

In Defense Of The Increased-Risk Doctrine In Workers' Compensation

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ABSTRACT

Thirty-five years ago, the late Arthur Larson of Duke University, the pre-eminent workers' compensation scholar in the United States, argued that states should adopt a new compensability regime. In place of the widely-adopted increased-risk doctrine, Larson lobbied for the positional-risk doctrine, under which virtually all injuries occurring "in the course of" the employment are deemed compensable. Despite Larson's stature and eloquence, however, states have not heeded his call for change, and with good reason. First, the positional-risk doctrine ignores the "arising out of" component of the statutory language. Additionally, the positional-risk doctrine inefficiently allocates liability for industrial accidents. Finally, the exceptions to the increased risk doctrine are not significant enough to warrant a new rule. Courts should recognize that newer is not always better and continue to apply the increased-risk doctrine.

Keywords: workers' compensation; employment law; law and economics

I. INTRODUCTION

Workers' compensation is a unique branch of the law. People unfamiliar with workers' compensation are often confused by its seemingly similarity to other areas, such as tort or insurance law.¹ An attorney hoping to win a workers' compensation case by relying on tort or insurance principles will be confronted by the singularity of workers' compensation law. Unlike in tort, for example, fault of the employer is largely immaterial;² similarly, a job is not an insurance policy guaranteeing compensation for any injury that an employee might sustain.³

That being said, however, it is equally unwise to view workers' compensation as being completely divorced from other areas of law, particularly tort law. Although contributory negligence is not a defense to a workers' compensation claim,⁴ accidents resulting from "personal risks" (such as congenital health problems or dangerous items imported into the work area by the employee) are typically not compensable.⁵ The real issue is not fault, but work connection.⁶ The question becomes: Is the connection to the employment sufficient to justify compensation? Note that the proper test is not: Was the injury "proximately caused by the employment"?⁷ Larson frames the issue as "not a matter of assessing blame, but of marking out boundaries."⁸ Considerable controversy exists concerning where those boundaries should be drawn.

¹ See 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 1.02, At 1—3 (2008) [Hereinafter Larson].

² 1 *id.* § 1.03(1).

³ "The Workers' Compensation Act was not intended to insure employees against all injuries." Patrick M. Keefe, *What Is an Accident? Arising Out of*, in *Ill. Workers' Compensation Prac.* 3—1, 3—3 (Ill. Inst. For CLE, 2006), *citing* Quarant v. Indus. Comm'n, 231 N.E.2d 397 (Ill. 1967).

⁴ 1 Larson, *supra* note 1, § 1.03(1).

⁵ 1 *id.* § 4.02, *See also* Mark A. Rothstein Et Al., *Employment Law* § 7.20, at 644 (3d ed. 2004).

⁶ 1 Larson, *supra* note 1, § 1.03(1)

⁷ 1 *id.* § 1.02, at 1—4 (footnote omitted). *But see* Robbins v. Nicholson, 188 S.E.2d 350 (N.C. 1972); Hill v. St. Paul Fire & Marine Ins. Co., 512 S.W. 2d 560 (Tenn. 1974); Sinclair Trucking v. Bailey, 848 P.2d 1349 (Wyo. 1993).

⁸ 1 Larson, *supra* note 1, § 1.03(1), at 1—5.

There are three types of risks facing an employee: employment risks, personal risks, and neutral risks.⁹ Employment risks concern “all the obvious kinds of injury that one thinks of at once as industrial injury,” such as injuries caused by “machinery breaking, objects falling, explosives exploding, tractors tipping, fingers getting caught in gears, excavations caving in, and so on.”¹⁰ Injuries caused by employment risks are compensable in all jurisdictions.¹¹

Personal risks involve injuries where “the origins of harm [are] so clearly personal that, even if they take effect while the employee is on the job, they could not possibly be attributed to the employment.”¹² These include “medical disorders that coincidentally manifest themselves at work,”¹³ including heart attacks,¹⁴ and risks imported to the workplace by the injured employee.¹⁵ Injuries from purely personal risks are typically not compensable, absent some connection to the employment.¹⁶

Finally, neutral risks are risks “neither of distinctly employment nor distinctly personal character.”¹⁷ This gray area between employment and personal risks is, not surprisingly, the subject of much litigation. Larson has succinctly described the problem posed by neutral risks: “There are...three categories of risk; but unfortunately, there are only two places where the loss may fall—on the industry or on the employee.”¹⁸ The focus of this paper will be on the proper allocation of liability for injuries caused by neutral risks.

I will begin by discussing the increased-risk doctrine, the compensability regime currently in effect in the majority of jurisdictions.¹⁹ I will then describe the positional-risk doctrine, a test adopted by “[a]n important and growing number of courts”²⁰ and endorsed by Professor Larson.²¹ Finally, I will argue that states should apply the increased-risk doctrine because the positional-risk doctrine ignores the “arising out of” component of the

⁹ 1 *id.* §§ 4.01-4.03. See also Rothstein, *supra* note 5, § 7.15, at 636. Note that Larson also describes a category of risks he calls “mixed risks,” but this category is irrelevant to the discussion here. See Larson, *supra* note 1, § 4.04.

¹⁰ 1 Larson, *supra* note 1, § 4.01, at 4—1-2.

¹¹ 1 *id.* At 4—2.

¹² *Id.*

¹³ Rothstein, *supra* note 5, § 7.15, at 636.

