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WHEN DOES AN INJURY ARISE OUT OF AND IN THE COURSE OF EMPLOYMENT, UNDER THE WORKMEN'S COMPENSATION LAW?

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More than two-thirds of the American states have, in recent years enacted workmen's compensation laws.[1] It is the design of these laws to extend and increase the liability of an employer respecting injuries sustained by employees, and to recognize every such injury, which is not self-inflicted, as an element in the cost of production to be charged first to the industry, but ultimately to be borne by the community in general.[2] Under the common law the employer was liable for an injury to his employees only in case his negligence was the proximate cause of injury. He could defeat an action by his employee, by showing that the employee was guilty of contributory negligence, that the employee had assumed the risk of the accident when he entered the employment, or that the employee was injured by the negligence of a fellow servant.[3] This system prevented recovery in many cases of injury. But by the compensation law the employer's negligence is not important with respect to the right of the employee to recover, and the employer cannot avail himself of the common law defenses of contributory negligence, assumed risk or negligence of a fellow servant. His liability depends wholly upon whether or not the accident "arose out of and in the course of" the employee's employment.[4]

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[1] The following states have compensation laws: Arizona, California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, Washington, West Virginia, Wisconsin and Wyoming.

[2] *City of Milwaukee v. Miller* 154 Wis. 652, 144 N. W. 188 L. R. A. 1916 Al.; *Jillson v. Ross* 94 Atl. 717; *Kennerson v. Thames Towboat Co.* 89 Conn. 367, L. R. A. 1916 A. 436; *State v. Industrial Commission*, 92 Ohio St. 434, 111 N. E. 299; *Allen v. State* (Sup.) 160 N. Y. Sup. 85; *Phil Hollenbach Co. v. Hollenbach* 181 Ky. 262, 204 S. W. 152; *Honnolds' Workmen's Compensation* Vol. I, p. 5 and cases cited.

[3] *West Kentucky Coal Co. v. Smithers* 211 S. W. 580, 184 Ky. 211; *Lamberg v. Central Consumers Co.* 211 S. W. 746, 184 Ky. 284.

[4] See Sec. 1 *Kentucky Workmen's Compensation Law.*

If it did, the employee can recover. If it did not, he cannot recover. Instead of determining questions of negligence and proximate cause the courts are therefore called upon to determine when "an accident arises out of and in the course of" one's employment. What is the test which should determine the answer to this question?

The term "in the course of" refers to the time, place and circumstances under which the accident took place. The term "out of" in general refers to the origin or cause of the accident.[5] The terms are not synonymous, for it is held that an injury may be received in the course of employment, and still have no causal connection with it, as is necessary if the injury arises out of the employment[6] as e. g., if an employee while at his work bench is shot, and wounded by a stranger, who suddenly appears at the window, the injury arises "in the course of" employment, but does not have its cause or origin in or grow out of the employment. The establishment of both of these elements is necessary to a recovery by the employee.[7] It must be admitted however, that it is difficult to conceive of a case in which an injury arises "out of" the employment, that doesn't also arise "in the course of" the employment.[8]

Although the courts have frequently confused the two terms and have usually discussed them conjunctively, it would seem desirable to treat them separately, so far as is possible, in order that a separate test for each may be determined.

First, then, when does an injury arise in the course of one's employment?

A review of the cases involving this question indicates that for an injury to arise in the course of the employment the following facts are always essential, viz.:

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[5] *Pace v. Appanoose Co.* 168 N. W. 916 (Iowa).

[6] *State v. District of Columbia* 129 Minn. 176, 151 N. W. 912; *Bryant v. Fissell* 84 N. J. Law 72, 86 Atl. 458; *Phil Hollenbach v. Hollenbach* 204 S. W. 152, 181 Ky. 262.

[7] *Bryant v. Fissell* (see note 6); *Moore v. Lehigh Valley R. R. Co.* 169 App. Div. 177, 154 N. Y. Sup. 620.

[8] *Leach v. Oakley* (1911) 4 B. W. C. C. 98; *McLauchlen v. Anderson* (1911) 4 B. W. C. C. 379.

