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Arising Out of and in the Course of Employment in New York

Charles S. Desmond

"ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT" IN NEW YORK

The draftsmen of the New York Workmen's Compensation law, borrowing a phrase from the British statute,[1] directed the payment of compensation by employers to employees for disability or death from injury " . . . arising out of and in the course of employment. . . . " [2] This simply worded phrase, found now in the compensation statutes of at least forty states and the Federal Government,[3] has been defined so many times in the various jurisdictions that it spreads itself over more than one hundred pages of *Words and Phrases*.[4] Everyone claims to know what it means, but its application to particular facts harasses lawyers, administrators and judges. Forty years ago, the English Court of Appeal accurately pointed out that the first part of the phrase describes the character or quality of the accident, while the latter part introduces the idea that an accident to be compensable must in some sense be due to the employment, and must result from a risk reasonably incident to the employment.[5]

Since its law was enacted, New York state alone has dealt with more than forty million workmen's compensation claims, small and large, contested and uncontested. Each one required an application of the phrase we are concerned with here, and vast numbers of them involved contests over its application to special facts. For that reason, one cannot in an article such as this attempt to summarize the entirety of the New York law on the subject. What will be attempted in this article is a sampling of decisions from one court, the New York Court of Appeals, where application of the phrase

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1 The Workmen's Compensation Law, 1925, 15 & 16 GEO. 5, c. 84, § 1(1).

2 NEW YORK'S WORKMEN'S COMPENSATION LAW § 10.

3 Longshoremen's and Harbor Workers' Compensation Act, 44 STAT. 1425 (1927), as amended, 33 U. S. C. § 902 (1946).

4 4 WORDS AND PHRASES 18-147 (perm. ed. 1940).

5 Fitzgerald v. W. G. Clarke & Son, [1908] 2 K. B. 796.

has resulted, unless otherwise stated, in the affirmance of an award. Limiting our field still further, this article will deal only with a few fact areas of recent and particular interest. Cases involving occupational disease claims and awards [6] are omitted entirely. Finally, readers are reminded that under the New York statute, a decision of the Workmen's Compensation Board is "final as to all questions of fact," so that no New York court can review administrative findings of fact.[7]

I.

Injuries Going to Work

Injuries sustained by employees while going to work have provided some of the most difficult problems. The determinative factor in each case seemed to be whether the employee's actions were motivated by furtherance of the employer's interest. Quite significant in this category of cases are *Scott v. U. S. O. Camp Shows Inc.*,[8] and *Lyons v. U. S. O. Camp Shows Inc.*[9] Both Scott and Lyons were professional entertainers employed by the USO, under direction of the United States Army, to tour the camps in the American occupation zone in Germany. During a break in their schedule, Scott and Lyons went to Paris. While returning to Frankfort to rejoin the company, the automobile in which they were riding collided with another. The compensation board made findings that at the time of the mishap the actors had returned to their employment because they were en route to their next engagement at the time the injuries were sustained.

The discovery of a theretofore unknown fact enabled the claimant to recover in a unique application of the going-to-work concept. In *Manville v. New York State Dept. of*

6 NEW YORK WORKMEN'S COMPENSATION LAW § 3(2).
7 NEW YORK WORKMEN'S COMPENSATION LAW § 20.
8 298 N. Y. 896, 84 N. E. (2d) 808 (1949).
9 298 N. Y. 897, 84 N. E. (2d) 808 (1949).

Labor,[10] a state employee was injured in a fall on the sidewalk in front of the State Office Building in Albany. Although the sidewalk was to all appearances an ordinary public one, it was discovered that the fee simple was in the State of New York. Therefore, since the state was Manville's employer, there was adequate basis for the finding that the accident had taken place after the worker had entered the employer's premises while proceeding to work. A similar approach resulted in an award where the claimant was forced to climb over the coupling between the cab and trailer of a truck, so parked at a loading platform as to block the usual entrance to the place of employment.[11] It was held that the employee was in the course of his employment in attempting to gain entrance to his employer's building, and that the employer was liable for the failure to provide safe access to the building.