¹⁴ See *e.g.*, *Vesco Ventilation Equip. Sales v. Indus. Comm’n*, 523 N.E.2d 111, 115 (Ill. App. 1988) (“The mere fact that an employee is at work when the heart attack occurs is insufficient to justify an award”). Note, however, that where work duties aggravate a pre-existing condition, the risk is deemed an employment risk. See, *e.g.*, *Sears, Roebuck & Co. v. Indus. Comm’n*, 402 N.E.2d 231 (Ill. 1980).

¹⁵ In one case, an employee brought a bomb to work and it went off. *Bogavich v. Westinghouse Elec. & Mfg. Co.*, 57 A.2d 598 (Pa. Super. 1948). In another case, a woman was murdered at work by a co-worker from a previous job because she had refused to go on a date with him. *Kendrick v. Peel, Eddy & Gibbons Law Firm*, 795 S.W.2d 365 (Ark. App. 1990).

¹⁶ Rothstein, *supra* note 5, § 7.20, at 644.

¹⁷ 1 Larson, *supra* note 1, § 4.03, at 4—2.

¹⁸ 1 *id.* 4.03, at 4—3.

¹⁹ 1 *id.* 3.03, at 3—4.

²⁰ 1 *id.* § 3.05, at 3—5. These are California, Colorado, Hawaii, Idaho, Kentucky, Louisiana, Massachusetts, New Jersey, New York, South Dakota, Texas, and the District of Columbia. Lex K. Larson & Arthur Larson, *Workers’ Compensation Law: Cases, Materials, And Text* § 3.06(4), AT 50 (3rd ed. 2000) [hereinafter Lex K. Larson]. Note that Larson also lists Oklahoma as a positional-risk doctrine state, *id.*, but this is incorrect. See *Workers’ Compensation Act*, Okla. Stat. tit. 85, § 3(12)(a)(2008) (“Only injuries having as their source a risk not purely personal but one that is reasonably connected with the conditions of employment shall be deemed to arise out of employment”); *American Mgmt. Sys., Inc. v. Burns*, 903 P.2d 288, 291 (Okla. 1988) (the positional-risk test is now “unavailable for proving an injury’s causal nexus to employment”). Additionally, there are states where “acceptance of the positional-risk approach is marginal or inconclusive,” including North Dakota, New Mexico, Pennsylvania, Connecticut, Florida, Georgia, North Carolina, and Pennsylvania. Lex K. Larson, *supra* note 20, § 3.06(4), at 50-51. Other jurisdictions have specifically considered the positional-risk doctrine and declined to adopt it. See *e.g.*, *Workers’ Compensation Act*, Okla. Stat. tit. 85, § 3(12)(a)(2008) (the legislature amended the statute to preclude application of the positional-risk doctrine in response to the Oklahoma Supreme Court’s decision in *Fox v. National Carrier*, 709 P.2d 1050 (Okla. 1985)); *Brady v. Louis Ruffolo & Sons Constr. Co.*, 578 N.E.2d 921 (Ill. 1991); *Lathrop v. Tobin-Hamilton Shoe Mfg. Co.*, 402 S.W.2d 16 (Mo. App. 1966).

²¹ See Arthur Larson, *The Positional-Risk Doctrine in Workmen’s Compensation*, 1973 Duke L.J. 761.

compensability formula, inefficiently allocates liability, and because the exceptions to the increased-risk doctrine are not significant enough to warrant a new rule.²²

II. THE INCREASED-RISK DOCTRINE

The typical workers' compensation statute awards benefits to an employee who suffers "a personal injury by accident arising out of and in the course of employment."²³ The "arising out of" portion of this formula refer[s] to causal origin," while "in the course of" refers to the "time, place and circumstances of the accident in relation to the employment."²⁴ This formula can also be thought of like this:

if the employee is clearly working for his employer at the time of the accident, the question as to whether the accident is caused by the work he was doing and is a risk peculiar to that work concerns the issue of "arising out of" the employment. When the employee's injury clearly results from what he is doing but there is some doubt as to whether the work he is doing is his own, the question arises as to whether the accident occurred "in the course of" the employment.²⁵

The focus of this paper will be on the "arising out of" element of the compensability formula.

Under the increased-risk doctrine, benefits are awarded "where there has been evidence that the conditions or nature of employment increased the risk of injury beyond that to which the general public was exposed."²⁶ The increased-risk doctrine supplanted the earlier peculiar-risk doctrine, which "gradually achieved a well-deserved oblivion."²⁷ Under the peculiar-risk doctrine, the test is whether "the source of harm was in its nature peculiar to [the claimant's] occupation."²⁸ The harshness of this doctrine is revealed in cases of exposure to the elements. An illustrative case (in fact, the one Larson uses to explain this regime²⁹) is a Massachusetts case³⁰ where an employee hired to clean the town square suffered severe frostbite that led to the amputation of his right leg. The court denied compensation because "there is nothing to show that the employee was exposed to any greater risk of freezing his foot than the ordinary person engaged in outdoor work in cold weather."³¹ Because this type of risk was the same as that faced by the general public, the employee failed to meet the peculiar-risk standard. The flaw in this doctrine is that employment often (as in the above case) exposes an employee to such a general risk at a greater level than the general public faces.³²

Under the increased-risk doctrine, an injury is compensable even if it resulted from a risk common to the general public as long as the quantity of exposure to the risk exceeded the quantity faced by the general public.³³ In a factually similar exposure case to the Massachusetts case described in the preceding paragraph, the Illinois Supreme Court awarded compensation because:

²² Note that there are two other risk doctrines. The actual-risk doctrine a sort of an increased-risk and peculiar-risk hybrid. 1 Larson, *supra* note 1, § 3.04. Because this doctrine often overlaps with the increased-risk and positional-risk doctrines in specific situations, discussion here will be limited to the other two regimes. Additionally, some states apply the proximate cause doctrine, which will not be discussed here because it is widely considered an "aberration." 1 *id.* § 3.02, at 3—4. For a discussion of the proximate cause doctrine, see 1 *id.* § 3.06.

