

FD:

FD:

DT:D

DN: 804/89

STY: HUSSAIN v. MACLEALLAN

PANEL: Strachan (dissenting); Fox Cabinet

DDATE: 311089

ACT: 8(9); 15

KEYW: Section 15 application; In the course of employment (horseplay); In the course of employment (fighting); Board Directives and Guidelines (horseplay); Board Directives and Guidelines (fighting).

SUM: The plaintiff and two co-workers were engaged in a form of horseplay involving the throwing of dough balls. A dough ball thrown by the plaintiff hit the defendant worker. A confrontation between the plaintiff and defendant escalated to the point where the defendant took a knife normally used for his job and slashed the plaintiff repeatedly.

The majority of the Panel found that both the plaintiff and defendant were in the course of employment. Board policy suggests that participants in fighting and horseplay take themselves out of employment. However, a number of Tribunal decisions, none of which has been reviewed under s.86n, have found that injuries sustained in a fight are compensable if the activities leading up to the fight were reasonably incidental to employment. In this case, some element of horseplay existed on a regular basis. If the knife attack had taken place subsequent to a reasonable cooling off period after the horseplay, the employment nexus would have been severed. However, no cooling off period occurred and the employer nexus was not broken.

The right of action regarding the wounding incident was taken away. The Tribunal did not have jurisdiction to deal with a wrongful dismissal action against the employer.

The Panel Chairman, dissenting, agreed that the plaintiff was in the course of employment but found that the defendant took himself out of employment. There come a point where the nature of the harmful act is such that it, but its very nature, breaks the employment nexus because of its remoteness from the normal work place activity. This must be determined on a case by case basis. By viciously attacking and repeatedly slashing the plaintiff, the defendant took himself out of the course of employment.

PDCON:

TYPE:15;S

DIST:S

DECON: Decision No. 337 (1986), 2 W.C.A.T.R. 141; Decision No. 771/87 (1987), 6 W.C.A.T.R. 247; Decision Nos. 234/87; 879/87; 1017/87

BDG:Claims Adjudication Branch Procedures Manual, Document no. 33-05-03; Document no. 33-05-04

IDATE:

HDATE:061089

TCO:

KEYPER:R. Zemla; c. Neuwald; R. D'Angelo

XREF:

COMMENTS:

TEXT:

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 804/89

IN THE MATTER OF an application pursuant to section 15 of the Workers' Compensation Act, R.S.O. 1980, c.539, as amended.

AND IN THE MATTER OF an action commenced in the District Court of Ontario at the City of Toronto as Action No. 309923/87.

B E T W E E N:

AHMED HUSSAIN and THE GRIFFITHS LABORATORIES LIMITED

Applicants in this application  
and Defendants in the District  
Court of Ontario Action.

- and -

GERARD J. MacLELLAN

Respondent in this application  
and Plaintiff in the District  
Court of Ontario Action.

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 804/89

IN THE MATTER OF an application pursuant  
to section 15 of the Workers' Compensation  
Act.

AND IN THE MATTER OF an action commenced  
in the District Court of Ontario, at the  
City of Toronto, as Action No. 309923/87.

B E T W E E N:

AHMED HUSSAIN and THE GRIFFITHS  
LABORATORIES LIMITED

Applicant/Defendant

- and -

GERARD J. MacLELLAN

Respondent/Plaintiff

WORKERS' COMPENSATION ACT  
SECTION 15 APPLICATION

**WORKERS' COMPENSATION APPEALS TRIBUNAL**

DECISION NO. 804/89

This Section 15 Application was heard on October 6, 1989, by:

I.J. Strachan: Panel Chairman,  
S. Fox : Tribunal Member representative of workers,  
M. Gabinet : Tribunal Member representative of employers.

This Section 15 Application arises from a law suit between the Plaintiff Gerard J. MacLellan and the Defendants Ahmed Hussain and The Griffiths Laboratories Limited, commenced in the District Court of Ontario as Action No. 309923/87. The amended statement of claim discloses two causes of action against The Griffiths Laboratories Limited, namely, a wrongful dismissal action and an action grounded in negligence in which the Plaintiff seeks damages for certain wounds sustained on the employer's premises.