Claims of employees injured while away from the physical place of work are honored when there is a reasonable basis in the record for a holding that some furtherance of the employer's business was involved in the particular journey, even though the major part of the worker's purpose was personal to himself.[12] These cases fall into the going-to-work category because in each of them there was, in one way or another, evidentiary justification for a finding that whatever the employee was doing at the particular instant, he was approaching a place of actual work on orders of his employer.[13] Thus, salesmen who used their automobiles in their employer's business were allowed compensation de-

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10 294 N. Y. 1, 59 N. E. (2d) 780 (1944).

11 Leatham v. Thurston & Braidich et al., 289 N. Y. 804, 47 N. E. (2d) 51 (1943).

12 Buholtz v. Kearse et al., 291 N. Y. 694, 52 N. E. (2d) 590 (1943); Kristjanson v. Lehman et al., 287 N. Y. 569, 38 N. E. (2d) 230 (1941); Oram v. Byron C. Moon Co. et al., 285 N. Y. 42, 32 N. E. (2d) 785 (1941).

13 *See, e.g.*, Nagengast v. Spatz et al., 283 N. Y. 573, 27 N. E. (2d) 437 (1940); Van de Bogart v. Onondaga Litholite Co., 274 N. Y. 595, 10 N. E. (2d) 568 (1937); Bennett v. Marine Works, Inc. et al., 273 N. Y. 429, 7 N. E. (2d) 847 (1937).

spite the fact that the accidents occurred in the salesmen's own garages or driveways.[14]

Another unusual example of the going-to-work theory is found in *Buchignani v. Donald Taylor Co.*[15] The deceased had been intermittently employed on some construction work at Riker's Island, off the mainland of New York City. After his last period of employment, he had been told to come back in a few days at which time he would either be reemployed or told when work would be available. While being transported to the island for this purpose, he was drowned when the employer's steamboat blew up and sank. Additional facts supporting the claim in this case were that the deceased still carried a pass, had left his tools on the island, and his job had not been given to anyone else.

II.

Injuries at Work

Of course, if a man, while working at his machine in a factory, is hit on the head, in the presence of witnesses, by something which falls from the ceiling, there is no doubt that he was injured while at work, and that the facts necessary to establish the claim are readily provable. The situation to be adjudicated, however, is not always quite so simple. To provide for unwitnessed accidents, the New York law states that "it shall be presumed in the absence of substantial evidence to the contrary . . . that the claim comes within the provision" of the statute.[16] This presumption, coupled with another that the injury did not result solely from the intoxication of the employee while on duty,[17] was applied in *McKenna v. Atlas Contractors Equipment*

14 Eaton v. Webster Motors of Glen Falls, Inc. et al., 291 N. Y. 699, 52 N. E. (2d) 592 (1943); Madelung v. Dale Radio Co. et al., 287 N. Y. 556, 38 N. E. (2d) 225 (1941).

15 281 N. Y. 707, 23 N. E. (2d) 540 (1939).

16 NEW YORK WORKMEN'S COMPENSATION LAW § 21(1).

17 NEW YORK WORKMEN'S COMPENSATION LAW § 21(4).

Corp.,[18] where the body of a watchman was found in the shanty where he worked, near a burned mattress. The autopsy revealed both carbon monoxide poisoning and the presence of alcohol. An award was upheld in the absence of any explanation of how the accident occurred.

An illustration of the more common application of the presumption that the claim is lawful is found in *Kleid v. Carr Bros.*[19] The work of the claimant's decedent took him about the city and into the subways. His body was found on the tracks in a subway station, at a point which indicated that he had come onto the tracks from a sort of extension of the subway platform, his presence on that extension being unexplained. Affirmance of the award was based not only on the statutory presumption against suicide, but also on an admission, found in a report by the employer to the board, to the effect that the decedent was engaged in his regular occupation when killed.