²³ 1 Larson, *supra* note 1, § 1.01, at 1—2. This language is taken from the original British Workmen's Compensation Act, 1897, 60 & 61 Vict., c. 37 (Eng.).

²⁴ 3 Larson, *supra* note 1, § 3.01, at 3—3.

²⁵ Frank J. Wiedner & Michael F. Dorries, *What Is an Accident? In the Course of*, in Ill. Workers' Compensation Prac. 4—1, 4—3 (Ill. Inst. For CLE, 2006). It is important to note that "arising out of" and "in the course of" are not independent elements.

"[T]he basic concept of compensation coverage is unitary, not dual, and is best expressed in the term work connection." 1 Larson, *supra* note 1, § 3.01, at 3—3.

²⁶ Campbell 66 Exp., Inc. v. Indus. Comm'n, 415 N.E.2d 1043, 1044 (Ill. 1980)(citation omitted).

²⁷ 1 Larson, *supra* note 1, § 3.03, at 3—4 (citation omitted).

²⁸ 1 *id.* 3.02, at 3—4.

²⁹ See *id.*

³⁰ Robinson's Case, 198 N.E. 760 (1935).

³¹ *Id.* at 761.

³² 1 LARSON, *supra* note 1, § 3.02.

³³ 1 *id.* § 3.03.

The average man, free of obligations of any particular employment, does not stay outdoors for 9 ½ hours when the average temperature is 6 degrees below zero. The ordinary person is not engaged in outside work in cold weather and experience teaches us to stay inside when necessary to avoid the risk of frostbite. Petitioner, unfortunately, did not have the choice of staying inside or not.³⁴

The increased-risk doctrine is not only distinguishable from the peculiar-risk doctrine in exposure cases. In another Illinois case,³⁵ a woman received benefits after being involved in an automobile accident with a semi-truck in the employer's parking lot. Although being struck by a semi was not a risk peculiar to her employment, the fact that the claimant was on the employer's premises and that trucks frequently crossed the lot as part of the employer's business created an increased risk.³⁶ In an Arizona case,³⁷ an employee received compensation for a knee injury sustained stepping off a one-foot platform. The court recognized that there was nothing about the action of stepping down that was peculiar to the employment, but concluded that repetitive stepping while wearing work boots created an increased risk.³⁸

It's important to note that in cases where the exact mechanism of injury appears rather commonplace, the circumstances surrounding the accident may support a finding of increased risk. In *Eastern State Hospital v. Swinehart*,³⁹ a nurse tripped over a curb on her employer's premises while on her lunch break. On these facts alone, compensation may well have been denied unless there was something particularly unsafe about this curb.⁴⁰ However, at the time of the fall, the claimant was distracted because she was attempting to lure a patient out of a restricted area, an action she believed to be work-related.⁴¹ She also had concerns that the patient might try to harm her and wanted to keep him away from her car.⁴² The court did not cite the latter factor in support of its holding, but it probably could have found that the patient himself presented a risk, and that injuries sustained in ensuring the claimant's safety would be compensable.

III. THE POSITIONAL-RISK DOCTRINE

Under the positional-risk doctrine, “[a]n injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed the claimant in the position where he was injured.”⁴³ According to Larson,⁴⁴ the first application of this principle was the 1927 case of *Aetna Life Insurance Co. v. Industrial Commission*.⁴⁵ In *Aetna*, a farmhand died after being struck by lightning while driving a team of horses. The court found “a causal relationship between the employment and the accident” on the grounds that the decedent's “employment caused him to be where the lightning struck him” without finding any increased risk.⁴⁶

Under the increased-risk doctrine, lightning strikes are not compensable unless some aspect of the employment increased the risk for injuries caused by lightning.⁴⁷ In an increased-risk case cited by the *Aetna* court,⁴⁸ a welder's dependents received compensation after he was killed by a lightning strike while working on a steel bridge over a river. The court based its award on a finding by the Industrial Commission that “the steel in the bridge

³⁴ American Freight Forwarding Corp. *v.* Indus. Comm'n, 201 N.E.2d 399, 401 (1964).

³⁵ Hammel *v.* Indus. Comm'n, 626 N.E.2d 234 (Ill. App. 1993).

³⁶ *Id.* at 237.

³⁷ Industrial Indem. Co. *v.* Indus. Comm'n, 784 P.2d 209 (Ariz. App. 1989).

³⁸ *Id.* at 38.

³⁹ 996 P.2d 479 (Okla. Civ. App. Div. 1999).

⁴⁰ See e.g., Caterpillar Tractor Co. *v.* Indus. Comm'n, 524 N.E.2d 250 (Ill. App. 1988).

⁴¹ Eastern State Hosp., 996 P.2d at 481.

⁴² *Id.*

⁴³ 1 Larson, *supra* note 1, § 3.05, at 3—5-6.

⁴⁴ Larson, *supra* note 21, at 761 n.3.

⁴⁵ 254 P. 995 (Colo. 1927).

