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# Labor of Love: Sex, Jobs, and Workers' Compensation

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# Verdict

January 22, 2013

Joanna L. Grossman and Lawrence M. Friedman

## Labor of Love: Sex, Jobs, and Workers' Compensation



A young woman in Australia was sent by her employer to a country town. She checked into a motel, and set up a meeting with a male friend, who happened to live in the town. They had a nice dinner, and then went back to the woman's motel room. There, they proceeded to have sex; and while this was going on—her male friend testified that they were “going hard” at it and were “rolling around”—a glass light fixture above the bed was somehow pulled from its mount. It fell on the woman, and she suffered injuries to her nose and mouth; she also (she claimed) suffered from a depression as a result, which forced her to stop work. She put in a claim for workers' compensation, which her employer resisted.

Should the woman recover damages for her injuries? That was the question posed to a series of courts in Australia who heard her claim. Eventually, the woman won her case. This result might seem odd to some readers, but in fact it is consistent with American workers' compensation law. In this column, we'll examine her case, the cases of some others whose injuries on the job were arguably connected to sexual dalliances; and the reasons why the worker, in such cases, sometimes wins and sometimes loses.

### A Business Trip That Ends Badly

The woman in the Australian case—her name is never given, and she is identified only by the mysterious initials PVYW—had a civil service job with a government agency. She lived and worked in Sydney, but, as we said, her employer sent her 100 miles away, to a town where she was supposed to observe a budgeting process and meet the local agency staff. Her employer arranged for her to stay at a motel.

Australian law provides compensation, through Comcare, the government's insurer. Under the statute, Comcare must pay for injuries if the injuries result in “death, incapacity for work, or impairment.” Only an injury “arising out of” and “in the course of” employment is covered. (Injuries that are intentionally self-inflicted, or caused by serious and willful misconduct are not usually covered). The two phrases—“arising out of” and “in the course of” employment occur in American state statutes, too; and there are literally thousands of cases that turn on the meaning of these two phrases. Is sex with a non-employee at a motel, on an out-of-town business trip covered, if it leads to injuries?

Comcare originally said yes; but then changed its corporate mind, after looking into the matter further. An administrative tribunal, the AAT, agreed with Comcare. Compensation, the tribunal felt, was not called for, because the employer “had not expressly or impliedly induced or encouraged the applicant’s sexual conduct that evening,” nor did it reasonably expect such activity. Sex with a friend was not, in the tribunal’s eyes, “an ordinary incident of an overnight stay like showering, eating, or returning to the motel.” Thus, the woman’s encounter—and the resulting injury—were of a “private nature,” and not fairly deemed to be arising out of and in the course of employment. The woman appealed to a trial court judge, who sided with her. Comcare then appealed to the Australian Federal Court; and there, the woman known in court as PVYW won her claim.

In most workers’ compensation cases, the injury alleged clearly occurred at work. An industrial accident, an occupational disease, or a slip-and-fall in the office obviously arises out of, and in the course of, one’s employment. By the same token, when an employee goes home at night, and hits his head on an open kitchen cabinet door, his injury is clearly *not* covered by workers’ compensation. Home is home, and work is work.

But traveling salespeople and other business travelers are “at work” twenty-four hours a day. After all, it is part of their job to travel to a different place, stay at a hotel, eat meals there, and so on. And in the course of these duties, accidents may occur: A slip in the hotel shower, choking on a cheeseburger at the hotel restaurant, a car accident on the way back to the hotel, or an injury in a hotel fire—all of these accidents would clearly be compensable under worker’s compensation.

Of course, PVYW was not brushing her teeth or taking a shower; she was having sex, and fairly vigorous sex at that—not exactly what her employer had in mind when it sent her on the trip, and an activity that was not exactly something the employer endorsed or encouraged. Still, the Court felt that PVYW had a right to compensation. Injuries are compensable if they occur during a “work period.” Since PVYW had to spend the night away from home due to work, her romancing took place during a “work period.” It was enough, in the court’s eyes, that the injury occurred in a place designated by the employer; it did not have to also occur during an activity that the employer encouraged or induced.

