Modern Trends in Workmen's Compensation (a nation-wide review of basic principles)

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SYMPOSIUM
Scientific Proof and Relations of Law and Medicine†
MODERN TRENDS IN
WORKMEN'S COMPENSATION
(a nation-wide review of basic principles)
SAMUEL B. HOROVITZ*

Workmen's Compensation insurance has become a $500,-000,000 annual business. It prevails in 47 out of the 48 states, and in 6 additional American territories and jurisdictions. It affects, directly or indirectly, the rights of about 46,000,000 workers annually, 18,000 of whom die in industry, 100,000 are maimed for life, and 2,000,000 suffer temporary injuries.¹

In wartime, work-injuries delay production, reduce output, and arouse federal and state interest—but too often more from the point of view of winning the war, than of interest in the legal, social and economic results upon the victims and their families.

† THE JOURNAL, in this issue is printing articles from the National Symposium on "Scientific Proof and Relations of Law and Medicine," Second Series. Readers interested in procuring the master index of the entire series should write Professor Hubert Winston Smith, General Editor, College of Law, University of Illinois, Urbana, Illinois. The price of the index is twenty cents.

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Workmen's compensation began about a generation ago as a peacetime device, as a legal method of caring for industry's human wreckage. It was a revolt against an earlier legal system, in existence over one hundred years, which sacrificed the injured worker on the altar of capital's industrial growth. As the factory system grew, as industries of all kinds brought large number of workers into close contact with machinery and with each other, the number of injuries and fatalities skyrocketed. Injured workers and their dependents were compelled to look to the courts for redress.

The courts, in turn, looked to precedents for the answer. For generations one person's liability to another was based on fault, or negligence. If none existed, there was no redress. Too bad that the worker lost a leg, or arm, or eye, in the factory, or at work elsewhere; but the employer not being at fault, it was inconceivable to the early judges that the employer should be held liable, or in any way be compelled to contribute toward medical treatment or the support of the worker or his family. No fault, no liability. No liability, and charity or the worker's savings or friends (if any) stood the entire loss.

And even where fault on the part of the employer was established, the accident-victim was still further victimized by early court rulings that he could not recover if he, the worker, was in part to blame (contributory negligence), or if he assumed the risk of injury in undertaking the work (assumption of risk), or if a fellow worker, and not the employer personally, was the cause of the accident or at fault (fellow-servant rule).

The fellow-servant defence was particularly harmful to workers. In huge factories and work places it was usually the fellow worker, not the boss himself, who caused the accident. By staying out of the factory the employer usually could avoid liability for all injuries to his men.

The creation by the courts, therefore, of the fellow-servant defence was hailed by employers with wide acclaim. As stated by one writer: "Very appropriately, this exception was first announced in South Carolina, then the citadel
of human slavery. It was eagerly adopted in Massachusetts, then the center of the factory system, where some decisions were then made in favor of great corporations, so preposterous that they have been disregarded in every other state without even the compliment of refutation. It was promptly followed in England, which was then governed exclusively by landlords and capitalists."

No wonder, then, that 80\(^3\)\% of the cases were lost or uncompensated; and in the 20\% of successful cases the lawyer's fees, doctor's bills and other expenses often ate up a substantial portion of the award.

As workers and their union representatives clamored for amelioration of these outmoded court-made rules, some of the liberal courts invented the doctrine of vice-principal\(^4\) (i.e., a person in superintendence was not a fellow employee, and his negligence was that of the employer); and the legislatures passed Employers' Liability Acts,\(^5\) cutting down the value of some of these three defences. Nevertheless, most of the courts, bound by precedent, continued to grind out pro-employer decisions, and the workers were up in arms. Workers and their families had the right to vote. Legislators felt the pressure of their constituents.

"The workers wanted a system entirely new. It is but


4. Little Miami R. Co. v. Stevens, 20 Ohio 415, 435 (1851)—different where employees do not "stand on the same footing;"

Contra: Green v. Cohen, 298 Mass. 439, 11 N.E. 2d 492 (1937)—in Massachusetts at common law superintendent and foreman remained fellow servants, but compensation act made "sweeping changes."

5. In England, 1880, Stats. 43 & 44, Victoria, c. 42 (Law Rep. 15-16, p. 258), made practically valueless by a decision soon after that the employee could contract with his employer not to claim compensation for personal injuries under the act, such contract not being against public policy—Griffiths v. Earl of Dudley, 9 Q.B.D. 367 (1882).

See Greem v. Cohen, 298 Mass. 439, 11 N.E. 2d 492 (1937): "The scope of the employers' liability act and that of workmen's compensation do not coincide." Uninsured worker can ignore still existing employers' liability act and sue at common law, where negligence of superintendent is negligence of a fellow servant, and non-insurance removes that defence.
fair to admit that they had become impatient with courts of law. They knew and both economists and jurists were pointing out what is now generally conceded—that two generations ought never to have suffered from the baleful judgments of Abinger and Shaw. What could be done?

In 1884, Germany, led by Bismarck, had evolved the idea of workmen's compensation legislation. Work-injuries for the first time were compensated, not on the basis of negligence but on their relation to the job. In 1897 England had enlarged the German idea, and had abolished the common law and its amendments and established an entirely new theory—that of workmen's compensation. Liability depended not on who was at fault for the accident, but on whether it arose out of the employment, while the worker was engaged therein. English legal minds evolved the phrase "personal injury by accident arising out of and in the course of the employment" as the basis of awards. To laymen this simply meant that if the worker was injured at work because of his work he would obtain a certain percentage of his wages during periods of injury-enforced idleness, plus medical care at the employer's (or his insurer's) expense.

From 1902 onward many legislators clamored for a similar change of law in this country. They argued that the mechanization of the country had made injuries inevitable; that industry and not charity or savings should pay for industrial injuries; that simple justice required the abolition of the old common-law defences for industrial injuries.

"Legislate as we may... for safety devices the army of the injured will still increase, the price of our manufacturing greatness will still have to be paid in human blood and tears. To speak of the common-law personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to one who asks for food."

A new system was needed, and one that would also help in accident prevention and rehabilitation. Commissions sprang up in many states to study the idea. Massachusetts debated the question for nine years, and when it finally passed its compensation law in 1911, ten other states had already completed the change to compensation.

Halted temporarily by three state courts which declared their acts unconstitutional, and then spurred on in 1917 when the Supreme Court of the United States upheld three different types of acts, the compensation idea spread rapidly. Today 47 out of 48 states (Mississippi standing alone) have compensation acts. In addition, such legislation exists in Alaska, Hawaii and Puerto Rico. Federal workmen's compensation laws now also cover government employees, longshoremen and harbor workers, and private employees in the District of Columbia.

The change was not easily made. Opposition developed from many quarters. Insurance companies or carriers who made large profits from common-law coverage of employers at first bitterly opposed the adoption of the English system. For a short while even the labor unions joined the opposition, then turned about and became its most insistent proponents. Employers, fearing large increased costs, added their powerful opposition voices.

Unquestionably, compensation laws were enacted as a humanitarian measure, to create a new type of liability,—liability without fault,—to make the industry that was respon-


sible for the injury bear a major part of the burdens resulting therefrom.\textsuperscript{12} It was a revolt from the old common law and the creation of a complete substitute therefor, and not a mere improvement therein.\textsuperscript{13} It meant to make liability dependent on a relationship to the job,\textsuperscript{14} in a liberal,\textsuperscript{15} humane fashion, with litigation reduced to a minimum. It meant to cut out narrow common-law methods of denying awards.\textsuperscript{16}

It made substitute schemes, or substitute-employer plans, except where expressly permitted in the compensation statute under safeguards, illegal and against public policy;\textsuperscript{17} or void because of an element of coercion;\textsuperscript{18} or as violating the state’s insurance provisions;\textsuperscript{19} or as additional to, and not a substi-

\begin{enumerate}
\item Humphries v. Boxley Bros Co., 146 Va. 91, 106, 135 S.E. 390 (1926)—like expense of repairing “damage to machinery.”
\item Green v. Cohen, 298 Mass. 439, 11 N.E. 2d 492 (1937)—workmen’s compensation provisions abolishing the employees’ common-law defences “were not mere amendments to the existing law. The workmen’s compensation act was new legislation having a procedure all its own.”
\item Bradford Electric Light Co. v. Clapper, 284 U.S. 221, 52 S. Ct. 118, 76 L. Ed. 254 (1931), Mr. Justice Brandeis said: “Workmen’s Compensation acts are treated almost universally as creating a statutory relation between the parties—not like employers’ liability acts, as substituting a statutory tort for a common law tort.”
\item Cudahy Packing Co. v. Parramore, 263 U.S. 418, 44 S. Ct. 153, 68 L. Ed. 487 (1923)—“idea of status, not upon that of implied contract.”
\item See Employer’s Liability Assur. Corp. v. Industrial Accident Commission, 37 Cal. App. 2d 567, 99 P 2d 1089 (1940)—construe liberally in favor of employee.
\item Continental Cas. Co. v. Haynie, 51 Ga. App. 660, 181 S.E. 126 (1936)—the conception underlying workmen’s compensation is one of insurance,—an escape from personal injury litigation under fixed rules and without friction, hence liberal and broad construction.
\item Cf. language of M. Justice Black, dissenting in Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 64 S. Ct. 208 (1943): “Courts schooled in the common law have long objected to what has been designated ‘splitting a cause of action, ’. This predilection of common law judges. is here apparently elevated to a position of Constitutional impregnability in the full faith and credit clause.” (Italics ours).
\item Christensen v. Dysart, 42 New Mexico 107, 76 P 2d 1 (1938).
\item Red Rover Copper Co. v. Ind. Commission, 58 Ariz. 203, 118 P. 2d 1102 (1941)—Lloyd’s of London substitute scheme held coercion, as condition precedent to employment.
\item See sec. 54A, G.L. (Ter. Ed.), ch. 152 (Mass.).
\item Attorney General v. Osgood, 249 Mass. 473, 144 N.E. 371 (1924)—G.L. ch. 175, sec. 2, defines “insurance” widely.
\item Clafin v. U.S. Credit System Co., 165 Mass. 501, 43 N.E. 293 (1896): “The defendant has not been admitted to transact insurance in this Commonwealth. The contract sued on seems to be made unlaw-
tute for workmen's compensation benefits; or construed the policy issued as one under which full workmen's compensation benefits were due.

All this is now past history. Relatively few thinking persons today would want a worker's rights dependent on fault. Yet it took courage a score or more years ago for the judges in both state and federal courts to recognize the narrowness of earlier legal ideas, and to declare constitutional and sound an entirely new conception. Said Fullerton, J. in the State of Washington in 1911:

"It was the belief of the legislature that they (the losses) should be borne by the industries causing them, or, perhaps more accurately, by the consumers of the products of such industries. (The new) . . . principle . . . is economically, sociologically, and morally sound."

And Mr. Justice Sutherland of the United States Supreme Court wrote in 1923:

"The modern development and growth of industry, with the consequent changes in the relations of employer and

ful; . . . no court will consciously lend its aid for the enforcement of an illegal contract."

Cf. Aleck's Case, 301 Mass. 403, 17 N.E. 2d 173 (1938)—accident policy held in addition to all rights for failure to carry compensation.

As to substitute schemes and service companies, see 18 B.U. Law Rev. 9-14, and note 26, p. 12 (January, 1938); and 36 Mich. Law Rev. 385 (April, 1938), by Sabel, S.L.


Even a city cannot make a private contract with an injured employee to replace his compensation rights by a city council contract to give him a job for life instead. Conlon v. City of Lawrence, 299 Mass. 528, 13 N.E. 2d 425 (1938).

Cf. Independent Service Corp. v. Tousant et al., 56 F. Supp. 75, aff'd 149 F. 2d 204 (1 Cir. 1944)—constitutional for legislature to keep service companies from adjusting claims.


Alabam Freight Line v. Chateau, 57 Ariz. 373, 114 P. 2d 233 (1941)—collecting on accident policy does not prevent later compensation award, in spite of release.

21. "Accident" policy held to be a compensation policy, even though Pioneer National Casualty Co. tried to require affirmative acceptance by employees—Conrad v. Midwest Coal Co. 231 Iowa 53, 300 N.W. 2d 721 (1941).


employee, have been so profound in character and degree as
to take away, in large measure, the applicability of the
doctrines upon which rest the common-law liability of the
master for personal injuries to a servant, leaving of necessity
a field of debatable ground where a good deal must be con-
ceded in favor of forms of legislation, calculated to establish
new bases of liability more in harmony with these changed
conditions."

What, then, was this new theory, this compensation
theory, which now prevails in all but one state and is accepted
elsewhere? It was that industry (and ultimately, the con-
sumer) should bear its fair share of the cost of injuries
to workers without trying to place the blame on either party.
The relation of the injury to the job was to be the test,
not the relation of the injury to fault or blame or negligence.

PART II

PERSONAL INJURY BY ACCIDENT ARISING
OUT OF AND IN THE COURSE OF THE EMPLOYMENT

New legislation or statutes necessarily are in writing
and not oral. Ideas need words, and words become the bases
of litigation, as inevitable as the need for eating and breath-
ing. The words used in most states as the compensation
bases for liability were, as previously stated, borrowed from
England; that the injured worker collects, not by proving
negligence, but by establishing a "personal injury by accident
arising out of and in the course of the employment."

Personal Injury

From the start it was evident that difficulties would
arise over the meaning of the words "personal injury." A
few states\(^\text{24}\) used these words without the additional phrase
"by accident." And even in the states using the full expres-
sion "personal injury by accident," it was necessary first
to determine what "personal" and "injury" mean.

\(^{24}\) Cudahy Packing Co. v. Parramore, 263 U.S. 418, 423, 44 S. Ct. 153,
68 L. Ed. 487 (1923).

\(^{25}\) E. g., California, Iowa and Massachusetts.
See Wisconsin—mental or physical harm caused by accident or
disease; and North Dakota—injuries in course of employment...in
addition to injuries by accident, any disease approximately caused
by the employment.
Definitions

Said one court: "In common speech the word 'injury' as applied to a personal injury to a human being includes whatever lesion or change in any part of the system produces harm or pain or a lessened facility of the natural use of any bodily activity or capability";28 damage to the body;27 "any harm or damage to the health of an employee however caused,—whether by accident, disease or otherwise."

However, certain things were clear, even though no one general definition ever satisfied all the states. In general, these words were not to be construed as establishing a system of health insurance,29 nor, conversely, were these words to be limited to the old narrow accident insurance policy definition of injuries by external, violent and accidental means, nor to require external trauma.30 Definitely, traumatic injuries, such as broken bones and external physical injuries—which make up the bulk of compensation injuries—come under the definition of personal injuries. Any blow or trauma to the human flesh admittedly is a personal injury.31

Property Damage

From the beginning, employers' representatives began whittling at each phrase. "Personal injury," they argued, meant exclusively and only a blow to the human flesh. If a coal driver fell from his truck and broke his wooden leg and had no other "injury"—that was "property damage," and his enforced idleness until a new one was built was one for charity to worry about and was no concern of the

32. Long-Bell Lumber Co. v. Parry, 156 P. 2d 225 (Wash. 1945)—cleaning sawdust, induced coronary occlusion.
insurance carrier. In California it took an amendment to the state constitution, and express legislation, to overcome this argument.32 But most state courts today support the employers' views on this phase, and such damage is held to be solely property damage, not personal injury.33 One must injure the surrounding tissues to obtain replacement of a glass eye, artificial arm or leg as part of restorative treatment.34 And even in California, the mere breaking of eyeglasses, which are not a substitute for a "natural part of the human body," without physical injury, is still property damage.35 Most states now provide by statute that if human legs, arms, eyes, or teeth are lost, the employer or insurer may be ordered to supply substitutes or aids to restore the man to industry.

**Nervous Shock**

Grasping at the common-law ruling that nervous shock without a flesh wound or external trauma was not a basis of liability36 insurance carriers fought to infuse the same doctrine into compensation acts. Successful in a few states, they went down to defeat in England and in most American jurisdictions. Injury to the nervous system may well be a personal injury although not caused by external trauma. A worker who has a nervous collapse, without physical impact, after helping carry a fellow-worker who was crushed by a timber prop and bleeding from the ears and head, and thereupon needs medical care himself and loses substantial

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33. London Guaranty & Accident Co. v. Industrial Commission, 80 Colo. 162, 249 P. 642 (1926)—"A wooden leg is a man's property, not a part of his person, and no compensation can be awarded for its injury."
34. Most states now have provisions allowing the commission to order (at the expense of the employer or carrier) artificial eyes or limbs or other mechanical appliances, to promote restoration to industry or to continue workers in industry. See G.L. (Ter. Ed.) (Mass.) ch. 152, sec. 30; St. 1920, ch. 324, and St. 1936, ch 164.
35. California Casualty Indemnity Exch. v. Industrial Accident Board of California, 13 Cal. 2d 529, 90 P. 2d 289 (1939)—"Eye glasses are in no sense a substitute or replacement for a natural part of the body; they are merely aids to the eyesight."
time from work, receives a compensable "personal injury." A fortiori, traumatic neuroses following physical injuries are almost universally compensated, even though financial, marital and other worries play a part. So, too, are many injuries to nerves, even by invisible but poisonous coal tar gas.

Diseases

Arguing that a "disease was not an injury," a few states failed to make awards for diseases as a result of inhaling germs in the natural way, i.e., through the nose or mouth.

37. Yates v. South Kirkby Collieries Ltd. (1910), 2 K.B. 538, 3 B.W.C.C. 418—nervous shock causing incapacity for work is as much a personal injury by accident "as a broken limb or other personal injury." "Directly you have that which requires treatment of the body means that a portion of the body (visible or invisible does not matter) is in a state of ill health." Accord: Geltman v. Reliable Linen Co., 128 N.J.L. 443, 25 A. 2d 894 (1942), Hunter v. Saint Mary's Natural Gas Co., 122 Pa. Super. 300, 186 A. 325 (1938), Eaves v. B. Colliery Co. Ltd., 2 K.B. 73, 2 B.W.C.C. 329 (1909)—"Fallacy to say a man's rights cease when the muscular mischief is ended, but the nervous or hysterical effects still remain." But see Holt v. Yates and Thorn, 3 B.W.C.C. 75 (1909)—brooding over injury, award denied.

38. See note 37, supra.


but upheld awards where the entry was not natural or where exposure to wetness and overwork were factors.\footnote{The great majority of states now hold that as the effect of the inhalation, natural or otherwise, is to cause physical harm to the body, the result is a personal injury in either case. Hence, awards have been supported to nurses and others who by contact at work suffer tuberculosis,\footnote{Milwaukee County v. Industrial Commission, 224 Wis. 302, 272 N.W. 46 (1937)—tuberculosis contracted by nurse in sanitarium. Accord: \textit{Benner v. I.A.C.}, 159 P. 2d 24 (Cal. 1945).} smallpox,\footnote{Brodin's Case, 124 Me. 162, 126 A. 829 (1924)—typhoid fever from inhaling poisonous fumes from gasoline blow torch held personal injury.} scarlet fever,\footnote{Black v. Creston Auto Co., 225 Iowa 671, 281 N.W. 189 (1938)—lead poisoning from inhaling poisonous fumes from gasoline blow torch held personal injury.} anthrax,\footnote{McPhee's Case, 222 Mass. 1, 109 N.E. 633 (1915)—pneumonia from water, helping put out employer's fire.} and the like. Similarly, poisoning from gas, dust or fumes,\footnote{Brinton's Ltd. v. Turvey (H.L. 1905), A.C. 230, 92 L.T. 578—anthrax from wool entered through eye.} typhoid from drinking polluted liquids,\footnote{McPhee's Case, 222 Mass. 1, 109 N.E. 633 (1915)—pneumonia from water, helping put out employer's fire.} pneumonia from exposure to water, rain or draughts,\footnote{Coyle v. Watson (H.L. 1915), A.C. 1, 7 B.W.C.C. 259—pneumonia from cold down draught in mine. “This accidental but prolonged exposure was the cause of the injury and the chill. The pneumonia was only the disease brought on by that injury.”} and other ordinary diseases apart from common colds,\footnote{A “series of colds caused by conditions under which she performed her work,” added to other things, like overwork and sudden changes in temperature, was the basis of an award in Mercier's Case, 315 Mass. 238, 52 N.E. 2d 380 (1943). But the common cold is excluded—dictum in Smith's Case, 307 Mass. 516, 30 N.E. 2d 556 (1940).} have been brought under various compensation acts.}

\textit{Occupational diseases}, which are especially incident to particular employments, are generally held to be personal injuries, but compensation is usually denied on the ground

\begin{itemize}
\item \footnote{Mercier's Case, 315 Mass. 238, 52 N.E. 2d 380 (1943).}
\item \footnote{Coyle v. Watson (H.L. 1915) A.C. 1, 7 B.W.C.C. 259.}
\item \footnote{Connely v. Hunt Furniture Co., 240 N.Y. 83, 147 N.E. 366, 39 A.L.R. 867 (1925).}
\item \footnote{Milwaukee County v. Industrial Commission, 224 Wis. 302, 272 N.W. 46 (1937)—tuberculosis contracted by nurse in sanitarium. Accord: \textit{Benner v. I.A.C.}, 159 P. 2d 24 (Cal. 1945).}
\item \footnote{Vilter Mfg. Co. v. Jahncke, 192 Wis. 362, 212 N.W. 641, 57 A.L.R. 627 (1927)—outside engineer at isolation hospital contracted smallpox—ate infected ice cream given him by hospital janitor.}
\item \footnote{Gaites v. Society for Prevention of Cruelty to Children, 251 App. Div. 761, 295 N.Y.S. 594 (1937)—matron at Shelter contracted scarlet fever when children vomited, coughed or took their medicine.}
\item \footnote{Brinton's Ltd. v. Turvey (H.L. 1905), A.C. 230, 92 L.T. 578—anthrax from wool entered through eye.}
\item \footnote{Black v. Creston Auto Co., 225 Iowa 671, 281 N.W. 189 (1938)—lead poisoning from inhaling poisonous fumes from gasoline blow torch held personal injury.}
\item \footnote{Brodin's Case, 124 Me. 162, 126 A. 829 (1924)—typhoid fever from employer's water. Accord: \textit{Permanent Construction Co. v. Industrial Commission}, 380 Ill. 47, 43 N.E. 2d 557 (1942).}
\item \footnote{McPhee's Case, 222 Mass. 1, 109 N.E. 633 (1915)—pneumonia from water, helping put out employer's fire.}
\item \footnote{Coyle v. Watson (H.L. 1915), A.C. 1, 7 B.W.C.C. 259—pneumonia from cold down draught in mine. “This accidental but prolonged exposure was the cause of the injury and the chill. The pneumonia was only the disease brought on by that injury.”}
\item \footnote{A “series of colds caused by conditions under which she performed her work,” added to other things, like overwork and sudden changes in temperature, was the basis of an award in Mercier's Case, 315 Mass. 238, 52 N.E. 2d 380 (1943). But the common cold is excluded—dictum in Smith's Case, 307 Mass. 516, 30 N.E. 2d 556 (1940).}
\end{itemize}
that they are not “by accident,” since they generally come from prolonged periods of exposure.\textsuperscript{51} In states requiring only a “personal injury” (“by accident” being omitted from the statute), awards properly have been made for all types of occupational diseases, e.g., lead poisoning,\textsuperscript{52} silicosis,\textsuperscript{53} benzol poisoning, dermatitis\textsuperscript{54} and the like. The date of the injury in industrial diseases is usually the date of maximum and final exposure, often the day of quitting work, even though the disability occurs later.\textsuperscript{55} As between two employers, both of whom contributed to the disease, the last is generally held responsible in the majority of states.\textsuperscript{56}

\textbf{Wear and tear}

But how about “wear and tear”? If it takes over fifteen

\begin{itemize}
\item \textsuperscript{51} Aranbula v. Banner Min. Co., 161 P. 2d 867 (N.M. 1945)—silicosis from ordinary exposure.
\item Miller v. American Steel & Wire Co., 90 Conn. 349, 97 A. 345 (1916)—lead poisoning not personal injury as there must be accidental bodily injury; changed by statute in 1919, practically eliminating need off accidental quality. Dupre v. Atlantic Refining Co., 98 Conn. 646, 120 A. 288 (1923)—holding lobar pneumonia from exhaustion due to heavy lifting, producing “weakened resistance to infection of the respiratory tract,” was compensable. See Marathon Paper Mills v. Huntington, 203 Wis. 17, 233 N.W. 558 (1930)—hernia as industrial disease.
\item Pershing Quicksilver Co. v. Thiers, 152 P. 2d 432 (Nev. 1944)—mercurial poisoning not “accidental.” See also notes 81-85, post.
\item Johnson’s Case, 217 Mass. 388, 104 N.E. 735 (1914)—lead grinder. Personal injury “includes any injury or disease which arises out of and in the course of the employment.”
\item Sullivan’s Case, 265 Mass. 497, 164 N.E. 457, 62 A.L.R. 1458 (1929)—pneumoconiosis (silicosis or granite cutter’s disease) compensable, as there was “tangible impact of particles of granite upon the lungs of the employee, producing definite damage to his body. The personal injury . . might have been found to be due to physical deterioration following immediately from corporeal collision with a foreign substance set in motion by the business of the employer (as) tangible as a broken bone.” Cihowski v. Clayton Mfg. Co., 105 Conn. 651, 136 A. 472 (1927)—pneumoconiosis and tuberculosis from grinding on emery wheels.
\item Panagotopulos’s Case, 276 Mass. 600, 177 N.E. 800 (1931)—dermatitis of shoe-treer is personal injury.
\item Lelenko v. W. H. Lee Co., 128 Conn. 499, 24 A. 2d 253 (1942)—dermatitis is occupational disease and compensable, even though due to individual susceptibility and unusual in that industry.
\item Fabrizio’s Case, 274 Mass. 352, 174 N.E. 720 (1931).
\item Anderson’s Case, 288 Mass. 96, 192 N.E. 520 (1934).
\item Pac. Employers Ins. Co. v. Ind. Commissio, 157 P. 2d 800 (Utah, 1945).
\item King v. St. Louis Steel Casting Co., 182 S.W. 2d 560 (Mo. 1944)—last insurer assumed entire liability—per Hyde, J., citing Wis., Mass. and N.J. cases.
\item Fabrizio’s Case, 274 Mass. 352, 174 N.E. 720 (1931)—even though only 13 days additional exposure (silicosis). 
\end{itemize}
years of hard work to produce Dupuytren's contracture, or neuritis from faulty posture, or if it requires thirteen months of long walks in a large factory to break down a heart already damaged when the employee began the job—is the result wear and tear or a personal injury? Awards have been denied in one state on the ground that they are wear and tear and hence not injury,57 or at least not injury "by accident."58 Wear and tear as a defence is often abused. It refers only to years59 of imperceptible changes common to ordinary human activity, and does not embrace exertion or exposure resulting in harm or physical lesions in months60 or days;61 and it has many exceptions. Where industry ruins a man's health or body in days or months it hardly can be termed wear and tear. Such deterioration can usually be shown to be due to a series of traumas resulting in personal injury. Thus it does not include cases involving more than nine months of overwork by a claims adjustor, resulting in spasm of the heart muscle.62 It excludes all occupational diseases or poisonings, and even cases involving as much as eighteen years of inhalation of harmful fumes.63 Excepted from the wear and tear theory are a series of cuts becoming suppura-
tive and leading to arthritis and invalidism,64 or a single

57. Reardon's Case, 275 Mass. 24, 175 N.E. 149 (1931)—Dupuytren's contracture, from fifteen years' work.
Burns's Case, 266 Mass. 516, 165 N.E. 670 (1929)—pre-existing heart disease aggravated by thirteen months of walking.
Maggiolet's Case, 228 Mass. 57, 115 N.E. 972 (1917)—neuritis or neurosis of nerves from faulty posture of cigar maker over many years.
Contra: Marathon Paper Mills v. Huntington, 203 Wis. 17, 233 N.W. 558 (1930)—herna from twenty years lifting is "industrial disease" here, though usual hernia is compensable as "injury."
See also Webb v. New Mexico Publishing Co., 47 N.M. 279, 141 P. 2d 333 (1943)—printer used soap for six months, was unusually susceptible to soap—held: injury by continual traumas.
59 Maggolet's Case, 228 Mass. 57, 116 N.E. 972 (1917).
60. Mill's Case, 258 Mass. 475, 155 N.E. 423 (1927)—herna from three months of lifting.
Accord: Littel v. Lagomarcino Grupe Co., 17 N.W. 2d 120 (Iowa, 1945)—lifting for four to six weeks, aggravated defective heart.
61. Garoffola v. Yale & Towne Mfg. Co., 41 A. 2d 451 (Conn. 1945)—back strain ensued within two or three hours.
See also Mercier's Case, 315 Mass. 238, 52 N.E. 2d 380 (1943)—five months of overwork, and going from hot to cold rooms, and a wetting, as basis of aggravating tuberculosis.
strain or repeated strains covering a period of a few months resulting in a rupture (hernia)\(^65\) or in back strains\(^66\) or knee strains,\(^67\) or where a series of usual and heavy lifts result in heart strains or attacks.\(^68\) Awards in such cases are usually upheld as "personal injuries," often even in jurisdictions requiring accidental origin,\(^69\) because of the repeated specific traumas. Paralysis of the face from continual exposure to wind or weather, inability to open the hand after long hours of typing, or lesions from continuous friction or movements of the fingers or hand, occurring in a few days, weeks, or even months, should therefore definitely be compensated as personal injuries in states not requiring accidental origin. And states which provide for full occupational disease coverage, properly include hernia from years of lifting,\(^70\) and Dupuytren’s contracture\(^71\) from years of hand friction, as compensable industrial diseases.