⁴⁶ *Id.* at 997.

⁴⁷ 1 Larson, *supra* note 1, § 3.03.

⁴⁸ Hassell Iron Works Co. *v.* Indus. Comm'n, 201 P. 894 (Colo. 1921).

and the water underneath caused an attraction for lightning.”⁴⁹ Similarly, in *Bauer’s Case*,⁵⁰ benefits were awarded because “a person in wet clothes, standing close to an iron bed and near an electric light and electric wiring, in a building on the top of an exposed hill, was in a position of unusual danger from lightning.”⁵¹

It is rather curious that Larson relies so heavily on lightning cases to argue that the positional-risk doctrine should supplant the increased-risk doctrine.⁵² Lightning cases are so frequently compensable under the increased-risk doctrine that Larson devotes more than three full pages of his treatise to citations to such cases.⁵³ Since lightning strikes are so frequently compensable under the increased-risk doctrine, the threat of uncompensated lightning injuries is not a compelling justification for abandoning that regime.

A major difference between the increased-risk and positional-risk doctrines is their respective treatments of fluke accidents. Larson’s poster-child for the positional-risk doctrine is one such case, *Gargiulo v. Gargiulo*.⁵⁴ This case involves a butcher’s assistant who was hit in the eye by an errant arrow fired by a neighborhood boy.⁵⁵ The claimant was returning to the shop after burning garbage when the boy tragically missed a shot aimed at a tree on the employer’s property. The court awarded compensation because the claimant’s work duties “brought him unwittingly into the line of fire of the arrow.”⁵⁶ Under the increased-risk doctrine, a court would have denied compensation because there was no showing that the claimant’s work duties put him at an increased risk for being struck by stray arrows.⁵⁷

Under the increased-risk doctrine, compensation was also denied when an unknown assailant shot a grocery store clerk.⁵⁸ The court found no evidence that the store was located in a dangerous neighborhood and also noted that the store had not been robbed nor had other employees been attacked. These factors led to a conclusion of no increased risk.⁵⁹

A contrary result was reached under the increased-risk doctrine in *Arnestad v. McNicholas*.⁶⁰ While clearing trees to break a new road, the claimant was accidentally shot by “the all-too-common deer hunter to whom anything that moves looks like a deer.”⁶¹ The Michigan Supreme Court held that the risk of being inadvertently shot by a hunter “was a special hazard incident to [the claimant’s] employment in such a locality.”⁶²

IV. CRITICISM OF THE POSITIONAL-RISK DOCTRINE

A. The positional-risk doctrine ignores the “arising out of” element.

One problem with the positional-risk doctrine is that it largely ignores the “arising out of” element of the compensability calculus.⁶³ The “but for” test employed in positional-risk analysis focuses only on time and location,

⁴⁹ *Id.* at 895.

⁵⁰ 49 N.E. 2d 118 (Mass. 1943).

⁵¹ *Id.* at 120.

⁵² See Larson, *supra* note 21, at 765-67.

⁵³ See 1 LARSON, *supra* note 1, at D5—3-6. *But see* Fuqua v. Dept. of Hwys., 168 S.W.2d 39 (Ky. 1943); Their v. Widdifield, 178 N.W. 16 (Mich. 1920), *overruled by* Whetro v. Awkerman, 174 N.W.2d 783 (Mich.1970); Schmidt v. Adams & Sons Grocer Co., 377 S.W.2d 564 (Mo. Ct. App. 1964); Lucas v. Fed’l Express Corp., 583 S.E.2d 56 (2003); 1 Larson, *supra* note 1, § 4.01[3], at 5—3.

⁵⁴ 97 A.2d 593 (N.J. 1953), *discussed in* Larson, *supra* note 21, at 761.

⁵⁵ *Gargiulo*, 97A.2d at 594.

⁵⁶ *Id.* at 596.

⁵⁷ This might be the case, for example, if the claimant were a counselor at children’s summer camp or a physical education teacher.

⁵⁸ *Heath v. Indus. Comm’n*, 628 N.E.2d 335 (Ill. App. 1993).

⁵⁹ *Id.* at 340.

⁶⁰ 194 N.W. 514 (Mich. 1923).

⁶¹ 1 Larson, *supra* note 20, § 70.1(3), at 7—9 (citation omitted).

⁶² *Arnestad*, 194 N.W. at 515.

⁶³ See *Brady v. Louis Ruffolo & Sons Const. Co.*, 578 N.E.2d 921, 925-26 (Ill. 1991)(the positional-risk doctrine “would not be consistent with requirements expressed by the legislature in the Act.”)(citations omitted).

but completely ignores whether the injury was actually the result of the employment. An employee merely has to prove an injury occurred “in the course of” the employment and get over the modest personal risk hurdle. The problem with this is that workers’ compensation law is a creature of statute, and the vast majority of statutes⁶⁴ contain the “arising out of” element. When courts disregard this element, they are re-writing the law.

Larson himself notes that it is improper to “assum[e] that the right to compensation resembles the right to proceeds of a personal insurance policy.”⁶⁵ However, this is the exact mistake made by states applying the positional-risk doctrine—they are treating a job as an insurance policy. As Chief Justice Brennan of the Michigan Supreme Court points out, “[t]he workman’s compensation law is not a utopian attempt to put a price tag on all human suffering and incorporate it into the cost of living.”⁶⁶ Brennan’s statement accurately reflects the relatively modest goals of workers’ compensation statutes. Indeed, it has been noted that “[w]orkers’ compensation was a much smaller step toward social welfare programs than unemployment insurance or social security would have been.”⁶⁷ By eliminating “arising out of,” courts are fundamentally changing workers’ compensation.