The Applicant, The Griffiths Laboratories Limited ("Griffiths"), was represented by R. Zemla of the law firm Brown & Forbes. The Applicant, Ahmed Hussain ("Hussain"), was represented by C. Neuwald of the law firm Ecclestone, Chykaliuk, Hamer & Poisson. The Plaintiff/Respondent Gerard J. MacLellan ("MacLellan") was represented by R. D'Angelo of the law firm Posthumus and Abols. The Panel heard and considered testimony by Mr. MacLellan. The Applicant's statement and the Section 15 Statement of the Respondent were marked as Exhibits #1 and #2 respectively. In addition, the Panel heard submissions from counsel.

**THE SECTION 15 APPLICATION**

Section 15 of the Workers' Compensation Act (the "Act") provides:

15 Any party to an action may apply to the Appeals Tribunal for adjudication and determination of the question of the plaintiff's right to compensation under this Part, or as to whether the action is one the right to bring which is taken away by this Part, or whether the action is one in which the right to recover damages, contribution, or indemnity is limited by this Part, and such adjudication and determination is final and conclusive.

Subsection 8(9) of the Act provides:

8(9) No employer in Schedule 1 and no worker of an employer in Schedule 1 or dependant of such worker has a right of action for damages against any employer in Schedule 1 or any executive officer or any director or any worker of such employer, for an injury for which benefits are payable under this Act, where the workers of both employers were in the course of their employment at the time of the happening of the injury, but, in any case where the Board is satisfied that the accident giving rise to the injury was caused by the negligence of some other employer or employers in Schedule 1 or their workers, the Board may direct that the benefits awarded in any such case or a proportion of them shall be charged against the class or group to which such other employer or employers belong and to the accident cost record of such individual employer or employers.

The basic facts in this case are not in dispute. The central issue which the Panel must determine is whether Mr. MacLellan and Mr. Hussain were both in the course of their employment when Mr. MacLellan sustained certain knife wounds.

(i) Background

On July 22, 1987, Messrs. MacLellan and Hussain were both employed by Griffiths, the Plaintiff (MacLellan) as a fork-lift operator and the Defendant (Hussain) as a lead hand. Griffiths is a Schedule 1 employer under the Act. Any contact between MacLellan and Hussain was limited to work-related activities. They did not socialize either at work or outside the workplace. On July 22, 1987, both the Plaintiff and Defendant were working on the night shift. During that shift, the Plaintiff and two other co-workers engaged in a form of "horseplay" involving the throwing of "dough balls". During one instance of this "horseplay", a dough ball thrown by the Plaintiff struck the Defendant Hussain. Although the sequence of the events is uncertain, because of contradictions in testimony, the following events did occur: Mr. Hussain confronted the Plaintiff and accused him of having thrown the dough ball. The Plaintiff while intending to proceed to line office #5, pushed Hussain causing him to fall backwards on a skid. The manner in which this confrontation escalated is not entirely clear (i.e. whether the Plaintiff next struck the Defendant or whether the Defendant next attacked the Plaintiff). The end result is quite clear. The Defendant Hussain drew an x-acto knife and slashed the Plaintiff on his left arm, right leg, lower back and chest. Approximately 45 stitches were required to close the various cuts. The x-acto knife was used by the Plaintiff to cut bags in the course of his employment. The employer supplied knives for this purpose, although it did not supply the specific x-acto blade used by the Defendant to wound the Plaintiff.

As a result of the wounds, the Plaintiff was disabled for a period of approximately eight weeks. Griffiths terminated the employment of both MacLellan and Hussain.

