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WORKMEN'S COMPENSATION: THE AGGRESSOR DEFENSE RESURRECTED

Injuries and death are the inevitable by-products of an industrialized, mechanized society. Workmen's compensation was devised as a partial answer to the question of who shall bear the burden of such loss of life and limb. Society has come to realize that these burdens are the legitimate risks of the enterprise; this recognition has culminated in legislation creating a system of workmen's compensation. The goal of such legislation is to provide an injured or disabled employee and his dependents some means of subsistence while he is unable to work. In the light of these objectives, the legislature and the judiciary alike have declared that workmen's compensation laws are not to be construed narrowly, but liberally, with the aim of protecting as far as possible persons injured in the course of employment.

Until recently, California has been a leader in the nationwide movement towards a broader interpretation of workmen's compensation laws. This modern trend favors the enlargement of the scope of workmen's compensation to "cover virtually every injury occurring by reason of a condition or incident of the employment." The decision in Mathews v. Workmen's Compensation Appeals Board, however, indicates that California has stepped out of this progressive trend. In that case, the California Supreme Court, by holding section 3600(g) of the Labor Code constitutional, has refused to allow recovery

1. 41 CONG. REC. 22, 26 (1906) (Annual message of President Theodore Roosevelt).
4. 2 W. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION § 8.03 [1] (2d ed. 1972) [hereinafter cited as HANNA].
5. Id. § 8.02 [3].
6. 6 Cal. 3d 719, 493 P.2d 1165, 100 Cal. Rptr. 301 (1972).
7. CAL. LABOR CODE § 3600 (West 1971) reads in part as follows: "Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as provided in Section 3706, shall, without regard to negligence,
where the injury arises out of an altercation in which the injured employee is the initial physical aggressor. This decision is contrary to the majority of jurisdictions, where the courts have allowed compensation for injuries sustained by an employee in a work-connected assault in which he was the initial aggressor.

This note will explore the historical bases for the so-called “aggressor defense,” the modern rejection of that defense, and the possible ramifications of this California decision.

The Early Years of Workmen’s Compensation

The origins of employers’ liability acts and workmen’s compensation legislation are to be found in the very narrow tort liability of the master to his servant at common law. Even if the servant could establish his master’s fault or negligence, the common law defenses of contributory negligence, assumption of risk, and the fellow servant rule nearly always defeated his recovery. Thus, the majority of industrial injuries remained uncompensated, and the losses fell upon the workman, who was least able to bear them. The harshness of this common law approach eventually was ameliorated by the enactment, both in England and America, of employers’ liability and workmen’s compensation acts, designed to enforce the liability of an employer for certain industrial injuries.

exist against an employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur: . . . . (g) where the injury does not arise out of an altercation in which the injured employee is the initial physical aggressor.”

8. 6 Cal. 3d at 740, 493 P.2d at 1179, 100 Cal. Rptr. at 315.
9. 1 A. Larson, Workmen’s Compensation § 11.15(a) (1972) [hereinafter cited as Larson].
10. For a more complete summary of the historical development of workmen’s compensation, see generally S. Riesenfeld & R. Maxwell, Modern Social Legislation (1950).
14. In Priestley v. Fowler, 150 Eng. Rep. 1030 (Ex. 1837) Lord Abinger formulated the now famous fellow servant rule, precluding a servant’s recovery from the master for an injury received in the course of employment, where such injury was solely caused by the negligence of another servant of the same master. This doctrine was upheld in Farwell v. Boston & Worcester R.R., 45 Mass. (4 Met.) 49 (1842). The court held the railroad immune from liability to an engineer where the injury was caused by the negligent act of a switchman.
15. 1 W. Schneider, Workmen’s Compensation 1 (3d ed. 1941). Schneider estimated that 70% of industrial accidents remain uncompensated.
16. 2 Hanna § 1.03[1][a].
The development of the concept of workmen's compensation may be traced to Germany, where for the first time compensation for injuries was conditioned, not on the basis of negligence, but on the relationship of the injury to the employment. England expanded upon the German idea and, after several false starts, in 1897 adopted the British Workmen's Compensation Act. Liability, as in the German legislation, depended not on who was at fault for the accident, but on whether it arose out of employment while the worker was engaged therein. English jurists devised the phrase "personal injury by accident arising out of and in the course of employment" as the basis for recovery by the workman.