It is important to note that workers’ compensation statutes are the product of compromise between labor and management (among other interests).⁶⁸ Nearly all of the deals struck in the states included a causation element.⁶⁹ Courts are modifying the agreement by eliminating this element.

The problem of disregarding the “arising out of” component is illustrated in *Carroll v. W.C.A.B.*⁷⁰ According to Larson, the court in *Carroll* “adopt[ed] what amounts to a positional-risk stance without actually employing the term.”⁷¹ The claimant sustained an eye injury while attempting to suppress a sneeze at a meeting with co-workers, which astoundingly left him blind in one eye.⁷² The court awarded benefits because the claimant was “injured while actually engaged in furtherance of the employer’s business or affairs.”⁷³ The problem with the court’s analysis is that it only focuses on the “in the course of” element without finding the employment to be a causative factor. The fact that the claimant was on duty at the time of the accident does not change the fact that suppressing a sneeze was the actual mechanism of injury, to which the court never demonstrates a connection to the employment.⁷⁴ Under the court’s analysis, it is difficult to imagine an injury the claimant could have sustained at that meeting table that would not have ruled compensable.

B. The positional-risk doctrine inefficiently allocates liability.

An important goal of workers’ compensation should be accident prevention. Before workers’ compensation, employers had little incentive to prevent employee accidents.⁷⁵ Injured employees were only entitled to compensation if they could demonstrate negligence on behalf of the employer. Furthermore, employers could

⁶⁴ See 1 Larson, *supra* note 1, § 3.01.

⁶⁵ 1 *id.* § 1.02, at 1—3. Larson further endorses this premise by arguing against compensability for accidents resulting from personal risks. 1 *id.* § 4.02.

⁶⁶ Whetro v. Awkerman, 174 N.W.2d 783, 787 (1970)(dissenting). Larson is correct in noting that Brennan’s opinion inappropriately questions the “basis of moral responsibility” upon which an award rests. Larson, *supra* note 21, at 769-70, *citing* Whetro, 174 N.W.2d at 787. The concept of moral responsibility is not applicable in a no-fault system like workers’ compensation.

⁶⁷ Price V. Fishback & Shawn Everett Kantor, A Prelude To The Welfare State: The Origins Of Workers’ Compensation 3 (2000).

⁶⁸ See *id.* at 120-47.

⁶⁹ 1 LARSON, *supra* note 1, § 3.01, at 3—2.

⁷⁰ 750 A.2d 938 (Pa. Commw. Ct. 2000).

⁷¹ 1 LARSON, *supra* note 1, § 3.05, at 3—6.

⁷² Carroll, 750 A. 2d at 939-40. An Ohio appellate court also awarded compensation for a claimant who dislocated a shoulder while sneezing. Grimes v. Mayfield, 564 N.E.2d 732 (Ohio App. 1989).

⁷³ Carroll, 750 A.2d at 941, *quoting* Workers’ Compensation Act, 77 PA. Cons. Stat. § 411(1)(2000)(emphasis omitted).

⁷⁴ There are situations where such a sneezing accident might be compensable under the increased-risk doctrine. For example, if the workplace contained some agent, such as mold or dust, that caused the claimant to sneeze, the injury would be compensable. Similarly, if the claimant’s supervisor had an irrational fear of germs and reprimanded employees for sneezing, this would be compensable because the supervisor’s rule made stifling the sneeze an employment duty.

⁷⁵ Fishback & Kantor, *supra* note 67, at 11.

raise the common law defenses known alternatively as the “unholy trinity” or “three wicked sisters”—contributory negligence, the fellow servant rule, and assumption of the risk.⁷⁶ As Prosser has noted, “[t]he effect of these defenses was to relieve the employer of responsibility even though he, or his servants, had failed in respect of the specific obligations for the protection of the servant.”⁷⁷

It would be incorrect to say, though, that the employer under the common law had no incentive to prevent industrial accidents. Under the economic theory of compensating wage differentials, workers in more dangerous vocations commanded higher wages.⁷⁸ Thus, employers had an incentive to prevent worker accidents in order to keep wages down, as long as the cost of preventing the accidents was lower than the wage premium.⁷⁹ Similarly, the common law system provided a slight incentive for employers to take incentives as they feared large jury awards, which would include both actual financial losses (lost wages and medical expenses), and pain and suffering awards.⁸⁰ This threat of liability was of course tempered by the existence of the common law defenses, which ensured “the great majority” of injured employees received no compensation at all.⁸¹ Finally, in the case of skilled employees, the cost of training a replacement provided incentive for the employer to prevent industrial accidents.

That being said, however, the passage of workers’ compensation statutes clearly increased the incentive for employers to prevent accidents.⁸² This was accompanied by a corresponding decrease in incentives for employees to prevent accidents,⁸³ although workers were not completely devoid of such incentives. The first, and most obvious, incentive a worker possessed was a natural aversion to the physical pain of industrial injuries.⁸⁴ Second, benefits were typically limited by statute to two-thirds of the employee’s average weekly wage to reduce the moral hazard problem.⁸⁵ Third, by denying compensation for injuries resulting from personal risks, workers’ compensation statutes provide incentives for a worker to exercise caution in personal activities unrelated to the employment. Finally, because workers’ compensation benefits are largely offset by lower wages,⁸⁶ an employee has an incentive to keep insurance premiums down in order to keep wages up.

