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Areas of Changing Interpretation: The Positional Risk Doctrine Student Symposium - Workmen's Compensation: A Pandect of the Texas Law.

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roborated by psychiatric evidence.[509] It has been held that the uncontradicted testimony of one psychiatrist based on a single psychiatric interview is sufficient probative evidence to establish causal connection.[510] The concern does prevail, however, that in view of the nebulous characteristics of a claim predicated upon traumatic neurosis, courts should proceed with caution in their scrutiny of the evidence.[511] Thus, the court may choose to believe one of two conflicting expert opinions and deny a claim, upon reasonable conclusion from one opinion that there is no causal connection between an event arising out of employment and the alleged mental disability.[512]

In the final analysis the medical evidence is evaluated in light of the totality of the fact situation. After hearing explanation of the physiological reactions of the employee to the strain or stress of work activity, the court weighs the facts and circumstances surrounding the work activity and the injury, and the medical opinion as to the connection between the two, in determining whether all the evidence coalesces to support a legal conclusion of cause and effect.[513]

AREAS OF CHANGING INTERPRETATION: THE POSITIONAL RISK DOCTRINE

In order to establish eligibility for workmen's compensation coverage it is necessary to allege and prove that the injury "arose out of the employment" and occurred "in the course of the employment."[514] Of these two prerequisites to coverage, the question whether an injury arises out of the employment has presented the greater problem to those concerned with the administration of workmen's compensation. It is the purpose of this section to analyze this problem and to recommend the "positional risk" doctrine as the superior standard to measure compensability.

In recent years the concept of whether an injury "arises out of the employ ment" has been defined through the use of one of two standards. The first of these, utilized by the majority of jurisdictions, requires the claimant to establish as an essential ingredient of coverage that the employment somehow increased the risk.[515] This requirement, known as the "increased risk doc-

509. Raby v. East Baton Rouge Parish School Bd., 289 So. 2d 535, 538 (La. Ct. App. 1973).

510. Guidry v. Michigan Mut. Liab. Co., 130 So. 2d 513, 516 (La. Ct. App. 1961); Miller v. United States Fidelity & Guar. Co., 99 So. 2d 511, 517 (La. Ct. App. 1959).

511. Jackson v. International Paper Co., 163 So. 2d 362, 365 (La. Ct. App. 1964).

512. Messex v. Georgia-Pacific Corp., 293 So. 2d 615, 616 (La. Ct. App. 1974).

513. Dwyer v. Ford Motor Co., 178 A.2d 161, 165 (N.J. 1962).

514. Larson, *The Positional Risk Doctrine in Workmen's Compensation Law*, 1973 DUKE L.J. 761, 762; 58 AM. JUR., *Workmen's Compensation* § 209 (1948).

515. *E.g.*, Dallas Mfg. Co. v. Kennemer, 8 So. 2d 519, 520 (Ala. 1942); Hartford Accident & Indem. Co. v. Zachery, 25 S.E.2d 135, 135 (Ga. Ct. App. 1943); Hill-Luthy Co. v. Industrial Comm'n, 103 N.E.2d 605 (Ill. 1952); Maryland Paper Prods. Co.

trine," is rooted in the common law concept of foreseeability. Under this standard the fact that the employee is required to be at a certain location when the injury occurred is insufficient to establish a right to compensation.[516]

With the increasingly liberal construction of workmen's compensation statutes, however, many courts have come to realize that the concept of forseeability is a product of negligence law, where fault is an important factor, and not of workmen's compensation, where it is irrelevant.[517] In keeping with this liberal trend many courts have moved toward the adoption of the "positional risk" doctrine,[518] a theory more consistent with the spirit of workmen's compensation. The "positional risk" doctrine rejects the fault concept of the common law, requiring as its standard only that the injury would not have occurred "but for" the employment, and further that the employee must have been injured due to a neutral cause.[519] This doctrine necessarily results in bringing more disabilities within the penumbra of workmen's compensation coverage. Under the positional risk doctrine a sufficient causal connection exists between the employment and the injury if the employment places the claimant at the particular location where and when the injury occurs.[520]

The precise meaning of the positional risk doctrine varies to some extent

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v. Judson, 139 A.2d 219, 222 (Md. Ct. App. 1958); McGrath v. Railway Express Agency, Inc., 411 S.W.2d 260 (Mo. Ct. App. 1967); Hardy v. Small, 99 S.E.2d 862, 866 (N.C. 1957); Knox v. Batson, 399 S.W.2d 765, 770 (Tenn. 1966). *See also* 99 C.J.S. *Workmen's Compensation* § 210 (1958).

516. *E.g.*, Laudato v. Hunkin-Conkey Constr. Co., 19 N.E.2d 898, 900 (Ohio 1939); Knox v. Batson, 399 S.W.2d 765, 772 (Tenn. 1966).

517. *E.g.*, Corken v. Corken Steel Prods., Inc., 385 S.W.2d 949 (Ky. 1964); Baran's Case, 145 N.E.2d 726, 727 (Mass. 1957); Secor v. Pennsylvania Serv. Garage, 117 A.2d 12, 14 (N.J. 1955).