The German and English legislation had important repercussions in the United States. Most state acts were patterned after the British legislation, and nearly all followed the formulae adopted by the British act defining the boundaries of the employer's liability. Thus, the common law bases of liability—fault and negligence—were replaced by a new concept. This concept was liability without fault, dependent only on the relation of the injury to the employment. The motivation for such legislation was humanitarian in nature: to make the industry which was responsible for the injury bear a major part of the burdens resulting therefrom. "The cost of the product should bear the blood of the workman."

The Development of Workmen's Compensation in California

Prior to 1907, the liability of a California employer for injuries to his employees was based on the common law tort standard of due care. Various legislation was adopted from 1907 to 1917 abrogating the common law defenses and establishing a compulsory compensation system. The Workmen's Compensation, Insurance and


20. For a history of American workmen's compensation legislation, see W. Dodd, ADMINISTRATION OF WORKMEN'S COMPENSATION (1936).


23. This remark is generally attributed to Lloyd George. See Prosser, supra note 11, at 530 n.37.

24. Cal. Stat. 1907, ch. 97, § 1, at 119 (limitation of the defense of assumption of risk); Cal. Stat. 1911, ch. 399, § 3, at 796 (abrogation of the defenses of contributory negligence, assumption of risk, and the fellow servant rule); Cal. Stat. 1913,
Safety Act of 1917, as amended over the years, represents the present law. With the adoption of this act in 1917, the legislature proposed extensive amendments to Article XX, section 21 of the California Constitution to insure the constitutional validity of the new comprehensive system of compulsory compensation. This amendment was adopted in 1918. It expressly vests the legislature with the power, unfettered by any other constitutional provisions, to impose liability on employers to compensate their workmen for disability or injury, and their dependents for death, irrespective of the fault of any party. The legislation enacted pursuant to this constitutional mandate has been codified in the Labor Code.

The Scope of Liability

As stated earlier, the test for employers' liability adopted by most workmen's compensation acts is whether the injury has arisen out of and in the course of the employment. The California workmen's compensation act is no exception. However, as Larson points out, the theory behind workmen's compensation is fundamentally distinct from strict tort liability:

The right to workmen's compensation depends on one simple test:
Was there a work-connected injury? Negligence and . . . fault are not in issue and cannot affect the result. Let the employer's conduct be flawless in its perfection, and let the employee's be abysmal in its clumsiness, rashness, and ineptitude: if the accident arises out of and in the course of the employment, the employee receives his award. Reverse the positions, with a careless and stupid employer and a wholly innocent employee: the same award issues. Thus, the test is not the relation of an individual's personal quality ch. 176, § 1, at 279 (creation of a workmen's compensation system); Cal. Stat. 1917, ch. 586, § 1, at 832 (creation of a compulsory and comprehensive system of workmen's compensation).

26. The California Constitution had been amended in 1911 by article XX, § 21 to permit the legislature to create a system of workmen's compensation free of common law defenses.

28. Cal. Const. art. XX, § 21 which provides in part: "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability, and their dependents for death incurred or sustained by the said workmen in the course of their employment, irrespective of the fault of any party."

29. Id.
31. See note 7 supra.
32. 1 Larson, supra note 9, at § 2.00.
(fault) to an event, but the relationship of an event to an employment. The essence of applying the test is not a matter of assessing blame, but of marking out boundaries. It has largely been left to the courts to delineate these boundaries, and it is in this area of statutory construction that problems arise most frequently.

The “Arising Out Of” Test Applied to Assaults

The early English compensation cases generally applied narrow agency-tort concepts to work injuries stemming from assaults. The typical result was a denial of compensation on the grounds that the assault did not arise out of and in the course of employment. The early American cases followed much the same line of reasoning. Small, discussing these cases in The Effect of Workmen's Compensation on Agency-Tort Concepts of Scope of Employment, concluded that the courts were guided by a very narrow definition of the term “employment.”

