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DePaul Law Review

Volume 25
Issue 2 *Winter 1976*

Article 20

Workmen's Compensation - Compensable Injuries - Injuries Arising Out of Personal Disputes May be Work Related and Therefore Compensable - Converters, Inc. v. Industrial Commission, 61 Ill.2d 218, 334 N.E.2d 155 (1975)

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Recommended Citation

Mary B. Denefe, *Workmen's Compensation - Compensable Injuries - Injuries Arising Out of Personal Disputes May be Work Related and Therefore Compensable - Converters, Inc. v. Industrial Commission, 61 Ill.2d 218, 334 N.E.2d 155 (1975)*, 25 DePaul L. Rev. 579 (1976)
Available at: https://via.library.depaul.edu/law-review/vol25/iss2/20

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perpetuates the risk of injury from a defective motor vehicle.[31] As to indemnity, the burden imposed upon parties in the distributive chain to seek the creator of the defect should likewise be imposed upon the used car dealer.[32] The relative difficulty in obtaining indemnification is a consideration; however, in view of the used car dealer's position in the commercial market, it should not outweigh the need for effective remedies to an injured plaintiff.

Mark Spadoro

Workmen's Compensation—Compensable Injuries—INJURIES ARISING OUT OF PERSONAL DISPUTES MAY BE WORK-RELATED AND THEREFORE COMPENSABLE—*Converters, Inc. v. Industrial Commission*, 61 Ill.2d 218, 334 N.E.2d 155 (1975).

In order for an employee to qualify for workmen's compensation benefits, his injuries must arise out of and in the course of employment.[1] By

299, 304-06 (1971) (jury verdict for defendant used car dealer that defect in seven-year-old used car was not "unreasonably dangerous" upheld as proper under doctrine of strict liability in tort).

31. A 1973 survey of the used car market indicates that there are more than 100 million used cars in the United States. N.Y. Times, Oct. 30, 1973, at 57, col. 7. The auto industry estimates sales of 25 million used cars in 1974, including private trading. N.Y. Times, Dec. 28, 1974, at 31, col. 4. In 1973, sales of new automobiles by domestic and foreign manufacturers were approximately 11,433,325. N.Y. Times, Jan. 7, 1975, at 43, col. 3. This figure dropped to 8,856,884 in 1974. N.Y. Times, Jan. 7, 1975, at 43, col. 3. In addition, dealers at United States-Canadian wholesale auctions purchased 1.5 million used cars. N.Y. Times, Dec. 28, 1974, at 35, col. 6-7. Apparently, used motor vehicles acquired by dealers account for a conservative 13% of annual sales by domestic and foreign manufacturers. (This percentage is based on 1973 statistics and does not include trade-ins to dealers.)

32. Such a burden would not be unreasonable. Liability resulting from defects discoverable upon reasonable inspection or otherwise within the dealer's control, should rest with the dealer as part of an obligation to provide a reasonably safe car. *See* 61 Ill.2d 17,22, 329 N.E.2d 785,787 (Goldenhersh, J., dissenting).

Liability for defects beyond the scope of the dealer's control, such as structural or metallurgical defects traceable to the manufacturer, should ultimately rest with that party. But, in the interest of protecting the injured plaintiff, the used car dealer should be liable initially for the loss. This would not prejudice the dealer because through the process of strict liability indemnity the used car dealer could shift the burden of ultimate loss to the distributive party responsible for such defect if he chose to do so.

1. *See* ILL. REV. STAT. ch. 48, §§ 138.1 *et seq.* (1975).