In support of its reasoning, the court mentioned a case where an employee was injured playing cricket during a lunch break. The court acknowledged that the employer didn’t require PVYW to use the motel room for sex, or even encourage her to do this; but it also pointed out that there was nothing illegal about her activities. Nor were these activities in any way incompatible with her job. If she had been injured playing cards in the motel room on her trip, the court said, she would clearly be entitled to compensation, even though her employer did not encourage her to pick up the deck and play. (The reader might wonder how playing cards could conceivably lead to an injury; but after all, sex is usually harmless, too). In any event, sex would be, according to the court, no different from any other “lawful recreational activity” that might occur in the context of a business trip.

### **Sex on the Job, American-Style**

The Australian woman known as PVYW fared a lot better than the family of a Kentucky milkman, Glen Meeker, who worked for Blue Grass Pasturelands Dairies—and whose tort case also involved sexual activity. This was in the 1930’s, a time when milkmen, making their rounds, were still a familiar sight. Glen delivered milk to the Poulter family; he and Mrs. Poulter hit it off, and he apparently had an affair with her. Mr. Poulter got suspicious, lurked about, and saw the milkman, who was making his rounds, put his arm around Mrs. Poulter. Poulter then shot and killed the milkman, on the Poulter’s house’s porch. There, the widow’s claim for compensation failed: the murder did not “arise out of” the milkman’s employment. Mr. Poulter, the court reasoned, obviously believed that the milkman was delivering a lot more than milk, which “engendered . . . hostility.” This hostility, however, was not one that “arose” out of the employment.

Making love to customers is not only dangerous to one’s health, but it is dangerous to workers’ compensation claims as well—much more dangerous than sex with a friend on an overnight stay in Australia. In 1963, Hubert Gagne, who managed “The Flame,” a bar in Duluth, left the bar to help a drunk woman to her car (his version), or to make love to her (her husband’s version), when two men (one of them apparently the husband) attacked Hubert with lead pipes and injured him. The Minnesota Supreme Court sent the case back for fact-finding. If Hubert was indeed “in pursuit of amour, his mission was personal,” the court reasoned, and the Compensation

Act was not “intended to insure against the consequences of such ventures.”

A somewhat similar incident occurred in 2009 as well. Robert McKinney, a meter reader for the city of Ashland, Kentucky, was sitting in his truck, waiting for his coworker, Tammy Sexton, who was presumably off reading meters. One Richard Ramsey opened the door of the truck, jumped on McKinney, and beat him up. It seems that Tammy had been in “a relationship” with Ramsey “off and on for 15 years”; then they split up, and Tammy moved in with McKinney. The Kentucky court denied compensation. Ramsey had a “personal grievance against McKinney;” and that “grievance had nothing to do with McKinney’s employment.”

Are these decisions right? In each case, the injury does indeed relate to employment in a number of ways. The injuries occurred during work hours and at the workplace (which clearly includes, for a milkman or meter reader, the homes of customers). And, perhaps more importantly, it was the nature of the employment in each case that threw together the milkman and the customer, the barman and customer, and the meter reader and the co-worker.

In a 1950 California case, *State Employees’ Retirement System v. Industrial Accident Commission*, an appellate court in California upheld a workers’ compensation award granted to a game warden, Karl Lund, who was found dead in his state-provided car, which was parked on an isolated road. Also dead in the car was a woman with what we might today call a “stripper name”—Chelsea Miami; both the warden and his lady friend were in a state of undress, and both had succumbed to carbon monoxide poisoning. Lund’s uniform, gun, and boots were tucked neatly under a seat.

