

INJURIES ARISING OUT OF OR IN THE COURSE OF EMPLOYMENT? SPORTIVE ACTS, SKYLARKING, AND GOOSING

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ABSTRACT

From time immemorial, workers have engaged in prankish activities on the job and some have been injured. Whatever these activities are called—goosing, skylarking, or sportive acts—it is clear from case decisions that workers' compensation is not a fruitful avenue for a favorable resolution of these claims. In some recent cases, common law causes of action for money damages have provided remedies for injured workers.

As long as workplaces have existed, there have been opportunities for mischievous behavior among employees. In most cases, employees who are injured as a result of workplace pranks have turned to states' Workers' Compensation Acts for recompense for injury, but with little success.

Within the past few years, however, there have been at least three cases in which employees, injured by sportive behavior in the workplace, have recovered for their injuries through common law litigation using such theories as assault, battery, and infliction of emotional distress, thus providing an opportunity for compensatory as well as punitive damages. It is a trend about which employers should be concerned.

COMMON LAW CAUSES OF ACTION AGAINST THE EMPLOYER

In 1995, the Virginia Supreme Court decided *Richmond Newspaper Inc. v. Hazelwood*, which dealt with the issue of whether "goosing" was compensable as a Workers' Compensation claim [1].

To “goose” means to poke or dig a person in some sensitive spot, or to poke (a person) between the buttocks with an upward thrust of the finger or hand from the rear [2].

The facts of the case were that Hazelwood, a journeyman pressman, sought both compensatory and punitive damages from his employer, Richmond Newspapers, Inc., claiming he was the victim of several incidents of assaults and batteries committed by Mabe, his supervisor, the assistant night foreman, who was not named as a defendant. Hazelwood maintained that the newspaper was negligent in hiring and retaining such an unfit person in the workplace [1, at 57].

Hazelwood testified that, on five different occasions on the job, Mabe grabbed him in the buttocks or in the genital area, and that on September 14, 1990, Mabe’s finger penetrated Hazelwood’s body [1, at 57]. The latter testified that, as a result of this incident, he was “embarrassed and humiliated, his hair was standing up and his chest felt prickly and his knees were rubbery” [1, at 57].

Hazelwood claimed he suffered a similar reaction on other occasions when Mabe goosed him and that, while these incidents caused him no physical injury, they did cause emotional distress by reviving memories of a childhood sexual assault. As a result, Hazelwood claimed he suffered depression and post-traumatic stress disorder (PTSD), for which he sought psychological treatment [1, at 57].

Since Mabe admitted his role in the goosing incident, the trial court instructed the jury that, while acting as an employee of Richmond Newspapers within the scope of his employment, Mabe had committed a battery upon Hazelwood.

The jury returned a verdict in favor of Hazelwood for \$40,000 in compensatory and \$100,000 in punitive damages [1, at 57].

Richmond Newspapers moved to set aside the verdict, arguing that Workers’ Compensation was Hazelwood’s exclusive remedy and that Hazelwood suffered no accidental injury. The trial court denied the motion while holding that Hazelwood’s injury arose out of and in the course of his employment. The court found Hazelwood did not suffer his injuries *by accident* within the meaning of the Workers’ Compensation Act and thus, his claim was not barred by the exclusive provisions of the law [1, at 58].

The Workers’ Compensation law states that an injury is covered by the act if it is the result of an accident that arose out of and in the course of employment. The Virginia Supreme Court concluded that the injury was the result of an accident [1, at 58], but also believed that the key question was whether the injury arose out of the employment.

Richmond Newspaper argued that the *actual risk* test should be applied:

if an injury can be seen to have followed as a natural incident of the workplace and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of employment and then it occurs “out of employment” [3].

The “actual risk” test excludes any injury that cannot fairly be traced to the employment or that comes from a hazard to which workers would have been exposed apart from the workplace.

Under this test, the danger that caused the injury must be peculiar to the work or incidental to the character of the business and not independent of the relationship of master and servant [1, at 58].

