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FORTY YEARS OF AMERICAN WORKMEN'S COMPENSATION*

BY STEFAN A. RIESENFELD**

I. BACKGROUND AND ORIGIN OF AMERICAN WORKMEN'S COMPENSATION

The year 1951 marks the 40th anniversary of continuously operating workmen's compensation legislation in the United States. For in 1911 the compensation acts of California, Illinois, Kansas, Massachusetts, New Hampshire, New Jersey, Nevada, Ohio, Washington and Wisconsin went into effect, constituting the first group of state statutes to withstand constitutional attacks and to remain, with more or less radical changes, operative until the present day. This legislation marked the beginning of a new era in the law governing work-injuries and spelled curtains for an antiquated approach to the problem of the injured workman, for constitutional squabbles and for judicial obstacles to progress.

Of course the compensations acts of these ten pioneer states had very important precursors. But the first legislative attempts in this field were limited and sporadic, and with one exception fell victim to the fatal verdict of unconstitutionality. Maryland actually as early as in 1902 established a Cooperative Accident Fund for certain perilous occupations. But it did not stand the test of

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Massachusetts enacted a voluntary compensation statute in 1908. But it remained a dead letter. Congress itself likewise acted in the same year, thanks to the ardent pleas by President Theodore Roosevelt, who was the early champion of compensation legislation. But the congressional act benefited only federal employees. Montana initiated compensation legislation for the mining industry in the following year, but the courts again repudiated it. New York in the next year finally became the first state to enact comprehensive workmen's compensation legislation, consisting of two complementary acts, of which one established compulsory coverage while the other provided for a voluntary system. But in a decision that created a national sensation the highest court of that state invalidated the more important one of the twin acts on constitutional grounds.

The legislative movement which was initiated by the federal act of 1908 and the ten pioneer state acts of 1911 kept its momentum and gradually swept the nation, particularly after the Supreme Court in three forward looking opinions had set at rest the constitutional doubts. Mississippi was the last state to fall in line and today 48 state and 6 federal and territorial compensation acts operate on the American scene, covering a substantial portion of the labor force in the United States.

5. 35 Stat. 556 (1908).
6. See the various messages of President Roosevelt to Congress, especially his annual message of 1906, 41 Cong. Rec. 22, 26 (1906) and the messages of Dec. 3, 1907, 42 Cong. Rec. 69, 72 (1907) and of Jan. 31, 1908, 42 Cong. Rec. 1347 (1908)
9. N. Y. Laws 1910, c. 674 (compulsory coverage for certain dangerous employments); N. Y. Laws 1910, c. 352, § 3 (voluntary system).
11. See, e.g., the Symposium in 25 Survey 185 (1911).
15. No accurate statistics regarding the number of employees actually
Workmen's compensation is designed to protect the worker against substandard living conditions resulting from work-injuries. With almost 1,900,000 disabling injuries of that kind occurring in 1947 the social significance of the field can hardly be overestimated. This type of legislation was prompted because the rules which governed prior thereto were predicated on notions of fault and failed dismally to protect the injured workman. The proof necessary for a recovery was difficult and cumbersome and necessitated protracted litigation. Recoveries were consequently rare and greatly reduced by costs and fees. For the injured worker and his family it was at best a venture of too little and too late.

Of course, the new system in the United States was not a venture for which there was no model elsewhere. Germany and England had embarked in protective legislation of that character many years before, although the actual systems of the two countries differed considerably. There was originally much disagreement in the United States as to which of the two was the preferable pattern and the pioneer statutes borrowed to a varying degree from both schemes. Perhaps even more interesting is the fact that labor at first showed little interest in the matter and actually fought some of the early proposals. Enlightened public officials, political

covered by the existing 54 compensation statutes exist. The elective character of 26 state acts as well as the variations in the minimum number of employees required for coverage and in the other exemptions preclude even a reliable estimate. It seems, however, safe to conclude that at least more than fifty percent of all employed workers are now covered. See McCamman, Workmen's Compensation: Coverage, Premiums and Payments, 13 Social Security Bulletin No. 7, 3 (1950).

16. For a detailed presentation of the different legislative programs operating in the United States to prevent or remedy substandard living conditions resulting from the various hazards of modern life see Riesenfeld and Maxwell, Modern Social Legislation (1950).
18. The German Industrial Accident Insurance Act of 1884 was the first in a series of social insurance laws sponsored by the imperial government to curb the spread of the socialist party. See Brooks, Compulsory Insurance in Germany, Fourth Special Report of the U. S. Commissioner of Labor 84 (1893).
19. 60 & 61 Vict. c. 37 (1897).
20. About the influence of the German system on Washington's Industrial Insurance Law of 1911, see the comments by Judge Bausman in Stertz v. Industrial Commission, 91 Wash. 588, 590, 158 Pac. 256, 258 (1916). See also Sherman, Can the German Workmen's Insurance Law be Adopted to American Conditions?, 61 U. of Pa. L. Rev. 67 (1912).
21. Some of the reasons for labor's hostility were well taken, especially their concern about over-standardization and the discrimination against younger workers.
leaders and most of all academic men were the true standard bearers of the movement. But a convincing study of the New York legislative investigatory commission on the plight of the injured workmen and cost and waste involved in the existing system, which was published in 1910, exerted a profound influence on the leaders in the American labor movement and from then on they took an active part in the promotion of compensation legislation.

