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After setting out the factors which make for change in the compensation structure, the author goes on to discuss three problem areas in which that change is clearly visible: distinguishing between employees and independent contractors, determining the rights of a borrowed employee, and deciding whether an accident arose out of the employment. He concludes that the law of workmen's compensation is developing in consonance with the social philosophy which underlies it.

The trend in workmen's compensation decisions during recent years is not difficult to describe in broad outline. It can be said with some assurance that today more workers recover under more circumstances for more varied types of injuries against more defendants than ever before in the history of workmen's compensation. This tendency, however, is not new. The past few years have only witnessed in dramatic form an acceleration of changes that has been taking place in compensation litigation over a period of more than four decades. We are still in a process of transition, but the pattern is becoming clear, and we can define directions with a little more assurance than would have been possible twenty years ago. Announcements of liberal positions that once were found in only a few daring decisions are now becoming ordinary conversation in the decided cases. The citadel of employer defenses is eroding rather than exploding, but erosion is taking place at such an accelerated pace that one may well suspect that the structure itself is in danger of complete collapse.

We can profitably consider some of the factors that are at work in producing change in the compensation structure. First, our basic outlook toward workmen's compensation is undergoing a radical transformation. At the inception of the compensation movement in 1910 the entire scheme rested on tenuous and suspicious foundations. Workmen's compensation emerged as an imported novelty that contradicted the sanctified principle of fault liability. Although legal historians tell us that the idea of liability based upon fault is itself a comparative newcomer to torts law, nevertheless it had secured a strong hold upon

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the sentiments of American lawyers and judges by the end of the nineteenth century. In 1911 the New York Court of Errors and Appeals invalidated the first New York compulsory compensation statute on the ground that the legislature, by imposing liability without fault upon the employer and arbitrarily restricting the amount to be recovered by the employee, had deprived both of due process of law under the federal and New York constitutions.[1] Even after this highly skeptical attitude was abandoned,[2] judges and lawyers readily succumbed to the temptation to assimilate workmen's compensation into the fault or negligence pattern with which they had become familiar. Compensation, at the beginning, was relegated to the role of little sister to tort law. Instances of this restrictive attitude were so commonplace that the bare mention of them is hardly necessary. There was a prevalent attitude that the employee must *deserve* his compensation protection. He must show himself worthy of his award by remaining faithfully at his task, by carefully avoiding any violation of his employer's rules, by staying away from horseplay and dangerous recreation, and by maintaining a careful lookout for his own safety. Although he was no longer open to the charge of contributory negligence, as that term was understood at common law; yet his infidelity to duty and his disregard of his own safety frequently served to place him outside the course of his employment and thus to deny him the protection of the statute. Doctrines borrowed from the older law of master and servant were extremely prominent in the earlier compensation decisions. It was difficult for the courts to envisage a worker as being within the course of his employment except at such times as he was within the control of the employer. This type of thinking has largely disappeared today.

At least two basic changes in our social outlook have worked toward a reversal of our attitude toward workmen's compensation. First is our increasing familiarity with the phenomenon of social legislation as a means of providing benefits in terms of human need rather than as a reward for good behavior or as a punishment for the employer's indifference. We now live at home with social security and unemployment insurance. We spend our tax money for the provision of public housing and health facilities for the underprivileged simply because we have become convinced that this is the decent and honest thing to do. Society now recognizes the necessity of absorbing in mass the ordinary and expectable costs that flow from the highly complex and dangerous urban life with which it is unavoidably confronted.

Secondly, we should recognize that even where torts analogies still

1. Ives v. South Buffalo Ry., 201 N.Y. 271, 94 N.E. 431 (1911).
2. New York Cent. R.R. v. White, 243 U.S. 188 (1917).

persist in compensation law, the tort law itself from which the analogy is drawn is not the tort law of the past. The element of personal fault is fast distintegrating even in ordinary negligence suits. The prevailing presence of liability insurance and other means of loss distribution is fast bringing to tort law the flavor of workmen's compensation. The significance of this observation must be apparent to any attorney familiar with the Federal Employers' Liability Act.[3] In these cases fault on the part of the railway lies wherever the jury may choose to find it, and it is familiar knowledge that jurymen nearly always do so choose. Recent developments in other areas of tort law, such as the increasing reliance on the doctrine of *res ipsa loquitur*, the notion that the violation of any traffic statute is negligence per se, and the movement toward absolute warranty liability for manufacturers of defective products, all suggest an eventual eclipse of the fault principle. In short, the former little sister—the compensation scheme—is fast assuming the role of the big brother.