The courts continued to deny compensation even to the victims of work assaults until 1920, when a minor revolution occurred. Justice Cardozo, then on the New York court, attacked the rule of non-liability and allowed a claimant, a nonparticipating victim of a sportive assault, to recover: “The claimant was injured, not merely while he was in a factory, but because he was in a factory, in touch with associations and conditions inseparable from factory life.” Horovitz declares that Justice Cardozo deserves the “chief credit for at least saving innocent victims from the charity scrap-heap,” but adds that while the majority of jurisdictions followed this rule for the innocent victims, they began to issue dicta against the aggressor, i.e., the initiator of the assault. Successive cases were replete with the pos-

33. Id. § 2.10.
35. Jacquemin v. Turner & Seymour Mfg. Co., 92 Conn. 382, 103 A. 115 (1918) (Dispute arose over possession of a tool which both employees wanted to use); Gavros’ Case, 240 Mass. 399, 134 N.E. 269 (1922) (Group of employees were fighting over the right to use tools. Gavros, a non-participant, asked them to stop, whereupon two of the men smashed his head with a shovel and sledge hammer. The court found that Gavros’ intervention had nothing to do with his employment).
36. 11 NACCA L.J. 19, 22 (1953).
37. Horovitz, Assaults and Horseplay Under Workmen's Compensation Laws, 41 Ill. L. Rev. 311, 319 (1946) [hereinafter cited as Assaults and Horseplay].
39. Assaults and Horseplay, supra note 37, at 319.
40. E.g., Hegler v. Cannon Mills, 224 N.C. 669, 671, 31 S.E.2d 918, 919 (1944). The court stated that “while the assault may have resulted from anger or revenge, still it was rooted in and grew out of the employment.” Accord, Sykes v. Craycroft Brick Co., 12 Cal. Comp. Cases 237 (1947).
41. Assaults and Horseplay, supra note 37, at 323. Horovitz declares that
tion that he who starts a fight as an initial aggressor cannot recover for his own injuries. Thus, the aggressor defense was born.

The courts utilizing this aggressor defense generally based their decisions on one or more of the following theories. The earlier cases set forth the notion that it is "contrary to all justice and law" to compensate an aggressor or his dependents; that is, a man should not profit from his own wrongdoing. However, this rationale was contrary to the basic principle of workmen's compensation which is to place the costs of industrial accidents on industry, without regard to the culpability of the employer or the employee. "That there is a natural repugnancy to help a guilty party is no excuse for relieving industry of a liability and placing it on the worker or charity."

Another reason given for the validity of the aggressor defense was that a fight by necessity arose out of the act of aggression, not out of the employment. Somewhat akin to this argument was the proposition that the employee, by initiating the hostilities, had "stepped out of" the course of employment and, at least as to his own injuries, was not within the purview of the compensation act. The basic error in these arguments was the failure to recognize the causal connection between the frictions, conditions and contacts of employment and the initial act of aggression.

The real problem in the aggressor doctrine, however, was not in the various theories put forth as a rationalization of the defense, but in the application of the doctrine itself. The courts had to determine who was the aggressor. Any attempt to determine who in fact initiated the altercation was by its nature an exercise in futility. The

"[T]he reason for the dicta against the aggressor was clear. In trying to make a new rule or exception palatable, it has for years been customary for courts to throw a judicial bone of solace to the losing employer or insurer. . . . It has been the history of law that when courts wish to make a change, they proceed cautiously, that they put boundaries around the change, and thereby issue dicta which gives the loser some hope in future cases, thus making the decision presumably acceptable to both parties. . . . Hence arose the exception to the new rule—that the aggressor could not recover." *Id.*

42. E.g., Horvath v. La Fond, 305 Mich. 69, 8 N.W.2d 915 (1943); Staten v. Long-Turner Const. Co., 185 S.W.2d 375, 381 (Mo. App. 1945). In Staten, the court determined that "clearly, an aggressor is not in the course of his employment and is not entitled to compensation for an injury caused by his own uncontrolled emotions, threats and demonstrations of assault upon another."

43. 1 LARSON, supra note 9, at § 11.15(a).
44. Horvath v. La Fond, 305 Mich. 69, 8 N.W.2d 915 (1943).
46. *Assaults and Horseplay, supra* note 37, at 346-47.
47. Fischer v. Industrial Comm'n., 408 Ill. 115, 96 N.W.2d 478 (1951).
48. Staten v. Long-Turner Const. Co., 185 S.W.2d 375 (Mo. App. 1945). See also text accompanying note 73 infra.
49. 1 LARSON, supra note 9, at § 11.15(a).
first blow was often the automatic and irrational flashpoint of a host of mounting antecedent pressures. Furthermore, the first blow may have been as harmless as a mere tap on the shoulder while the second blow resulted in death. The aggressor doctrine required that the courts find an act of "initial aggression" where none in fact may have existed and thus forced the courts to draw patently absurd distinctions.

