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with respect to actions between husband and wife; yet these actions are permitted.[40] In short, the present immunity rule and its exceptions result in cases difficult to determine with any degree of fairness and lead in many cases to injustice. It has been suggested that the simplest way to abolish parent–child tort immunity is to enact a statute doing so. At least one writer has gone so far as to suggest that legislation is the only way.[41] However, it should be remembered that the immunity was a creature of the courts,[42] and what the courts have created they can destroy.

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Workmen's Compensation—Average Weekly Wage—Combination of Wages

Barnhardt had been working during the days for National Cash Register Company, at an average weekly wage of 68 dollars, and during the evenings for Yellow Cab Company, at an average weekly wage of 26 dollars. He sustained a compensable injury while working for Yellow Cab. In *Barnhardt v. Yellow Cab Co.*[1] the North Carolina Supreme Court held that it was error for the Workmen's Compensation Commission to have combined the wages earned from both employers in fixing the compensation at 37.50 dollars per week (the maximum) and that the compensation should have been limited to 16.14 dollars per week, sixty per cent of the average wage earned from Yellow Cab.

North Carolina's Workmen's Compensation Act provides that an employee is to be compensated for sixty per cent of his average weekly wage, up to a maximum of 37.50 dollars per week, for a period not exceeding 400 weeks.[2] Average weekly wage is defined as the average of the employee's wages earned over a period of a year in the employment in which he was working at the time of the injury.[3] When the employment is casual or for a shorter period than a year, the statute authorizes consideration of the average weekly wage of employees in the same class of employment or an

[40] Dunlap v. Dunlap, 84 N.H. 352, 354, 150 Atl. 905, 906 (1930).
[41] See Castellucci v. Castellucci, 188 A.2d 467, 469 (R.I. 1963).
[42] See note 2 *supra*.

[1] 266 N.C. 419, 146 S.E.2d 479 (1966).
[2] N.C. GEN. STAT. § 97-29 (1965).
[3] N.C. GEN. STAT. § 97-2(5) (1965).

averaging of the wages of the injured employee over the shorter period of time, provided the results are fair and just to both parties.[4] If because of exceptional reasons these methods would be unfair to either party, other methods may be used "as would most nearly approximate the amount the employee would be earning were it not for the injury."[5]

Since the statute contains no express authorization for combination of wages, the court said it would be exceeding the limits of judicial interpretation to allow it.[6] Furthermore, the court read the statute as allowing consideration of only those wages earned in the employment "in which the employee was injured."[7] The actual language of the statute directs consideration of the wages in the employment "in which the employee *was working at the time of the injury.*"[8] It does not seem that this language necessarily restricts the consideration to wages earned from the employment at the very moment of the injury. If a specific limitation had been intended, the legislature could have said simply that the compensation should be sixty per cent of the wages earned from the employer liable for the compensation. Since the statute twice directs results fair and just to both parties[9] and allows the use of methods that would most nearly approximate the amount the employee would be earning were it not for the injury,[10] the statute ought to be interpreted to allow a combination of wages where it is necessary in order to obtain fair results.

The statute directs that compensation awarded to a volunteer fireman is to be based on the average weekly wage in the employment in which the volunteer principally earned his livelihood.[11] The court viewed this provision as evidence of legislative intent not to allow any combination of wages.[12] The court may have reached this conclusion on either of two grounds. It might have thought this provision to be directed at the situation where a volunteer is working for two employers in addition to his service as a volunteer and legislative intent thus to be specifically to limit the basis of

[4] *Ibid.*
[5] *Ibid.*
[6] 266 N.C. at 429, 146 S.E.2d at 486.
[7] 266 N.C. at 428, 146 S.E.2d at 485.
[8] N.C. GEN. STAT. § 97-2(5) (1965). (Emphasis added.)
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*
[12] 266 N.C. at 428, 146 S.E.2d at 485.