(a) A contract of employment.[9]

(b) The employee at the time of the injury must be at a place on or reasonably near the premises where he works, or at a place to which his employment reasonably requires him to go.[10]

(c) The injury must occur at a time or reasonably near the time when the employee is on duty.[11]

The presence of these three facts is indispensable, no matter what other facts may exist. For convenience, these facts will be herein referred to as "group one." But the existence of these facts alone, without one or more other facts, is not sufficient to determine that the injury is one arising in the course of employment. There must exist in addition to, and in concurrence with such facts, one or more of the following six facts. That is to say, the employee, when injured, must be.

(1) Actually engaged at his work,[12] or

(2) Doing something reasonable connected with or incidental to his actual work,[13] or

(3) Doing something in an emergency in order to protect another's life or limb, or the property of his employer,[14]

or

(4) Doing something reasonably necessary in the preparation for beginning or leaving his work,[15] or

(5) Doing something reasonably necessary for his own health, comfort or convenience,[16] or

(6) Doing something (ordinarily outside of his employment) which is customary and acquiesced in by the employer.[17]

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[9] *Cal. Highway Com. v. Industrial Com. of Cal.* 181 Pac. 112.

[10] *Nordyke and Marmon Co. v. Swift* (Ind.) 123 N. E. 449.

[11] *N. K. Fairbank Co. v. Industrial Com. of Ill.* (Ill.) 120 N. E. 457.

[12] *Scot v. Payne Bros. Inc.* 85 N. J. Law 446, 89 Atl. 927.

[13] *Consumers Co. v. Ceislik* 121 N. E. 831 (Ind.).

[14] *Baum v. Industrial Com.* (Ill.) 123 N. E. 625.

[15] *Terlecki v. Strauss* (N. J.) 89A 1023; *In re Ayers* (Ind.) 118 N. E. 386.

[16] *In re Ayers* (Ind.) 118 N. E. 386; *Holt Lumber Co. v. Industrial Com.* (Wis.) 170 N. W. 366; *Whiting-Mead Commercial Co. v. Industrial Commission* (Cal.) 173 P. 1105.

[17] *White v. Kansas City Stock Yards Co.* (Kan.) 177 p. 522; *Thomas v. Proctor and Gamble M'f'g Co.* (Kan.) 179 p. 372.

These facts, for convenience, will be referred to as "group two".

The existence of any one of the six facts of group two, in concurrence with the three facts of group one, is sufficient to place the injury in the class of injuries arising in the course of the employment. Many cases have two facts of group two,[18] and some of them have three,[19] but every one must have at least one. And cases which do not contain at least one of the facts of group two, even though all the facts of group one exist, have held that the injury did not arise in the course of the employment.[20]

Cases containing either fact one or two are the plainest and simplest cases of injuries arising in the course of employment. Cases containing fact three are not quite so plain, but the authorities are unanimous in favor of the view.[21] It is unnecessary, therefore, to discuss them.

It might be concluded from a number of the cases that all three of facts four, five and six, or at least two of them must occur in order to bring an injury within the course of the employment.[22] But it is believed that it is only necessary that *any one* of such facts exist for such purpose, and in support of this view, the reader's attention is directed to the following cases: *City of Milwaukee v. Althoff*,[23] *In re Brightman*,[24] and *In re Loper*.[25]

The case of *Milwaukee v. Althoff*, decides that an employee injured by falling upon the sidewalk, while going to a place to work, designated by the foreman, was within the course of his employment, even though such injury occurred before the time when his regular duties for the day began. He was only preparing to go to work. He was not doing a thing customary, or for his own special benefit, but

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[18] *In re Osterbrink*, 118 N. E. 657 in which facts numbered five and six occur.
[19] See note 21.
[20] *Newman v. Milwaukee Electric Ry. and Light Co.* Bul. Wis. Industrial Com. vol. I, p. 92.
[21] See note 13.
[22] As e. g. see *In re Ayers*, 118 N. E. 386 and *Terlecki v. Strauss* 89 Atl. 1023, in which all three of facts numbered four, five and six occur.
[23] 156 Wis. 68, L. R. A. 1916 A. 327.
[24] 220 Mass. 17; L. R. A. 1916 A, 321.
[25] 116 N. E. 324 (Ind.).