**Prostrations**

Prostrations, and effects of the elements, whether by overheating or overexertion\(^72\) or from direct rays of the sun\(^73\)

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Harrington’s Case, 285 Mass. 69, 188 N.E. 499 (1933)—"series of strains and twists, which had a cumulative effect not different from a single severe twist culminating in a hernia."

Green v. Jones County, 16 N.W. 2d 238 (Iowa, 1944)—hemorrhoids from strain.


In Werner v. Peaty & Fuhrman, Inc., 289 N.Y. 670, 45 N.E. 2d 172 (1940), a bricklayer stooping to pick up a brick felt something snap in left lumbar region of his back. Award for back injury "by accident", upheld.


69. Fenton v. Thorley (1903) A.C. 443, 89 L.T. 314—workman suffered rupture (hernia) when wheel stuck and he exerted self, feeling "a tearing in his inside," but there was "no evidence of any slip or wrench or sudden jerk."

See also notes 105-109, post and note 127, post.


72. Pace v. North Dakota Workmen’s Compensation Bureau, 51 N.D. 815, 201 N.W. 348 (1924)—prostration from exertion in an overheated boiler—a physical impact is not a necessary prerequisite to an injury. Here prostration from excessive and unusual heat, then collapse and broken blood vessel.


Malone v. Industrial Commission, 140 Ohio St. 292, 43 N.E. 2d 266 (1942)—heat stroke or heat exhaustion in a foundry is a traumatic accidental injury.

73. Zucchi’s Case, 310 Mass. 130, 37 N.E. 2d 514 (1941)—sun stroke or heat stroke in pier-footing hole.
or frost bite, are usually held to constitute personal injuries, although one cannot always point to the exact location of the lesions. It is enough that there exists "bodily harm." However, compensation is sometimes denied in injuries, by the elements on the ground that although they are personal injuries, they did not arise out of the employment. 74

Aggravations

Aggravations of pre-existing diseases or defects are as compensable in most states as an original or new injury. The overwhelming weight of authority compensates employees for aggravation, acceleration, or precipitation of pre-existing diseases or defects where the work done is a factor in the disabling result, even though the result would have occurred later in time due to the natural progress of such pre-existing condition. 75 Employers take workmen "as is," i.e., without and warranty as to any previous state of health, known or unknown. Hence paralysis due in part to a blow on the head and in part to an underlying syphilis is clearly compensable. 76 So, too, an aggravation of Buerger's disease or any other underlying condition is compensable. 77 Loss of the one remaining eye is thus considered as compensable as if both

75. Harding Glass Co. v. Albertson, 187 S.W. 2d 961 (Ark. 1945), and cases and texts cited, per Holt, J. (heat prostration hastened heart disease and contributed to death eight months later).
Davis v. Artley Construction Co., 18 So. 2d 255, 16 N.C.C.A. (N.S.) 423 (Fla. 1944)—employee who had syphilis suffered a cerebral hemorrhage from overheating work.
Aggravation of mental condition is as compensable as physical condition—Buxton v. Williams Co., 208 La. 261, 13 So. 2d 885 (1943).
eyes were removed, i.e., total disability. However, some states, by express statute, apportion the loss, although difficulties often arise in determining the percentage due to previous defect or disease. To help cripples obtain jobs and to assist in the payment of such aggravations, the majority of states now have second-injury or similar funds, placing part of the cost on the fund.

**BY ACCIDENT**

*Occupational diseases*

Employers also argued that though silicosis, benzol poisoning, and various *industrial or occupational diseases* resulted from a series of personal injuries, they were not compensable because each personal injury was not "by accident." "By accident" connoted something sudden, unusual, unexpected—an unlooked for mishap or an untoward event which is not expected or designed. Industrial diseases were of slow growth, not unusual, and to be expected; and the great majority of accident-requiring states found themselves obliged to deny awards therefor.

To correct this injustice, many states have either (1) not used the words "by accident" or (2) added specific provisions to compensate for some or all industrial diseases.

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See also Morris v. Pulaski Veneer Corp., 33 S.E. 2d 190 (Va. 1945)—error to give only partial when second hand lost; S.C., 35 S.E. 2d 342 (1946)—but deduct 150 weeks paid for first hand (and not the amount in dollars) from the total of 500 weeks due ($7000 maximum—$5,215 awarded, at $17.90 weekly) for total and permanent disability.

79. Tweten v. N.D. Workmen’s Compensation Bureau, 69 N.D. 369, 287 N.W. 304 (1939)—but apportionment for pre-existing "disease" held not to include underlying structural weakness.
American Rolling Mill v. Stevens, 290 Ky. 16, 160 S.W. 2d 355 (1941)—75 per cent due to strain, 25 per cent due to underlying arthritis.


81. Miller v. American Steel Co., 90 Conn. 349, 97 A. 345 (1916)—lead poisoning not "by accident."


See also Travelers Ins. Co. v. Shepard, 20 So. 2d 903 (Fla. 1945).

84. E.g., California, Iowa and Massachusetts.

85. (As of November, 1945) seventeen acts cover only diseases listed specifically in schedules which are sometimes quite limited in extent; twenty acts provide general or blanket coverage. The tendency is toward all-inclusive coverage. In 1945, Michigan, Minnesota...
Unfortunately, some list these diseases by name, and when a new one appears in medicine, the poor victim gets nothing. All the legislature can do in such cases is to take care of future victims by adding the new disease to the list. In the meantime the court is powerless to help the victim unless the disease can be termed an injury, or an injury by accident. The proper remedy is for the legislature to provide that all occupational diseases are compensable.

By the terms "injury by accident" are covered not only an injury the means or cause of which is an accident but also an injury which is in itself an accident.\(^{86}\) And an industrial disease may be an accident where the exposure is very short or results from an unexpected event.\(^ {87}\) But the attempt

and Nebraska provided for general coverage. A few states have special provisions limiting payment for silicosis.


Schedule coverage: One jurisdiction compensates for some occupational diseases, but not for silicosis—Maine.

Sixteen jurisdictions compensate for some occupational diseases, including silicosis—Arizona, Arkansas, Colorado, Delaware, Idaho, Kentucky, Maryland, New Jersey, New Mexico, North Carolina, Pennsylvania, Puerto Rico, Rhode Island, Utah, Virginia, West Virginia (silicosis only).

No coverage: Sixteen jurisdictions do not cover occupational diseases—Alabama, Alaska, Georgia, Iowa, Kansas, Louisiana, Montana (in Montana any person totally disabled from silicosis who has been a resident of the State for ten years or more is entitled to a pension of $30 a month), Nevada, New Hampshire, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Vermont and Wyoming.


For excellent article on Occupational Disease Coverage under Workmen's Compensation, see VI La. Law Review 85-98 by Evylen Cole (Dec. 1944).


87. Lockhart v. State Compensation Commission, 115 W Va. 144, 174 S.E. 780 (1934)—using spray gun five hours, causing paint poisoning and led to acute septicemia ‘specific exposure while painting a truck.’ We do not believe that his condition could be classed as a non-compensable occupational disease.”

Young v. Salt Lake City, 97 Utah 123, 90 P 2d 174 (1939)—lead poisoning.
to include some slowly acquired occupational diseases, not then included in the occupational disease statute, under the heading of personal injury “by accident” has had unsatisfactory results. Complete occupational disease coverage would avoid much mental gymnastics by courts more liberal than the legislatures.

The Court of Appeals in New York denied an award on the ground of “not accidental,” where a girl’s finger became red, swollen and gangrenous from the continuous dipping of the hand for about one week (500 to 800 times daily) in a poisonous photographic solution,88 but held that infection while embalming a corpse was by accident.89 As seen above, Massachusetts refused an award for Dupuytren’s contracture from long-continued use of tools, though there was no requirement that the injury be “by accident,” holding that the contracture was due to “wear and tear” and hence not an “injury.”90 Yet New York made an award for the same condition (due to sixteen years of continuous friction), calling it an industrial disease, although not by accident.91 Tuberculosis, precipitated by silica dust, was held to be an accidental disease, and compensable as an injury by accident, although not an occupational disease and not listed as such, the distinction being in the suddenness of the onslaught.92

Assaults

Are assaults by design accidental? Or assaults due to sudden or spontaneous anger? If boys, seeing a teacher bent over picking up an object, deliberately “spank” her so that she falls and breaks her wrist, is this “by accident” or by design? The House of Lords struggled for weeks with a similar problem, where reform-school boys with brooms ambushed and killed the disciplinarian master, and finally held

90. Reardon’s Case, 275 Mass. 24, 175 N.E. 149 (1931)—took fifteen to twenty-five years to produce contracture.
92. Dobbs v. State, 63 Idaho 290, 120 P 2d 263 (1941)—employee originally claimed silicosis under occupational disease statute, but the commissioner found pulmonary tuberculosis was precipitated, instead.
that the case must be decided, not from the boys' viewpoint, but from that of the injured worker. As the teacher saw it, it was, of course, by accident, and hence compensable.98

The rule of viewing the result from the point of view of the victim, allowing an award as an accidental injury, has wide support.94 Thus, England regarded the following assaults as "by accident": by a mischievous boy who threw a stone at a railway engineer;95 a stoker assaulted by an undisciplined African aboard a ship;96 a quay foreman assaulted by a rough dock laborer;97 a cashier of a colliery murdered while carrying wages;98 a taxi-driver taking an officer to a fort shot by a sentry whom he failed to hear;99 a subway lavatory attendant assaulted by a drunken sailor.100

Our courts generally follow the English rule as to assaults being "by accident".101 The question of who was the

94. McLaughlin v. Thompson, Boland & Lee Inc., 34 S.E. 2d 562 (Ga. App. 1945) and cases and text cited by Parker, J.
95. Challis v. London Ry Co. (1905), 2 K.B. 154, 93 L.T. 330—court cannot overlook matters of common knowledge and experience on this subject, as to the boy's propensity to throw stones at moving engines.
96. Parker v. Federal Steam Navigation Co. (1925), 18 B.W.C.C. 469, 134 L.T. 137—for "some small cause the savage nature of the African was roused," and there was "a special risk to this man in working near the African."
97. Reid v. British Packet Co. (1921), 2 K.B. 319, 14 B.W.C.C. 20—ordinary citizen does not have to direct men of rough character.
98. Nisbet v. Rayne (1910), 2 K.B. 689, 3 B.W.C.C. 507—there is a distinct and well-known risk run by cashiers and the like who are known to carry considerable sums.
101. W.B. Davis & Son v. Ruple, 222 Ala. 52, 130 So. 772 (1930)—employee injured by superintendent forcibly ejecting her.
U.S. Fidelity & Guaranty Co. v. Barnes, 187 S.W 2d 610 (Tenn. 1945) "accidental so far as he (the employee) was concerned"—watchman killed by fellow employee.
Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 161 P. 398 (1915) —in altercation over shovel, workman injured foreman in charge of gang of section hands on a railroad.
See cases cited in notes 315-336, post.
aggressor has no place in the discussion where a work-argument (as distinguished from a purely personal affair) produced the assault.\textsuperscript{102} And where the assault was by the employer himself, in a fit of insanity, Oklahoma and most states make an award,\textsuperscript{103} while England in one case denied it.\textsuperscript{104}

**Unusual results of ordinary work**

Suppose an ordinary or usual strain produces an unusual result, is the resulting injury by accident? It is now well established that ordinary and usual exertion at work resulting in injuries is compensable. By the great weight of authority the injury is accidental where either the cause or the result is accidental, although the work being done is usual and ordinary.\textsuperscript{105} Thus awards have been upheld on the basis of accidental injuries where the strain in tightening

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\textsuperscript{102} Hartford Accident & Indemnity Co. v. Cardillo, 112 F. 2d 11, 16, (n. 15), 17, 18; 72 App. D.C. 52 (1940)—(cert. den. 60 S.Ct. 1100)—and cases cited, per Rutledge, A.J.—“Fault there was on both sides . . . but compensability in these circumstances is not a matter of comparative fault. The entire sequence of events arose out of the fact that the work of the participants brought them together and created the relations and conditions which resulted in the clash . . . He was guilty at most of contributory fault.” In note 15, p. 16, are collected the cases holding aggressors may collect if the antecedent quarrel arises out of the work, or unless the aggression is of the type specified in the statutory exception. See also note 17, p. 16.

See also Hegler v. Cannon Mills Co., 31 S.E. 2d 918 (N.C. 1944)—assault by fellow employee angered by criticism of his work.

See also note 336, post and note 101, supra.

\textsuperscript{103} Pawnee Ice Cream Co. v. Cates, 164 Okla. 48, 120, 22 P 2d 347 (1933)—and cases cited.

\textsuperscript{104} Blake v. Head, 106 L.T. 822, 5 B.W.C.C. 303 (1912).

\textsuperscript{105} Harding Glass Co. v. Albertson, 187 S.W. 2d 961 (Ark. 1945)—it is no less an accident when a man breaks down than when there is a like mishap to a machine.

Garafola v. Yale & Towne Mfg. Co., 41 A. 2d 451 (Conn. 1945)—3 hours of heavy work, though usual, resulted in unexpected back strain.


Harbor Marine Contracting Co. v. Lowe, 152 F. 2d 845 (C.C.A. 2d, 1945, per Clark, Cir. J.)—Texas Employers Ins. Ass’n v. Grimes, 186 S.W. 2d 280 (Tex. Civ. App. 1944, reh. den. 1945)—“internal injuries resulting from usual strain in the course of the employment are compensable injuries”—per Rice, C.J.

Sturgis Bros v. Mays, 185 S.W. 2d 629 (Ark. 1945).


See also notes 106-109, post.
a nut in the ordinary manner caused an aneurism to break;\textsuperscript{106} or where shoveling snow precipitated a heart attack;\textsuperscript{107} so, too, a pulmonary hemorrhage precipitated by the usual work of loading paint for two and one half days.\textsuperscript{108} England held it was error to refuse an award because the workman had left the heavier work and was doing light work when the injury occurred, holding that a light strain causing a ruptured aneurism of the aorta was as compensable as if caused by a heavy strain. And a new trial will be granted if the commissioner requires \textit{unusual} activity, as normal or usual activity causing a hemorrhage is compensable.\textsuperscript{109}

\textsuperscript{106} Clover, Clayton v. Hughes (H.L. 1910), A.C. 242, 3 B.W.C.C. 275—"broke a part of his body," and he "certainly did not mean to do it." "The work was ordinary work, but it was too heavy for him."

\textsuperscript{107} Accord: Griffin's Case, 315 Mass. 71, 51 N.E. 2d 768 (1943), per Dolan, J. Lumbermen's Mutual Casualty Co. v. Griggs, 190 Ga. 277, 9 S.E. 2d 84 (1940)—cerebral hemorrhage following ordinary lifting in unloading 600 sacks. Internal injuries are as compensable as external ones—per Duckworth, J. (excellent citations). Brown's Case, 123 Maine 424, 123 A. 421 (1924)—ordinary shoveling of snow, sudden dilatation of heart. Result was unexpected, though cause was ordinary work.

\textsuperscript{108} Hewitt v. Partridge Jones (1922), 15 B.W.C.C. 239, 128 L.T. 238. Or a rheumatic heart made worse by light and quick work, where the exertion was greater than his physical capacity to endure it—Northwest Metal Products, Inc. v. Department of Labor, 12 Wash. 2d 155, 120 P 2d 855 (1942).


\textsuperscript{107} Jones v. Town of Hamden, 129 Conn. 532, 29 A. 2d 772 (1942)—janitor of public school shoveling snow died of hemorrhage (aneurysm)—error to deny award because not due to unusual activity, or could not definitely be located in time or place. New trial ordered, per Jennings, J. McCormick Lumber Co. v. Department of Labor, 7 Wash. 2d 40, 108 P 2d 807 (1941)—wrong to require unusual effort or strain. Duff Hotel Co. v. Ficara, 150 Fla. 442, 7 So. 2d 790 (1942)—hernia from usual lifting of pot of meat compensable. Hardware Mutual Casualty Co. v. Sprayberry, 195 Ga. 393, 24 S.E. 2d 315 (1943)—hernia from ordinary and usual work compensable as by accident, though no slipping or unusual lift. Accord: Scales v West Norfolk Farmers Ltd. (1913), 6 B.W.C.C. 188, C.A.—furnace worker strangulated old hernia. Because the man "had used in safety the heavy raking iron many times, that did not lessen the risk of strain which he ran from the hernia and was incidental to the employment."

See also Macaluso v United Engineers & Constructors, 43 A. 2d 239 (Pa. Super. 1945).
A fortiori, in states not requiring accidental origin, a special incident or unusual occurrence is not needed where ordinary work or strain causes or results in injury.\textsuperscript{110}

\textit{Acts of God}

Injuries resulting from \textit{the elements} (heat, cold, rain, lightning, hurricane, earthquake, and the like—acts of God), or heat stroke or \textit{heat exhaustion} from artificial heat while at work, are usually sudden and unexpected, hence accidental\textsuperscript{111} (although awards are sometimes denied on other grounds—such as they did not arise “out of the employment”).\textsuperscript{112}

\textit{Vaccination injuries}

Where the employer compels or provides \textit{vaccination} or \textit{antitoxin treatment}, and harm results, the resulting injury is usually considered “by accident,” as the unfortunate result is unexpected and unforeseen.\textsuperscript{113}

\textit{Fright and shock}

How about \textit{fright and shock}? “Where a man . . . sustains

\textsuperscript{110} Littell v. Lagomarcino Grupe Co., 17 N.W. 2d 120 (Iowa, 1945).

\textsuperscript{112} Matthews v. Woodbridge Township, 14 N.J. Misc. 143, 183 A. 150 (1936)—night police officer froze fingers, necessitating amputation—is “injury” and “accidental”.
\textsuperscript{113} Malone v. Industrial Commission, 140 Ohio St. 292, 43 N.E. 2d 266, (1942)—heat exhaustion in hot foundry. See excellent citations per Hart, J.

\textsuperscript{112} Accord: Hughes v. St. Patrick’s Cathedral, 245 N.Y. 201, 156 N.E. 665 (1927)—“Heat prostration is an accidental injury,” even though “the risk may be common to all who are exposed to the sun’s rays on a hot day.”

\textsuperscript{112} Warner v. Couchman (1912), A.C. 35, 5 B.W.C.C. 177—journeyman baker while driving his rounds had right hand frostbitten. Finding against him upheld. See notes 146—187, post, and text applicable thereto.

\textsuperscript{113} Alewine v. Tobin Quarries, 33 S.E. 2d 81 (S.C., 1945)—see excellent discussion by Oxnor, J.
\textsuperscript{113} Sanders v. Children's Aid Society, 238 App. Div. 746, 265 N.Y.S. 698, aff'd, 262 N.Y. 655, 188 N.E. 107 (1933)—epidemic in vicinity, employer requested employees to take diphtheria anti-toxin administered by its contract-physician. Award upheld.
\textsuperscript{113} Neudeck v. Ford Motor Co., 249 Mich. 690, 229 N.W. 438 (1930)—officials ordered vaccination, resulting in streptococcus poisoning and death. Award upheld as “accidental.”
\textsuperscript{113} Contra: Where health authorities made request and the employer supplied facilities, but left it optional with employees to have vaccination—Smith v. Seamless Rubber Co., 111 Conn. 385, 150 A. 110, 69 A.L.R. 856 (1930)—Wheeler, J., dissenting.
a nervous shock, producing physiological injury, not a mere emotional impulse, he meets with an accident.\textsuperscript{114} Physical impact, unlike common-law cases, is not necessary in compensation cases.\textsuperscript{115} If during fright he falls and injures himself, or “drops dead,” the injury is by accident.\textsuperscript{116}

\textbf{Diseases}

Even \textit{diseases} may be accidental injuries, although sometimes they are said to arise accidentally from injuries. Thus anthrax,\textsuperscript{117} poison ivy,\textsuperscript{118} gangrene contracted while embalming a corpse,\textsuperscript{119} scarlet fever contracted by a nurse,\textsuperscript{120} “Bell’s palsy” caused by draught from an electric fan,\textsuperscript{121} and pneumonia from draughts and working on an old cement floor\textsuperscript{122} were all the bases of compensation awards.

\begin{itemize}
  \item 114. Yates v. South Kirkby Collieries (1910), 2 K.B. 538 541, 3 B.W.C.C. 418—nervous shock from seeing fellow worker horribly injured, held as much a personal injury by accident as a broken limb.
  \item 115. Geltman v. Reliable Linen Co., 128 N.J.L. 443, 25 A. 2d 894 (1942), and cases cited—salesman frightened when forced by operator of other vehicle to pull over to side of road. Heart gave way—“no less a ‘personal injury by accident’ than if it had ensued from physical impact.”
  \item 116. Hall v. Doremus, 114 N.J.L. 47, 175 A. 369 (1934)—overcome while watching unusually bloody, tearing delivery of calf, farmhand fell to concrete floor, fracturing skull. Held: “accident . . . not essential that there be physical injury.” Railroad cases distinguished as not natural result of negligent act that ordinary healthy man becomes nervous without trauma, but compensation does not depend on previous health. In Hunter v. Saint Mary’s Natural Gas Co., 122 Pa. Super. 300, 186 A. 325 (1936), a gas company employee died of fright caused by dog jumping upon his back while he was repairing gas heater in cellar of consumer. Held: by accident. See also notes 364—370, post.
  \item 117. Hiers v. Hull & Co., 178 App. Div. 350, 164 N.Y.S. 767 (1917)—anthrax from handling wet, dirty, diseased hides as accidental as if a “serpent concealed in the hides had attacked him.”
  \item 119. Connely v. Hunt Furniture Co., 240 N.Y. 83, 147 N.E. 366, 39 A.L.R. 867 (1925)—infection may be a disease and “yet an accident too.” Disease and injury often overlap. Common understanding as revealed in common speech would “envisage this mishap as an accident,” per Cardozo, J., in 4 to 3 vote to restore award.
  \item 121. Lurye v. Stern Bros. Dept. Store, 275 N.Y. 182, 9 N.E. 2d 828 (1937)—saleswoman got palsy of face and distorted speech when fellow employee switched on electric fan. All occurred in one day—so swift and harsh a disablement was accidental, like sunstroke. Award reinstated.
\end{itemize}
Need of suddenness

While suddenness of onset is usually requisite, a delay of hours, days, or even months is not necessarily fatal, e.g., pneumonia from cold draughts,\(^1\) or a subacute rheumatism from bailing water,\(^2\) nor a longer delay if due to a series of traumas or scratches;\(^3\) although New York considered a delay of about one week in photographic poisoning by 500 dippings a day as fatal to the "accidental" part of the injury,\(^4\) while New Mexico properly considered six month's use of injurious soap, finally resulting in injuries to the hands, as "accidental."\(^5\)

ARISING OUT OF

Proving that a workman received a personal injury and by accident does not settle the question. He must in addition prove that it "arose out of and in the course of the employment."

Arising out of—words to bedevil the injured worker! A few judges gave lip-service to the doctrine that it was their duty to construe the act liberally (to protect the rights of workers who no longer could sue at common law and obtain a jury trial), and then used their ingenuity to deny recovery.\(^6\) Others permitted recovery so liberally that the late F. Robertson Jones\(^7\) was driven nearly to tears. Def-

\(^1\) Coyle v. Watson Ltd. (1915), A.C. 1, 7 B.W.C.C. 259—delayed in mine one and one half hours, pneumonia from cold draughts.

\(^2\) Glasgow Coal Co. v. Welch (1916), 2 A.C. 1, 9 B.W.C.C. 371—subacute rheumatism from eight hours bailing out water.