A final factor that has made for change in workmen's compensation relates to administration. Subtle distinctions borrowed from the substantive law of negligence and from the concept of *respondeat superior* have not worked out in practice when they have been directed toward workmen's compensation controversies. They have proved to be too artificial and too overrefined for successful administration in the great mass of controversies involving employee injuries in modern industrial society. We are tempted to suspect that they have introduced more confusion than good. The demands of practical necessity have obliged the courts to extricate themselves from a web of nineteenth century technicalities that bears little resemblance to the actualities presented in compensation claims. In short, judges have found themselves in desperate need of blunter tools for decision.

Although the process of change that has resulted from the pressure of the factors described above is obvious everywhere in the compensation structure, we cannot here attempt to survey the entire stage upon which the drama is unfolding. For present purposes it is necessary to restrict ourselves to just a few substantive areas where the pattern of progress is evolving rather clearly and where the forces that are making for change can be brought to the surface and examined.

I. Employee Distinguished From Independent Contractor

The distinction between the employee or servant and the independent contractor is one with which lawyers were thoroughly familiar long before the advent of workmen's compensation. More than a cen-

3. 53 Stat. 1404 (1939), 45 U.S.C. §§ 51-59 (1958).

tury earlier it had become established that the master was answerable for the torts of his servant, while the principal bore no responsibility for the damage done by a careless independent contractor who injured a third person while carrying out the terms of his contractual undertaking. These were torts cases, and the distinction between the two relationships was drawn almost exclusively in terms of the *control* that the master was presumed to exercise over his servant. When it is borne in mind that the doctrine of *respondeat superior* was strictly a product of tort law and hence rested firmly on a foundation of personal fault, it is easy to understand why the control test was a matter of great importance in the earlier cases. Here was an exceptional situation in which a plaintiff sought to impose responsibility upon a master who, concededly, was not chargeable with personal blameworthiness. The only conceivable legal theory which could justify making such an innocent defendant liable for the misconduct of some other person was that the blameless master had the power of control over the conduct of his servant. It could be plausibly contended that along with that power of control went responsibility for the servant's misdeeds. It follows as a corollary to this theory that whenever the power of control is lacking the entire basis for master-servant responsibility falls to the ground.

It is unfortunate that courts adhered to the control test when they later attempted to distinguish the employee from the contractor in workmen's compensation controversies; the traditional fault concept (which afforded the sole justification for the control requirement) had been deliberately abandoned by the legislatures when they devised the compensation scheme. Indeed, in compensation law there is a sound reason for distinguishing the employee from the contractor, but this distinction has entirely different policy roots from those that support the *respondeat superior* type of liability described above. The employee's claim to workmen's compensation rests on the fact that he, as a worker, is an economically dependent unit of his employer's enterprise, and the question as to whether or not he was subject to the control of his employer is an important consideration only to the extent that the employee's subjection to control may suggest that he was economically dependent upon his job. Experience has shown that the ordinary worker is exposed by his employment to dangers which he cannot meet with his own resources. Under ordinary wage practices the worker is not in a position to anticipate his accident costs in advance and insist upon a rate of pay that would enable him to set aside funds sufficient to make an advance provision for any expected catastrophe. The basic purpose of compensation is to afford a means whereby accident costs may be transferred from the worker to the enterprise he serves, thence to be passed in diluted form to all those

who benefit from the goods that the enterprise produces. In other words, the employee is entitled to compensation from his employer because of the recognized social need of his class and not arbitrarily because he is subject to his employer's control.

By the same token, under this social policy the independent contractor has a less plausible claim for compensation when an accident befalls him personally. The contractor himself represents an independent enterprise, and the contractor, if he is typical of his class, is in a position to anticipate his possible accident cost in advance, to capitalize it through insurance, and to insist upon a contract price that will protect him and his workers. Since, presumably, he has already exacted a charge for this purpose in fixing the charge for his undertaking, it would be manifestly unfair if his principal, the other party to the contract, were thereafter obliged to reach again into his pocket and pay compensation in the event of accident. Thus the difference between the employee and the contractor in compensation law resolves itself into a difference with respect to the bargaining power of the wage earner as contrasted with the bargaining power of the typical contractor.

