

INTOXICATION AS A DEFENSE IN WORKMEN'S COMPENSATION

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Intoxication may figure as a defense in workmen's compensation cases within three statutory settings: those containing no special defenses at all, those having the defense of wilful misconduct, and those specifically making intoxication a defense. The beginning point in every case, however, must be the same. It is to ask: what is intoxication?

I

DEFINING INTOXICATION

This question, like the question "what is truth?," is a very old one, and one that has never received a satisfactory answer. But when the law sets out to deny compensation on the ground of intoxication, the matter of definition becomes one of extreme gravity. Most analysts have ended by delineating several states of drunkenness, such as the merry, the affectionate, the pugnacious, the suspicious, the lachrymose, the somnolent, and, finally, the out-cold state. Such subtle and fascinating gradations are, however, of little help when one has to interpret a rule or statute under which a person either is intoxicated or is not.

Several points are well established. Proof of intoxication does not follow from evidence of any one of the following: that the claimant had had a few drinks,¹ that there was a smell of liquor on

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¹ *King v. Alabam's Freight Co.*, 38 Ariz. 205, 298 P. 634 (1931); *American Cas. Co. v. Jones*, 224 Ark. 731, 276 S.W.2d 41 (1955) (death of salesman from collision with parked bulldozer not solely occasioned by intoxication, although he had consumed five cans of beer); *General Acc. Fire & Life Assur. Corp. v. Prescott*, 80 Ga. App. 421, 56 S.E.2d 137 (1949) (employee credited with consuming "a large quantity of liquor"); *Parks v. Maryland Cas. Co.*, 69 Ga. App. 720, 26 S.E.2d 562 (1943).

In *Trent v. Employers Liab. Assur. Corp.*, 178 So.2d 470 (La. App. 1965), the decedent, a football coach, was killed while driving to observe a football game. He and two other coaches drank a pint of whiskey, amounting to about two drinks each, before beginning the trip. The other coaches followed the decedent in another car, and although they could not see him once he began to drive, they stated that when he left he appeared to be in control of his faculties. Another motorist stated that before the accident the decedent's car was weaving back and forth across the road. The court held that the defendant had failed to establish the defense of intoxication.

the claimant's breath,² that he had in his possession a partially empty bottle of whiskey,³ or that he enjoyed a general reputation as a heavy drinker.⁴ But a combination of some of these, particularly if supported by evidence of the conduct of an intoxicated man, may establish intoxication. It is not, however, necessary to meet the extreme test laid down in the well-known quatrain:

He is not drunk who from the floor
 Can rise again and drink some more;
 But he is drunk who prostrate lies
 And cannot drink and cannot rise.

For example, in *Lee v. Maryman*,⁵ there was evidence that a truck driver had been drinking, that his breath smelled of liquor, that he whooped and hollered and attempted to urinate from the running board of his truck and drive the truck at the same time. The court thought this added up to intoxication, and observed that

In *Corso v. Tandy & Allen Associates*, 10 App. Div. 2d 741, 197 N.Y.S.2d 510 (3d Dep't 1960), the claimant consumed 12 shots of gin but could not keep them down. The use of gin was to minimize the pain of coronary thrombosis, and the vomiting minimized the effect of the gin. Compensation was awarded.

See *Counce v. Farmers Ins. Exch.*, 228 S.W.2d 825 (Mo. App. 1950).

² *United States Fid. & Guar. Co. v. Davis*, 99 Ga. App. 45, 107 S.E.2d 571 (1959). In *Davis*, a witness testified that the decedent "was not drunk" but had an odor of alcohol. The workman had purchased a pint of whiskey and consumed some beer with his meal. A one-third-full bottle of whiskey was found at the scene of the accident. Earlier, the employee had complained of fatigue and illness. The court felt that the circumstantial evidence could also sustain a finding that the accident had been caused by sickness and lack of sleep. To find that the decedent was intoxicated, and to further find that the accident was caused by this intoxication, "would constitute pyramiding an inference on an inference." Death benefits were awarded.

See *Parks v. Maryland Cas. Co.*, 69 Ga. App. 720, 26 S.E.2d 562 (1943); *Hopwood v. Pittsburgh*, 152 Pa. Super. 398, 33 A.2d 658 (1943).

³ *King v. Alabam's Freight Co.*, 38 Ariz. 205, 298 P. 634 (1931); *see* *United States Fid. & Guar. Co. v. Davis*, 99 Ga. App. 45, 107 S.E.2d 571 (1959).

In *Van Note v. Combs*, 24 N.J. Super. 529, 95 A.2d 12 (App. Div. 1953), the caretaker of a stable tripped and fell while climbing down from a hay loft where he had gone to sleep. Under a "sole-cause" statute (*see* notes 77-84 and accompanying text *infra*), a half-empty wine bottle was held insufficient evidence to establish intoxication, even coupled with the claimant's own statement that he had "had too much to drink." *See* *Traders & Gen. Ins. Co. v. Scott*, 189 S.W.2d 633 (Tex. Civ. App. 1945).

⁴ *Lefens v. Industrial Comm'n*, 286 Ill. 32, 121 N.E. 182 (1918).

⁵ 191 So. 733 (La. App. 1939); *accord*, *Montange v. C.A. Wagner Constr. Co.*, 66 S.D. 48, 278 N.W. 176 (1938) (denying compensation on evidence that claimant had had from two to six drinks of moonshine, acted drunk, and lost control of his truck).

In *Fidelity & Cas. Co. v. Hodges*, 108 Ga. App. 474, 133 S.E.2d 406 (1963), the employee was seen drinking from a pint of "bonded" whiskey at lunch time, a bottle of "shine" liquor at 3 p.m., several cans of beer in the afternoon, and a can of beer at 5:30 p.m. He was fatally injured in an automobile accident at 6:28 p.m. Witnesses noted the employee's "thick-tongued" condition prior to the accident. Compensation was denied.

a man did not have to reach the stage of insensibility to qualify as drunk under the statute.

Evidence of blood or brain alcohol content is admissible⁶ and is the most objective evidence possible on the issue of intoxication. Although stated percentages of alcohol presence may not be conclusive proof of intoxication because individuals differ in their ability to absorb and eliminate the poison before it affects the brain, it has been held in New York that "when anyone, without regard to the breadth of his drinking experience, has achieved a 'three-plus' content of alcohol in the brain tissues, he is intoxicated."⁷

In *Smith v. State Roads Commission*,⁸ the Maryland Court of Appeals held that the presence of 0.27 percent alcohol in the blood, shown by autopsy, was proof of intoxication. The court observed that in Maryland drunken driving prosecutions 0.15 percent is prima facie evidence that the defendant was under the influence of intoxicating liquor.⁹ The doctor in *Smith* testified that the presence of 0.27 percent alcohol in the blood would indicate that the person was highly intoxicated, and that many people "pass out" at this level. He said that this amount of alcohol amounted to a pint of one hundred proof whiskey.¹⁰

Although evidence of blood alcohol level is an increasingly common feature of death cases presenting the intoxication defense, there are so many variables in these cases, including the decedent's own capacity, the presence or absence of other indicia of

⁶ *J.H. Rose Trucking Co. v. Bell*, 426 P.2d 709 (Okla. 1967). At the trial, evidence was excluded as to the percentage of alcohol in the decedent's blood. This was held error on the ground that the removal of a blood sample from the body without authorization is not in contravention of the state constitutional provision against self-incrimination.

But cf. *R.W. Rine Drilling Co. v. Ferguson*, 496 P.2d 1169 (Okla. 1972). Results of a blood test taken to determine intoxication pursuant to a statute governing motor vehicle operation were held inadmissible in a workmen's compensation case, since the statute specifically provided that the results of such a test could not be used as evidence in a "civil action."

⁷ *Swanson v. Williams & Co.*, 278 App. Div. 477, 479, 106 N.Y.S.2d 61, 63 (3d Dep't), *aff'd*, 304 N.Y. 624, 107 N.E.2d 96 (1951). In *Swanson*, it was found, nevertheless, that this admitted intoxication was not the sole cause of the injury. See note 77 *infra*.

