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## Workmen's Compensation—Liability for Assault and Battery Committed by One Employee on Another Employee

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WORKMEN'S COMPENSATION—LIABILITY FOR ASSAULT AND BATTERY COMMITTED BY ONE EMPLOYEE ON ANOTHER EMPLOYEE

Two workers, engaged in laying a concrete floor, were waiting for the mixer to be refilled. On being struck by an empty cigarette package thrown by his co-worker, Pittman tossed a small pebble at him and returned to his wheelbarrow. His co-worker, being hit on the neck, became angry and struck Pittman a blow on the back of the head with his shovel, causing a fractured skull and permanent brain injury. In Pittman's suit under the Workmen's Compensation Act, the Workmen's Compensation Commission allowed recovery, and this award was upheld by the circuit court. On appeal, held: affirmed. An assault and battery by one employee upon another is one of the hazards of the employment; therefore, the injury resulting arose out of and in the course of employment.<sup>1</sup>

The Mississippi Compensation Act, as typical of the statutes in a majority of the states,<sup>2</sup> requires that the injury must arise "out of and in the course of employment."<sup>3</sup> The courts have made a distinction between the phrases "arising out of" and "in the course of employment," the former involving an idea of causal relationship between the employment and the injury and the latter referring to the time, place, and circumstances under which the injury occurred.<sup>4</sup> The court in the principal case, taking an approach like that of other tribunals which have been confronted with this particular fact situation,<sup>5</sup> did not discuss the question of whether the resulting injury occurred in the course of the employment. Such an approach, however, seems reasonable, under the above definition of the phrase, in view of the fact that both men were on the job at the time of the assault.

There is, however, a clear conflict of authority on the question of whether an injury suffered under the precise facts of the instant case is one which arose out of the employment. At the

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1. *Mutual Implement & Hardware Ins. Co. v. Pittman*, 59 So.2d 547 (Miss. 1952).

2. 6 SCHNEIDER, WORKMEN'S COMPENSATION TEXT § 1542 (Permanent ed. 1948); 58 AM. JUR., WORKMEN'S COMPENSATION § 209.

3. Miss. Laws 1948, c. 354.

4. 6 SCHNEIDER, *op. cit. supra* note 2, § 1542(b); AM. JUR., WORKMEN'S COMPENSATION § 210.

5. See, *e.g.*, *Hartford Accident and Indemnity Co. v. Zackery*, 69 Ga. App. 250, 25 S.E.2d 135 (1943); *Urak v. Morris & Co.*, 107 Neb. 411, 186 N.W. 345 (1922); *Mountain Ice Co. v. McNeil*, 91 N.J.L. 528, 103 Atl. 184 (1918); *Gory v. Monarch Mills*, 208 S.C. 86, 37 S.E.2d 291 (1946).

outset, it should be noted that the principal case is to be distinguished from that situation where the assault grew out of an argument over the performance of the work or the possession of equipment used in the work, in which case the authorities are generally agreed that there should be compensation.<sup>6</sup> Here the assault was not the result of a dispute concerning the execution of the work, and the decision on the issue of recovery in such a factual situation has depended on whether the particular court has adopted a strict or liberal construction of the phrase "arising out of the employment."<sup>7</sup> The majority of the courts has taken a conservative approach which requires that the causative danger be inherently or essentially connected with the employment;<sup>8</sup> and, under this general principle, assaults made solely to gratify a feeling of anger or hatred have not been deemed to be so connected with the employment.<sup>9</sup> On the other hand, the minority courts have fostered a more liberal view based upon the position and activities of the claimant rather than upon the motivation of the assailant.<sup>10</sup> The test applied by one of the liberal courts is not whether the injury was caused by something peculiar to the employment, but whether the risk from which the injury resulted was greater for the workman than for others not engaged in the

6. 1 LARSON, WORKMEN'S COMPENSATION LAW § 11.12 (1952).

7. Mutual Implement & Hardware Ins. Co. v. Pittman, 59 So.2d 547, 548 (Miss. 1952).

8. For a collection of the cases which verbalize their rulings in this manner, see 58 AM. JUR., WORKMEN'S COMPENSATION § 211. Exemplary cases in point with the instant case are: Hartford Accident & Indemnity Co. v. Zackery, 69 Ga. App. 250, 25 S.E.2d 135 (1943); Chicago Hardware Foundry Co. v. Industrial Commission, 393 Ill. 294, 65 N.E.2d 778 (1946); Chicago v. Industrial Commission, 292 Ill. 406, 127 N.E. 49 (1920).

9. Hartford Accident & Indemnity Co. v. Zachery, 69 Ga. App. 250, 25 S.E.2d 135 (1943); Chicago Foundry Co. v. Industrial Commission, 393 Ill. 294, 65 N.E.2d 778 (1946); Chicago v. Industrial Commission, 292 Ill. 406, 127 N.E. 49 (1920); Lardge v. Concrete Products Mfg. Co., 251 S.W.2d 49 (Mo. 1952); Urak v. Morris & Co., 107 Neb. 411, 186 N.W. 345 (1922); Mountain Ice Co. v. McNeil, 91 N.J.L. 528, 103 Atl. 184 (1918); Gory v. Monarch Mills, 208 S.C. 86, 37 S.E.2d 291 (1946); accord, Texas Indemnity Ins. Co. v. Cheely, 232 S.W.2d 124 (Tex. Civ. App. 1950); cf. Monte v. General Motors Corp., 24 N.J. Misc. 383, 49 A.2d 591 (C.P. 1946).