There are numerous cases in which it is not clearly established that the presumption—that the claim is within the provisions of the statute—was employed; rather, it may be found that the fact finding board, from some substantial evidence, inferred that the claimant was at work when injured. Thus, a performer in an ice show was granted compensation when she fell while practicing in the afternoon at a public ice rink.[20] Of course, difficulties of this sort, *i.e.*, whether the employee was in the course of employment, arise more often in death cases.[21] In many of these, the awards are supported by the rather slim evidence that the worker was engaged in his employment when killed. One case also illustrated the applicability of the presumption against the in-

18 300 N. Y. 317, 90 N. E. (2d) 479 (1950).

19 300 N. Y. 270, 90 N. E. (2d) 185 (1949).

20 Lewis v. Hotel St. Regis et al., 287 N. Y. 598, 38 N. E. (2d) 708 (1941).

21 Landrum v. Congress Motor Corp. et al., 301 N. Y. 544, 93 N. E. (2d) 347 (1950); Mata v. Phoenix Construction Associates et al., 283 N. Y. 571, 27 N. E. (2d) 436 (1940); State Commissioner of Taxation and Finance v. Grain Handling Corp. et al., 272 N. Y. 548, 4 N. E. (2d) 730 (1936).

jury having resulted from the employee's intoxication, since there was actually a great deal of evidence that the claimant was intoxicated when he was killed.[22]

One more case deserves comment in this section because of its unusual facts.[23] A nurse in one of the city-owned hospitals, while eating lunch supplied by the city in the nurses' dining room, swallowed some food that was so hot that she fainted. The resulting fall caused her hands to come into contact with more and still hotter food. Of course, in a case like that, there is really no doubt that the injury arose out of and in the course of employment, but nonetheless, it is a striking example of liability without fault attaching to the employer.

III.

Personal Activities While at Work

In the early days of workmen's compensation, there were a great many claims which were disputed on the grounds that the damaging activity was something personal to the claimant. Such was *Lief v. A. Walzer & Son*,[24] in which a traveling salesman injured his eye with a hairbrush when the train on which he was riding jolted. Of course, brushing his locks was a matter of personal vanity with the worker, but the jolt of the train was a risk of the employment. Where a hospital provided maintenance for one of its clerks who was subject to twenty-four hour call, an award was allowed when the clerk was injured after stepping from a bathtub.[25] The affirmance of the award was based on the general ground that such a person was in his employment at all times while on the premises.

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22 Landrum v. Congress Motor Corp. et al., *supra* note 21.

23 Smith v. City of New York, 285 N. Y. 646, 33 N. E. (2d) 561 (1941).

24 272 N. Y. 542, 4 N. E. (2d) 727 (1936).

25 Wood's Estate v. Kings Park State Hospital et al., 293 N. Y. 919, 60 N. E. (2d) 129 (1944).

A unique case which can fairly be treated under the heading of personal activities resulting in injury is that of *Kalikoff v. John Lucas & Co.*[26] The claimant, a salesman, was allowed to charge his expense account for the purchase of cigars, etc., for his customers. While making such a purchase, he was bitten by a cat; he was again bitten by the same cat while taking it to the board of health for a rabies test. An award was allowed the claimant for serious psychic disorders as well as the physical suffering caused by the bites.

IV.

Play and Horseplay

It is common practice today for employers to encourage and sponsor athletic and recreational activities among their employees. The question of whether injuries sustained due to participation in these activities are compensable has been answered both ways. Generally, the problem resolves itself into a question of fact, such factors as knowledge of the employer, the degree of employer sponsorship and encouragement, and the incidence of the sport or recreation to the employment being given consideration. Thus, where the claimant was hurt while playing volleyball on the employer's premises during lunch hour, an award was allowed when it was shown that the employer knew of the practice and that one of its officials participated in it.[27] But on the same day that the Court of Appeals affirmed this award, it reversed another given to a claimant who had been injured while playing baseball in a public park.[28] Although the league in which the claimant was playing was to a degree sponsored by the employer, it was held that the sport

26 297 N. Y. 663, 76 N. E. (2d) 324 (1947).