518. Some 16 jurisdictions either have accepted the positional risk doctrine in name or have applied it in practice. The following are examples of the case law in these respective jurisdictions: *See* O'Leery v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 506-507 (1951); Hartford Accident & Indem. Co. v. Cardillo, 112 F.2d 11, 17 (D.C. Cir. 1940); Industrial Indem. Co. v. Industrial Accident Comm'n, 214 P.2d 41, 47 (Cal. Ct. App. 1950); London Guar. & Accident Co. v. McCoy, 45 P.2d 900, 902 (Colo. 1935); Mayo v. Safeway Stores, Inc., 457 P.2d 400, 403 (Idaho 1969); Corken v. Corken Steel Prods., Inc., 385 S.W.2d 949, 950 (Ky. 1964); Harvey v. Caddo DeSoto Cotton Oil Co., 6 So. 2d 747, 750 (La. 1942); Baran's Case, 145 N.E.2d 726, 727 (Mass. 1957); Whetro v. Awkerman, 174 N.W.2d 783, 786 (Mich. 1970); Wiggins v. Knox Glass, Inc., 219 So. 2d 154, 158 (Miss. 1969); Gargiulo v. Gargiulo, 97 A.2d 593, 596 (N.J. 1953); B. & B. Nursing Home v. Blair, 496 P.2d 795, 797 (Okla. 1972); Commercial Standard Ins. Co. v. Martin, 488 S.W.2d 861, 869 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.); Cutler Hammer, Inc. v. Industrial Comm'n, 92 N.W.2d 824, 828 (Wis. 1958); Candelaria v. Industrial Comm'n, 85 P.R.R. 18, 22 (Puerto Rico 1962). For an example of the positional risk doctrine as applied in Hawaii see Asaeda v. Haraguchi, 37 Hawaii 556 (1947), *cited in* Larson, *The Positional Risk Doctrine in Workmen's Compensation*, 1973 DUKE L.J. 761, 817.

519. Larson, *The Positional Risk Doctrine in Workmen's Compensation*, 1973 DUKE L.J. 761.

520. *E.g.*, Madin v. Industrial Accident Comm'n, 292 P.2d 892, 896 (Cal. 1956); Edwards v. Louisiana Forrestry Comm'n, 60 So. 2d 449, 451 (La. 1952).

among jurisdictions; however, the definition coined by Professor Larson provides an excellent framework for the discussion of the doctrine:

> [a]n injury 'arises out of the employment' if it would not have occurred *but for* the fact that the conditions or obligations of the employment *placed* claimant in the position where he was injured by a neutral force, meaning by 'neutral' neither personal to the claimant nor distinctly associated with the employment.[521]

Professor Larson necessarily focuses on neutral causation because there has rarely been any controversy over compensability for injuries directly associated with the job or injuries distinctly private to the employee. The former are compensable, and the latter are not.[522] It is this neutral causation consideration which has plagued the courts. The question of who should bear the burden of an injury resulting from a neutral cause is a policy consideration centering not only upon which party can better sustain the cost of the injury, but also upon the very theoretical basis of workmen's compensation.[523] Certainly the argument can be asserted that an employer should not bear the liability for an injury over which he has no control. This argument, however, is merely another way of granting that the employer is not at fault. Ironically, it was to eradicate this very concept that workmen's compensation insurance was instituted. The rationale behind workmen's compensation is that the employee surrenders his common law right, an action in tort, in return for a guaranteed scheduled award.[524] This compromise was intended to avoid the common law negligence suits which were seldom won by employees[525] and to allow the employer to insure his employee's disabilities in much the same manner as he would insure his equipment. Therefore, to allow the common law concept of fault to be utilized to defeat an employee's claim where the injury is due to a neutral cause, not only is inconsistent with the spirit of the program but also places the risk of loss on the party least able to sustain such a loss—the employee.

A National Approach

The development of the positional risk doctrine is an evolutionary phenomenon resulting from, and contributing to, the erosion of the "increased risk" standard. At present the doctrine has been adopted in a substantial number

521. Larson, *The Positional Risk Doctrine in Workmen's Compensation*, 1973 DUKE L.J. 761 (emphasis supplied).

522. For an excellent discussion of personal, neutral and work-related causation see Larson, *The Positional Risk Doctrine in Workmen's Compensation*, 1973 DUKE L.J. 761, 764.

523. See discussion pp. 611-12 *infra*.

524. For a discussion of the theory and history of the development of workmen's compensation see S. HOROWITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS (3d ed. 1948).

525. *Id.* at 2-4.

of states,[526] where it continues to chip away at the increased risk concept, thereby expanding the range of compensability. In order to understand the relative progress of the positional risk doctrine it is necessary to analyze the injury areas in which it has been most successfully applied. It is only by fitting together these pieces that the overall concept of the positional risk doctrine can be appreciated.

Stray Bullets

One of the classic applications of the positional risk doctrine relates to the firing of projectiles, conveniently categorized as the "stray bullet cases." An excellent articulation of such application was made by the New Jersey Supreme Court in *Gargiulo v. Gargiulo.*[527] There a store clerk was struck by a misdirected arrow while burning trash on his employer's premises. One of the defenses raised by the insurer was that the injury was not inherent in the work because such injuries are not foreseeable. The New Jersey Supreme Court rejected foreseeability as a prerequisite to recovery and stated that "*but for* the compliance with his work directive requiring his presence at the particular time and place in question, the injury would not have occurred."[528] Applying Professor Larson's definition to the holding in this case, it is apparent that the employee would not have been injured but for his employment and that the injury itself stemmed from a cause which was neither inherent in the employment nor personally related to the employee.

