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Recent Cases

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CONSTITUTIONAL LAW—CRIMINAL LAW—FORMER JEOPARDY—RETRIAL FOR GREATER DEGREE AFTER REVERSAL OF CONVICTION OF LESSER DEGREE OF SAME OFFENSE

Green v. United States[1]

Defendant was tried in the United States District Court for the District of Columbia under an indictment in two counts, charging arson and murder in the first degree (committed in the perpetration of a felony), respectively. With respect to the latter count, the jury were instructed on both first and second degree murder. The jury found the defendant guilty of arson and murder in the second degree, the verdict making no reference to the charge of murder in the first degree. The court of appeals found the conviction of second degree murder unsupported by the evidence, and reversed.[2] Upon a new trial the defendant was found guilty of first degree murder under the original indictment, the court overruling his defense of former jeopardy. The court of appeals affirmed.[3] On appeal to the Supreme Court of the United States, *held*, reversed, by a 5-4 decision. The jury's silence at the first trial amounted to an implied acquittal of the charge of first degree murder, which was not affected by the defendant's successful appeal. Having once been acquitted of murder in the first degree, the second trial placed the defendant twice in jeopardy for the same offense in violation of the fifth amendment.

The extent of the application of double jeopardy principles has been considered in a number of Missouri cases involving a retrial for the greater offense, after reversal of a conviction of a lesser degree of the offense charged.[4]

Prior to 1875, decisions of the Missouri supreme court were compatible with the rule asserted in the *Green* case, providing that a defendant convicted of murder in the second degree on an indictment for murder in the first degree, which conviction was set aside, could not be retried for murder in the first degree.[5] The conviction

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1. 355 U.S. 184 (1957).
2. Green v. United States, 218 F.2d 856 (D.C. Cir. 1955). The court found that the necessary elements of second degree murder had not been established by the evidence, and that the defendant must either be guilty of murder in the first degree or not guilty.
3. Green v. United States, 236 F.2d 708 (D.C. Cir. 1956).
4. See Miller, *The Plea of Double Jeopardy in Missouri*, 22 Mo. L. Rev. 245, 292 (1957). The merits and anticipated effect of the decision in the principal case are noted in more than a score of law review discussions, including 26 Geo. Wash. L. Rev. 749 (1958), 9 Syracuse L. Rev. 331 (1958), 32 Tul. L. Rev. 488 (1958), and 60 W. Va. L. Rev. 281 (1958).
5. State v. Smith, 53 Mo. 139 (1873); State v. Ross, 29 Mo. 32 (1859).

of second degree murder was considered an implied acquittal of the charge of first degree murder.[6] Reversal of the conviction subjected the defendant to a trial only for that degree of the offense, the implied acquittal as to the greater charge remaining unaffected thereby and standing as a bar to a subsequent prosecution for murder in the first degree.[7]

This rule was abrogated by the Missouri Constitution of 1875, article II, section 23. This section was perpetuated, without substantial change, in article I, section 19, of the Constitution of 1945, and provides:

> . . . nor shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury; but . . . if judgment on a verdict of guilty be reversed for error in law, the prisoner may be tried anew on a proper indictment or information, or according to law.

The language of this provision is interpreted as declaring that when there is a conviction of a lesser degree of a crime than is charged, and such conviction is reversed for error of law, the former proceeding is to be regarded as a mistrial, and on remand the cause is to be tried anew.[8] The conclusion reached in subsequent cases is that when a defendant is convicted of murder in the second degree under an indictment charging murder in the first degree, and the conviction is reversed, he may again be tried for murder in the first degree.[9]

Although the result is certain, an examination of the cases does not readily disclose the theory upon which it is founded. At least one case seems to imply that conviction of the lesser offense is *no acquittal* of the greater, and upon a new trial the cause stands as though there had been no trial at all, the defendant being again subject to trial on the greater charge.[10] Other cases hold that by voluntarily seeking a new trial, the defendant *waives* his right to plead former jeopardy in a second trial for the greater offense.[11]

On the other hand, Missouri courts uniformly hold that this constitutional provision has no application where a defendant is charged with separate and distinct offenses. In such case, where the jury brings a verdict of guilty as to one offense, making no reference to the others, the silence of the jury amounts to an acquittal of the others,[12] which is not affected by a reversal of the conviction upon appeal by the defendant.