It is becoming increasingly obvious that the control test is fast disappearing as an exclusive determinant of the distinction between the employee and the contractor. Courts still speak of the test with respect, but they employ it only in conjunction with other considerations, such as the relative expertise of the claimant, the specialized nature of his undertaking, the fact that he does or does not provide specialized equipment, or that he does or does not supply workers of his own hiring. All these determinants, employed in every conceivable permutation, are useful only to the extent that they may tend to suggest that the injured claimant was initially in a position to capitalize his accident costs in advance at the bargaining table. Whenever a court becomes convinced that the basic economic policy underlying workmen's compensation will be best served by ignoring all tests it is likely to strike out on its own. Whenever the claimant must fairly be regarded as the defendant's man, whenever he is basically dependent upon the latter for his livelihood, whenever the remuneration for the claimant's services is found to have been figured on some standardized basis, he will likely be regarded as an employee, irrespective of the dictates of any so-called test or combinations of tests. Artists in nightclubs,[4] trapeze artists,[5] company physicians,[6] and at-

4. Russell v. Torch Club, 26 N.J. Super. 75, 97 A.2d 196 (L. 1953). Similarly as to a model. Reyes v. Cowles Magazine, 5 App. Div. 2d 708, 168 N.Y.S.2d 660 (1957).

5. Zuijs v. Wirth Bros. Proprietary, Ltd., 55 N.S.W. St. 368 (New South Wales 1955).

6. West Virginia Coal & Coke Corp. v. State Compensation Comm'r, 116 W. Va. 701, 182 S.E. 826 (1935).

torneys retained on a sustained basis by a single client[7] have all been regarded in recent decisions as employees, since they were found to be economically dependent units of the enterprise under which they worked.

The tendency to refer the distinction between the employee and the contractor to the economic realities of each situation as it presents itself is perhaps most apparent in cases involving the sales agent. The used car salesman or the insurance solicitor are typically subject to little control. These persons determine their own hours of work, they find their prospects when and where they can, and they devise their own methods of operation. However, they are still subservient units of a single enterprise. Their pay, although frequently in the form of a commission, is entirely standardized. They are their employers' men, and if they are injured they may well be entitled to compensation.[8]

In a few states the legislatures have significantly altered the distinction between contractor and employee and have directed that compensation be awarded to both classes of workers under appropriate circumstances. In Louisiana the contractor who spends a substantial part of his time in manual labor is regarded under the statute as though he were an employee.[9] Recently the Louisiana court awarded compensation to a contractor who employed about thirty men and who, at the time of accident, was engaged in a contract operation that grossed over 10,000 dollars per month.[10] His presence as supervisor on the site in work clothes was regarded as being engaged in manual labor within the intention of the statutory provision. In Wisconsin and Oregon any person doing work for another is classified as an employee unless he maintains a separate enterprise and holds himself open to all comers.[11] In Colorado a contractor is entitled to compensation so long as the work being done can be regarded as a part of the business of the principal.[12] The chief advantage of these statutes lies in the fact that they enable the court or commission to sidestep many difficult administrative problems in distinguishing the two classes of workers. It is noteworthy, however, that none of the statutes is all-inclusive. The Louisiana requirement of manual labor, the Wisconsin and Oregon exclusions from compensation of all those who maintain a separate

7. Egan v. New York State Joint Legislative Comm., 2 App. Div. 2d 218, 158 N.Y.S.2d 47 (1956). The same may be true of a minister. Meyers v. Southwest Regional Conference, 230 La. 310, 88 So. 2d 381 (1956).

8. Gresham v. Speights, 133 So. 2d 846 (La. Ct. App. 1961) (used car salesman); Gordon v. New York Life Ins. Co., 300 N.Y. 652, 90 N.E.2d 898 (1950) (insurance solicitor).

9. LA. REV. STAT. § 23:1021(6) (1950).

10. Welch v. Newport Indus., 86 So. 2d 704 (La. Ct. App. 1956).

11. ORE. REV. STAT. § 656. 124 (1961); WIS. STAT. § 102.07(8) (1957).

12. COLO. REV. STAT. ANN. § 81-9-1 (1953).

enterprise, and the Colorado insistence that the work being done must be part of the business of the principal all indicate that the purpose of such statutes is to simplify but not to obliterate completely the distinction between the contractor and the employee.