The Rejection of the Aggressor Defense

Prior to 1947, the aggressor defense was accepted by nearly every jurisdiction in the country, generally for the reasons outlined above. In 1940, however, Judge Rutledge, in a now famous dictum in *Hartford Accident & Indemnity Co. v. Cardillo*, 50 exposed the fallacy of the aggressor defense:

[W]ork places men under strains and fatigue from human and mechanical impacts, creating frictions which explode in myriads of ways, only some of which are immediately relevant to their tasks. Personal animosities are created by working together on the assembly line or in traffic. Others initiated outside the job are magnified to the breaking point by its compelled contacts. No worker is immune to these pressures and impacts upon temperament. They accumulate and explode over incidents trivial and important, personal and official. But the explosion point is merely the culmination of the antecedent pressures. That it is not relevant to the immediate task, involves a lapse from duty, or contains an element of volition or illegality does not disconnect it from them or nullify their causal effect in producing its injurious consequences. 51

Although the claimant in *Cardillo* did not strike the first blow (he merely called his assailant a vile name, which in the opinion of the court did not constitute aggression), 52 the persuasive language of Judge Rutledge influenced many courts in their subsequent rejection of the aggressor defense. Commencing with the opinion in *Cardillo*, various courts began to re-examine their positions and adopt the view that

50. See Assaults and Horseplay, supra note 37, at 326 n.31. There were a few exceptions. E.g., Stark v. State Industrial Accident Comm'n., 103 Ore. 80, 92, 99, 204 P. 151, 155, 157 (1922): "It is one of the principles of the workingmen's insurance and compensation laws which are the products of the development of social economic ideas that the industry which has always borne the burden of depreciation and destruction of the necessary machinery, whether such destruction was caused within or without the industry, shall also bear the burden of repairing the efficiency of the human machines necessary to the life of the industry . . . .

The question as to who started the sport can become material only for the purpose of fixing fault, and . . . fault of the injured employee . . . does not constitute a reason for not allowing compensation."


52. Id. at 17.

53. Id. at 18.
the aggression of the claimant in itself would not bar recovery for an
injury sustained in a work-connected dispute.

The tide of judicial thinking was finally turned by the opinions
written by Justice Kenison of New Hampshire in Newell v. Moreau54 and
by Chief Justice Qua of Massachusetts in Dillon's Case,55 wherein they
confronted the aggressor defense directly.56 In Newell v. Moreau, the
claimant's decedent, a boss shipper, had argued with a fellow em-
ployee over the dilatory manner in which the latter had allegedly done
his work. The shipper was the first to raise his arm in a striking po-
sition but was knocked to the ground by his opponent. The result-
ing fall was fatal. The lower court denied his widow compensation
primarily on the ground that the deceased had been the aggressor.57
Justice Kenison, citing Cardozo's opinion in Leonbruno v. Champlain
Silk Mills58 and that of Judge Rutledge in Cardillo,59 held that it was
error to deny compensation on the basis of the aggressor defense:

The defense of "aggressor" is not to be found in our statute or
in other laws. By the application of tort reasoning the defense has
been judicially inserted in some compensation cases. We have
already refused to read in a similar defense in sportive assaults
...60 and we see no reason for its judicial insertion in this ass-
ault.

Arguments, altercations and assaults are as inevitable as
they are undesirable. Where they arise out of the employment,
they may properly be regarded as an employment hazard.61

Two years later, the Massachusetts court in Dillon's Case62 reached
a similar conclusion. Dillon, a one eyed longshoreman gang leader,
was engaged in a work related argument with one of the gang. A
blow or a few blows followed, and the leader's remaining eye was
permanently blinded. The first reviewing board denied compensation
on the ground that the claimant was the aggressor, having struck the
first blow. The Massachusetts Supreme Court affirmed the reversal
of this decision. Chief Justice Qua held that it was error to deny compen-
sation merely because the injured man was the aggressor, since fault

54. 94 N.H. 439, 55 A.2d 476 (1947).
55. 324 Mass. 102, 85 N.E.2d 69 (1949).
56. Prior to 1947, some courts allowed the aggressor to recover by finding that
his acts were privileged. E.g., Republic Iron & Steel Co. v. Ingle, 223 Ala. 127,
134 So. 878 (1931). Other courts ignored the fact of aggression. E.g., Delco-Remy
58. 229 N.Y. 470, 472, 128 N.E. 711 (1920).
59. 112 F.2d 11 (1940).
61. 94 N.H. at 442-43, 55 A.2d at 479-80.
is not the determining factor.\textsuperscript{63} "[W]hen the accumulated strain finally breaks down resistance, it seems a narrow treatment of the problem to determine the granting or denying of compensation by the more or less fortuitous circumstance of who aimed the first blow."\textsuperscript{64}