10. Ferguson v. Cady-McFarland Gravel Co., 156 La. 871, 101 So. 248 (1924); Stasmas v. State Industrial Commission, 80 Okla. 221, 195 Pac. 762 (1921). New York, despite one result to the contrary, also has adopted the liberal approach. Compare Verschleiser v. Joseph Stern & Son, Inc., 229 N.Y. 192, 128 N.E. 126 (1920) (liberal result) and Humphrey v. Tietjen & Steffen Milk Co., 235 App. Div. 470, 257 N.Y. Supp. 768 (3rd Dep't 1932), *aff'd without opinion*, 261 N.Y. 549, 185 N.E. 733 (1933) (liberal result), with Scholtzhauer v. C. & L. Lunch Co., 233 N.Y. 12, 134 N.E. 701 (1922) (liberal phraseology but conservative result).

employment.<sup>11</sup> Other American courts apparently have adopted the even more liberal "position and locality" test, which has been expressed in the leading English case of *Thom or Simpson v. Sinclair*.<sup>12</sup> This rule makes the injury an incident of the job where the worker is required to be in a place which turns out to be dangerous. The liability of injury inflicted by co-employees is considered, under both liberal views, as one of the risks involved in the employment.<sup>13</sup>

In holding that the employment brought Pittman and his assailant into close contact and that one of the hazards of this contact was that an assault might take place, the court in the principal case apparently adopted the test of *Thom or Simpson v. Sinclair*. Because of the two decisions by the Mississippi court in the case of *Brookhaven Steam Laundry v. Watts*,<sup>14</sup> however, it cannot be categorically stated that Mississippi has the liberal view. In that case a laundryman, who was having illicit relations with a customer's wife regularly, was shot by the woman's husband while making one of his stops at the customer's house. In its first decision on that set of facts, the Mississippi Supreme Court ruled that, since the work brought the worker within the orbit of danger, personal motives did not break the causal relation between the employment and the injury. Later, however, the court reversed its first decision and argued that the mere fact the worker was on the job and would not have been injured had he not been so employed did not show a causal connection between

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11. *Ferguson v. Cady-McFarland Gravel Co.*, 156 La. 871, 101 So. 248 (1924).

12. [1917] A.C. 127. The American courts which seemed to have adopted the *Thom or Simpson v. Sinclair* test are New York and Oklahoma. See *Verschleiser v. Joseph Stern & Son, Inc.*, 229 N.Y. 192, 128 N.E. 126 (1920); *Humphrey v. Tietjen & Steffen Milk Co.*, 235 App. Div. 470, 257 N.Y. Supp. 768 (3rd Dep't 1932), *aff'd without opinion*, 261 N.Y. 549, 185 N.E. 733 (1933); *Stasmas v. State Industrial Commission*, 80 Okla. 221, 195 Pac. 762 (1921). It is interesting to note, however, that the test applied in the one English case in point with the principal case and subsequent to *Thom or Simpson v. Sinclair* appears to have been verbalized along the lines of the rule adopted in the case of *Ferguson v. Cady-McFarland Gravel Co.*, 156 La. 871, 101 So. 248 (1924). In *Parker v. Federal Steam Navigation Co.*, 95 L.J.K.B. 664, 665 (C.A. 1925), *Atkin, L.J.*, felt that the basic issue in such a case was whether the danger of assault was merely one which was common to anyone equally with the person who suffered the assault or whether there was some special risk of assault to the particular person arising from his employment. The latter question having been answered in the affirmative, compensation was awarded for the injury as one arising out of the employment.

13. See notes 10, 11, 12 *supra*.

14. 55 So.2d 381 (Miss. 1951), *rev'd*, 59 So.2d 294 (Miss. 1952).

the employment and the injury. Granting that the fact situations were not identical, the contrast in the language used in the principal case and that used in the second *Brookhaven* decision seems clearly, on the basis of the above discussion, to impart two different approaches.<sup>15</sup> The difficult problem of delineating the limits of the area of liability, which is often discussed in terms of causation, seems again to have produced inconsistent rulings.

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15. Roberds, J., dissenting in the principal case, realized the inconsistency referred to in the text. He describes the stand of the court in the instant case as follows:

We have crossed the Rubicon. The Court has now held that every employer, who is within the Workmen's Compensation Act, is liable for every injury inflicted by one employee on a co-employee while working together at the place of work, even though the injury results from personal malice on the part of the wrongdoer towards the injured employee. There is no claim here that the injury arose out of the employment other than in the sense that both were employed and were working at, or about, the same place. In other words, every employer is the guarantor against eccentricities, habits, temperament, disposition, inclinations, emotions, and foolish whims of all of his employees. With deference to my brethren I do not think the phrase "arising out of \* \* \* employment," as used in the Act, means that, nor that the Legislature intended for it to mean that.

So far as this Court is concerned we have settled upon the definition of that meaning in the opinion this day handed down sustaining a suggestion of error in the case of *Brookhaven Steam Laundry v. Watts*, Miss., 59 So.2d 294. I can do no better than to quote what we there say: [The following quotation from the second *Brookhaven* case is itself a quotation from 6 SCHNEIDER, WORKMEN'S COMPENSATION TEXT § 1542 (b) (Permanent ed. 1948)]

. . . The fact that one is working at the time he is injured, and would not have suffered injury had he not been employed, does not show a causal connection between the employment and the injury, nor will a showing that the employment brought the party to the place where injured and that he would not have met with the accident elsewhere show a proximate causal relation between the employment and the injury. The risk must be reasonably incidental to the employment \* \* \*. There must be some connection between the injury and the employment other than the mere fact that the employment brought the injured party to the place of injury.

*Mutual Implement & Hardware Ins. Co. v. Pittman*, 59 So.2d 547, 556, 557 (Miss. 1952).