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6. State v. Ball, 27 Mo. 324 (1858).
7. State v. Smith, *supra* note 5; State v. Ross, *supra* note 5.
8. State v. Simms, 71 Mo. 538 (1880).
9. State v. Stallings, 334 Mo. 1, 64 S.W.2d 643 (1933); State v. Goddard, 162 Mo. 198, 62 S.W. 697 (1901); State v. Billings, 140 Mo. 193, 41 S.W. 778 (1897); State v. Anderson, 89 Mo. 312, 1 S.W. 135 (1886); State v. Simms, *supra* note 8.
10. State v. Higgins, 252 S.W.2d 641 (St. L. Ct. App. 1952).
11. State v. Beard, 334 Mo. 909, 68 S.W.2d 698 (1934); State v. Austin, 318 Mo. 859, 300 S.W. 1083 (1927).
12. State v. Ash, 286 S.W.2d 808 (Mo. 1956); State v. Barbour, 347 Mo. 1033, 151 S.W.2d 1105 (1941); State v. Jett, 318 Mo. 672, 300 S.W. 752 (1927); State v. Socwell, 318 Mo. 742, 300 S.W. 680 (1927); State v. Perry, 267 S.W. 828 (Mo. 1924); State v. Hays, 252 S.W. 380 (Mo. 1923); State v. Patterson, 116 Mo. 505, 22 S.W. 696 (1893) (en banc); State v. Hays, 78 Mo. 600 (1883); State v. Cofer, 68 Mo. 120 (1878); State

This approach was taken by the United States Supreme Court in the *Green* case. Noting that the District of Columbia court of appeals had expressly held that second degree murder is a lesser offense which can be proved under a charge of felony murder,[13] the high court stated:

> It is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense.[14]

This conclusion was reached under District of Columbia statutes defining the crime of murder in terms substantially identical to the laws of Missouri.[15]

The precise question—whether a defendant indicted for felony murder and convicted of second degree murder may, if the conviction is set aside for error of law, be retried on the original charge—has yet to arise before the Missouri courts.[16]

However, the probable answer is not unpredictable. In the first place, the Supreme Court of Missouri has expressly concluded that a homicide committed in the perpetration of arson is *not* a distinct offense, but is merely one of the methods by which the crime of murder in the first degree may be committed.[17] Proof that the homicide was committed in the perpetration of or attempt to perpetrate any of the felonies set forth in section 559.010, Missouri Revised Statutes (1949) is held to be the "legal equivalent" of that willfulness, premeditation, and deliberation which is otherwise necessary to be proved to constitute murder in the first degree,[18]

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v. Whitton, 68 Mo. 91 (1878); State v. Brannon, 55 Mo. 63 (1874); State v. McCue, 39 Mo. 112 (1866); State v. Kattlemann, 35 Mo. 105 (1864); State v. Meyer, 221 S.W. 775 (K.C. Ct. App. 1920); State v. Polk, 144 Mo. App. 326, 127 S.W. 933 (Spr. Ct. App. 1910); State v. Hall, 141 Mo. App. 701, 125 S.W. 229 (Spr. Ct. App. 1910); State v. McAnally, 105 Mo. App. 333, 79 S.W. 990 (St. L. Ct. App. 1904); State v. Bruder, 35 Mo. App. 475 (K.C. Ct. App. 1889); State v. Grimes, 29 Mo. App. 470 (St. L. Ct. App. 1888); State v. Gannon, 11 Mo. App. 502 (St. L. Ct. App. 1882).

13. Goodall v. United States, 180 F.2d 397, 400 (D.C. Cir. 1950).

14. 355 U.S. at 194 n.14.

15. D.C. CODE ANN. § 22-2401 (1951) (§ 559.010, RSMo 1949); D.C. CODE ANN. § 22-2403 (1951) (§ 559.020, RSMo 1949).

16. In none of the Missouri cases cited in note 9 *supra*, has the prosecution been based on that part of § 559.010, RSMo 1949, providing that: ". . . every homicide which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or mayhem, shall be deemed murder in the first degree." However, Justice Frankfurter, dissenting in the principal case, cites Missouri as being among some 19 states permitting retrial for the greater offense under such circumstances as are here presented, this rule purporting to rest upon "special constitutional provision." 355 U.S. at 216-17 n.4.