Thus, with the passage of workers’ compensation statutes, both employers and employees had incentives to prevent industrial accidents. A bilateral precaution regime, one in which both parties have incentives to exercise

⁷⁶ W. Page Keeton, Gen. Ed., Prosser And Keeton On The Law Of Torts § 80, At 569-72 (5th Ed. 1984)[hereinafter Prosser & Keeton].

⁷⁷ *Id.* at 569. See also Linda Darling-Hammond & Thomas Kniesner, The Law And Economics Of Workers’ Compensation 7-8 (1980).

⁷⁸ Fishback & Kantor, *supra* note 67, at 15. See also William M. Landes & Richard A. Posner, The Economic Structure Of Tort Law 309-11 (1987); Price V. Fishback & Shawn Everett Kantor, “Square Deal” or Raw Deal? Market Compensation for Workplace Diseminities, 1884-1903, 52 J. ECON. HIST. 826 (1992).

⁷⁹ Fishback & Kantor, *supra* note 67, at 16.

⁸⁰ *Id.* at 28-30.

⁸¹ Prosser & Keeton, *supra* note 76, § 80, at 569.

⁸² Fishback & Kantor, *supra* note 67, at 77-78. In the manufacturing industry, employers increased supervision of employees and installed safety devices to prevent injuries. *Id.* at 81.

⁸³ *Id.* See also Roger J. Butler, et al., *More than Cost Shifting: Moral Hazard Lowers Productivity*, 65:4 J. Risk & Ins. 671 (1998).

⁸⁴ As Mark Twain wryly observed, the monetary compensation awarded as a result of an accident is often poor consolation:

I have had people come to me on crutches, with tears in their eyes, to bless this beneficent institution. In all my experiences of life, I have seen nothing so seraphic as the look that comes into a freshly mutilated man’s face when he feels in his vest pocket with his remaining hand and finds his accident ticket all right.

Mark Twain, Speech to Allyn House, Hartford, Conn. (Oct. 12, 1874), available at www.twainquotes.com/insurance.html.

⁸⁵ Fishback & Kantor, *supra* note 67, at 8. This is reinforced by findings that the number of accidents reported and duration of time off tend to increase as workers’ compensation benefits increase. Richard J. Butler, *Economic Determinant’s of Workers’ Compensation Trends*, 65:4 J. Risk & Ins. 383 (1994); Michael J. Moore & W. Kip Viscusi, *Have Increases in Workers’ Compensation Benefits Paid for Themselves?*, in Benefits, Costs, And Cycles In Workers’ Compensation 18-19 (1990). The impact of the statutory benefit cap is mitigated by the fact that workers’ compensation benefits are not taxable. Internal Revenue Code of 1986, as amended, 26 U.S.C. § 104(a)(1)(2008).

⁸⁶ Fishback & Kantor, *supra* note 67, at 69. See also Moore & Viscusi, *supra* note 85, at 1. Note that the wage offset for union workers was “substantially smaller” than the offset for nonunion workers. Fishback & Kantor, *supra* note 67, at 69-70.

care, is more efficient than a unilateral precaution regime.⁸⁷ The impact of workers' compensation statutes on accident rates is worth examining. In terms of nonfatal accidents, the rates increased or decreased after the passage of workers' compensation statutes based on the increase in employer incentives relative to the decrease in employee incentives, with some variance based on the industry and locality.⁸⁸ It may be safe to conclude that workers' compensation had slight impact on nonfatal industrial accident rates taken as a whole because incentives merely transferred from employees to employers.⁸⁹

Fatal industrial accidents, on the other hand, were reduced by the implementation of workers' compensation systems.⁹⁰ Fishback and Kantor propose a couple of theories to explain the differences between the accident rates in fatal and nonfatal cases. First, employers have a greater incentive to prevent fatal accidents than nonfatal ones because such accidents are more expensive to them.⁹¹ The second theory is that the moral hazard problem is greatly diminished for fatal accidents because a dead worker does not enjoy the benefits of compensation.⁹² Both theories are based on the same idea—because the stakes are higher for fatal accidents, there is a greater incentive for safety for both employers and employees.

Because safety incentives can impact the accident rate, it is important to apply such incentives efficiently to keep down the cost of doing business and, more importantly, to keep workers healthy. It is most efficient to hold employers liable for accidents over which they exercise some control. The nature of the employment relationship is such that the employer should properly be viewed as exercising control over a wider sphere than is assumed in typical liability allocation analysis. For example, because employers have the ability to prevent negligence by employees through training, supervision, and safety rules, there is no problem assigning liability to employers when employees' injuries are the result of their own negligence.

The problem occurs when courts assign liability to the employer for situations in which it is impractical or impossible for the employer to exercise any control. In such cases, the employee moral hazard problem discussed above cannot be offset by increased precaution on the part of the employer. Higher accident rates are therefore likely.

The significance of employer control is demonstrated in *Odyssey/Americare of Oklahoma v. Worden*.⁹³ The Oklahoma Supreme Court in *Odyssey/Americare* made note of the fact that it had adopted the positional-risk doctrine in a previous case,⁹⁴ but that the legislature subsequently amended the statute to reinstate the increased-risk doctrine.⁹⁵ The claimant in this case slipped on wet grass in her own yard while leaving home to go to a work-related appointment.⁹⁶ The court noted that “[b]ut for the employment, [the claimant] would not have left the house”⁹⁷—indicating this would have been compensable under the positional-risk doctrine. Applying the increased-risk test, though, the court denied compensation.⁹⁸ The Oklahoma Supreme Court properly allocated liability in this

⁸⁷ Robert Cooter & Thomas Ulen, *Law And Economics* 304 (3d Ed. 2000).