⁸ 240 Md. 525, 214 A.2d 792 (1965).

⁹ MD. ANN. CODE art. 35, § 100(a)(3) (1957 & Cum. Supp. 1965). For a New York case citing a similar statute, see *Calka v. Mamaroneck Lodge B.P.O.E.*, 285 App. Div. 1093, 139 N.Y.S.2d 316 (3d Dep't 1955). The blood of the Elks' steward who was killed in an auto accident had an alcoholic content of 0.29%. The Vehicle and Traffic Law declares that 0.15% alcohol content in the blood is prima facie proof of intoxication. N.Y. VEH. & TRAF. LAW § 70(5) (McKinney 1965). Compensation was denied.

¹⁰ 240 Md. at 530, 214 A.2d at 794.

intoxication,¹¹ the contribution of other causal factors in producing the accident, and the wide range of degrees of causal relation of the intoxication to the accident required by state statutes, that the cases emphatically cannot be lined up on either side of some percentage figure with any expectation that those above the figure will be noncompensable and those below compensable. Nevertheless, it may be useful at this point simply to list the reported cases in which percentage figures for blood alcoholic content have been involved, if only to show the variety of results that have emerged even within single jurisdictions.

In New York, where intoxication is a defense only when it is the sole cause of the injury,¹² the reported appellate cases show one award involving blood alcohol level of 0.35 percent,¹³ one of 0.34 percent,¹⁴ two of 0.32 percent,¹⁵ one of 0.31 percent,¹⁶ three of "three-plus,"¹⁷ three of 0.29 percent,¹⁸ two of 0.21 percent,¹⁹ 0.15

¹¹ *Industrial Indem. Co. v. Industrial Acc. Comm'n*, 108 Cal. App. 2d 632, 239 P.2d 477 (1952). Blood tests taken of the decedent led the expert witness to testify that the decedent must have been "dead drunk," "gutter drunk," and semi-conscious at the time of the accident. But his wife testified that he was not drunk, and the court held this a sufficient conflict of evidence to affirm the commission's award.

¹² See notes 77 & 78 *infra*.

¹³ *Barrett v. Al Charyn, Inc.*, 13 App. Div. 2d 863, 214 N.Y.S.2d 533 (3d Dep't), *aff'd*, 11 N.Y.2d 849, 182 N.E.2d 282, 227 N.Y.S.2d 673 (1962). The cause of death here was asphyxiation from a charcoal heater used for warming the interior of a panel truck.

¹⁴ *May v. Accident & Cas. Ins. Co.*, 276 App. Div. 1043, 95 N.Y.S.2d 687 (3d Dep't 1950). In *May*, it was found that the presence of 0.34% alcohol content in the brain was adequate to produce "intoxication, 'impaired senses, disturbed equilibrium, staggering gait.'" *Id.* Nevertheless, intoxication was not the sole cause, and compensation was awarded for the death of a tavern fire tender who had apparently fallen down stairs.

¹⁵ *Smyth v. Pinkerton Nat'l Detective Agency*, 4 App. Div. 2d 726, 163 N.Y.S.2d 442 (3d Dep't 1957). The employee, a night guard at an industrial plant, was found crushed to death between the steering wheel of an electric lifting machine and a conveyor belt. In *McKenna v. Atlas Contractors Equip. Corp.*, 275 App. Div. 876, 88 N.Y.S.2d 668 (3d Dep't 1949), *rev'd*, 300 N.Y. 317, 90 N.E.2d 479 (1950), the employee, a night watchman, was killed in a fire in a shanty provided by the employer.

¹⁶ *Brame v. Alcar Trucking Co.*, 31 App. Div. 2d 881, 297 N.Y.S.2d 378 (3d Dep't 1968); see note 77 *infra*.

¹⁷ *Swanson v. Williams & Co.*, 278 App. Div. 477, 106 N.Y.S.2d 61 (3d Dep't), *aff'd*, 304 N.Y. 624, 107 N.E.2d 96 (1951); *Shannon v. American Can Co.*, 278 App. Div. 546, 107 N.Y.S.2d 1 (3d Dep't), *leave to appeal and rehearing denied*, 303 N.Y. 1016, 102 N.E.2d 841 (1951) (employee's tractor-trailer collided with vehicle left standing on blocks in dark street); *Malloy v. Cauldwell Wingate Co.*, 284 App. Div. 798, 135 N.Y.S.2d 445 (3d Dep't 1954), *aff'd*, 308 N.Y. 1031, 127 N.E.2d 867 (1955) (decedent night watchman found on employer's premises dead from skull fracture and inter-cranial injuries).

¹⁸ *Cliff v. Dover Motors, Inc.*, 11 App. Div. 2d 883, 202 N.Y.S.2d 914 (3d Dep't 1960), *aff'd*, 9 N.Y.2d 891, 175 N.E.2d 831, 216 N.Y.S.2d 703 (1961). An autopsy disclosed 0.291% alcoholic content in the brain of the deceased salesman. He was killed when the demonstration automobile that he was driving left the road and struck a utility pole. The court

percent,²⁰ and 0.146 percent.²¹ With these may be compared denials in two cases, one at 0.30 percent²² and one at 0.29 percent.²³

Minnesota has one reported case of an award when the level was "three-plus,"²⁴ and one of a denial at a level of 0.2858 percent.²⁵

Among other states, there may be found a Wisconsin award at 0.29 percent,²⁶ a Colorado award at 0.195 percent,²⁷ a Missouri award at 0.175 percent,²⁸ and Arizona awards at 0.19 percent and 0.10 percent.²⁹ Reported denials include one from Maryland at

confirmed board findings that intoxication was not the sole cause of the accident. *See Post v. Tennessee Prod. & Chem. Corp.*, 19 App. Div. 2d 484, 244 N.Y.S.2d 389 (3d Dep't 1963), *aff'd*, 14 N.Y.2d 796, 200 N.E.2d 213, 251 N.Y.S.2d 213 (1964); note 77 *infra*.

In *Barker v. General Motors Corp.*, 5 App. Div. 2d 1031, 173 N.Y.S.2d 42 (3d Dep't 1958), a millwright was found fatally injured by a fall from a roof. The defense of sole causation by intoxication was not pressed on appeal.

¹⁹ *Skinner v. Tobin Packing Co.*, 24 App. Div. 2d 785, 263 N.Y.S.2d 719 (3d Dep't 1965), *aff'd*, 18 N.Y.2d 738, 221 N.E.2d 172, 274 N.Y.S.2d 347 (1966) (employee's body found in overturned automobile); *Van De Water v. Emmadine Farms, Inc.*, 18 App. Div. 2d 1119, 239 N.Y.S.2d 182 (3d Dep't 1963); *see note 77 infra*.

²⁰ *Scott v. George Schaefer & Sons*, 3 App. Div. 2d 775, 160 N.Y.S.2d 429 (3d Dep't 1957) (employee's automobile struck rear of tractor-trailer unit left unattended on public highway).

²¹ *Fonze v. Stuyvesant Oil Burner Corp.*, 10 App. Div. 2d 761, 197 N.Y.S.2d 496 (3d Dep't 1960) (0.146% alcohol in decedent's brain not sufficient to find vehicle accident caused solely by intoxication; compensation affirmed).

²² In *Majune v. Good Humor Corp.*, 26 App. Div. 2d 849, 273 N.Y.S.2d 819 (3d Dep't 1966), the employee was driving a truck which collided head-on with an oncoming vehicle in the opposite lane. The autopsy evidence, in addition to the 0.30% content of alcohol by weight, showed stomach distension with about 1000 c.c. of liquid and a strong odor of aldehyde, indicating rapid ingestion of a large amount of alcohol.

²³ *Calka v. Mamaroneck Lodge B.P.O.E.*, 285 App. Div. 1093, 139 N.Y.S.2d 316 (3d Dep't 1955); *see note 9 supra*.