compensation to the wages earned from one of those employers, that is, the one from whom the volunteer principally earns his livelihood. But it seems strange that the legislature would have anticipated and dealt with this particular case of concurrent employment while leaving so much ambiguity in the other sections. On the other hand, the court might have thought that the legislature classifies the service as a volunteer as an employment and that wages from only the employment in which the volunteer principally earned his livelihood should be considered in computing his compensation. However, a volunteer fireman ordinarily receives no wages in that capacity, so ordinarily there would be no problem of combination. Since volunteer firemen are not included in the definition of "employee"[13] and the methods for computation of average weekly wage refer to "employees,"[14] the legislature could have thought this section necessary to provide a basis of compensation for such volunteers who are given the right to compensation elsewhere in the General Statutes.[15]

The problem of computation of average weekly wage where there is concurrent employment (employment at two jobs with two employers) has been resolved in three ways in jurisdictions. Some courts have allowed consideration of only those wages earned in the employment in which the injury occurred.[16] Others have held that wages may be combined to the extent that such wages are earned in related or similar employment[17] but that no such combination is permitted where the employments are unrelated or dissimilar.[18]

[13] N.C. GEN. STAT. § 97-2(2) (1965).
[14] N.C. GEN. STAT. § 97-2(5) (1965).
[15] N.C. GEN. STAT. § 69-25.8 (1965).
[16] Walters v. Greenland Drilling Co., 184 Kan. 157, 334 P.2d 394 (1959); Black Star Coal Co. v. Hall, 257 Ky. 481, 78 S.W.2d 343 (1935); Stephens v. Catalano, 7 So. 2d 380 (La. 1940); Crower v. Baltimore United Butchers Ass'n, 206 Md. 606, 175 A.2d 7 (1961); Buehler v. University of Mich., 227 Mich. 648, 270 N.W. 171 (1936); Knight v. Cohen, 56 N.J. Super. 516, 153 A.2d 334, *aff'd*, 32 N.J. 497, 161 A.2d 473 (1959); De Asis v. Fram Corp., 78 R.I. 249, 81 A.2d 280 (1951).
[17] St. Paul Mercury Indem. Co. v. Idov, 88 Ga. App. 697, 77 S.E.2d 327 (1953) (retail salesman for three different employers); Texas Employers' Ins. Ass'n v. Hamilton, 95 S.W.2d 767 (Tex. Civ. App. 1936) (common laborer in highway construction and other construction work); Banberger Elec. R.R. v. Industrial Comm'n, 59 Utah 257, 203 Pac. 345 (1921) (electrician for railroad company and for power company).
[18] Murphy & Sons v. Gibbs 137 So. 2d 553 (Fla. 1962) (restaurant employee and operator of invoice producing machine); Welding & Iron Works v. Renton, 145 So. 2d 876 (Fla. 1962) (truck driver and shipping clerk); Harris Meat & Produce Co. v. Brown, 177 Okla. 317, 59 P.2d 280

Still other courts have reasoned that the policy of compensation requires a determination of average weekly wage based on all the employee's wages from all employers at the time of the injury.[19]

In Massachusetts where earlier court decisions had not allowed the combination of wages,[20] the statute was amended to provide expressly for combination.[21] Other states now have similar provisions.[22] The federal Longshoremen's and Harbor Workers' Compensation Act[23] has been interpreted to allow a combination of wages.[24] As early as 1906 the English statute allowed this combination.[25]

The policy question in *Barnhardt* is simple. Should an employee be compensated for his *actual* loss of wages, although not all of his wages are earned in the employment in which he was injured? The Court said it seemed reasonable that the legislature would relate the compensation to the wages paid by the employer in whose employment the injury occurred.[26] If the over-all policy of the act is to compensate the employee for at least a portion of all pecuniary loss occasioned by a compensable injury, whether such

(1936) (machine repairman and bookkeeper); Graham v. Glouschester Furniture Co., 169 Va. 505, 194 S.E. 814 (1938) (steeplejack and mechanic).