These two cases established a trend. The New York court, following the reasoning of Judges Kenison and Qua, declined to be bound by earlier narrow precedents and judicially discarded the aggressor defense in 1950.\textsuperscript{65} California followed suit in 1952.\textsuperscript{66} In the quarter of a century since the New Hampshire court first rejected the aggressor defense, a majority of jurisdictions have come to the view that the initiation of the fight by the claimant is not alone sufficient to disqualify the aggressor from the benefits of workmen's compensation.\textsuperscript{67}

\textbf{The Aggressor Defense in California}

California rejected the aggressor defense in 1952 in \textit{State Compensation Insurance Fund v. Industrial Accident Commission}.\textsuperscript{68} Hull, an oiler on a road construction job, was asked by his foreman to assist in loading a caterpillar. The foreman did not ask Hull directly, but passed the order through a truck driver. This angered Hull, and an argument developed. Following this exchange of words, Hull swung at the foreman and missed. In the ensuing fight the oiler was injured by blows struck by the foreman. The commission denied compensation, but on rehearing found that Hull's injury did arise out of and in the course of employment, and awarded him $8.57 in temporary disability plus medical expenses. The insurer appealed, citing dicta in two earlier California Supreme Court cases which suggested that an aggressor should be denied compensation.\textsuperscript{69}

The California Supreme Court affirmed the award, stating that the modern trend and the weight of reason both refuse to distinguish between aggressors and innocent victims. The court noted that the constitution\textsuperscript{70} compelled affirmance of the award, in that it required that compensation be given "irrespective of the fault of any party."\textsuperscript{71}

\begin{itemize}
\item \textsuperscript{63} \textit{Id.} at 106, 85 N.E.2d at 72.
\item \textsuperscript{64} \textit{Id.}
\item \textsuperscript{66} State Comp. Ins. Fund v. Industrial Accident Comm'n., 38 Cal. 2d 659, 242 P.2d 311 (1952).
\item \textsuperscript{67} For a comprehensive listing by jurisdiction, see 1 LARSON, \textsuperscript{supra} note 9, at § 11.15(a), n.84.
\item \textsuperscript{68} 38 Cal. 2d 659, 242 P.2d 311 (1952).
\item \textsuperscript{69} Globe Indem. Co. v. Industrial Accident Comm'n., 2 Cal. 2d 8, 37 P.2d 1039 (1934); Globe Indem. Co. v. Industrial Accident Comm'n., 193 Cal. 470, 225 P. 273 (1924).
\item \textsuperscript{70} CAL. CONST. art. XX, § 21.
\item \textsuperscript{71} 38 Cal. 2d at 660, 242 P.2d at 312-13.
\end{itemize}
Furthermore, the court concluded that the crucial issue in such cases was whether the injury "arose out of" the employment, i.e., whether there was a causal connection between the employment and the injury. Therefore, the charge of aggressor could not be a defense, for it was nothing more than an assertion that the employee was at fault. With the majority decision in State Compensation Fund, California became the fourth state to disavow the aggressor defense.

Nine years later, however, the legislature intervened and amended section 3600 of the Labor Code by adding subdivision (g). The aggressor defense was thereby statutorily reintroduced. The new subdivision provided that workmen's compensation benefits were to be awarded so long as the "injury does not arise out of an altercation in which the injured employee is the initial physical aggressor."  

The first case to consider this new provision was Argonaut Insurance Co. v. Workmen's Compensation Appeals Board. Referring to the 1961 amendment, the court said, "Horseplay is distinguishable from 'altercation'" and allowed the injured initiator of "horseplay" to recover. The next case to consider subdivision (g) was Litzmann v. Workmen's Compensation Appeals Board. There the court found that the evidence did not sustain the referee's finding that the claimant was the aggressor, but added that "even if it did, compensation could not be denied on that ground." The court also issued a strong dictum to the effect that in view of the decision in State Compensation Fund, the 1961 amendment was probably unconstitutional. This was the state of the law when Mrs. Mathews came before the Workmen's Compensation Appeals Board.