\(^3\) Dauber v. City of Phoenix, 59 Arizona 489, 130 P. 2d 56 (1942)—while some sewer gas was expected in manhole, here the unexpected appearance of a cloud of sewer gas was in such quantity that claimant became unconscious.


initions and formula only multiplied the difficulties.\textsuperscript{130}

"A few and seemingly simple words, 'arising out of and in the course of the employment' have been the fruitful (or fruitless) source of a mass of decisions turning upon nice distinctions and supported by refinements so subtle as to leave the mind of the reader in a maze of confusion. From their number counsel can, in most cases, cite what seems to be an authority for resolving in his favour, on whichever side he may be, the question in dispute."\textsuperscript{131}

Where there is a \textit{causal relation} between the employment and the injury, the injury is properly said to arise out of the employment.\textsuperscript{132} Had the courts at any early date adhered to this simple definition and not tried to read in additional, narrow common-law refinements or requirements, much litigation would have been avoided. Long judicial habits in tort cases added to the confusion.\textsuperscript{133} The connection between the employment and injury need not be the sole proximate cause; it is enough if it is a \textit{reasonably contributory} cause.\textsuperscript{134} Thus where at the time of injury there was a concurrent business

\textsuperscript{130}Attempts have been made to define these words. See McNicol's Case, 215 Mass. 497, 102 N.E. 697 (1913). Caswell's Case, 305 Mass. 500, 25 N.E. 2d 328 (1940), is more general, accurate and modern. See also Qua, J., in Souza's Case, 316 Mass. 332, 55 N.E. 2d 611 (1944).

Lord Loreburn, L.C., said in Kitchenham v. S.S. “Johannesbury” (1911), A.C. 417, 4 B.W.C.C. 311, 312—“We have to decide each case on the facts. Argument by analogy is valueless. I am getting afraid to say anything more by way of judgment than that the appeal should be allowed or dismissed, because what one says in one case is used as an argument why one should decide a particular way in another case.”

\textsuperscript{131}Per Lord Wrenbury in Herbert v. Fox (1916), A.C. 405, 419, 9 B.W.C.C. 164—dealing with disobedience as affecting “out of” the employment.

\textsuperscript{132}In Cudahy Packing Co. v Parramore, 263 U.S. 418, 44 S.Ct. 153, 68 L.Ed. 487 (1923), Mr. Justice Sutherland said “it is enough if there be a causal connection between the injury and the business. . . a connection substantially contributory, though it need not be the sole proximate cause. . . No exact formula can be laid down which will automatically solve every case.” Accord: Ronan, J. in Varao's Case, 316 Mass. 363, 364, 55 N.E. 2d 451 (1944)—arising out of “means that he must prove a casual connection between the employment and the injury.” Accord: Girocelli v. Franklin Cleaners & Dyers, 132 N.J.L. 590, 42 A. 2d 3 (1945)—rape arose out of, as “in some sense due to the employment, from a risk reasonably incident thereto,” . . . “she was exposed to the attack that took place” in the rear room where the cleaned garments were kept.

\textsuperscript{133}Hanson v. Robitshek-Schneider Co., 209 Minn. 596, 297 N.W. 19 (1941). Anderson v. Hotel Cataract, 17 N.W. 2d 913 (S.D. 1945).

\textsuperscript{134}See notes 132 and 133, supra.
and personal cause or motive, the injury still arises out of the employment. The fact that the very same kind of an accident may happen elsewhere, as in the home, is no defence.

Street risks

At an early date trouble started when claimants asked compensation for injuries due to so-called "street risks."

A shirt salesman, specializing in sales to ministers, was sent in the chill of the winter to make a sale and slipped on an icy sidewalk not far from the premises of the customer. He sought compensation from the carrier. Yet the carrier convinced the highest court in Massachusetts that it should deny recovery. It was a street risk and by some subtle reasoning street risks could not possibly "arise out of" the employment. Argued the earlier 1917 court: the risk was common to the public and not peculiar to the employment, hence no recovery could be had. Exceptions were made for teamsters, those repairing roads, and for an insurance collector, for as to them there was a cumulative risk—the road was their workshop.

More judicial words were written and rewritten about street risks in that Commonwealth than over any other comparable subject. As the Court changed, the majority ruling

135. Martin v. Hasbrouck Heights Building Loan & Savings Association, 132 N.J.L. 569, 41 A. 2d 898 (1945)—walking home to meet customers and eat dinner, business was a concurrent cause.


Aetna Casualty Co. v. Industrial Commission, 110 Colo. 422, 135 P 2d 140 (1943).


Linderman v. Cownie Furs, 13 N.W. 2d 677 (Iowa 1944)—fishing trip partly to stimulate sales.


138. Keaney's Case, 232 Mass. 532, 122 N.E. 739 (1919)—teamster. To him the street risk was peculiar to his employment.

Moran's Case, 234 Mass. 566, 125 N.E. 591 (1920)—insurance collector. Risks are "greater because more constant."
changed, finally to be laid at rest by legislative mandate that "ordinary risks of the street" be compensated—only to be followed by a majority decision (a sensible one) as to what was meant by "ordinary risks" of the street.4

Fortunately, the majority of jurisdictions still make awards for street risks without legislative amendments.4 It is enough that the work brought the worker in contact with the risk even though others may be exposed to like risks. The cab driver who skids on the road and the salesman who overturns or collides with another automobile have equal rights to protection, so long as at the moment of the injury the vehicle is being used for company business; and the fact that the driver has a concurrent personal motive is not fatal to an award.142 And New York properly considers an attack by a lunatic on a chauffeur in a crowded city street as a compensable street risk. Said this court:

139. Cook's Case, 243 Mass. 572, 137 N.E. 733, 29 A.L.R. 114 (1923)—4 to 3 majority upheld award to insurance solicitor and collector for street risks. Contains excellent citation of cases from other jurisdictions, but it was overruled in Colarullo's Case, 258 Mass. 521, 155 N.E. 425 (1927), and restored by legislature by St. 1927, ch. 309, sec. 3, amending G.L. ch. 152 sec. 26 (Mass.).
141. In Cudahy Packing Co. v. Parramore, 263 U.S. 418, 44 S.Ct. 153, 68 L.Ed. 487 (1923), where employee in automobile was struck by train en route to work, Mr. Justice Sutherland said that the award was proper, as it was continuously necessary to cross the tracks, "resulting in a degree of exposure to the common risk beyond to which the general public was subjected."
City of Chicago v. Industrial Commission, 60 N.E. 2d 212 (Ill. 1945), and cases cited by Gunn, J.
Kuharski v. Bristol Brass Corp., 46 A. 2d 11 (Conn, 1946)—modern tendency is toward a more liberal view as to compensability of injuries resulting from street risks—per Jennings, J.
Pierce v. Provident Clothing Co. (1911), 4 B.W.C.C. 242—collector on bicycle killed by tramcar. Held: more exposed to risks of the street than ordinary members of public. Buckley, L.J.: "The risk incident to the employment may include a risk common to all mankind."
Concurrent personal motive held immaterial—Aetna Casualty Co. v. Industrial Commission, 110 Colo. 422, 135 P 2d 140 (1943)—intended later to visit relatives after picking up truck in Detroit.
In Sater v. Home Lumber & Coal Co., 63 Idaho 776, 126 P. 2d 810
"Particularly on the crowded streets of a great city, not only do vehicles collide, pavements become out of repair and crowds jostle, but mad and biting dogs may run wild, gunmen may discharge their weapons, police officers may shoot at fugitives fleeing from justice, or other things may happen from which accidental injuries result to people on the streets and do not commonly happen indoors."

England has also held that the man occasionally on the street on business is protected as much as one whose workshop is the street.

As far back as 1919, Wisconsin laid down the broad principle that street risks were compensable. Said that court:

"If it should be held that messengers, delivery men, salesmen, and others who by the nature of their employments are required to be continuously on the streets and highways, are not entitled to compensation for injuries received in the course of their employment if the injury occurs on a street or highway, a large class of worthy applicants would be cut off and the workmen's compensation law emasculated. If an employee in the course of his employment is required to go up and down a stairway occasionally or frequently, and while so doing falls and injures himself, should he be denied compensation because every one uses stairways and is continually liable to receive like injuries? Clearly not. The risk of injury to the applicant in this case was incidental to his use of the street in the course of his employment, and was peculiar to the employment in that the work of the employee could not be carried on without his subjecting himself to that risk; it therefore grew out of his employment. The fact that others

(1942), where service of employer was a concurrent cause of the trip, the employer was liable, even though employee's wife was with him, as he turned off the main highway to see a customer at least partly on business.

Linderman v. Cowme Furs, 13 N.W. 2d 677 (Iowa, 1944)—drowned on fishing trip, taken partly to stimulate sales, per Mulroney, J.

This doctrine was extended to an indoor attack by a lunatic—Hartford Accident v. Hoage, 66 App. D.C. 160, 85 F. 2d 417 (1936).


—Lord Finlay: "It is quite immaterial whether the nature of the employment involves continuous or only occasional exposure to the dangers of the street."
may be exposed to like risks does not change the character of the risk to which the applicant was exposed.”

Acts of God

Suppose an act of God plays a part in the injury. A bricklayer on a twenty-three foot high scaffold is hit by lightning and is killed outright. A street-cleaner on the roadway gets a direct hit by a bolt. Lightning strikes a rain-soaked medical student acting as a first-aid man while in a hospital on a high hill in New Hampshire. A hurricane causes the walls to collapse on a machinery worker. The employer’s argument is everywhere the same—that God did it, that God alone is responsible, is the proximate and primary cause; that the relation to the work is too incidental and too remote to be the basis of liability.

England and most of the states originally straddled and drew hairline distinctions. If, they argued, the worker was unable to prevent the injury, and the work placed him in a place of greater danger than the ordinary out-door worker, then and only then could he recover. Hence the teamster or “road steward” on the street, hit directly by a bolt, or suffering frostbite was in no more danger than the ordinary outdoor worker, and his widow’s relief was solely on the charity roles. The fact that except for his work he would not be on that particular errand on that particular spot, seems not to have appealed to the English courts until 1929, when “during a gale” a tree fell on a salesman driving a motorcycle. Then, with a special conscience developed in two decades, an award was upheld. A street risk had finally joined with an act of God, and the result was compensable.

152. Warner v. Couchman (1910), 4 B.W.C.C. 32, aff’d (1912, H.L.), A.C. 35, 5 B.W.C.C. 177—journeyman baker had right hand frostbitten while driving rounds.
153. Lawrence v. George Matthews (1929), 1 K.B. 1, 21 B.W.C.C. 345. Accord: Globe Indemnity Co. v. MacKendree, 39 Ga. App. 58, 146 S.E. 46 (1928)—tree fell on auto because of winds in woodland. Storm and tree combined, and as tree was along route he traveled “his employment subjected him to such danger.”
However, as a result of following the earlier English cases many American courts still require workers to prove that the employment or industry combined with the elements in producing the injury, e.g., the storm collapsed the building, and the wall, not the wind, caused the injury; or to try to convince the courts, with or without experts, that somehow there was more danger (and hence compensability) from lightning when under a wet tree, or that there was more exposure from the sun on a steel deck, or that it was hotter in a ditch or pier footing hole than on the ground, and hence more danger from sunstroke or heatstroke; or colder near the waterfront and hence more likelihood of frostbite. But if one froze his leg at 4 to 5 A.M., clearing the public square and gutters of debris before the arrival of expected vehicles during severe cold weather, one case held that since the risk was common to all outdoor workers (if not sleeping at that hour), and as there was evidence that he could have gone to warm himself (although frostbite strikes suddenly and without warning), and he had no definite working hours, the resulting injury was purely an act of God, and the amputation that followed was 'none of the insurer's concern.' The weight of authority on similar

154. Industrial Commission v. Hampton, 123 Ohio St. 500, 176 N.E. 74 (1931)—"The injury to Hampton was not caused by the direct force of the wind upon his person." Accord: Harvey v. Caddo D.S. Cotton Oil Co., 199 La. 720, 6 So. 2d 747 (1942).


156. Buhrkuhl v. O'Dell Construction Co., 232 Mo. App. 967, 95 S.W. 2d 843 (1936)—judicial notice that superior height of barn resulted in his "excessive exposure to the common risk by lightning." Consolidated Pipe Line Co. v. Mahon, 152 Okla. 72, 3 P. 2d 844 (1931), and many cases cited. Court took judicial notice that old dilapidated house in that neighborhood "much more liable to be struck by lightning."
See also notes 175 and 176, post, and text applicable thereto.


159. Zucchi's Case, 310 Mass. 130, 37 N.E. 2d 514 (1941).
McCarthy's Case, 232 Mass. 557, 123 N.E. 87 (1919)—sunstroke in gravel pit, overcome suddenly, so unable to protect self.


161. The board took judicial notice of this fact in Shute's Case, 290 Mass. 399, 195 N.E. 354 (1935).

162. Robinson's Case, 292 Mass. 543, 198 N.E. 760 (1935)—but contra when worker of low mentality was passing out circulars without gloves and had no warning of freezing—Shute's Case, 290 Mass. 399, 195 N.E. 354 (1935).
frostbite cases is to the contrary, however. Massachusetts by statute in 1937 corrected the situation for frostbite and sunstroke, but failed to make a similar statutory change for lightning and hurricane.

In 1940 a clearer conception of the words "arising out of" was given, following more recent English cases, by a liberal Massachusetts justice who has since then been followed by other liberal courts. Said he, in the hurricane case:

"The only other requirement is that the injury be one 'arising out of' his employment. It need not arise out of the nature of the employment. An injury arises out of the employment if it arises out of the nature, conditions, obligations or incidents of the employment."

The court thereupon held that as it was the employer's walls which injured the employee, the cause of their collapse (the hurricane) was immaterial and did not prevent an award.

The older Massachusetts definition (formerly widely quoted, now antiquated) required, in addition, that "the causative danger must be peculiar to the work and not common to the neighborhood." An entire neighborhood may be scourged by a tornado or windstorm, but if it causes the employer's wall or debris to fall and injure the employee,

163. Eagle River Bldg. Co. v. Industrial Commission, 199 Wis. 192, 225 N.W. 690 (1929)—frozen while loading sleigh.
In Re Harraden, 66 Ind. App. 298, 118 N.E. 142 (1917).
Cf. Matthews v. Woodbridge Township, 14 N.J. Misc. 143, 183 A. 150 (1936)—police officer on night duty froze fingers, could not seek shelter. Award stands.
Accord: Goodyear Aircraft Corp. v. Industrial Commission, 158 P. 2d 511 (Ariz. 1945)—adopting Caswell's Case, by said Lummus, J., and repudiating narrow language in McNicol's Case.
Accord: Ruckgaber v. Clark, 39 A. 2d 881 (Conn. 1944).
166. Caswell's Case, 305 Mass. 500, 26 N.E. 2d 328 (1940).
Accord: Murphy v. Cadzow Coal Co. (Scotland) 1943 S.C. 51, 57.
167. McNicol's Case, 215 Mass. 497, 102 N.E. 697 (1913)—where superintendent knew worker was habitually intoxicated and quarrelsome and permitted him to work, assault by drunkard arose out of employment. In undertaking to give a comprehensive definition, Rugg, C.J. unfortunately indulged in "exclusions," and it was these exclusions which many decisions quoted, not the "inclusions."
an act of God combines with the debris of the employer, and
the old definition is no longer an escape-corridor for the em-
ployer or insurer. So, too, it may not be peculiar to work-
ing in a factory that an employee slips on a well-kept floor.
He may more easily slip in his wife's slovenly kept kitchen.
Yet if, perchance, he trips or slips on the factory floor, nearly
every state in the Union gives him an award.

"Peculiar to the work and not common to the neighbor-
hood"—a mere doggerel to deny liability. Aside from indus-
trial diseases, many modern injuries are really not peculiar
to an employee's work; they may happen anywhere. Fortu-
ately, however, case after case, realizing the narrowness
of these words, now expressly deny that the injury need be
"peculiar to the employment," or have twisted their original
meaning so as to render them innocuous, especially so far
as street risks and acts of God are concerned. And its
counterpart, "not common to the neighborhood," has received

168. Reid v. Automatic Electric Washer Co., 189 Iowa 964, 179 N.W.
323 (1920).

Caccamo's Case, 316 Mass. 358, 55 N.E. 2d 614 (1944), and cases
there cited.
See also cases in notes 357 to 363 post, and text applicable thereto.

170. Eagle River Bldg. & Supply Co. v. Industrial Commission, 199
Wis. 192, 225 N.W. 690 (1929)—seventy-year old man froze foot
while loading sleigh in subzero weather. Award restored. Crown-
hart, J.: "The use of the phrase 'peculiar to the industry' was
unfortunate."
Pacific Employers Insurance Co. v. Industrial Accident Commiss-
ion, 19 Cal. 2d 622, 629, 122 P. 2d 570 (1942)—traveling salesman
contracted San Joaquin Valley fever—"need not be anticipated" or
be "peculiar to the employment"—Carter, J.
In Hughes v. St. Patrick's Cathedral, 245 N.Y. 201, 156 N.E. 665
(1927), a section boss in a cemetery was overcome by heat pro-
stration. An award was upheld without reliance on peculiar or
increased exposure, stating: "Although the risk be common to all
who are exposed to the sun's rays on a hot day, the question is
whether the employment exposes the employee to the risk."
See: Burroughs Adding Machine Co. v. Dehn, 110 Ind. App. 483,
39 N.E. 2d 429, 507 (1942). Bedwell, pr. J. "Many of the limita-
tions upon the granting of compensation under the act and judicial
inventions wholly unjustified by the language of the Act or the
humane purposes of the legislature in enacting it"—need not be
a different risk from that of general public.

171. Schroeder v. Industrial Commission, 169 Wis. 557, 173 N.W. 328
(1919)—"peculiar to the employment in that the work of the
employee could not be carried on without subjecting himself to
that risk."
(1922).
direct and unqualified disapproval.\textsuperscript{172} Hence that part of the old McNicol's case definition (originally taken from the narrowest English act-of-God cases) which led the majority in Massachusetts astray on street risks,\textsuperscript{173} and by repetition elsewhere had caused untold havoc to injured employees, is on its way to a deserved oblivion.\textsuperscript{174}

Lightning cases are now partially taken care of, by taking judicial notice, without experts, of increased risks, such as when wet and standing under a tree,\textsuperscript{175} or under an electric light in a building on the highest hill,\textsuperscript{176} or by seeking shelter in an isolated barn,\textsuperscript{177} or dilapidated house.\textsuperscript{178} It is hoped that some day the courts will recognize that when an employer sends a truck driver out in a storm, or a storm suddenly arises, and he happens to be where lightning strikes directly, there is a sufficient relation to the employment to sustain an award without indulging in metaphysics, or in judicial knowledge of the antics of lightning, or requiring him to fall on

\begin{footnotes}
\footnotetext[172]{Eagle River Bldg. Co. v. Industrial Commission, 199 Wis. 192, 225 N.W. 690 (1929)—"It makes no difference that the exposure was common to all out-of-door employments in that locality in that kind of weather."}
\footnotetext[173]{Lawrence v. Matthews (1929), 1 K.B. 1, 21 B.W.C.C. 345.}
\footnotetext[174]{See In re Harraden, 66 Ind. App. 298, 118 N.E. 142 (1917).}
\footnotetext[175]{Aetna Life Insurance Co. v. Industrial Commission, 81 Colo. 233, 254 P 995 (1927).}
\footnotetext[176]{Cf: Martin v. Plaut, 293 N.Y. 617, 59 N.E. 2d 429 (1944)—immaterial that risk may be common to all mankind if in the particular case it arises out of the employment.}
\footnotetext[177]{Colarullo's Case, 258 Mass. 521, 155 N.E. 425 (1927).}
\footnotetext[178]{The difficulty began with Donahue's Case, 226 Mass. 595, 116 N.E. 226 (1917)—fall on icy street, act of God combined with street risk. But years later, Shute's Case, 290 Mass. 392, 195 N.E. 354 (1935), partly disavowed these narrow English cases of injuries by elements, by stating: "So far as the decision in Warner v. Couchman (1912), A.C. 35, cited in McNicol's Case, 215 Mass. 497, is at variance with what is here decided, we are not disposed to follow it." See also Souza's Case, 316 Mass. 332, 55 N.E. 2d 611 (1944)—traveler's death by fire in stranger's hotel while sleeping. So too, Cardozo, J., refused to follow early English cases inconsistent "with the broader conception of employment," in Leonbruno v. Champlain Silk Mills, 229 N.Y. 470, 128 N.E. 711, 13 A.L.R. 522 (1920).}
\end{footnotes}
a sharp object, or jump from a height, or be cut by glass (as happened during an earthquake) to make a closer relation to the employment. The position of the employee, whether on the ground or in the air, may specially expose the worker to the risk of injury and thus supply the causal relationship. It is hard to see how England can support an award when a tree falls on a motorcycle during a gale, and deny it when a road steward is hit directly by lightning, or a journeyman baker is overcome by frostbite. And New York protects a chauffeur injured by a lunatic on the streets, but intimated it would not help a person injured by lightning directly, while a few states now boldly and properly declare that even a direct injury by lightning or sunstroke or freezing is compensable without proof of increased danger. The great weight of authority now com-

179. Dunngan v. Clinton Falls Nursery Co., 155 Minn. 286, 193 N.W. 466 (1923)—lightning struck horse, employee fell upon harrow, fracturing skull.

180. Brooks v. Greenburg, 67 S.W. 2d 823 (Mo. App. 1934)—power line struck by lightning causing fire, employee jumped from second story to escape. Collects, as act of God was only one factor.

181. See also Enterprise Dairy Co. v. Industrial Accident Commission, 254 P. 274 (Cal. App. 1927); aff'd, 202 Cal. 247, 259 P. 1099 (1927)—cut by glass milk bottle broken in an earthquake; collects.


186. Aetna Life Insurance Co. v. Industrial Commission, 81 Colo. 233, 254 P. 995 (1927)—"A majority of this court thinks that, since Oakley's employment required him to be in a position where lightning struck him, there was causal relation between the employment and the accident" (farmhand and horses killed directly by lightning). Hughes v. St. Patrick's Cathedral, 245 N.Y. 201, 156 N.E. 665 (1927)—heat prostration from exposure to the sun's rays.

Eagle River B. & S. Co. v. Industrial Commission, 199 Wis. 192, 225 N.W. 690 (1929).


pensates for heat prostration without proof of increased hazard, and whether due to unusual conditions or not. There is no adequate reason for preferring those injured by nature's sun or heat, over those injured by nature's lightning, winds, or other phenomena.

**Acts of war**

Acts of war or acts of the enemy have had but few precedents. In World War I England applied the same rules to war injuries as to acts of God. Where a bomb fell on an oil and color warehouse, causing fire and collapse, and the worker died from suffocating from the ensuing smoke and not from a direct hit, an award was upheld on the ground that he was subject to a special risk of fire and suffocation not shared by the ordinary public during air raids. So, too, where a trawler struck a mine en route to report floating mines, and the chief engineer was injured, an award was upheld.

But where a potman was cleaning a brass door-plate outside his employer’s public house when a bomb fell in the street, injuring him, it was held that there was no evidence of any special danger attached to the spot where the man was working; that it was therefore not a street risk, and hence the injury did not arise out of the employment. And where an engine driver, leaving his engine, was hit by shell fire, and there was no evidence that the enemy's fire was directed to any particular part of the town, it was held that the danger was common to all persons in the town, whether at work or not, and hence not out of the employment.

In this country, a salesman aboard the “Lusitania” (sunk

Baltimore & O. R. Co. v. Clark (4 Cir), 59 F. 2d 695 (1932).


See also Knyvett v Wilkinson Bros. (1918), 11 B.W.C.C. 50, 118 L.T. 476—explosion of enemy bomb in street, while claimant was walking on business (debt collector). No special danger, so no award.
by a German submarine before we entered the war) was held protected.\footnote{192}

In World War II Congress extended the longshore act to injuries on defence bases outside the continental United States.\footnote{193}

By statutory arrangement with the government, carriers have been reimbursed for unexpected and premiumless war-risk payments (under the longshore act) to injured civilian workers creating air fields and the like in the small Pacific islands attacked and seized by Japan early in the war; so no decisions as to a private carrier's war-risk liability are as yet available.

It is likely that during wars the number of injuries which occur will influence the legal result. If they are large in number, and generosity of decision will bankrupt the carrier or employer, very narrow rulings will probably be made, limiting awards very stringently. If but few occur, the compensation act will be applied liberally in war cases as it is now applied during times of peace; e.g., where a bomb fell (in peace time) on Wall Street, New York, injuries to a workman were held compensable as a street risk.\footnote{194} And in spite of

\footnote{192. Foley v. Home Rubber Co., 89 N.J.L. 474, 99 A. 624 (1917).}
\footnote{193. Royal Indemnity Company v. Puerto Rico Cement Corp., 142 F. 2d 237, cert. den. Oct. 23, 1944 (1944)—Defence Bases Act of August 16, 1941, applies even though Puerto Rico has its own act; so carrier under longshore act has subrogation rights, per Peters, J. Accord: Marine Operators v. Barnehouse, 61 F. Supp. 572 (N.D., Ill. 1944)—to Waterways, Alberta, Canada. Accord: Contractors v. Pillsbury, 150 F. 2d 310 (9 Cir. 1945)—to Island of Samoa. Accord: applied to Alaska—Huhn v. Foley Bros., 22 N.W. 2d 3 (Minn. 1946). Public Law 208—77th Congress, ch. 357, 1st Session (S. 1642) secs. 1-4, effective August 16, 1941—placing employment by private contractors under contract with the federal government in these islands and military outposts, and by amendment December 2, 1942, to include all foreign public works, under the longshore act. See McCauley, W., Summary of Federal Legislative and Administrative Changes during 1942 and 1943, and Zimmer, V.A., War Prisoners and Workmen's Compensation, both delivered at 29th meeting of the I.A.I.A.B.C., October, 1943, Harrisburg, Pa., obtainable from U.S. Department of Labor, Washington, D.C. Some of the longshore act provisions, administered by the U.S. Employees' Compensation Commission, for a time were made to apply, with certain changes, to WAACS, WAVES, SPARS and the Marine Reserve, and to Japanese confined in War Relocation Camps, but seamen in the American Merchant Marine, under federal agency, the War Shipping Administration, preferred to keep their civil maritime rights—McCauley, W., supra.}
\footnote{194. Roberts v. Newcomb & Co., 234 N.Y. 553, 138 N.E. 443 (1922).}
the existence of war, in this country, compensation boards and courts were still open to resident enemy aliens.  

Horseplay

_Horseplay_ or larking among employees is unfortunately too common. The use of the power hose and other means of "goosing," has caused many injuries or deaths to innocent victims, as has the throwing of nails, apples and like objects by employees who think pranks "funny." Does not the placing of employees in close proximity increase the risk of injury and make the result compensable? Courts disagree, the more liberal ones even years ago placing the burden on the offending industry, where the injured man is an innocent victim and does not take part in the horseplay. The aggressor, in the older cases, was usually denied recovery. Massachusetts denied recovery even to innocent victims.

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196. Stark _v._ State Industrial Commission, 103 Ore. 80, 204 P. 151 (1922)—death from air hose entering rectum. Sporting is not defense, as not “deliberate intention” to hurt self. _Dewing v. N.Y. Central R. Co._, 281 Mass. 351, 183 N.E. 754 (1933)—workers daily subjected to “goosing.”