The court noted that while the incident need not have been foreseen or expected. . . . “it must appear that the incident had its origin in a risk connected with the employment and to have flowed from it as a rational consequence” [4].

To establish that the goosing was an actual risk of Hazelwood’s employment, Richmond Newspapers offered evidence to show that goosing was prevalent in the pressroom, that it had existed there for more than forty years and that the practice existed in newspaper pressrooms throughout the country. Twelve pressmen, in addition to Mabe, testified about the risk of being goosed in the Richmond pressroom [1, at 58]. The newspaper claimed that the goosing was an activity engaged in by the pressmen to break the tension of the job.

As the evidence showed that the activity was limited to the pressroom, Richmond Newspapers maintained that the activity was peculiar to the work. The newspaper believed that the trial court was correct in holding that if the risk to Hazelwood of being goosed in the pressroom was an actual risk of the job then the injury arose out of his employment [1, at 58].

The Virginia Supreme Court believed that Richmond Newspapers failed to address the issue that, if an assault is personal and not directed against him as an employee or because of his employment, the injury does not arise out of the employment [1, at 58].

The court believed that Mabe goosed fellow workers because he considered them his friends, and that friendship seemed to have been the motivation for the activity. Brown, an assistant manager in the pressroom, testified he had engaged in goosing before he joined management and he did not know “anybody that had goosed anybody that he didn’t consider a friend” [1, at 59]. When asked the purpose of pressroom goosing, Mabe stated, “Everybody thought it was a big joke then. It was like a big locker room, a bunch of guys working together” [1, at 59]. When asked why he goosed Hazelwood in the September 1990 incident, Mabe replied that he had considered Hazelwood a friend back then. “I didn’t have any problem with him. He got along. He joked. He kidded around with everybody else” [1, at 59].

Mabe also testified that he goosed pressmen other than Hazelwood, stating that “it was more or less play down there. I was passing idle time with a bunch of men working together” [1, at 59].

Contrary testimony was heard from Howell Taylor Bear III, who had worked in the pressroom for six years. He stated that no one had ever attempted to goose him. When asked whether the work of a pressman had anything to do with or it benefited the work of a pressman, he responded in the negative.

The court concluded the undisputed evidence clearly showed goosing in the pressroom was of such a personal nature that it was not directed against recipients as employees or in furtherance of the employer's business and that Hazelwood's injury did not arise out of his employment. The court upheld the judgment against Richmond Newspapers [1, at 59], dismissing the argument that goosing was engaged in as a means of breaking job-related tension and thus in furtherance of the employer's business [1, at fn. 3].

COMMON LAW CAUSE OF ACTION AGAINST A CO-WORKER

Goosing in the workplace was also at issue in *Villa v. Derouen* [5]. Villa, an employee of M. A. Patout and Sons, was working with a welding torch while his co-employee Derouen was standing to his left using a cutting torch. When Derouen turned toward Villa, he discharged his torch [5, at 715].

Under cross-examination Derouen admitted he placed his torch between Villa's legs and intentionally sprayed him with oxygen, causing burns to Villa's groin area.

Another employee, Mitchell, testified that shortly before the accident, he saw Derouen take the torch and blow pressurized oxygen behind Villa's lowered face shield as he was welding. Mitchell also testified that Villa had told Derouen to stop fooling around only moments before the incident occurred. Due to the welding noise, Villa could not have heard Derouen's torch [5, at 715].

The issues to be decided in the case were threefold: whether Derouen committed a battery against Villa, whether he suffered offensive contact as a result of the intentional act that caused the offensive contact, and whether Derouen desired to cause the consequence that followed [5, at 715].

The court noted the distinction between an intentional act that causes an intentional injury and one that causes unintentional injury. To constitute a battery, Derouen needed only to intend that the oxygen sprayed toward Villa would come into contact with him or know that such contact was likely to occur [5, at 717].

The court found the jury had been the victim of a misleading instruction, because Derouen's lawyer told the jury that in order to find Derouen liable, it must find that he *intended* to hurt Villa or to burn him.