The heart of every compensation act, and the source of most litigation in the compensation field, is the coverage formula. Forty-two states, and the Long-

definition, the term "arising out of" requires that the accident have its origin in a risk incidental to the employment, whereas, "in the course of" describes an injury which occurs within the time, place and circumstances of the employment.[2] Although this appears to be a dual requirement, the ultimate test is whether the injury is work-related.[3] When an employee's injury results from an assault, a causal connection must be shown between the working conditions and the assault for the injury to be compensable.[4] Conversely, if the assault arises from a personal matter, having no connection with employment, no right to compensation exists.[5] This formula of "arising out of and in the course of employment" was strained by the Illinois Supreme Court in *Converters, Inc. v. Industrial Commission*.[6] This casenote will examine the *Converters* decision and its effect on the traditional compensation formula.

In *Converters*, the claimant was physically assaulted by a co-employee[7] in the plant locker room after work following an alleged dice game.[8] Traditionally, an injury sustained after the end of the work

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shoremen's and Harbor Workers' Compensation Act have adopted the entire British Compensation Act formula: injury "arising out of and in the course of employment."

1 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 6.10 [hereafter cited as LARSON].

2. *See* Armour v. Indus. Comm'n, 397 Ill. 433, 74 N.E.2d 704 (1947) (worker who interposed comments in dispute between boss and fellow worker and was then struck by the co-worker, did not receive injuries in the course of his employment); Pekin Cooperage Co. v. Indus. Comm'n, 285 Ill. 31, 120 N.E. 530 (1918) (employee who when leaving work fell off a ramp leading from "employees' exit" received injuries arising out of and in the course of employment); McField v. Lincoln Hotel, 35 Ill.App.2d 340, 182 N.E.2d 905 (1st Dist. 1962) (injury to employee in fight with co-worker over the proper conduct of each other's job, arose out of the employment).

3. In practice, these two requirements are not always applied independently. Most cases reveal a "quantum theory," where deficiencies in one may be made up by strength in the other. For example, if the "in the course of" quantity is very small, but the "arising out of" quantity is large, the quantum will add up to the necessary minimum; the converse being likewise true, LARSON *supra* note 1, at § 29.

4. *See* Fischer v. Indus. Comm'n, 408 Ill. 115, 96 N.E.2d 478 (1951); Math Igler's Casino v. Indus. Comm'n, 394 Ill. 330, 68 N.E.2d 773 (1946); Scholl v. Indus. Comm'n, 366 Ill. 588, 10 N.E.2d 360 (1937).

5. *See* Fischer v. Indus. Comm'n, 408 Ill. 115, 96 N.E.2d 478 (1951); Triangle Auto Painting & Trimming Co. v. Indus. Comm'n, 346 Ill. 609, 178 N.E. 886 (1931); Franklin Coal & Coke Co. v. Indus. Comm'n, 322 Ill. 23, 152 N.E. 498 (1926).

6. 61 Ill.2d 218, 334 N.E.2d 155 (1975).

7. Sufficient evidence was presented to sustain a finding that the co-worker was intoxicated. 61 Ill.2d at 223, 334 N.E.2d at 158.

8. The investigating officer and several employees of Converters testified that the victim, George Pearson, and the assailant, Morris Andrews, had had an argument over the alleged theft of ten dollars by Pearson during a dice game. The testimony indicated that the game began shortly after Pearson's shift ended and continued for two or three hours.

day[9] and arising out of a personal dispute[10] is non-compensable. However, by ignoring the evidence concerning the dice game, and by placing the cause of the assault in a work-related context, the court was able to grant compensation. In reaching its decision, the court relied solely upon the testimony of a third-party co-worker that the assault arose out of a dispute occurring earlier in the day.[11] The court grounded its decision on a basic tenet of workmen's compensation law which provides that the resolution of a disputed factual question may be set aside only when it is against the manifest weight of the evidence.[12] In this case, the testimony of one employee was sufficient to sustain the Industrial Commission's findings.