II. Borrowed Employees

Another pernicious byproduct of an indiscriminate use of the control requirement in compensation controversies has been the borrowed-servant doctrine. The employer who leases one of his regular workers to another person enjoys a complete relief from compensation liability so long as the loaned employee is subject to the exclusive direction and control of the borrower. Here again we find that the courts of the past were unable to envisage an employment relation between the lender and the worker so long as the former was not in a position to exercise control over the conduct of his employee. We may note again how this contradicts the economic philosophy underlying workmen's compensation. The lending employer may be engaged in the regular business of leasing out his workers, who are actually carrying out his business while they are on hire. The lender may be in a position to exact of the borrower a charge covering the cost of all anticipated accidents. The worker may, and usually will, regard himself as the lender's man rather than as an employee of the borrower. Nevertheless, until recently the courts tended to blind themselves to all considerations apart from the bare absence of a power of control.[13]

There is a manifest tendency in the recent decisions to depart from the old policy and to permit the loaned employee to subject either the lender or the borrower to his compensation claim. The new tendency first manifested itself solely in connection with the vocational lender—the employer who is engaged in the regular business of leasing out his workers together with some piece of complicated equipment. Here the courts devised what has come to be known as the dual capacity doctrine. In those situations where the worker was hired out along with a piece of machinery the courts were able to observe that the loaned worker was still within the control of the lending employer with respect to all conduct involving the care or preservation of the piece of machinery with which he was entrusted.[14] This approach, however, was fortuitous. The application of the dual control rule depended in many cases upon a determination as to whether the worker was operating the machinery at the time of accident or whether

13. Coughlan v. City of Cambridge, 166 Mass. 268, 277, 44 N.E. 218, 219 (1896).

14. Mahoney v. New York, N.H. & H.R.R., 240 Mass. 8, 10-11, 132 N.E. 384-396 (1921).

he was injured while doing some other job that did not involve the care and preservation of the machine.[15]

A frontal attack upon all aspects of the borrowed-employee doctrine has been underway for some time. At least five states (New York, California, Illinois, Kentucky and Louisiana) have provided either by statute or through judicial decision that both the lending employer and the borrower are jointly liable for compensation to the loaned worker.[16] He may successfully prosecute his claim against either or both. The only remaining problem in these jurisdictions relates to the proper ultimate allocation of the compensation cost between the two employers after the claim of the employee has been satisfied. A Louisiana court has held that the borrower or special employer who has discharged the compensation claim of the worker is entitled to be indemnified by the general employer. At least, this is true where the latter was engaged in the business of leasing out workers.[17] A similar result is reached in California by statute.[18] In Illinois, on the other hand, the borrower must eventually bear the compensation burden and indemnify the lender for any judgment secured against the latter.[19]

III. ACCIDENTS ARISING OUT OF EMPLOYMENT

It is familiar learning that the injured employee who seeks compensation must establish that the harmful accident of which he complains occurred during the course of his employment. In most states he must go further and convince the court or commission that the accident also *arose out of* his employment. This latter phrase has been the subject of more sharply contested litigation than any other term in the typical compensation statute. In essence the *arise out of* requirement is a sound one. Workmen's compensation was designed to care for only one type of misfortune—the industrial accident. One may well inquire, what *is* an industrial accident? An accident does not meet this requirement merely because it happened fortuitously while the victim was engaged in an industrial pursuit. Our compensation statutes proceed upon the assumption that industry brings in its wake certain character-

15. See, *e.g.*, Pacific Employers' Ins. Co. v. Liberty Mut. Ins. Co., 174 F.2d 1 (5th Cir. 1949); Langevin's Case, 326 Mass. 43, 91 N.E.2d 920 (1950).

16. Famous Players-Lasky Corp. v. Industrial Acc. Comm'n, 194 Cal. 134, 228 Pac. 5 (1924); Humphreys v. Marquette Cas. Co., 235 La. 355, 103 So. 2d 895 (1958); De Noyer v. Cavanaugh, 221 N.Y. 273, 116 N.E. 992 (1917); ILL. REV. STAT. ch. 48, § 138.1 (1962); KY. REV. STAT. § 342.060 (1963); Comment, 26 CALIF. L. REV. 370 (1938).