## (ii) The right to sue

The Plaintiff took the position that he was entitled to exercise an option between receiving compensation benefits and instituting an action for damages for the wounds which he sustained. Under subsection 8(9) of the Act quoted earlier, if either MacLellan or Hussain were not in the course of their employment at the time Mr. MacLellan sustained his injuries, the Plaintiff's right to sue is preserved. However, if both men were in the course of their employment at the time of the happening of the injury, then the right to sue is taken away by the provisions of the Act.

**THE PANEL'S REASON**

## (i) In the course of employment

The compensation system in Ontario was established to provide injured workers with compensation benefits for work related injuries. The system is based on no fault insurance principles designed to provide an expeditious remedy to an injured worker without resorting to litigation. An impartial observer of the compensation system could be forgiven for forming an initial impression that injuries sustained in a knife fight are not properly the subject of the Workers' Compensation Act (the "Act").

Indeed, the published Board policies on "fighting" and "horseplay - larking" suggest that participants (other than innocent victims) take themselves out of the course of their employment by engaging in fighting.

Claims Adjudication Branch Procedures Manual, Document #33-05-03, deals with fighting and reads as follows:

1. Workers who participate in a fight are usually not entitled to compensation benefits. However, where the fight results solely over the work, the claim may have merit if:
  - the worker was not the aggressor and did not provoke the fight, or
  - the worker was an innocent bystander.
2. Where the fight results from an argument over a personal matter, there is no entitlement.
3. Since the aggressor or participants take themselves out of the course of their employment an innocent bystander injured in a fight over a personal matter, has a right to action.

Claims Adjudication Branch Procedures Manual, Document #33-05-04, deals with "horseplay - larking" and reads as follows:

1. There is no entitlement to compensation benefits for workers injured while participating in horseplay or larking.
2. The innocent victim has entitlement when:
  - He does not participate in the horseplay or larking.
  - He does not retaliate.
3. Since the parties who initiated the horseplay took themselves out of the course of their employment, the injured party must elect to claim compensation.

However, a stream of WCAT decisions appear to have dramatically altered the Board policy on fighting. The following is a selection of Tribunal decisions dealing with fighting. To the best of the Panel's knowledge, none of these decisions have been subjected to the section 86n review process reserved to the WCB under the Act.

(ii) Decision No. 337

In this decision [(1986), 2 W.C.A.T.R. 141], the Panel held that a spontaneous escalation of "horseplay" which ultimately resulted in a fight did not take the assailant out of the course of his employment because some "horseplay" in the form of bantering was a regular part of the work day. That Panel concluded at page 148:

The incident occurred on the employer's premises. There was evidence that horseplay in the form of a good-natured bantering, teasing, and joking occurred regularly during the work day and there was evidence that this particular incident started out as routine horseplay but quickly developed into something more serious. In our view, the circumstances which gave rise to the assault were circumstances that were regularly part of the employment. Given the momentary nature of the incident, the fact that Digout was already on his shift, the occurrence of the incident on the employer's premises within the normal work day, and particularly noting that the assault did not arise solely from private reasons but arose out of a horseplay incident that was very common on the work crews, we conclude that Digout's actions did not take him out of the course of his employment.

(iii) Decision No. 234/87

In this case, the majority of the Panel held that a knife wound sustained as a result of an altercation between two workers occurred in the course of the worker's employment. The Panel concluded that "horseplay" was a reasonably incidental activity to the worker's employment and that an escalation involving obscene language and physical confrontation resulting in a knife wound did not break the employment nexus. The Panel made reference to Decision No. 337 and stated at page 4 of its decision:

So, when considering horseplay, we are not looking at fault; rather we are looking at whether the injured worker chose a form of horseplay that could be considered an activity not reasonably incidental to the worker's employment. If he did, then it can be said that the worker was no longer in the course of his employment and that any accident occurring during that activity did not arise in the course of the worker's employment.