Kentucky has joined those jurisdictions recognizing the application of the positional risk doctrine through a change of judicial interpretation in stray bullet cases. In an early decision Kentucky had denied compensation to the heirs of a streetcar operator who was struck and killed when a youth fired a bullet at a group of birds.[529] Some years later, however, in *Corken v. Corken Steel Products, Inc.*,[530] the positional risk doctrine gained recognition in Kentucky. Although this was not a stray bullet case, the court held that its previous decision on stray bullets was inconsistent with the positional risk doctrine and was specifically overruled.[531]

California has applied the doctrine in *Industrial Indemnity Co. v. Industrial Accident Commission*,[532] in which a bar waitress was killed by a bullet, fired by an irritated wife of a customer, which richocheted and struck her in the

526. Cases cited note 518 *supra.*
527. 97 A.2d 593 (N.J. 1957).
528. *Id.* at 596 (emphasis supplied).
529. Lexington Ry. Sys. v. True, 124 S.W.2d 467 (Ky. 1939). This case was subsequently overruled by Corken v. Corken Steel Prods. Inc., 385 S.W.2d 949, 950 (Ky. 1964).
530. 385 S.W.2d 949 (Ky. 1964).
531. *Id.* at 950.
532. 214 P.2d 41 (Cal. Ct. App. 1950).

back. The facts were such that the court could have recognized the injury as compensable either under the "increased risk" doctrine or under the "instrumentality of the employer exception."[533] The supreme court took the opportunity to demonstrate the absurdity of such categorizations and pointed out

> how unrealistic it is to attempt to find hazards as a basis of decision when the fact is that the decisions have really been based upon the fact that when a person's employment brings him into a position which becomes dangerous and he is there acting in the scope of his employment, his injury is compensable.[534]

The California Supreme Court appears to have expanded the traditional "stray bullets" category to include other objects set into motion which results in injuries neither personally nor work related. In *Madin v. Industrial Accident Commission*[535] the claimants, managers of rental property, were injured when some youths started a bulldozer which had been located on neighboring property. The bulldozer ran wild, striking the unit in which claimants lived, causing them to be pushed through the walls. The court upheld the award of compensation holding that the injury arose out of the employment because the employment required claimant's presence at the location where and when the danger struck.[536] This case is significant because it demonstrates that the positional risk doctrine need not be limited to injury areas which have previously been established. On the contrary, the case indicates that the positional risk doctrine can transcend these limitations so as to provide a uniform standard of causation. The court must have recognized that the object set in motion is immaterial so long as the injury arises from a neutral cause and would not have occurred but for the employment.

Acts of God

One of the areas in which most jurisdictions have stubbornly held on to the increased risk doctrine concerns cases where the injury was due to an act of God. Generally, an act of God is considered to be a force of nature which is beyond the control of man.[537] Despite the tendency of a majority of jurisdictions to cling to the "increased risk" doctrine, several jurisdictions have allowed recovery in cases where the employee was injured by an act

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533. *Id.* at 46. The instrumentality of the employer exception is defined as follows:
> An employee who, in the course of his employment, is hurt by contact with something directly connected with his employment, receives a personal injury arising out of his employment, even though the force that caused the contact was not related to the employment.

Wiggins v. Knox Glass, Inc., 219 So. 2d 154, 158 (Miss. 1969).

534. Industrial Indem. Co. v. Industrial Accident Comm'n, 214 P.2d 41, 47 (Cal. Ct. App. 1950).

535. 292 P.2d 892 (Cal. 1956).

536. *Id.* at 896.

537. *E.g.*, Sky Aviation Corp. v. Colt, 475 P.2d 301, 303, 304 (Wyo. 1970).

of God.[538] For example, in *Wiggins v. Knox Glass, Inc.*[539] the claimant was working on his employer's premises when he was instructed to seek cover behind a concrete wall from an approaching tornado. Following this direction, the employee was struck by a flying object and rendered unconscious. When he subsequently filed for workmen's compensation, the insurer denied liability alleging that the injury was the result of an act of God. The Mississippi Workmen's Compensation Committee held that the act of God defense was not applicable because the employee had been placed in a position in which the employment had increased the risk.[540] The Mississippi Supreme Court recognized that recovery should be possible under one of the many recognized exceptions to the act of God defense, but opted instead for a more uniform standard of causation and applied the positional risk doctrine, stating

> we will recognize an employee's right to compensation for injury as 'arising out of' his employment when the employee is injured at the place where he is required to be engaged in the employer's business . . . and where the employer's business required the employee to be at the place of the accident at the time it occurred.[541]

Idaho, like Mississippi and California, had recognized the "increased risk" doctrine and its various exceptions for many years. In *Wells v. Robinson Construction Co.*[542] the Supreme Court of Idaho denied recovery when an employee was struck and killed by lightning while performing job related duties. The court determined that the claimant had failed to establish that the employment had subjected the decedent to a risk necessarily incidental to the employment.[543] Some 30 years later, however, the Idaho Supreme Court in *Mayo v. Safeway Stores, Inc.*[544] accepted the positional risk doctrine with regard to all injuries caused by a neutral force. The court determined that the *Wells* decision was inconsistent with the test to be utilized—the positional risk doctrine—and it was therefore emphatically overruled.[545]

In essence, judicial opinion in the majority of states is that an employer should not be liable for the injurious results of a force beyond his control. This reasoning, however, is a reflection of the fault concept of the common law and has no validity in a suit based on workmen's compensation. A three-judge Puerto Rico court, hearing an appeal from an order entered by the In-

538. *E.g.*, Mayo v. Safeway Stores, Inc., 457 S.W.2d 400, 404 (Idaho 1969), *overruling* Wells v. Robertson Constr. Co., 16 P.2d 1059 (Idaho 1932); Whetro v. Awkerman, 174 N.W.2d 783, 785 (Mich. 1970); Wiggins v. Knox Glass, Inc., 219 So. 2d 154, 158 (Miss. 1969); Candelaria v. Industrial Comm'n, 85 P.R.R. 18 (Puerto Rico 1962).

539. 219 So. 2d 154 (Miss. 1969).