17. State v. Bobbitt, 215 Mo. 10, 114 S.W. 511 (1908).

18. State v. Bradley, 361 Mo. 267, 234 S.W.2d 556 (1950); State v. Cole, 354 Mo. 181, 189 S.W.2d 541 (1945); State v. Schnelt, 341 Mo. 241, 108 S.W.2d 377 (1937); State v. Barr, 340 Mo. 738, 102 S.W.2d 629 (1937); State v. Kauffman, 335 Mo. 611, 73 S.W.2d 217 (1934); State v. Sharpe, 326 Mo. 1063, 34 S.W.2d 75 (1930); State v. Moore, 326 Mo. 1199, 33 S.W.2d 905 (1930); State v. Mabry, 324 Mo. 239, 22 S.W.2d 639 (1929); State v. Robinett, 279 S.W. 696 (Mo. 1926); State v. Hayes, 262 S.W. 1034 (Mo. 1924); State v. Hart, 292 Mo. 74, 237 S.W. 473 (1922); State v. Carroll, 288 Mo. 392, 232 S.W. 699 (1921); State v. Garrett, 276 Mo. 302, 207 S.W. 784 (1918); State v. Bobbitt, 215 Mo. 10, 114 S.W. 511 (1908); State v. Daly, 210 Mo. 664, 109 S.W. 53 (1908); State v. Foster, 136 Mo. 653, 38 S.W. 721 (1897); State v. Donnelly, 130 Mo. 642, 32 S.W. 1124 (1895); State v. Meyers, 99 Mo. 107, 12 S.W. 516 (1889).

in the sense that proof of those constituent elements of first degree murder becomes unnecessary.[19]

From an appraisal of the prior Missouri decisions, it is submitted it may be anticipated with a considerable degree of confidence that the Missouri courts will reject the proposition that second degree murder constitutes an offense separate and distinct from felony murder, and will determine that under facts similar to those of the *Green* case a defendant may be tried again on a charge of felony murder following his successful appeal from conviction of a lesser degree of murder.

WILLIAM CLARK KELLY

WORKMEN'S COMPENSATION—MISSOURI—INJURY AT EMPLOYER-SPONSORED RECREATION

Graves v. Central Elec. Power Co-op.[1]

In this workmen's compensation action the employer was an electric utility and the employee, James Graves, was a sub-station superintendent and trouble-shooter. He was one of three employees who shared responsibility for supervising emergency line repairs, and one of these three was always on stand-by duty by phone or radio when company offices were closed. Graves' salary was considered to include compensation for stand-by duty. In 1952 the company sponsored its third annual company picnic and rented a recreation area and lake for that purpose. Employee attendance was desired and all received invitations, but actual attendance was considered optional. The objective of the affair was the promotion of closer social relationships among the employees and the providing of employee recreation. Graves accepted the company's invitation following a conversation with his superior, Pawley. He had not attended previous picnics, and, though there was some conflict as to the nature of the conversation, it was inferable that Pawley strongly urged Graves to attend in order to represent the department which he supervised, since other supervisors were on vacation. Furthermore, Pawley was grooming Graves for promotion and felt that he should attend for his own good as well as for the company's benefit. Upon his arrival at the picnic grounds, Graves set up the radio contact with the generating plant as a necessary part of stand-by duty. He set the volume on the company radio loud enough to be heard anywhere on the grounds and proceeded to take part in the picnic activity. While boating on the lake with his family, Graves drowned in an unsuccessful attempt to rescue his small son who had fallen from the boat. The Industrial Commission awarded death benefits to Graves' survivor. This award was affirmed in the Cole County circuit court. Employer and insurer appealed on the grounds that at the time of his death, Graves was not engaged in

19. State v. Schnelt, *supra* note 18; State v. Kauffman, *supra* note 18; State v. Meadows, 330 Mo. 1020, 51 S.W.2d 1033 (1932); State v. Moore, *supra* note 18.

1. 306 S.W.2d 500 (Mo. 1957).

any activity related to his employment. The Missouri supreme court affirmed the award of compensation.

I. Introductory Comments

Recovery under workmen's compensation is extended to accidents which "arise out of and in the course of" the employment.[2] Freely interpreted, this double test requires that the accident must have a causal genesis in the employment, and that it must occur within the ambit of the time, space, and activity requirements of the work. Larson lists three interpretations of the causation requirement.[3] The oldest interpretation required that the risk which injured the employee be peculiar to the employment and not common to the public. A more modern interpretation holds that the causation requirement is satisfied if the risk is an actual risk of the employment, regardless of the fact that it also may be common to the public. This is the interpretation followed in Missouri.[4] The "positional risk" approach considers the causation requirement met if the injury arises because the conditions of the employment brought the employee to the scene of the accident. There is general agreement that the "course of the employment"[5] requirement is satisfied if the accident arises within the time period of the employment, at a place where the employee might reasonably be, and while he is performing duties of his employment or something incidental thereto.[6] Larson advocates recognition of a "quantum theory" of compensability, which would merge the "arising" and "course" requirements into a single standard of work-connection, and allow a strong case of "arising" to buoy up a weaker case of "course" or vice versa, so long as a significant quantum of connection was present.[7]

The instant case raises two interesting compensation problems: the company-picnic injury and the emergency-rescue injury. This Case Note discusses the former problem. The latter is considered separately in a companion case note immediately following.