[19] Wells v. Industrial Comm'n, 63 Ariz. 264, 161 P.2d 113 (1945); Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 Pac. 491 (1916); Baily v. Farr, 66 N.M. 162, 344 P.2d 173 (1959).

The North Carolina court discussed McCummings v. Anderson Theatre Co., 225 S.C. 187, 81 S.E.2d 348 (1954), where the court affirmed an award based on wages from all employers. But the South Carolina court expressly stated that since no other method was offered on appeal its decision did not constitute authority for computation of average weekly wage by consideration of wages earned in other employment.

[20] Quebec's Case, 247 Mass. 80, 141 N.E. 582 (1923); King's Case, 234 Mass. 137, 125 N.E. 153 (1919); Marvin's Case, 234 Mass. 145, 125 N.E. 154 (1919).

[21] MASS. ANN. LAWS ch. 152, § 1(1) (1965). "In case the injured employee is employed in the concurrent service of more than one insured employer or self insurer, his total earnings from the several insured employers or self insurers shall be considered in determining his average weekly wage." Note that the wages from only insured employers or self-insurers may be considered. The same limitation has been established by court decision in Kansas. Walton v. Electric Serv. Co., 121 Kan. 480, 247 Pac. 846 (1926). The present Kansas rule does not allow any combination of wages in cases of concurrent employment. Walters v. Greenland Drilling Co., 184 Kan. 157, 334 P.2d 394 (1959).

[22] CAL. LABOR CODE § 4453; ME. REV. STAT. ANN. tit. 39, § 2(2)(1) (1964); PA. STAT. ANN. tit. 77, § 482 (Supp. 1965).

[23] 62 Stat. 603 (1948), 33 U.S.C. § 910 (1964).

[24] Liberty Mut. Ins. Co. v. Britton, 233 F.2d 699 (D.D.C. 1956).

[25] Workmen's Compensation Act, 1906, 6 Edw. 7, c. 58, § 13.

[26] 266 N.C. at 427, 146 S.E.2d at 485.

loss be in the form of medical expenses or wages lost,[27] it should not matter where the wages are earned. At least one court has acknowledged this to be the policy of workmen's compensation.[28]

The court thought increased compensation resulting from allowing a combination of wages would be unfair to the employer and his insurance carrier because insurance premiums are based on the amount of wages paid by the employer.[29] If a combination of wages is allowed the increased cost would be borne in the same manner as increased cost of medical treatment,[30] and the final result would be a shifting of the loss to the industry as a whole and its customers, and not to the individual employer or his insurance carrier.[31] Although the employer of a part-time employee would pay a smaller premium than he would if the same employee were full-time,[32] com-

[27] See N.C. GEN. STAT. § 97-25 (1965), which authorizes compensation for medical expenses without regard to the amount of wages earned; N.C. GEN. STAT. § 97-25 (1965), which fixes the compensation for loss of wages of North Carolina National Guardsmen at the maximum of $37.50 without regard to actual wages earned; N.C. GEN. STAT. § 97-2 (1965), which provides that veteran trainees are entitled to consideration of subsistence allowances paid by the United States Government in computing their average weekly wage and that volunteer firemen are entitled to consideration of their average weekly wage in their principal employment for calculation of compensation.

[28] See State *ex rel.* Munding v. Industrial Comm'n, 92 Ohio St. 435, 11 N.E. 299 (1915): "[T]he theory upon which compensation law is based (which is now generally accepted) is that each time an employee is killed or injured there is an economic loss which must be made up or compensated in some way . . . that . . . this economic loss should be borne by the industry. . . ." *Id.* at 450, 11 N.E. at 303.

[29] 266 N.C. at 427, 146 S.E.2d at 485.

[30] Premiums are determined by multiplying each $100 of the employer's annual payroll by the basic rate for his industry classification over a three-year period. The basic rate is determined by reference to the incurred losses in the classification over the same period. Payments for loss of wages as well as payments for medical expenses are included in the incurred-loss factor. An increase in either type of payment would result in an increase in the incurred losses. Assuming the premiums remained constant, an increase in the basic rate would be required. See REEDE, ADEQUACY OF WORKMEN'S COMPENSATION 239 (1947).

