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As the dissent stated, the testatrix' intention should not be defeated unless it clearly prejudices the public interest.

Missouri cases are in agreement that courts should be extremely cautious in holding a will provision void as against public policy. If the *Eyerman* decision is read as expanding the application of the doctrine to factual situations not previously held to be clearly in violation of the public interest, the result is highly questionable. Public policy should not be used as an elastic concept to be readily extended to situations which the court believes to be contrary to the public good, but which have never been articulated in either judicial decision or statute to be actually contrary to the public interest.

TERESA WEAR

WORKMEN'S COMPENSATION–RECOVERY ALLOWED FOR NEUTRAL ASSAULTS–RECOVERY DENIED FOR PERSONALLY-MOTIVATED ASSAULTS

Person v. Scullin Steel Co.[1]
Allen v. Dorothy's Laundry & Dry Cleaning Co.[2]

Person, an employee of Scullin Steel Company, was in the habit of driving Barber, a fellow employee, to work each day. Stopping by Barber's house on November 7, 1970, Person was told by Barber's wife that her husband would not be going to work that day. Person proceeded without him. Barber subsequently accosted Person at work and berated him for

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The right of a court to declare what is or is not in accord with public policy does not extend to specific economic or social problems which are controversial in nature and capable of solution only as the result of a study of various factors and conditions. It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring. There must be a positive, well-defined, universal public sentiment, deeply integrated in the customs and beliefs of the people and in their conviction of what is just and right and in the interests of the public weal. . . . If, in the domain of economic and social controversies, a court were, under the guise of the application of the doctrine of public policy, in effect to enact provisions which it might consider expedient and desirable, such action would be nothing short of judicial legislation, and each such court would be creating positive laws according to the particular views and idiosyncracies of its members. Only in the clearest cases, therefore, may a court make an alleged public policy the basis of judicial decision.

Id. at 325, 17 A.2d at 409. *See also* Jenkins v. First Nat'l Bank in Dallas, 107 F.2d 764, 765 (5th Cir. 1939); *In re* Rahn's Estate, 316 Mo. 492, 501, 291 S.W. 120, 123, *cert. denied,* 274 U.S. 745 (1927); *In re* Mohler's Estate, 343 Pa. 299, 303, 22 A.2d 680, 683 (1941).

1. 523 S.W.2d 801 (Mo. En Banc 1975).
2. 523 S.W.2d 874 (Mo. App., D.K.C. 1975).

not waiting for him. Person went about his work, but shortly thereafter was unexpectedly shoved by Barber, causing him to fall and sustain injuries.[3] Person's claim for workmen's compensation was denied.

Allen, an employee of Dorothy's Laundry & Dry Cleaning Company, was shot by a berserk rifleman while delivering laundry for his employer. Allen was apparently the victim of a "radical protestor" who also killed two policemen during his shooting spree. Allen's claim for workmen's compensation was upheld.

In both *Person* and *Allen* the courts were called upon to construe Missouri's amended workmen's compensation statute, section 287.120(1), RSMo 1969. Section 287.120(1) defines an employer's liability for injury or death of an employee stemming from an accident "arising out of and in the course of employment."[4] A 1969 amendment added the following to section 287.120(1):

> The term "accident" as used in this section shall include, but not be limited to, injury or death of the employee caused by the unprovoked violence or assault against the employee by any person.[5]

Person contended that this statute should be construed to mean that all work-related assaults, except those in which the claimant was the aggressor, should be compensable.[6] Allen contended that all unprovoked assaults should be compensable, and further, that no connection with the job need be shown.[7]

The Supreme Court of Missouri held in *Person* that claimant's injuries were not compensable because they arose out of a personal dispute.[8] The Kansas City District of the Missouri Court of Appeals decided in *Allen* that compensation should be awarded because the claimant was the victim of a neutral attack, not having its origins in either Allen's employment or in his personal matters.[9] In both cases the courts found that the 1969 amendment eliminated the necessity for showing that the

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3. Some evidence indicated the argument was pursued again at the time Barber shoved Person. 523 S.W.2d at 802.

4. Prior to the 1969 amendment, this section read in part:

> [T]he employer shall be liable irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of his employment. . . .

"Arising out of" the employment generally means that the injury was caused by an increased risk which claimant was subjected to by his employment. "In the course of" employment means that an injury takes place within the time period of the employment, at a location where the employee should reasonably be while fulfilling his duties or something incidental to them. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 6.00, 14.00 (1952).

5. § 287.120(1), RSMo 1969.

6. 523 S.W.2d at 803.

7. 523 S.W.2d at 877.