In the present case the evidence indicated that the type of horseplay chosen by the injured worker was a common enough part of the every day work environment that it cannot be said that he chose to break the employment nexus. He made an obscene comment to a co-worker. That was not an uncommon event at the work-place. During the course of the events that followed that obscene comment, the worker did nothing that could be considered to have broken the employment nexus. He made no physical contact with Mr. D. nor did he choose to introduce any other element that could be considered a personal activity not reasonably incidental to the employment. From his point of view the accident was a fluke consequence of an activity that was as much a part of his work environment as was operating his machine.

(iv) Decision No. 771/87

In this decision [(1987), 6 W.C.A.T.R. 247], the Panel rejected the Board policy on fighting and held that the focus should be on a substantial relationship to work. At pages 251-2, the Panel stated:

The Board's policy is to regard injuries arising out of a fight as arising out of employment only if the fight was solely over work. The Panel is of the view that this test is too restrictive. Rather it is more in keeping with the usual test for whether an accident arose out of employment to ask if the fight was substantially related to work.

The only reason for invoking a more restrictive test in these circumstances, would be a desire to punish the worker who was involved in a fight. This, however, is not the purpose of the Workers' Compensation Act. In this case

the Panel is satisfied that this fight was, at least in part, work related. Both men denied any personal animosity towards one another, and their supervisor knew of none.

We do not believe that the worker simply began throwing oil bottles at Mr. B. for no reason at all. Whether this disagreement arose out of the worker's frustration at the number of uncapped bottles coming through, as Mr. B. suggested, or out of Mr. B. taking offence at the way the worker attempted to dispose of the leakers, as the worker suggested, it was clearly substantially related to their work.

(v) Decision No. 879/87

In this case the Panel concluded that a fight which arose in the employer's parking lot arose out an activity reasonably incidental to the employment. The Panel reviewed some of the Tribunal decisions on fighting and implicitly rejected the Board policy on fighting. At page 6 of the decision the Panel stated:

...it is the circumstances giving rise to the fight, in each case, which should be examined in the analysis conducted under section 3(1). A finding that a worker was an aggressor or participant in a fight is a consideration relevant to the next stage of analysis - that conducted under section 3(7).

In our view, the adjudication approach reflected in Document #33-05-03 is not one which gives effect to the wording or intent of the Act, and we would, in the circumstances, not take guidance from it.

The Panel then went on to conclude:

The worker's trip to his car formed a regular part of the process of leaving the employment premises, and the altercation between this worker and the driver of the other car developed spontaneously out of the mishap of the other driver coming into closer contact with this worker. Although the disagreement between the two cannot be said to have arisen specifically out of a work related issue, we are satisfied that the circumstances given rise to the disagreement between these two workers arose out of and in the course of an activity reasonably incidental to the employment.

(vi) Decision No. 1017/87

In this case two worker's became engaged in a fight as a result of an accusation by one worker that the other had stolen his boots. The Panel found that the fight arose out of employment. At page 5 of that decision,

the Panel set out certain circumstances in which compensation for a fight was payable and then went on to apply those circumstances to the facts of the case. The conclusion at page 5 reads as follows:

The Panel's conclusions

The circumstances for which compensation is payable for injuries sustained during fights has been discussed in previous WCAT decisions. In general, compensation for fights is payable when:

1. The fight occurs in the course of employment (at work and during working hours) and;
2. Because of a work situation or;
3. Because of a situation which is not personal and therefore does not break the connection between the work and the circumstances surrounding the fight. These have been described as neutral risk situations in other decisions and;
4. The cause of the injury is not solely the serious and wilful misconduct of the injured party.

In this case, this Panel has made the following findings given the evidence which was heard and the evidence contained in the Case Description:

1. The fight occurred in the course of employment;
2. Mr. A. provoked the assault, whether on that day or at some other time. Most of the evidence indicates that he had accused either directly or indirectly Mr. B. of stealing his boots;
3. Mr. A.'s accusations about the stolen boots stemmed from antagonism between Mr. B. and himself. This antagonism appears to have developed because of the disparity between their working conditions;
4. The workers had no relationship other than the work relationship. In other words, there was no personal relationship between Mr. A. and Mr. E.

