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# Workmen's Compensation—Injury Arising "out of" and "in Course of Employment"

This decision raises for the first time in five years the efficacy of consent as a defense in a civil action for damages where the cause rests upon the commission of a crime by which the public peace or the life of an individual or his person is affected. 1 Cooley, TORTS (3rd ed. 1906) 282.

The most recent case prior to the principal one is *Szadiwicz v. Cantor* (1926) 257 Mass. 518, 154 N. E. 251, which held in accord with the instant case, and strengthened a position, which hitherto had been in the minority, refusing recovery on the strict doctrine that a court will not lend its aid to one who founds his cause of action upon an immoral or illegal act to which he has consented. This view is favored in Throckmorton's, *Cooley on Torts* (1930) 240, as consonant not only with the general principle of *volenti non fit injuria*, but with common sense justice.

The contrary doctrine and probably the majority rule is asserted in *Milliken v. Heddesheimer* (1924) 110 Ohio St. 381, 144 N. E. 610; *Lembo v. Donnell* (1917) 116 Me. 505, 101 Atl. 469; *Miller v. Boyer* (1896) 94 Wis. 123, 68 N. W. 869. The rule which denies the ability to consent to an assault and battery accompanied by a breach of the peace is extended by these cases to include abortions, as affecting a public interest in the life and safety of individuals, which forbids the power to consent. This public interest is evidently of a different nature from that sought to be protected by the criminal law. The Missouri statutes are directed solely at the physician and make him guilty of manslaughter if the operation is fatal to the mother of an unborn "quick" child, and if the operation is successful, he is guilty of a felony. R. S. Mo. (1929) secs. 3990, 3991. Performing any criminal abortion is a ground for revocation of the surgeon's license to practice. R. S. Mo. (1929) sec. 9120.

In many jurisdictions, as in Missouri, the question as to civil liability has never arisen. The trend of the last twenty years is with the minority rule, upholding consent as a defense. This position was adopted by the American Law Institute in its RESTATEMENT OF THE LAW OF TORTS (Am. L. Inst. 1925) no. 1 sec. 75.

Where, however, there is negligence resulting in injuries which are beyond the normal consequences of the illegal operation, there is no apparent reason why the physician should not be held liable as in every other case of malpractice. Such negligence overreaches the scope of consent and expectancy. If it is recognized that such operations will inevitably be performed, a liability for negligence would seem desirable as an additional protective measure tending at least to induce care. S. M. R., '33.

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WORKMEN'S COMPENSATION—INJURY ARISING "OUT OF" AND "IN COURSE OF EMPLOYMENT."—Plaintiff whose duty it was to see that lights were burning on defendant's trucks parked on a street adjacent to defendant's premises was injured while crossing a street other than the one on which the trucks were parked. *Held*, that the injury of plaintiff did not arise out of and in the course of plaintiff's employment so as to permit recovery

under the Workmen's Compensation Law of Missouri. *Bise v. Tarlton* (Mo. App. 1931) 35 S. W. (2d) 993.

Before recovery can be had under the Workmen's Compensation Act it must be shown that the accident arose "out of" as well as "in the course of" the employment. 1 Schneider, WORKMEN'S COMPENSATION LAW (1922) 500; *Wahlig v. Grocer Co.* (Mo. 1930) 29 S. W. (2d) 128; *Smith v. Lewis-Zukoski Mercantile Co.* (Mo. App. 1929) 14 S. W. (2d) 470. An injury arises "out of" the employment when there exists as between the conditions under which the employment is carried out and the resultant injury a causal connection, and the phrase "in the course of" has reference to the time, place, and circumstances under which the accident takes place. 1 Schneider, *op. cit.* 500 *et seq.*; *Metling v. Lehr Const. Co.*, above; *Wahlig v. Grocer Co.*, above; *Cassidy v. Eternit* (Mo. 1930) 32 S. W. (2d) 75.

Where the employee is sent into the public streets on his employer's business, whether habitually or occasionally, and is injured by reason of a risk of the street to which his employment exposes him, the accident arises out of as well as in the course of the employment. 1 Schneider, *op. cit.* 575; *Redner v. H. C. Faber & Sons* (1918) 223 N. Y. 379, 119 N. E. 842; *Wahlig v. Grocer Co.*, above; *Dennis v. White* (1917) A. C. 479, Ann. Cas. 1917 E. *l. c.* 326. In *Wahlig v. Grocer Co.*, above, the employee was killed at a rail crossing accident while soliciting business for his employer. It was held that the employment necessarily exposed him to danger of having his automobile struck by a train while used on public streets and thoroughfares and predicated recovery on theory that the injuries arose "out of" the employment.

It is generally held that an injury does not arise out of the course of the employment if the accident occurs when the employee is away from his place of duty or place of employment on his own business or business other than his employer's. 1 Schneider *op. cit.* 612; *Borck v. Murphy Co.* (1919) 205 Mich. 472, 171 N. W. 470; *King v. State Ins. Fund* (1918) 184 App. Div. 453, 171 N. Y. Supp. 1032; *Kennedy v. Stearns Salt and Lumber Co.* (1916) 190 Mich. 628, 157 N. W. 378; *Casualty Co. of America v. Indus. Acc. Comm.* (1917) 176 Cal. 530, 169 Pac. 76; *Murphy v. Ludlum Steel Co.* 182 App. Div. 139, 169 N. Y. Supp. 781.

It would seem that a different result might follow in such a state as Utah where the statute demands that the injury arise "out of *or* in the course of the employment." The injury to plaintiff here arose "out of" the employment. *Wahlig v. Grocer Co.* and other authorities, above. Nevertheless, it is doubtful whether the Utah courts can observe the distinction between the phrase arising "out of" and the phrase "in the course of" as explained above, and also maintain the proposition that the phrase "arising out of" is by necessity included in the phrase "in the course of." *Twin Peaks Canning Co. v. Industrial Commission of Utah* (1921) 57 Utah 589, 196 Pac. 853, 858. This view is substantiated by the fact that a survey of adjudicated cases fails to disclose any claim having been allowed where it was shown that the accident arose "out of" but not "in the course of." H. K. M., '33.