17. Casualty Reciprocal Exch. v. Richey Drilling & Well Serv., 137 So. 2d 127 (La. Ct. App. 1962).

18. CAL. INS. CODE § 11663. See Agronaut Ins. Exch. v. Industrial Acc. Comm'n, 154 Cal. App. 2d 703, 316 P.2d 759 (Dist. Ct. App. 1957).

19. ILL. REV. STAT. ch. 48, § 138.1(4) (Supp. 1961).

istic perils that are peculiarly associated with industrial operations. The legislative intention was to deal exclusively with workday injuries. Hence, industrial or workday accidents must be carved out from the general body of perils that beset all mankind. The task of sorting the risks was left by the lawmakers to the courts. Judges were told by the legislators that the accident must arise out of the employment, but they were not told how to go about determining whether it did so arise. The courts met this challenge at first by devising the test which has become familiar as the "increased risk" test. The risk, it was said, must be greater for the employee than for one not so employed.

Although it is not to be denied that this test of "increased risk" comports with the policy that underlies workmen's compensation; yet it has proved to be almost impossible to administer with fairness to both parties. In difficult cases its use often results in hair-splitting distinctions which are of no service to a sensible administration of law or the cause of justice. The basic difficulty with the increased-risk rule lies in the fact that it requires that the risk that caused the accident be compared with an entirely unknown quantity. When can it be said that the risk from which the injury resulted is greater for the workman than for a person not engaged in the employment? *Who* is such a person who is not engaged in the complainant's employment? Comparison here invites only disaster for clear thinking. Some risks, of course, can be classified without difficulty as being peculiarly characteristic of the employment. The risk of injury by an exploding boiler, for example, or the danger of accident by a derailed train, can easily be associated specially with the calling of an engineer or a fireman. But the greater part of the accidents that befall industrial workers—strains, injury by falling, burns, traffic accidents and similar casualties—are fairly typical of mine-run accidents that occur in all walks of life. It follows that a literal adherence to the strictures of the increased-risk rule would have the effect of reducing the compensation act to virtual impotency.

The test of increased risk was subjected to constant pressure in litigation from the beginning. But it was in the street risk situations that the urge for repudiation was most strongly felt. In the earlier cases of this kind the courts were content to announce that only messengers, truck drivers, and similar employees whose duties called them into the streets with regularity were entitled to compensation if injured in traffic.[20] It was difficult to conclude that the ordinary factory worker

20. For a fairly recent decision adhering to this position, see United Serv. Ins. Co. v. Ronaldson, 254 Ala. 204, 48 So. 2d 3 (1950). At one time an even more conservative position was adopted in some jurisdictions. Donahue v. Maryland Cas. Co., 226 Mass. 595, 116 N.E. 226 (1917) (traveling salesman who spent more than half of his time walking the streets denied compensation for injuries resulting from fall on icy pavement).

or office employee suffered any greater exposure to the hazards of the public streets than "one not so employed." The essential increase of risk was lacking. But the courts could not continue to resist the pressure of human drama in the street injury cases. Traffic presents a constant and ever-growing hazard that must be faced daily by every man who goes out to work, and if his job has brought him into the streets at the time when he was injured, what difference should it make that at other times he was not required to be there with any regularity? The occasion that really counts is the one that gives rise to the claim. In short, the increased-risk test failed in these cases to meet the more important demands of fair play. This proved to be its undoing.

As a means of circumventing the increased-risk rule in the street accident situations courts resorted to a device that is familiar to all torts lawyers—proximate causation. An accident that is proximately caused by the employment, they observed, necessarily arises out of the employment. If the duties of the employee called him to face the traffic of the streets at the time of his accident and thus proximately caused his injury, it could not fairly be said that the accident did not arise out of the employment. As observers we cannot escape the conclusion that this was a radical departure from the older approach. Even though the risk of being struck down in traffic was no greater for the worker than for the highway-using public at large, the worker's accident was regarded as arising out of his employment.[21] At first the position just described was restricted to those risks which could be regarded as peculiar to the use of the streets, such as traffic accidents, and the exception became known as the "street risk" rule.

There followed a second stage in the erosion of the increased-risk test. This resulted when courts expanded the term "street risk" so as to include almost *any* mishap that occurred by chance in the public streets. A wound by a stray bullet, a tripping on the curb, the bite of a mad dog, and other similar misfortunes all arose out of the employment solely because they took place in the public street where the employee was required to be in the performance of his duties.[22] It is obvious that in their eagerness to meet the demands of practical justice in a special situation the courts had created a doctrinal anomaly. They had singled out one special area, the public street, where the test of increased risk was ignored, while they had retained the strictures of the increased-risk requirement for all accidents that happened at any place other than the streets.