²⁴ *Olson v. Felix*, 275 Minn. 335, 146 N.W.2d 866 (1966); *see note 56 infra*.

²⁵ *Fogarty v. Martin Hotel Co.*, 257 Minn. 398, 101 N.W.2d 601 (1960). Under a statute requiring that intoxication be the "proximate cause of the injury" (MINN. STAT. ANN. § 176.021(1) (1953)), the court in *Fogarty* applied the defense: "When an employee renders himself so intoxicated that he cannot perform any of the usual duties of his employment." An expert testified that the deceased had 0.285% alcohol in his blood and "would have difficulty walking."

²⁶ *Haller Bev. Corp. v. Department of Indus. Labor & Human Relations*, 49 Wis. 2d 233, 181 N.W.2d 418 (1970); *see note 56 infra*.

²⁷ *Electric Mut. Liab. Ins. Co. v. Industrial Comm'n*, 154 Colo. 491, 391 P.2d 677 (1964); *see note 57 infra*.

²⁸ In *McCue v. Studebaker Automotive Sales, Inc.*, 389 S.W.2d 408 (Mo. 1965), the decedent, an automobile salesman, was killed while on his way to meet a prospective customer. He had been drinking and had a blood alcohol level of 0.175%. It was found that he still had been performing his duties, even after drinking. Compensation was awarded. The employer had attempted to show that because of his drinking, the decedent could not have been in the course of his employment.

²⁹ *Peterson v. Industrial Comm'n*, 16 Ariz. App. 41, 490 P.2d 870 (1972). Here, the

0.27 percent,³⁰ one from Kentucky at 0.25 percent,³¹ and one from Oklahoma at 0.19 percent.³²

II

INTOXICATION APART FROM STATUTORY DEFENSE

The reported cases in which intoxication has, apart from special statute, been successfully urged as a defense to workmen's compensation claims have been based on the theory that, by reaching an advanced stage of intoxication, the claimant has abandoned his employment, since he has made himself incapable of engaging in the duties of that employment. A clear example is that of a chauffeur who became so drunk that the passenger stopped the car and sent the chauffeur back to the garage from which the car had been rented.³³ The chauffeur's superior then ordered him to go home, but the chauffeur was soon after found dead in the garage. Similarly, a watchman who, after drinking heavily, deliberately went into a washroom to sleep, was guilty of an obvious abandonment of his employment.³⁴ Indeed, he probably would have been out of the course of his employment even apart from the drinking. And a salesman who became so intoxicated that he fell out of his car was found by the court to have been so "far gone" that he could not either physically or mentally have engaged in the duties of his employment.³⁵

On the other hand, if the claimant continues actively to perform his duties, even while admittedly intoxicated, he has not abandoned his employment. Thus, compensation was awarded to a coal driver who continued to drive his wagon while intoxicated, and fell from the seat.³⁶ Missouri has expressly adopted the

decident, at a time when his blood alcohol content was 0.19%, suffocated as a result of getting his head caught between two metal slats of a bed headboard in a rooming house where he was staying overnight. Compensation was awarded. The court stated that the Arizona rule required intoxication to reach the point at which it is "tantamount to abandonment of employment," if it is to be a defense. *Id.* at 43, 490 P.2d at 872; see *Ortega v. Ed Horrell & Son*, 89 Ariz. 370, 362 P.2d 744 (1961) (involving 0.10% level).

³⁰ *Smith v. State Roads Comm'n*, 240 Md. 525, 214 A.2d 792 (1965).

³¹ *Woosley v. Central Uniform Rental*, 463 S.W.2d 345 (Ky. 1971); see note 60 *infra*.

³² *In re Barger*, 450 P.2d 503 (Okla. 1969); see note 78 *infra*.

³³ *In Emery Motor Livery Co. v. Industrial Comm'n*, 291 Ill. 532, 534, 126 N.E.143, 144 (1920), compensation was denied. The cause of death is not mentioned in the opinion, except to the extent that it is noted that "death arose out of his drunken condition rather than out of his employment."

³⁴ *John A. Roebbling's Sons Co. v. Industrial Acc. Comm'n*, 36 Cal. App. 10, 171 P. 987 (1918).

³⁵ *O'Neil v. Fred Evens Motor Sales Co.*, 160 S.W.2d 774 (Mo. App. 1942).

³⁶ *City Ice & Fuel Co. v. Karlinsky*, 33 Ohio App. 42, 168 N.E. 475 (1929).

course-of-employment approach in this class of cases. In awarding compensation in spite of evidence of considerable drinking and of "weaving on the highway" prior to the accident,³⁷ the court quoted the following passage from an earlier case:

[W]e cannot deny compensation because of intoxication, at least unless it was shown that the degree of intoxication was such that it could be held that the injury did not arise out of the employment because the employee could not have been engaged in it. Employers will have to enforce their rules against drinking by discharging offending employees or by such other disciplinary measures as they see fit to adopt.³⁸

III

INTOXICATION AS WILFUL MISCONDUCT

Attempts to treat drinking as "wilful misconduct" under that statutory defense have been generally unsuccessful, usually for lack of a clear causal connection between the drinking and the injury.³⁹ The Supreme Court of Wisconsin has rejected the defense on the basis of a distinction between wilful drinking and wilful intoxication.⁴⁰ This court was confronted with a pair of findings which on the surface looked inconsistent: that the deceased's fall from his wagon was not caused by wilful misconduct, but that the deceased was in an intoxicated condition which proximately caused the accident. These findings were reconciled by the observation that a person, although drinking intentionally, may not intend to become drunk, and yet may become so due to fatigue, hunger, or illness.

Michigan has ruled that the element of wilfulness can be negated by evidence that drinking was the only way the claimant could relieve the pain of compensable injury.⁴¹

³⁷ *Coonce v. Farmers Ins. Exch.*, 228 S.W.2d 825 (Mo. App. 1950).

³⁸ *Id.* at 828, quoting *Phillips v. Air Reduction Sales Co.*, 337 Mo. 587, 595, 85 S.W.2d 551, 555 (1935) (emphasis in original).

³⁹ *Ginther v. J.P. Graham Transfer Co.*, 348 Pa. 60, 33 A.2d 923 (1943); see *Hopwood v. Pittsburgh*, 152 Pa. Super. 398, 33 A.2d 658 (1943). In *Hopwood*, a hospital orderly's drinking on duty in violation of rules and statutes was held not a "violation of statute" under the Pennsylvania act.

⁴⁰ *Nekoosa-Edwards Paper Co. v. Industrial Comm'n*, 154 Wis. 105, 141 N.W. 1013 (1913).

⁴¹ In *Scroggins v. Corning Glass Co.*, 283 Mich. 628, 172 N.W.2d 367 (1969), the claimant suffered a compensable back injury and, after surgery, returned to work for the same employer. He was later discharged for working while drunk, but claimed that his drinking was the only way he could alleviate the pain resulting from the original injury. The claimant's intoxication was held not to be wilful misconduct, and an award of benefits resulting from the claimant's firing was affirmed.

Kentucky, however, supplies a case illustrating how the extreme character of the facts can support a conclusion that wilful intoxication constitutes wilful misconduct.⁴² The decedent, an attorney, had driven to another city to have a "rehabilitation client" tested. During the testing, the decedent went to a bar and had several drinks, and afterwards, in the company of the client, he spent about two hours in a bar, becoming highly intoxicated. The decedent permitted the client, an inexperienced driver who did not have a driver's license, and was somewhat intoxicated, to drive the car, and the decedent was killed when the car mysteriously left the road. The court held that the decedent had been guilty of wilful misconduct in permitting the client to drive the car, and he was also guilty of wilful intoxication, even though he was not driving the car.