27 Brown v. United Services for Air, Inc. et al. 298 N. Y. 901, 84 N. E. (2d) 810 (1949).

28 Wilson v. General Motors Corp. et al., 298 N. Y. 468, 84 N. E. (2d) 781 (1949).

was not reasonably incident to the employment. A different type of recreational case is illustrated by *Piusinski v. Transit Valley Country Club.*[29] The claimant, a caddy employed by the country club, was struck by a ball while playing golf with other caddies. It was shown that the golf practice and golf tournaments were recognized group activities for the caddies and an incident to their customary employment.

In recent years, there has been an increasing number of claims arising out of "horseplay" indulged in by employees at their work. It is possible to distinguish the results in some of the cases on the basis of employer knowledge and encouragement, or lack of discouragement, of the activities and circumstances prompting or leading up to the occurrence. Two of the most important of these cases, both very recent, involved the same kind of violent and vicious practical joke, *i.e.,* offering a fellow worker a drink from a bottle labeled whiskey or gin, but which in truth contained dangerous carbon tetrachloride. The settings for the two pranks were, however, basically different. In *McCarthy v. Remington-Rand Inc.,*[30] holiday festivities were under way at the plant, and there was evidence to support findings that the employer knew of but failed to discourage the drinking of intoxicants during the holiday season. But in *Burns v. Merrit Engineering Co.*[31] the fellow employee who duped the claimant into drinking the poison had no such circumstances surrounding his vicious act. Nevertheless, the award was upheld. Perhaps this latter case may be more logically classified with the "assault" cases which will be considered in the following section.

An innocent, though nonetheless tragic, illustration of the "friendly" horseplay injury is found in another recent case,[32]

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29 283 N. Y. 674, 28 N. E. (2d) 401 (1940).

30 300 N. Y. 715, 92 N. E. (2d) 58 (1950).

31 301 N. Y. 131, ...N. E. (2d).... (1951).

32 Industrial Commissioner v. McCarthy, 295 N. Y. 443, 68 N. E. (2d) 434 (1946).

in which a waiter was fatally stabbed when he made a pass at a fellow employee who held a knife in his hand. In turning away to avoid the gesture, the co-worker accidentally struck the waiter in the heart. There was evidence and a finding that the restaurant owner was well acquainted with the fact that similar sparring was habitual with his employees, and it was also shown that indulgence in brief and seemingly innocent play had long been an incident of that particular employment.

V.

Assaults

Injuries sustained by employees in personal fights produce many compensation claims and not a few awards.[33] Where such awards have been affirmed, the rationale is that, whatever the particular facts, the claimant, whether or not he participated in the brawl, was the victim rather than the instigator of the affray. In a famous case,[34] a bartender, while on his way home, was assaulted by a customer whom he had ejected from the tavern earlier in the evening. Actually, this case does not belong in this article because the award was ultimately disallowed, but the holding of the Court of Appeals was that the board could have found, although it did not, that there was such continuity in time and place that the quarrel and the subsequent assault could be taken as one transaction. A case in which the award was sustained was *Levy v. World-Telegram Corp.*[35] While carrying newspapers to his employer's truck, the claimant's decedent was tickled by an unknown assailant. Believing that a particular fellow employee was guilty, Levy struck and kicked at the man and called him a vile name, whereupon the fellow employee hit Levy so hard that he died from the

33 See 49 MICH. L. REV. 452 (1951).

34 McGrinder v. Sullivan et al., 290 N. Y. 11, 47 N. E. (2d) 421 (1943).

35 285 N. Y. 533, 32 N. E. (2d) 827 (1941).

resulting injuries. The board made a well-nigh fictional finding that Levy was not the instigator or aggressor, but was merely retaliating for an initial assault on himself.