It is therefore our conclusion that the fight occurred as a result of the employment situation.

The general thrust of the various decisions appears to favour the conclusion that injuries sustained in a fight are compensable if the activities leading up to the fight were reasonably incidental to the worker's employment. As Decision No. 879/87 states, it is the circumstances giving rise to the fight which are examined and if these circumstances are reasonably incidental to employment, then the act of fighting will not take a worker out of the course of his employment. Panels have focused on the fact that "horseplay" (in Decision No. 337 it took the form of teasing or bantering) was an activity reasonably incidental to the employment; thus, a fight which had its root in the daily bantering did not take the worker out of the course of employment.

In the case before the Panel, there is conflicting evidence as to the extent of the "horseplay" which occurred on the employer's premises. Mr. Smith, a supervisor, indicated that no "horseplay" occurred. Mr. Hussain also indicated that no "horseplay" occurred. Mr. MacLellan stated that water fights and doughball tossing were regular occurrences during off shifts (i.e. shifts other than the day shift). It is not surprising that a supervisor would deny any "horseplay", since workers would not ordinarily carry on such activity in view of a manager or supervisor. In weighing the evidence of Mr. MacLellan regarding the "horseplay" practice, it is worth noting that his testimony is essentially adverse in interest. Normally he could be expected to maintain the position that the "horseplay" giving rise to the fight was unusual and not part of the work routine. We prefer the evidence of Mr. MacLellan and accept that some element of "horseplay" existed on a regular basis.

If "horseplay" forms part of the work related activity, can it be said that the chain of events leading up to the wounding broke the employment nexus? We are of the opinion that it could not. We are persuaded by the volume of Tribunal decisions and the absence of any section 86n challenge, that the fight which resulted from an escalation of "horseplay" did not take either worker out of the course of employment.

However, if the knife attack by the Defendant Hussain had taken place subsequent to a reasonable "cooling off" period after the "horseplay", we are of the opinion that the employment nexus would have been severed because the element of contemporaneity which existed between the "horseplay" and the knife attack would have been removed. Since no cooling off period occurred in this fact situation, we conclude that Mr. Hussain's actions did not take him out of the course of his employment.

Accordingly we conclude that both the Plaintiff and Defendant Hussain were in the course of their employment at the time of the fight.

**THE DECISION**

1. The Plaintiff's right of action with respect to the wounding incident is taken away.
2. The Tribunal has no jurisdiction to deal with the wrongful dismissal aspect of the case.

DATED at Toronto, this 31st day of October, 1989.

SIGNED: S. Fox, M. Gabinet.

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 804/89

DISSENT

I agree with the conclusion of my colleagues that the Plaintiff MacLellan was in the course of his employment at the time of the fight. Evidence indicates that he was on his way to the line #5 office or to the foreman's office immediately adjacent the line #5 office. This is an activity which is within the scope of his normal duties as a lift truck operator and bakery runner or reasonably incidental to such normal duties.

My disagreement with the other Panel Members relates to the status of the Defendant Hussain. In my opinion, his action in repeatedly slashing at his fellow worker with a knife took him out of the course of his employment. This was not an accidental wounding; this was a deliberate attempt to inflict serious harm with a potentially lethal weapon. One slash may be accidental; 9 to 12 slashes give lie to the proposition that the Defendant was acting in self defence or that he wounded the Plaintiff accidentally. In my opinion, it is unlikely that Mr. Hussain would have slashed Mr. MacLellan in the back if he were acting in self defence.

It is well known in compensation circles that the Tribunal has expanded the scope of compensation coverage for workers by its interpretation of the legislation and Board policies. A review of the few decisions outlined earlier on fighting indicates that the Board policy has, in effect, been rejected by a number of Tribunal panels and compensation granted, or the right to sue taken away (as in Decision No. 337), in cases of fighting. To my knowledge, the Board has not reviewed those decisions under the section 86n process.