IV

INTOXICATION AS A SEPARATE STATUTORY DEFENSE

Thirty-six states make intoxication the basis of a separate defense, and three others make it a ground for reduction in the amount of the award.⁴³ The variation among the statutes appears almost entirely in the manner in which the requisite causal connection between the intoxication and the injury is described. This causation requirement ranges from none whatever to sole causation. Most of the statutes state a simple causal relation in such terms as "injury due to (or caused by, or resulting from) intoxication."⁴⁴ A few prefer the somewhat similar phrase "oc-

⁴² *Banks v. Department of Educ. Bureau of Rehab.*, 462 S.W.2d 428 (Ky. 1971).

⁴³ COLO. REV. STAT. ANN. § 81-13-5 (1953) (50% reduction); see *Mohawk Rubber Co. v. Claimants in Death of Cribbs*, 165 Colo. 526, 440 P.2d 785 (1968). Colorado's 50% reduction in benefits applies if the "injury" is caused by intoxication. This provision has been held applicable to death benefits as well as to disability benefits. In *Conn v. Conn*, 167 Colo. 177, 446 P.2d 224 (1968), the decedent's death was a result of his intoxication. Death benefits were reduced by 50%.

Idaho, Utah, and Wisconsin have statutes similar to that of Colorado. See IDAHO CODE § 72-208 (1973) (50% reduction); UTAH CODE ANN. § 35-1-14 (1953) (15% reduction except in death cases); WIS. STAT. ANN. § 102.58 (1973) (15% reduction, not to exceed \$7,500).

⁴⁴ ALA. CODE tit. 26, § 270 (1958); CAL. LABOR CODE § 3600 (West 1971); COLO. REV. STAT. ANN. § 81-13-4 (1963); CONN. GEN. STAT. ANN. § 31-284 (1972); DEL. CODE ANN. tit. 19, § 2353 (1953); GA. CODE ANN. § 114-105 (1953); IDAHO CODE § 72-208 (1973); IND. ANN. STAT. § 40-1208 (1965); KY. REV. STAT. ANN. § 342-015 (1969); LA. REV. STAT. § 23-1081 (1964); ME. REV. STAT. ANN. tit. 39, § 61 (1965); N.D. CENT. CODE § 65-1-2 (1960); R.I. GEN. LAWS ANN. § 28-33-2 (1956); S.D. COMP. LAWS ANN. § 62-4-37 (1967); TENN. CODE ANN. § 50-910 (1966); UTAH CODE ANN. § 35-1-14 (1953); VT. STAT. ANN. tit. 21, § 649 (1967); VA. CODE ANN. § 65-35 (1963); W. VA. CODE ANN. § 23-4-2 (1973); WIS. STAT. ANN. § 102.58 (1973).

caused by" intoxication.⁴⁵ Several require that the intoxication be the "proximate cause,"⁴⁶ several the "sole cause,"⁴⁷ one the "primary cause,"⁴⁸ one the "direct cause,"⁴⁹ and one the "whole or partial cause."⁵⁰ Three require proof only that the employee was intoxicated at the time of injury,⁵¹ apparently whether or not the intoxication had anything to do with the injury.

Naturally, since these varying statutes have to be given their plain meaning, the cases are somewhat varied too, although it may be observed that, wherever possible, the courts are inclined to avoid a forfeiture on the basis of the intoxication defense except when the defense is clearly made out.⁵² Since intoxication is an affirmative defense, the burden of proof of intoxication and of the requisite degree of causation is on the employer,⁵³ and when there is a conflict in the evidence, a finding by the commission that inebriation was not the cause of the accident must be affirmed.⁵⁴

⁴⁵ N.M. STAT. ANN. § 59-10-8 (1953); N.C. GEN. STAT. § 97-12 (1972); S.C. CODE ANN. § 72-156 (1962).

⁴⁶ Federal Employees' Compensation Act, 5 U.S.C. § 8102 (1970); IOWA CODE ANN. § 85.16 (1949); MINN. STAT. ANN. § 176.021 (1966); MISS. CODE ANN. § 6998-04 (1952); N.J. STAT. ANN. § 34:15-7 (1959). New Jersey, however, has interpreted its statute to require "sole and proximate" cause. See note 77 *infra*.

⁴⁷ Longshoremen's & Harbor Worker's Act, 33 U.S.C. § 903(b) (1970); ARK. STAT. ANN. § 81-1305 (1960) ("solely occasioned by intoxication," plus statutory prima facie presumption that injury did not result from intoxication); KAN. STAT. ANN. § 44-501 (1964); MD. ANN. CODE art. 101, § 45 (1964); N.J. STAT. ANN. § 34:15-7 (1959); N.Y. WORKMEN'S COMP. LAW § 10 (McKinney 1965).

⁴⁸ FLA. STAT. ANN. § 440.09(3) (1966).

⁴⁹ OKLA. STAT. ANN. tit. 85, § 11 (1970). For a discussion of the element of "sole" cause as figuring in Oklahoma decisions, see note 78 *infra*.

⁵⁰ N.H. REV. STAT. ANN. § 281:15 (1966).

⁵¹ NEB. REV. STAT. § 48-127 (1960); NEV. REV. STAT. § 616-565 (1967); TEX. REV. CIV. STAT. art. 8309, § 1 (1967).

⁵² General Acc. Fire & Life Assur. Corp. v. Prescott, 80 Ga. App. 421, 56 S.E.2d 137 (1949).

⁵³ United States Fid. & Guar. Co. v. Collins, 231 Miss. 319, 95 So. 2d 456 (1957). In Douglas Aircraft, Inc. v. Industrial Acc. Comm'n, 303 P.2d 26 (Cal. App. 1956), *rev'd*, 47 Cal. 2d 903, 306 P.2d 425 (1957), there was evidence that the claimant was intoxicated while driving a motor scooter. The commission made an award. The intermediate court reversed, but the supreme court restored the award.

⁵⁴ In Vandiver v. Watford, 178 So. 2d 195 (Fla. 1965), the decedent, a truck driver, died in an unwitnessed accident. There was evidence that he had been taking drugs and alcohol in an attempt to stay awake and that he was speeding. He had driven the truck for an hour and a half after consuming the alcohol. The deputy commissioner found that the death was not primarily caused by intoxication, but decreased the award 25% for violation of the speed limit. The full commission reversed, but the supreme court reinstated the award, stating that the award was based on substantial, competent evidence.

See also Douglas Aircraft, Inc. v. Industrial Acc. Comm'n, 303 P.2d 26 (Cal. App. 1956), *rev'd*, 47 Cal. 2d 903, 306 P.2d 425 (1957).

A. *Intoxication Without Regard to Causation*

In Texas, where the defense requires only a showing that the claimant was intoxicated at the time of the accident, the courts have held that any discussion of causal connection between the intoxication and the accident is irrelevant. In *Texas Indemnity Insurance Co. v. Dill*,⁵⁵ a jury had made two findings: first, that the deceased was intoxicated, and second, that the intoxication did not contribute to the injury. The appellate court struck the second finding as immaterial and reversed the compensation award. Under the wording of the statute, there apparently was no choice. It may be observed in passing that this type of statute is as foreign to compensation principle as anything could be. It can only be described as a sort of special penal prohibition measure applicable exclusively to employees. Other people may be punished for drunkenness by small fines or a night in jail, but if it can be proved that a workman was intoxicated when blinded by an explosion on the premises, although he would have been blinded just the same if sober, his penalty is the loss of compensation rights, not to mention common-law rights, running into many thousands of dollars. Such statutes, whether phrased in their present form by inadvertence or intent, are preposterous, and should be speedily amended before they work some such staggering injustice.

B. *Intoxication as the Proximate Cause of Injury*

The intermediate group of statutes, which look for something resembling ordinary legal causation, have been strictly construed.⁵⁶ When a statute says merely "caused by" or "due to," this can refer neither to remote cause nor to sole cause. It must mean proximate cause. When, in addition to the intoxication, the facts have pre-

⁵⁵ 42 S.W.2d 1059 (Tex. Civ. App. 1931), *aff'd*, 63 S.W.2d 1016 (Tex. Comm. App. 1933).