A much less innocent affair gave rise to the case of *Heimroth v. Elk Transportation Co.*[36] The claimant's decedent, a night watchman, had an arrangement whereby Kick, a fellow employee, came to the plant on Sunday and holiday mornings to drive him home. Some altercation occurred in the early hours of one of those mornings, and Heimroth was found dead. Kick later pleaded guilty to second degree murder, and at the compensation hearings testified that he had thrown a hammer at Heimroth causing his death after Heimroth had made remarks about a girl friend of Kick's. The defense interposed was that this was a personal quarrel not related to the employment, but there was evidence that Kick had robbed the employer's safe at the time of the occurrence. The board and the courts thought that there was enough evidence to justify a rejection of part of Kick's story and a finding that the killing was actually connected with the robbery, so that Heimroth was adjudged the innocent victim of an assault by a robber, and an award was granted.

VI.

Compensable Though Suicidal

The New York statute provides that there shall be no liability for compensation "when the injury has been solely occasioned . . . by wilful intention of the injured employee to bring about the injury or death of himself or another." [37] It does not, however, follow absolutely that death by suicide is not compensable. In *Pushkarowitz v. A & M Kramer,*[38] the decedent on account of whose death the claim was filed, had suffered a permanent partial loss of use of one eye

36 288 N. Y. 716, 43 N. E. (2d) 95 (1942).
37 NEW YORK WORKMEN'S COMPONSATION LAW § 21(3).
38 300 N. Y. 637, 90 N. E. (2d) 494 (1950).

while working for one employer, and later had suffered a further loss of use of the same eye while working for another. The result was that, since he had lost the other eye during childhood, he was blinded. He caused his own death by drinking hydrochloric acid. An award of death benefits was made and sustained on the finding that he had suffered from depressive psychosis as a result of the eye injury, that his death was due to accidental injuries, which caused the insanity with which he was suffering when he killed himself.

An interesting case to compare with the *Pushkarowitz* case is *Brown v. New York State Training School for Girls*,[39] where a death award made by the board was reversed by the Court of Appeals. Brown had, by mistake, swallowed a poison tablet instead of a mild sedative, the latter having been prescribed by his physician after an operation, which in turn had been necessitated by an injury received in the course of his employment. The Court of Appeals held that Brown's mistake was not a natural consequence of or directly connected with his work, especially since there was no proof of mental derangement or impaired vision.

The presumption against suicide found in the statute provided a partial basis for the award where a theatre porter was found in the basement of the building with his head under the burner of a hot water tank.[40] Although death had resulted from inhalation of gas, the porter did have duties in connection with the tank, and the employer failed to overcome the presumption.

VII.

Going Home

Where injuries have been sustained by an employee returning to his home from work, awards are sustained on the grounds that the trip is a necessary incident to the employ-

39 285 N. Y. 37, 32 N. E. (2d) 783 (1941).

40 Phillips v. R & M Operating Corp. et al., 298 N. Y. 608, 81 N. E. (2d) 333 (1948).

ment. Thus, in *Welz v. Markel Service, Inc.*,[41] a claim investigator required to hold himself in readiness for night work, left his home one night to investigate an accident. He later telephoned his report to his superior, and then, while returning to his home collapsed on a subway platform, receiving fatal injuries. The award was affirmed because, under the circumstances of the case, the return of Welz to his home was an incident of his employment.

A complicating factor which is sometimes introduced is the discharge of personal affairs while making the journey home. Thus in *Callan v. State Highway Dep't*,[42] the claimant had gone to the paymaster's office to sign a payroll, and when injured was being taken home by his foreman on a direct route between the two points. It was shown that the two men had consumed somewhat more time than would normally be required for the trip, but an award was nevertheless allowed, probably on the theory that the primary purpose of the trip was an incident to the claimant's employment. An illustration of the more common and conventional claim in this type of case is *Heary v. Draudt*,[43] in which an award was allowed when the claimant's decedent was killed when returning from his work on his employer's truck.