only something reasonably necessary to the beginning of his actual duties. In addition to the facts of group one, this case contains *only* the fourth fact of group two, and illustrates the principle that the existence of such fact without the other facts of group two determines the injury as being one arising in the course of the employment. In *re Brightman, supra,* held that an injury to an employee while attempting to remove his personal belongings from a sinking ship, upon which he was employed as cook, was an injury arising in the course of the employment. This case has the fifth fact, but none other, and illustrates the proposition that an employee injured while doing something reasonably necessary for his comfort or convenience is within his employment, notwithstanding his acts were not preparatory to beginning or leaving his work, and notwithstanding they were unusual and uncustomary.[20] In *re Loper, supra* holds that an employee injured by "horse play" is within his employment, because such practice was a custom acquiesced in by the employer. Such act was neither necessary for the health, comfort or convenience of the employee, nor necessary for the beginning or leaving of his work. This case contains the sixth fact of group two, to the exclusion of the others and shows that when an employee is doing something customary and acquiesced in by the employer, it is neither necessary that such be for the health, comfort or convenience of the employee, nor reasonably necessary for the beginning or leaving of his work, for such employee to be within the course of his employment.

It appears to the writer, therefore, that the existence of *any one* of the facts of group two in concurrence with the three facts of group one is sufficient to place the employee within his employment. If the three facts of group one plus one fact of group two exist, the result is "course of employment". Using the above letter and numerical designations for the facts, the formula might be expressed mathematically as follows: (a+b+c)+1=course of employment. Either 2, 3, 4, 5 or 6 could be substituted for 1, and the formula would still be correst.

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[20] To the same effect see *Beaudry v. Watkins* 158 N. W. 16 and *Holland—St. Louis Sugar Co. v. Shraluka* 116 N. E. 330.

However, in most cases involving such questions, it is usual for two or more facts of group two to concur. In those cases there are as many reasons as there are such facts for saying that the employee is within his employment. For instance in *Terlecki v. Strauss*,[22] where the employee was injured while combing her hair preparatory to leaving the factory, as was customary, such employee was not only doing something customary but also something that was necessary for her own health, comfort and convenience, and also something that was reasonably necessary to her preparation to leave her work. This decision could have been based upon any one of three grounds. The existence of all three of them made it unnecessary for the court to indicate upon which ground the decision was rendered.[23]

Now, what general rule as to when an injury arises in the course of one's employment, are we to deduce from the above summarization of cases? It will be observed that any group of facts, as above set out, which places an injury in the class of injuries arising in the course of employment, the employee is always doing something when injured that might be reasonably expected of an ordinary man. That is to say, it is reasonably expected of an ordinary man, while employed, that he will do those things reasonably connected with or incidental to his work; he will do those things reasonably necessary to his preparation for beginning and leaving his work; he will do those things which are reasonably necessary for his own health, comfort or convenience; he will do those things which are the custom and practice of his associates and in an emergency he will give relief. These are things that the sane, average, normal, ordinary, prudent men do when employed. And the cases hold that if one is injured, from whatever source, while in the act of doing any of those things, his injury arises in the course of his employment. If this is true, why cannot the test as to when an injury arises in the course of one's employment be stated as follows: *If an employee is injured while doing an act that might reasonably be expected of an ordinary man, under all the circumstances of his employment, his injury arises in*

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[22] 89 Atl. 1023.
[23] To same effect see *In re Ayers* 118 N. E. 386.

the course of his employment. This test presupposes the existence of the three facts of group one.

It is not a question of anticipating or expecting the injury that is sustained. Often times the injury is so unusual and novel that no one could have anticipated or expected it. It is only a question of anticipating or expecting the act being performed by the employee at the moment of his injury. If an employee has just left his work bench, and is in the act of reaching for his coat preparatory to leaving his place of employment, when a missile, from no one knows where, comes flying in thru the window and strikes him dead, could such an injury have been anticipated in a quiet, peaceable neighborhood? It would seem not. Could the act of the employee in reaching for his coat preparatory to leaving, have been anticipated? It would seem so. Then undoubtedly the injury arose in the course of his employment.

Second, When does an injury arise out of one's employment?