The court uses the manifest weight rationale to sidestep the problem of applying the more stringent traditional formula with regard to injuries from assaults. As courts have looked for ways to award compensation, the formula "arising out of and in the course of" has been greatly strained. It has been predicted that soon injuries compensable under workmen's compensation will bear little, if any, relation to the particular occupation of the claimant.[13] When such a change in the traditional

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This directly contradicted Pearson's testimony before the arbitrator in which Pearson alleged the incident took place immediately after the end of his shift. 61 Ill.2d at 219, 334 N.E.2d at 156.

9. *See* note 2, *supra*.

10. *See* note 5, *supra*.

11. The employee saw Andrews and Pearson arguing earlier in the day after Pearson asked Andrews to move so that Pearson could mop the floors. However, this same employee also testified that he had overheard an argument concerning the alleged theft during the dice game. 61 Ill.2d at 222, 334 N.E.2d at 158. This contradictory evidence raises the question whether the claimant met his burden of proof. Wilhelm v. Indus. Comm'n, 399 Ill. 80, 77 N.E.2d 174 (1948). He must prove by sufficient evidence that the accidental injury arose out of and in the course of the employment. Corn Prod. Ref. Co. v. Indus. Comm'n, 6 Ill.2d 439, 128 N.E.2d 919 (1955). A preponderance of the evidence is the standard of proof required. Northwestern Yeast Co. v. Indus. Comm'n, 378 Ill. 195, 37 N.E.2d 806 (1941).

12. In determining questions of manifest weight of the evidence, it is clear that the number of witnesses may be a factor, but it is not the controlling consideration. In addition the weight to be accorded this factor may depend upon the nature of the issue of fact involved. Pugh v. Bershad, 133 Ill.App.2d 174, 177, 272 N.E.2d 745, 748 (1st Dist. 1971) (jury verdict that plaintiff, injured while crossing street, was not contributorily negligent will not be set aside as against the manifest weight of the evidence though defendant had three witnesses to plaintiff's one); Haas v. Woodard, 61 Ill.App.2d 378, 384-85, 209 N.E.2d 864, 867 (1st Dist. 1965) (despite the fact that plaintiff had two witnesses to defendant's one, a jury finding in favor of defendant was not against the manifest weight of the evidence).

13. Henderson, *Should Workmen's Compensation Be Extended to Nonoccupational Injuries?* 48 TEXAS L. REV. 117, 121 (1969).

formula occurs without legislative intervention the result is inconsistency in awarding compensation.

If in fact the court is extending compensability to cover injuries from assaults that are not work-related, other jurisdictions have preceded Illinois in doing so. For example, the Appellate Court for the District of Columbia[14] as early as 1940 held that even if the subject of the dispute is unrelated to the work, the injury from the assault is compensable if the work of the participants brought them together and created the relation and conditions which resulted in the clash.[15] The New York Court of Appeals[16] rendered an even more expansive test:

> An award of compensation may be sustained even though the result of an assault [citation omitted], so long as there is any nexus, however slender, between the motivation for the assault and the employment.[17]

It is difficult to conceive of an injury to an employee from an assault by a co-employee which would not be compensable under this theory; the previous requirement that the dispute be "related" to the employment appears to be meaningless.[18] Unfortunately, in *Converters*, the Illinois court's expansion of compensability is not as explicit as that of the courts of the District of Columbia and New York.

Although the court in *Converters* based its decision on the manifest weight rationale, a theory of compensation based on the foreseeability doctrine runs, *sub silentio*, through the case. The claimant contended that the injury should be compensable because it was foreseeable.[19] The status of the doctrine of foreseeability[20] in Illinois is uncertain and it may be that the only criterion is whether the injury is in fact connected with the employment.[21] However, the use of the doctrine of foreseeabil-

14. Hartford Accident & Indem. Co. v. Cardillo, 112 F.2d 11. (D. C. Cir. 1940).

15. *Id.* at 17-18.

16. Seymour v. Rivera Appliances Corp., 28 N.Y.2d 406, 271 N.E.2d 224, 322 N.Y.S.2d 243 (1971). The victim employee had intervened on behalf of two employees who were arguing. The argument resumed away from the employer's premises after work. The next day the intervener was killed by the other two employees.