VIII.

Heart Injuries as Accidental Injuries

A debate of long standing in the courts seems to have been put to rest in New York, at least temporarily, by the case of *Masse v. James H. Robinson Co.*,[44] where Chief Judge Loughran for the Court of Appeals stated this rule:

> A heart injury such as coronary occlusion or thrombosis when brought on by overexertion or strain in the course of

41 296 N. Y. 640, 69 N. E. (2d) 682 (1941).
42 293 N. Y. 743, 56 N. E. (2d) 742 (1944).
43 288 N. Y. 593, 42 N. E. (2d) 602 (1942).
44 301 N. Y. 34, 92 N. E. (2d) 56, 57 (1950).

daily work is compensable, though a pre-existing pathology may have been a contributing factor.

The *Masse* opinion frankly admits that the court may, in the past, have denied claims for compensation in cases not easily distinguishable from Masse's application.[45] The court made no apologies for those aberrations, if such they were. But referring to the old question which underlies this whole problem, the court said that whether a particular event was an industrial accident is to be determined, not by any legalistic definition, but "by the common sense viewpoint of the average man." Viewing the *Masse* case in its long-range significance, it is not only a holding that a pre-existing heart disease aggravated by overexertion in the course of employment is compensable as an accidental injury; it disposes, apparently, of the old idea that to be accidental, an injury must be assignable to a single, particular catastrophic or extraordinary event, identified in time and place.[46] It is not easy to reconcile the numerous conflicting decisions in this area of compensation law, but it is submitted that the *Masse* decision, as the culmination of a line of decisions permitting recoveries in heart injury cases,[47] has enunciated a workable rule the application of which will result in substantial justice.

Conclusion

The foregoing review of cases in several areas of workmen's compensation law should well illustrate the difficulty in applying the statutory language to particular factual situations. The problem is usually one of fact rather than law because of the unlimited number of possible combina-

45 See, *e.g.*, Dworak v. E. Greenbaum Co., 287 N. Y. 555, 38 N. E. (2d) 224 (1941); La Fountain v. La Fountain, 284 N. Y. 727, 31 N. E. (2d) 199 (1940); Scully v. Linwood Amusement Corp., 268 N. Y. 512, 198 N. E. 380 (1935).

46 Lerner et al. v. Rump Bros. et al., 241 N. Y. 153, 149 N. E. 334 (1925); Connelly v. Hunt Furniture Co. et al., 240 N. Y. 83, 147 N. E. 366 (1925).

47 *E. g.*, Ruby v. Lustig et al., 299 N. Y. 759, 87 N. E. (2d) 672 (1949); McCormack v. Wood Harmon Warranty Corp. et al., 288 N. Y. 614, 42 N. E. (2d) 613 (1942); Green v. Geiger et al., 280 N. Y. 610, 20 N. E. (2d) 559 (1939).

tions of circumstances giving rise to employment-connected injuries. The same factor makes it well-nigh impossible to draw any broad conclusions on the state of the law of workmen's compensation in regard to any particular type of case. But it can be stated that in virtually all cases a liberal application of the statute is and will be attempted so that the broad policy it enunciates, mitigation of the financial straits of the injured workman, may be effectively carried out. This article has attempted to point out some of the more interesting recent cases which define the limits of that policy today.

*Charles S. Desmond**

*Judge, New York Court of Appeals. A. B., 1917, Canisius College; LL.B., 1920, University of Buffalo; LL.D., 1942, Canisius College. Member of the Bar of New York; American Bar Association; American Judicature Society; American Law Institute; Phi Delta Phi Fraternity. Formerly, Member of the New York State Board of Social Welfare; Justice, New York Supreme Court. Lecturer, and author of Sharp Quillets of the Law. Contributor, New York Law Journal, New York State Bar Association Bulletin, Rocky Mountain Law Review, Syracuse Law Review.