[31] See note 30 *supra*. The adjustment would be made in the basic rate which is applicable to all firms in the industry classification. Assuming the employer's payroll remained constant, his only increase would be in the basic rate so that it would be shared by the industry as a whole.

[32] Part-time employment means that the employer's annual payroll would be smaller. Therefore, when it is multiplied by the basic rate for his classification his total premium would be smaller than it would have been if the same employee had been employed full-time. The smaller premium is paid because there is less exposure to the risk that any compensation will have to be paid. The same principle would be applicable in the case of compensation for loss of wages. The smaller premium would be paid because of

pensation for medical treatment for the employee would not be limited because of the part-time employment.[33] For purposes of premium computation, wages merely measure the exposure to the risk of compensation. In so far as actual compensation is concerned, wages measure the pecuniary loss to the employee. Since the loss of wages earned in other employment is just as much a part of the pecuniary loss as medical expenses and loss of wages earned in the employment in which the injury occurred, such wages should be considered in computing the average weekly wage. In any event the maximum that the employee will recover is 37.50 dollars per week,[34] so there appears no valid reason for denying compensation at least for the allowable percentage of all wages earned immediately prior to the injury.

In 1940 only 26.4 per cent of the estimated wage loss in North Carolina was compensated.[35] In 1952 the percentage fell to 22.1.[36] Though there have been increases in the maximum allowable compensation since 1952,[37] it is apparent that even today the statute places much of the loss on the employee. In June 1964, the average weekly wage in manufacturing in North Carolina was 72.10 dollars.[38] Sixty per cent of this would be 43.26 dollars, but the actual compensation is limited to the maximum of 37.50 dollars per week, leaving 34.60 dollars uncompensated. Of course employees earning above-average wages would incur a larger uncompensated loss while those earning below-average wages would incur a smaller uncompensated loss.

The court recognized the injustice in the application of the statute in *Barnhardt,* but concluded that the remedy required legis-

less exposure to the possibility that the compensation would have to be paid at all, not because the possible compensation payments would be expected to be smaller. See REEDE, ADEQUACY OF WORKMEN'S COMPENSATION 239 (1947).

[33] See N.C. GEN. STAT. § 97-25 (1965). No distinction is made between part-time employees and full-time employees for purposes of compensation for medical expenses.

[34] N.C. GEN. STAT. § 97-29 (1965).

[35] From a theoretical computation of Professor Arthur H. Reede as reported in SOMERS & SOMERS, WORKMEN'S COMPENSATION 81 (1954).

[36] *Ibid.*

[37] The maximum weekly payment was increased from $24 to $30 in 1951, N.C. Sess. Laws 1951, ch. 70, § 1; from $30 to $32.50 in 1955, N.C. Sess. Laws 1955, ch. 1026, § 5; from $32.50 to $35 in 1957, N.C. Sess. Laws 1957, ch. 1217, § 1; and from $35 to $37.50 in 1963, N.C. Sess. Laws 1963, ch. 604, § 1.

[38] N.C. DEP'T OF LABOR, BIENNIAL REPORT 8 (1964).

lative action.[39] The legislature should amend the act to allow a combination of wages where there is concurrent employment.[40] Until this is done the interpretation in *Barnhardt* increases the pecuniary loss falling on the employee, contrary to what appears to be the basic policy of the act.[41]

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[39] 266 N.C. at 428, 146 S.E.2d at 485.

[40] It is suggested that the following provision be inserted between the third and fourth paragraphs of N.C. GEN. STAT. § 97-2(5) (1965): "If the employee were working under concurrent contracts with two or more employers immediately prior to the accident, his wages from all such employers shall be considered in computing his average weekly wage.

[41] Indicating its continued concern over the result, the court has applied the rule announced in *Barnhardt* in a later case. Joyner v. Carey Oil Co., 266 N.C. 519, 146 S.E.2d 447 (1966).