17. 28 N.Y.2d at 409, 271 N.E.2d at 225, 322 N.Y.S.2d at 245.

18. Wolff, *Workmen's Compensation*, 24 SYRACUSE L. REV. 249 (1973).

19. Brief for Defendant-Appellant at 19-23, Converters, Inc. v. Indus. Comm'n, 61 Ill.2d 218, 334 N.E.2d 155 (1975).

20. Earlier courts recognized that maliciously assaulted persons were entitled to workmen's compensation where the employer knew of the risk. Small, *The Effect of Workmen's Compensation Trends in Agency-Tort Concepts of Scope of Employment*, 11 NACCA L.J. 19, 23-25 (1953).

21. LARSON, *supra* note 1, at § 6.50. *See also* Taylor Coal Co. v. Indus. Comm'n, 301 Ill. 548, 134 N.E. 172 (1922); Baum v. Indus. Comm'n, 288 Ill. 516, 123 N.E. 625 (1919); Swift & Co. v. Indus. Comm'n, 287 Ill. 564, 122 N.E. 796 (1919).

ity is not without support.[22] Employers who knew or should have known that an injury to an employee was imminent have uniformly been held liable for that injury.[23] Thus it is not unreasonable that the employer in *Converters* be held liable in that the injury sustained by the claimant was foreseeable. The employer knew that dice games[24] frequently occured on the premises and was aware of the assailant's inebriation[25] on the day of the assault, conditions which could produce unruly behavior. Rather than couching the decision in the terms of a manifest weight rationale, the preferred method of judicial expansion of the standard of compensation is to utilize the foreseeability doctrine. Basing decisions on foreseeability would promote predictability and facilitate subsequent case interpretation because of the legal community's general comprehension of foreseeability and its reasonable person standard.

Converters strains the traditional criteria for determining compensation and establishes that injuries arising out of personal disputes may now be held work-related and therefore compensable. Failing to provide explicit guidance to the courts, commissions, and attorneys, *Converters* frustrates efforts at interpretation and leads to unpredictability of future decisions. Notwithstanding any future judicial resolution, a substantial revision of the existing formula should preferably be made by the legislature.

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22. *See, e.g.*, Trunkline Gas Co. v. Indus. Comm'n, 40 Ill.2d 542, 240 N.E.2d 655 (1968); United States Indus. v. Indus. Comm'n, 40 Ill.2d 469, 240 N.E.2d 637 (1968); Ace Pest Control, Inc. v. Indus. Comm'n, 32 Ill.2d 386, 205 N.E.2d 453 (1965); American Freight Forwarding Corp. v. Indus. Comm'n, 31 Ill.2d 293, 201 N.E.2d 399 (1964).

23. In Ace Pest Control, Inc. v. Indus. Comm'n, 32 Ill.2d 386, 205 N.E.2d 453 (1965), an employee truck driver stopped to give aid to a motorist in distress and received injuries. The court in awarding compensation, stated that since the employer did not prohibit its drivers from stopping in such situations, the rendering of aid was discretionary and could have reasonably been expected. However, in United States Indus. v. Indus. Comm'n, 40 Ill.2d 469, 240 N.E.2d 637 (1968), a travelling employee was injured in a car accident during a pleasure drive. The court held the claimant's action was clearly unanticipated and unforeseeable, not normally to be expected of a travelling employee.

24. Claimant made an offer of proof that for several years prior to the date of the accident, dice games had taken place once or twice a week. 61 Ill.2d at 222, 334 N.E.2d at 158.

25. A foreman at Converters testified that on the day of the assault he had asked Andrews to leave because Andrews had been drinking or was on drugs. Other employees also testified they were aware of the assailant's state of intoxication. 61 Ill.2d at 220-22, 334 N.E.2d at 157-58.