It should be noted that the New York legislative investigation of the defects in the existing law relating to work-injuries was not an isolated event. Similar movements reached the legislative level in other jurisdictions at the same time. Among them was Minnesota where, owing to the efforts of its governor and some prominent members of its bar, including Pierce Butler who later became a Justice of the Supreme Court, a legislative investigatory commission was appointed in 1909. This commission called the first National Conference on Workmen's Compensation which was held in Atlantic City, July 29-31, 1909, and constituted an important milestone in the American development.

The period of forty years which thus began in 1911 when the efforts of these pioneers in social legislation first produced lasting legislative results has witnessed a tremendous expansion and liberalization of the protection originally envisaged, especially because of progressive judicial enlightenment. A brief analysis of the main trends and currents which have occurred in the field during

23. Theodore Roosevelt, in particular, took an active interest in the promotion of compensation legislation both as Governor of New York and President of the United States; see also note 6 supra.

24. Leaders in that movement for social insurance were especially Professors Henderson of the University of Chicago and Seager of Columbia University; see Henderson, Industrial Insurance in the United States (1910); Seager, Social Insurance (1910).


27. Legislative or gubernatorial investigatory commissions on the subject of workmen's compensation were appointed in Minnesota, New York and Wisconsin in 1909 and in Illinois, Massachusetts, Missouri, Montana, New Jersey, Ohio, Washington and by Congress in 1910. For a summary of some of these reports see Clark, Workmen's Compensation and Insurance, 22 Bull. Bur. of Labor 97 (1911); see also Riesenfeld and Maxwell, Modern Social Legislation 133, 134, 137 (1950); Dodd, Administration of Workmen's Compensation 18 ff. (1936).

the four decades of its operation is the main object of my lecture today.29

II.
THEORY AND NATURE OF WORKMEN'S COMPENSATION

While on the administrative and judicial level questions involving the scope of the protection under the applicable compensation acts present themselves generally as problems of statutory construction, actually in the end they always resolve themselves into a consideration of the basic policy and nature of this type of legislation. Workmen's compensation, as stated before, has the purpose of protecting the worker from a life on a substandard level as the result of a disabling work injury. Although the compensation acts of most jurisdictions are complicated and extremely technical pieces of legislation their basic theory is clear and simple. Perhaps the most dramatic formulation of it is a slogan ascribed to David Lloyd George,30 even though the speaker has never been able to verify this authorship. This slogan states that “The cost of the product should bear the blood of the workingman.” Of course clichés like that usually possess delusive simplicity and occasionally do more harm than good. It is perhaps more accurate though less colorful to say that workmen's compensation is social insurance against a particular hazard of modern life. The negative implication flowing from this nature of workmen's compensation is that it is fundamentally and intrinsically different from tort liability. Because of the many consequences which flow from this insight and the frequency with which courts and textwriters have been oblivious to this simple truth it may be well to elaborate on this argument.

The fact that the incidents of compensation liability may reflect themselves in the cost of the product and thus be shifted to the ultimate consumer31 is in itself neither a differentiating nor an essential factor. Tort liability will likewise appear as a part of the cost of the product and is to no lesser degree passed on to the consumer public. The differentiation between compensation and tort

29. For a more detailed treatment, see Horovitz, Current Trends in Workmen's Compensation (1947); Riesenfeld and Maxwell, Modern Social Legislation 127-440 (1950).
31. The extent to which added costs of the production can be shifted to the consumers rather than being absorbed by the wage-earners in the form of a reduction of wages or by the entrepreneur in the form of a reduction of profits is actually a complicated problem of economic theory about which there is apparently much controversy among the experts, see Witte, The Theory of Workmen's Compensation, 20 Am. Lab. Leg. Rev. 411 (1930).
liability, especially if there is insurance against either, is actually quite sophisticated and a matter of tradition. Certainly it is a naive over-simplification to say that "tort liability is, by its nature, expected to hurt the defendant."\(^2\) Classical tort principles impose upon the enterprise the risk of a variety of hazards according to more or less crystallized policies ordinarily involving notions of foreseeability and failure to exercise control. Workmen's compensation on the other hand imposes upon the industry the risk of one particular class of hazards (work-injuries of the employees) and follows policies which are special and separate. Thus while tort and compensation principles as applied to industry both involve essentially a distribution of risk, the underlying policies governing this distribution (the rationes distribuendi) are not identical. It is interesting to observe that Justice Cardozo, one of the most profound thinkers in such matters, made this very point\(^3\) and thus exhibited greater insight into the differences in the underlying policy considerations which determine the criteria for risk distribution than a famous tort expert who unduly slighted them.\(^4\)

Workmen's compensation is basically a branch of social insurance.\(^5\) Again it might be well to emphasize that the mere fact that the employers in all states, except perhaps one, must insure their liability with a private company, become subscribers to a state fund or qualify as self-insurers\(^5\) is in itself not the essential insurance feature. Workmen's compensation was social insurance even during the early years when such duty to insure did not exist. The real characteristic of social insurance is the fact that the worker is entitled to the benefits as a matter of right, irrespective of need; that the hazard which is involved is a typified hazard of modern society: loss or reduction of earning power; and that there is a certain standardization of benefits and de-technicalization in the procedure.\(^6\) Workmen's compensation as social insurance is thus a member of the great family of American social insurance programs.


\(^{33}\) See the comments by Justice Cardozo in Babington v. Yellow Taxi Corp., 250 N. Y. 14, 164 N. E. 726 (1928).

\(^{34}\) Smith, *Frolic and Detour*, 23 Col. L. Rev. 444, 716, at 456 (1923).