540. *Id.* at 155.

541. *Id.* at 158.

542. 16 P.2d 1059 (Idaho 1932). This case was overruled by Mayo v. Safeway Stores, Inc., 457 P.2d 400 (Idaho 1969).

543. Wells v. Robertson Constr. Co., 16 P.2d 1059, 1062 (Idaho 1932).

544. 457 P.2d 400 (Idaho 1969).

545. *Id.* at 404.

dustrial Commission, labeled the fault concept an anachronism, stating that "[f]ortunately, we can contemplate today that additional requirement [speaking of increased risk] with the serenity with which we contemplate 'the sacred remains of a beloved fossil.' "[546]

Unexplained Falls

In cases where the cause of a fall cannot be identified, a majority of jurisdictions recognize a presumption that the fall would not have occurred but for the employment.[547] The rationale behind many of these decisions is that if the cause cannot be ascertained, then it lies within the realm of neutral causation and therefore should be compensable under the positional risk doctrine.[548] *Coomes v. Robertson Lumber Co.*[549] illustrates the positional risk approach as applied to unexplained falls. Coomes, an employee of a lumber company, performed work of a general nature in a lumberyard. A fellow employee testified that he saw the plaintiff after his return from lunch and stated that the plaintiff appeared to be functioning in a normal manner. An hour later the same fellow employee found the claimant in a daze and staggering to his feet near a truck where he had been unloading two-by-fours. The witness testified further that the claimant was bleeding from the forehead but that he could not recollect noticing anything which might have caused claimant to fall. The compensation board denied recovery, asserting that the claimant had failed to prove a causal connection between the injury and his employment.[550] The Kentucky Court of Appeals reversed, however, relying upon the positional risk doctrine. The court recognized that "but for" the employment the fall would not have occurred.[551] In a later Kentucky decision the *Coomes* rule was summarized in the following manner: "[W]hen an employee during the course of his work suffers a fall by reason of some cause that can not be determined, there is a natural inference that the work had something to do with it . . . ."[552] This presumption has been extended in at least one jurisdiction to include cases in which the accident is witnessed but unexplainable.[553]

546. Candelaria v. Industrial Comm'n, 85 P.R.R. 18, 21 (Puerto Rico 1962).

547. *E.g.*, Workman v. Wesley Manner Metrodist Home, 462 S.W.2d 898, 900 (Ky. 1971); Damon v. Central Hotel, 135 So. 2d 204, 205 (Fla. 1961); *see* 1 A. LARSON, WORKMEN'S COMPENSATION LAW § 10.31 (1972).

548. *E.g.*, New Amsterdam Cas. Co. v. Hoage, 62 F.2d 468 (D.C. Cir. 1932); Coomes v. Robertson Lumber Co., 427 S.W.2d 809 (Ky. 1968).

549. 427 S.W.2d 809 (Ky. 1968).

550. *Id.* at 810.

551. *Id.* at 813.

552. Workman v. Wesley Manner Methodist Home, 462 S.W.2d 898, 900 (Ky. 1971).

553. Bruni v. International Terminal Operating Co., 274 N.Y.S.2d 332, 333 (Sup. Ct. 1966); Brasch v. Investors Funding Corp., 259 N.YS.2d 126, 128 (Sup. Ct. 1965).

Lunatic Assaults

The lunatic assault cases are another area in which the majority of jurisdictions which have decided the question have granted compensation.[554] Many of these jurisdictions have arrived at this result by means of the positional risk doctrine.[555] As in the act of God cases, the causation is tied to irrational forces, in this case individuals, which constitute a neutral cause which "but for" the employment would not have occurred.

Unexplained Assaults

Unexplained assaults, much like unexplained falls, are particularly interesting because they require the court, in the absence of proof, to create a presumption that the injury arose out of the employment. For example, in *Ensley v. Grace*[556] an employee was shot to death by a fellow employee who immediately thereafter committed suicide. Although there was no evidence to explain the motive underlying the slaying, the court created a presumption that the death arose out of the employment and found the injury to be compensable.[557]

The manner in which the presumption is employed in unexplained assault cases is exemplified by the Idaho Supreme Court in *Mayo v. Safeway Stores, Inc.*[558] In that case Mr. Justice McFadden stated,

> [a]lthough in a workmen's compensation case the burden is always upon the claimant to establish by a preponderance of the evidence that the injury arose out of and in the course of the employment . . . in a case like the present, the claimant is aided by a presumption of compensability which arises as a result of the positional risk rule.[559]

Although there is much diversity between jurisdictions in respect to creating a presumption that the assault arose out of the employment, the majority of jurisdictions uphold such a presumption.[560]

THE DEVELOPMENT OF THE DOCTRINE IN TEXAS

The development of the positional risk doctrine in Texas is a manifestation of the gradual trend toward interpreting causation from a standpoint favor-

554. *E.g.*, Howard v. Harwood's Restaurant Co., 123 A.2d 815, 819 (N.J.-Essex County Ct. 1956); *see* 1 A. LARSON, WORKMEN'S COMPENSATION LAW § 11.32(a) (1972).

555. *E.g.*, London Guar. & Accident Co. v. McCoy, 45 P.2d 900, 902 (Colo. 1935); Louie v. Bamboo Gardens, 185 P.2d 712, 714 (Idaho 1947); Perez v. Fred Harvey, Inc., 224 P.2d 524, 527-28 (N.M. 1950).

556. 417 P.2d 885 (N.M. 1966).

557. *Id.* at 887.

558. 457 P.2d 400 (Idaho 1969).

559. *Id.* at 403.