II. The Compensability of Injury at Employer-Sponsored Recreation

If the employee at company-sponsored recreational events is fulfilling his duties or performing some activity incidental thereto, and is injured by a risk of the recreation, his case is compensable. Although the typical case involves injury which can easily be attributed to a risk of the recreation, it is customarily more difficult to find that the recreational activity is a duty or incident of the employment. Therefore most of the cases revolve around the requirement of "course of the employment." Analysis of the cases reveals that certain interrelated factors may be important in deciding the issue.[8]

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2. § 287.120, RSMo. 1949.
3. 1 Larson, Workmen's Compensation § 6.00 (1952).
4. Foster v. Aines Farm Dairy Co., 263 S.W.2d 421, 423 (Mo. 1953).
5. 1 Larson, *op. cit. supra* note 3, § 14.00.
6. Foster v. Aines Farm Dairy Co., *supra* note 4.
7. 1 Larson, *op. cit. supra* note 3, § 29.10.
8. For similar listings of determinative factors, see Woodmansee v. Frank Lyon Co., 223 Ark. 222, 224, 265 S.W.2d 521, 523 (1954); Moore's Case, 330 Mass. 1, 110 N.E.2d 764 (1953); Note, 25 N.Y.U.L. Rev. 149 (1950).

A. Did the Employer Compel Participation?

Continuation of the employment is rarely contingent upon participation in recreational events sponsored by the company,[9] but many instances exist where such participation is less than voluntary. Clearly when the employer orders, instructs, or requires a worker to participate in recreation, it becomes an incident of employment.[10] Subtler forms of coercion may suffice equally well, however, for the courts realize that the employee is naturally sensitive to his employer's wishes and desires, and that a request or invitation may have the force of an order from the employee's view.[11] When the employer has made the day's pay conditional upon attendance at a recreational function, he has created another form of coercion by presenting the employee with a choice of reward or penalty.[12]

B. Did the Employer Benefit Significantly From the Activity?

When the employer sponsors and contributes to a recreational activity, this may indicate that a benefit is expected in return,[13] although such a conclusion is not always required.[14] Specific evidence of some significant benefit accruing to the employer from recreational activity may bring into play the "mutual benefit" doctrine that employee activity sponsored by the employer for mutual benefit becomes an incident of the employment.[15] Providing recreation raises employee moral, develops *esprit de corps,* and improves personal relationships within the organization. Recreational events may provide management officials with an opportunity to make "pep talks" aimed at achieving the same results. Many courts will find such benefits sufficient to make the activity an incident of the employment,[16] while others consider these benefits too indefinite or insignificant to justify such a finding.[17] Signi-

9. See, however, University of Denver v. Nemeth, 127 Colo. 385, 257 P.2d 423 (1953), compensating a college athlete's practice injury on the grounds that his continued employment at his campus job depended directly upon his sports participation.

10. Huber v. Eagle Stationery Corp., 254 App. Div. 788, 4 N.Y.S.2d 272 (3d Dep't 1938); Shoemake Station v. Stephens, 277 P.2d 998 (Okla. 1954); Salt Lake City v. Industrial Comm'n, 104 Utah 436, 140 P.2d 644 (1943).

11. Jewel Tea Co. v. Industrial Comm'n, 6 Ill. 2d 304, 128 N.E.2d 699 (1955); Kelly v. Hackensack Water Co., 10 N.J. Super. 528, 77 A.2d 467 (App. Div. 1950); Wilson v. General Motors Corp., 298 N.Y. 468, 477-78, 84 N.E.2d 781, 787-88 (1949) (dissenting opinion).

12. Stakonis v. United Advertising Corp., 110 Conn. 384, 148 Atl. 334 (1930).

13. The usual statement is that the directors cannot bestow largess from the stockholders' money. Tedesco v. General Elec., 305 N.Y. 544, 114 N.E.2d 33 (1953); Holst v. New York Stock Exch., 252 App. Div. 233, 299 N.Y. Supp. 255 (3d Dep't 1937).