\(^{34a}\) The nature of workmen's compensation as social insurance has recently been recognized by the Supreme Court of New Jersey in 78 A. 2d 709, 713 (N.J. 1951).

\(^{35}\) For details see Riesenfeld and Maxwell, *Modern Social Legislation*, 147, 368-394 (1950).

\(^{36}\) The aspects of standardization and de-technicalization form the subject of my second lecture, *Problems of Workmen's Compensation Administration*. 
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comprised, in addition, of old-age and survivors insurance, unemployment insurance and the new-comer in that class—sickness cash benefits insurance.\(^{37}\)

The principle that workmen’s compensation is social insurance and not tort liability should furnish the clue to all difficult problems of statutory construction. Its neglect is the cardinal sin against the injured workman. This none of the traditional restrictive tort doctrines such as “scope of employment,” “proximate causation,” “assumption of risk” and “blameworthiness” should ever be relied upon in compensation cases. As we will see, the courts have gradually come to recognize this policy. It should be added that while the capacity of industry to pass the cost on to consumers and patrons is perhaps an important consideration in the imposition of risks upon it; the possibility of such transference is not necessarily a condictio sine qua non of compensation coverage. Thus there is no convincing reason why a charitable or non-profit organization should not likewise bear the risk of work-injuries of their employees incurred in the performance of its function. An illustrative example of the faulty approach is the decision of Caughman v. Columbia Y.M.C.A.\(^{38}\) In that case the question in issue was whether or not a charitable organization such as the Y.M.C.A. was liable for compensation to an injured employee. The court admitted that “the definitions of employers and employees who are subject to the provisions of the Act are very broad and comprehensive and entirely sufficient to include charitable institutions.” Nevertheless it denied relief to the injured employee because according to the controlling South Carolina law charitable organizations are not liable in tort and therefore “by implication” excluded from compensation liability which was “substitutional in character.” This reasoning shows patently the undesirable results which flow from the wrong characterization of the nature of compensation. Fortunately a number of other jurisdictions have taken a more enlightened approach on that issue.\(^{39}\)

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38. 212 S. C. 337, 47 S. E. 2d 788, 33 Minn. L. Rev. 440 (1948).
39. See, for instance, Schneider v. Salvation Army, 217 Minn. 448, 14 N. W. 2d 467 (1944); Gardner v. Trustees of M. E. Church, 217 Iowa 1390, 250 N. W. 740 (1933). The latter case is perhaps also remarkable because the court disposed of the defendant’s contention that the injured workman’s employment by the church was merely casual and not in the employer’s trade or business with the reference to the scriptural words: “I must be about my Father’s business.”
Perhaps the last point which ought to be made in that connection is the thesis that workmen's compensation is not only radically different from tort liability, but also that its basis is not contract. It is properly classified as a status.\textsuperscript{40} This holds true regardless of whether a state has a compulsory or a so-called elective system,\textsuperscript{41} or whether compensation liability is imposed upon the employer and his private insurance carrier or upon a state fund to which an employer must subscribe. Although courts have occasionally classified workmen’s compensation liability, particularly if of the elective type,\textsuperscript{42} as contractual, this error happily has not too frequently entailed results which are socially undesirable. The courts have ordinarily recognized that the content of the legal relation between the worker and the employer and the insurance carrier is determined by statute. Nevertheless there are instances where the technical difference between contract and status becomes material and should be kept in mind.\textsuperscript{43}

III.

THE "RED-SHIFT" IN WORKMEN'S COMPENSATION

Modern physics tells us that the major secret of nature still unsolved is the phenomenon that the spectral lines of light coming from the outer spaces have exhibited through a period of careful measurements a demonstrable shift towards one side of the spectrum, the so-called “red-shift.” Outstanding experts have deduced therefrom that the universe is gradually and steadily expanding. The following remarks are designed to focus attention upon the gradual and continuous expansion of the scope of workmen’s compensation during its journey of 40 years, and deal therefore with what one may call with a borrowed term the red-shift in workmen’s compensation.

The progressive liberalization of workmen’s compensation has been accomplished by a fascinating interplay of legislative fiat and increasing judicial enlightenment. It can perhaps be best gauged

\textsuperscript{40} Leadership in the classification of workmen’s compensation as status relation was assumed by the United States Supreme Court, especially in the pioneering decision of Parramore v. Cudahy Packing Co., 263 U. S. 418, 44 Sup. Ct. 153, 68 L. Ed. 366 (1923).

\textsuperscript{41} Actually in most of the 26 states still adhering to that system, elective coverage is “presumed” and requires a formal rejection, see Note, 60 Harv. L. Rev. 1131 (1947).

\textsuperscript{42} See, e.g., Secrest v. Galloway Co., 239 Iowa 168, 171, 30 N. W. 2d 793, 794 (1948).

\textsuperscript{43} Such instances are the status of minors, problems involving the conflict of laws, etc.
by a careful comparison of the two outstanding studies of the field which, as it were, sandwich in the evolution of 40 years, viz. Francis Bohlen's, "A Problem in the Drafting of Compensation Acts" and Samuel Horowitz's, "Current Trends in Workmen's Compensation."

Since workmen's compensation is designed to protect the workman against destitution resulting from work-injuries, the three pillars upon which the coverage rests are: a) the existence of the requisite employment relation, b) the occurrence of a disabling injury of the specified type and c) the attributability of the injury to the employment. The statutory language, borrowed from the original English act usually refers to a personal injury by accident, arising out of and in the course of the employment, sustained by an employee. Our inquiry therefore will briefly survey the vicissitudes and liberalization of the three phrases "employment," "personal injury by accident" and "in the course and out of the employment."