197. _Leonbruno v. Champlain Silk Mills_, 229 N.Y. 470, 128 N.E. 711, 13 A.L.R. 522 (1920)—claimant hit in eye by apple thrown by one boy at another. Cardozo, J., said that the innocent victim “was injured, not merely while he was in a factory, but because he was in touch with associations and conditions inseparable from factory life. The risks of such associations and conditions were risks of the employment.” (Citing _Thom v. Sinclair_ (1917), A.C. 127, 142). Earlier English cases were inconsistent “with the broader conception of employment and its incidents to which this court is now committed.” Factories have crowded contacts, and resulting injuries are not to be measured “by the tendency of the acts to serve the master’s purposes.” Accord: _Pekin Cooperage Co. v. Industrial Board_, 277 Ill. 53, 115 N.E. 128 (1917)—jostled and fell to floor while waiting in line for pay.

Cf. _Petersen’s Case_, 138 Maine 289, 25 A. 2d 240 (1942)—innocent victim hurt trying to break aggressor’s hold. Employer knew, or ought to know, fooling frequently went on at the plant, so liable for compensation payments. See also note 201, post.


and finally came into line by statute in 1937. Non-participants, or innocent victims, injured as the result of horseplay are today clearly entitled to compensation by the weight of authority and reason. The more recent and better rule is to allow an award without regard as to who was the immediate aggressor where the injury is a by-product of associating men in close contacts, recognizing the "strains and fatigue from human and mechanical impacts." So long as causal relation to the work is shown, whether it be because the work placed the instrument of horseplay in the hands of a worker, or for other reasons, the victim of work-induced horseplay should be given compensation rights, without importing narrow common-law rules barring an aggressor, and without indulging in mental gymnastics to determine who was the aggressor. Using the word "aggressor" is to bring back into the compensation acts the common-law theories of contributory negligence and assumption of risk. Most courts admit

200. Mass. St. 1937, ch. 370, sec 1, "is injured by reason of the physical activities of fellow employees in which he does not participate, whether or not such activities are associated with the employment"—so now broader even than in New York.


See also cases in next note, 202, and cases marked contra, in note 199, supra.

202. Hartford Accident & Indemnity Co. v. Cardillo, 112 F. 2d 11, 17; 72 App. D.C. 52 (1940), and cases cited, per Rutledge, A.J. See note 102, supra.


See also Stark v. State Industrial Commission, 103 Ore. 80, 204 P. 151 (1922)—death from air hose entering rectum. Sporting is no defence, as not "deliberate intention" to hurt self.

Accord: Maltais v. Equitable Life Assurance Society of U.S., 40 A. 2d 837 (N.H. 1944)—where Marble, C.J., said: "matter of common knowledge that there might be brief 'lapses from duty' on the part of its employees as in 'horseplay, kidding and teasing'... 'He (decedent) was guilty at most of contributory fault,'" citing with approval Hartford Accident & Indemnity Co. v. Cardillo, 112 F. 2d 11, supra in this note, saying "The trend of our decisions is clearly in accord with these views." (participation by victim does not prevent recovery).

these theories are not applicable to compensation cases. And as *causal relation* to the work is really the basis of liability, then the sole test is the relation of the work to the horseplay.

**Incidents of work**

Must the injury arise out of the main work which produces the employee's wages? If hired to cut wood, or run a machine, does the protection cease when he goes for a drink of water to a near-by water-cooler placed there for that purpose? Or does the right to an award cease if, acting on an impulse of nature, he goes to the toilet and is injured on the way thereto or because of a defect in that room? Or if he is eating an employer-provided lunch, as permitted or required by the employer or by the nature of the employment, and he suffers food poisoning—does that arise "out of" his employment? Or if he is habitually, but without contract basis, is transported by the employer to work, and is not paid for transportation time—is a traffic accident en route to work compensable?

It is now well settled by the overwhelming weight of authority that all types of incidents, personal, habitual, contractual, or simply reasonable under the circumstances, may well arise out of the employment. They are not limited to acts of personal ministration, but include the incidental use of hotels, stairways, parking grounds—in fact anything reasonably incidental to the main work for which the worker is employed.  

203. See cases collected in notes 205 to 225 inclusive, post.


See Slavin v. A.M. Carmichael & Co. (H.L. Scotland), (1945) Session Notes 9—driver of tractor attempted to repair scraper attached to it, without waiting for regular repairmen. Denial of award reversed, the House of Lords saying: "An accident might arise out of the workman's employment not only if it occurred in consequence of his doing the actual job he was employed to do but also if it occurred in consequence of his doing something reasonably incidental to his job, although not within the normal scope of his employment."
most states a traveling salesman may go to the toilet and be protected, as an act of nature gives rise to an incident; but in a few, if he takes a bath except in a room or place provided for that purpose by the employer, he is doing something purely personal, engaging in something not incidental to his employment. The same salesman while lodging and sleeping in a hotel owned by the employer or in a stranger's hotel selected by the worker and paid for by the employer, in most states is protected from fire and other hazards without proof of increased risks, as lodging thereby becomes a contractual incident of his employment. The exclusion of hotel


But when a traveling salesman was sent to South Africa on business, and a deadly mosquito bit and killed him, a compensation award was upheld as "incidental to his itinerary," even though there was no proof that the biting occurred during working hours, as distinguished from sleeping or resting hours—Lepow v. Lepow Knitting Mills, Inc., 288 N.Y. 377, 43 N.E. 2d 450 (1942).

Gibbs Steel Co. v. Industrial Commission, 243 Wis. 375, 10 N.W. 2d 130 (1943)—traveling salesman slipped and fractured femur in shower bath in tourist camp. No award.

Contra in principle—Souza's Case, 316 Mass. 332, 55 N.E. 2d 611 (1944)—death by fire in lodging house.


Accord: Pacific Indemnity Company v. Industrial Accident Commission, 150 P. 2d 625 (Cal. 1945)—drowned in reservoir of employer, habitually used by grape-pickers to wash work-dirt.


Kentucky: Standard Oil Co. v. Witt, 283 Ky. 327, 141 S.W. 2d 271 (1940)—construction foreman died in hotel fire.


Massachusetts: Souza's Case, 316 Mass. 332, 55 N.E. 2d 611 (1944)—excellent discussion and citations by Qua, J. There is no need to show any increased risk of fire, and injuries other than by fire are compensable also.


Minnesota: Stansberry v. Monitor Stove Co., 150 Minn. 1, 183 N.W.
bath-room injuries from compensation protection rests on weak and dubious grounds.

It is now clear that the mere fact that an employee is performing a personal act when injured does not, without further evidence, place him outside the protection of the workmen's compensation acts. Many acts of a personal nature are clearly incidents of the employment, even though occurring during leisure time. Thus, getting fresh air, smoking, resting, eating food or ice cream, quenching

977, 20 A.L.R. 316 (1921)—traveling salesman killed in trying to escape hotel fire.

208. Pacific Indemnity Co. v. Industrial Accident Commission, 159 P. 2d 625 (Cal. 1945), and cases cited in the notes 209-225, post.

Dzikowska v. Superior Steel Co., 259 Pa. 578, 103 A. 351 (1917)—when employee lit a match for his cigarette, his apron, soaked with employer's oil, caught fire. Held: compensable.

211. Sullivan's Case, 241 Mass. 9, 134 N.E. 406 (1922)—in rest room, fell through glass window.
State Treasurer v. Ulysses Apartments, Inc., 232 App. Div. 393, 250 N.Y.S. 190 (1931)—painter smoked in violation of orders, while using inflammable paint remover. Whiting-Mead Co. v. Industrial Accident Commission, 178 Cal. 505, 173 P. 1105, 5 A.L.R. 1518 (1918)—lighting match to smoke, ignited turpentine-soaked bandage on injured hand. The court said "Tobacco is universally recognized as a solace. The tobacco habit is with us, even if mankind would be better off 'without the weed.'" Cf: In re Betts, 66 Ind. App. 484, 118 N.E. 551 (1918)—crossed street to buy tobacco. No award.


213. Vilter Mfg. Co. v. Jahncke, 192 Wis. 362, 212 N.W 641 (1927)—"eating of ice cream" like "drink of water."
thirst, whether by water, beer or wine, transportation to and from work, taking a bath provided by the employer, using a telephone or a toilet, or using a stairway or elevator, washing and pressing working clothes, obtaining war bonds, or getting eyeglasses have been held compensable incidents ("contractual," "reasonable," "fixed," "customary" or just plain "incidents") of one's employment.


219. Haskin's Case, 261 Mass. 436, 158 N.E. 845 (1927)—employer provided no toilet, so used bridge, fell over and was drowned. Accord: Zabriskie v. Erie R. Co., 86 N.J.L. 266, 92 A. 385 (1914)—no toilet facilities in work-building, so protected crossing street to employer's other building.

In Sachleben v. Gjellefald Co., 228 Iowa 152, 290 N.W. 48 (1940), while on a sewer job, the employee had a sudden need of moving his bowels, and to hide from public view went between two trains, and was injured by a train. Held: compensable incident.


223. Bethlehem Steel Co. v. Industrial Accident Commission, 161 P. 2d 59 (Cal. App. 1945)—fell on premises, going after war bonds, after ceasing work.

224. Ruckgaber v. Clark, 39 A. 2d 881 (Conn. 1944)—per Brown, J.

Incidents of the employment do not cease to be compensable merely because the same type of incident may occur in one's home or outside of the employment. Thus, for example, where the employer provides a smoking room, smoking accidents are incidental to the employment and compensable without showing an increased risk due to the employment.\footnote{226}

**Deviations**

Slight deviations are no defence under most state decisions. Thus a slight deviation to get a chew of tobacco,\footnote{227} or to ask a fellow employee the time,\footnote{228} or to throw away a cigarette,\footnote{229} is harmless, and awards were upheld where the injury occurred during the deviation. A fortiori, deviations sanctioned by custom are no defence.\footnote{230}

**Emergencies and unusual errands**

How about acts in emergency? Suppose a worker finds an employee of another contractor injured in a cave-in and himself is injured trying to assist, as an act of humanity;\footnote{231} or a hotel cook hired to cook only is burned warning guests of a fire;\footnote{232} or a truckdriver suffers injury while assisting at an accident blocking his route\footnote{233}—are these compensable?

\footnote{226} Puffin v. General Electric Co., 43 A. 2d 746 (Conn. 1945)—Dickenson, J. "We have never held that the conditions of the employment must be such as to expose the employee to extraordinary risks in order to entitle him to compensation in case of injury. The risk may be no different in degree or kind, than those he may be exposed outside of his employment. The injury is compensable, not because of the extent or particular character of the hazard, but because it exists as one of the conditions of the employment." (sweater caught on fire from own match). Accord: Martin v. Plaut, 293 N.Y. 617, 53 N.E. 2d 429 (1944).

\footnote{227} Wickham v. Glenside Woolen Mills, 252 N.Y. 11, 168 N.E. 446 (1929).


\footnote{230} Columbia Casualty Co. v. Parham, 69 Ga. App. 258, 25 S.E. 2d 147 (1943)—caught arm in elevator while throwing away his cigarette—employment at least "a contributing cause."

\footnote{231} Miller v. C.F. Mueller Co., 41 A. 2d 402 (N.J. 1945)—deviated to help fellow worker on a machine. See also excellent discussion as to smoking, by Stukes, J. in Mack v. Branch No. 12 etc., 35 S.E. 2d 838 (S.C. 1945).

\footnote{232} Waters v. Taylor Co., 218 N.Y. 248, 112 N.E. 727 (1916)—Hiscock, J. "There is a moral duty resting on principles of humanity."

\footnote{233} Stilson v. Littlewood, 244 App. Div. 858, 279 N.Y.S. 781 (1935).

Suppose ammonia instead of water is accidentally thrown on the face of a female worker to revive her after she fainted during a quarrel with the employer? New York managed to sustain an award in all but the last case. Most courts recognize the worker's right to protection in doing the humane thing. The employer responsible for compensation payments is usually the one upon whom the duty of rescue devolves, and, if two employers are involved, employees of another employer may be regarded as loaned for the emergency. And where employers send employees on unusual errands no matter how far removed from their usual work, the compensation protection continues in most states. Hence, a dairy employee sent to move a piano at a church bazaar, the church being a dairy customer, was given compensation for an auto injury en route; and similarly, a domestic servant ordered to secure her eyeglasses at a friend's house and injured by slipping on the pavement.

*Obtaining wages or tools*

Suppose the employee is on his way to obtain his wages or workclothes or tools, either during or after working hours? If such action by the employee is customarily, expressly or

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235. See Ocean Accident & Guar. Corp. v. Industrial Accident Commis- sion, 180 Cal. 389, 182 P. 36 (1919)—hurt while rescuing child nearly run down by employer's auto. To be sure, he was not employed to rescue children, but there was emergency. Puttkammer v. Industrial Commission, 371 Ill. 497, 21 N.E. 2d 575 (1939)—Farthing, J.: Illinois act copied from England, so "decisions of the English courts are of persuasive authority on subjects in common." Award upheld where coal truck driver picked up injured child in somebody else's collision and was struck and killed by a passing auto while carrying child. He did not break thread of his employment. "Giving aid to an injured child on the highway is just as natural and just as much to be expected from a driver of another vehicle as stopping to get liquid refreshment for himself."

236. Cherry v. Industrial Commission, 16 N.W 2d 800 (Wis. 1944), and cases cited per Fowler, J.

237. Ferragino v. McCue's Dairy, 128 N.J.L. 525, 26 A. 2d 730 (1942)—it "is not easy to see how he could have refused to obey except at the risk of his job." Not ultra vires for corporation building up goodwill.

impliedly permitted by the employer, injuries on the premises on the way to or from the accomplishment of such projects are clearly compensable. If a return to the place of employment for such purposes is justified, by usage or otherwise, even days after the termination of employment, the employee is protected against injuries on the premises during such return.

**Intoxication**

Suppose intoxication plays a part in the injury? Where the statute is silent as to the effect of intoxication, courts usually require proof by the employer or insurer that the drunkenness was the sole cause of the injury, and hence it “could not arise out of the employment,” or that it amounted to willful misconduct. Where the statute expressly permits the defence of intoxication, some require proof that it was the sole cause, or that it was the cause or the proximate cause; and it is not the proximate cause where it is

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Riley v. Holland & Sons Ltd. (1911), 4 B.W.C.C. 155, 104 L.T. 371—returning two days later.
240. See leading case of Parrott v. Industrial Commission of Ohio, 60 N.E. 2d 660 (Ohio, 1945)—returning six days later for wages and clothes.
See also cases in note 239, supra.
241. Phillips v. Air Reduction Sales Co., 337 Mo. 587, 85 S.W. 2d 551 (1935)—the degree of intoxication must be such that the accident could not arise out of the employment “because the employee could not have been engaged in it.” Employers should enforce rules against drinking by discharging employees, not by denying them compensation.
See also Hopwood v. Pittsburgh, 152 Pa. Super. 398, 33 A. 2d 658 (1943)—orderly had been drinking in violation of hospital rule, but that did not establish intoxication as “the cause” of the injury and death.
Griffiths & Sprague Stevedoring Co. v. Marshall, 56 F. 2d 665 (W.D. Wash. 1930)—under longshore act.
Elm Springs Canning Co. v. Sullins, 180 S.W. 2d 113 (Ark. 1944)—fell from truck in unknown manner after driving two-thirds of the long trip.
245. Reddick v. Grand Union Tea Co., 230 Iowa 108, 296 N.W. 800 (1941)—by statute must be “proximate cause.”
only a contributing cause\textsuperscript{246} or is a condition,\textsuperscript{247} not a cause.

There must first be proof of actual intoxication.\textsuperscript{248} Such a state is not necessarily proved by evidence that the employee had been drinking,\textsuperscript{249} or had a strong odor of liquor on his breath,\textsuperscript{250} or in his vomitus,\textsuperscript{251} or that his automobile zigzagged.\textsuperscript{252} In each case it is a question of fact on all the evidence, and the finding of the board or commission, if rationally possible, stands.\textsuperscript{253}

The burden is always upon the party raising the defense,\textsuperscript{254} and therefore is upon the insurer or employer;\textsuperscript{255} and if the evidence produced is disbelieved, the defence fails.\textsuperscript{256} Violation of an employer's rule against drinking is not necessarily fatal to an award.\textsuperscript{257}

And even proof of actual intoxication fails where the work placed the employee in a dangerous position, as on a

\begin{footnotes}
\begin{enumerate}
\item State v. District Court, 145 Minn. 96, 176 N.W. 155 (1920)—fell down stairway. Intoxication was only contributing cause, not proximate cause.
\item Connor Co. v. Industrial Commission, 374 Ill. 105, 28 N.E. 2d 270 (1940)—intoxication "had nothing to do with the death."
\item Bol v. Guaranteed Sanitation, 251 App. Div. 757, 295 N.Y.S. 173 (1937)—unwitnessed death, overcome by fumigating gas while operating with gas mask. On autopsy 3.8 per cent alcohol found in brain, but one can "navigate" with 4 plus. Award sustained that death did not result solely from intoxication while on duty.
\item Martin v. City of Biddeford, 138 Me. 26, 20 A. 2d 715 (1941).
\item Evans v. Louisiana Gas & Fuel Co., 19 La. App. 529, 140 So. 245 (1932).
\item Shelby Mfg. Co., Inc. v. Harris, 112 Ind. App. 627, 43 N.E. 2d 315 (1942)—consistent with zigzagging due to defect in car.
\item Eldrige's Case, 310 Mass. 830, 38 N.E. 2d 566 (rescript without opinion, 1941).
\item Martin v. City of Biddeford, 138 Me. 26, 20 A. 2d 715 (1941).
\item State v. District Court, 145 Minn. 96, 176 N.W. 155 (1920).
\item Napoleon v. McCullough, 89 N.J.L. 716, 99 A. 385 (1916).
\item Phillips v. Air Reduction Sales Co., 337 Mo. 587, 85 S.W. 2d 551 (1935)—read evidence in most favorable view to uphold award.
\item Johnson v. Johnson Lumber Co., 200 So. 48 (La. App. 1941).
\item Reddick v. Grand Union Tea Co., 230 Iowa 108, 296 N.W. 800 (1941).
\item Martin v. City of Biddeford, 138 Me. 26, 20 A. 2d 715 (1941).
\item Hopwood v. Pittsburgh, 152 Pa. Super. 398, 33 A. 2d 658 (1943)—orderly in hospital had been drinking, but that did not establish intoxication as "the cause"—per Hirt, J.
\end{enumerate}
\end{footnotes}
wagon or stairway or height, and the intoxication was only a condition, or even a contributing cause. This is especially justified in states where the legislature has not seen fit to give employers or insurers the express defence of “intoxication.” The defence, therefore, is that the injury did not arise “out of” the employment, and it is only where the employment played absolutely no part in the injury, and the intoxication was solely responsible for said injury, that the defence should be allowed to prevail.

The fact that the driver or third party is drunk does not prevent the employee-helper from getting an award, even though the driver’s intoxication was the cause of the accident.

Violations of rules

Suppose the worker violates a rule, instruction or law? Suppose, for example, an employer warns an employee not to drive a truck over a given trip of one hundred miles more than twenty miles per hour, and further, warns him to stay on the right-hand side of the road and to violate no state, county, city or town law, and not to do thus and thus; and the worker is injured while going twenty-two miles per hour. If warnings could avoid liability, many employers would print rules miles long, and if they did not, the carriers would do it for them.

By the weight of authority, violation of rules or instructions of employers do not necessarily prevent recovery on

260. State v. District Court, 145 Minn. 96, 176 N.W 155 (1920)—fall down stairway.
See also Griffiths & S.S. Co. v. Marshall, 56 F 2d 665 (W.D. Wash. 1930)—defective winch suddenly fell; no defence that employee intoxicated as it might also have killed a sober man—not “sole” cause.

261. See notes 241, 258 and 260, supra. Cf. falls due to idiopathic conditions, notes 361-363, post, and text applicable thereto.
263. Macechko v. Bowen Mfg. Co., 179 App. Div. 573, 166 N.Y.S. 822 (1917)—“To hold otherwise would be to permit an employer by means of a comprehensive set of rules to render the statute practically nugatory.” (Collects even though there was a rule against putting hand in press in motion to remove material).
the ground that the injury did not arise out of the employment.\[264\] The great majority of states now rule that violations or disobedience while acting within the scope of the employment do not avoid liability (1) if they are mere conditions and not causes of the accident or injury;\[265\] or (2) if the rule which the claimant broke was not one which limited the sphere of his employment, but simply dealt with his conduct in acting within his employment; i.e., misconduct or disobedience within the sphere of the employment is still compensable, e.g., simply doing his work in the wrong way, as not stopping his machine first to remove obstructions, or sitting instead of standing the safe way, or not wearing gloves on cold days in violation of orders, or violating speed and road laws;\[266\] or (3) if the violation is mere thoughtlessness, not


See also many cases in notes 265-271, post.

265. Royal Indemnity Co. v. Hogan, 4 S.W. 2d 98 (Tex. Civ. App. 1928)—picked up two young ladies while testing brakes, but ladies not cause of collision accident which followed. Sawyer's Case, 315 Mass. 75, 51 N.E. 2d 949 (1943)—oil truck driver, in violation of rule, picked up soldier hitch-hiker. Truck overturned, no evidence that soldier was "positive factor" in accident. Violation of rule was "mere condition or attendant circumstance of the accident."

266. Ricci v. Katz, 267 App. Div. 928, 44 N.Y.S. 2d 781 (1944)—forbidden use of tractor. "The use of the tractor was but an incident in the principal job of removing and carting away stones. Claimant performed his work in a forbidden manner, rather than performing work which had been forbidden."


Rogers v. Garside (1915), 9 B.W.C.C. 91, W.C. & Ins. Rep. 535—misconduct within sphere of employment compensable, and misdirection to call it added risk without getting all facts as to how hand was drawn into moving machinery. New trial ordered.

Whitehead v. Reader (1901), 2 K.B. 48, 84 L.T. 514—carpenter, grinding tools, told not to touch machinery, but band broke, and in order to go on with his work he tried to replace the band and was injured. Held: doing forbidden work in master's interest still compensable.

Chila v. N.Y. Central R. Co., 251 App. Div. 575, 297 N.Y.S. 850 (1937)—porter used tracks instead of street as passageway between
wilful;\textsuperscript{267} or (4) if instructions are honestly misunderstood;\textsuperscript{268} or (5) if the rules are not enforced, or are a dead letter;\textsuperscript{269} or (6) if the rules are not conveyed to the employee or he does not know of the rules.\textsuperscript{270} Narrow tort rules, having a basis where third parties make claims against an employer, have no sound application when an employee-employer relationship

two railroad towers—in sphere but forbidden manner. Blair & Co. Ltd. v. Chilton (1915), 8 B.W.C.C. 324, 115 L.T. 514—told to use safe platform and not to sit while turning wheel—"workman acting within sphere of employment, though doing his work in the wrong way."


Day v. Gold Star Dairy, 307 Mich. 383, 12 N.W. 2d 5 (1943)—truck driver going up hill forty-seven and one half miles per hour on wrong side of road hit oncoming automobile. Award stands, even though found guilty in criminal court.

Corrins v. Barberi, 247 N.Y. 357, 160 N.E. 397 (1928)—fell asleep on wagon on ferry, in disobedience to orders, merely negligence and no bar to recovery.

Capital Transit Co. v. Hoage, 65 App. D.C. 382, 84 F 2d 235 (1936)—employee was told to use insulated gloves, and was electrocuted when he did not do so. Disobedience did not separate him from his employment. Admonition was simply to direct manner in which he did his work, i.e., repairing cylinders.

In Olson v. Robinson, 168 Minn. 114, 210 N.W. 64 (1926)—a stock boy in department store was killed running elevator against orders. Dependents collect, as disobedience does not necessarily place him outside protection of the act.

Griffith v. Coal Co., 229 Iowa 496, 294 N.W. 741 (1940)—overcrowded "man trip" in violation of rule of six-men maximum, and failed to sit down.

Cf: Hartz v. Hartford F Co., 90 Conn. 539, 97 A. 1020 (1916)—clerk, hired to inspect, gave fellow employee assistance with barrel and strained self. Still within scope as "for his master's benefit"—otherwise, "would punish energy and loyalty and helpfulness and promote sloth and inactivity in employees."


West's Case, 313 Mass. 146, 46 N.E. 2d 760 (1942)—disobedience by minor.


270. Sawyer's Case, 315 Mass. 75, 51 N.E. 2d 949 (1943). "There was no evidence that the deceased had ever received any personal instructions in this connection from the owner."
alone is involved.\textsuperscript{271} England, by a 1923 amendment, has made violations of statutes and regulations harmless for death cases and for cases of serious disablement if done in connection with the employer's trade or business,\textsuperscript{272} while West Virginia still punishes "wilful disobedience" by denying all compensation.\textsuperscript{273}

True, where the rule-violator deliberately and knowingly exceeds the scope of his authority and goes beyond his assigned work or anything incidental thereto, the injury does not arise out of the employment. The real reason is that he went beyond the scope of his authority and hence the injury did not arise out of the employment. Unless the disobedience brings the case within serious and wilful misconduct, and hence is an additional statutory reason for denying compensation, courts are not justified in reading in a new defence based on violations of rules (really assumption of risk or contributory negligence in a new form).\textsuperscript{274}

\textit{Added risk}

An easy way to deny an award is to say the worker "added a peril"\textsuperscript{275} to the job and hence cannot recover. "\textit{Added risk}" or "wanton incurrence of special danger" as an excuse for denying an award because an employee was contribu-
torily negligent is all too common. Most courts agree that negligence or assumption of risk by the employee is no bar in a compensation case, and having uttered that phrase, a few substitute "added peril" (merely negligence or assumption of risk in most cases) as the excuse for the worker's legal demise. Thus awards were denied where a garbage collector jumped off his truck in motion going three and one half miles an hour, and where a carpenter jumped on a slowly moving train. So far as it means that the employee was not acting within any reasonable scope of the employment when injured, i.e., that the injury did not arise "out of" the employment, it is proper to deny an award; but the writer feels that the words "added risk" should never be used in


277. Lazar's Case, 293 Mass. 538, 200 N.E. 275 (1936)—"negligence on the part of the employee does not deprive him of compensation." Accord: Smith v. Industrial Accident Commission, 18 Cal. 2d 843, 118 P 2d 6 (1941), and Griffith v. Coal Co., 229 Iowa 496, 294 N.W 741 (1940)—mere negligence no bar.

278. Anderson v. Woesner, 159 P 2d 899 (Idaho, 1945)—boy attempted to swing onto truck—mere "negligence"—per Alshie, C.J.

279. Illinois: Herald Printing Co. v. Industrial Commission, 345 Ill. 25, 177 N.E. 701 (1931)—assisting junkman, climbed up to adjust bale—"danger of his own choosing." Iowa: Kraft v. W Hotel Co., 193 Iowa 1288, 188 N.W 870, 31 A.L.R. 1245 (1922)—maid in hotel, after hours, and not subject to call, burned by alcohol lamp which she had used in curling her hair. Held: "added peril" violated hotel rule to have such a lamp. Dissent: "That might be negligence on her part; but this proceeding is not based upon negligence."