⁸⁸ Fishback & Kantor, *supra* note 67, at 78, 79-82.

⁸⁹ *Id.* at 78.

⁹⁰ Edwin J. Faulkner, *Accident-And-Health Insurance* 27 (1940)(finding a decrease of over 55% from 1913 to 1938). *See also* Fishback & Kantor, *supra* note 67, at 78. Fatalities actually increased in the coal mining industry after the passage of workers' compensation statutes; this is likely explained by the difficulties employers in the coal industry had relative to manufacturing employers in taking affirmative steps, such as increasing supervising or installing safety equipment, to reduce accidents at low cost. Price V. Fishback, *Soft Coal, Hard Choices: The Economic Welfare Of Bituminous Coal Miners, 1890-1930*, 116-26 (1992); Fishback & Kantor, *supra* note 67, at 81.

⁹¹ Fishback & Kantor, *supra* note 67, at 78.

⁹² *Id.* They also raise a third theory, that employees began reporting more of their accidents once they could actually benefit from doing so. *Id.* 78-79.

⁹³ 948 P.2d 309 (Okla. 1997).

⁹⁴ *Fox v. Nat'l Carrier*, 709 P.2d 1050 (Okla. 1985).

⁹⁵ *Odyssey/Americare*, 948 P.2d at 312. *See Workers' Compensation Act*, Okla. Stat. tit. 85, § 3(12)(a)(2008)(“Only injuries having as their source a risk not purely personal but one that is reasonably connected with the conditions of employment shall be deemed to arise out of employment”).

⁹⁶ *Odyssey/Americare*, 948 P.2d at 311.

⁹⁷ *Id.*

⁹⁸ *Id.* at 313.

case. The claimant was in a much better position to prevent the accident than her employer. The employer exercised no control over the claimant's lawn or her method of traveling from her house to her car, so it would be inefficient to allocate liability for such accidents to the employer.

C. The exceptions to the increased-risk doctrine are not significant enough to warrant a new rule.

Another argument in favor of adopting the positional-risk doctrine is that the exceptions to the increased-risk doctrine merit abandoning that rule. One such exception is the street-risk doctrine, which covers street or highway injuries.⁹⁹ Justice Pound of the New York Court of Appeals provides a justification for the street-risk doctrine as well as describing street risks, by “paint[ing] this Hogarthian picture of the city street and its perils”¹⁰⁰:

The street becomes a dangerous place when street brawlers, highwaymen, escaping criminals, or violent madmen are afoot therein as they sometimes are. The danger of being struck by them by accident is a street risk because it is incident to passing though or being on the street when dangerous characters are abroad.

Particularly on the crowded streets of a great city, not only do vehicles collide, pavements become out of repair, and crowds jostle, but mad or biting dogs run wild, gunmen may discharge their weapons, police officers may shoot fugitives fleeing from justice, or other things may happen from which accidental injuries result to people on the streets which are peculiar to the use of the streets and do not commonly happen indoors.¹⁰¹

There are currently two versions of this rule applied by increased-risk states. The increased-street-risk test awards compensation for street injuries sustained by “certain classes of employees whose duties carried them into the street more often than ordinary people,” such as “delivery workers, collectors, traveling employees, salesmen, teamsters, inspectors, journeymen electricians, insurance workers, icemen, chauffeurs, news carriers, and messengers.”¹⁰² These cases do not offend the increased-risk doctrine because such employees, while exposed to the same kind of risks common to the public, are exposed to these risks to a greater degree.¹⁰³

The actual-street-risk test holds that “if the employment occasions the employee's use of the street, the risks of the street are the risks of the employment” even if the job does not require frequent exposure to the dangers of the street.¹⁰⁴ This test is the majority rule, which Larson deems significant because it is the only area where the increased-risk doctrine has been supplanted by another rule.¹⁰⁵ This is not so radical a departure as Larson indicates, though, and fits conceptually much better with the increased-risk doctrine than the positional-risk doctrine.

Under the increased-risk doctrine, an employee injured by some dangerous element of the workplace will generally receive compensation. The actual-street-risk test simply extends such coverage in cases where the workplace happens to be somewhere other than a building maintained by the employer. This remains consistent with the goal of efficient liability allocation as well, because the employer retains control. The employer can reduce the

⁹⁹ 1 Larson, *supra* note 1, § 6.00, at 6—1.

¹⁰⁰ 1 *id.* § 6.05, at 6—7.

¹⁰¹ Katz v. A. Kadans & Co., 134 N.E. 330, 331 (N.Y. 1922). Other risks covered by this doctrine include:

stray bullets, a bomb dropped on Wall Street, or even placed in a plane, potions of roofs or buildings falling in a windstorm, trees falling on the highway, a shot by a sentry whose challenge was not heard by a taxi driver, a brick or an apple thrown by a small boy, a stabbing by a lunatic, a toy torpedo thrown by a child, or footballs and baseballs flying into the streets.

1 Larson, *supra* note 1, § 6.05, at 6—7-8 (citations omitted).

¹⁰² 1 Larson, *supra* note 1, § 6.01, at 6—2, § 6.03, at 6—3 (citations omitted).