Many of those cases build their foundation on the concept of "horseplay" and indeed, that is the case presently before the Panel. Those cases appear to stand for the proposition that if "horseplay" can be said to be part of the normal workplace activity, then a fight which has its roots in "horseplay" is compensable because it does not take a worker out of the course of his employment. Put another way, "horseplay" becomes part of employment activity or becomes reasonably incidental to the employment. As long as a fight can be traced back to some form of this reasonably incidental activity, then compensation results, unless the fight is solely attributable to personal (i.e. non-work related) matters.

One difficulty with this analysis is instantly apparent to any person who has spent a modicum of time actually working in an industrial environment. A standard method of coping with the tedium of mundane work activity is ongoing repartee, teasing, bantering or needling which some panels characterize as "horseplay". Unquestionably it is part of the work environment. Indeed, in the opinion of some workers, it is an essential

coping mechanism. Employers interested in a reasonably happy work-force do not discourage this type of relatively harmless interchange which often helps maintain worker morale. However, to use this type of interchange as an "employment nexus" to bring a knife attack within the course of employment, appears to me to take the compensation law beyond the intent of the Legislation. To be sure, an innocent victim of an altercation would be entitled to benefits and the Tribunal decisions and WCB policies so provide. In this case, the Plaintiff could elect to receive compensation benefits. But the Plaintiff does not seek compensation benefits; he seeks damages in a law suit. Under the common law, a victim has the right to sue his assailant for damages by instituting a civil action separate from any criminal proceedings. In the case of a Section 15 Application under the Workers' Compensation Act, before this right to sue can be taken away, it is necessary to find both workers were in the course of employment at the time of the happening of the injury. The Tribunal decisions quoted earlier in this decision suggest that this requirement is met if the activity of each worker has an "employment nexus" or is reasonably incidental to the work activity.

In my opinion, there comes a point where the nature of the offending or harmful act is such that it, of itself, breaks the employment nexus because such an act is so remote from the normal workplace activity that it cannot be said to come within the course of employment. I find that it is incongruous to conclude that a knife attack does not break the employment nexus merely because it has its roots in relatively harmless "horseplay". It does not logically follow, because "horseplay" is part of a normal employment environment, that a worker remains in the course of his employment when he makes a quantum leap in escalating this activity into a potentially lethal multiple wounding.

I would hold that the point at which a harmful act loses its work-relatedness is a question of fact for individual panels to determine. It is simply not feasible to develop a universal test for all types of activity. However it is possible to determine, on a case by case basis, whether an activity is so obviously outside the employment sphere that it cannot be said to come within the course of employment. In considering the employment context, the initial focus should be on the offending or harmful activity itself to determine whether the activity, by its very nature, breaks the employment connection and thus does not come within the course of employment. I would find that a vicious knife attack resulting in multiple slash wounds to the Plaintiff is such an activity. In repeatedly slashing the Plaintiff, the Defendant Hussain took himself out of the course of his employment.

In my opinion, this approach is particularly appropriate in a section 15 application. It is worth noting in this case, the "benefits" which the injured worker seeks take the form of a monetary award for damages resulting from the wounding. He does not seek compensation benefits under the Act; rather, he seeks an alternate remedy - a remedy which, in my opinion, should be available to him. Ironically, the analysis which some panels have developed to broaden worker entitlement in fighting cases,

is being used in this case to deny the injured worker the very remedy which he seeks. As stated earlier, I am satisfied that the Plaintiff was acting in the course of his employment when confronted by the Defendant Hussain. Under subsection 8(1) of the Act, the Plaintiff would be entitled to sustain an action against Hussain, although not against the Defendant Griffiths. I would conclude that the action of the Defendant Hussain took him out of the course of his employment and entitled the Plaintiff to proceed with his civil remedy.

I would deny the application and order that the Plaintiff's right to sue has not been taken away by the provisions of the Act. Obviously this order would have no effect upon the wrongful dismissal aspect of the action.

DATED at Toronto, this 31st day of October, 1989.

SIGNED: I.J. Strachan.