A. The Requisite Employment Relationship

The classical common law thought in terms of master and servant. It evolved certain tests for the existence of that relationship mainly for the purpose of delimiting the scope of liability of the master to a third person incurred by the tortious conduct of his servant. This branch of the law consequently does not concern itself with questions relating to the status or the legal protection of the employee. Tort liability to the victim is not imposed if the immediate tort-feasor has not acted in the capacity of a servant but in that of an independent contractor.

The proper use of these terms to define workmen's compensation coverage requires great caution. It is always necessary to bear in mind the difference in intellectual climate in which these concepts grew up. The federal Supreme Court has pointed out that the existence of an employment relationship, if required for pur-
poses of social legislation should not be determined by slavish reliance on common law tests but by elaborating an independent suitable set of criteria. The Court, to be sure, developed these views for different social insurance programs such as old-age and survivors insurance and unemployment insurance\(^5\) and other laws regulating employees' rights.\(^5\) But the Supreme Court's famous "economic reality" test rather than the common law control test should also govern the coverage under the workmen's compensation acts and at least a few progressive decisions have specifically held so.\(^5\) At any rate, the applicable test for the coverage should be liberally construed in favor of the injured workmen and by and large the courts have become fairly enlightened on that subject.\(^5\)

The coverage of minors, especially if illegally employed, of spouses, of working partners and corporate officers is still a troublesome question in many jurisdictions.\(^5\) But gradually statutory amendments and modernistic tendencies among the courts have eradicated many of the restrictions resulting from the blind transplantation of common law rules.\(^5\)

While the range of covered employments has been broadened in most jurisdictions in the course of time, too many jurisdictions still have size-of-firm requirements, \emph{i.e.}, exclude enterprises with less than a minimum number of regular employees\(^5\) and except certain types of occupations such as agricultural or domestic


\(^{51}\) Heiliger v. City of Sheldon, 236 Iowa 146, 161, 162, 18 N. W. 2d 182, 190 (1945); Bowser v. State Industrial Commission, 182 Ore. 42, 45, 185 P. 2d 891, 892 (1947); see also Loudenslager v. Gorum, 355 Mo. 181, 60 (1949).

\(^{52}\) Some courts speak in terms of a presumption of coverage, see for instance, Conrad v. Industrial Commission, 254 Wis. 574, 577, 37 N. W. 2d 60 (1949) (containing a survey of the applicable Wisconsin cases); Glen Falls Indemnity Co. v. Clark, 75 Ga. App. 453, 43 S. E. 2d 752 (1947).


\(^{54}\) For details see Riesenfeld and Maxwell, Modern Social Legislation 175, 179 (1950).

workers. A customary clause exempts workers whose employment is casual and not in the employer's regular course of business. While there is perhaps some reason for such exemption in view of the difficulty of insurance coverage for occasional work, the courts have sometimes been too prone to invoke the exemption. The repair and modernization of any establishment which is used for other than residential purposes by its owner, for instance, should not come under the exemption. Yet there is much older case law to the contrary. *Billmayer v. Sanford,* a case in which the Supreme Court of Minnesota held that a man who did repair work on several apartment houses owned by a housewife was not covered because such ownership was an investment rather than a business, is illustrative of the view which fortunately becomes gradually abandoned.

A certain relief from the restrictions in the coverage provisions of the various compensation acts has been provided by the statutory or judge-made rule which prevents insurance carriers to plead lack of coverage if the activities of a particular person were expressly included in the terms of a compensation insurance policy or included in the computation of the premium.57

B.

*The Nature of Compensable Harm*

In the identification of compensable harm the progressive liberalization of the system is perhaps even more clearly marked. The original English Act of 1897 defined the type of compensable harm as "personal injury by accident."58 The successor Act of 1906 retained the same phrase, but added a limited number of specified so-called occupational diseases.59 Most American statutes repeated this circumscription of the compensable harm contained in the

56. 177 Minn. 465, 225 N. W. 426 (1929). The Supreme Court of Minnesota itself was apparently later embarrassed by its holding and impliedly restricted it in *Fisher v. Manzke,* 208 Minn. 410, 294 N. W. 477 (1940).


58. 60 & 61 Vict. c. 37, § 1(1) (1897).

59. 6 Edw. 7, c. 58, § 8 and Schedule III (1906).
English acts but did not include occupational diseases until a later period.

At first the majority of courts took an exceedingly narrow view about the meaning of the qualification expressed in the term "by accident" construing it as a strict limitation on the term "personal injury." In doing so they were influenced by contemporary English precedents and their analysis in Professor Bohlen's aforementioned article which stressed the English case law and suggested an artificial and most uncalled for difference in the scope of coverage according to whether the statute used the term "by accident" or "accidental."61

The qualification "by accident" was held to imply two limiting characteristics of the personal injury, viz.

1) that its occurrence be due to an unlooked for mishap or untoward event which was not expected or designed,62

2) that it be traceable within reasonable limits to a definite time, place and occasion or cause.63

As a result the courts have experienced difficulty in finding an accident in two major classes of personal injuries: a) where the injury was not caused by an external and separate event or at least some extraordinary circumstances in the work but where at the most the injury itself was the unexpected event and resulted merely from the usual work performed in the usual manner under usual circumstances, and b) where the injury was produced by a protracted exposure or strain.

