Recent Developments: Imperfect Self Defense

Regan J.R. Smith
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 employer's 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

**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
believing that he is threatened with
Nevertheless, because the killing was
excuse, the defendant is not entitled to
doctrine where the defendant
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
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 exoneramation." Yet, according to
the court the defendant is entitled to a

appropriate 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

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**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
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
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. For instance, a chemical sobriety
test must be administered within two
hours "after the person accused is
may not be compelled to submit to such
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. &
Additionally, §16-205.l(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.l(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