⁵⁶ See, e.g., *Haller Bev. Corp. v. Department of Indus. Labor & Human Relations*, 49 Wis. 2d 233, 181 N.W.2d 418 (1970). The decedent in *Haller*, a liquor salesman, was killed when the car he was driving crossed the opposite lane of traffic and struck a bridge. His blood alcohol level was 0.29%, which led the department to determine that he was "probably intoxicated." However, the employer's request for a 15% decrease in compensation benefits for death resulting from intoxication was denied, since no evidence was presented showing a causal relationship between the intoxication and the fatal accident.

In *Olson v. Felix*, 275 Minn. 335, 146 N.W.2d 866 (1966), the decedent was found crushed by his motor grader, with an extremely high blood alcohol content of 0.30%. See notes 7-32 and accompanying text *supra*. However, immediately before his death he had been performing his job in a competent manner. The finding that intoxication was not the proximate cause of death was affirmed.

sented a special source of hazard bearing upon the accident, courts have frequently held that the intoxication was not the proximate cause. Thus, when there was evidence both that the claimant was intoxicated and that the wheel of his car had broken, the broken wheel, not the intoxication, was held to be the "cause" of the overturn of the car.⁵⁷ When a janitor fell down some cellar steps while intoxicated, and there was some evidence of snow and ice on the steps and danger due to lack of a railing, the condition of the steps, not the intoxication, was held the proximate cause.⁵⁸ Similarly, when the deceased, after drinking a "large quantity" of liquor, walked into the side of a moving taxi on a foggy night,⁵⁹ and when an intoxicated claimant's car smashed into a tree at a time when there was some ice and fog, compensation was awarded.⁶⁰ When an intoxicated sawmill worker was killed by getting his jacket caught in a shaft, it was held that the employer had failed to prove that the intoxication was the "proximate" cause

⁵⁷ *Evans v. Louisiana Gas & Fuel Co.*, 19 La. App. 529, 140 So. 245 (1932); *accord*, *Electric Mut. Liab. Ins. Co. v. Industrial Comm'n*, 154 Colo. 491, 391 P.2d 677 (1964). The claimant's intoxication does not affect the question of whether the accident was one arising out of and in the course of his employment. Rather, the effect of intoxication under Colorado law is to reduce benefits by 50%. There was evidence that the decedent in *Electric Mutual* had a blood alcohol level of 0.195%, but this was held not to affect the size of the benefits, since the accident was caused by a malfunction in the automobile. *Id.* at 495, 391 P.2d at 679.

In *Stephens v. Hartford Acc. & Indem. Co.*, 116 Ga. App. 15, 156 S.E.2d 100 (1967), a finding that a wreck was caused by lights ceasing to function while the claimant was traveling 60-65 miles per hour in a 50 miles per hour zone was held not to support a conclusion that the injury was proximately caused by the claimant's intoxication.

⁵⁸ *State ex rel. Green v. District Court*, 145 Minn. 96, 176 N.W. 155 (1920).

⁵⁹ *General Acc. Fire & Life Assur. Corp. v. Prescott*, 80 Ga. App. 421, 56 S.E.2d 137 (1949).

⁶⁰ *Lamb v. Standard Oil Co.*, 250 Ia. 911, 96 N.W.2d 730 (1959) (medical expert testified that blood test showed 196 mg. alcohol per 100 c.c. of blood, indicating decedent's intoxication). *Contra*, *Woosley v. Central Uniform Rental*, 463 S.W.2d 345 (Ky. 1971). In a case of first impression, the *Woosley* court held that the statutory provision denying compensation in cases of injury or death "caused by . . . intoxication" meant that intoxication must be a proximate cause of the injury or death. *Id.* at 347. In *Woosley*, the decedent was killed in an unwitnessed accident, driving a truck over a winding, hilly road in wet weather conditions. The truck went off the road on a bad curve on a hill. The decedent had a blood alcohol level of 0.25%. The court held that there could be more than one proximate cause of an accident, and benefits could be denied even if the hazardous driving conditions contributed to the accident, as long as the accident would not have happened but for the intoxication. The court stated that since a truck does not ordinarily run off the road if a driver is exercising due care, a rebuttable presumption arose that the accident was the result of the driver's negligence. *Id.* When the additional fact of high blood alcohol level was added, the presumption was enlarged to include a determination that the bad driving resulted from intoxication, and in the absence of conflicting or rebutting testimony no benefits could be paid. A finding in this case that the death was due to intoxication, and therefore not compensable, was supported by the evidence.

of the accident.⁶¹ In another case involving a typical hazard of the employment, compensation was awarded for the death of a drunk employee who was killed by the fall of a log from a log truck.⁶² The employment hazard may also be a co-employee, and it has been held that an injury is not "caused by" intoxication when an intoxicated claimant's verbal abuse prompted a co-employee to assault him.⁶³ The court specifically pointed out that the word "caused" in the statute meant proximately caused by the intoxication, as when a workman attempts to operate machinery when drunk.⁶⁴

Georgia has gone even further in narrowing the concept of causation by intoxication, by holding in *Bullington v. Aetna Casualty Co.*⁶⁵ that it does not include direct medical causation. The decedent in *Bullington* had had a moderate drinking problem before his accident, but it was found that due to a combination of his pain, enforced idleness, and apprehension of surgery, the drinking problem was aggravated, and resulted in his death from alcoholic gastritis. The court held that the defense of intoxication was not applicable, because even though intoxication was the medical cause of death, it was not the cause of the accident. But New York, under its "sole cause" statute,⁶⁶ has reached the opposite result as to death from pulmonary edema and acute alcoholism after a Christmas party drinking contest.⁶⁷ This difference in result cannot be accounted for by difference in statutory wording. The Georgia statute says: "No compensation shall be allowed for an injury or death

⁶¹ *Shiplett v. Moran*, 58 Ga. App. 854, 200 S.E. 449 (1938).

⁶² In *Smith Bros. v. Dependents of Cleveland*, 240 Miss. 100, 126 So. 2d 519 (1961), the deceased employee was laid off work for the remainder of the day because he was drunk, but was ordered to park his log truck before leaving. The employer contended the fatal accident occurred when the employee as a result of intoxication and contrary to orders attempted to unload the logs. The court held that the employers, who were 150 yards away, would have heard him trying to remove logging chains and concluded that an unsecured log fell when the decedent was passing the truck. *Id.* at 520-21.

⁶³ *Conley v. Travelers Ins. Co.*, 53 So. 2d 681 (La. App. 1951).

⁶⁴ *Id.* at 683.

⁶⁵ 122 Ga. App. 842, 178 S.E.2d 901, *rev'd on other grounds*, 227 Ga. 485, 181 S.E.2d 495 (1971). The court further held that the proper test to apply to the employer's defense was the "intentionally self-inflicted injury test." *Id.* at 844, 178 S.E.2d at 903. The court then adopted what it described as the "Arizona test" for compensable suicides, holding such a death compensable if the suicide, or alcoholic problem, resulted from the decedent's becoming devoid of normal judgment. *Id.* As to the suicide test, see 1A A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* §§ 36.20, .21 (1973).

⁶⁶ See notes 77-84 and accompanying text *infra*.

⁶⁷ *Herman v. Greenpoint Barrel & Drum Reconditioning Co.*, 9 App. Div. 2d 572, 189 N.Y.S.2d 353 (3d Dep't 1959), *aff'd*, 8 N.Y.2d 880, 168 N.E.2d 721, 203 N.Y.S.2d 922 (1960); *cf.* *Munsie v. Di Fiore*, 19 App. Div. 2d 916, 243 N.Y.S.2d 988 (3d Dep't 1963) (compensation awarded for death due to delirium tremens caused by trauma of industrial accident and aggravated by intoxication).