The court believed that no reasonable juror could have found that Derouen did not *intend* the act of directing compressed oxygen in the direction of Villa's groin.

Declaring this was no accidental release of pressurized oxygen or gas in Villa's direction, because it was undisputed that Derouen had aimed his welding torch and sprayed the contents that ignited at Villa's groin or on the ground between his legs, the court found the jury erred in finding that a battery had not occurred [5, at 718]. A reasonable juror simply could not have found that Derouen did not intend for the air from his welding torch to come in contact with Villa's groin and could

not have found that Derouen, in pointing his torch at Villa and releasing pressurized oxygen in the area of his groin, was not aware or substantially certain that oxygen would come into contact with him [5, at 718].

Although Villa's second-degree burns healed completely with some depigmentation but no loss of function, he complained of being nervous and depressed. A psychiatrist testified that Villa "would need several years of rehabilitation, counseling or retraining to build his self-esteem and self-respect and recover his loss of trust in people" [5, at 719]. The court, therefore, upheld the jury's award of over \$114,000 in special and \$60,000 in general damages. The court further noted that Villa was not limited to a Workers' Compensation remedy because his coemployee had committed an intentional tort [5, at 714].

COMMON LAW CLAIM AGAINST THE PERPETRATOR'S EMPLOYER

It is more common for an injured employee to try to sue the employer for damages arising out of horseplay committed on the job, but such an action will not necessarily succeed. Such was the case in *Prairie Livestock Co., Inc. v. H. T. Chandler* [6]. Chandler was injured in a freak accident when a buyer for a livestock company fell on him. A buyer named Davis entered the stands at a cattle auction where two other buyers, named Crenshaw and Mitchell, were already seated. When Davis playfully sat down on Crenshaw's lap for a minute as he searched for an empty seat, without warning, Mitchell goosed Crenshaw from behind. Crenshaw reacted by suddenly jumping up and hurling Davis down the aisle. During his fall, Davis' body struck Chandler, who was sitting on the aisle steps. As a result of this freak accident, the jury awarded Chandler \$10,000 [6, at 909].

The court found that Mitchell's sudden goosing of Crenshaw could not reasonably have been foreseen or anticipated by Davis and was an independent, intervening, and effective proximate cause of Chandler's injury. Therefore, if Davis' action in sitting momentarily on Crenshaw's lap was negligent, it was only a remote cause of Chandler's injury and was superseded and insulated by Mitchell's intervening act [6, at 909].

The court noted Prairie's liability rested on a theory of agency or *respondeat superior*: that Davis was acting within the scope of his employment or in furtherance of Prairie's business.

This was not the case because Davis' entire contribution to the bizarre events that resulted in Chandler's injury was restricted to his joking request to Crenshaw to give up his seat and in playfully sitting down on Crenshaw's lap.

Since Mitchell's goosing of Crenshaw was exclusively his idea and not associated with Davis or Prairie, the court held that Prairie could not be held liable under a theory of agency or *respondeat superior* [6, at 911].

CLAIMS FOR WORKERS' COMPENSATION: BENEFITS DENIED

While the above cases involved common law actions for money damages against employers or coworkers, there have been cases in which victims of horseplay on the job have sought Workers' Compensation benefits. The issue to be decided in the cases discussed below is whether injuries incurred as a result of horseplay are compensable.

Cases of typical of this genre include *Insurance Company of America v. Hogsett* where Workers' Compensation benefits were awarded to Hogsett, an employee of the Pepsi Cola Bottling Company [7]. In his petition for Workers' Compensation benefits, he claimed that, while pursuing his duties as an operator of a forklift, he was struck in the jaw by a Pepsi Cola bottle, suffering severe and disabling injuries. Hogsett had a habit of punching Hill, his supervisor, in the ribs, causing Hill to react with a reflex action. Hogsett did it for the purpose of watching Hill react. Hill warned Hogsett not to do that, especially if "I have got something in my hand" [7, at 731].