280. Eifler's Case, 276 Mass. 1 176 N.E. 529 (1931)—majority decision of court leaves open the question if duty had required jumping off moving truck or it was a "recognized practice." Contra: Strong v. Wright (1922), S.C. 515, 15 B.W.C.C. 307—lorry going four or five miles an hour. No prohibition by employer, so recovers. "That is just an ordinary piece of negligence." Also contra: Smith v. Industrial Accident Commission, 18 Cal. 2d 843, 118 P 2d 6 (1941)—jumped from moving truck. "It is nothing more than a charge of negligence which is no defence in proceedings for workmen's compensation."


compensation cases. And most jurisdictions have either so stated or have ignored the doctrine entirely. Iowa held the use even of private airplanes for travel unless prohibited expressly, was not a "rash act" and a fall in one was compensable. Where the compensation statute limits denial to

283. In Associated Indemnity Corp. v. Industrial Accident Commission, 18 Cal. 2d 40, 112 P. 2d 616 (1941), Carter, J. said, at p. 46 (where superintendent rode on non-passenger switch engine, rather than walk, and broke leg stepping off to avoid steam). "The doctrine urged by petitioner must be applied with extreme caution for the reason that it is barely distinguishable from the rules of contributory negligence and assumption of risk which are not applicable in compensation cases. Indeed, it may well be asserted that the doctrine of 'added risk'—that is, where an employee assumed a risk greater than that usually incident to his employment, he cannot recover—cannot be followed in California because it is in effect nothing more than contributory negligence (Campbell, Workmen's Comp., Vol. 1, Sec. 238; Cal. Const. Art. XX, Sec. 21). The circumstances giving rise to the doctrine are pertinent in determining the issue as to whether the injury arose out of or in the course of the employment."

In Archie v. Green Lumber Co., 222 N.C. 477, 23 S.E. 2d 834 (1943), the majority disagreed with the dissenting member that North Carolina should follow the Massachusetts Withers' Case. See also Stark v. State Industrial Commission, 103 Ore. 89, 95, 204 P. 151 (1922).

In Griffith v. Coal Co. 229 Iowa 496, 294 N.W. (1940), a coal miner, in violation of a rule that not over six ride the "man trip," hopped on back, made the seventh rider, forgot to "duck" and was injured. Held: not added risk, but mere negligence, and misconduct here not a bar.

See Cordero, Mgr. v. Industrial Commission, 60 Puerto Rico Rep. 851 (1942)—jumped from auto to truck, to get transportation. "The theory of the assumption of an additional risk is, in our opinion, untenable"—per Mr. Chief Justice Del Toro.

284. Chila v. New York Central R. Co., 251 App. Div. 575, 297 N.Y.S. 850 (1937)—performing work hired to do, but in a forbidden manner. Railroad porter used tracks, instead of street, as passageway between two towers he cleaned (1,200 feet apart). He collects, though ordered three years before not to use tracks.

State Treasurer v. Ulysses Apartments, 252 App. Div. 398, 250 N.Y.S. 190 (1931)—painter using inflammable paint remover still was in scope of employment, even though he lit a cigarette in violation of rule, and was burned to death.

Gomer v. Chase Co., 97 Conn. 46, 115 A. 677 (1921)—in spite of doctor's warnings, painter went on scaffold, had fainting spell and fell, fracturing skull. Wheeler, C.J., said it was not wilful misconduct and hence award stands. No attempt by court to read in "added risk."


In Strong v. Wright & Co. (1922), S.C. 515, 15 B.W.C.C. 307, a workman jumped off a moving lorry to recover a jacket. A denial of an award was reversed.

Accord: Anderson v. Woessner, 159 P. 2d 899 (Idaho, 1945)—sick employee jumped on moving truck, though advised to walk.

two things only, (1) "not out of" and (2) "serious and wilful misconduct," the court is not justified in reading in "added risks." Judicial insertion of defences not specifically granted by the legislature is indefensible in remedial legislation intended to widen the rights of injured workers.

The compensation act does not create a stage of liability part way between "not out of," and "wilful misconduct." The words "added risk" are a court-created hybrid which has confused compensation decisions as has its common-law twin, "contractual" (versus "voluntary") assumption of risk. In the compensation act, as in some tort cases, the legislature abolished contributory negligence and assumption of risk. Equally promptly "contractual" and similar forms of assumption of risk stole in.

"A phrase begins life as a literary expression; its felicity

286. Associated Indemnity Corp. v. Industrial Accident Commission, 18 Cal. 2d 40, 112 P. 2d 615 (1941).
Massachusetts has recently and more properly spoken of "the scope of the employment" rather than "added risk."
Cf. Enga v. Sparks, 315 Mass. 120, 51 N.E. 2d 984 (1943), when Ronan, J., said "if the plaintiff was not acting within the scope of his employment when injured, but was doing something he was not authorized to do, he could not recover."
See Lazarz's Case, 293 Mass. 538, 200 N.E. 275 (1936), where Lummus, J., said the injury was not "out of the employment, as it was "outside the scope of the employment," and "negligence on the part of an employee does not deprive him of compensation."
Massachusetts refused to extend the doctrine of added risk to many cases: Nickerson's Case, 218 Mass. 158, 105 N.E. 604 (1914)—cleaning moving machinery.
Swardleck's Case, 264 Mass. 495, 163 N.E. 161 (1928)—jumping on a moving elevator, after leaving it against orders.
Shute's Case, 290 Mass. 393, 195 N.E. 354 (1935)—failure of moron to wear gloves in 17° below weather.
Masguskas's Case, 298 Mass. 80, 9 N.E. 2d 380 (1937)—leaned into elevator shaft and fell in.
West's Case, 313 Mass. 146, 46 N.E. 2d 760 (1942)—minor wiped moving machinery in violation of order.

287. See Mr. Justice Rutledge in Hartford Accident & Indemnity Co. v. Cardillo, 72 App. D.C. 52, 112 F. 2d 11 (1940)—"Any other view would reintroduce the conceptions of contributory fault . . . and independent, intervening cause as applied in tort law, which it was the purpose of the statute to discard"; that the legislature (Congress) has specifically set forth the exceptions and the courts should not read in new ones.
Accord: Anderson v. Hotel Cataract, 17 N.W. 2d 913 (S.D. 1945)—per Smith, P.J.


But see Lummus, J., in Lakube v. Cohen, 304 Mass. 156, 23 N.E. 2d
leads to a lazy repetition, and repetition soon establishes it as a legal formula, indiscriminately used to express different and sometimes contradictory ideas.1290

If the court wishes to deny an award on the ground that the injury did not arise out of the employment, there is adequate language available without resorting to the wrongful use of the words “added risk.”291 “Unless great care be taken the servants’ rights will be sacrificed by simply charging him with assumption of risk under another name.”292

Old confusions die hard, yet may it be said to the everlasting credit of the Supreme Court of the United States that it has now closed the door to one of the twins,—contractual and every other type of assumption of risk.

“We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defence of assumption of risk in that statute, did not mean to leave open the identical defence for the master by changing its name to ‘non-negligence.’”293

Similarly, it is high time that those few states who use the twin term “added risk,” or “added peril” abandon it from

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144 (1939)—contractual assumption of risk is “inaccurate expression.”

Accord: Taylor v. Newcomb Baking Co., 317 Mass. 609, 59 N.E. 2d 293 (1945)—“speaking more accurately, it excused the defendant from the duty of care with respect to the risk assumed”—per Qua, J. Since Nov. 15, 1943 even contractual assumption of risk was abolished for most uninsured employers in Massachusetts. St. 1943, ch. 529, Sec. 9A.

Cf. Blair v. Baltimore & O. R. Co., 323 U.S. 600, 89 L. ed. 446 (1945)—even before 1939, contractual assumption of risk did not include obvious dangers which superior orders his worker to face.


In Stark v. State Industrial Commission, 103 Ore. 80, 99, 204 P. 151 (1922), where employees used to sport with the air hose, and one was killed, the court awarded compensation, saying the commission’s contention, contra: “partakes of the nature of contributory negligence, and assumption of the risk of an act of a fellow employee, neither of which have any place in the Workmen’s Compensation Act.”

293. Mr. Justice Black in Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 63 S.Ct. 444 (1943)—railroad policeman inspecting car seals in yard, killed by train.

Accord: Peterson, J. in Gonyea v. Duluth M. & I.R. Ry. Co., 19 N.W. 2d 384 (Minn. 1945), and cases cited.
their decisions. The more recent English and Massachusetts cases are headed in that direction. "Such a doctrine has no proper place in a philosophy which discards the principle of negligence."

Unexplained deaths

Unexplained deaths have made Sherlock Holmeses of many judges. The distinction between "reasonable inferences" (compensable) and speculation, conjecture and surmise (non-compensable) would certainly and often baffle Watson's credulity.

294. In 1925 England held that the accident arose out of the employment where a dust collector was killed trying to jump on his employer's moving lorry—Clark v. Southworth Corp. (1925) 18 B.W.C.C. 367, 133 L.T. 763. In 1922 the House of Lords upheld an award where a workman, part of whose job it was to clean machinery, cleaned it in motion in disobedience to a seen notice prohibiting cleaning in motion—Estler Bros. v. Phillips (1922), 15 B.W.C.C. 291, 127 L.T. 73. And recent Massachusetts cases, while not denying the principle of added risk, uphold awards, where previously added risk would have been a valid defence:

Warakomski's Case, 310 Mass. 657, 39 N.E. 2d 572 (1942)—fell in tub cleaning employer's shellac from own rubbers. The board found there was no added risk—upheld.

Schneider's Case, 311 Mass. 427, 41 N.E. 2d 561 (1943)—the board found that employee, by dangling his legs from back of truck, did not add risk to employment—upheld. "Still engaged in the work for which he was hired."

See also Ferreira's Case, 294 Mass. 405, 2 N.E. 2d 454 (1936)—assisting fellow worker, in employer's interest.

295. Campbell, D.A. Workmen's Compensation (1935), Vol. 2, sec. 233, pp. 230, 231. In his foreword, p. IX, he says: "A further difficulty exists in that the revolutionary principles of this new social creed are interpreted by a Judiciary which was trained in the earlier philosophy and . the tendency is to revert to common-law principles creating anachronisms."


Accord in principle: Rutledge, J., in Hartford Accident & Indemnity Co. v. Cardillo, 112 F 2d 11, 17 (1940).

See Smith v. Industrial Accident Commission, 18 Cal. 2d 843, 118 P. 2d 6 (1941).

296. Sawyer's Case, 315 Mass. 75, 51 N.E. 2d 949 (1943)—inference from right-hand position of dead hitch hiker, driver getting out of left-hand window.

See Edwards v. Warwick, 317 Mass. 573, 59 N.E. 2d 194 (1945)—"may" not fatal, where elsewhere definite opinion that (81 year old) elderly woman's death hastened, without need of proof of amount of hastening, and even though death "would have occurred at no very remote date from other causes"—per Qua, J.

297. McMahon's Case, 236 Mass. 473, 128 N.E. 778 (1920)—bus boy found dead in elevator well.

Accord: Stevens v. Industrial Commission, 145 Ohio St. 198, 61 N.E. 2d 198 (1945)—auto death far from mine—mere surmise whether on business or social mission.
Of course, some of the difficulty is unavoidable. Awards were upheld on inferences when a cab driver’s body was found in a river, with his valuables missing,298 and a general caretaker was found dead on the employer’s premises from a gunshot wound,299 and where a gasoline truck driver was discovered fatally burned near the truck in which a soldier “pick-up” was still on the front seat burned to death.300 The courts usually abide by the decision of the hearer of the facts, unless they can say that “taking all the factors into account the board drew an inference that no reasonable man could draw.”301 The death of the employee usually deprives the dependent of his best witness—the employee himself—and, especially where the accident is unwitnessed, some latitude should be given the claimant.302

Circumstantial evidence may be such as to be above speculation and conjecture and hence legally sufficient to sustain a dependency award by inferences from undisputed facts produced in evidence. One inference may be based on another inference.303 Hence the disappearance of a husband, last seen hurrying on the job near the waterfront, with proof that he did not leave by the only gate-exit, with no cause for suicide, is sufficient, with other similar circumstances, to sustain an award for “accidental” drowning, even though seven years had not expired and dragging in winter had not produced the body.304 A wait of seven years to establish death applies only to an unexplained absence.305

In addition, express statutory presumptions or inferences

300. Sawyer’s Case, 315 Mass. 75, 51 N.E. 2d 949 (1943).
301. Ibid.

Accord: Woolworth Co. v. Industrial Accident Commission, 17 Cal. 2d 604, 111 P. 2d 313 (1941)—fell from window to which he had gone to get relief from “stuffy” feeling. Award cannot be disturbed unless inferences drawn are “wholly unreasonable.”

302. Burke v. B.F. Nelson Mfg. Co., 18 N.W. 2d 121 (Minn. 1945)—per Matson, J.

that an unwitnessed death arose out of the employment are allowed in some jurisdictions, where the employer provides no contrary proof, and when last seen the deceased was working or had properly recessed.\textsuperscript{306}

**Suicide**

How about suicide? Suppose an injury is so painful that the worker commits suicide rather than lead a life of horrible pain? Many states think of the victim as having committed a crime himself (suicide being a crime) and thereby breaking the chain of causation\textsuperscript{307}—a bit of narrow common law harking back to the days of railroad-favoring judges.\textsuperscript{308} The weight of authority still holds that suicide ordinarily breaks the chain of causation, and that an award is allowed only when the suicide is due to an uncontrollable impulse, or occurs during a delirium so strong that the deceased did not realize he was ending his life, and the suicide was connected with an insanity caused by the injury.\textsuperscript{309}

\begin{itemize}
\item \textsuperscript{306} Travelers Insurance Co. v. Cardillo, 140 F 2d 10, 78 App. D.C. 255 (1943)—ice technician at a public rink slept in small room for convenience of employer. He was beaten, tied and set on fire and permanently injured for unknown reasons. Presumed that injuries on premises in connection with his employment arose out of employment unless the contrary is shown.
\item Norris v. New York Central R. Co., 246 N.Y. 307, 158 N.E. 879 (1927)—assuming or inferring causal relationship.
\item Ruschetti's Case, 299 Mass. 426, 13 N.E. 2d 34 (1938)—“chain of causation is broken by the voluntary though insane choice of the injured person to die”—arm amputated, hanged self.
\item Jones v. Traders & General Insurance Co., 140 Tex. 599, 169 S.W. 2d 160 (1943)—suicide is an independent agency that breaks the casual connection between injury and death—per Mr. Presiding Judge Smedley.
\item Konaszewskas v. Erie R. Co., 41 A. 2d 130 (N.J. 1945)—“The intentional act of the deceased broke the causal connection even though the brain was injured by the blow suffered in the course of the employment.”
\item Cf. Lupfer v. Baldwin Locomotive Works, 269 Pa. 275, 112 A. 458 (1921)—suicide for uncontrollable impulse, following pain due to diseased condition from electric shock.
\item See excellent dissenting opinion by Fowler, J., in Barber v. Industrial Commission, 241 Wis. 462, 6 N.W. 2d 199 (1942)—no break in causal chain, refuses to accept “any species of fine-spun reasoning.”
\item Sponatski's Case, 220 Mass. 526 108 N.E. 466 (1915)—molten lead in eye, uncontrollable impulse, jumped through window.
\item Gatterdam v. Dept. of Labor, 185 Wash. 628, 56 P 2d 693 (1936)—because of pain in injured toe, following osteomyelitis, spoke of suicide were it not for his family; later shot self in bathroom. Held: took life as result of uncontrollable impulse or delirium, all having origin in foot injury. His earlier restraint because of family points to final act as one without capability of appreciating consequences.
\item See also Hepner v. Dept. of Labor & Industry, 141 Wash. 55, 250 P 461 (1926)—knee injury, insanity, walked into moving train.
\end{itemize}
The legislature, however, has now altered that rule in Massachusetts to allow compensation when, "due to the injury, the employee was of such unsoundness of mind as to make him irresponsible for his act of suicide."\textsuperscript{1} England, by using a social conscience rather than legal technicalities, and with no statutory help, recognized that if suicide is the result of \textit{insanity or mental derangement} caused by the accident or injury, compensation is due the dependents, without discussion as to whether the suicidal death was due to an uncontrollable impulse, and the insane man understood that he was ending his life.\textsuperscript{2}

\textbf{Mistakes}

\textit{Mistakes} may arise out of the employment. Thus mistaking poison for drinking water was held compensable,\textsuperscript{3} as was confusing two medicines prescribed by the doctor,\textsuperscript{4} or mistaking a stairway for the toilet door and falling.\textsuperscript{5}

\textbf{Assaults}

Do \textit{assaults} arise out of the employment? They do if the assault is causally related to the work. It is sufficient if after the event there is apparent to the rational mind a causal

\textsuperscript{1} Changed by statute 1937, ch. 370, sec. 2 (Mass. G.L. (Ter. Ed.), ch. 152, sec. 26A).

\textsuperscript{2} Marriott v. Maltby Colliery (1921), 13 B.W.C.C. 353, (1921) W.N. 7 C.A.—miner's severely injured hand caused insanity, and suicide by cutting throat was the result of the insanity.

\textsuperscript{3} Dixon v. Sutton, etc., Colliery (1930), 23 B.W.C.C. 135—miner depressed from nystagmus, found in canal two and one-half miles from home. Mental derangement is as competent as insanity eo nomine to cause death to be result of accident.

\textsuperscript{4} See Stapleton v. Keenan, 265 N.Y. 528, 193 N.E. 305 (1934)—awake all the night before, because of pain from infected hand; committed suicide by hanging while temporarily insane.


\textsuperscript{6} Osterbrink's Case, 229 Mass. 407, 118 N.E. 657 (1918).

\textsuperscript{7} Accord: Elliott v. Industrial Accident Commission, 21 Cal. 2d 281, 131 P. 2d 521 (1942)—indisposition, drank carbon tetrachloride labelled "wine," in spite of rule against drinking liquor.


\textsuperscript{9} Doyle's Case, 256 Mass. 290, 152 N.E. 340 (1926)—nurse in sanitarium. See also American Mutual Liability Insurance Co. v. Parker, 188 S.W. 2d 1006 (Tex. Civ. App. 1945)—mistake of fact, on premises thinking time left for doing some work.

\textsuperscript{10} Hughe's Case, 274 Mass. 540, 175 N.E. 95 (1931)—mistook doors.
connection between the conditions under which the work is required to be performed and the resulting injury. And it makes no difference whether the assault takes the form of murder or rape, or whether there is in fact an increased risk or danger, where the conditions under which the work is done causes exposure to the risk, even arising outside the sphere of the employer's control.

A fortiori, if the employment increases or contributes to the risk of assault, even though the increase or contribution be small in degree, the assault is compensable. Where work places the worker on lonely roads in the early morning hours, the character of the employment is considered a contributing factor. Where the work in any reasonable degree increases the risk or chance of assault, the resulting injury is compensable. Thus awards have been sustained where a Y.M.C.A. attendant was assaulted by a drunken sailor; where an innocent employee was struck by a superior fellow

315. Anderson v. Hotel Cataract, 17 N.W. 2d 913, 915 (S.D. 1945)—"a rational mind can trace the injury to a risk inherent in the employment."
U.S. Fid. & Guar. Co. v. Barnes, 187 S.W. 2d 610 (Tenn. 1945)—watchman killed.
Giracelli v. Franklin Cleaners & Dyers, 42 A. 2d 3 (N.J. 1945)—rape.

Lundell v. Walker, 204 Ark. 871, 165 S.W. 2d 600 (1942).

317. Giracelli v. Franklin Cleaners & Dyers, 42 A. 2d 3 (N.J. 1945)—raping of sales clerk, alone in store with customer, held to arise out of the employment ( negro, brandishing knife, seeking wife's suit).

318. Hartford Accident & Indemnity Co. v. Cardillo, 112 F. 2d 11, 72 App. D.C. 52 (1940); cert. den. 60 S.Ct. 1100.
See also Casualty Reciprocal Exchange v. Johnson, 148 F. 2d 228 (5 Cir. 1945)—night worker killed by unknown assailant while getting a drink during a race riot.
See also cases in notes 317, supra, and notes 319—336, post.

319. In Lee v. Breckman, Ltd. (1928), 21 B.W.C.C. 32, 35, 138 L.T. 610, the court says a workman can recover if he can show "a risk of being assaulted such as would not be present if he were not in the employment."
For English cases see notes 93—100, supra, and text applicable thereto.

Gargano v. Essex County News Co., 129 N.J.L. 369, 29 A. 2d 879 (1943)—collector of money assaulted and stabbed on lonely street by five men at 2 a.m. Whether the motive was to commit robbery or not, the character of the employment was a "contributing factor."

321. See note 320, supra.

worker;[328] where the employer knew the drunken, quarreling
nature of the assailant;[329] where a discharged waiter murdered his superior;[329] where a chauffeur on an errand in a
crowded city street was stabbed by an insane man;[330] where a
taxi-cab driver got into a dispute over a fare and his rights
on the street;[331] and where a quarrel began when the checker
called his helper "Shorty."[332] Awards have been denied where
a night watchman was mistaken for a yegg by a sheriff and
shot,[333] and where the assault was for personal reasons, e.g.,
refusing a fellow worker a loan;[334] but assaults by members
and non-members of labor unions are usually compensable,
when the labor disputes are the causative factors.[331]

Lundell v. Walker, 204 Ark. 871, 165 S.W. 2d 600 (1942)—farm
boss impulsively, irrationally shot and killed laborer on telling
him he was discharged.
325. Cranney's Case, 232 Mass. 149, 122 N.E. 266 (1919); and vice
versa where plantation foreman impulsively and irrationally shot
employee, not as a private transaction, but as part of dismissal—
Lundell v. Walker, 204 Ark. 871, 165 S.W. 2d 600 (1942).
Accord: Hartford Accident & Indemnity Co. v. Hoage, 66 App. D.C.
160, 85 F. 2d 417 (1936)—a crazy man entered the kitchen of the
restaurant often used by the public to reach the toilet and dug a
knife into the chef's nose, causing loss of sight. He was a stranger
to the innocent chef. Although danger was unusual, his work put
him in place of attack, citing Katz v. Kadans, supra.
328. Hartford Accident & Indemnity Co. v. Cardillo, 112 F. 2d 11, 72
App. D.C. 52 (1940) cert. den. 60 S.Ct. 1100—excellent decision, with
review of many cases on assaults, horseplay, and the wrongful in-
sertion of commonlaw principles into compensation cases.
1945).
Contra: Ex parte Rosengrant, 213 Ala. 202, 104 So. 409 (1925),
where deceased on moored schooner was shot by negro engineer
(on a nearby tug) whose pistol accidentally exploded while he was
cleaning it—"should be construed with breadth and liberality so as
to advance . . . the beneficent objects of the act."
Also contra: Frigidaire Corp. v. Industrial Accident Commission,
103 Cal. App. 27, 283 P. 974 (1929)—shot aimed by peace officer
at fleeing criminal hit salesman on Reno station platform; a street
hazard which flowed into an adjacent area.
Also contra: Casualty Reciprocal Exchange v. Johnson, 148 F. 2d
228 (5 Cir. 1945)—night engineer on premises shot by unknown ass-
sailant, not for any personal reason.
See also U.S. Fidelity & Guar. Co. v. Barnes, 187 S.W. 2d 610 (Tenn.
1946).
331. Corcoran v. Teamsters & Chauffeurs Joint Council, 209 Minn. 289,
Assaults by insects or animals follow the same rules. A stableman or teamster bitten by a stable cat collects, as the cat is really part of "the necessary furniture of a stable," and is known to be there and becomes a risk of the place;\(^{322}\) and a lifeguard in a bathing suit at a beach, bitten by an insect and suffering blood poisoning, is protected;\(^{333}\) but in England a lady's maid assaulted by a strange cockchafer which flew in through the window, lost her case, as she "was not placed by reason of the employment in a position of any special danger."\(^{334}\) However, where a salesman is sent into an insect-infected district, assaults or bites by insects are clearly compensable, even if the biting occurs after working hours.\(^{335}\)

**Work-assaults** should not be confused with injuries during ordinary horseplay. Where the assault is directly connected with the work, and arises out of work-quarrels, as distinguished from personal quarrels, the assault is compensable without determining questions of aggressors or innocent parties. Courts are not justified in making exceptions.

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297 N.W. 4 (1941), per Gallagher, C.J.
Patterson v. Thompson, 12 N.J. Misc. 4, 169 A. 338 (1933)—non-union truck driver assaulted by union men.
In Field v. Charmettd Knitted Fabrics, 245 N.Y. 139, 156 N.E. 642 (1927), worker assaulted the superintendent on the sidewalk because of quarrel started in factory. Award upheld, as it "was merely a continuation or extension of the quarrel begun within."


333. North Wildwood v. Cirelli, 129 N.J.L. 302, 29 A. 2d 544 (1943)—bite of an insect is a risk incident to lifeguard's work, exposed by attire and position to greater hazard than were members of the general public.


A fortiori, if bitten during working hours—Barton v. Skelly Oil Co., 47 New Mexico 127, 138 P. 2d 263 (1943)—laying pipes in open country, felt but did not see insect, probably black widow spider—"greater hazard than general public"—per Mabry, J.
for “aggressors” where the legislature has not done so by express provision.336 While an argument can be made against aggressors in horseplay and skylarking which may or may not be incident to the work, an assault that arises out of work-arguments, as distinguished from personal grudges, is clearly causally related to the employment, regardless of who strikes the first blow, and hence “arises out of” the employment. Furthermore, to make a distinction between aggressors and innocent victims adds further complications as to what constitutes an aggressor, and is judicial legislation in a remedial act intended to widen, not narrow, the rights of workers. In tort law, who strikes the first blow may be material on assumption of risk, contributory negligence, intervening cause, and on other questions. But in compensation law, the question “arising out of” depends simply on the causal relation to the work, in which the question of “aggressors” is a courtmade, not legislative, exception.

Subsequent aggravations

Do subsequent aggravations of injuries arise out of the employment? Suppose a negligent doctor makes the injury worse—is this “out of” the employment? Most courts allow awards for the entire disability. The chain of causation is not broken where the injury or death is due to the mistake or negligence of attending physicians acting honestly.337 But the rule is said to be otherwise if the employee knowingly

336. See Mr. Justice Rutledge in Hartford Accident & Indemnity Co. v. Cardillo, 72 App. D.C. 52, 112 F. 2d 11 (1940)—“Any other view would reintroduce the conception of contributory fault... and independent, intervening cause as applied in the tort law, which it was the purpose of the statute to discard”; that fighting at work from time to time is a by-product of associating men together, under fatigue and strain.

See Hegler v. Cannon Mills Co., 31 S.E. 2d 918 (N.C. 1944)—assault by fellow-employee, angered by criticism of his work.


See also note 102, supra.