14. See Wilson v. General Motors Corp., *supra* note 11, at 473, 84 N.E.2d at 784, where the court refers to the employer's support of recreation as a "gratuitous contribution to its employees' social and recreational life."

15. The leading statement of this rule is found in Smith v. Seamless Rubber Co., 111 Conn. 365, 150 Atl. 110 (1930).

16. Jewel Tea Co. v. Industrial Comm'n, *supra* note 11; Kelly v. Hackensack Water Co., *supra* note 11; Tedesco v. General Elec., *supra* note 13; Fagan v. Albany Evening Union Co., 261 App. Div. 861, 24 N.Y.S.2d 779 (3d Dep't 1941); Ott v. Industrial Comm'n, 83 Ohio App. 13, 82 N.E.2d 137 (1948); Miller v. Keystone Appliances, 133 Pa. Super. 354, 2 A.2d 508 (1938).

17. Clark v. Chrysler Corp., 276 Mich. 24, 267 N.W. 589 (1936); Stevens v. Essex Fells Country Club, 136 N.J.L. 656, 57 A.2d 469 (Sup. Ct. 1948); Wilson v. General Motors Corp., *supra* note 11.

ficant public relations and advertising benefits may be involved if the recreation is a major publicity medium of the employer.[18] Increased work efficiency arising from recreation is another type of benefit which may be considered by the courts.[19]

C. *Was the Activity Significantly Connected With Company Operations?*

Mere employer acquiescence and/or sponsorship of recreation does not necessarily make it an adjunct of company affairs except in cases where the activity has been continuously conducted so as to become a company custom.[20] However, the greater the degree of company sponsorship, financial support and management participation, the more likely the courts are to find that the recreation is an incident of employment.[21] If the recreation is on company time[22] or upon company premises,[23] this may be a make-weight factor. The interposition of an employee association as a sponsor of recreation will tend to separate the company from the activity,[24] unless, of course, the company controls the association.[25] When the recreation has become one of the terms of the employment recognized in a union agreement[26] or in the hiring of new employees,[27] these factors also suggest that it is inseparable from the employment.

Two corollary factors are discernible from the cases, although they may not receive formal notice from the courts. *The nature of the recreation* may affect the compensability of the injury. Company picnics and parties may be distinguished, at least in degree, from company sporting events, since the former are conducted for the entire work force and the latter only for smaller groups with special interests

18. La Bar v. Ewald Bros. Dairy Co., 217 Minn. 16, 13 N.W.2d 729 (1944) illustrates advertising benefits as a major factor. Advertising benefit was a make-weight factor in such cases as Jewel Tea Co. v. Industrial Comm'n, *supra* note 11 and Tedesco v. General Elec., *supra* note 13.

19. Linderman v. Cownie Furs, 234 Iowa 708, 13 N.W.2d 677 (1944); Piusinski v. Transit Valley County Club, 283 N.Y. 674, 28 N.E.2d 401 (1940); Kenny v. Ochiltree Elec. Co., 125 Pa. Super. 161, 190 Atl. 166 (1937); Salt Lake City v. Industrial Comm'n, *supra* note 10.

20. Winter v. Industrial Acc. Comm'n, 129 Cal. App. 2d 174, 276 P.2d 689 (1954); Thomas v. Proctor & Gamble Mfg. Co., 104 Kans. 432, 179 Pac. 372 (1919); Geary v. Anaconda Copper Mining Co., 120 Mont. 485, 188 P.2d 185 (1947). *Contra*, Luteran v. Ford Motor Co., 313 Mich. 487, 21 N.W.2d 825 (1946).

21. The strongest example of recreation entwined with company operations is Tedesco v. General Elec., 305 N.Y. 544, 114 N.E.2d 33 (1953). See also Jewel Tea Co. v. Industrial Comm'n, 6 Ill. 2d 304, 128 N.E.2d 699 (1955); Kelly v. Hackensack Water Co., 10 N.J. Super. 528, 77 A.2d 467 (App. Div. 1950); Holst v. New York Stock Exch., 352 App. Div. 233, 299 N.Y. Supp. 255 (3d Dep't 1937); Kelly v. Ochiltree Elec. Co., *supra* note 19.

22. Fishman v. Lafayette Radio Corp., 275 App. Div. 876, 89 N.Y.S.2d 563 (3d Dep't 1949).

23. Tedesco v. General Elec., *supra* note 21.

24. Wagner v. Buescher Band Instrument Co., 125 Ind. App. 103, 122 N.E.2d 618 (1954); Fick v. American Mut. Life Ins. Co., 26 N.J. Misc. 244, 58 A.2d 854 (Workmen's Comp. Bur. 1948).