After such a warning, Hogsett approached Hill, goosed him, and caused him to lose control of a soft drink bottle in his hand. The bottle struck Hogsett in the mouth, breaking four teeth, a problem that was later corrected and did not result in any loss of time from work [7, at 731].

The chancellor's decree granted Hogsett \$1,311.00 for medical expenses after finding his injury was one that arose out of an in the course of his employment and that it did not amount to willful misconduct [7].

The appellate court disagreed with that conclusion, citing a Tennessee law:

No compensation shall be allowed for an injury or death due to an employee's willful misconduct or intentional self-inflicted injury, or due to intoxication, or willful failure or refusal to use a safety appliance or perform a duty required by law.

If the employer defends on the ground that the injury arose in any or all of the above stated ways, the burden of proof shall be on the employer to establish such defenses [8].

The court held that Hogsett's conduct in poking Hill in the ribs was willful misconduct. It believed an employer is entitled to protection from liability when an employee willfully refuses to observe reasonable rules and obey orders forbidding dangerous practices.

The court held benefits should be denied because Pepsi Cola had proved the elements of willful misconduct: intention to do the act, purposeful violation of orders, an element of perversiveness [7, at 733] and that the accident and injury did not arise out of the employment because there was no causal connection between the work required to be done and the result [7, at 733].

Benefits were also denied in *Lincoln v. Whirlpool Corp.*, where Lincoln, a punch press operator at the Whirlpool Corp., was shot and killed as he waited for a factory whistle to blow [9]. As Lincoln and approximately fifty to sixty employees gathered around the fence, a fourteen-year-old boy named Whitehouse began to pinch and goose Lincoln through the fence, calling him obscene names. A witness testified to the verbal exchange, saying, "they were both cutting up" [9, at 597].

Whitehouse, who was 5'1" and weighed 125 pounds, jokingly asked the guard, "Can I whip his _____?" When the guard unlocked the gate, Whitehouse pushed it open and kicked Lincoln on the leg. Lincoln, a twenty-seven year old who was 5'8" and 175 pounds, playfully struck Whitehouse on the leg with his belt [10].

Whitehouse's mood changed and he pointed his finger at Lincoln and said, "Just wait, I'll be right back. I'll fix you." Returning several minutes later with gun in hand, he promptly shot Lincoln, who died before reaching the hospital [9, at 598].

The Indiana Industrial Board declined to give Lincoln's widow Workers' Compensation because it stated, "At the time of his death, the decedent was not performing his job." The court noted the incident had occurred when Lincoln was waiting for his lunch period, he had engaged in horseplay with a person who was not an employee, and he was involved in no activity of benefit to his employer [9, at 598].

The court found Lincoln's widow had the burden to prove that Lincoln's fatal injury "arose out of and in the course of his employment with Whirlpool Corporation." Further, it stated that the terms "arising out of . . ." and "in the course of" employment are not synonymous but are conjunctive terms. The term "arising out of" refers to the origin and cause of the accident while "in the course of" refers to the time, place, and circumstances under which the accident occurred [9, at 599].

The court also noted that Indiana's courts have held the question of "whether or not the injury arises out of employment does not depend on what the employee is doing at the time "the accident" occurs, but whether the "accident" was due to a hazard to which the employee would not have been exposed had he not been performing the duties or incidental tasks of his employment" [11].

The court then addressed the key question that has plagued courts since Workers' Compensation plans were established: whether a person actively engaged in horseplay is barred from compensation because such an injury does not "arise out of his employment" [9, at 600].

The *Lincoln* court noted that courts first recognized the "horseplay" doctrine in the case of *In Re Loper* [12], which stated:

The books contain many cases involving injuries to workmen caused or occasioned by some sportive act of a fellow workman done by him independent of any duty on his employment and characterized by the courts and law writers as "practical joking, skylarking or horseplay."

With practical uniformity the courts hold both under the English Act and also under the various American statutes that an injury so suffered does not arise out of the employment within the meaning of the governing statute and consequently that its compensatory provisions are not thereby invoked [13].