Gradually the most forward-looking courts have whittled away many of the self-created hurdles to a sensible application of the compensation act. But the path in many jurisdictions is still not


61. See Bohlen, op. cit. supra note 44, at 337, 338.

62. For early American cases stressing this aspect of the clause "by accident" see, e.g., Bryant v. Fissell, 84 N. J. L. 72, 76, 86 Atl. 458, 460 (1913); Monson v. Battelle, 102 Kan. 208, 170 Pac. 801 (1918).

63. This aspect of the phrase was emphasized for instance in Liondale v. Beach, Dye and Paint Works v. Riker, 85 N. J. L. 426, 89 Atl. 929 (1914); Matthiesen & Hageler Zinc Co. v. Industrial Board, 284 Ill. 378, 120 N. E. 249 (1918).
This is mainly due to the unwillingness of the courts to clear away the underbrush of judicial glosses that has sprung up on the words of the statute instead of by-passing the obstacles by more or less ingenious contrivances. Thus the requirement that the injury to be sustained "by accident" must be traceable to a definite time interval, was circumnavigated with relative ease in many cases either by only looking at the ultimate physical change as the injurious event, as in the "drooped foot" or "slipped disk" cases, or by resolving the gradual deterioration into a series of "repeated traumas."

Perhaps the greatest confusion has resulted from the attempts of the courts to differentiate between "accident" and "disease" for the purpose of delimiting compensable injuries. This is especially true with respect to the so-called "ordinary diseases of life" of the infectious or contagious type and the cases of heart failure, back-injury or hernia where only the work itself constitutes the sole contributing cause.

At first even the liberal courts were willing to accept common infectious or contagious diseases as accidents only if the channel of infection was unusual and abnormal or where there was some extreme or exceptional exposure, to heat, cold or fumes. Thus Justice Cardozo, who apparently became the father of this ques-


tionable distinction, granted compensation to an embalmer's helper who had contracted blood poisoning by scratching a pimple on the neck with hands contaminated by embalming fluid, solely because of the peculiar channel of attack of the infection. But the same court at least until recently, has persistently denied compensation because of the lack of an accident to workers who contracted pneumonia and other respiratory diseases from "ordinary" exposure to coldness or dampness. Other courts similarly refused to find an accident in the cases where the workers contracted typhoid or food poisoning because of the working conditions. Fortunately the trend of modern authority is away from these narrow precedents both in exposure cases and cases of food poisoning, etc.

There still exists, however, a great reluctance of some courts to grant compensation when the cause of the injury is nothing but the usual work under usual conditions. They insist on the presence of a separate event or at least extraordinary conditions, although

67. The leading case is Lerner v. Rump Bros., 241 N. Y. 153, 149 N. E. 334, 41 A. L. R. 1122 (1925); now seemingly on the way to being discredited, see Merriam and Vogel, "Accidental Injury" in the Court of Appeals: The Metamorphosis of a Rule of Law, 26 Brooklyn L. Rev. 203 (1950).
70. For cases of that type see Permanent Construction Co. v. Industrial Commission, 380 Ill. 47, 43 N. E. 2d 557, 141 A. L. R. 1484 (1942); Union Mining Co. v. Blank, 181 Md. 62, 28 A. 2d 568 (1942); Sebek v. Cleveland Graphite Bronze Co., 148 Ohio St. 693, 76 N. E. 2d 892 (1947).
they are sometimes prone to find them. It perhaps bears mentioning that even recently the Supreme Court of Rhode Island had so tied itself up in narrow interpretations\(^7\) that the legislature had to cut the gordean knot and throw the qualification "by accident" out altogether.\(^8\) It is likewise significant that in 1949 the Committee on Workmen's Compensation Law of the State Bar of Michigan recommended "that appropriate legislation be sponsored which would eliminate from the Workmen's Compensation Act any requirement that injuries to be compensable must be accidental in nature."\(^9\) It might be added in parenthesis that the only basis for the Michigan rule which restricts the compensability of injuries other than those defined as occupational injuries and diseases to such of an accidental nature is the title of the act and the reluctance of some members of the Supreme Court of that state to attribute to the occupational disease amendments of 1943 a general broadening of the scope of the act.\(^10\) Nevertheless the court has persisted in interpreting the mainly judge-made qualification in a fairly restrictive manner.\(^11\) Even the Supreme Court of Minnesota, usually in line with the progressive courts, still looks for extraordinary exertion in case of heart failure.\(^12\) Actually there exists no sound reason why disabling personal injuries which are produced, accelerated or intensified by the work should not be compensable, regardless of unusual circumstances. The question of proof, of course, may sometimes be beset with difficulties. But it is undesirable to shunt out these difficulties by a socially undesirable interpretation of the statutory terms. It is gratifying, however, that the number of jurisdictions which have recognized that even an


\(^{73}\) R. I. Laws 1949, c. 2282.


\(^{77}\) See, e.g., Sokness v. City of Virginia, 42 N. W. 2d 551 (Minn. 1950).
injury caused by the regular work under normal conditions may be an accident is steadily on the increase.78

So-called occupational diseases may require a special regulation because of the special mode of their development. Most statutes now provide for coverage either in the form of a schedule of varying range or under a generic formula.79 While legislative intervention of some sort was necessary in the light of existing case law, the techniques followed perpetuated by implication the limitations thought to be inherent in the phrase "accident" or "accidental." Actually such restrictions, especially in the case of unscheduled occupational diseases, constitute a relapse into the unsuitable "assumption of risk" idea80 and even in jurisdictions which have blanket coverage tend to produce the socially undesirable result of employment-connected injuries which are nevertheless non-compensable. For instance, in New York tuberculosis contracted from a fellow-employee was recently held to be non-compensable because under the circumstances of the case it was neither "accidental" nor "occupational."81

C. The Requisite Connection With the Employment

Undoubtedly the most pronounced outward shift of the boundaries which circumscribe the scope of the protection accorded by workmen's compensation has occurred in the interpretation of the celebrated formula which defines the requisite connection with the employment, viz. the terms "out of and in the course of the employment."