560. *See* Larson, *The Positional Risk Doctrine in Workmen's Compensation Law*, 1973 DUKE L.J. 761, 785-89.

able to the employee. Until very recently, Texas has professed to follow the "increased risk" standard in all areas of workmen's compensation. Nonetheless, in scrutinizing Texas case law it becomes apparent that the courts have often applied the positional risk doctrine while at the same time giving nominal credit to the increased risk doctrine.

Lunatic assaults

The expansion of workmen's compensation coverage to an employee disabled by the action of an irrational person was accomplished by overcoming the statutory exception denying coverage to those persons injured for personal reasons. The Texas Workmen's Compensation Act states that

> [t]he term 'injury sustained in the course of employment,' as used in this Act, shall not include:
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> . . . .
>
> (2) An injury caused by an act of a third person intended to injure the employee because of reasons personal to him and not directed against him as an employee, or because of his employment.[561]

The Texas courts' initial refusal to apply this exception to lunatic assault cases came in *Petroleum Casualty Co. v. Kincaid*.[562] In that case an employee was murdered by a fellow worker who had delusions that the decedent had been intimate with his wife. The job position of the decedent was indirectly related to the incident in that it required the decedent to visit the assailant's wife periodically. The court analyzed the legislative intent behind the exception and concluded that it was designed to bar from coverage disabilities to those employees who by their own actions subjected themselves to personal risks.[563] The court then concluded that the exception was never meant to apply to an employee who was technically brought within the exception due to the delusions of another;[564] accordingly, the court granted an award of compensation.

In searching the language of the court, mention of the positional risk doctrine cannot be found;[565] yet it cannot be denied that certain attributes of the doctrine are present in the opinion. For example, the court never drew a causal connection between the job and the injury, but rather held merely that the relationship was not of a personal nature.[566] In essence, the court had shown that the assailant's delusion was re-enforced by the fact that the

561. TEX. REV. CIV. STAT. ANN. art. 8309, § 1(4)(2) (1967).
562. 93 S.W.2d 499 (Tex. Civ. App.—Eastland 1936, writ dism'd).
563. *Id.* at 501.
564. *Id.* at 501-502.
565. The positional risk doctrine was first applied only as early as 1936, and therefore it is not surprising that the Texas court did not mention it by name. London Guar. & Accident Co. v. McCoy, 45 P.2d 900 (Colo. 1935).
566. Petroleum Cas. Co. v. Kincaid, 93 S.W.2d 499 (Tex. Civ. App.—Eastland 1936, writ dism'd).

victim was required to visit the assailant's wife and that the injury was not personal to the victim. The language is similar to that used by the Wisconsin Supreme Court in defining the positional risk doctrine as one relating to an injury which would not have occurred but for the employment and which is not the result of an act personal to the plaintiff.[567]

A similar rationale was used 31 years later when the Eastland Court of Civil Appeals again had the opportunity to rule in a lunatic assault case.[568] The facts of that case show that the claimant's decedent was shot by an insane cousin of a fellow employee. The assailant originally had come to the employer's premises for the purpose of shooting his cousin, however, when he became frustrated by the presence of two men he fired killing both of them. The injury was held to have been extra-personal to the victim but, as in *Kincaid* the court did not specify in what manner the work had increased the risk of injury. Although the positional risk doctrine was not mentioned, it is evident that the irrational assault was treated as a neutral cause which "but for" the unforeseeable danger created by the employment would not have occurred.[569]

These cases, while not specifically recognizing the positional risk doctrine in the lunatic assault area, are important because they were able to provide a positional risk framework upon which subsequent decisions have rested.

Assaults of a Neutral Origin

The early neutral assault cases are characterized by the fusion of the increased risk doctrine with the concept of positional risk. Indicative of this proposition is *Vivier v. Lumbermen's Indemnity Co.*,[570] the first such case litigated in Texas. Vivier, a night watchman, was struck over the head with an iron bar and died shortly thereafter. The probable motive for the assault was established as robbery, and the appellate court held that the death had resulted from reasons personal to the employee. The Commission of Appeals, however, decided in favor of the claimant stating that "[w]hat the law intends is to protect the employee against the risk or hazard taken in order to perform the master's task."[571] This decision consists of a strange

567. The Wisconsin Supreme Court has stated that,
> an accident arises out of the employment when the connection between the employment and the accident is such that the obligation or circumstances of the employment places the employee in the particular place at the particular time when he is injured by a force which is not solely personal to him.

Cutler-Hammer, Inc. v. Industrial Comm'n, 92 N.W.2d 824, 827 (Wis. 1958).

568. Travelers Ins. Co. v. Hampton, 414 S.W.2d 712 (Tex. Civ. App.—Eastland 1967, writ ref'd n.r.e.).

569. In fact, a later judicial interpretation stated that the positional risk doctrine was the standard utilized in this case. Commercial Standard Ins. Co. v. Marin, 488 S.W.2d 861, 863 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.).

570. 250 S.W. 417 (Tex. Comm'n App. 1923, jdgmt adopted).

571. *Id.* at 418, *quoting* Pace v. Appanoose County, 168 N.W. 916, 918 (Iowa 1918).

mixture of the "increased risk" and "positional risk" doctrines. Several cases are cited in the opinion which reflect the increased risk doctrine, yet, interestingly enough, the court couches its decision in terms of positional risk.[572] It not only rejected the idea that the injury was personal but further held that Mr. Vivier

> was placed in a position where his environment contributed to his risk and that the fact that he was killed in the discharge of his duties evidenced the further fact that he would not have been killed *but for* his presence at the plant in the performance of such duties.[573]

Had the facts of *Vivier* been different, the court in so holding might have been forced to expressly accept or reject the positional risk doctrine. Vivier's job as a night watchman, however, provided an opportunity to hold that he was thereby subjected to a greater risk of injury than the average employee. The court based its opinion on two doctrines—the positional risk doctrine and the increased risk doctrine. The fusion of these two left unanswered the question of whether compensation would have been granted had the employee not been subjected to a greater risk.