... due to intoxication"⁶⁸ The New York language is: "[T]here shall be no liability for compensation under this chapter when the injury has been solely occasioned by the intoxication of the injured employee while on duty"⁶⁹ The Georgia interpretation can be defended by stressing the commonly accepted meaning of "intoxication." Note that the statute does not use such terms as "excessive drinking" or "use of alcohol." The dictionary definition of "intoxication" is: "The action of stupefying with a drug or alcoholic liquor"⁷⁰ The employee's death in the Georgia case was not "due to" his being stupefied, but was due to his being made ill by alcohol. As to the New York decision, it should be stressed that the denial was primarily based on lack of work connection, with the intoxication defense merely added as a makeweight.

The intoxication which produces the injury must be that of the employee himself. Thus, when the accident occurred because of the intoxication of the employee's wife, who was driving him on a business trip, the defense was held inoperative, although he himself was dead drunk at the time.⁷¹ Similarly, when employees riding a truck driven by an intoxicated foreman were themselves drunk, they were held entitled to compensation when the truck hit a tree.⁷² But when the direct cause of the accident was the fact that a salesman, who had fallen asleep after heavy drinking, fell against a customer who had taken over the driving of the car and caused him to lose control, compensation was denied.⁷³

In another of the rare denials in this area, an employee "in a state of intoxication where he was practically helpless" was placed by the employer near a basement stairway—"a place of safety had he remained there." The intoxication was held the proximate cause of his fall down the stairs.⁷⁴ Here, in at least one view, the accident was a solo performance, with no distinctive or special employment

⁶⁸ GA. CODE ANN. § 114-105 (1973).

⁶⁹ N.Y. WORKMEN'S COMP. LAW § 10 (McKinney 1965).

⁷⁰ THE SHORTER OXFORD ENGLISH DICTIONARY 1035 (3d ed. 1955). The alternative meaning of intoxication, "[t]he action of poisoning; the state of being poisoned" is labeled "obsolete, except medical," (*id.*) and accordingly should not be attributed to modern lay legislators.

⁷¹ *Industrial Indem. Co. v. Industrial Acc. Comm'n*, 108 Cal. App. 2d 632, 239 P.2d 477 (1952).

⁷² *Allison v. Brown & Horsch Insulation Co.*, 98 N.H. 434, 102 A.2d 493 (1954).

⁷³ Compare *Klein v. Maryland Cas. Co.*, 79 Ga. App. 560, 54 S.E.2d 277 (1949); see *Banks v. Department of Educ. Bureau of Rehab.*, 462 S.W.2d 428 (Ky. 1971) (compensation denied); note 42 *supra*.

⁷⁴ *Fogarty v. Martin Hotel Co.*, 257 Minn. 398, 101 N.W.2d 601 (1960) (alleged negligence of employer held immaterial).

factor, such as ice, fog, elevator doors, or falling logs, involved in bringing on the accident. The mere presence of the stairs was a passive and normal part of the environment. Note that here we are not concerned with the special compensation rules associated with the term "arising out of the employment," but with the more familiar legal term "proximate cause."

Under a statute which requires that intoxication be the "primary" cause,⁷⁵ the burden on the defense becomes somewhat heavier. For example, an intoxicated painter fell through a defective guard rail on a scaffolding, but the defectiveness of the rail was held the direct cause of the accident, while the intoxication was a remote cause.⁷⁶

C. *Intoxication as the Sole Cause of Injury*

The strictest type of statute, which requires a showing that intoxication was the "sole cause" of the injury, presents an opportunity for a little more controversy than the better-known concepts of causation in the other statutes. Because of the severe burden of proof, the majority of attempts to invoke the defense have been unsuccessful,⁷⁷ and there have been few denials of compensation,

⁷⁵ See, e.g., *Vandiver v. Watford*, 178 So. 2d 195 (Fla. 1965); see note 54 *supra*.

⁷⁶ *Zee v. Gary*, 137 Fla. 741, 189 So. 34 (1939).

⁷⁷ *C.F. Lytle Co. v. Whipple*, 156 F.2d 155 (9th Cir. 1946); *Maryland Cas. Co. v. Cardillo*, 107 F.2d 959 (D.C. Cir. 1939) (collector robbed and beaten while drunk); see note 79 *infra*.

In *Jones Truck Lines, Inc. v. Letsch*, 245 Ark. 982, 436 S.W.2d 282 (1969), the claimant, a truckdriver, ran off the road, suffering injuries. He did not remember the circumstances surrounding the accident. A doctor testified that pills the claimant was required to take and an earlier head injury could have contributed to the accident, causing the claimant to become confused. In addition to the pills, the claimant had been drinking alcoholic beverages which the doctor stated could have increased the effects of the pills. Intoxication was held not to be the sole cause of the accident, and compensation benefits were awarded.

In the New Jersey case of *O'Reilly v. Roberto Homes, Inc.*, 31 N.J. Super. 387, 107 A.2d 9 (App. Div. 1954), a few beers in the afternoon, four rye egg-nogs in the evening, and sufficient alcohol content in the brain to affect people different ways did not establish that intoxication was the sole and proximate cause of death from an automobile accident. New Jersey had construed its statutory phrase "natural and proximate cause" to mean "sole and proximate cause." The *O'Reilly* court said:

As to the matter of intoxication, R.S. 34:15-7 [N.J.S.A.] requires that an employer, seeking to show intoxication as a defense, demonstrate that it is "the natural and proximate cause of injury." In *Kulinka v. Flockhart Foundry Co.*, 9 N.J. Super. 495 (Ct. Cl. 1950), affirmed *sub nomine Bujalski v. Flockhart Foundry Co.*, per curiam and substantially on opinion below, 16 N.J. Super. 249 (App. Div. 1951), certification denied 8 N.J. 505 (1952), the court interpreted this statute to mean "solely" produced by intoxication. (9 N.J. Super. 505.) [sic] See 1 *Larson, supra*, secs. 34.33, 34.34, pp. 492, 493.

Thus the New Jersey rule today is that the employer must show intoxication as a cause to the exclusion of all others.

even when the intoxication played a substantial part in causing the

Id. at 392-93, 107 A.2d at 12.

Kulinka v. Flockhart Foundry Co., 9 N.J. Super. 495, 75 A.2d 557 (L. Div. 1950), involved a fall by an employee attempting to enter a crane. The court based its reading of the statute as requiring "sole" causation on the force of the word "the." The court explained:

Has the respondent shown by the preponderance of all of the evidence in the record that *Kulinka's* intoxication was "the natural and proximate cause" of his injury?

The article "the" in this statutory context is a word of exclusion. It means that in order to defeat recovery the employer must show by the greater weight of the evidence that the employee's injury was produced solely by his intoxication. In other words, the employment must supply no more than the setting, the stage, the situation in which the fall occurred; it can be no more than an inactive condition as distinguished from a moving cause. If the hazards or risks which are incidental to the employment concur with the employee's insobriety in producing the fall or if the hazards or risks contribute efficiently to the production of the fall, compensation cannot be denied. If the legislature intended intoxication as a concurrent or contributory cause of an injury to effect a deprivation of the benefits of the statute it would have been a simple matter to have said so.

Id. at 505, 75 A.2d at 562 (emphasis in original).

Olivera v. Hatco Chem. Co., 55 N.J. Super. 336, 150 A.2d 781 (App. Div. 1959), quoted both *O'Reilly* and *Kulinka* at length as requiring a showing that intoxication was the "sole producing cause of death" to establish the defense. In this instance, the decedent was struck by a broken piece of lumber flung out by a whirling centrifuge. The decedent's blood alcohol content was 0.01634% by weight. See *Schultz v. Henry V. Vaughans Sons*, 24 N.J. Super. 492, 94 A.2d 873 (L. Div. 1953); note 84 *infra*.