A resolution of this anomaly in favor of the worker constituted the

21. The leading case here is Dennis v. White & Co., [1917] A.C. 479.

22. Everard v. Women's Home Companion Reading Club, 234 Mo. App. 760, 122 S.W.2d 51 (1938) (stubbing toe on curb); Katz v. A. Kadans & Co., 232 N.Y. 420, 134 N.E. 330 (1922) (chauffeur stabbed by madman while in the street).

third and final stage. One illustration will suffice. In New Jersey a butcher's helper was disposing of meat scraps in the rear yard of his employer's establishment. While he was so engaged, a neighbor's child next door let fly a toy arrow which by sheer chance struck him in the eye. The employer answered his worker's compensation claim by contending earnestly that there is nothing peculiar to the work of a butcher's helper that causes him to face a greater risk of exposure to a child's arrow than is faced by the public at large. The claimant, he insisted, could not meet the requirements of the increased-risk test. In reply, the worker pointed out that if his employer had ordered him to go into the public street where an identical misfortune had befallen him there would be no doubt that the resulting injury would have arisen out of his employment under the established New Jersey street-risk rule. If the bare fact that the employer's orders carried the worker into the street where the mishap occurred was enough to characterize the accident as one that arose out of the employment, why should the result not be the same when the employer's orders carried the worker into the back yard of the employer's own establishment and into the path of the errant arrow? If there is to be a special street-risk doctrine, why should there not likewise be a backyard doctrine, an open lot doctrine, or an upstairs-on-the-third-floor doctrine? This type of argument came to achieve increasing recognition in the courts. The result was the announcement of the broad principle to the effect that whenever the call of duty brings the worker to the place of accident (wherever this may be) the resulting injury should be regarded as one that arose out of his employment.[23] This principle, derived, as we have seen, from the earlier street-risk rule, has since acquired a name of its own—"positional risk" doctrine. Within the past few years the doctrine has been adopted by even the traditionally conservative Supreme Judicial Court of Massachusetts.[24]

The positional-risk doctrine, as described above, can be examined profitably from another angle: it seems to represent a proposition that the employee who is directly answering the call of duty at the time he sustains an accident will be protected indiscriminately against any danger that befalls him so long as the risk was not one of his own making. The fact that the worker was securely within the course of his employment at the time (because he was acting in obedience to orders) has become a consideration whose persuasion overrides any

23. The most convincing and elaborately reasoned decision supporting this position is Industrial Indem. Co. v. Industrial Acc. Comm'n, 95 Cal. App. 2d 443, 214 P.2d 41 (Dist. Ct. App. 1950). The case of the butcher's helper and the arrow, discussed in the text is Gargiulo v. Gargiulo, 24 N.J. Super. 129, 93 A.2d 598 (App. Div. 1952), *aff'd*, 11 N.J. 611, 95 A.2d 646 (1953).

24. Baran's Case, 336 Mass. 342, 145 N.E.2d 726 (1957) (stray bullet).

weakness in his showing with reference to the character of the risk that brought about the accident. In other words, a very strong showing on the during-course-of side of the ledger can so operate as to offset a decided weakness on the arise-out-of side of the balance sheet.

We are tempted to inquire as to whether the converse may not also be true. If the risk producing the accident is one that can be readily and intimately associated with the nature of the job, may compensation be awarded even though the harm was inflicted at a time when and at a place where the worker was clearly outside the course of his employment? Recent decisions suggest that such may be the case. Again we may refer to the traditionally conservative state of New Jersey for an example. The facts are from *Meo v. Commercial Can Corp.*, decided last year.[25] Meo, the claimant, was the supervisor of defendant's plant. At the time in question a strike was in progress, and the claimant had been continuously engaged in strike-breaking activities on behalf of his employer. One morning while he was standing in his own front yard, intending to enter his car for the purpose of going to work, he was assaulted by disgruntled strikers who acted in resentment of Meo's anti-labor activities. Meo was compensated for the resulting injuries. Although it is clear that accidents occurring at home are not generally regarded as happening during the course of employment, yet the nature of the risk that brought about the assault in this case was so peculiarly a risk of the job that this consideration overrode the obvious weakness of his showing with reference to the during-course-of requirment.