The inherent danger present in the *Vivier* case was not so apparent in *Southern Surety Co. v. Shook*.[574] There the employee's work consisted of overseeing an oil pump and performing minor periodic maintenance. The nature of the work required the employee to live in a remote area and to be on duty round the clock. While on duty Shook was murdered for reasons the court considered not to have been personally related to the employee.[575] The opinion stated that because of the requirements of the worker's employment, the injury was reasonably determined to have been inherent in his work.[576] Again, as in the *Vivier* case, the reasoning of the court is nebulous. It is difficult to determine whether the court's holding is that the employment increased the risk of the assault or whether the court is saying that *but for* the employment the injury would not have occurred. There are strong indications that the decisions in both cases turned upon the positional risk doctrine. Nonetheless, the question of whether the *Vivier* and *Shook* cases constituted the acceptance of the positional risk doctrine was left to be resolved by future judicial interpretation.

The erosion of the "increased risk" doctrine in favor of positional risk received further impetus from a decision of the United States Court of Appeals for the Fifth Circuit. In *Casualty Reciprocal Exchange v. Johnson*[577] the court held that for purposes of granting compensation an injury need not be

572. *Id.* at 418.
573. *Id.* at 418 (emphasis added).
574. 44 S.W.2d 425 (Tex. Civ. App.—Eastland 1931, writ ref'd).
575. *Id.* at 427.
576. *Id.* at 427.
577. 148 F.2d 228 (5th Cir. 1945).

inherent in the work. The court said that an injury arises out of the employment if the work causes the exposure to the risk even though the risk is external to the employment.[578] This decision appears to be fatal to the increased risk doctrine because it seems to be a contradiction in terms to argue that the work, per se, increased the risks when in fact the risk was external to, rather than inherent in, the employment.

Finally, in *Commercial Standard Insurance Co. V. Marin*[579] Justice Cadena, writing for an unanimous court, officially recognized by name the doctrine which, in spirit, had so long been applied in Texas.

> It is contended that to hold that an assault is compensable if the risk of the assault is increased because of the nature of the work is to adopt the 'positional risk' test . . . and that this test has been rejected by the Texas courts. We know of no Texas case rejecting this test. It is the test which was applied in *Vivier* and *Shook*; and in *Hampton*, it was clearly the test applied in determining whether the killing arose from, and originated in, the work.[580]

Although this acceptance of the positional risk doctrine by the San Antonio Court of Civil Appeals is not binding on all Texas courts, it may be indicative of the future development of the doctrine in Texas. It is important to note that this decision does not represent an abrupt departure from the established law in Texas but rather merely expressly recognizes a doctrine which, as the court itself noted in the opinion,[581] had been previously applied by Texas courts. Moreover, the fact that the court relied upon decisions treating injury areas other than neutral assault,[582] may very well be illustrative of the court's search for a uniform approach to neutral causation.

Acts of God

Unlike the lunatic and neutral assault areas, the act of God area belongs to the future development of the positional risk doctrine rather than to its past. In fact, where injuries have been caused by an act of God the Texas courts have uniformly applied the increased risk doctrine.[583] Nevertheless, the application of the positional risk doctrine with respect to an insect bite gives reason to believe that the foundation for the act of God defense may be waning. Although Texas courts do not recognize an insect bite as an act of God,[584] the fact that both are acts of nature opens the door for the poten-

578. *Id.* at 229.
579. 488 S.W.2d 861 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.).
580. *Id.* at 869.
581. *Id.* at 869.
582. For example the lunatic assault and insect bite cases. *Id.* at 869.
583. *See* Traders & Gen. Ins. Co. v. Wimberly, 85 S.W.2d 343 (Tex. Civ. App.—El Paso 1935, writ dism'd); Texas Employer's Ins. Ass'n v. Moyers, 69 S.W.2d 777 (Tex. Civ. App.—Texarkana 1934, writ ref'd).
584. Standard Fire Ins. Co. v. Cuellar, 468 S.W.2d 880, 882 (Tex. Civ. App.—San

tial expansion of the positional risk doctrine. In fact, the decisions stating that an insect bite is not an act of God appear to be based upon a misinterpretation of a prior judicial holding.[585]

An example of the application of the increased risk standard to an insect bite case can be seen in *Travelers Insurance Co. v. Williams*.[586] There the court held that because wasps were prevalent in the employment area, and because other employees had been stung, the claimant had been exposed to an increased risk and therefore was entitled to compensation.[587] These elements of increased risk were not present, however, in *Standard Fire Insurance Co. v. Cuellar*,[588] where a Texas court was once again confronted with an insect bite situation. There the employee was stung while driving down the public highway: no evidence was introduced to establish that the risk was any greater to this employee than to anyone else in the general work force. The court did not specifically state that it was granting compensation under the positional risk doctrine, but a reading of the case leads to that conclusion. The court, in the absence of evidence increasing the risk, held that Cuellar had sustained the bite while in the performance of his duties and that the employment had presented the opportunity for the injury.[589] The combination of these insect bite cases, the acceptance of the positional risk doctrine by the San Antonio Court of Civil Appeals, and the application of the positional risk doctrine to act of God cases in other jurisdictions should provide strong authority when Texas courts are confronted in the future with a claim by an employee injured as a result of an act of God.