In the case of *In re McNicol*[29] the test is stated in the following language:

"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. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment. But it excludes an injury which cannot be fairly traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence."

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[29] 215 Mass. 497; 102 N. E. 697. See also *Pekin Cooperage Co. v. Industrial Commission* 120 N. E. 530.

Does this mean that if there is any casual connection between the employment and the injury, it arises out of the employment? Evidently not, for if that were true, the test would be simply, that an injury grows out of the employment, when but for the fact of employment the injury would not have happened, or in other words the injury grows out of the employment when the employment contributes in any degree to the injury. But this cannot be the test. This would cover many injuries, which were not intended to be covered by the workmen's compensation act. For instance, if A, who is employed in B's factory six days a week is given a key to his work room, which he enters on Sunday for the purpose of performing work for himself, and is injured, such injury does not arise out of his employment, even tho it is true that but for his employment he would not have been injured. If he hadn't been employed, he would not have had the key. Or if A is struck by an automobile on his way home from work, and is injured, his injury does not arise out of his employment.[30] But in each of these cases the employment is a contributing cause to the injury.

In re McNicol, supra, cannot, therefore mean that the compensation statute covers *all* of those injuries of which the employment is a contributing cause, but only a part of them. The question then is, what part? That part which a reasonably prudent man might foresee or expect? Surely not those merely, for that would mean only those injuries due to the employer's negligence would come within the operation of the statute, but the act admittedly covers many injuries due to other causes than the employer's negligence, and it is universally recognized that the employer's negligence is not the test in such cases. The group of injuries coming under the operation of the act, therefore, is larger than the group of injuries due to the employer's negligence, but smaller than the group of injuries of which the employment is a contributing cause. Somewhere between the boundaries of these two groups, the line dividing the injuries that fall within the statute from those which do not, must be drawn.

Every member of society is exposed to certain dangers in the

[30] *American Indemnity Co. v. Dinkin* 211 S. W. 149.

battle of life. He may be struck by lightning; his house may fall in on his head; an earthquake may swallow him; he may fall on the sidewalk and break his neck; or he may bite his tongue while eating his pie. All are exposed to these dangers whether in the employ of some one or not. Most employments do not increase or decrease the likelihood of the happening of these accidents. Such accidents, consequently are not primarily due to, and therefore do not arise out of one's employment, unless his exposure to such dangers is increased by the nature of his employment, as e. g., one, who is required to work on top of a telegraph pole is peculiarly exposed to the dangers of lightning, and if injured should be allowed to recover because his increased danger arises out of his employment.

It is therefore very generally held that injuries growing out of risk to which the public or commonalty is exposed, as e. g., lightning, sunstroke, assaults, dangerous animals and street dangers, are not such as grow out of employment,[31] unless the nature of the employment increases the exposure to such dangers.[32]

But when one is employed by another he incurs new risks and exposes himself to other dangers, which are greater in number and different in kind from his societal risks. These risks, whether they are the old ones increased or new ones added, produce accidents which are due to, and therefore arise out of his employment. Injuries from these added risks include those due to the employer's negligence, those due to the negligence of a fellow servant and those due to the inherent nature of the business and to circumstances under which the services are rendered, or in other words all of the injuries due to the employment. And those due to the employment are those that are not due to the risks of society in general, but are those remaining after the societal risks are subtracted from the totality of risks.

Based upon these deductions, the following is submitted as a test of whether or not an injury arises out of the employment: *If the employee, by reason of the circumstances of his employment,*

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[31] *Hopkins v. Michigan Sugar Co.* 184 Mich. 87, 150 N. W. 325, L. R. A. 1916 A 310; *Gaskill v. Voorhies Co.* 2 Cal. I. A. C. Dec. 1020.

[32] *Fensler v. Associated Supply Co.* 1 Cal. I. A. C. Dec. 447; *Ketron v. United Railroads of San Francisco* 1 Cal. I. A. C. Dec. 528.

has incurred a greater risk of the injury sustained, than is incurred by society in general, then his injury is due to and arises out of his employment.[33] Determine whether or not the risk of the injury in question is a societal risk. If it is, it does not rise out of the employment, but if it is not a societal risk, it follows that it must rise out of the employment. It may be contended that it is just as easy to determine whether or not the risk of an injury is an employment risk in the first instance, as it is to determine whether or not it is a societal risk and then an employment risk, but it is submitted that all persons, including judges and jurors, are more familiar with the risks incident to life itself than they are with risks of occupations or special situations in life. Our knowledge of human experience in general is richer and more thorough than our knowledge of particular phases of human experience unless the particular phase is our own. It is therefore believed that a result more in harmony with reason and justice will be reached by the application of the above principle, than by an attempt to determine, in the first instance, whether the injury is due to the employment.