It is perhaps not amiss to reduce the principal trends in this process of liberalization to two general propositions: On the one hand courts and administrative agencies have recognized to an increasing extent that workmen's compensation involves fundamental policies of its own which make any reliance on tort principles such as embodied in the ideas of scope of employment, control, proximate cause, foreseeability, blameworthiness, assumption

78. See Riesenfeld and Maxwell, Modern Social Legislation 200, text to note 20 (1950). For an excellent judicial discussion see Southern Stevedoring Co. v. Henderson, 175 F. 2d 863 (5th Cir. 1949), 34 Minn. L. Rev. 377 (1950).
80. Id., that the occupational disease was "foreseeable" and therefore a risk of the employee.
of risk, etc., totally inapposite. On the other hand courts and administrative agencies have also come to realize that fixing the boundaries of protection involves basic policy considerations defying hard and fast rules and that the various secondary tests, such as the "added peril rule" or "common hazard rule," which have sprung up in the field are at the most preliminary working hypotheses which require careful scrutiny and adaptation when applied to actual controversies. It might also be appropriate to emphasize in this conjunction that regardless how far out the boundaries of the protection are pushed there will always be troublesome borderline cases in which the ultimate result will necessitate a careful balancing of conflicting interests.

The application of the requirement that to be compensable the injury must arise out of and in the course of the employment has produced a staggering volume of reported cases and has frequently been the object of re-examination by courts as well as writers. Of course, here only a few very general remarks can be made.

82. The federal Supreme Court has perhaps been particularly instrumental in removing the vestiges of common law tort principles from the field of workmen's compensation, see especially the statements to that effect in Cudahy Packing Co. v. Parramore, 263 U. S. 418, 44 Sup. Ct. 153, 68 L. Ed. 366 (1923); Cardillo v. Liberty Mutual Ins. Co., 330 U. S. 469, 67 Sup. Ct. 801, 91 L. Ed. 1028 (1947); O'Leary v. Brown-Pacific-Maxon Inc., 19 U. S. L. Week 4138 (U.S. Feb 26, 1951). For other leading cases in that vein see Matter of Babington v. Yellow Taxi Corp., 250 N. Y. 14, 164 N. E. 726 (1928); Hartford Accident & Indemnity Co. v. Cardillo, 72 App. D. C. 52, 112 F. 2d 11 (1940); Hanson v. Robitshek Schneider Co., 209 Minn. 556, 297 N. W. 19 (1941); Heiliger v. City of Sheldon, 236 Iowa 146, 161, 18 N. W. 2d 182, 190 (1945); Southern Stevedoring Co. v. Henderson, 175 F. 2d 863 (5th Cir. 1949). Conversely workmen's compensation cases are of little assistance in determining the scope of tort liability to an injured employee where it is undisputed that the injury was not employment connected, Rogers v. Allis Chalmers Mfg. Co., 85 Ohio App. 421, 88 N. E. 2d 234 (1949), aff'd, 153 Ohio St. 513, 92 N. E. 2d 677 (1950).

83. See infra text to notes 122-126.

84. The truth of the statement in the text was comparatively early recognized in a leading early English compensation case. Lord Dunedin in Plumb v. Cobden Flour Mills Company Ltd. [1914] A. C. 62, 65 observed pointedly: "It is often useful in striving to test the facts of a particular case to express the test in various phrases. But such phrases are merely aids to solving the original question and must not be allowed to dislodge the original words. Most of the erroneous arguments which are found in this branch of the law will be found to depend on disregarding this salutory rule."


86. For recent treatments by writers see Horovitz, The Litigious Phrase: "Arising Out of Employment," 3 NACCA L. J. 15 (1949); 4 NACCA L. J. 19 (1949); Schneider, Workmen's Compensation, vol. 6 (1948); vol. 7 (1950).
It is frequently said that the portion of the phrase which refers to the course of the employment envisages mainly the time, place and external circumstances of the disabling event while the words "out of" connote its cause and origin. But although this differentiation has been approved by a learned commentator as "useful and profitable" it must be recognized that the two aspects of the employment connection are so closely interwoven that no true line of distinction can be drawn and that in many instances it is impossible to tell whether a certain activity or conduct of the employee which contributed to the injury interrupted the course of the employment or merely the relevant causal connection between the employment and the injury. Viscount Haldane has come close to the truth with the observation in a leading English case: "I doubt whether time, place and circumstances can properly be so sharply distinguished from other conditions which are described as belonging to the origin and cause as these words suggest."

Certain cases seem to make it clear that an injury may now be considered to have occurred "in the course" of the employment because the employment was its cause. Vice versa at least some courts have admitted that injuries may be considered as "caused" by the employment because they were sustained during and at the place of the employment. Cases of the latter type are instances where the worker at the place of his work is injured by the

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87. The leading American precedent for this differentiation is McNicol's Case, 215 Mass. 497, 102 N. E. 697 (1913, 1916 A. L. R. A. 306: "... [A]n injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It 'arises out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury."