In New York, the lack of success in invoking the intoxication defense is illustrated by the following cases. In *Cliff v. Dover Motors, Inc.*, 11 App. Div. 2d 883, 202 N.Y.S.2d 914 (3d Dep't 1960), *aff'd*, 9 N.Y.2d 891, 175 N.E.2d 831, 216 N.Y.S.2d 703 (1961), an autopsy disclosed 0.291% alcoholic content in the brain of the deceased salesman. The court confirmed the findings of the board that intoxication was not the sole cause of the accident. In *Malloy v. Cauldwell Wingate Co.*, 284 App. Div. 798, 135 N.Y.S.2d 445 (3d Dep't 1954), *aff'd*, 308 N.Y. 1031, 127 N.E.2d 867 (1955), compensation was awarded for the death of an intoxicated night watchman, whose normal post of duties was outside of the building, even though he was inside the building and death occurred after his hours of duty.

In *Bramer v. Laratonda*, 8 App. Div. 2d 876, 186 N.Y.S.2d 1001 (3d Dep't 1959), the claimant was told to quit because he was intoxicated. The court affirmed an award on the presumption that the injury did not result solely from intoxication. A similar result was reached in *Peer v. East Rochester Exempt Firemen's Ass'n*, 281 App. Div. 934, 119 N.Y.S.2d 646 (3d Dep't 1953). There, an intoxicated cook was found face down two feet from a rear sidewalk. He died of a fractured skull and death was held compensable.

In *Brame v. Alcar Trucking Co.*, 31 App. Div. 2d 881, 297 N.Y.S.2d 378 (3d Dep't 1969), the decedent's truck broke down, and while crossing an expressway to reach a second truck which had been sent to pick him up he was struck and killed. An autopsy revealed a 0.31% blood alcohol concentration, which would have seriously impaired motor functions, judgment, and visual perception. However, the testimony of witnesses who had observed the decedent immediately prior to his death was not produced. A finding that death was not due solely to intoxication was held supported by the evidence, and an award of death benefits was affirmed. See *Department of Tax. & Fin. v. De Parma*, 254 App. Div. 615, 3 N.Y.S.2d 120 (3d Dep't 1938); note 80 *infra*.

In *Post v. Tennessee Prod. & Chem. Corp.*, 19 App. Div. 2d 484, 244 N.Y.S.2d 389 (3d Dep't), *aff'd*, 14 N.Y.2d 796, 200 N.E.2d 213, 251 N.Y.S.2d 32 (1963), the employee was so intoxicated that his companions refused to ride with him and considered taking his car keys from him. A subsequent blood test indicated a 0.29% blood alcohol content. He entered the wrong side of a divided highway near his home and proceeded a considerable distance with cars approaching directly at him until the fatal head-on collision. Compensation was

injury.⁷⁸ For example, an intoxicated employee fell off a truck, but there was evidence that the truck had struck an obstruction and jolted. Hence, although the employee was off balance because of his intoxication, the jolt also contributed, and the intoxication could

awarded. The dissent contended that affirming compensation established a precedent that when an employee is driving a vehicle, his intoxication can never be the "sole" cause of injury. *Id.* at 489, 244 N.Y.S.2d at 394.

The court in *Swanson v. Williams & Co.*, 278 App. Div. 477, 106 N.Y.S.2d 61 (3d Dep't), *aff'd*, 304 N.Y. 624, 107 N.E.2d 96 (1951), awarded compensation to an admittedly intoxicated employee who fell on the stairway of his own home, in part because of a prior compensable injury which required him to use crutches. See notes 7 & 16 *supra*.

In *Van De Water v. Emmadine Farms, Inc.*, 18 App. Div. 2d 119, 239 N.Y.S.2d 183 (3d Dep't 1963), a milk driver fell out of his truck, fractured his skull, and died. The autopsy indicated 0.21% alcohol in the blood stream. Since the driver had to stand near the open door while operating the truck, the additional employment factors supported a finding that his death was not due solely to intoxication. Compensation was awarded.

See *Munsie v. Di Fiore*, 19 App. Div. 2d 916, 243 N.Y.S.2d 988 (3d Dep't 1963) (death from delirium tremens caused by accidental trauma and contributed to by intoxication held compensable). See also New York cases cited in notes 13-21 *supra*.

⁷⁸ For example, in *Smith v. State Roads Comm'n*, 240 Md. 525, 214 A.2d 792 (1965), the decedent was killed in a collision with a telephone pole, while driving at night on a wet road. The fact of intoxication was established by an autopsy showing 0.27% alcoholic content in the blood. The commission held that intoxication was not the sole cause of the death, but this was reversed by the trial court, which under Maryland practice, conducts a trial which is essentially *de novo*. The trial court decision was affirmed. Maryland requires that intoxication, to be a defense, must be the sole cause, but also creates a presumption that the injury did not result solely from the intoxication of the injured employee, in the absence of substantial evidence to the contrary. MD. ANN. CODE art. 101, § 64 (1957). The court dealt at considerable length with the argument that other factors, such as the condition of the road, the darkness and haziness, the excessive speed of the truck, the curves on the road, and possible oncoming lights or other hazards might have contributed to the accident. Such speculations and conjectures were held insufficient to ground a finding of cause other than intoxication. The court said:

Appellant argues that where intoxication and hazards of the employment concur the claimant *must* prevail; that Smith, even though intoxicated, was in the course of his employment and compensation cannot be denied his widow. If appellant is right, then the Maryland statute is meaningless and we do not agree that it is meaningless. We agree with the New Jersey court that if the employment does no more than supply the setting, the stage or the situation in which the injury occurs, if it is no more than an inactive condition and not a moving cause, compensation must be denied. Concurrence of intoxication and the setting, alone, is not enough. There must be in addition, if compensation is to be awarded, some active or moving or contributing cause.

Id. at 534-35, 214 A.2d at 797 (emphasis in original).

The New Jersey case referred to was *Kulinka v. Flockhart Foundry Co.*, 9 N.J. Super. 495, 75 A.2d 557 (L. Div. 1950); see note 77 *supra*.

In *Majune v. Good Humor Corp.*, 26 App. Div. 2d 849, 273 N.Y.S.2d 819 (3d Dep't 1966), the decedent was killed in an automobile accident when his car crossed into the opposite lane and collided head-on with another vehicle. At the time, his blood alcohol was 0.30% by weight. It was unnecessary for the board expressly to negative all possible contributory factors to reach a finding that intoxication was the sole cause of the accident. See *Calka v. Mamaroneck Lodge B.P.O.E.*, 285 App. Div. 1093, 139 N.Y.S.2d 316 (3d Dep't 1955); note 9 *supra*. See also *Herman v. Greenpoint Barrel & Drum Reconditioning Co.*, 9 App. Div. 2d 572, 189 N.Y.S.2d 353 (3d Dep't 1959), *aff'd*, 8 N.Y.2d 880, 168 N.E.2d 721, 203 N.Y.S.2d 922 (1960); note 67 *supra*. In *Herman*, the deceased died of pulmonary edema

not be said to have been the sole cause of the fall.⁷⁹ Similarly, a window washer who fell after having been drinking was held to have sustained injury not solely because of his drinking but also because of the dangerous character of his work.⁸⁰

This suggests a rather tempting analogy between the degree of contribution by employment conditions which will render compensable a fall due to epilepsy,⁸¹ and the degree of contribution which will do the same under a "sole cause" statute for a fall due to intoxication. It has been submitted by one writer that whenever an intoxicated workman falls from a stairway or other height, the employment has contributed to the severity of the injury by placing him in that dangerous position.⁸² This conclusion, however, is contradicted by the cases which have addressed the question. The Court of Appeals of New York had occasion to express its views in connection with the claim of a worker who fell from a bridge girder while intoxicated:

If, in a perfectly safe place, the employee falls because he is drunk and injures himself, it is clear that the injury results solely from the intoxication, but it would be unreasonable to deny compensation only in such cases. Here death was due to the fall from the bridge girder, but if the fall was due solely to the intoxication of the employee the case does not come under the

and acute alcoholism several hours after a company Christmas party where he engaged in a contest with another employee, claiming that he could drink the latter "under the table." The death was held noncompensable. "The intoxication was the result of excessive personal use of alcohol which departed from any rational relationship to the work." *Id.*, 189 N.Y.S.2d at 355. The denial was based primarily on lack of work connection, although the intoxication defense was also mentioned.