The same explanation accounts for a fairly recent Michigan decision in which a factory worker died of cyanide poisoning.[26] In this case circumstantial evidence satisfied the court that cyanide became lodged under the deceased's fingernails or on his shoes while he was at the employer's plant. He arrived home in good health and apparently ingested the substance into his mouth in some unaccountable manner while preparing for bed. Expert testimony showed that he must have died within five minutes after the substance entered his mouth. Compensation was awarded his widow. The court was apparently not concerned with the fact that the accident occurred at home and at a time when the worker could not by any stretch of the imagination be regarded as within the course of his employment. The risk of cyanide poisoning was a risk of the job, and the deceased, like Meo, the strike breaker, carried the risk around with him after he left the work premises. One can readily gather from the recent decisions that the during-course-of requirement and the arising-out-of-require-

25. 76 N.J. Super. 484, 184 A.2d 891 (L. 1962).

26. Zytkewick v. Ford Motor Co., 340 Mich. 309, 65 N.W.2d 813 (1954).

ment are not separate inquiries to be decided in isolation from each other. Rather, the two seem to interact upon one another and to form together a single indivisible context within which each situation must be appraised.[27]

We observed earlier that the positional-risk doctrine is fast supplanting the older requirement of increased risk in many situations. There remain, however, two clouded areas in which the courts continue to insist that the claimant must show that the nature of the job or the working environment served to enhance the prospect of the accident complained of. The first of these areas involve accidents which must be attributed in part at least to the employee's own physical condition or to his own behavior, or which are the outgrowth of his own private life. These are commonly referred to as *personal* risks and they are generally excluded from the protection of the positional-risk doctrine.

One is tempted to inquire why this is so. A worker is directed by his employer to burn meat scraps in the back yard. If while he is there he is wounded by a stray bullet, assaulted by a madman who happened to be at large in the neighborhood, or shot for some entirely unaccountable reason, he will be entitled to compensation solely because he is in a position to invoke the positional-risk doctrine, and he can recover merely because his duties brought him into the path of the bullet. But if the assailant of the butcher's helper happens to be a personal enemy who finds him at work and shoots him because of some grudge arising out of their private lives, the helper will be obliged to show in addition that the general nature of his work or the environment in which he performed his duties was calculated to increase the risk of such a personal assault. If he fails in this respect, the court will conclude that the accident did not arise out of the employment, although concededly it happened during the course of it.[28] Why should this be so? An attack by a madman or the ricochet of a bullet intended for someone else are surely no more characteristic risks of the job of a butcher's helper than is the chance that an enemy who bears him an old grudge will find his victim at work and assault him there. In both situations the performance of duty has played a causal part by bringing the victim to the place of injury.

Again, suppose that a worker who is walking toward the machine he intends to operate falls to the floor for absolutely no accountable rea-

27. This is discussed in detail in Malone, *The Compensable Risk*, 31 ROCKY MT. L. REV. 447 (1959). See also the splendid discussion in 1 LARSON, WORKMEN'S COMPENSATION § 29 (1952).

28. The decisions so holding are legion. *E.g.*, Devlin v. Ennis, 77 Idaho 342, 292 P.2d 469 (1956); Rice v. Revere Copper & Brass, Inc., 186 Md. 561, 48 A.2d 166 (1946).

son and suffers a head injury. The positional-risk doctrine will save his compensation claim because his motion in doing as he was told brought him to the place where he fell. It need not be shown that the physical environment where he worked played any causal part; nor need it be demonstrated that the worker's haste in reaching his machine precipitated the accident in any way. But add to this identical picture the single fact that the worker was epileptic and that his fall was caused by an epileptic seizure. Once this is shown he will lose his claim unless he succeeds in showing in addition that the physical environment in which he worked contributed to the occurrence in some way.[29] The increased-risk test has again been brought into play. The epileptic worker may save his case by establishing that he was on a ladder when he suffered his seizure, or that he was driving a truck and that the seizure caused him to run off the road. But if the fall from epilepsy occurred under such circumstances that it could plausibly produce the identical harmful result without reference to any peculiarity of the place where he was working, the employee will lose his compensation claim.