CONCLUSION

Since the adoption of the Workmen's Compensation Act in 1913 there has been a trend to gradually liberalize its standards of application. The number of compensable occupational diseases has been greatly increased by the repeal of their specific listing.[590] In addition, the employee has been permitted

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Antonio 1971, writ ref'd n.r.e.); Travelers Ins. Co. v. Williams, 378 S.W.2d 110, 113 (Tex. Civ. App.—Amarillo 1964, writ ref'd n.r.e.).

585. The cases holding that an insect bite is not an act of God rely upon Indemnity Ins. Co. of North America v. Garsee, 54 S.W.2d 817 (Tex. Civ. App.—Beaumont 1932, no writ) for that proposition. However, *Garsee* merely said, "as the evidence did not raise the issue of 'act of God,' the trial court did not err in refusing to define that term." *Id.* at 819. The decision does not say that an insect bite is not an act of God.

586. 378 S.W.2d 110 (Tex. Civ. App.—Amarillo 1964, writ ref'd n.r.e.).

587. *Id.* at 113.

588. 468 S.W.2d 880 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.).

589. *Id.* at 883. A later judicial opinion held that the positional risk doctrine was the standard applied in this case. Commercial Standard Ins. Co. v. Marin, 488 S.W.2d 861, 869 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.). The standard utilized in this case is without question more liberal than the traditional increased risk standard. *See* Akin, *Workmen's Compensation*, 26 SW. L.J 177 (1972).

590. *See* TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Supp. 1974).

to pursue third-party actions without losing his right to compensation. In the last 4 years the Act has been amended to provide coverage for employers and employees who were previously excluded. Even so, antiquated concepts of the nature of some businesses, particularly farming, have prevented the extension of coverage to all workers.

There has also been a continued strict adherence to many of the provisions which can be unduly harsh on an employee. For example, intoxication and willful intent are still complete defenses to an employee's claim in Texas. A more modern result when these defenses are presented is to reduce the amount of the employee's recovery rather than to deny it altogether.[591] In some instances the loss of earning capacity requirement also has defeated the purpose of workmen's compensation by excluding serious job-connected injuries. More equitable results could be reached if the "course of employment" rule were the only test. The employee would still be required to prove an occupational injury; however, his claim would not be barred simply because the injury did not affect his ability to work. A re-evaluation of these provisions is necessary, therefore, in order to perpetuate the underlying purpose of workmen's compensation—to most efficiently provide prompt and adequate relief to employees who sustain employment connected accidents.

The greatest problem with the majority of the benefits provided under the Workmen's Compensation Act is not that they ignore the needs of employees, but rather that they too often do not adequately provide remedies for these needs. While the Workmen's Compensation Act provides a substitute for the uncertainty of recovery under common law actions, the advantage of definite compensation is diminished by the fact that the recovery is frequently too limited.

The recently enacted amendment to section 7, which allows the employee to select his own medical services, is a step forward in abrogating some of the limitations in the statute. But this is only one of the many necessary changes. For example, there is still the problem of interpreting section 7 as it relates to incidental services. The discretion of the courts in this matter is almost unlimited, and the resultant inequities underscore the need for a uniform interpretation of the statute to provide a standard which courts may follow in awarding such medical benefits.

Since the overall intent of workmen's compensation is to provide prompt and equitable relief, a restrictive interpretation of section 8 defeats the purpose of the Act. Proving by direct evidence that a particular activity caused the death of the employee is almost always impossible to do. The better rule in this area would be that if expert medical testimony concludes that the in-

591. See for example, Electric Mut. Liab. Ins. Co. v. Industrial Comm'n, 391 P.2d 677, 679 (Colo. 1964). *See also* Davis, *Workmen's Compensation*, 34 J. AM. TRIAL LAWS ASS'N 299, 308 (1972).

jury *could* have caused death, the circumstantial evidence should be construed in favor of the plaintiff, and the employee's beneficiaries should receive the death benefits. Even if this liberal view were adopted, a statutory amendment would be needed in the area of eligibility for legal beneficiaries. The inequity caused by automatically awarding the benefits to the natural parents in the *in loco parentis* situations, could easily be alleviated by permitting examination of each fact situation on a case by case basis.

In the area of general incapacity, the statute precludes recovery by an injured employee if he cannot show that the specific injury sustained has extended to and affected another part of his body.[592] Often the distinctions needed to decide this question are difficult to discern. In a case in which the incapacity is clearly one that affects the employee's entire body, he should be compensated for total incapacity rather than simply awarded compensatory benefits for his specific injury. The paradox of the current situation is that the courts may recognize the general disability but then choose to ignore it if the workman cannot prove the extension.[593] Moreover, the insurer's liability is limited to the compensation provided in section 12, notwithstanding the fact that the injury to the specific member resulted in permanent incapacity.[594] A more equitable practice in instances where the general disability is obvious, but the employee cannot prove it as an extension of the specific injury, would be to award compensation only for total incapacity. This would actually provide compensation for both conditions without effecting a double recovery.

All of the benefits mentioned may be waived inadvisedly by an employee in the undesirable position of having either to accept the terms stipulated by the insurer or to await the outcome of lengthy litigation. If the employee chooses to settle, he may attempt to negotiate with the insurer for a provision relating to the payment of future medical benefits. If, however, he compromises his claim and later finds that the provisions incorporated in the settlement do not cover his actual expenses, he has no alternative but to pay them himself.[595] If the employee chooses not to settle, he is precluded by section 5 from recovering for future medical expenses at the trial. This problem could be alleviated in two ways. First, allow the employee to amend the original settlement when future expenses relate to his original claim, and second, ab-

592. TEX. REV. CIV. STAT. ANN. art. 8306, § 10 (Supp. 1974); Texas Employers' Ins. Ass'n v. Espinosa, 367 S.W.2d 667, 669 (Tex. Sup. 1963).