In the Oklahoma case *In re Barger*, 450 P.2d 503 (Okla. 1969), the decedent was involved in an automobile accident and was found to have a blood alcohol level of 0.19%. No reason other than intoxication was given for the accident. The finding that the decedent's death was not the result solely of intoxication was reversed as not supported by the evidence, and death benefits were denied. The Oklahoma statute, in creating the intoxication defense, uses the word "directly" to describe the degree of requisite causation. OKLA. STAT. ANN. tit. 85, § 11 (1970). But later at § 27, the statute says that it shall be presumed, in the absence of substantial evidence to the contrary, that the injury did not result "solely" from the intoxication of the employee while on duty. *Id.* § 27. The court applied a rule, laid down in *Dunaway v. Southwest Radio & Equip. Co.*, 331 P.2d 365 (Okla. 1958), that a finding of a 0.15% blood alcohol rating was enough to overcome the presumption. Since no other cause of the accident was shown, and since the presumption was inoperative, the claim failed.

See *Collins v. Cole*, 40 R.L. 66, 99 A. 830 (1917); note 84 *infra*.

⁷⁹ *C.F. Lytle Co. v. Whipple*, 156 F.2d 155 (9th Cir. 1946); *accord*, *Van De Water v. Emmadine Farms, Inc.*, 18 App. Div. 2d 119, 239 N.Y.S.2d 182 (3d Dep't 1963).

⁸⁰ *Department of Tax. & Fin. v. De Parma*, 254 App. Div. 615, 3 N.Y.S.2d 120 (3d Dep't 1938); *accord*, *Maryland Cas. Co. v. Cardillo*, 107 F.2d 959 (D.C. Cir. 1939).

⁸¹ See I. A. LARSON, *supra* note 65, at §§ 12.10-14.

⁸² S. HOROVITZ, *WORKMEN'S COMPENSATION* 122 (1944).

act. . . . If the board reaches the conclusion on the evidence that Shearer was drunk at a place where if he fell he would probably be killed and that he fell owing to his drunkenness, compensation should be denied.⁸³

In Rhode Island, compensation was denied to a night watchman on a dredge who, in pursuance of his duty of rowing members of the crew to shore, stood up in a small skiff while intoxicated, fell into the water, and drowned.⁸⁴ Here again, it could be argued that the employment made a contribution to the hazard by placing the watchman in a dangerous position.

But this line of argument ignores an important distinction between the epileptic fall and drunken fall cases. In the former, the conduct of the employee in going upon the girder or getting into the boat is in itself perfectly proper and reasonable, while in the latter, the train of causation begins not with the fall, but with the act of the employee in going onto the girder or getting into the boat while drunk. By starting the chain of causation at that point, it is possible to say that the intoxication is the sole cause of the injury. Moreover, apart from any such technical distinction, most of the intangible factors which have produced the extremely generous holdings in the epileptic fall cases are not present here. The sympathy one is bound to feel for the workman who conscientiously tries to carry on his work in spite of internal weakness or illness does not carry over to the workman who voluntarily becomes intoxicated on the job. Nor can one say of the drunken workman, as one says of the epileptic, that the employer takes the workman as he finds him. He hires a sober workman, who later makes himself drunk.

D. *Employer Participation or Knowledge*

Even in a case in which the intoxication defense might otherwise apply, the employer may be estopped to assert it if he helped to cause the episode. In a California case,⁸⁵ the general manager,

⁸³ *Shearer v. Niagara Falls Power Co.*, 242 N.Y. 70, 73-74, 150 N.E. 604, 605 (1926); *cf.* *Swanson v. Williams & Co.*, 278 App. Div. 477, 106 N.Y.S.2d 61 (3d Dep't), *aff'd*, 304 N.Y. 624, 107 N.E.2d 96 (1951).

⁸⁴ *Collins v. Cole*, 40 R.I. 66, 99 A. 830 (1917); *cf.* *Schultz v. Henry V. Vaughans Sons*, 24 N.J. Super. 492, 94 A.2d 873 (L. Div. 1953). It was not established in this case that the employee was intoxicated or that intoxication was the sole or proximate cause of the accident. The employee had one whiskey and five beers between 11:30 p.m. and 1:30 a.m. and had been drinking before that. After an unexplained fall, he was found in water near a gang plank. The death was held compensable.

⁸⁵ *Tate v. Industrial Acc. Comm'n*, 120 Cal. App. 2d 657, 261 P.2d 759 (1953).

A contrary result was reached under the draconian Texas statute, already severely

who was aware of the deceased's weakness for alcohol, took him to a bar and later to a tavern, having drinks at both places. The court adopted the view that when the employer permits intoxication or other dangerous practices among employees, the results are industrial injuries. The concept of safe place of employment was also invoked, with the statement that "[t]o send an intoxicated employee onto a busy highway in a company car is not furnishing him with a safe place to work."⁸⁶

Indiana⁸⁷ and New Hampshire⁸⁸ have gone further and held that the employer's knowledge of the intoxication coupled with his permitting the employee to continue to work in this condition is in itself sufficient to destroy the defense. Maine,⁸⁹ by statutory provision, specifies that intoxication, to be a defense, must be without the employer's knowledge or consent. But since employer negligence generally is not relevant, so far as compensation liability is concerned, the mere negligence of the employer in dealing with a drunk employee does not itself undermine an intoxication defense that would otherwise be complete. For example, in the previously noted case in which an employer had allegedly placed the intoxicated employee too close to a basement stairway, the court simply dismissed the issue of employer negligence as immaterial.⁹⁰

CONCLUSION

Voluntary intoxication which renders an employee incapable of performing his work is a departure from the course of employment. Otherwise, apart from special statute, evidence of intoxica-

criticized (*see* text accompanying notes 51 & 55 *supra*), in *Smith v. Traders & Gen. Ins. Co.*, 258 S.W.2d 436 (Tex. Civ. App. 1953). In *Smith*, the fact that the employer originated and participated in the drinking did not estop him from asserting the statutory defense. The employer took the employee with him on a business trip. On the first night, the employer produced a bottle which they consumed. In addition, the employer and the employee and a friend drank sufficient whiskey and beer during the evening to become intoxicated. The employee fell out of a hotel window. The injuries resulting from the fall were held noncompensable.

⁸⁶ *Tate v. Industrial Acc. Comm'n*, 120 Cal. App. 2d 657, 665, 261 P.2d 759, 764 (1953).

⁸⁷ *In United States Steel Corp. v. Mason*, 141 Ind. App. 336, 227 N.E.2d 694 (1967), the claimant arrived at the job intoxicated and, as a result, was injured. However, the employer knew of his condition and had allowed him to continue working. It was held that the employer could not raise the defense of intoxication.

⁸⁸ *Henderson v. Sherwood Motor Hotel, Inc.*, 105 N.H. 443, 201 A.2d 891 (1964). In *Henderson*, the decedent was killed as a result of becoming intoxicated on the job. The intoxication was held not to be a defense since the employer knew she was intoxicated.

⁸⁹ ME. REV. STAT. ANN. tit. 31, § 18 (1964).

⁹⁰ *Fogarty v. Martin Hotel Co.*, 257 Minn. 398, 101 N.W.2d 601 (1960).

tion at the time of injury is ordinarily no defense, at least unless intoxication was the sole cause of injury. Under the special statutory defense of intoxication, the requisite causal connection between intoxication and injury varies among the statutes all the way from mere existence of intoxication at time of injury to the requirement that intoxication be the sole cause. To the extent that there is any room for judicial constriction under these statutes, the courts will ordinarily (but not invariably) give the intoxication defense as narrow a scope as the words will bear. This is in line with the pervading spirit of compensation law and administration, which minimizes the element of employee fault and maximizes the element of protecting the security and families of all workers, including the just and the unjust, the "deserving" and the non-deserving, the prudent and the negligent—yes, and even the sober and the not-so-sober.