The application of the above principle can be well illustrated by reference to the two following situations: Suppose a clerk in a store is injured in a quarrel with a customer, does his injury arise out of his employment? The application of the test calls first, for the determination of whether the risk of such an injury is a societal risk. It is clear that every member of society runs some risk of being injured at the hands of the customers of this particular store, but it is equally clear that the clerk, who is required by his employment to deal with customers, is exposed to a greater danger

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[33] This seems to be the view taken by the courts in the cases of *In re McNicol*, 215 Mass. 497; *In re Harbroe*, 223 Mass. 139, 111 N. E. 709; *Sheldon v. Needham* 7 B. W. C. C. 471; *Falconer v. London and Glasgow Shipbuilding Co.* (1901) 3 F. 564 Ct. of Sessions (Act of 1897); *Brown v. City of Decatur* 188 Ill. App. 147; *Slade v. Taylor* (1915) 8 B. W. C. C. 65 C. A.; *White v. Sheepwask* (1910) 3 B. W. C. C. 382 C. A.; *Peel v. Lawrence and Sons Ltd.* (1912) 2 W. C. C. 274 C. A.; *Amys v. Barton* (1912) 5 B. W. C. C. 117 C. A.; *Butler v. Burton-on-Trent Union* (1912) 5 B. W. C. C. 355 C. A.; *Sterling v. Inderredian Co.* 2 Cal. I. A. C. Dec. 172; *Goodwin v. Libby, McNeal and Libby* 2 Cal. I. A. C. Dec. 211; *Ketron v. United Railroads of San Francisco* 1 Cal. I. A. C. Dec. 528; *Aillo v. Milwaukee Refrigerator Transit and Car Co.* Rep. Wis. Indus. Com. 1914-15, p. 18; *Newman v. Newman* 155 N. Y. S. 665.

of attack by a customer. Accordingly it is held in *O'Connor v. London Guaranty and Accident Co.*,[34] in *State ex rel Anseth v. District Court (Minn.)*,[35] and in *Craycroft v. Craycroft-Herrold Brick Co.*,[36] that such an injury arises out of the employment.

But suppose a clerk in a store is injured in a quarrel with a stranger, who is not a customer, does his injury grow out of his employment? Is this a societal risk? The answer is again clear. Every member of society, whether employed or not is equally exposed to the danger of attack at the hands of a stranger. Employment as a clerk in a store does not increase this danger. It is accordingly held in *Treadwell v. Marks*,[37] that such an injury does not grow out of the employment.

The same distinction can be pointed out in the case where a woman employed in a cannery is bitten by a spider while eating her lunch, and in the case where an employee is bitten by a spider while handling fruit in the course of his employment. Anyone is liable to be bitten by a spider while eating his lunch, but one handling fruit is exposed to an increased danger in that particular. Consequently the latter injury arose out of the employment, whereas the former did not.[38] It is believed that these cases have correctly stated the principle which determines whether or not an injury arises out of the employment.

The tests herein laid down are submitted with full knowledge that the law on this subject is in its infancy, and that any rules suggested, at this stage of the law's development must be more or less tentative. But even tentative rules have their value, if it is only to furnish the objective of fair attack. It is hoped the suggestions herein made shall have at least that value.

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[34] 2. Mass. Wk. Comp. Cases 387.
[35] 158 N. W. 713.
[36] 2 Cal. I. A. C. Dec. 654.
[37] 3 Cal. I. A. C. Dec. 3.
[38] *Sterling v. Inderredian Co.* 2 Cal. I. A. C. Dec. 172; *Goodwin v. Libby, McNeil and Libby* 2 Cal. I. A. C. Dec. 211. See other cases cited in note 32.