337. Gunnison Sugar Co. v. Industrial Commission, 73 Utah 535, 275 P. 777 (1929)—back injury. On wrong diagnosis teeth were extract-
hires a quack doctor. Where the insurer's doctor is negligent, some states compel the employee to accept the increased compensation resulting, and bar suits against the doctor or carrier; others using a better and more liberal construction, permit common-law suits against the negligent doctor by such employees, some as in addition to, and others as supplementary to his increased compensation rights against the employer or carrier. Some states allow common-law suits against an employer for negligence in supplying incompetent doctors or first-aid attendants.

If the employee unreasonably refuses treatment he may break the chain of causation and stop his compensation. In practice, however, boards rarely punish injured workers by such drastic action. They have seen too many comparative-
ed, later found unnecessary, as there was partial dislocation of sacro-iliac joint. Collects expense and time lost. Atamian's Case, 265 Mass. 12, 163 N.E. 194 (1928)—appendix removed during hernia operation. "Compensable unless claimant was negligent in selecting the chiropractor" per Garfield, J. in Cross v. Hermanson Bros., 16 N.W. 2d 616 (Iowa, 1944).

338. Pelletier v. LaChance, 49 Que. Super. 122 (1916)—no award, as employee hired charlatan in preference to a doctor of medicine.


Accord: Vatalaro v. Thomas, 262 Mass. 383, 160 N.E. 269 (1928)— during hernia operation doctor allegedly stitched the spermatic cord too tightly and the left testicle became atrophied and had to be removed.

In Jordan v. Orcutt, 279 Mass. 413, 181 N.E. 661 (1932), insurer may sue employee's physician for negligence, although employee himself cannot do so once he takes compensation. (Injury to hand, allegedly made permanent by doctor).


McGough v. McCarthy Improvement Co., 206 Minn. 1, 287 N.W. 857 (1939), and cases cited—allows malpractice suit plus increased compensation.

Seaton v. U.S. Rubber Co., 61 N.E. 2d 177 (Ind. 1945), and cases cited by Starr, J.—supplementary, election.


341. Cf. Ashby v. Davis Coal & Coke Co., 95 W.Va. 372, 121 S.E. 174 (1924), where common-law suit allowed, even against employer, for knowingly supplying incompetent and negligent doctor; and Vesel v. Jardine Mining Co., 110 Mont. 82, 100 P. 2d 75 (1940)—miner with steel in eye was alleged to have been made blind by incompetent first-aid attendant. Demurrer overruled, compensation act not exclusive right.


342. Leah v. Illinois Steel Co., 163 Wis. 124, 157 N.W. 539 (1916)—denied where employee refused to submit to a slight surgical operation to remove a nodule involving a superficial nerve.
ly minor operations result in unexpected emboli, thromboses, septicemiae, and the like; and properly refuse to take the responsibility of forcing workers to face those risks. To justify such suspension, the employer has the burden of proving that the employee's refusal was unreasonable, and that the operation or treatment would probably have removed the compensable disability and hence relieved the insurer of future payments,—essentially questions of fact, not law. Thus, where an employee refused Pasteur treatment after a dog bite, fearing the treatment and not believing the dog was rabid, and died from hydrophobia, the dependents recovered, because he was guilty only of an error of judgment. Refusal of serious operations, dangerous to life, even if all doctors favor operation, ordinarily does not deprive a worker of his compensation rights, especially where there is doubt about the substantial benefit to the employee.

As a result, most courts now rule that when the outcome of an operation is problematical or attended with real dangers to life or limb, even though all the testifying doctors were in favor of operation, the refusal is not ordinarily unreasonable. The relevant issue in determining whether the refusal was unreasonable is not whether medical opinion in favor or that against the operation is correct, but whether the workman himself was unreasonable in his refusal. This question being one of fact, a finding that he was not unreasonable will not be disturbed on appeal.

343. Deaths from comparatively simple operations are more common than the public realizes. See Baker v. Silaz, 205 Ark. 1069 (1943)—died from hernia operation. Atamian's Case, 265 Mass. 12, 163 N.E. 194 (1928)—died during hernia operation, appendix also removed. It does not help a widow to tell her that her husband's operation was successful, but the patient died from an unexpected embolus, or developed a fatal ether pneumonia, or the heart unexpectedly gave way etc., etc. Even the best insurance surgeons can recount many cases going unexpectedly "sour" (author).


346. Burns's Case, 228 Mass. 78, 9 N.E. 2d 719—refused operation to remove deformed little finger.

347. Bethlehem Steel Corp. v. Industrial Accident Commission, 161 P 2d 18 (Cal. App. 1946). Wood v. Wagner Electric Corp., 192 S.W. 2d 579 (Mo. App. 1946), per McCullen, J.—error to deny award on refusal of hernia operation. The law does not require courts to deal with human
Similarly, so long as the chain of causation is not broken, aggravations by re-injury are compensable. Thus an employee suffering dermatitis does not necessarily break the chain of causation by washing his hands in water,\(^{348}\) nor does a worker with a leg injury break the chain when his crutch slips and in addition he fractures his hip. Both injuries are chargeable to the carrier.\(^{349}\) Similarly, if after the injury he is put in bed and a bedsore develops, causing death, the causal chain is not broken;\(^{350}\) nor is the chain broken when traumatic neurosis due to an injury is aggravated by marital, financial and other worries,\(^{351}\) nor where on friendly non-professional advice to help the injured jaw, an employee drinks poisonous Jamaica ginger and his legs become paralyzed.\(^{352}\)

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\(^{348}\) Davis's Case, 304 Mass. 530, 24 N.E. 2d 541 (1939).

\(^{349}\) Continental Casualty Co. v. Industrial Commission, 75 Utah 220, 284 P 313 (1930)—taxicab driver injured leg and limped for three days. Later slipped on sidewalk and broke hip. Held: chain of causation unbroken.

\(^{350}\) Continental Casualty Co. v. Industrial Commission, 75 Utah 220, 284 P 313 (1930)—taxicab driver injured leg and limped for three days. Later slipped on sidewalk and broke hip. Held: chain of causation unbroken.

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\(^{352}\) Continental Casualty Co. v. Industrial Commission, 75 Utah 220, 284 P 313 (1930)—taxicab driver injured leg and limped for three days. Later slipped on sidewalk and broke hip. Held: chain of causation unbroken.
Recurrences

Doctors often use the word "recurrence" loosely. Whether the disability is due to an earlier injury which "recurred" without relation to the later incident, or whether the later incident was in fact a new injury, is usually a question of fact. In such cases, the trial board's finding is final if supported by evidence. Such finding may be based on reasonable inferences, even though the court on appeal might have made a contrary inference. Thus a "recurrent" back strain caused by leverage exerted on the muscles of the back at a later incident was properly held to be a new injury. And the insurer on the risk at the time of the last injury, causing, or contributing to, the disability is usually chargeable with the compensation payments.

Adjacent premises as cause

Objects falling from adjoining premises usually give rise to an award as "out of" the employment if the worker can reasonably associate his position at the moment of the injury with the flying missile. Thus, where a worker in an open yard was hit by a slate blown from an adjoining roof during a windstorm (while the worker was bent over back to it adjusting machinery, and could not see it coming), it was held that the risk of injury arose out of his employment. So, too, where an object from the next building strikes a worker in a pit, or an explosion in the adjacent building sends part of the roof into the worker's room, injuring him.

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Evan's Case, 299 Mass. 435, 13 N.E. 2d 27 (1938)—last insurer ordinarily liable.
Blanco's Case, 308 Mass. 574, 33 N.E. 2d 313 (1941)—last insurer liable even if it was the minor contributory cause.

See also note 353, supra.


356. Filitti v. Lerode Homes Corp., 244 N.Y. 291, 155 N.E. 579 (1927)—digging hole, hit by piece of cornice which fell from next building. Collects, citing Thom v. Sinclair (1917), A.C. 127, 10 B.W.C.C. 220. Malena v. Leff, 265 N.Y. 533, 193 N.E. 307 (1934)—explosion next door, part of wall fell through own employer's roof, crushing employee beneath falling material. Caswell's Case, 305 Mass. 500, 26 N.E. 2d 328 (1940)—same theory applied where hurricane caused walls to collapse and fall on employee, from employer's (not adjoining) premises; and Murphy v. Cadzow Coal Co. (1943) Session Cases, 51, 57 (Scotland 1942), explosion in employer's mine, cause unknown, held: error to refuse compensation, as risk of the premises or locality, and that all inquiry as to the frequency or magnitude of the risk is irrelevant.
Slipping and falls

There is a distinction between slipping or tripping on a floor because of some cause connected with the floor, and simply falling on the floor because of something personal to the worker.

Slipping on the floor, or tripping over objects thereon, is held universally to arise out of the employment, even though with unusual results, (as choking on a nut the worker is eating). So, too, both explained or unexplained falls from heights or into machines or against a table are usually compensable, because the work exposed the worker to that special risk. But an unexplained fall on a floor sometimes fails, as its causal relation to the employment is left in doubt. In states allowing presumptions favorable to the worker, even an unexplained fall may be compensated. Where the cause of the fall is personal to the worker (as a non-industrial heart attack, dizzy or epileptic spell, or any idiopathic condition) the fact that the floor is of rough cement instead of wood, and hence more dangerous, is no ground for an award in Massachusetts. But awards are

358. Connelly v. Samaritan Hosp., 259 N.Y. 137, 181 N.E. 76 (1932)—misstep at work—compensable, though same misstep at home would not be. Even where there was no misstep, and the fall was due to cardiac condition, he recovers if he hits table in the laundry on the way down, injuring teeth and chest. Although primary cause was non-industrial, here the co-operating cause was industrial. The table was a zone of special danger, although the danger at home may have been just as great.
360. Hoffman v. N.Y. Central R.R. Co., 290 N.Y. 277, 49 N.E. 2d 136 (1943)—unexplained fall on icy walk. Frankly stated he did not know cause of fall. Presumption that his claim comes within the statute prevails.

Contra: Savage v. St. Aedin's Church, 122 Conn. 343, 189 A. 599 (1937).
Contra: Barlau v. M.M.P. Implement Co., 214 Minn. 564, 9 N.W. 2d 6 (1943), and cases cited—fall on floor due to epileptic seizure, compensable.
Cf: Hansen v. Turner Construction Co. 224 N.Y. 391, 120 N.E. 693 (1918)—but there must be evidence that contact with floor played part in epileptic's death.
upheld there and in most states if the fall is on a stairway, or into a machine, or against anything except the bare floor, and especially if the fall is from a height, as the risk of injury is increased, or is a "special danger" of the employment. Many states properly do not distinguish between such falls, and compensate for injuries whether due to the bare floor or to machinery, etc.—both being compensable where the injury results from contact with the floor or other objects. While the chance of breaking a hip, for example, by a fall on a concrete floor may be less than on a stairway, or from a height, the difference is not one of causal relation, but of degree.

Fright as cause

Excitement or fright induced by the employment may arise out of it and be compensable. Thus where a boat catches fire, and in the excitement of trying to prevent loss the worker dies, the case is compensable. So, too, an award stands where heart failure was induced by fright when a dog in the cellar jumped on the gas man's back, or where a heart attack was precipitated by testifying as a witness for the employer, or by fright when forced to pull to the

363. Varao's Case, 313 Mass. 363, 55 N.E. 2d 451 (1944), containing excellent citations by Ronan, J.—"Regard must be had to the impetuosity and heedlessness of youthful employees, and to the disabilities and infirmities of aged employees."
364. Dow's Case, 231 Mass. 121 N.E. 19 (1918)—heart attack, fell into machine, neck severed.
365. Christensen v. Dysart, 42 New Mexico 107, 76 P. 2d 1 (1938)—fell from roof platform, due to heart attack.
366. Barlau v. M.M.P. Implement Co., 214 Minn. 564, 9 N.W. 2d 6 (1943), and cases cited by Peterson, J.
side of a road while in an automobile; or when nervous shock resulted, *without external trauma* or physical impact, from seeing a fellow worker horribly maimed, or a cow terribly torn during labor. Similarly, a collapse due to mental strain, worry and long and excessive hours of work by a claims adjuster, accompanied by an angina pectoris attack, arose out of the employment and was an accidental injury.

*Diseases*

*Diseases* do not necessarily arise out of the employment. But where a causal relation to the employment is shown, and there is evidence of repeated though minute traumas to the body or bodily harm results from exposure or exertion, even over a period of months rather than at one specific time, the disease is compensable, whether as a brand-new disease, or as an aggravation of a pre-existing disease. Thus, inhalation of sand dust is considered as repeated trauma to the lungs, and if it aggravates a dormant tuberculosis, or causes silicosis, these diseases, being causally related to the employment, arise out of it. Aggravation of many usual as well as unusual types of diseases are clearly compensable. Thus many states have made awards on the ground that a *cancer* or malignant growth (whose cause is generally unknown) was aggravated or its spread hastened. Even a

370. Hoage v. Royal Indemnity Co., 67 App. D.C. 142, 90 F 2d 387, (1937), handled over 250 cases a month, where evidence showed 75 to 100 cases was all an adjuster could handle properly—per Martin, C.J., citing English, New York and Michigan cases.
See also note 371, supra.
373. Elford v. State Industrial Accident Commission, 141 Ore. 284, 17 P 2d 558 (1932)—lifting sacks caused rupture of abdominal cancerous growth involving spleen, liver and suprarenal glands. Utah Fuel Co. v. Industrial Commission, 102 Utah 26, 126 P. 2d 1070 (1942)—bruise of right testicle. "Even doctors have no television of the pathological history of the inside of man," per Wolfe,
finding of original causation stands. Where an award is based on medical testimony that causal relation existed, it will stand regardless of the court's private views on cancer. Even where the statute requires that the disease be "peculiar" to, or "inherent" in, the employment, it does not require that it originate exclusively in the particular kind of employment involved. It is enough if the disease is a natural result or incident of the particular occupation. Proof that no one else so suffered, or that this worker was unusually susceptible, does not prevent an award under such statutes.

Almost every type of disease known to man has at one time or another been claimed or found to be causally related (by original causation or by aggravation or hastening) to the employment. Usually, whether or not there is such relation is a question of fact, and if medical testimony or fair inferences support the claim, a finding by the industrial administrator in favor of the claimant will not be disturbed.

J. Positive testimony is not needed where specific member was injured, and from that time on grew progressively worse until death.

Macon County Coal Co. v. Industrial Commission, 374 Ill. 219, 29 N.E. 2d 87 (1940)—stomach cancer. Died year after severe accident.
Causey v. Kansas City Bridge Co., 191 So. 730 (La. App. 1939)—aggravation or activation of stomach cancer by severe strain of moving heavy rock.
Baker v. State Industrial Commission, 128 Ore. 369, 274 P. 905 (1929)—where injury lowered vitality, even though cancer also a contributing cause of death, award for injury's part upheld.
In Orff's Case, 122 Me. 114, 119 A. 67 (1922)—employee receiving compensation for broken rib was kept on compensation, even after abdominal cancer was found, as there was evidence that the cancer was aggravated.

374. Haward v. Rowsell & Matthews (1914), 7 B.W.C.C. 552—cancer of testicle, which he hit falling off bicycle. Doctors testified "to some external abuse, some blow, or something of that nature" and was related to the accident.
McCullough v. Industrial Commission, 60 N.E. 2d 628 (Ohio App. 1944)—bone sarcoma following severe strain and injury to thigh.


Thus awards have been sustained for chromium poisoning, for undulant fever from contact with cows and typhoid fever from drinking water furnished by the employer, tuberculosis aggravated by irritant, non-silicate dust from emery wheels, encephalitis, arthritis, caisson disease or the bends, carbon monoxide poisoning leading to leukemia, rupture of stomach ulcer by sewer gas poisoning or gastric ulcer from strain, traumatic epilepsy, and wood alcohol poisoning. Where all the physicians testified that even breaking ribs did not hasten the rupture of duodenal ulcers, the court remarked that, though as laymen they thought otherwise, the blame for error, if there was error, was on the medical profession, not the judiciary.

Where it is clear from a reading of the witness' testimony:


379. Crutcher Dental v. Miller, 251 Ky 201, 64 S.W 2d 466 (1933)—from nickel plating or chromium plating. Court must be liberal—need not be result of traumatic injury.

380. Brodin's Case, 124 Me. 162, 126 A. 829 (1924).
    Permanent Construction Co. v. Industrial Commission, 380 Ill. 47, 43 N.E. 2d 557 (1942)—from hospital waterworks.
    For undulant fever from contact with cow, see Crowley v. Idaho Industrial Training School, 53 Idaho 606, 26 P 2d 180 (1933).

381. Duggan's Case, 315 Mass. 355, 53 N.E. 2d 90 (1944)—"causing a lesion or some other definite physical harm . . . compels him to quit his employment."
    Accord: Cavanaugh v. Murphy Varnish Co., 130 N.J.L. 107, 31 A. 2d 769 (1943)—tuberculosis aggravated or stirred into activity by series of ordinary strains, loading and unloading paints, leading to hemorrhage following specific lift, per Donges, J.


    Herron Lumber Co. v. Neal, 205 Ark. 1093, 172 S.W. 2d 252 (1943)—operated on next day, died from peritonitis. No mathematical certainty needed. Question of fact, doubts resolved in favor of claimant.


mony as a whole that he (a doctor) was basing it on a factual foundation, his admission that it was "speculative" did not destroy its evidentiary value. It amounted to inference and not conjecture. Medical testimony is not always essential to support an award. Sometimes the courts uphold awards without medical evidence, where the sequence of events is very convincing, or where common experience or knowledge seemed to justify the board's award, e.g., aggravation of herniae by lifting and strains, or loss of sight from hot liquid.

**Liberal construction**

However, the unending stream of appeals (by insurers mainly, as most employees cannot afford to appeal), on the ground that injuries do not "arise out of" the employ-

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390. Hiber v. City of St. Paul, 16 N.W. 2d 878 (Minn. 1944)—"It is the intrinsic quality of the conclusion that matters and not the label or characterization."—per Peterson, J.

"Even with the modern marvelous advancement of medical science it must be conceded that the best of doctors sometimes fail correctly to diagnose a human ailment," so employee given new trial two years later after operation at Mayo Clinic—Jovanovich v. St. Paul Corrugating Co., 201 Minn. 412, 276 N.W. 741 (1937).

See Duggan's Case, 315 Mass. 355, 53 N.E. 2d 90 (1944)—testimony amounted to a probability, though "may" used in part.

391. Crowley's Case, 130 Me. 1, 153 A. 184 (1931)—leukemia held related to carbon monoxide, in spite of uncertainty of medical testimony. Johnson v. Valvoline Oil Co., 131 Pa. Super. 266, 200 A. 224 (1938)—no medical testimony needed where death resulted from fumes. Where medical evidence was weak ("possible," "might"), but it was clear that from the time the employee bruised his testicle until his death he grew progressively worse, aggravation of cancer sustained. "Even doctors have no television of the pathological history of the inside of a man"—Utah Fuel Co. v. Industrial Commission, 102 Utah 26, 126 P. 2d 1070 (1942).


392. Harrington's Case, 286 Mass. 69, 183 N.E. 499 (1933)—no medical testimony needed; hernia.


See also Garafola v. Yale & Towne Mfg. Co., 41 A. 2d 451 (Conn. 1945).


394. As a result of over twenty years' experience in Massachusetts, the author has found that over 80 per cent of the appeals to the highest court are by insurers, but not because they lose most of their cases before the commission. In fact, while no exact figures are kept by the board, the majority of employees whose cases go to a written decision before the board lose their cases. However—
ment, will never abate so long as some courts will inject antiquated common-law rules into a new law which intended once and for all to bury the narrow rules of the common law as related to work-injuries. A few states omitted the use of the words “out of” the employment, but that did not solve their problem, as the courts properly read in an equivalent requirement of some degree of “causal relation” to the employment. To say that “in the course of” the employment is sufficient would make the employer an insurer, and be health and accident insurance in the guise of workmen’s compensation. But where any reasonable relation to the employment exists, or the employment is a contributory cause, the court is justified in upholding an award as “out of” the employment. The rule of liberal and broad construction is especially justified, as the acts usually severely cut down the amounts individuals can recover, with the

very few employees can afford $200 to $500 which is the usual actual expense of complete court appeals, and their grievances often die before the highest court is reached. Hence in over 80 per cent of cases in the Superior Court (about 150 to 200 annually) and in the Supreme Judicial Court (about 20 to 30 annually) the insurer is the appealing party. Therefore one cannot conclude that since the insurer is usually the appealing party the board is necessarily liberal in its decisions.

395. “. decisions of tort cases and the definitions of the common law therein should not be followed too closely in compensation cases”—per Bliss, J., in Hegler v. City of Sheldon, 18 N.W 2d 182 (Iowa, 1945), and cases there cited.

See also Hartford Accident & Indemnity Co. v. Cardillo, 72 App. D.C. 52, 112 F 2d 11 (1940)—it was the purpose of the statute to discard certain narrow principles of tort law.

396. Monahan v. Seed & Durham, 336 Pa. 67, 6 A. 2d 889 (1939)—timekeeper dropped dead on job from cerebral hemorrhage unrelated to his work. Clearly “in the course of” the employment, yet the court properly denied recovery as it “would render the employer an insurer.” (So “out of” read into Pennsylvania act). “If indeed, the element of casual relation between the injury and the employment be ignored, it is probable that the law would be unconstitutional, as depriving employers of their property without due process of law”—Brown, Prof. Ray A., 7 Wis. Law Rev. 18 (1931), citing Cudahy Packing Co. v. Parramore, 263 U.S. 418, 44 S.Ct. 153 (1923), that unless there is a relation to the employment an award might be “clearly unreasonable and arbitrary.” Accord: Hobbs, C.W., Workmen’s Compensation Insurance (1939), p. 204.


North Wildwood v. Cirelli, 129 N.J.L. 302, 29 A. 2d 544 (1943)—insect bite—“employment contributed to the injury or death.” Harding Glass Co. v. Albertson, 187 S.W. 2d 911 (Ark. 1945)—“a connection substantially contributory though it need not be the sole or proximate cause.”
intent that the recoveries be spread over a larger number of cases and thus benefit larger groups of workers, and to effectuate the humane purposes for which the acts were enacted.\(^9\) Hence board or commission awards based on a liberal construction of the words "out of" are upheld whenever "rationally possible."\(^{400}\) Any reasonable doubt as to whether the act of the employee arose out of the employment should be resolved in favor of the employee or dependent, in view of the policy of broad and liberal construction of the workmen's compensation law.\(^{401}\)

**IN THE COURSE OF**

The employee's worries about awards are not over when he proves that he received a personal injury by accident arising out of the employment. He may still be bedeviled by the words "in the course of" the employment. Most states require proof of the latter phrase also before an award is made.\(^{402}\) Those few states which require only "in the course of," and make no mention of "out of," in substance read in "out of," i.e., the need of causal relation between the injury and the job.\(^{403}\) This is proper, as otherwise a worker, awakening at home with a heart attack (for example), or hit by an auto as he leaves home for work, could drag himself to work,

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   Accord: Hunter v. Summerville, 205 Ark. 463, 169 S.W. 2d 579 (1943)—the rule of liberal construction reiterated, "and doubtful cases resolved in favor of compensation."
   Dahn v. Davis, 258 U.S. 421, 431, 42 S.Ct. 320 (1922)—"to compensate, promptly . . . all employees . . . in an amount which, on the average, was thought adequate and just."

   See Woolworth Co. v. Industrial Accident Commission, 17 Cal. 2d 634 (1941)—"unless inferences . . . wholly unreasonable."

   Hunter v. Summerville, 205 Ark. 463, 169 S.W. 2d 579 (1943).
   Bales v. Service Club No. 1 Camp Chaffee, 187 S.W. 2d 321 (Ark. 1945)—"should be liberally not strictly construed"—per Smith, J.


403. North Dakota, Pennsylvania, Texas and Washington require only "in the course of" without requiring "out of", but each has other separate limitations which in effect are manipulated to require a causal relation to the employment, such as the injury must be not only in the course of, but also "by accident" or due to a "sudden and tangible happening" or specifically exclude certain acts of God.
and if he died in the factory his death would occur "in the course of" his work (although not "out of" it). The legislatures had in mind, however, compensation insurance, and not health or accident insurance, and until they pass health insurance laws, compensation laws cannot be a complete substitute, although at times compensation awards necessarily combine parts of both health and accident features.


Monahan v. Seed & Durham, 336 Pa. 67, 6 A. 2d 889 (1939)—time-keeper working over-hours to locate error in figures dropped dead from cerebral hemorrhage. Doctors said death was not related to overwork. Award reversed. "If death came during the course of employment in the ordinary way natural to the progress of the disease, there can be no recovery; ... compensation act is... not one to insure the life and health of the employee." (Yet "in the course of" supposedly enough in Pennsylvania).


Texas: Southern Surety Co. v. Stubbs, 199 S.W. 343 (1917)—in emergency, drowned in storm trying to save non-seagoing dredge. "In the course of" enough (but causal relation existed).

Washington: Atkinson Co. v. Webber, 15 Wash. 2d 579, 591, 137 P. 2d 814 (1942)—exertion caused coronary thrombosis, so is not an unrelated collapse.

See also Wisconsin: Covers injuries sustained in performing services growing out of and incidental to the employment. See Nebraska Seed Co. v. Industrial Commission, 206 Wis. 199, 239 N.W. 432 (1931)—deceased was employee of seed company engaged in stripping grass. When thunder shower came up he sought shelter in building near by and was struck by lightning. Held: building on elevation slightly higher than surrounding surface, thereby increased danger from lightning.

Utah: covers injuries by accident "arising out of or in the course of" the employment. State Road Commission v. Industrial Commission, 56 Utah 262, 190 P. 544 (1920)—struck and killed by lightning after having left a state road on which he worked, to seek shelter from storm. Arose in course of, but not out of—but in Utah one alone enough. Acts of God not excluded in Utah (but causal relation conceivable).

Offret v. Industrial Commission, 91 Utah 466, 64 P. 2d 1224 (1937)—got sick on job while tightening rusty burr, but not causally related to work. Illness caused by heart trouble, hence no award (yet strictly "in course of", though not "out of").

Reynolds v. Industrial Commission, 61 N.E. 2d 784 (Ohio, 1945).

Sallee Bros. v. Thompson, 187 S.W. 2d 956 (Ark. 1945)—not "general accident insurance."

Employer takes worker "as is"—if a head injury aggravates even an underlying social disease, industry takes over complete responsibility—Crowley's Case, 223 Mass. 288, 111 N.E. 786 (1916).
Definitions

Attempts have been made to define "in the course of" the employment. An injury or an accident "befalls a man 'in the course of' his employment, if it occurs while he is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time."406

"In the course of" is sometimes referred to as "during" the employment or "while the employment was in progress." Its main element is, in practice, that of time and space, though place and circumstances are often said to be factors.407

How about injuries just before work starts, or shortly after quitting work?

Certainly, if an employee worked from 9 to 12 and from 1 to 5, these hours were "in the course of." But how about the dinner hour, 12 to 1 P.M.?