Historically, the courts have denied compensation because the “sportive” act that results in the injury does not constitute part of the enterprise conducted by the employer. But the courts have also recognized two exceptions to the horseplay doctrine. The first occurs when the employer, knowing of the activity, permits such practices to continue when it is within the employer’s power to prevent it. Failing to stop the horseplay makes it an element of the conditions under which the employee is required to work [12, at 571, 573; 324, 325].

The second exception occurs when the instrumentality used in the sportive act is incidental to the work environment and the injured employee is an innocent victim of the horseplay [14]. There are cases that allow compensation where the employer has acquiesced in the horseplay [15, 16] and cases when horseplay is expected to occur because of the type of activity the employee is engaged in, like the “airhose goose.”

Horseplay can take a variety of forms. In *Neal v. Boeing Airplane Co., et al.* [17], Neal’s duties were to keep production moving through his department. When there was a lull, he and other employees would wager as to which employee could engage in the pastime of trying to lift and raise large rolls of waxed paper above their heads [17].

Neal was injured when, in attempting to lift one such heavy roll of paper, it slipped and fell against his neck [17].

In his quest for Workers’ Compensation benefits, Neal did not contend that this horseplay had been a matter of common practice about which the employer had knowledge or had in any way condoned because an assistant foreman in charge of that department testified that, on the day Neal was injured, the foreman had told two or three employees the rolls of paper were too heavy to lift and that they were to leave them alone [17, at 645].

Neal advanced the novel argument that there was a “modern trend” in Workers’ Compensation law that the stresses and strains resulting from the close association of employees under conditions common to modern industry inevitably leads to pranks, sportive acts, or horseplay among them and that injuries resulting from participation in such acts should be regarded as one of the perils of employment the Compensation Act was intended to cover [17, at 645].

The court rejected this argument, declaring the decision to adopt Neal’s view should be left to the legislature. The court further noted that compensation has been denied even where the injured employee was not a participant unless it was shown that the horseplay or dangerous practice on the employees’ part had been a customary practice known to, and acquiesced in, by the employer [18].

CLAIMS FOR WORKERS' COMPENSATION: BENEFITS GRANTED

The type of case in which an employee injured as a result of horseplay has been awarded Workers' Compensation benefits is exemplified by *McCoy v. Easley Cotton Mills* [19].

McCoy was employed at Woodside Mills' Easley plant. While smoking outside the mill during a break, he was unintentionally struck in the eye with a copper tube by a fellow employee. As a result he lost the sight of the eye, which was later removed and replaced by an artificial one [19, at 773].

The hearing commissioner denied McCoy's claim for compensation on the grounds that the accident did not arise out of or in the course of his employment. The full commission reversed, awarding McCoy for the loss of the eye and facial disfigurement. When the circuit court affirmed the full commission's award, the mill appealed [19, at 773].

The Supreme Court pointed out that, although McCoy and other employees were outside the plant smoking, the injury did occur during a paid work interval permitted by the employer [19]. Among the employees taking time out to smoke were McCoy and Roy Holder. It was generally known that Holder was "goosey" or ticklish. As McCoy came out of the plant he passed Holder, and goosed or punched him. Later they began a discussion about some copper piping on the premises. McCoy then walked away from Holder and was standing with his back to him. Holder was holding in his hand a piece of copper pipe 10-12" long. Someone said, "Look out!" Upon hearing the words, "Look out," McCoy turned quickly and his face struck the piece of copper pipe in Holder's hand [19, at 773].

At the time of the injury, the men were not engaged in horseplay. The copper tubing was being used to air condition the plant and had been left in a box just outside the door of the mill by a construction company [19, at 773].

The Court concluded the accident had occurred in the course of McCoy's employment. While smoking was not an obligatory duty of his employment, it was a permitted part. The Court concluded there was no break in McCoy's employment even though he had temporarily left his job [19, at 774].

While the Court conceded McCoy had engaged in horseplay with Holden as they exited the mill, it found abundant testimony that McCoy was not so engaged at the time of the injury and for at least five minutes prior to the incident. Thus the Court concluded McCoy was entitled to Workers' Compensation benefits [19, at 774].