In both the situation of the personal assault and the situation of the epileptic seizure it appears that the courts have retreated to the old tort idea that the employee had ouly himself to blame if he was injured and hence he does not deserve a compensation award unless he can tie his injury to his employment in some way. This must be regarded as a residual trace of the old fault notion that has been repudiated in other areas of compensation law. The attitude described is in derogation of the familiar notion that the employer takes the employee as he finds him. The epileptic is entitled to the same compensation protection as the worker who is in good health. The employee who is careless or disobedient or who brings to his job a bad moral background does not for that reason alone lose his compensation claim. By the same token, the fact that the worker's individual health deficiencies or his personal life (rather than some neutral cause outside the control of either party) has created the risk that culminates in an accidental injury should not serve to deprive him of access to the liberal positional-risk doctrine. However, apart from a few sporadic decisions or dicta,[30] there is as yet little indication that the courts are prepared to go this far with reference to the personal risk.

It should also be noted that the liberal positional-risk test can be resorted to only in cases where at the time of accident the worker was

29. Henderson v. Celanese Corp., 30 N.J. Super. 353, 104 A.2d 720 (App. Div. 1954). The sharp and vigorous dissenting opinion of Clapp, J., is of particular interest.

30. *E.g.*, the dissent of Clapp, J., in Henderson v. Celanese Corp., *supra* note 29. See also Livingston v. Henry & Hall, 59 So. 2d 892 (La. Ct. App. 1952) (compensation awarded for personally motivated assault under positional-risk doctrine).

actively at work or was moving from one place of work to another as directed by his employer. Injuries during lunch periods or during periods of permitted idleness or rest may be regarded as within the course of employment. But the employee who is injured at such a time must go further on the arise-out-of issue and must show that the nature of his employment increased the risk of accident and caused it to be greater for him than for one not so employed.

One type of spare-time accident, however, is faring better in the courtroom than it formerly did. A common source of industrial injury is the risk arising from horseplay or boisterous antics among idle workers. At one time horseplay injuries were definitely outside the course of employment. The refusal of compensation was justified along three different lines: (1) the horseplay injury represented a personal risk brought on to the job through the worker's own impulse to entertain himself or to cater to his fun-loving instincts; (2) horseplay usually took place during rest periods or idle time, and hence this type of accident could not fall within the protection of the positional-risk rule; and (3) the claimant was frequently the aggressor and was the originator of the prank that resulted in his injury. This type of situation suggested to the courts in the earlier cases that the employee had brought his trouble upon his own head, that he was blameworthy and hence did not deserve compensation. Employers were able to convince the courts that the act of originating the fun was tantamount to aggression, thus affording the employer a defense under familiar provisions of the statutes that expressly excluded accidents caused by the employee's "wilful misconduct" or by his "intention to injure himself or another."

Today horseplay accidents are receiving an increasingly sympathetic reception. The objection that the risk of horseplay is one that is personal and is imported by the worker into his employment has been met by the observation of judges and commissioners that roughhousing and sportive play are expectable incidents of the ordinary working day and are characteristic of healthy and exuberant workers. Such pranks are no longer regarded as the product of some objectionable idiosyncrasy on the part of the participating worker.[31] The defense of "wilful misconduct" is rejected with increasing frequency in the later decisions. Wilful misconduct, say the courts, indicates a serious intention to inflict an injury, rather than the sportive instinct characteristic of American workers who clown during their idle moments.

31. Interesting recent decisions illustrative of the newer approach are Crilly v. Ballou, 353 Mich. 303, 91 N.W.2d 493 (1958); Cunning v. City of Hopkins, 258 Minn. 306, 103 N.W.2d 876 (1960) (one of several youthful employees riding in truck playfully threw raincoat over head of driver, resulting in collision; compensation awarded).

IV. CONCLUSION

In conclusion, it seems appropriate to observe that the substantive law of workmen's compensation is tending to give an increasingly realistic expression to the social philosophy behind the American statutes. Courts are slowly erecting a new and independent legal structure freed of the ideas of fault and blameworthiness so readily associated with tort law, and freed also from the fetters of the requirement of employer control that at one time, at least, was characteristic of the law of *respondeat superior*. Perhaps there has been no sudden breakdown of earlier positions in compensation law, but there is an obvious strengthening of the courts' appreciation of the new need and there is ample evidence of the continuing capacity of judge-made law to grow and to adjust itself to the dangerous industrial society in which we live.