25. Tedesco v. General Elec., *supra* note 21.

26. Kelly v. Hackensack Water Co., *supra* note 21.

27. Reinert v. Industrial Acc. Comm'n, 46 Cal. 2d 349, 294 P.2d 713 (1956); University of Denver v. Nemeth, 127 Colo. 385, 257 P.2d 423 (1953); Holst v. New York Stock Exch., *supra* note 21. *Contra*, Berry v. Colonial Furniture Co., 232 N.C. 303, 60 S.E.2d 97 (1950).

and abilities. Typically, picnics are more likely to involve subtle coercion, a greater morale benefit, and a closer connection with company operations. *The status of the injured employee* also may be a factor, since those men with management status are more likely to be attending recreational functions to supervise them or to build personal relationships with their subordinates—all activities which attach to their duties as managers.

Underlying the consideration of the factors above is the court's own conception of the social results of the decision. It is not uncommon to find a court saying that awards of compensation for recreational injury will only deprive the majority of employees of the benefits of such programs, since employers would tend to drop recreational sponsorship rather than assume attendant risks of liability.[28] The reply made in other opinions is that the relatively low costs of insurance coverage of such risks will not burden the employer sufficiently enough to make him discontinue his personnel programs if he finds them productive.[29]

III. The Missouri Cases

The Missouri cases have generally followed the criteria discussed. Employer coercion, through direct order or the offering of a penalty-reward choice, is recognized as the most important factor in these recreation cases.[30] While moral benefits have been recognized and are entitled to some consideration,[31] they are insufficient, standing alone, to justify compensation.[32] In the only Missouri case where the issue of advertising benefit was raised, the facts presented such "infinitesimal" benefit that the court did not recognize it.[33] The degree of connection between recreation and the employer's business has been recognized as a factor. Mere acquiescence is insufficient,[34] and token encouragement or small financial assistance may not constitute much more of a connection.[35] However, there is authority that a close connection illustrated by long-term sponsorship and support will be given weight.[36] Missouri has also endorsed the policy argument that awards of compensation would discourage employer sponsorship of recreational activity.[37] The Missouri decisions, in the aggregate, have laid down rather strict requirements for compensation in recreational injury cases, but have not foreclosed the possibility of an award.

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28. Industrial Comm'n v. Murphy, 102 Colo. 59, 76 P.2d 741 (1938); Clark v. Chrysler Corp., 276 Mich. 24, 267 N.W. 589 (1936); Wilson v. General Motors Corp., 298 N.Y. 468, 84 N.E.2d 781 (1949); Jewel Tea Co. v. Industrial Comm'n, 6 Ill. 2d 304, 319, 128 N.E.2d 928, 929 (1955) (dissenting opinion).

29. Wilson v. General Motors Corp., *supra* note 28.

30. Stout v. Sterling Aluminum Prod. Co., 213 S.W.2d 244 (St. L. Ct. App. 1948).

31. Conklin v. Kansas City Pub. Serv. Co., 226 Mo. App. 309, 41 S.W.2d 608 (K.C. Ct. App. 1931).

32. McFarland v. St. Louis Car Co., 262 S.W.2d 344 (St. L. Ct. App. 1953); Stout v. Sterling Aluminum Prod. Co., *supra* note 30.

33. McFarland v. St. Louis Car Co., *supra* note 32, at 347.

34. Dunnaway v. Stone & Webster Eng'r Co., 61 S.W.2d 398 (K.C. Ct. App. 1933).

35. McFarland v. St. Louis Car Co., *supra* note 32.

36. Conklin v. Kansas City Pub. Serv. Co., *supra* note 31.

37. McFarland v. St. Louis Car Co., *supra* note 32.

IV. CONCLUSION

In the instant case the court, analyzing the picnic problem apart from the rescue problem, found with "no difficulty" that the death would be compensable. Graves was on stand-by duty at the time of his accident. While the employer's position was that Graves had attended the picnic voluntarily, the court accepted the finding below that the remarks of Graves' superior constituted an "insistence" which "had the force of an order so far as concerned its effect upon Graves."[38] The logical conclusion was that the company "in effect directed him to participate in the picnic activities while performing the duties of his employment."[39] The coercion by the employer is the main point relied upon; other elements were present in the facts, although not discussed by the court. The employer had insisted that Graves attend because he was a supervisory employee, and his presence would produce a desired morale benefit to the company by promoting good relations with his men. The picnic was closely connected to company operations, being an annual affair under complete company management and held upon the company's leased premises. The fact situation was a strong one for compensation, including all elements of (a) employer coercion, (b) employer benefit, and (c) connection with company operations. The chief contributions of the case to the Missouri law on the recreational injury problem lie in its recognition that a recreational injury may be compensable under proper facts, and that employee participation in recreational activity is involuntary when "subtle coercion" is present.