90. The chief instances are the cases where an employee as e.g., a bartender or foreman gets attacked outside his place of work because of a quarrel in which he became involved because of and during his employment, Field v. Charmette Knitted Fabric Co., 245 N. Y. 139, 156 N. E. 139, 156 N. E. 642 (1927); Scholl v. Industrial Commission, 366 Ill. 588, 10 N. E. 2d 360, 112 A. L. R. 1254 (1937); Zolkover v. Industrial Accident Commission, 13 Cal. 2d 584, 91 P. 2d 106 (1939).

91. See the strong language of Judge Rutledge to that effect in Hartford Accident and Indemnity Co. v. Cardillo, 72 App. D. C. 52, 112 F. 2d 11, 14 (1940): "No more is necessary than that the work subject the employee to a peril which comes from the fact that he is required to be in the place where it strikes when it does so." Similarly also Simmons National Bank v. Brown, 210 Ark. 311, 317, 195 S. W. 2d 539, 542 (1946).
forces of the elements or was attacked by an insane outsider or suffered an epileptic fit or fainting spell, etc.

Actually the statutory formula must be read in toto and means no more and no less than that an injury to be compensable must appear to the rational mind, upon consideration of all circumstances, to be reasonably attributable to the employment. But because the underlying policy can be stated only in such general terms it follows inevitably that the decision of concrete cases will frequently involve grave doubts. Can it for instance, consistently be held that there is an injury fairly attributable to the employment if the hotel in which a traveling salesman has chosen to stop during a trip burns down but not if he is attacked there by an insane person or if he slips there while shaving? Can it consistently be held that there is coverage for an employee who is attacked during working hours by a fellow-employee jealous of the attentions paid to the victim by a third employee of the opposite sex, but not for a delivery man injured at work by a suspicious husband, or for an employee attacked during employment by a colored fellow-worker who resents the victim's refusal to loan his water bottle or to accept a date? Is there a material difference in employment connection between an injury which is sustained by a worker who urinates from a moving truck and one which is sustained when the employee sought to get a free ride on a conveyer belt?


95. Souza's Case, 316 Mass. 332, 55 N. E. 2d 611 (1944).


97. Gibbs Steel Co. v. Industrial Commission, 243 Wis. 375, 10 N. W. 2d 130 (1943).


with fatal result tried to push an abandoned baby buggy into a river drowning in the course of such entertainment.\(^{104}\)

As a result of the extreme difficulties encountered in the ascertainment of whether or not the requisite employment connection is present some decisions, spearheaded by the federal Supreme Court itself, have recently come to admit that there is a twilight zone in which the expert judgment of the administrative agency will not be disturbed, regardless of whether it finds or rejects attributability to the employment.\(^{105}\) But this judicial deference devolves upon the administrative agency the questionable responsibility of developing without the benefit of judicial guidance the expertise necessary for the formulation of the standards and criteria controlling the area of actually the most troublesome borderline cases.

It should be useful to follow up this discussion of the transformations in judicial thought on the scope of the protection with a brief survey of various results which have been the consequence thereof. On the strength of early English cases decided under the Act of 1897\(^{106}\) the rule (sometimes codified by statute) became established that ordinarily a workman is not within the protection of the statute except while engaged on, in or about the premises, where his services are being performed or where his services require his presence as a part of such service and during the hours of his service as such employee.\(^{107}\) Accordingly the so-called "Coming and Going" rule sprang up which denied compensation for injuries incurred when proceeding to and from work. In the course of time, however, a number of exceptions have become well established.\(^{108}\) Compensation is now granted to employees for injuries

106. The English act of 1897 applied only to employment on, in or about a railroad, mine, quarry or engineering work and this "on, in or about" clause was authoritatively construed to refer to a physical area, Back v. Dick Kerr & Co., Ltd. [1906] A. C. 325. The act of 1906 omitted his limitation, but left its mark on the interpretation of the "out of and in the course of" clause.
sustained even while coming and going especially if the transportation was an incident of the employment, if the employee was engaged in a special mission or errand for the employer or if he followed an emergency call while on 24 hour duty. In addition the application of these exceptions has undergone a process of constant broadening. Similarly the notion of "premises" itself has been the subject of an increased expansion. The Supreme Court of the United States took the lead in adding to the "actual" premises a zone that made the customary and practicable way of ingress and egress one of hazard. Today many courts have included parking lots, even if not technically part of the premises. The protection is not limited to the scheduled working hours, but may begin prior thereto and last beyond them provided that the arrival and departure is not unreasonably premature or retarded. The liberality of the courts in that respect, however, sometimes leaves much to


110. For interesting applications see Benjamin H. Sanborn Co. v. Industrial Commission, 405 Ill. 50, 89 N. E. 2d 804 (1950); Bengston v. Greening, 230 Minn. 139, 41 N. W. 2d 185 (1950) (zone of protection includes walk on employee's premises); Smith v. University of Idaho, 67 Idaho 349, 170 P. 2d 404 (1946); Kaplan v. Alpha Epsilon Phi Sorority, 230 Minn. 547, 42 N. W. 2d 342 (1950), 5 NACCA L. J. 61 (1950). The last two cases also involve the 24 hours rule, note 111 infra.


be desired.145 The course of the employment is not broken because the employee refreshes himself by taking a drink of water, getting fresh air, smoking, etc.146 Lunch and recreation periods spent on the premises are likewise within the course of employment147 and to an increasing degree other employer-sponsored recreational and social activities have been held to be included.148 Conversely while activities undertaken during working hours for the exclusive benefit of the employee or a third person may constitute a "temporary detachment" from the employment,149 the courts have become increasingly reluctant to find such break if the employer was at least indirectly benefitted150 or if the action of the employee was such that it was by the standards of common decency compatible with his duties as employee, such as rescue attempts in an emergency,151 etc.