8. The court rejected the contention that an argument over transportation to and from work was connected with the employment. 523 S.W.2d at 806.

9. 523 S.W.2d at 878.

assault arose out of the employment only in the case of neutral assaults, leaving assaults stemming from personal matters uncompensable.

Workmen's compensation provides benefits to employees who sustain injury in a work-related accident, regardless of negligence or fault on the part of the employee. An "accident" is defined in Missouri as "an unexpected or unforeseen event happening suddenly and violently, with or without human fault and producing at the time objective symptoms of an injury."[10] In Missouri assaults are deemed to be accidents for purposes of workmen's compensation.[11] However, unlike other accidents where negligence is of no consequence, the cause of an assault is important in determining whether it is compensable. Assaults are generally categorized into three classes: those distinctly associated with the employment,[12] those personal to the claimant,[13] and those which are neutral assaults—stemming neither from employment nor from personal beginnings.[14]

For an assault to be compensable under Missouri law before 1969, it had to "arise out of" the work situation and thus fall in the category of assaults distinctly associated with the employment. A compensable assault must have had its origin in something connected with the employment or some particular duty which the employment imposed,[15] or the employment had to expose the employee to an unusual risk of injury which was not shared by the public.[16] Consequently, prior to 1969 neither so-called "neutral assaults"[17] nor personally-motivated assaults[18] were compensable.

Two 1965 neutral assault cases denied claims specifically because the

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10. § 287.020 (2), RSMo 1969.

11. Keithley v. Stone & Webster Eng'r Corp., 226 Mo. App. 1122, 1127-28, 49 S.W.2d 296, 300 (K.C. Ct. App. 1932).

12. Missouri finds a risk to be distinctly associated with the employment when the degree to which the employee is exposed to it by reason of his employment is over and above that of the public at large. Sweeney v. Sweeney Tire Stores Co., 227 Mo. App. 93, 100, 49 S.W.2d 205, 208 (St. L. Ct. App. 1932). In *Sweeney* the decedent, manager of a tire store, was killed during a robbery. The court held that the assault was peculiar and special to the status of the deceased as a manager and therefore compensable.

13. Personal assaults are those which have no connection with the employment—*e.g.*, an assault stemming from an argument over a bottle of wine when wine was not permitted on the employer's premises and had nothing to do with work. Lardge v. Concrete Products Mfg. Co., 251 S.W.2d 49 (Mo. 1952).

14. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 11.31 (1952). *See* Ries v. DeBord Plumbing Co., 186 S.W.2d 488 (St. L. Mo. App. 1945) (claimant was assaulted when leaving work for no known reason and without provocation).

15. Macalik v. Planters Realty Co., 144 S.W.2d 158, 159 (St. L. Mo. App. 1940).

16. Ries v. DeBord Plumbing Co., 186 S.W.2d 488, 489 (St. L. Mo. App. 1945).

17. Kelley v. Sohio Chem. Co., 383 S.W.2d 146 (K.C. Mo. App. 1964), *aff'd*, 392 S.W.2d 255 (Mo. En Banc 1965); Liebman v. Colonial Baking Co., 391 S.W.2d 948 (St. L. Mo. App. 1965); Scherr v. Siding & Roofing Sales Co., 305 S.W.2d 62 (St. L. Mo. App. 1957); May v. Ozark Cent. Tel. Co., 272 S.W.2d 845 (St. L. Mo. App. 1954); Long v. Schultz Shoe Co., Inc., 257 S.W.2d 211 (St. L. Mo. App. 1953); Ries v. DeBord Plumbing Co., 186 S.W.2d 488 (St. L. Mo. App. 1945).

18. Toole v. Bechtel Corp., 291 S.W.2d 874 (Mo. 1956); Foster v. Aines Farm Dairy Co., 263 S.W.2d 421 (Mo. 1954); Lardge v. Concrete Products Mfg. Co., 251

injuries did not "arise out of" the employment. In *Kelley v. Sohio Chemical Co.*[19] an employee was struck in the head by an unknown assailant for no apparent motive. The Missouri Supreme Court denied compensation because the claimant had failed to meet her burden of showing that her work exposed her to extra hazards and that there was a direct causal connection between the assault and her employment. The court stated: "It is not sufficient that the employment may simply have furnished an *occasion* for an injury from some unconnected source."[20] In *Liebman v. Colonial Baking Co.*[21] the St. Louis Court of Appeals denied recovery to a bakery employee who was assaulted by a drunken stranger while delivering bread, for the same reasons as stated in *Kelley*.