Mathews v. Workmen's Compensation Appeals Board:
The Majority Opinion

Mathews was employed by Western Contractors, Inc. as a heavy duty truck driver at the Castaic dam site in Los Angeles county. On the day in question, Mathews had just stopped his truck at the dam site

72. Id. at 661, 242 P.2d at 312-13.
73. The dissenting opinion argued that the aggressor had "stepped aside from his employment, and at least as to his own injuries is not within the purview of the compensation acts." Id. at 671, 242 P.2d at 319.
75. CAL. LABOR CODE § 3600(g) (West 1971).
77. Id. at 682, 55 Cal. Rptr. at 819.
78. 266 Cal. App. 2d 203, 71 Cal. Rptr. 731 (1968).
79. Id. at 209-10, 71 Cal. Rptr. at 736.
80. Id.
81. See text accompanying notes 68-72 supra.
82. 266 Cal. App. 2d at 209 n.3, 71 Cal. Rptr. at 736 n.3.
when he was approached by Marcus Cedillo, a dump man, who was employed to direct incoming trucks to appropriate places for unloading. Cedillo told Mathews that his truck was blocking traffic and would have to be moved. Mathews replied with an obscene remark and gesture. Cedillo responded similarly. Mathews then climbed down out of the cab of his truck and began walking toward Cedillo with his fists clenched at his sides. Cedillo, who was shorter and lighter than Mathews, picked up two rocks and began backing away. Both men paused, and Cedillo drew a line in the dirt with his foot, warning Mathews not to cross it. This action apparently fueled Mathews' anger. He crossed the line and advanced toward Cedillo. Cedillo threw one of the rocks, missing Mathews. Mathews then lunged toward Cedillo, losing his hard hat in the process. Cedillo struck Mathews in the head with the second rock. Mathews fell to the ground unconscious. He died two months later without regaining consciousness. His widow sought workmen's compensation death benefits.83

The Workmen's Compensation Appeals Board referee awarded her full death benefits, concluding that although Mathews' conduct fell within the ambit of Labor Code section 3600(g), the code provision was unconstitutional. However, on reconsideration, the board held the provision constitutional and denied the widow benefits. The California Supreme Court affirmed this decision. The court concluded that the California Constitution did not prohibit the legislature from conditioning the right to compensation on the absence of wilful misconduct or other intentional wrongdoing. Therefore, section 3600 subdivision (g) of the Labor Code was constitutional.84

The court first interpreted the statutory provision, noting that it must be construed narrowly in keeping with the act's injunction that workmen's compensation laws are to be liberally applied with the "purpose of extending their benefits for the protection of persons injured in the course of their employment."85 The court found that the legislature's use of the word "physical" indicated that the provision was primarily concerned with the increased risk of injury which arises when a quarrel moves from the verbal stage to a trading of physical blows. The majority then concluded that although Mathews did not strike the first blow, it is not necessary that there be a battery before one can be deemed a physical aggressor.86 Rather, under the appropriate circumstances, clenching a fist may be sufficient to convey a real, present and apparent threat of physical injury. Thus, the court held

83. 6 Cal. 3d at 725, 493 P.2d at 1168, 100 Cal. Rptr. at 304.
84. Id.
85. CAL. LABOR CODE § 3202 (West 1971).
that there was sufficient evidence to support the board's finding that Mathews was the initial physical aggressor.87

Turning to the legislative history, the court found that the use of the phrase "irrespective of the fault of any party" in the constitution88 was intended only to give the legislature authority to establish a workmen's compensation system and grant benefits without regard to the common law tort concept of negligence. Thus the court equated fault with negligence89 and found the legislature free to condition the right to compensation on a variety of factors, including aggression.90 In addition to this interpretation of the constitution, the court relied on the traditional argument *ad horendum:*91 to hold Labor Code section 3600(g) unconstitutional would cast doubt over a vast number of other Labor Code provisions which incorporate a notion of intentional fault.92 Finally, the court dismissed the precedent established in *State Compensation Fund*93 by stating that "[s]ince Hull [State Compensation Fund], the Legislature has expressly provided that initial physical aggressors shall not receive compensation. [W]e now follow the expressed intent of the Legislature."94

**Mathews in Critical Perspective**

The decision in *Mathews* is open to criticism on several grounds. The questionable constitutionality of Labor Code section 3600(g), the difficulties inherent in the application of the aggressor defense, the modern trend toward fuller compensation and the purpose of workmen's compensation all suggest that the *Mathews* case was incorrectly decided.