How can a court decide that goosing is a common workplace practice? *McKenzie v. Brixite Manufacturing Company* dealt with this issue [20]. McKenzie was employed by Brixite as a granite mixer. As he was passing Johnson, a fellow employee who was scraping hot asphalt from a bucket, McKenzie touched him on the shoulder. Johnson immediately turned and struck McKenzie on the right forearm, burning him with a hot scraper [20, at 277].

Johnson claimed McKenzie goosed him in the buttock area near the anus. McKenzie confessed to another employee that he had indeed done so [20, at 277].

The court was satisfied from the testimony that goosing was a common practice in various parts of the plant and that many employees occasionally participated in it. The court was also convinced that management was aware of the practice but took no steps to stop it [20, at 279].

The court cited the relevant statute:

An accident to an employee causing his injury or death suffered while engaged in his employment but resulting from horseplay or skylarking on the part of a fellow employee not instigated or taken part in by an employee who suffers the accident, shall be construed to have arisen out of and shall be compensable under the Act . . . [21].

Brixite argued that the legislation intended to bar instigators or participants in skylarking from the benefits of Workers' Compensation in all cases. But the Supreme Court disagreed, saying, "the plain wording of the statute emphasizes the intent to rectify the injustice of withholding compensation from innocent victims of sportive acts whether or not such an act was part of a common practice of which the employee knew or should have known" [20, at 280].

The court noted McKenzie's act was completely unconnected with his duties and was entirely "the product of his own caprice" [20, at 281] because his touching of Johnson had nothing to do with his employment.

McKenzie argued the prevalence of this particular sportive act among the employees occurred with Brixite's knowledge, thus making it an incident of employment for which the company was responsible. The court conceded there had been a reported New Jersey case in which a participant or instigator of skylarking has been allowed a recovery. It noted the court had endorsed the concept that a recovery may be based on the fact that skylarking was a common practice conducted "with the knowledge and acquiescence of the employer" [20, at 282].

The court found however, that McKenzie's act was purposely committed to molest Johnson because McKenzie knew of his sensitivity. The court also believed McKenzie's behavior was part of a continuous pattern and a significant departure from the course of his employment. McKenzie also knew it was disruptive of the work routine for both Johnson and himself. The court concluded McKenzie's acts were the result of an act unconnected with his duties as an employee [20, at 283].

There is a significant body of opinion that disagrees with the prevailing view on sportive behavior in the workplace as averred by the majority in *McKenzie*. The dissenter, Judge Sullivan, believed "the incident clearly was a mishap and while it may have resulted from the exercise of some raffish behavior" [20, at 284] on McKenzie's part, the judge considered the nature of the work

environment and the fact that such behavior was frequently indulged in by the employee. The judge believed McKenzie's act was "a momentary, impulsive, and an inconsequential deviation" [20, at 284] from the course of employment and would have ruled in his favor.

The McKenzie majority recognized the disagreement on this topic. It quoted a law review article:

The more recent and better rule is to allow an award for an injury resulting from horseplay even to aggressors where an injury is a by-product of associations of men in close contact, thus realistically recognizing the strains and fatigue from human and mechanical impacts [22].

While some cases like *Crilly v. Ballou* [23] share this view, the notion has not been widely followed.

Crilly, a minor, sued Ballou, a subcontractor doing business as Wisdom Roofing and Siding. From time to time, Crilly and a coworker, Wozniak, would throw asbestos shingles back and forth at each other, even after being warned not to do so. The action was a result of horseplay, not animosity, but the last shingle thrown put out Crilly's eye [23, at 305]. Ballou argued the injury did not arise out of or in the course of employment and that the weight of the authority was on his side.

The *Crilly* court took a different tack from *McKenzie*, stating that while an employee is "not an automation even when he is highly efficient, he will, to some extent, deviate from the uninterrupted performance of his work" [23, at 314].