Noon-hour injuries

Most courts have been liberal in protecting the workers during the noon-hour. Thus an employee eating his lunch on the employer's premises is almost universally considered as "in the course of" the employment.408 Food or rest during that hour is considered essential to his well-being, without which he could not efficiently perform for his employer during the actual work hours.409 But proving that the injury occurred at lunch time is not per se enough. The injury occurred at lunch time is not per se enough. The injury

406. Per Lord Loreburn, L.C., in Moore v. Manchester Liners (H.L. 1910), A.C. 498, 3 B.W.C.C. 527, holding English seaman still in the course of employment when he fell from ladder on quay while returning from shore trip in New York to buy necessaries (tobacco, underthings).

Accord: Industrial Exchange v. Industrial Accident Commission, 156 P. 2d 926 (Cal. 1945)—"It is generally said that 'an employee is in the course of his employment when he does those reasonable things which his contract with his employer expressly or impliedly permits him to do'."


See Giracelli v. Franklin Cleaners & Dyers, Inc., 132 N.J.L. 590, 42 A. 2d 3 (1945)—"The time when, the place where the happening occurred, and the attending circumstances ... demonstrate that the petitioner was acting in the course of her employment," (raped by customer).

See also notes 410 and 418, post.


Leary v. S.S. "Deptford" (1935), 28 B.W.C.C. 235—probability that typhoid came from food or drink aboard ship rather than on shore.

must also arise "out of" the employment. Hence, what he was doing at the moment of injury, during the noon hour, is still an essential matter to be determined, before an award can be made. There must be a causal connection (out of) as well as a time connection (in the course of) with the employment.410

Thus, if he were sitting on a chair in the usual fashion, eating, and the chair collapsed, most states would make an award.411 The collapse of the chair would be a risk of employment and hence the causal connection exists, i.e., "out of" it, and the fact that the accident occurred during the noon hour would not deny recovery, as he would still be "in the course of" his employment, i.e., the time connection. But if in a sporting mood, in which the male worker co-operates, a young female co-worker attempts to add her weight also to the same chair, and the chair breaks or he grabs a stamping machine to extricate himself from this posture and loses some fingers, the award fails,412 as some courts would rule that the added weight due to larking or horseplay has no causal connection with the employment, and hence the unfortunate lad is without a compensation remedy. The mere fact that the injury occurred "in the course of" (i.e., during the noon hour) is not per se enough.

Noon hour injuries have been protected where the employee was on his way out,413 or taking a short nap awaiting

410. Irwin Neisler & Co. v. Industrial Commission, 846 Ill. 89, 92, 178 N.E. 357 (1931)—"The words 'out of' point to the origin of the cause of the accident, and the words 'in the course of' point to the time, place and circumstances under which the accident occurred." Traveling employee on the way home from errand for employer is protected. Callaghan v. Brown, 16 N.W 2d 317 (Minn. 1944)—causal connection missing when crossing street to get coffee to satisfy own desire. Ohio combines the two elements: "an injury occurs in the course of the employment if there is a causal connection between the injury and some condition, activity, environment or requirement of the employment."—per Hart, J. in Parrott v. Industrial Commission of Ohio, 60 N.E. 2d 660 (Ohio, 1945).


412. Rochford's Case, 234 Mass. 93, 124 N.E. 891 (1919)—on "escapade of his own," attempting to extricate himself from a course of behavior utterly foreign to the business of the subscriber, when stamping machine came down on hand.

the resumption of his machine work, or when (while eating) a manager was shot by a disgruntled, recently fired employee. Where eating was an incident of the employment, i.e., where the employer supplied or paid for the food to a musician who played in his hotel, food poisoning and others risks of eating such food are protected by the compensation acts. The existence of a compensation right properly destroys all common-law rights against an insured employer in most jurisdictions.

Going and coming rule

Suppose, however, that the injury occurs on the way to work or on the way home from work. Injuries going to or from work have caused many judicial upheavals.

The question here is limited to whether the injuries are "in the course of" and not "out of" the employment. How the injury occurred is here not in point. Street risks, whether the employee was walking or driving, and all other similar questions deal with the risk of injury or "out of" the employment. "In the course of" deals mainly with the element of time and space, or "time place and circumstances."

Thus, if the injury occurred fifteen minutes before or after working hours and within one hundred feet of the employer's premises, on sidewalks or public roads, the question of "in the course of" the employment is flatly raised.

Some of our courts refuse to extend this definition of "in the course of" to include these injuries. Most of the

415. Cranney's Case, 232 Mass. 149, 122 N.E. 266 (1919)—that murder resulted instead of broken bone held immaterial.
417. DeStefano v. Alpha Lunch Co., 308 Mass. 38, 30 N.E. 2d 827 (1941), and cases cited.
419. Bell's Case, 238 Mass. 46, 130 N.E. 67 (1921)—crossing private railroad tracks.
Contra also: Bountiful Brick Co. v. Giles, 276 U.S. 154, 48 S.Ct. 221 (1928).
Contra also: Freire v. Mattson Nav. Co., 19 Cal. 2d 8, 118 P. 2d 809 (1941), and
courts will protect the employee from the moment his foot or person reaches the employer's premises, whether he arrives early or late. These courts justly find something sacred about the employment premises. The time and space element clearly comes into being when the premises are reached. While properly on such premises, whether actively at work or not, the worker is still in the course of his work.

The overwhelming weight of authority permits a very broad definition of "premises," not only to include premises owned by the employer, but also premises leased, hired, supplied or used by him, even private alleyways merely used by the employer. Adjacent private premises are protected by many states, and a few protect the employee even on

420. Latter's Case, 238 Mass. 326, 130 N.E. 637 (1921)—right to use elevator on way to work on fifth floor where he worked was sufficient.
Milliman's Case, 295 Mass. 451, 4 N.E. 2d 331 (1936)—hit by auto on employer's premises.
Accord: Murphy v. Miettinen, 317 Mass. 633, 59 N.E. 2d 252 (1945)—one-half hour early, per Wilkins, J.; and
Employer had rule that employees report one-half hour before worktime.

For stairway injuries, see Nagles' Case, 310 Mass. 193, 37 N.E. 2d 474 (1941) and cases there cited, per Donahue, J.


422. See Bountiful Brick Co. v. Giles, 276 U.S. 154, 48 S.Ct. 221 (1928), and cases there cited.

Accord: Oliva v. Goleta Lemon Assoc., 61 F. Supp. 241 (S.D., Cal. 1945), excellent discussion by Hollzer, D. J.
Cf. Rogers' Case, 318 Mass.—, 61 N.E. 2d 341 (1945)—injury on parking lot is incident of employment, though not contractual incident, merely provided by employer, per Qua, J.

Accord: Bales v. Service Club, 187 S.W. 2d 321 (Ark. 1945)—civilian worker on army camp sidewalk.

423. Associated Indemnity Corp. v. Industrial Accident Commission, 18 Cal. 2d 40, 45, 112 P. 2d 615 (1941)—includes adjacent railroad tracks, especially as superintendent had large discretion—"not a trespasser as to his employer."
Mannering's Case, 290 Mass. 517, 195 N.E. 757 (1935)—private alleyway customarily used to reach street. Cleaning woman was licensee, not trespasser, and award upheld.
Marley v. Johnson & Co., 215 Iowa 151, 244 N.W. 833 (1932)—premises being "used" enough; in between jobs, i.e., finishing one part of work on cemetery, going to another part protected, even though using own car.

424. Procaccino v. E. Horton & Sons, 95 Conn. 408, 111 A. 594 (1920)—crossing private property when killed by train.
Associated Indemnity Corp. v. Industrial Accident Commission, 18
adjacent public sidewalks and streets. A public employer, (e.g., the state or city) owning public streets adjacent to its building is liable for injuries to its employees, on such streets, as the streets become part of its premises. Where a city or any employer owns or controls an island, all its streets are protected premises.

There is no reason in principle why states should not protect employees for a reasonable period of time prior to or after working hours and for a reasonable distance before or after leaving the employer's premises. The Supreme Court of the United States has declared that it will not overturn any state decision that so enlarges the

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Cal. 2d 40, 45, 112 P. 2d 615 (1941)—"not necessary that premises be wholly under control of the employer."

Bountiful Brick Co. v. Giles, 276 U.S. 154, 48 S.Ct. 221 (1928)—adjacent railroad tracks, not trespasser as to employer.

425. Park Utah Consolidated Mines Co. v. Industrial Commission, 103 Utah 64, 133 P. 2d 314 (1943)—3 per cent icy slope on roadway necessarily used in front of premises right after work hours.

Freire v. Matson Navigation Co., 19 Cal. 2d 8, 118 P. 2d 809 (1941) and cases cited—paved public bulkhead, adjoining employer's premises, fifteen minutes before work started.


Smith v. Industrial Accident Commission, 18 Cal. 2d 843, 118 P 2d 6 (1941)—exposition employer owned or leased Treasure Island—fact that paying-public used streets did not make them any less the employer's premises (jumped off truck en route to ferry).


Cudahy Packing Co. v. Parramore, 263 U.S. 418, 426, 44 S.Ct. 153 (1923)—"The employment contemplated his entry upon and departure from the premises as much as it contemplated his working there, and must include a reasonable interval of time for that purpose." (Seven minutes before work was to begin).

Accord: Nesmith v. Reich Bros., 203 La. 928, 14 So. 2d 767 (1943)—accident a few minutes before work started, awaiting truck on highway, per O'Neill, C.J.; and


429. Judson Mfg. Co. v. Industrial Accident Commission, 181 Cal. 300, 184 P. 1 (1919)—on way to work, twenty feet from employer's gate.

Accord: Bales v. Service Club No. 1 Camp Chaffee, 187 S.W. 2d 321 (Ark. 1945)—31 feet from entrance to club.


Park Utah Consolidated Mines Co. v. Industrial Commission, 103 Utah 64, 133 P. 2d 314 (1943)—\textit{en route} out; exception to coming and going rule.
scope of its act. Hence, a deaf worker, trespassing on railroad tracks adjacent to his employer's brickmaking premises (but shown by his superintendent the specific short crossing over the track), and killed by a train, was held to be in the course of his employment when hit by an on-coming train fifteen minutes before his day would have begun. So long as causal relation to the employment is discernible, no federal question arises. And the trend is toward enlarging both the elements of time and space, in accordance with this federal, judicial authority.

The narrow rule that a worker is not in the course of his employment until he crosses the employment threshold is itself subject to many exceptions. Off-premise injuries to or from work, in both liberal and narrow states, are compensable (1) if the employee is on the way to or from work in a vehicle owned or supplied by the employer, whether in a public (e.g., the employer's street car) or private conveyance; and whether supplied under a contract, express or implied undertaking to furnish transportation. Tacit acquiescence of employer in custom of riding in sub-contractor's trucks, when convenient, held sufficient. Liberal construction justified.

430. Bountiful Brick Co. v. Giles, 276 U.S. 154, 48 S.Ct. 221 (1928), in which the author represented the widow.
Cudahy Packing Co. v Parramore, 263 U.S. 418, 44 S.Ct. 153 (1923).

Donovan's Case, 217 Mass. 76, 104 N.E. 431 (1914).
Gilbert's Case, 253 Mass. 538, 149 N.E. 412 (1925).
Vehicle includes a boat used to cross a river—Chapman v Cyr Co., Inc., 135 Me. 416, 198 A. 736 (1938)—is incident of employment. Foreman authorized use of boat, employee swept over dam to his death.
Hunter v Summerville, 205 Ark. 463, 169 S.W. 2d 579 (1943)—cutting timber fifteen miles from home, custom to ride home—enough if implied undertaking to furnish transportation. Tacit acquiescence of employer in custom of riding in sub-contractor's trucks, when convenient, held sufficient. Liberal construction justified.

Radermacher v. St. Paul City Ry. Co. 214 Minn. 427 8 N.W 2d 466 (1943)—pass on street railway is transportation, and includes waiting as passenger at stop when hit by runaway auto.
Accord: City of San Francisco v. Industrial Accident Commission, 61 Cal. App. 2d 248, 142 P 2d 760 (1943)—free pass plus regular practice of transportation made it incident of employment "whether it be in a private or public conveyance."
Contra: St. Helen's Colliery Co. v. Hewitson (1924), A.C. 59—not obliged to use pass on train to and from work.
Tallon v Interborough Rapid Transit Co., 232 N.Y. 410, 134 N.E. 327 (1922)—in subway on free pass, no recovery. (Court divided 4 to 3).
implied or whether supplied merely by custom, practice, or usage; (2) if the employee is subject to call at all hours or at the moment of injury; (3) if the employee is traveling for the employer, i.e., traveling workers; or is on a special mission, or going or returning therefrom even in his own au-

433. Donovan's Case, 217 Mass. 76, 104 N.E. 431 (1914).
434. Pearson v. Aluminum Co., 161 P. 2d 169 (Wash. 1945)—excellent opinion by Jeffers, J. citing many cases—"This exception may arise either as the result of custom or contract, express or implied. It may be implied from the nature and circumstances of the employment and the custom of the employer to furnish transportation, even though he [the employee] is not being paid for such [transportation] time . . . . This exception is supported by overwhelming authority and . . . is as well established as the rule itself."
Spadling v. Bituminous Casualty Corp., 187 S.W. 2d 628 (Tenn. 1945)—enough if transportation was given only when employer happened to have trucks going to place of employment.
Wolf v. Oestreicher, 41 A. 2d 29 (N.J. 1945)—boss made a practice of picking up his female designer and driving her part way and letting her drive his automobile to her home for week-ends and meeting her again Mondays.

See also notes 431-433, supra.

435. Sullivan's Case, 265 Mass. 463, 164 N.E. 392 (1929)—hotel kitchen dishwasher fell over broom on way to her room. Evidence of continuity of employment not strong, but sufficient.
Souza's Case, 316 Mass. 332, 55 N.E. 2d 611 (1944)—traveling worker, subject to call, burned to death while sleeping in public lodging house.
Employers' Liability v. Industrial Accident Commission, 37 Cal. App. 2d 567, 99 P. 2d 1089 (1940) and cases cited—cook in private residence, subject to call, fell from stool while fixing hem of her dress. Different from employee “who works set hours.”
Bowen v. Keen, 17 So. 2d 706 (Fla. 1944).

436. Railway Express Agency, Inc. v. Shuttleworth, 61 Ga. App. 644, 7 S.E. 2d 195 (1940)—A traveling salesman by reason of his employment, incurs the risk necessary and incident to the requirements of such employment”—so protected against hotel fire.
See Olson Drilling Co. v. Industrial Commission, 386 Ill. 402, 54 N.E. 2d 452 (1944), en route to office with reports, even though same as route home. “If the work of the employee creates the necessity for travel, he is in the course of his employment,” per Thompson, J. Aetna Casualty v. Industrial Commission, 110 Colo. 422, 135 P. 2d 140 (1943)—sent on long trip to Detroit to get two trucks, also expected to visit family thereafter. “If the work of the employee creates the necessity for travel, he is in the course of the employment, though he is serving at the same time some purpose of his own.”
Lief v. Walzer & Son, 248 App. Div. 651, 287 N.Y.S. 991; aff'd. 272 N.Y. 542, 4 N.E. 2d 727 (1936)—salesman on train shaving, when jolt pushed bristle of his brush into his eye; “while the claimant was performing a personal act, the injury was caused not by such act but by the jolt which was a risk growing out of his employment,” and that such a risk was one incidental to the mode of travel and circumstances in which he was serving his master. Includes errands for employer, though using own son's automobile—Donovan v. Worsted Mills, Inc., 90 N.H. 450, 10 A. 2d 456 (1940)—service was a causative factor of the accident.
tomobile; if the employer pays for the employee's time from the moment he leaves his home until his return home; if the employee is on the way home to do further work at home, even though on a fixed salary; or having started to work at home, is injured on route to his office to continue his work; (6) where the employee is required to bring his automobile to his place of business for use there. Other exceptions undoubtedly are equally justified, dependent on their own peculiar circumstances.


438. In Western Pipe Co. v. Industrial Accident Commission, 49 Cal. App. 2d 108, 121 P. 2d 35 (1942), Peters, P.J., said: "There are also many exceptions to the 'going and coming' rule; 'an exception to this rule, however, is generally recognized where the employee's compensation covers the time involved in going to and from his work." (Holding that a "slight deviation" to get cigarettes during a paid lunch hour did not take employee outside his employment).

In Fisher v. Industrial Commission, 55 Ohio App. 524, 9 N.E. 2d 884 (1936), an officer of a corporation without regular hours, furnished auto by employer, held protected until auto was actually parked in garage of his home; so award upheld where on way home he hit loaded freight car in public street.

In Stover v. Washington County, 63 Idaho 145, 118 P. 2d 35 (1941), Ailshie, J., held there was an exception for public employees (as distinguished from private employees) where by statute traveling expenses were paid—hence county commissioner was protected in train accident on way from his house to the meeting.

439. Proctor v. Hoage, 65 App. D.C. 153, 81 F. 2d 555 (1935)—employer, an insurance agent, at 6:30 p.m. ordered claimant on a fixed salary to go home and finish work there. She was struck by an auto on way home. Held: she comes within the exception where going home to do more work.


Inglish v. Industrial Commission, 125 Ohio St. 494, 182 N.E. 31 (1932)—school teacher after school hours, as customary, took examination papers home to correct, hit by auto and killed.

Cahill's Case, 295 Mass. 538, 4 N.E. 2d 332 (1936)—insurance adjuster injured in own yard coming home to do more work.


441. Davis v. Bjorensen, 229 Iowa 7, 293 N.W. 829 (1940), and cases cited—auto became instrumentality of the business—had to drive to work, so collision on way to work compensable.


Bethlehem Steel Co. v. Industrial Accident Commission, 161 P. 2d 56 (Cal. App. 1945)—on way out, stopped to pick up war bond and fell on premises.
Subject to call

It is reasonable to rule that a worker who is subject to call twenty-four hours a day is in the course of the employment at all times.44 To make an award only when he is actively working gives him no greater rights than the ordinary set-hour worker whose remainder of the day is his own.44 Nearly all states, therefore, recognize the principle of twenty-four hour protection for the man subject to call—the man who may be pulled out of bed or away from his home or family at any hour. An injury to such a worker, at all times, is in the course of his employment,44 although an award may be defeated on other grounds, e.g., that it did not arise out of the employment.

Continuity of work

Some states have recognized a kindred principle, i.e., continuity of employment. Thus, for example, a cook living

See Bowen v. Keen, 17 So. 2d 706, 708, 711 (Fla. 1944).
Souza's Case, 316 Mass. 322, 55 N.E. 2d 611 (1944) and cases there cited—traveling worker burned to death while sleeping in public lodging house selected by himself, and charged as expense to employer.
Morrison v. Vance, 42 A. 2d 195 (Pa. Super 1945)—maintenance man living on premises "subject to call twenty-four hours a day"—injured after midnight closing garage doors at suggestion of employer.

444. Moore v. Manchester Liners (H.L. 1910), A.C. 498, 3 B.W.C.C. 527—Lord Loreborn, L.C. "A man engaged for so many hours a day is in the employment only during those hours. If engaged for a month continuously day and night, he is in the employment during the whole month . . ."

Accord. Rudolph, J. in Lang v. Board of Education, 17 N.W. 2d 692 (S.D. 1945)—"fixed hours" worker distinguishable from worker who "often performed duties in connection with his work at his home."

445. Employers' Liability v. Industrial Accident Commission, 37 Cal. App. 2d 567, 99 P. 2d 1089 (1940)—cook in private residence, subject to call, is protected even when she fell from stool in own room on which she was standing to observe the hem of her dress. "In course of it is to be construed liberally—she was required to live on premises and be neat in dress and appearance.
Standard Oil Co. v. Witt, 283 Ky. 327, 141 S.W. 2d 271 (1940)—fire of unknown origin in hotel, construction foreman burned to death. Subject to call—widow recovers.

Accord: Souza's Case, 316 Mass. 322, 55 N.E. 2d 611 (1944), and cases cited.
Fintzel v. Stoddard Tractor Co., 219 Iowa 1263, 260 N.W. 725 (1935)—steel culvert salesman, hunting with customer to talk contract, was accidentally shot in leg. "He worked Sundays and nights . . . His employment was . . . continuous." "A successful salesman must be a good listener as well a a good talker. He must be a grateful guest as well as a generous host."
on the premises may not actually be subject to call, yet if burned at night by fire, or if he slips going to the bathroom on arising in the morning, or if he is a traveling salesman away from home or headquarters, even though not subject to call, he is usually given an award on the theory of "continuity" of the employment. Living on the premises usually throws a protecting mantle over the worker at all times that he is properly on the premises. Compensation protection is given domestic servants or service covering all injuries except extraordinary circumstances unconnected with any risks of domestic service.

While actual twenty-four hour service is rare, any employee whose contract calls for such service is in the course of the employment continuously. Hence a nurse actually on


U.S. Fidelity & Guaranty Co. v. Skinner, 58 Ga. App. 859, 200 S.E. 493 (1938)—"traveling salesman, away from home or headquarters, is in continuous employment,"—killed in automobile accident, compensable.


See also note 471, post.

448. Finnegan v. Biehn, 276 N.Y. 50, 11 N.E. 2d 348 (1937)—death of janitor from fire caused by overturning of oil heater. All tenants had vacated. Decedents (husband and wife) were in apartment to watch building in preparation for demolition—compared to twenty-four hours service.

Accord: Carroll v. Westport Sanitarium, 39 A. 2d 892 (Conn. 1944)—general maid fell on clinker on premises returning from visit at her sister's home.

Accord. See bunk-house rule in California—Pacific Ind. Co. v. Industrial Accident Commission, 159 P. 2d 625 (Cal. 1945), and cases cited per Spence, J.


Accord: Cooney v. Roper (1939) Ir. Jur. Reps. 29—domestic servant fell out of her bedroom window when opening it, after rising in the morning; and

Aldridge v. Merry (1913), 2 I.R. 308, at p. 312, where Cherry, L.J. said: "The employment of a domestic servant is continuous, as she is bound at any time, day or night, to answer and obey the orders of her mistress. In case of sickness her attendance may be required at night. Thus any accident that befalls her on the employer's premises must arise 'in the course of' her employment."
twenty-four hour service may be protected while cycling to quiet her nerves at her employer's request.\textsuperscript{450}

Injuries on the premises before starting actual work, or after quitting, are usually compensable. Hence an explosion killing an employee arranging his clothes preparatory to work is compensable,\textsuperscript{451} as is an injury after driving an automobile on the employer's parking premises even though arriving one-half hour early.\textsuperscript{452}

\textbf{Temporary detachment}

Furthermore, temporary detachment from duty does not necessarily defeat an award. Where rest or lunch periods are provided or permitted, injuries therein are still compensable.\textsuperscript{453} Employees who have ceased working were held to be "in the course of" the employment while taking a shower,\textsuperscript{454} or warming tea on a boiler,\textsuperscript{455} or while on an errand for the employer during the lunch period.\textsuperscript{456} A teamster who fell asleep on his wagon seat and was jostled off while on a ferry,\textsuperscript{457} a worker injured while asking a co-employee for tobacco,\textsuperscript{458} a bath house attendant on his way to make a per-
sonal phone call, a page boy playing soccer on time off on a team for a stock exchange employer, a cook fixing the hem of her dress, a worker after hours washing his work clothes, were all held to be in the course of the employment, although in each instance they were not actively at work, and the wages paid did not specifically cover the period or time of the injury.

Nor is the service interrupted when for a brief interval the worker performs a personal errand not forbidden. Hence a filling station attendant crossing the highway to make a personal purchase is protected by the act when struck by a passing automobile, on his return, near the station.

While on the master's premises a servant may be within his employment although he has not begun work or has already stopped work. And the mere fact that he has stopped his own work and has gone to assist a fellow worker, when not against express orders, does not cause the injury to be beyond "in the course of" the employment.

"Workmen situated as claimant was may reasonably be expected to chew tobacco and to ask their fellow workers for tobacco for that purpose" (even though a few feet away). In a sense for "own purpose" but "no objection was made to the practice," citing McLauclan v. Anderson (1911), 48 S.C. L.R. 349, 4 B.W.C.C. 376, where teamster dropped pipe, was injured going to pick it up.

462 Watkins v. N.Y., N.H. & H.R., 290 Mass 448, 195 N.E. 888 (1935)—"A servant does not necessarily lose his status by interrupting his work to lunch or rest on the master's premises, even though not paid for the time consumed by the interruption. The interruption may be found an incident of the employment"—per Lummus, J., citing many cases.
463. Whitham v. Gellis, 91 N.H. 226, 16 A. 2d 703 (1940)—a "natural incident" of the work, and not a departure from it.
468. Hartz v. Hartford F Co., 90 Conn. 539, 97 A. 1020 (1916)—clerk hired to inspect, assisted fellow-employee with barrel and strained
On the other hand, awards were denied where a chauffeur was joy riding with his employer's permission and where a caddy climbed a tree for his own amusement while waiting to be called. It is submitted that while the result in these last cases may be correct, the reasoning is faulty. Most of the denials should be put on the ground that the injuries did not arise out of the employment, that they resulted neither from a risk therein, nor from any incident referable to the employment, but in each case the injury occurred during a protected period of time and hence was still in the course of the employment.

Work at home

Usually a worker, arriving home after his work-day has ended, is no longer in the course of his employment, when not subject to call. But even at home, if performing a duty for his employer, he may still be in the course of the employment. Thus a janitor-plumber repairing a blow torch at home and an investigator about to typewrite a report at home were held still to be in the course of their employment.

So, also, an attack on a public street right after quitting time may still be in the course of the employment if it is an extension of a work quarrel begun within the factory.

470. Field v. Charmette Knitted Fabric Co., 245 N.Y. 139, 156 N.E. 642 (1927)—superintendent injured on sidewalk by continuation of work-quarrel with workmen begun in mill. Fell, fractured his skull and died. Still in course of. Cardozo, J.: "The quarrel outside of the mill was merely a continuation or extension of the quarrel begun within." "Continuity of case has been so combined with contiguity in time and space that the quarrel from origin to ending must be taken to be one."

Accord in principle: Kyriakos v. Goulardis, 151 F. 2d 132, 138 (2 Cir. 1945)—"Neither the short lapse of time, nor the distance
And traveling workers, away from home or headquarters, are usually held to be in the course of the employment at all hours, whether or not actually subject to call, where the employer pays the traveling expenses. The nature of his work is such that the doctrine of continuity of employment is applicable during his enforced absence on business.\footnote{471}

Post-termination injuries

Injuries occurring after the employee has been fired or employment terminated may still arise in the course of the employment. The great weight of authority gives the worker a reasonable opportunity to leave or return to the premises for legitimate purposes, and while on the premises, doing what a reasonable man may do under the circumstances, he is entitled to compensation protection. Thus he is protected while obtaining his clothes\footnote{472} or even later when returning for his pay or tools.\footnote{473}
Broad construction

Denials of awards for any period when the employee is actively engaged in working for his employer, or while doing something reasonably incidental to his employment, should rarely be based on the proposition that it was not in the course of the employment. These words are construed broadly and should continue to be so construed. If an insurer seeks relief, it can usually find other more cogent defences. Common sense indicates that a compensation law passed to increase workers’ rights (because their common-law rights were too narrow) should not thereafter be narrowly construed both as to time and space—the marrow of the words “in the course of” the employment.