These two decisions were consistent with the Missouri courts' rejection of the "positional-risk" doctrine. This doctrine, which can be used to justify coverage of all varieties of neutral injury-producing risks, is that:

> An 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 claimant in the position where he was injured.[22]

Positional-risk was expressly rejected in Missouri in *Lathrop v. Tobin-Hamlton Shoe Manufacturing Co.*[23] *Lathrop* was a case of a classic neutral risk, where a driverless, runaway car crashed through the window next to which claimant was working and injured her. Compensation was denied on the grounds that the injury was not a rational consequence of a hazard connected with the employment.

In both *Person* and *Allen* the courts found that the 1969 amendment to section 287.120(1) was intended to enlarge the category of compensable assaults to include neutral assaults such as those in *Kelley* and *Liebman*. Thus, a claimant in a neutral assault case such as *Allen* is no longer forced to show that the injury was one which had a direct connection with the employment. Such a claimant now has to show only that he was in the course of his employment and that the assault did not stem from a personal motivation. In *Person,* however, the court found that the legislature had not intended to enlarge the category of compensable assaults to include those that are personally motivated. Refusing compensation for personally-motivated assaults is consistent with the view of most jurisdictions.[24]

Judge Bardgett dissented in *Person,* saying that the legislature intended to compensate even privately-motivated assaults. He based this

S.W.2d 49 (Mo. 1952); Staten v. Long-Turner Constr. Co., 185 S.W.2d 375 (K.C. Mo. App. 1945).

19. 383 S.W.2d 146 (K.C. Mo. App. 1964), *aff'd,* 392 S.W.2d 255 (Mo. En Banc 1965).

20. 392 S.W.2d at 257.

21. 391 S.W.2d 948 (St. L. Mo. App. 1965).

22. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 6.40 (1952).

23. 402 S.W.2d 16 (Spr. Mo. App. 1966).

24. Freeman v. Callow, 525 S.W.2d 371, 376 n.3 (Mo. App., D. Spr. 1975).

position on the fact that compensation was denied in *Kelley* and *Liebman* because the assaults did not "arise out of" the employment, not because the attacks were provoked.[25] This analysis of *Kelley* and *Liebman* and the subsequent amendment to the statute led Judge Bardgett to conclude that all assaults, even those with an origin outside the employment, are compensable, except where the claimant provoked the attack.[26] This broad view of the amendment, however, would extend coverage far beyond its past limits in Missouri, and in fact beyond that allowed in most states.[27]

In *Person* and *Allen* the Missouri courts have adopted a positional-risk theory, at least in assault cases. To be compensable, non-personally-motivated assaults need only occur "in the course of" the employment, but need not be distinctly associated with the employment. However, all personally-motivated assaults will remain noncompensable. Such a test is unique in the workmen's compensation area in Missouri, going further in allowing compensation for an assault than other types of accidents.

The Missouri courts in *Person* and *Allen* have recognized the need to extend workmen's compensation benefits to neutral assault victims in their interpretation of section 287.120(1), although the section itself is unclear in its wording and intent.[28] It seems that this view should logically be extended to allow compensation for all neutral accidents, not just assaults. The "runaway car" type of case would then be compensable. Applying the positional-risk theory to other types of accidents in which the employee is injured from a non-work-related source would place regular accident coverage on a parallel with assault coverage. If compensation were extended to neutral accidents, only those injuries which were received due to idiopathic causes—*i.e.*, causes peculiar to the employee and in no way stemming from the employment activity, would remain noncompensable.[29]

The purpose of workmen's compensation is to provide recovery for employment-associated injuries. Refusing to compensate only personal assault victims and those who suffer injuries due to idiopathic causes would be consistent with this goal. It would make the employer bear the burden of all injuries which were work-related, either directly, or because of the

25. 523 S.W.2d at 807-08.

26. This interpretation of the *Kelley* and *Liebman* decisions ignores the fact that the assaults in both cases were "neutral" rather than privately-motivated. Therefore, legislative intent to compensate personal assaults was not necessarily the reason for the amendment to section 287.120(1).

27. Only Louisiana compensates private assaults which have no connection with the employment other than that they occur during the course of the employment. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 11.21 (1952).

28. In fact, a literal reading of section 287.120 (1), RSMo 1969, gives no indication of a change in the law at all. The proviso defining "accident" to include assault gives no indication that the "arising out of" or "in the course of" requirements are not to apply to assaults.

29. *See* Collins v. Combustion Eng'r Co., 490 S.W.2d 394 (Mo. App., D. St. L. 1973). An example of an idiopathic cause of an accident is a dizzy spell caused by an employee's non-work-related illness.

location of the victim in his course of employment. Extending coverage to neutral assaults, but not extending coverage to neutral accidents in general, draws an illogical dividing line.

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