**The Constitutional Question**

California Labor Code section 3600(g) resurrects the aggressor defense which the California Supreme Court had abolished in 1952.95 Its constitutionality would seem doubtful in light of the California con-

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87. 6 Cal. 3d at 727, 493 P.2d at 1169, 100 Cal. Rptr. at 305.
88. CAL. CONST. art. XX, § 21.
89. 6 Cal. 3d at 728, 734-35, 493 P.2d at 1170, 1175, 100 Cal. Rptr. at 306, 311.
90. These other factors include intoxication, self-inflicted injuries, and suicide; see CAL. LABOR CODE § 3600(d)-(f) (West 1971).
91. For the classic example of this type of reasoning see Lord Abinger's opinion in Priestley v. Fowler, 150 Eng. Rep. 1030 (Ex. 1837).
92. 6 Cal. 3d at 735, 493 P.2d at 1176, 100 Cal. Rptr. at 312. E.g., CAL. LABOR CODE § 3600(d)-(f). These sections deny compensation where the injury is caused by intoxication, is self-inflicted, or the product of suicide.
93. See text accompanying notes 68-72 supra.
94. 6 Cal. 3d at 737, 493 P.2d at 1177, 100 Cal. Rptr. at 313.
95. See text accompanying notes 68-72 supra.
stitutional mandate that compensation benefits should be awarded without regard to fault:

A complete system of workmen's compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workmen and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workmen in the course of their employment, irrespective of the fault of any party.96

Section 3600 of the Labor Code provides "[l]iability for the compensation provided by this division . . . shall, without regard to negligence, exist against an employer for any injury sustained by his employees . . . and for the death of any employee if the injury proximately causes death . . . ."97 The majority's interpretation of Labor Code section 3600(g) vis-à-vis the California Constitution can only be sustained if the terms "irrespective of the fault of any party"98 and "without regard to negligence"99 are entirely synonymous. That they are not is convincingly argued in the decision of the First Circuit in Compania Transatlantica, S.A. v. Melendez Torres. There the court stated flatly:

[It is claimed] that the word "fault" and the word "negligence" as used in this statute are synonymous. . . . We cannot accept this contention.

. . . .

The word "fault" should not be equated with the word "negligence." Each word has its own independent meaning.100

After examining this decision, the findings of lexicographers,101 and certain code sections,102 the dissent in Mathews persuasively concluded that the terms are far from identical in their import: fault is a broad generic term which includes the lesser word "negligence" as well as such concepts as wilful misconduct, gross negligence, misbehavior, offense, culpability, wrongdoing, and the like.

Finally, in upholding section 3600(g) as constitutional, the supreme court expressed fear that to do otherwise would put the validity of similar provisions in question.103 However, the dissent minimized these fears, noting that recovery in the cases of intoxication, self-inflicted injuries, or suicide can be barred by finding that such conduct

96. CAL. CONST. art. XX, § 21 (emphasis added).
97. CAL. LABOR CODE § 3600 (West 1971).
98. CAL. CONST. art. XX, § 21.
100. 358 F.2d 209, 213 (1st Cir. 1966) (Interpreting wrongful death statute).
102. E.g., CAL. CIV. CODE § 1689(b)(2) (West Supp. 1972); CAL. COMM. CODE § 2613, Comment (West 1964).
103. See text accompanying notes 91 & 92 supra.
was not work related or reduced by invoking the wilful misconduct statute.\(^{104}\)

It must be concluded that the test of employers' liability most compatible with a reasonable reading of the constitution is simply whether the altercation arose out of and in the course of employment. If the answer is in the affirmative, workmen's compensation benefits should be awarded.\(^{105}\) Such a result is consistent with the spirit of the act and has been advocated by writers and the courts:

It is the character and nature of the assault which determines whether it arises out of the employment, not the culpability or lack of culpability of the parties involved. It is the assault itself which arises out of the employment; and who initiates the altercation has no bearing on that question.\(^{106}\)

It would thus seem that Labor Code section 3600(g) should be deemed unconstitutional, as the Mathews' dissent declared, "'We cannot push back the limits of the Constitution merely to accommodate challenged legislation.'"\(^{107}\)

The Application of the Aggressor Defense in Mathews

As stated earlier,\(^{108}\) the major difficulty involved in the aggressor doctrine lies in the application of the defense itself, i.e., in the determination of who was the aggressor. The majority in Mathews relied upon the tortious definition of assault in making this determination: "An 'initial physical aggressor' is one who first engages in physical conduct which a reasonable man would perceive to be a 'real, present and apparent threat of bodily harm'"\(^{109}\) The court concluded that Mathews' conduct in leaving his truck and walking towards Cedillo with his fists clenched at his sides was sufficient to put a reasonable man in apprehension of bodily harm.