¹⁰³ 1 *id.*, § 6.01, at 6—2. “[A] court that has gone this far has neither abandoned the common-to-the-public test nor assumed any advanced or exceptional position.” 1 *id.*, § 6.01, at 6—3. *But see* United Serv. Ins. Co. v. Donaldson, 48 So. 2d 3 (1950) (applying the increased-street-risk test for street risks after finding it to be an exception to the increased-risk doctrine).

¹⁰⁴ 1 Larson, *supra* note 1, § 6.04, at 6—4.

¹⁰⁵ *Id.*

likelihood of accidents due to street risks through training (e.g., driver safety), safety rules (e.g., required seatbelt use), and by exercising control over the route and itinerary (e.g., instruct the employee to avoid dangerous neighborhoods or to avoid travelling at night). The street-risk doctrine is thus perfectly consistent with the increased-risk doctrine and not cause for abrogating that rule.

Another common exception to the increased-risk doctrine involves unexplained accident cases. Most significant among these are unexplained death cases. The majority of “courts will indulge a presumption or inference that the death arose out of the employment.”¹⁰⁶ The practical justification of such a rule is that where “the death itself has removed the only possible witness who could prove causal connection, fairness to the dependents suggests some softening of the rule requiring claimant to provide affirmative proof of each requisite element of compensability.”¹⁰⁷ The exception for unexplained deaths in increased-risk jurisdictions is really more of an issue of evidence than a philosophical shift.

Nonfatal unexplained fall cases are another matter. In an early English case,¹⁰⁸ an employer received compensation for a fall on a railway platform despite a lack of evidence of slipperiness or defects in the platform. Awarding compensation for unexplained falls has attained majority rule status,¹⁰⁹ even in a number of increased-risk states.¹¹⁰

It is important to distinguish unexplained falls from idiopathic falls. Idiopathic falls are caused by internal or inherent problems unrelated to the employment,¹¹¹ such as heart attack,¹¹² epilepsy,¹¹³ seizure,¹¹⁴ knee derangement,¹¹⁵ and a malfunctioning leg brace.¹¹⁶ Injuries resulting from idiopathic falls are not compensable unless “the employment makes a contribution to the ultimate injury by having placed the claimant on a height, or by putting in claimant’s way some object which claimant strikes in falling.”¹¹⁷ In these cases, the cause of the fall is known to be a risk personal to the claimant. Unexplained falls may or may not be the result of personal risks.

The problem with extending compensability to nonfatal unexplained falls cases is that it is unnecessary. The claimant is available to testify and few cases are really unexplained. Even if the exact mechanism of injury is not known, inferences can be drawn from the circumstances to suggest whether the accident was related to the employment. There is also a real danger of perjury; in questionable cases, an employee can simply “forget” how the fall occurred.¹¹⁸ For these reasons, the unexplained fall exception is poor justification for abrogating the increased-risk doctrine.

V. CONCLUSION

The increased-risk doctrine has been the majority rule for most of the history of workers’ compensation law, while the positional-risk doctrine remains a minority rule thirty-five years after Larson’s call for a new regime, and with good reason. The positional-risk doctrine ignores the “arising out of” component of the statutory language.

¹⁰⁶ 1 *id.* § 7.04(2), at 7—22. *See* 1 *id.* § 7.04D(2).

¹⁰⁷ 1 *id.* § 7.04(2), at 7—22. *See also* California State Polytech. Univ./Pomona v. Workers’ Comp. App. Bd., 179 Cal. Rptr. 605, 607 (1982). Massachusetts extends this exception to any case where the claimant “is physically or mentally unable to testify, and such testimonial incapacity is causally related to the injury.” Workers’ Compensation Act, MASS. GEN. LAWS ch. 152, § 7A (2008).

¹⁰⁸ Upton v. Great Cent. Ry., 1924 A.C. 302.

¹⁰⁹ 1 Larson, *supra* note 1 § 7.04(1)(a), at 7—15. *But see* 1 *id.* § 7.04D(1)(a), at D7—11-13.

¹¹⁰ *See, e.g.*, Williams G. Ceas & Co. v. Indus. Comm’n, 633 N.E.2d 994 (Ill. App. 1994); Burroughs Adding Mach. Co. v. Dehn, 39 N.E.2d 499 (Ind. App. 1942).

¹¹¹ Keefe, *supra* note 3, § 3.10, at 3—28. *See also* 1 Larson, *supra* note 1, § 9.01.

¹¹² Protectu Awning Shutter Co. v. Cline, 16 So.2d 342 (Fla. 1944).

¹¹³ 1 Larson, *supra* note 1, § 7.04(1)(b).

¹¹⁴ Prince v. Indus. Comm’n, 155 N.E.2d 552 (Ill. 1959).

¹¹⁵ Stapleton v. Indus. Comm’n, 668 N.E.2d 15 (Ill. App. 1996).

¹¹⁶ Leon County Sch. Bd. V. Grimes, 548 So.2d 205 (Fla. 1989).

¹¹⁷ 1 Larson, *supra* note 1 § 7.04(1)(b), at 7—18. *See also* 1 *id.* § 9.01.

¹¹⁸ Professor Bruce Bonds, Lecture at the University of Illinois College of Law (Jan. 29, 2002).

Additionally, the positional-risk doctrine inefficiently allocates liability for industrial accidents. Finally, the exceptions to the increased risk doctrine are not significant enough to warrant a new rule. Courts should recognize that newer is not always better and continue to apply the increased-risk doctrine.

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