117. For details see Riesenfeld and Maxwell, Modern Social Legislation 249 (1950).


119. The doctrine of "temporary detachment" was first authoritatively stated in the early English case of Reed v. Great Western Railway, [1909] A. C. 31, denying compensation to a railroad engineer who had left his engine to get a book from a fireman of another train. The field of applicability of this doctrine and its twin "deviation" has been constantly narrowed, but on its strength compensation has still recently been denied not only in a case where an employee rendered voluntary assistance to a fellow employee in his private business, Ridler v. Sears Roebuck & Co., 224 Minn. 256, 28 N. W. 2d 859 (1947); but even in a case where an employee living on the employer's premises was injured when aiding a fellow employee in improving his substandard living accommodations likewise on the employer's premises, Stepan v. Campbell, 228 Minn. 74, 36 N. W. 2d 401 (1949); or where the injury occurred during the lunch period on the occasion of a union meeting on employer's premises, Kelly v. Dixie Fuel & Supply Co., 45 N. W. 2d 356 (Mich. 1951).

120. For leading cases on the point see Wamhoff v. Wagner Elec. Corp., 354 Mo. 711, 190 S. W. 2d 915, 161 A. L. R. 1454 (private work in employer's plant during slack period increasing professional skill and encouraged by employer); Chapman's Case, 321 Mass. 705, 75 N. E. 2d 433 (1947) (private work for employer's customer during lunch period); Kennedy v. Thompson Lumber Co., 223 Minn. 277, 26 N. W. 2d 459 (1947) (union steward leaving plant to call union business agent in effort to avert strike).

The "added peril rule" which once was a threat to many recoveries where the employee acted carelessly or strayed from the customary path\(^1\) has been laid at rest\(^2\). A similar fate is in store for the superficial and pernicious "common hazard test" which prevents recovery where the injury is produced by a hazard common to the neighborhood. Courts have been prone to uphold the finding of a special exposure, first in the "street risk"\(^3\) and later in other cases\(^4\), and some courts have discarded it entirely as an unwarranted gloss upon the true coverage formula\(^5\). Injuries from skylarking and horseplay have been recognized more and more as reasonably attributable to the employment\(^6\). The same is true with respect to altercations with and attacks from patrons, strangers and fellow employees, except where the motive is purely per-

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3. The "street risk" exception to the "common hazard rule" was first clearly established in Dennis v. White and Co., [1917] A. C. 479. Its scope has, however, fluctuated in some of the jurisdictions, see, e.g., City of Chicago v. Industrial Commission, 389 Ill. 592, 60 N. E. 2d (1945) (license investigator stubbing his toe on street); Friel v. Industrial Commission, 398 Ill. 361, 75 N. E. 2d 859 (1947) (streetcar conductor hit by piece of glass from window shattered by football thrown by boy on street). Some courts have denied compensation because of the absence of a street risk in cases where the injury resulted on the premises from objects thrown from the street or adjacent premises, Associated Indemnity Corp. v. Industrial Acc. Comm'n, 43 Cal. App. 2d 292, 110 P. 2d 676 (1941); Auman v. Breckenridge Telephone Co., 188 Minn. 256, 246 N. W. 889 (1933); Lebeda v. Pongracz, 256 N. Y. 566, 177 N. E. 140 (1931); Nowicki v. Byrne, 73 R. I. 89, 54 A. 2d 676 (1941); Pacific Indemnity Co. v. Industrial Acc. Comm'n, 95 Cal. App. 2d 443, 214 P. 2d 41 (1950).

4. See as typical examples, Mixon v. Kalman, 133 N. J. L. 113, 42 A. 2d 309 (1945); Bales v. Covington, 312 Ky. 551, 228 S. W. 2d 446 (1950).

5. See, e.g., Olson v. Trinity Lodge, 226 Minn. 141, 32 N. W. 2d 255 (1948).

sonal and totally unrelated to the employment. Of course, again the judicial attitudes vary a great deal in regard to the exact limits.

CONCLUSION

Workmen's compensation during the forty years of its existence has manifested itself as a vigorous system which has grown steadily in width and depth. This proves that its underlying policy was needed and in harmony with the great trend of social developments. Whether its chances for survival are equally good is, however, difficult to predict. The most fundamental problem, of course, is the question whether it is advisable to follow the English example again and to maintain industrial injury insurance at least as a structurally separate branch in a future comprehensive social insurance program which embraces also non-industrial disease and accident insurance covering both medical costs and wage loss. But even apart from this major policy question the time has come for a re-examination, whether or not the existing structure and administration of the benefit formulae possesses inherent defects which must be cured to keep the now middle-aged system from decline and death.

128. The landmark case which prompted a veritable reorientation in the compensability of injuries from assaults and fights, is the late Justice Rutledge's great opinion in Hartford Accident & Indemnity Co. v. Cardillo, 72 App. D. C. 52, 112 F. 2d 11 (1940). Prior thereto compensation for injuries from attacks by fellow employees, patrons, or strangers was granted in many jurisdictions only in the case of special exposure or where the work was the object of the quarrel and where the victim was not the aggressor. For the evolution and present state of the law on the question, see Horovitz, The Litigious Phrase: "Arising out of" Employment, 4 NACCA L. J. 19, 47 et seq. (1949); Riesenfeld and Maxwell, Modern Social Legislation 286 et seq. (1950).