The court viewed the fact that Mathews struck no blow as irrelevant under the above theory\(^{110}\) and thus ignored the more traditional first blow test. More significantly, the court was unconcerned with the verbal antagonism which preceded the physical confrontation. Therefore, in Mathews, the determination of who was the phy-

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104. 6 Cal. 3d at 744, 493 P.2d at 1182, 100 Cal. Rptr. at 318.
105. Id. at 741, 493 P.2d at 1180, 100 Cal. Rptr. at 316.
108. See text following note 49 supra.
109. 6 Cal. 3d at 727, 493 P.2d at 1169, 100 Cal. Rptr. at 305.
110. Id.
sical aggressor became dependent upon an arbitrary identification of "one overt act out of a series of hostile verbal, psychological, and physical acts as the one that, for compensation purposes, caused the quarrel and elicited the ultimate injury." In applying the aggressor doctrine, the court was thus obliged to draw arbitrary distinctions, which frequently lead to harsh, if not inequitable, consequences for the victim and his family.

Mathews and the Modern Trend

The aggressor defense must be considered an anachronism in view of the modern trend toward liberalizing workmen's compensation benefits. The California Supreme Court in the *State Compensation Fund* decision found that the aggressor defense is inconsistent with the social policy underlying workmen's compensation legislation. The majority of jurisdictions recognize the fact that quarrels and fights among employees are among the normal incidents of the work environment. Consequently, most courts now hold that when an altercation stems from a dispute over performance of work or from frictions engendered by the work environment, the right to compensation ought not to turn on the issue of whether or not the injured employee was the initial aggressor. A further reason for this modern trend towards total rejection of the aggressor defense is stated by Professor Small in his book concerning workmen's compensation in Indiana: "to give . . . effect to the so-called aggressor doctrine would be to re-incarnate the old common law defense of assumption of risk, contributory negligence and the fellow servant rule, all abolished with the passage of the Compensation Act." The California Supreme Court, in the *Mathews* decision, has done just that, with the result that California, once a leader in the modern trend, has taken a significant step backward.

Mathews and the Philosophy of Workmen's Compensation

Professor Riesenfeld points out that workmen's compensation is a type of social insurance against a particular hazard of modern life; and, as such, it is fundamentally and intrinsically different from tort liability. He states that the neglect of this distinction has been "the cardinal sin against the injured workman. [N]one of the traditional restrictive tort doctrines such as 'scope of employment,' 'proximate causation,' 'assumption of risk' and 'blameworthiness' should ever be

111. 1 Larson, *supra* note 9, at § 11.15(c).
112. See note 67 *supra*.
relied upon in compensation cases.”115 This philosophy had been adopted in California. Its workmen's compensation system, in theory at least, substitutes the proposition of liability without fault for the common law concept of liability based upon culpability:

The ultimate “social philosophy” . . . behind nonfault compensation liability is the desirability of providing, in the most efficient, most dignified, and most certain form, the financial and medical benefits which an enlightened community would feel obliged to provide in any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source.

This statement, of course, is what might be called compensation theory in pure or idealized form. In the actual statutes, and still more in case-law interpretations, a greater or less admixture of the “fault” idea will be found in every jurisdiction. However, the whole story of the development of workmen's compensation is a record of movement in the direction of the “pure theory” stated above, and away from the fault concept.116

The Mathews decision is thus a departure from both the development and the ultimate social philosophy of workmen's compensation.

Conclusion

This note has put the case of Mathews v. Workmen's Compensation Appeals Board in social and historical perspective. It has traced the judicial history of the aggressor defense, its rejection by a majority of jurisdictions, and the resurrection of the aggressor doctrine by the California legislature and the California Supreme Court. It has been argued that the aggressor defense is an anachronism, and it is hoped that the California legislature, together with the judiciary, will come to the realization that this doctrine has no place in a socially responsible system of workmen's compensation.

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115. Id. at 531.
116. 1 Larson, supra note 9, at § 2.20.
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