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Recent Developments: Imperfect Self Defense

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valiant attempt to sue his employer twice for the same occupational injury, thus, defeating the principle behind the system of workers' compensation of limiting an employers' liability.

The Court of Appeals affirmed the decision of both the Court of Special Appeals and the trial court and adamantly refused to apportion the claimant's injury between the two Acts. In fact, in the area of workers' compensation, the courts are generally quite reluctant to apportion in such a manner. See *Newport News Shipbuilding & Drydock Co. v. Fishel*, 694 F.2d 327 (4th Cir. 1982) (single employer liable for the claimant's hearing loss although it was fully documented that the claimant worked for numerous employers). Apportionment between state and federal systems is also not permitted. See *McCabe v. Sun Shipbuilding & Dry Dock, Inc.*, Ben.Rev.Bd.Serv. (MB) 509 (1975), *rev'd. on other grounds*, 593 F.2d 234 (3d Cir. 1979). In *Stanley*, the court determined that since the LHWCA applied to a portion of the claimant's injury, then the Act would provide coverage for the entire injury.

The only case cited by Stanley as providing authority for his position is *Verderane v. Jacksonville Shipyards, Inc.*, 14 Ben.Rev.Bd.Serv. (MB) 220.15, BRB No. 76-244 (Aug. 13, 1981). At issue in that case was whether the claimant was a covered employee under the Act during his long history of employment, and the Benefits Review Board ("Board") stated, "[W]e have concluded that in determining jurisdiction we must apply pre-amendment law to the period of exposure prior to 1972 when the Act became effective, and post-amendment law thereafter;" 14 Ben.Rev.Bd. Serv. (MB) at 223. This statement, however, was limited to the issue of determining jurisdiction and was not applied by the Board to determine the issue of apportionment. Under this line of reasoning, the Board found that *Verderane* was covered under the pre-amendment Act, although not covered after 1972. This fact, however, did not deter the Board from holding that the entire claim was compensable under the LHWCA. "However, our conclusion that claimant may have been exposed to additional excessive noise during the period when his employment was outside the coverage of the Act does not affect our determination that his vertigo is compensable based on the earlier exposure." *Id.* at 225.

The *Stanley* decision is in accord with

the public policy considerations which are an essential part of the workers' compensation system. To allow this type of apportionment would clearly defeat the Congressional intent of limiting an employer's liability for a maritime worker's occupational injury. Such apportionment between acts would be in obvious conflict with the LHWCA, 33 U.S.C. §905 (a) which provides that "[t]he liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee... ." *Stanley*, therefore, manifests the intent of Congress regarding the exclusiveness of liability under the LHWCA and, presumably, any possible apportionment between Acts is an issue for the Congress and not the courts to ultimately determine. ⚖️

— by Cathleen A. Quigg



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IMPERFECT SELF DEFENSE

In *State v. Faulkner*, 301 Md. 482, 483 A.2d 759 (1984), the Court of Appeals of Maryland recognized that imperfect self defense can be used by a defendant as a defense to mitigate a conviction entered against him. To prevail upon such a defense, the defendant must show the jury that his actions were based on a subjectively honest but objectively unreasonable belief that he had to resort to deadly force to prevent his own serious bodily injury or death.

Faulkner had been involved in an argument outside of a Baltimore City bar. This argument escalated into a fist fight and then into a non-fatal shooting. Subsequently, Faulkner was charged with assault with intent to murder and related offenses. At his trial in the Criminal Court of Baltimore, the court instructed the jury as to the defenses of justification. Faulkner's request for a jury instruction on imperfect self defense was refused by the judge. The jury subsequently found Faulkner guilty of assault with intent to murder. On appeal, the court of special appeals, in a split decision, agreed with Faulkner, and held that he was entitled to the instruction of imperfect self defense because he had produced enough evidence to generate a jury issue regarding his belief at the time of the shooting. The court of appeals agreed, and went on to hold that the defense of imperfect self defense applies to the offense of assault with intent to murder.

The mitigating defense of imperfect self defense operates to negate malice, which is the mental state that the state must prove to establish the crime of murder. The court began its opinion by noting that the difference between murder and manslaughter is the absence of malice. Self defense operates as a complete defense to either murder or manslaughter. A proper claim of self defense will justify the homicide and result in a judgment of acquittal. On the other hand, imperfect self defense is not a complete defense to a crime, but rather, is merely a mitigating defense which operates to negate malice, thereby reducing murder to manslaughter.