Hence New York refused to deny compensation to a chauffeur impressed into public service by a policeman who ordered him to chase a criminal, and in so doing he collided with another vehicle. He was still considered to be acting in the course of his employment.

If the workman is acting in the scope of his employment,

authority, a workman who, being unable to procure his pay when he severed his employment, is injured when he returns to the premises of his employer for that purpose, is acting in the course of his employment under the Workmen’s Compensation Laws." (See cases cited).

 Accord: Anderson v. Hotel Cataract, 17 N.W. 2d 913 (S.D. 1945), per Smith, P. J.
Riley v. Holland & Sons Ltd. (1911), 4 B.W.C.C. 155, “this was an implied term of the contract.”

474. Employers’ Liability v. Industrial Accident Commission, 37 Cal. App. 2d 567, 99 P. 2d 1089 (1940)—“in course of” is to be “construed liberally.”
Souza’s Case, 316 Mass. 332, 55 N.E. 2d 611 (1944), and cases cited.
Bailey v. Mosby Hotel Co., 160 Kan. 258, 160 P. 2d 701 (Kan. 1945)—“to be liberally construed to effectuate its purposes”—per Hoch, J.
Accord. Pelfrey v. Ocmee County, 36 S.E. 2d 297 (S.C. 1945), per Stukes, J.

475. Babington v. Yellow Taxi Corp., 250 N.Y. 14, 164 N.E. 726 (1928)—Cardozo, C.J., said that it would be a criminal offence for the caby not to obey, “an incident of the service foreseeable, if not foreseen.” He also added that the chauffeur could not desert the cab without peril to his master’s interest.
In Mitchell v. Industrial Commission, 57 Ohio App. 379, 13 N.E. 2d 736 (1936), the deputy sheriff called upon claimant to assist in making an arrest, saying, “In the name of the law you are a deputy sheriff.” Held: claimant became impressed employee of the county (killed in auto returning with dangerous prisoner).
Vilas County v. Industrial Commission, 200 Wis. 451, 228 N.W. 591 (1930)—member of posse.
See also note 494, post.
his protection, “in the course of” usually continues, regardless of the place of injury.476 Said one court:

“A good deal has been said about the difference between an accident arising ‘out of’ and one arising ‘in the course of’ the employment. No doubt in the earlier cases under the act there was a certain amount of difficulty in the distinction, but my view on the matter is quite determined. I think it is impossible to have an accident arising out of, which is not also in the course of the employment, but the converse of this is quite possible.”477

Nevertheless, some courts still continue to disallow claims on narrow definitions of the words “in the course of” the employment, and the intent of the founders of compensation acts to give wide relief to injured workers receives many a jolt as new decisions seek new ways of denying recovery.478

OF THE EMPLOYMENT

So long as there is financial profit for any one in interpreting words for his own benefit, the proposed millennium


477. Per the Lord President of the Court of Sessions, Scotland, in M‘Lauchlan v. Anderson (1911), 48 Sc. L.R. 349, 4 B.W.C.C. 376. Accord. U.S. Fidelity & Guar. Co. v. Barnes, 187 S.W 2d 610 (Tenn. 1945)—“while an injury arising out of any employment almost necessarily occurs in the course of it.” Yet the 1921 Massachusetts court thought in Rourke’s Case, 237 Mass. 360, 129 N.E. 603 (1921), that an attack by strikers on the public street after quitting work is not in the course of the employment, though causally related to the work. But see Souza’s Case, 316 Mass. 332, 55 N.E. 2d 611 (1944)—in the course of, even while sleeping in public lodging house; and also “out of the employment.” Also see Cardozo, supra, in Field v. Charmette Knitted Fabric Co., 245 N.Y. 139, 156 N.E. 642 (1927)—“quarrel from origin to ending must be taken to be one.” Accord in principle: Lepow v. Lepow Knitting Mills, Inc. 288 N.Y. 377, 43 N.E. 2d 450 (1942)—in the course of, even if bitten by African mosquito after working hours, is risk of foreign travel.

478. See Rourke’s Case, 237 Mass. 360, 129 N.E. 603 (1921); and Bell’s Case, 235 Mass. 46, 130 N.E. 67 (1921)—query, whether the present Massachusetts court would follow these old narrow cases—Author. Cf. e.g., Bischoff v. American Car Co., 190 Mich. 229, 157 N.W. 34 (1919)—machine stopped, and molder injured trying to point out to machinist where defect was. Claimant could not speak English, so used hands, and his hand was crushed when machinery started while he was coming down ladder. No award upheld, 5 to 3. Cf. Lanphier v. Air Preheater Corp., 278 N.Y. 403, 16 N.E. 2d 382 (1938)—where worker knew job required being in 150° heat, got chill and pneumonia, award demed, as not accidental.
TRENDS IN WORKMEN'S COMPENSATION

in compensation acts—when both sides will be lawyerless, and written decisions will be unnecessary—will never be reached. The legislators who set up compensation acts little dreamed that the depression of 1929, with its subsequent relief work, and later the alphabetical federal-state projects (WPA, ERA, etc.) would make the words "of the employment" a source of prolific litigation. The earlier English experience since 1897 made it apparent that trouble was in the air over the rest of the bases of compensation liability. It almost seemed that the words "of the employment" were added simply to make good grammar and a sensible sentence-end to the words "personal injury by accident arising out of and in the course of."

However, employers and carriers have used these words recently and repeatedly (and successfully) to deny awards. Is it "employment" for a recipient of city charity to chop wood for his grocery order? Are inmates of the Odd Fellows Home or Salvation Army hotels "employees"? Is it "employment" or charity exercise? If a laborer on the welfare rolls worked side by side with a regular city street worker and a stone crushed both at the same time, was one the recipient of charity and the other a wage earner? If convicts are put on the road to work, are they employed, or can reasons be found to deny recovery?

Welfare recipients

In spite of the modern conception of the dignity of labor, many courts have placed welfare recipients in the same class as outright "paupers," whether the assistance came from public or private sources. Recipients of help from private sources (or employers) are obtaining "charity" and hence are not employed; e.g., an inmate of the Odd Fellows Home who occasionally worked and received small sums for odd jobs. But a Salvation Army worker or a hospital

479. I.A.I.A.B.C., 1941 Meeting at Winnipeg, Manitoba, Bulletin No. 53, U.S. Dept. of Labor, pp. 52, 53—Canadian commissioners boast of "no lawyers" and "no courts."

480. Seymour v. Odd Fellows' Home, 267 N.Y. 354, 196 N.E. 287 (1935)—where inmate is allowed pin money for occasional odd work, it is mere gratuity, and there is no contract of hire.

481. Where inmate acted as cook's helper, getting $3 weekly in addition to free board and room, there was a contract of hire, and wages were figured at $13.50—Hall v. Salvation Army, 236 A.D. 199, 258 N.Y.S. 269 (1932).
interne is "employed" and not an object of charity or philanthropy. The city or town welfare-assisted worker is either not "employed" or a "ward of the municipality," the object of state statutory "relief." Other states, however, recognize him as an employee, even though the municipality's purpose in giving him work was to aid its citizen. Such workers often labored side by side with regular city employees, and if both were injured at once on a job which "has substantial economic value," it is hard to see why one is an employee and the other is an outcast, not entitled to compensation or medical services.

**Federal relief workers**

If the worker is on the WPA, ERA or similar job, he is usually denied compensation by the state court because he is a "federal" employee and should look for relief, not to the state act, but to some federal act. State courts have not

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482. Hospital interne, without cash wages, is employee—Bernstein v. Beth Israel Hosp., 236 N.Y. 268, 140 N.E. 694 (1923).

483. A welfare recipient obtains not wages but poor relief, with no contract of hire, as his alleged wages are merely the result of a "statutory duty to care for poor persons." He is a "ward of the municipality"—Donnelly's Case, 304 Mass. 514, 24 N.E. 2d 327 (1939).


*Contr.:* Blake v. Dept. of Labor, 196 Wash. 681, 84 P. 2d 365 (1938), Hendershot v. City of Lincoln, 136 Neb. 606, 286 N.W. 909 (1939)—combination city welfare and federal relief worker; and cases in next note.

484. Industrial Commission v. McWhorter, 129 Ohio St. 40, 193 N.E. 620 (1934), and cases cited—relief workers are employees, unlike "paupers." Compensation awards create social justice, avoid "charity" which municipality would have to give relief worker in most injury cases if held outside of compensation act. *Accord:* Hendershot v. City of Lincoln, 136 Neb. 606, 286 N.W. 909 (1939)—where "work has substantial economic value," he is an employee of city. Excellent review of cases and law review articles, per Chappell, J.


485. Donnelly's Case, 304 Mass. 514, 24 N.E. 2d 327 (1939)—Dolan, J., said the evidence showed that the federal administrator had right to control, so award reversed and future claimants referred to federal act, E.R.A., act of 1936, U.S.C. Sup. III, Title 15, Sec. 728, extending the provisions of the act of Feb. 15, 1934 (48 U.S. Sts. at Large 351) to federal relief cases where state acts do not apply. *Accord:* Lawe v. Dept. of Labor, 189 Wash. 650, 66 P. 2d 848 (1937)—WERA laborer on work-relief not under state compensation act. Painter was hurt painting work-room of county welfare board handling WERA.
called him a "pauper" or "ward of the municipality," even though he often was the same fellow who was on city relief previously. And a few fortunately have found ways of giving him a state compensation award,\(^{(466)}\) by finding that the right to control the worker was in a state agent and not in the federal administrator.

The federal act (for ERA, WPA, etc., workers) is the one used for regular federal employees, and the commission provides no formal hearings (decisions are made usually upon \textit{ex parte} written reports) and absolutely no right of appeal. As the government is the employer, the commission assumes that formal hearings may be denied, and that it can refuse to be subject to all court proceedings.\(^{(487)}\)

\textbf{Prisoners}

As for \textit{prisoners or convicts}, some states have read in the requirement that the employment be voluntary, and have denied awards to all prison inmates.\(^{(488)}\) The compensation act is not a boon for the virtuous and a ban for the wicked, and the convict who is in fact employed outside of prison by a private employer is employed and protected by the common law.\(^{(489)}\) His arm, chopped off in this quasi-involuntary em-

\(^{486.}\) Doyle v. Commonwealth of Pennsylvania, 153 Pa. Super. 611, 34 A. 2d 812 (1943)—claimant operating roller on WPA job remained employee of highway department, and was not loaned to WPA.

\(^{487.}\) As the U.S. Employees' Compensation Commission (even though its chief attorney is able and liberal), is often hundreds or even thousands of miles away from the injured employee, who cannot even if near the New York commission, bring his witnesses to a "hearing" or have counsel do anything but write letters, the whole procedure is highly unsatisfactory, in the opinion of the author. Informal "trial" by official reports and other documentary evidence under this act of Sept. 7, 1916, is the rule of the commission, and, if constitutional (see Dahn v. Davis, 258 U.S. 421, 42 S.Ct. 320 (1922), should be changed by Congress to allow formal evidence at the employee's request, and to allow appeals. (Limited appeal effective late in 1946—author). Hearings before state boards are more in accord with the modern social and legal viewpoint.


\(^{489.}\) Common-law suits allowed for chain gang injuries: Sloss-Sheffield Steel & Iron Co. v. Long, 169 Ala. 337, 53 So. 910
ployment, given redress at common law where a chain gang employer was negligent, needs redress now under compensation acts. Certainly, once the convict becomes a free man, the loss of his arm will be felt in civil life.

To deny an award against a private employer or a highway or other state department which "borrows" the prisoner for regular work, is to insert into our compensation acts the intolerable continental law of civil death for all temporary convicts. There is no adequate reason for not insisting that outside employers insure convicts under the local compensation act. To provide a compensation award for a true work-injury by a convict making auto plates, furniture and the like, in competition with outside factories, is certainly not unreasonable. Except where the state requires that employment be by "contract," courts should not deny compensation in every case by reading in the word "voluntary" before the word "employment." Assuming that the convict cannot make a contract with the jail authorities, contracting the prisoner out to another department or to private employers raises a different question. Thus California properly permitted an award of compensation against its own highway department borrowing prisoners for work, even though the employment was not strictly voluntary. And North Carolina and Maryland by statute compensate some injuries to convicts. Where the employment need not be contractual, but may be by appointment, election, or otherwise, there is little excuse for denying compensation to work-

(1910)—minor prisoner negligently ordered to hitch a wild mule. No contract, but he was an injured human being.
Dalheim v. Lemon, 45 Fed. 225 (1891)—prison authorities allowed defendant contractor to use prisoners to erect building for state prison. Scaffold fell on prisoner while plastering. In charging jury orally, Shiros, J. (Cir. Ct. D. Minn.), said that (1) relation of master and servant could exist, if defendants knowingly received the benefits of prisoner's labor; (2) damages limited to effect on prisoner's labor after period of imprisonment, and nothing during term.

490. California Highway Commission v. Industrial Accident Commission, 200 Cal. 44, 251 P 808 (1926)—convict lost eyes in highway blast, getting $0.75 a day, under the "Convicts Road Camp Bill," permitting highway department to use him. "Held. he is an employee, as that act restored limited civil rights. (But see now ch. 653, Cal. Laws of 1927, expressly excluding convict labor on state roads).

491. See note 493, post.
492. In South Carolina a policeman is under the act, as all municipal employees except such as are "elected" come under the act—Green v. City of Bennettsville, 197 S.C. 313, 15 S.E. 2d 394 (1940).
ing convicts. Most states, however, for intramural injuries, e.g., making auto plates, beds, desks, etc., for use in other state departments, give no compensation rights to prisoners against the state or county as employer. The basis, however, is hardly that they are not voluntarily employed, as persons impressed into service by police or sheriffs, and others working out road taxes are allowed to recover, although their services are often not voluntary in the sense of contractual free choice. Convicts fail to collect compensation because most courts still feel that they are civilly dead or unemployable within the meaning of compensation acts, even when doing a full day's work under the chain-gang employer's orders.

**Illegal employments**

Illegal employment is not necessarily a bar. Thus where the nature of the business is legal but certain conduct therein is forbidden or illegal, awards are nevertheless upheld. Hence a minor illegally employed usually recovers, as does

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493. Greene's Case, 280 Mass. 506, 182 N.E. 857 (1932)—repairing toilet in county jail, now reinforced by St. 1930, ch. 159, to make sure prisoners have no compensation rights.

Lawson v. Travelers Ins. Co., 37 Ga. App. 85, 139 S.E. 96 (1927), and cases there cited.

Yet North Carolina passed a contrary statute to make sure that certain convicts have compensation rights—see amendment of March 15, 1941, sec. 14, Public Laws, 1929, amended—where results of injury continue after discharge.

And so did Maryand—see Art. 101, 1939 Code, sec. 47

494. In Mitchell v. Industrial Commission, 57 Ohio App. 319, 13 N.E. 2d 736 (1936), a deputy sheriff about to arrest a dangerous criminal verbally ordered claimant to assist, saying "in the name of the law you are a deputy sheriff." Held: claimant became deputized employee of the county, and dependents recover, when claimant was killed in auto accident after arresting prisoner.

New York held his immediate employer liable, even though the "cabbby" was impressed into service by a policeman—Babington v. Yellow Taxi Corp., 250 N.Y. 14, 164 N.E. 726 (1928)

New Mexico made a distinction between powers of peace officers (common-law posse comitatus) and ordinary traffic officer who had citizen take over while taking traffic victim to hospital—Eaton v. Bernacillo County, 128 P. 2d 738, 142 A.L.R. 647 (N.M. 1942).

495. Citizen working out a road tax becomes employee—Germantown v. Industrial Commission, 178 Wis. 642, 190 N.W. 449 (1922)—"his election to pay in labor implied a contract of service."


Pierce's Case, 267 Mass. 208, 166 N.E. 636 (1929)—killed in fireworks plant, father's sole right to dependency compensation.

West's Case, 313 Mass. 146, 46 N.E. 2d 760 (1943)—double compensation now provided for illegally employed minor.

**Accord:** Bloomer Brewery, Inc. v. Industrial Commission, 239 Wis.
a worker who procured employment by a criminally punish-able false statement;\textsuperscript{497} and a night club hostess illegally em-
ployed to encourage liquor sales and getting a percentage of
the beverages sold (and injured during a fire.)\textsuperscript{498} But em-
ployment in a business that is entirely forbidden by law, or
involves moral turpitude, as a bartender in a speakeasy during
prohibition,\textsuperscript{499} or employment in the United States in a house
of ill fame, or as a gangster to commit illegal acts of violence,
(being against public policy) cannot be the basis of an award,
even though in fact the claimant is actually employed under
a contract of hire, or otherwise complies with the statutory
bases of employment.

PART III

CONCLUSIONS

These, then, are the fundamental principles of the law
of workmen's compensation. True, complete uniformity of
judicial decision has not been reached; nor is it any more
possible than uniformity in anything that requires the use
of mental processes. We shall always have the leftists and

\begin{itemize}
\item \textsuperscript{497} Kenny v. Union Ry. Co. of N.Y.C., 166 A.D. 497, 152 N.Y.S. 117
(1915)—street car conductor falsely stated on application that he
never worked for another railway company (when in fact he was
discharged for failure to ring in fares), and that he was single
(when in fact married). Three months later he was killed in a
street car accident. \textit{Held.} widow collects, as contract only voidable,
not void, and false statements in no way contributed to the cause
of death, although a direct violation of Sec. 939 of Penal Law,
making criminal such false applications.
\item \textsuperscript{498} Massachusetts Bonding & Insurance Co. v. Industrial Accident
\item \textsuperscript{499} Herbold v. Neff, 200 A.D. 244, 193 N.Y.S. 244 (1922)—bartender
during prohibition cut self on bottle. Court, in denying award, took
judicial notice that in December, 1919, prohibition was in force, and
it was a criminal offence to sell liquor.
\end{itemize}
rightists, liberals and conservatives, or whatever nomenclature the reader prefers. The trend, however, is toward greater uniformity and fortunately toward more liberality in aiding the injured worker and his dependents.

Great judges no longer pretend complete neutrality. In dealing with human rights, with redress for industrial injuries and death, the neutral is usually the vacillating individual who gives and takes, trying to satisfy both sides, and creating only enmity or confusion. The compensation law was put on the books for the benefit of workers, not insurance companies (i.e., carriers), be they private or state fund, nor for self-insuring (i.e., non-insuring) employers.

It is human to err; and if judges are to err, their mistakes should be on the side of liberality. The author does not argue for unlimited liability in all cases. But if some of the judges could be present in the classrooms where compensation cases are being discussed before law students or students in economics, and hear the reactions of those who will dominate the scene when we are no longer here, they would cease their attempt to fly in the face of common sense, and stop introducing narrow common-law rulings into compensation cases. They would no longer attempt to stem the tide of reasonable liberality which the acts promised, and which should have arrived at our shores a generation ago.

Yet in some jurisdictions the shades of Abinger and Shaw still dictate decisions through the dogged hands of judges steeped in ancient learning. In the minority of courts common-law principles, long outworn, are brought back to deny recovery in present-day compensation actions.

To be more specific: while it may be good law in some states to prove that legally husband and wife are one, a wife will not be convinced, if she works in her husband’s shop and loses an arm, that she is not entitled to compensation simply because she cannot make a “contract of employment” with her husband, or because she has no separate legal entity. Nor will the husband be convinced that justice requires

Foster v. Cooper, 143 Fla. 493, 197 So. 117 (1940)—“She has no separate legal existence’ Held: husband and wife cannot be partners.
Contra: Reid v. Reid, 216 Iowa 882, 249 N.W. 387 (1933), and Nesbit v. Nesbit, 102 Pa. Super. 554, 157 A. 519 (1931)—can contract “for performance of services outside of her duties as a housekeeper.”
quires that the insurer should not pay his wife, after he has paid premiums on his wife's salary. And he would theoretically rise from his grave in indignation if he heard the judge rule, on hearsay grounds, or because it was a private conversation, that his widow could not repeat his story of how he bumped and fractured his skull on a machine when no one was present, or during a war-time blackout.501

Similarly, an ashman's widow cannot understand how an intelligent judge can rule that she and the five children must go on charity because her husband did not wait for the employer's truck to stop, but had jumped off when it was going three and one-half miles an hour, in order to rush or facilitate his work.502 To tell her it was an "added risk" is to raise her contempt for the law.

The public will never understand that if a salesman slips on ice in the street while getting orders, he is somehow outside of the compensation act because it is a street risk common to the walking public and not peculiar to the work;503 that if he takes a drink of water he is protected,504 but if he goes two steps out of his way to get a newspaper discarded by a fellow worker and falls on an apple peel, his employer's carrier is relieved of all liability;505 that if he freezes his fingers while driving a bakery wagon or cleaning a public square at four in the early morning, and has to have three of them amputated, he cannot collect compensation because it is an "act of God,"506 but if he is near the waterfront or is at a place where it is ten degrees colder than for other outdoor workers, the risk is greater and he can recover.507 He cannot collect if lightning strikes him directly while he is

504. See note 214, supra.
506. See note 162, supra.
cleaning street gutters or driving his horse or taxicab during a terrific storm, as required by his work, but if the horse is hit instead, and the worker falls to the ground and thereby is injured, he collects; or if he is twenty-three feet in the air on a scaffold he collects, even if injured by a direct hit, if experts will testify, or the court will take judicial notice, that therein lies an increased hazard.

It is true that all of these illustrations are taken from the rulings of august and able high courts, in a field of law which was created to replace the unfair, narrow, discarded common-law principles in the realm of personal injuries and death.

Part of the trouble stems from the doctrine of *stare decisis*—that the decision of the earlier court must be perpetuated unless changed by the legislature. *Stare decisis* serves a very useful purpose in most cases. It enables lawyers to advise their clients on the probable outcome of existing or future suits. But it also prevents a liberal court from re-examining the causes of popular discontent,—a discontent which has a real basis. It is a great aid in perpetuating both early errors in thinking and outmoded narrow rulings. A workmen's compensation ruling in 1914 may be shown to be against the trend of thought in 1944. It may be shown to

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508. See note 151, supra.
509. See notes 179-181, supra.
510. See notes 146, 155-157, supra.
511. See notes 146, 155-157, supra.

Great courts do not hesitate to admit errors of earlier narrow cases, and reverse themselves, in the field of workmen's compensation. See, for example:

**California:** reversing itself on horseplay cases, after 30 years of denying relief to innocent victims—Pacific Employer's Ins. Co. v. Industrial Accident Commission, 158 P. 2d 9 (Cal. 1945).

**Arizona:** reversing itself on theory the injury needs to be peculiar to employment, for years having erroneously followed a narrow dictum in McNicol's Case, 215 Mass. 497 (1913)—Goodyear Aircraft Corp. v. Industrial Commission, 158 P. 2d 511 (Ariz. 1945).

**Massachusetts:** disavowed, in effect, the same dictum in McNicol's Case. See Souza's Case, 316 Mass. 332, 55 N.E. 2d 611 (1944), and Rogers' Case, 318 Mass.—, 61 N.E. 2d 341 (1945), (in effect reversing Savage's Case, 257 Mass. 30, 153 N.E. 257,) where Qua, J., speaking for the present Massachusetts court said: " . we prefer to continue in the direction pointed out by the cases hereinbefore cited, nearly all of which were decided more recently than Savage's Case.

"The decree is reversed and a decree is to be entered in favor of the employee."

**Colorado:** reversed self in effect as to specific compensation for eye injuries—"compensation for eye injuries shall be computed without reference to the use of corrective lenses, is the better rule
be too narrow to conform with similar decisions on a kindred subject in the same state. Yet some courts even then adhere to the old decision, for there must be conformity whatever the cost. And the cost is popular dissatisfaction with the administration of justice.

Fortunately, in the field of workmen’s compensation—the field that is close to the heart of the working man and working woman—the great majority of state courts have taken the cue from the legislative mandate—the command of broad and liberal construction. That mandate conforms with the needs as well as wishes of the public, over two million of whom suffer work-injuries or death annually. These liberal courts are too often overlooked by the average layman.

Furthermore, the public little realizes that many of the carriers, both private and state-fund, have finally learned that the $500,000,000 that they collect annually is not all their money; that the greater part of it is held in trust for the injured worker and his dependents, for the doctor, nurse and hospital for its curative treatments, for rehabilitation, for accident-prevention work, to help pay part of the undertaker’s bill, and for numerous other legitimate purposes, including a fair margin of profit for a private carrier. The self-insuring employer has also begun to realize that he owes financial and medical help to his injured workers and their widows and dependents; that negligence is no longer the basis of liability; and that industry must pay its fair share of all its concomitant injuries and deaths, regardless of who is at fault with respect to the accident. Self-insurers usually are represented by private attorneys, many of whom have developed the proper social instinct.

Interested also in the field of workmen’s compensation, in addition to the many doctors and hospitals who treat the injured worker, are the social workers, the teachers, the labor unions, the state and federal officials whose work encompasses the subject of work-injuries, and many others.

Unfortunately lawyers in general cannot afford to practice on the worker’s side. The fees are limited by the various administrative officials to small sums, usually ranging from

of authority.” “. . . in consonance with the humane and beneficent purposes of that act.” The court then added that if Employer’s Mutual Insurance Co. v Industrial Commission, 70 Colo. 228 conflicts, “it is expressly overruled.”—Great American Indemnity Co. v. Industrial Commission, 162 P. 2d 413 (Colo. 1945)—per Alter, J.
10 to 20 per cent, and unless a lawyer has a sufficient number of cases, the work is not remunerative, and the law questions raised are multiple. No attempt is made by the commissions to control fees paid by carriers to their attorneys, and their number is consequently legion; carriers' work is widely sought by both doctors and members of the bar. Some of the ablest lawyers in the country practice as carriers' attorneys, and many display a spirit of fairness rarely found in the days of the old common-law injury claims. It is hoped that in time an equal number of able attorneys will arise to represent the injured worker and his dependents. Increased fees are one step in that direction; co-operative commissions are another. Fair and yet liberal administrators are found from one end of the country to the other. The Department of Labor in Washington is zealously guarding the rights of injured workers, as is clear from reading the many bulletins issued by it on workmen's compensation problems.

All of these things the public should know. It should read about the liberal decisions of the majority of the courts, and of the new judicial attitude toward work-injuries, of the modern trends in broadening the rights of injured workers, and of the success of compensation acts in improving employer-employee relations.

It is hoped that this discussion may cause the reader, whether layman, jurist or lawyer, to realize that whatever may have been the causes for popular dissatisfaction with the administration of justice in the past, there is at least one portion of the law—the workmen's compensation law—where the majority of commissioners, judges and lawyers deserve commendation; and that in this, one of the oldest branches of social security, lies the background for a change in legal thinking that combines common sense with modern ideas of legal, social and industrial responsibility. It offers a real opportunity for increasing public confidence in the law and in the courts.