The court noted the two situations in which the courts had allowed recovery: when the practice as of such longstanding duration that it has become a custom of the business and the employer knows of the practice and tolerates it, giving the injury a "work connection," [23, at 317] and where the party injured in the horseplay was innocent of any skylarking. The latter approach has been criticized.

Why should it make any legal difference under compensation law whether the injured party was the aggressor? To create an artificial rule that he, whose first made contact, is an aggressor even though the first fist did no harm, is to forget the legalistic command that injuries arising out of the employment be compensated short of willful misconduct or similar provision [24].

The court believed the central issue of the case was not whether Crilly's injury arose out of and in the course of his employment because Crilly was a willing participant in the horseplay and, although warned by his employer to stop the activity, he disobeyed instructions. Throwing shingles is clearly not incidental to the employment.

This court responded negatively to the question of whether an employee who deliberately and intentionally participates in a course of conduct that may result in injury in violation of the specific instructions of the employer is entitled to compensation because Crilly was not in the course of, nor did his injury result from his employment [25].

CONCLUSION

As discussion of the preceding cases indicates, willful engagement in horseplay has not proven a fruitful opportunity for obtaining Workers' Compensation benefits. The only workers who have a chance of recovery are those who are innocent bystanders to the horseplay or those who work where evidence shows sportive behavior to be inescapably a part of the workplace's daily routine.

Most fruitful from the standpoint of injured workers has been the pursuit of a common law cause of action for battery against the employer (Richmond Newspapers) or against the perpetrator (Derouen). Such common law actions improve the opportunity for a larger amount of money damages than could be gained under Workers' Compensation.

Regardless of whether the compensation of common law route is pursued, employers should be aware that, as long as there are workplaces, there will be horseplay, skylarking, and goosing. The use of the powerhose, acetylene torch, and the habits of throwing pipes, nails, apples, bottles, and shingles have the potential for serious injury and death despite instructions to the contrary. As one court acknowledged, "it is inevitable that, when human beings are associated together, there will be a certain amount of departure from the work and certain thoughtless acts of employees" [26]. With ever-increasing costs of compensation insurance and the possibility for litigation, employers are wise to carefully monitor their workplace, to insist that supervisors warn employees not to engage in such conduct, and to strongly sanction such behavior.

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ENDNOTES

1. *Richmond Newspaper Inc. v. Hazelwood*, 457 S.E. 2d 56 (Va. 1995).
2. [1, at 57], fn. 1, quoting *Webster's Third New International Dictionary*, p. 979 (1981).
3. *Bradshaw v. Aronovitch*, 170 Va 329, 196 S.E. 684 (1938).