J. W. ROBERTS

WORKMEN'S COMPENSATION—MISSOURI—INJURY DURING EMERGENCY RESCUE

Graves v. Central Elec. Power Co-op[1]

(This Case Note is a companion to the preceding case note. The statement of facts and the introductory comments appearing therein apply here also. ED.)

If an employee in the course of his employment encounters an emergency situation and is injured in a rescue attempt prompted thereby, the issue of compensability hinges primarily upon the finding of a work-connection, arising because the rescue act is incidental to the employment and because the injury during rescue may be connected to the employment by one of the causation theories discussed in the companion case note, preceding. If rescue work in emergencies is a regular or informal duty of the employment, the compensability of the rescue injury is clear.[2]

38. 306 S.W.2d at 502.
39. *Id.* at 503.

1. 306 S.W.2d 500 (Mo. 1957).
2. Scott v. Rhyan, 78 Ariz. 80, 275 P.2d 891 (1954); Steir v. City of Derby, 119 Conn. 44, 174 Atl. 332 (1934); Van Ness v. Borough of Haledon, 24 N.J. Misc. 29, 45 A.2d 673 (C.P. 1946); Sonnett v. Stone Twp., 100 Pa. Super. 397 (1930); Travelers Ins. Co. v. Dudley, 180 Tenn. 191, 173 S.W.2d 142 (1943); American Red Cross v. Hinson, 173 Tenn. 667, 122 S.W.2d 433 (1938).

However in the course of employment, injuries will often be thrust upon employees with no regular rescue duties, but who, nonetheless, will undertake a rescue.

If the rescue attempt was a service and benefit to the employer, a strong case is made for saying that the rescue was an incident of employment and that the risk of injury was an actual risk to which the employee was exposed. This theory may be applied to cases involving the rescue of someone to whom the employer owed a duty of care, and thus where a successful rescue would preclude employer liability.[3] In *Ocean Acc. & Guar. Corp. v. Industrial Acc. Comm'n*[4] the president of the employer company in the course of his employment was about to run down a child on company premises. The employee effected a rescue but was injured, and compensation was awarded and affirmed. The court held that such rescues, where the employer was faced with possible liability, were reasonably within the scope of the employee's expected duties, and that a failure to attempt the rescue might have resulted in the employee's dismissal. The work-connection in this class of cases is clear, but in limiting compensable rescues to those involving non-strangers, the decisions rely on a fictional assumption that it is only the employee's loyalty to his employer which prompts the rescue. It is far more likely that emergency rescues are prompted by humanitarian impulses rather than by a logical analysis of the employer's potential liability.

The landmark case of *Waters v. Wm. J. Taylor Co.*[5] recognized that a sufficient work-connection for compensation could exist despite the absence of any employer benefit. There a cave-in on a construction job had endangered the employee of one contractor. Waters, an employee of a second contractor, was working nearby, and attempted a rescue which resulted in his death. The rescue protected no interest of Waters' employer, since the endangered man was a total stranger to the employer. However a combination of other factors present justified an award: (1) the employment brought the employee to the scene of the emergency; (2) the employer could have foreseen such an accident; (3) the emergency arose from the nature of the employment; and (4) the humanitarian motivations of the situation were as strong as those involved in the rescue of a fellow-servant.

Both *Herman v. Follmer Trucking Co.*[6] and *Puttkammer v. Industrial Comm'n*[7] involved a truck driver injured while assisting at a highway accident. Connection with the employment, similar to that in the *Waters* case was present. The endangered persons, though technically strangers, were fellow travelers, and road accidents are closely related to the work of truck driving. In both cases compensation was awarded.[8]

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3. 1 LARSON, WORKMEN'S COMPENSATION § 28.11 (1952).
4. 180 Cal. 389, 182 Pac. 35 (1919).
5. 218 N.Y. 248, 112 N.E. 727 (1916).
6. 129 Pa. Super. 447, 195 Atl. 632 (1937).
7. 371 Ill. 497, 21 N.E.2d 575 (1939).
8. See also Short v. Kerr, 104 Ind. App. 118, 9 N.E.2d 114 (1937) and Denton v. Young, 226 P.2d 406 (Okla. 1950). *Contra,* Priglise v. Fonda J. & G.R.R., 192 App. Div. 776, 183 N.Y. Supp. 414 (3d Dep't 1920).