Did Lund’s death arise out of his employment? His widow filed a claim for workers’ compensation, alleging that it did. Was she correct? Lund had a fairly freewheeling job; he had no prescribed hours of duty, and no designated office. He was supposed to patrol areas where violations of the Fish and Game Code might occur. His car was equipped with a two-way radio and could be converted to a bed so that he could sleep on the job when necessary. And there was no rule stating that he couldn’t have company on patrol, or that he couldn’t share the convert-a-bed with a friend. His boss testified that Lund was possibly patrolling the area, looking for hunters who were illegally pursuing deer with flashlights at night.

The court ruled for the widow. A fact-finder could have drawn the inference that he was more or less on the job, trying to catch violators, when he died. Or, of course, the fact-finder could have drawn the inference that he was off on a frolic of his own, conducting an illicit love affair; which is why he chose a “secluded spot in a remote area.” Tucking his uniform and gun under the seat is more consistent with punching out of work than punching in. But the accident commission was entitled to draw the first inference—and it was entitled to find that Lund’s death arose out of his employment, and in the course of his employment, and thus was compensable. The commission possibly felt sympathy for a woman who both lost her husband and found out he was cheating on her.

### **Workers’ Compensation: A Form of Social Insurance**

The results in the Australian case and in the California case, may seem surprising to readers, but they do represent a definite tendency in the application of principles of workers’ compensation.

Workers’ compensation laws in the United States date to the first decade of the Twentieth Century. They were a response to an increase in industrial accidents and workplace injuries and deaths, which occurred in numbers that would seem unimaginable to most people today. Before these laws came into being, employees had to rely on tort lawsuits to recover for their injuries, but there were many legal obstacles that stood in their way. One was the infamous fellow-servant rule: An employee could not recover for a workplace injury, if a co-worker’s negligence was the cause of the injury. Courts and legislatures had begun to chip away at this rule even then; but tort recovery was still difficult for injured workers.

Congress kicked off the workers’ compensation era by passing laws to ensure greater recovery for railroad workers, and eventually seamen, who were injured on the job. At the state level, the tort law tradition was replaced completely with a compensation scheme. Fault, negligence, and the like no longer mattered. Any injury “arising out of” and “in the course of” employment earned compensation. Virtually every state had a

version of workers' compensation by the 1930's; the last holdout, Mississippi, joined the crowd in 1948. The laws were a kind of compromise; the workers would get their compensation, but in limited amounts—there were to be no open-ended tort recoveries. Gone would be the extravagant spending on lawyers and litigation, as well as employers' fear of a sympathetic jury that would overcompensate for injury or use verdicts to punish a rich employer. The money saved could then in theory be directed to compensating injured workers, who gave up a chance at a windfall recovery, in exchange for the certainty of some recovery. Over the century, the scope of the laws has expanded dramatically. Occupational diseases, for example, are now covered.

A central feature of these laws, as we noted above, was to eliminate the whole concept of fault and negligence; a careless, sloppy employee collected as much as a careful one. Only deliberate injury, blatant misconduct, or getting drunk or high on the job, posed any sort of danger. Even here, though, there was change, over time. Early on, courts denied recovery to workers who were injured while engaging in "horseplay." This view gradually relaxed. And stupidity was no bar to recovery, as time went on: In a 1943 case, a truckdriver's helper fell and injured himself, while urinating off the side of a moving truck. The Wisconsin Supreme Court allowed him workers' compensation.

Hence, the victory of the Australian woman, who had sex in her motel and was injured, is not that much of a stretch, when put in historical context. Like the tort system in general, where liability expanded greatly in the Twentieth Century, the workers' compensation system grew and spread and expanded coverage. The carnage in coal mines, factories, railroad yards, and construction sites—these provided the political and social stimulus for the programs in the early days. But as we moved from an industrial to a service economy, and from blue-collar to white-collar jobs, the compensation system moved along with the economy. Thus, PVWY benefitted from a long process of evolution in the way we treat, and think about, torts.



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