injured, he was not precluded from recovery.⁸⁰ The horseplay doctrine had not yet freed itself from the vocabulary of the common law. Later cases continued to cite employer knowledge of horseplay. Knowledge of employee's horseplaying tendencies and employer negligence in allowing horseplay figured in attributing liability.⁸¹ Though courts held that a participant or instigator could not recover, the claimant who could show that he had been forced to participate received compensation. Judges made more categories in a seeming effort to extend compensation. A strong tendency to avoid the aggressor defense could be seen in numerous decisions which found ways to compensate instigators and participants in horseplay.⁸²

The common law concepts of custom and foreseeability, previously mentioned, were also aids in overcoming the aggressor defense.⁸³ More importantly, the aggressor in assault cases was being compensated where it was found that the assault was

⁷⁹ *Kansas City Fibre Box Co. v. Connell*, 5 F. 2d 398 (8th Cir. 1925).

⁸⁰ *Miller's Indemnity Underwriters Co. v. Heller*, 253 S. W. 853 (Tex. Civ. App. 1913); *Industrial Comm. of Ohio v. Wolgandt*, 102 Ohio St. 1, 130 N. E. 38 (1921); *Myott v. Vermont Plywood, Inc.*, 110 Vt. 131, 2 A. 2d 204 (1938); *Cassel v. United States Fidelity and Guaranty Co.*, *supra* n. 3; *Badger Furniture Co. v. Industrial Comm.*, 195 Wis. 134, 217 N. W. 734 (1928).

⁸¹ *Pekin Cooperage Co. v. Industrial Board of Illinois*, 277 Ill. 53, 115 N. E. 128 (1917); *Payne v. Industrial Comm.*, 295 Ill. 388, 129 N. E. 122 (1920); *Kokomo Steel and Wire Co. v. Irick*, 80 Ind. App. 610, 141 N. E. 796 (1923); *Lee's Case*, 109 Conn. 413, 134 N. E. 268 (1922); *Stewart v. Kansas City*, 102 Kans. 307, 171 P. 413 (1919). *Glenn v. Reynolds Spring Co.*, 235 Mich. 693, 96 N. W. 617 (1924). *Anderson v. State Industrial Comm.*, 155 Okla. 34, 7 P. 2d 902 (1932).

⁸² *Conrad v. Cook-Lewis Foundry*, *supra* n. 1; *Chambers v. Union Oil Co.*, *supra* n. 4; *Scheuller v. Armour and Co.*, 116 Pa. Super. 323, 176 A. 527 (1935); *Stalginsky v. Waterbury Rolling Mills*, 124 Conn. 355, 199 A. 653 (1938); *Haas v. Brotherhood of Transportation Workers*, 158 Pa. Super. 291, 44 A. 2d 776 (1938); *Dillon's Case*, 324 Mass. 102, 85 N. E. 2d 69 (1949).

⁸³ *Dillon's Case*, *supra* n. 82.

work-connected.⁸⁴ Later, the distinction became unreal. In the case of *Verschleiser v. Joseph Stern and Son, Inc.*,⁸⁵ the court attempted to sidestep hairpin distinctions and said that regardless of provocation the injury was the result of horseplay engendered by employees in the course of employment on the premises of the employer.⁸⁶ Since horseplay did not entail serious wilful misconduct there was no need to differentiate it from ordinary assault.

Conclusion

The doctrine of horseplay has been a troublesome and anachronistic rule retaining common law principles which in reality are foreign to Workmen's Compensation concepts. The development of this doctrine into a modern view of working conditions, taking into account the normal tendencies of human nature, has spanned the first half of the Twentieth Century. This change has been made by the courts, not by the legislatures, and though it is not fully accepted, the present majority rule does not differentiate between instigator, victim, or participant. Abandonment of employment is more important than personal fault. While the "in the course of" test has been criticized, because the role of substantial deviation may cause the courts to flounder in a sea of subtle distinctions, this alternative of using "arising out of" has been demonstrating the dangers of reliance on causation tests. A possible solution to the problem caused by the words "arising out of" is their deletion by legislative action, thus imposing absolute liability on the employer for all injuries related to the incidents of the employment. Whether or not such an answer is posed, a final diagnosis indicates that at the present time the majority of courts show a healthy attitude—regarding concepts of fault, assumption of risk, contributory negligence, and foreseeability. The courts choose not to penalize the employee for indulging in "harmless pranks," which end in injury to himself or to others.

⁸⁴ *Ibid.*

⁸⁵ 229 N.Y. 192, 128 N.E. 126 (1920).

⁸⁶ *Ibid.*