The employee in *Weidenbach v. Miller*[9] was a truck driver who stopped on the road, and made a fatal attempt to rescue a man drowning in a lake adjoining the highway. Accepting the finding below that the employer had not ordered the employee to make the rescue attempt, the court held that the emergency involved was too far removed from the employment as a truck driver to be considered incidental to it. The denial of compensation was affirmed. Thus the cases following the *Waters* decision, though rejecting the stricter requirement of employer benefit, have required sufficient connection with the employment to show that the emergency was an actual risk. It is submitted that there is logic in support of this delineation of the boundaries of compensability, since the employee probably feels a greater sense of responsibility for rescue when the emergency is related in some way to his employment.

A few cases, following the "positional risk" theory of causation, have required only that the employment bring the employee to a scene where his humanitarian impulses prompt a rescue attempt. These cases represent the most extreme limits of compensability, since they do not present a strong case of "course of employment" or of "arising out of the employment." In *O'Leary v. Brown-Pacific-Maxon, Inc.*,[10] the employee drowned in an attempted rescue of swimmers stranded in dangerous waters adjoining the employer's beach and recreation area. In affirming an award of compensation, the United States Supreme Court stated:

> The test of recovery is not a causal relation between the nature of employment of the injured person and the accident. . . . Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose.[11]

The decision was somewhat qualified by a concluding statement that the court was according weight to the decision below, and that a contrary finding below might not have been reversed.

Edwards v. Louisiana Forestry Comm'n[12] followed the *O'Leary* case in awarding compensation to a fire-watcher who was injured going to the aid of a child menaced by a rabid dog near the foot of the fire tower on the employer's premises. The court rejected the requirement of employer benefit, holding that the rescue of persons endangered on the employer's premises was within the scope of things contemplated by the employment, and that a failure to attempt rescue would have been inhuman and also possible grounds for dismissal of the employee.

The instant case raised the rescue problem for the first time in Missouri. While attending a company picnic in the course of his employment, Graves was drowned attempting to rescue his child who had fallen from a boat.[13] The court held that the

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9. 237 Minn. 278, 55 N.W.2d 289 (1952).
10. 340 U.S. 504 (1951).
11. *Id.* at 506-07.
12. 221 La. 818, 60 So. 2d 449 (1952).
13. See the complete statement of facts in the companion case note preceeding.

directions of the employer placed Graves at the picnic where the employer reasonably knew he might participate in boating. Thus "the necessity for the attempt to rescue the Graves child . . . was brought about by the conditions of Graves' employment"[14] and reasonably could have been foreseen by the employer. Further, the court held that the employer could reasonably have foreseen that Graves would respond to the emergency in the manner he did. The award of compensation was therefore affirmed.

The Missouri court thus recognizes the compensability of a rescue injury when the emergency which prompted it foreseeably arose from the employment and the rescue itself could have been anticipated by the employer. In so holding the court relied upon and cited the *Waters* and *Puttkammer* cases, and the general theory of this case seems in accord with the doctrines of those two decisions. Both of them, however, involved the rescue of a total stranger to the employer, and the facts of the instant case would suggest that the endangered child was owed some duty of care by the employer, and was more than a stranger.[15] The facts seem analogous to the *Ocean Acc. & Guar. Corp.* case discussed above, in which the decision was based on employer benefit. It is submitted that the silence of the court upon this issue of possible employer benefit indicates an unwillingness of the court to restrict compensation to the rescue situations involving employer benefit, and an intention to follow the more liberal approach of the *Waters* and *Puttkammer* cases.[16] The facts did not require an acceptance of the "positional risk" approach of the *O'Leary* and *Edwards* cases, and the compensability in Missouri of a rescue injury when the emergency prompting rescue is dissociated from employment remains undecided.

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14. 306 S.W.2d at 504.

15. The only comment of the court upon the status of the endangered child was a recognition that he was "a stranger to the employer, in so far as any master-servant relation is concerned." 306 S.W.2d at 503.

16. Since claimant's brief and oral argument in the instant case raised the contention that the rescue tended to protect the employer from liability, the court's silence on this point cannot be attributed to oversight.