4. [1, at 58], quoting *Bradshaw v. Aronvitch*, 170 Va. at 335, 196 S.E. at 686, quoting *In Re McNicol* 215 Mass 497, 102 N.E. 697, (1913).
5. *Villa v. Derouen*, 614 So. 2d 714 (LA App. 3 Cir. 1993).
6. *Prairie Livestock Co., Inc. v. H. T. Chandler*, 325 So.2d 908 (1976).
7. *Insurance Company of America v. Hogsett*, 486 S.W. 2d 730 (1972).
8. T.C.A. sect. 50-910.
9. *Lincoln v. Whirlpool Corp.*, 279 N.E. 2d 596 (Ind. 1972).
10. [9, at 597]; One witness testified that Lincoln barely touched Whitehouse's leg.
11. [9, at 600], citing *Burroughs Adding Machine Co. v. Dehn* 110 Ind. App. 483, 39 N.E. 2d 499 (1942) and *Hunt v. Gutzwiller Baker Company* 104 Ind. App. 209, 9 N.E. 2d 129 (1937).
12. *In Re Loper*, 64 Ind. App. 571, 116 N.E. 324 (1917).
13. [12, at 573, quoted [9, at 600]]. *Loper* cited *Matter of DeFilipes v. Falkenberg* (employee struck in eye with scissors) Award denied. 170 App. Div. 153, 155 N.Y.S. 761 (1915). Questioned in *Leonbruno v. Champlain Silk Mills* 229 N.Y. 470, 128 N.E. 711 (1920); *Federal Rubber Mfg. Co. v. Havolic* 162 Wis. 341, 152 N.W. 143 LRA (1916) (Employee's rectum ruptured by airhose. Held: Injury not incidental to employment) overruled by *Badger Furniture Co. v. Industrial Comm'n* 195 Wis. 134, 217 N.W. 734; *Hulley v. Mossbrugger* 88 N.J. Law 161, 95 A. 1007, (L.R.A. 1916) (Hulley, in dodging fellow worker's blow, slipped on concrete floor, fell, and sustained injuries that caused his death. Award: Upheld, later overturned) disapp. by *Secor v. Penn. Service Garage* 19 N.J. 315, 117 A. 2d 12; *Fishing v. Pillsbury* 172 Cal. 690, 158 P. 215 (1916) (Employee's eye destroyed by missile from a trick camera.) (Award denied); *Coronado Beach Co. et al. v. Pillsbury* (Employee, particularly susceptible to tickling, was punched by fellow-employee and fell down a flight of stairs with injury to knee. Award denied) 172 Cal 682, 158 P. 212 L.R.A. (1916F); overruled by *Pacific Employers Insurance Company v. Industrial Accident Commission*; *Pierce v. Boyer-Van Kuran, etc.* 99 Neb. 321, 156 N.W. 509 L.R.A. (1916D) (Pierce attempted to strike fellow employee Brown with the ends of lines used to guide a horse and team, which provoked employee Brown to strike Pierce in the eye with a stick causing the loss of the eye.) (Award denied).
14. [9, at 601] quoting *Woodlawn Cemetery Association v. Graham* 27 Ind. Dec. 91, 94, 273 N.E. 2d 546, 548 (Ind. App. 1971).
15. *Kokomo Wire Co. v. Irick* 80 Ind. App 610, 141 N.E. 792 (1923).
16. *Kunkel v. Arnold* 131 Ind. App. 219, 158 N.E. 2d 610 (1959).
17. *Neal v. Boeing Airplane Co., et al.*, 161 Kan 322, 167 P.2d 643 (1946).
18. [17, at 645], quoting *White v. Kansas City Stock Yards* 104 Kan 90, 177 p. 522.
19. *McCoy v. Easley Cotton Mills*, 218 S.C. 353, 62 S.E. 2d 772 (1950).
20. *McKenzie v. Brixite Manufacturing Company*, 161 A. 2d 276, 61 N.J. Super 461 (1960).
21. N.J. S.A. 34: 15-7.1 L. 1956 c. 141 p. 579, sec. 9.
22. [20, at 282], quoting Samuel B. Horovitz, "Current Minds in Basic Principles of Workmen's Compensation," 3 *NACCA L.J.* 58 (1949).
23. *Crilly v. Ballou*, 353 Mich. 303 91 N.W. 2d 493 (1958).
24. [23, at 320], quoting Samuel B. Horowitz, "Assaults and Horseplay Under Workman's Compensation Law," 411 *Ill. L.R.* 311 (1945).

25. [23, at 331]. The court cited two cases in which innocent victims of horseplay did obtain compensation: *Glenn v. Reynolds Spring Company* 225 Mich. 693 (Glenn was employed as a scooper using his wheelbarrow for the collection of refuse. Two coworkers, subsequently convicted of manslaughter, attached an electric wire to the handles. Glenn died after receiving an electric shock. Although a boss knew of the horseplay, he did nothing to stop it. The court concluded that, based on these unusual facts, Glenn was entitled to an award because Glenn was a victim of the horseplay and subjected to an unknown hazard.) In *Leonbruno v. Champlain Silk Mills* 229 NY 470, 128 N.E. 711, Leonbruno was hit in the eye with an apple thrown by one fellow employee at another. He had no part or knowledge of the horseplay until struck with the apple. The award was sustained.
26. *Coronado Beach Company et al. v. Pillsbury* 172 Cal. 682, 158 p. 212, 212-213 L.R.A. (1916F).

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