593. Consolidated Underwriters v. Langley, 141 Tex. 78, 81, 170 S.W.2d 463, 464 (1943); Hartford Accident & Indem. Co. v. Helms, 467 S.W.2d 656, 661 (Tex. Civ. App.—Tyler 1971, no writ).

594. Consolidated Underwriters v. Langley, 141 Tex. 78, 81, 170 S.W.2d 463, 464 (1943); Hartford Accident & Indem. Co. v. Helms, 467 S.W.2d 656, 661 (Tex. Civ. App.—Tyler 1971, no writ).

595. Pearce v. Texas Employer's Ins. Ass'n, 403 S.W.2d 493, 495-96, 498 (Tex. Civ. App.—Dallas 1966), *reh. denied*, 412 S.W.2d 647 (Tex. Sup. 1967); see Angelina Cas. Co. v. Bennett, 415 S.W.2d 271, 275 (Tex. Civ. App.—Houston 1967, no writ).

rogate the invalidity of jury awards for reasonably anticipated future medical expenses.

The paucity of supreme court decisions relating to the benefits provided by workmen's compensation gives rise to a diversity of opinions rendered by the courts of civil appeals even when dealing with similar fact situations and questions of law. Many of the present inequities would be alleviated if the supreme court would definitively interpret the various sections of the statute, thereby providing examples for the lower courts and resulting in a more uniform dispersal of justice.

In the area of court appeals from Industrial Accident Board rulings there appears to be no great need for Texas to adopt the "substantial evidence" theory of litigating workmen's compensation cases. The Industrial Accident Board is performing its function by resolving the great majority of cases without appeal to the courts. Conversely, the courts are not being burdened by the relatively small number of cases which are appealed. When, and if, the courts have an excessive number of workmen's compensation cases on their dockets, consideration should be given to vesting the Texas Industrial Accident Board with greater authority by having its decisions appealed to the courts for review under the substantial evidence rule instead of set aside for a trial de novo.

The newest trends in workmen's compensation law revolve around the question of causal connection between employment and injury. Claims based on heart and neurosis disabilities have affected a growing judicial tendency to liberalize criteria governing recovery for these injuries. Although the "unusualness" requirement is still tenacious in some jurisdictions, it has been substantially eroded by the adoption of the more practical requirement of "usualness" coupled with "untoward event." Under the latter criteria, a probable causal connection between the injury and the employment must be established. With significant advancements in medical diagnosis, expert medical testimony is accorded considerable credibility and is indispensable in establishing causation, particularly in cases of idiopathic injuries. Texas' workmen's compensation law is part of the general trend extending recovery for emotionally precipitated heart attacks and neurosis, applying to the situation at bar its distinctive requirement of traceability to a definite time, place, and cause of employment. Texas is not, however, among the few jurisdictions which allow compensation for injuries produced solely by gradual mental or emotional stimuli.

The history of the positional risk doctrine represents the sporadic development of a potentially uniform standard of causation. Initially, there appears to be little or no relationship among the isolated areas in which various courts have chosen to apply the doctrine. A closer analysis, however, reveals neutral causation as the nexus present in all the cases and areas in which

the positional risk doctrine has been adopted. The central idea arising out of the development of the doctrine is that there is nothing special about the individual categories to which the doctrine has been applied. It is the element of neutral causation that is important, and it is this very fact that allows the positional risk doctrine to transcend the limited areas in which it has been applied. The time has come to abolish the artificial distinctions among the various areas of neutral causation. Those states which have accepted the positional risk doctrine, in one area or another, should adopt positional risk as their ultimate standard of causation, following the lead of those jurisdictions which have already done so.[596] The advantage of the uniform application of the positional risk doctrine lies in its ability to avoid such fictions as the increased risk and contact with the premises exceptions. The Louisiana Supreme Court recognizing the inconsistencies of such fictions held:

> With due deference to the jurisprudence to the contrary, it seems to us that the laborious efforts of some of the courts in weighing the evidence in order to discern whether the hazard to the employee has been increased by reason of the employment are tenuous and involve considerable guesswork and conjecture on the part of the judges.[597]

In contrast with these inconsistencies, the positional risk doctrine allows jurists to proceed to the origin of causation by inquiring whether the origin is personal, neutral, or work-related and further, whether the employment created the conditions or opportunity for the injury. In essence, the court need only ask what caused the injury and where and when did it happen.

It is not, however, the lack of uniformity which is most disturbing about the retention of the increased risk standard. Much more disturbing is the fact that the increased risk doctrine, based upon the common law concepts of fault and negligence, represents the antithesis of the spirit of workmen's compensation. Workmen's compensation was created to provide coverage for workers, regardless of fault, in return for the surrender of their right to bring an action in tort. Any doctrine which requires the employee to establish an increased risk is premised upon the existence of fault or foreseeability, a premise contrary to the theory of workmen's compensation.

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596. London Guar. & Accident Co. v. McCoy, 45 P.2d 900, 902-03 (Colo. 1935); Mayo v. Safeway Stores, Inc., 457 P.2d 400, 404 (Idaho 1969); Harvey v. Caddo DeSoto Cotton Oil Co., 6 So. 2d 747, 750 (La. 1942); Whetro v. Awkerman, 174 N.W.2d 783, 785-86 (Mich. 1970.

597. Harvey v. Caddo DeSoto Cotton Oil Co., 6 So. 2d 747, 750 (La. 1942).