Similar to imperfect self defense are the heat of passion defenses of mutual combat, assault and battery and discovering a spouse in the act of sexual intercourse with another, which can also be used by a defendant to mitigate a conviction entered against him. The key

distinction between imperfect self defense and the heat of passion defenses is that the defendant acted the way he did due to a "fear of life" rather than a heat of passion. The judicial recognition of the imperfect self defense allows the courts to avoid the choice between murder and complete exonerations in non-heat of passion cases where the defendant's conduct warranted neither a murder conviction nor an acquittal. This defense requires the defendant to bear some responsibility for the homicide, even though he may have lacked the requisite mens rea for murder.

The court reviewed the history of the imperfect self defense doctrine and found that the case law revealed three variations of the doctrine. Some courts have applied the doctrine where the homicide at issue falls within the perfect self defense doctrine, except for the fault of the defendant in provoking or initiating the difficulty at the non-deadly force level. Other courts have applied the doctrine where the defendant committed a homicide because of an honest but unreasonable belief that he was about to suffer death or serious bodily harm. Still, other courts have recognized the doctrine when the defendant uses unreasonable force in defending himself and as a result, killed his opponent.

Prior to the *Faulkner* decision, the court of special appeals had dealt with six imperfect defense cases which gradually expanded the application of this mitigating defense to the criminal defenses of imperfect defense of others, *Shuck v. State*, 29 Md. App. 33, 349 A.2d 378 (1975), cert. denied, 278 Md. 733 (1976) imperfect defense of duress, *Wentworth v. State*, 29 Md. App. 110, 349 A.2d 421 (1975), cert. denied, 278 Md. 735 (1976), and imperfect defense of habitation, *Law v. State*, 29 Md. App. 457, 349 A.2d 295 (1975), cert. denied, 278 Md. 729 (1976).

Due to the *Faulkner* decision, the defendant is now presented with a wide range of mitigating defenses that serve to reduce a conviction of murder to manslaughter. As the Court stated, "A defendant who commits a homicide while honestly, though unreasonably, believing that he is threatened with death or serious bodily harm, does not act with malice. Absent malice, he cannot be convicted of murder. Nevertheless, because the killing was committed without justification or excuse, the defendant is not entitled to full exoneration." Yet, according to the court the defendant is entitled to a

proper instruction to show the defendant's subjective (honest) belief that the use of force was necessary to prevent imminent death or serious bodily harm. Once the defendant has established the existence of that belief,

the jury must reject the reasonableness of that belief as well as the existence of that belief itself to find the defendant guilty of murder. ⚖️

by Regan J.R. Smith

DWI Rights

Chemical Sobriety Test

by Jennifer Hammond

The Maryland Court of Appeals recently considered the issue of whether a person who is apprehended for driving while intoxicated has a constitutional right to consult counsel before deciding whether to submit to a chemical sobriety test. In *Sites v. State*, 300 Md. 701, 481 A.2d 192 (1984), the court of appeals held that the due process clause of the Fourteenth

attempted communication will not substantially interfere with the timely administration of the testing process.

The laws concerning submission to a sobriety test in Maryland are fairly clear-cut. For instance, a chemical sobriety test must be administered within two hours "after the person accused is apprehended." Md. Cts. & Jud. Proc. Code Ann. § 10-303 (1984). A person may not be compelled to submit to such a test and any refusal is not admissible at a trial since no inference or presumption concerning guilt arises as a result of refusal to submit to the test. Md. Cts. & Jud. Proc. Code Ann. § 10-309 (1984). Additionally, § 16-205.1(a) of the Transportation Article — the "implied consent" statute — explicitly states that any person who operates a motor vehicle in Maryland is deemed to have consented to take a chemical test to determine alcohol content if that person is apprehended on suspicion of drunk driving. Md. Transp. Code Ann. § 16-205.1(b) (1984).

Maryland driver who declines to take the chemical sobriety test "shall" have his license suspended for not less than 60 days or more than 6 months for a first offense. Md. Transp. Code Ann. § 16-205.1(b) (1984).

As previously stated, the Maryland Court of Appeals in *Sites* based its decision on the due process clause of the Fourteenth Amendment. The court, citing *Rochin v. California*, 342 U.S. 165 (1952), stated that, while the exact contours of the due process clause are not definable with precision, the constitutional right of due process



Amendment of the United States Constitution, as well as Article 24 of the Maryland Declaration of Rights, requires that a person under detention as a drunk driving suspect must, if the suspect so requests, be permitted a reasonable opportunity to communicate with counsel before submitting to a chemical sobriety test, as long as the