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Recent Cases

CIVIL PROCEDURE—COLLATERAL ESTOPPEL—
CONSENT JUDGMENTS

Donohue v. St. Louis Public Service Co.1

Donohue brought an action against defendant for injuries allegedly resulting from an accident with defendant's bus. Before the case was tried Donohue died and his widow began an action for wrongful death. To avoid the possibility of double liability, defendant brought a bill in the nature of interpleader joining deceased's widow and his personal representative.2 In the interpleader proceeding the court entered a consent judgment barring further proceedings in the suit for personal injuries. In the subsequent action for wrongful death, defendant contended that death resulted from cancer and not the injuries. Judgment was entered for defendant.

Upon appeal the supreme court reversed, holding that the consent judgment barring the personal injury action necessarily determined that death was a result of the injuries. Otherwise the personal injury action could not legally be barred.3

It is well settled that a consent judgment operates as res judicata to bar a subsequent action upon the same claim or cause of action the same as a judgment entered after contest.4 The doctrine of res judicata applies not only to those issues actually litigated and determined, but it also bars litigation of those issues which might have been raised under the pleadings; i.e., the defendant cannot rely on defenses which might have been raised in the original action, nor can the plaintiff

1. 374 S.W.2d 79 (Mo. 1963).
2. Under Missouri law an action for personal injury does not survive where the injured party dies as a result of the injury (§ 537.080, RSMo 1959). If death results from other causes the action for personal injury does survive (§ 537.020, RSMo 1959). In Plaza Express Co. v. Galloway, 280 S.W.2d 17 (Mo. En Banc 1955), the court held that to avoid the possibility of double liability, a defendant may join the widow and personal representative to determine which one has the right to proceed against him.
3. Donohue v. St. Louis Public Service Co., supra note 1, at 82.
Cited as authority contra: Lawrence Mfg. Co. v. Janesville Cotton Co., 138 U.S. 552 (1891); Wadham v. Gay, 73 Ill. 415 (1874) (allowing equity to reopen decree to see if it was justified).

(488)
raise new grounds for recovery on which he might have relied in the original action.  

The doctrine of collateral estoppel applies when a different claim or cause of action is involved, as in the principal case. The rule of collateral estoppel only prevents relitigation of those issues actually litigated or determined by the prior action.  

It is often difficult to determine what issues were decided in a contested action, and this problem is even more complex when the judgment is entered by consent.  

The majority of the jurisdictions, including Missouri, accord a consent judgment the same estoppel effect as a judgment entered after contest. This is consistent with early United States Supreme Court decisions holding a consent decree not to be a mere authentication or recording of the agreement, but, rather, a judicial act of the court. In Nashville, C. & St. L. Ry. v. United States, a consent decree was held to bar a subsequent suit upon a claim for mail services, although at the time the decree was entered payment of any claim was prohibited by law.

This view has been criticized as being unjustly harsh. The argument is that a party enters into consent judgments for reasons other than the actual merits of the claim: "smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time." A case which has been criticized as being particularly harsh is Biggio v. Magee. The Massachusetts court entered a consent judgment between Magee and Biggio’s insurer allowing Magee substantial recovery. Although Biggio in a later suit produced sufficient evidence to show liability on the part of Magee, recovery was denied because the prior consent judgment was held to be an estoppel. The harshness of the result could

5. Restatement, Judgments §§ 47, 48 (1942).  
6. Cromwell v. County of Sac, 94 U.S. 351 (1876); Restatement, Judgments §§ 68-70 (1942); Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1 (1942).  
9. Short v. Taylor, 137 Mo. 517, 38 S.W. 962 (1897); Owen v. City of Branson, 305 S.W.2d 492 (Spr. Mo. App. 1957); McDougal v. McDougal, 279 S.W.2d 731 (Spr. Mo. App. 1955).  
11. Supra note 8, at 266.  
12. Cromwell v. County of Sac, supra note 6 at 356.  
have been avoided had Biggio's insurer received a covenant not to sue and had the case dismissed without prejudice. This would have protected both the insurer's interests as well as Biggio's.\textsuperscript{15}

In a situation such as the principal case such hardship is not present. By allowing the defendant to litigate the issue of cause of death in the wrongful death action after the personal injury suit was barred, he could avoid liability for his negligence by inconsistent judgments.\textsuperscript{18} The interpleader action was intended to protect defendants from the possibility of double liability by inconsistent judgment, not from all liability.

With the possible exception of California\textsuperscript{27} and Illinois,\textsuperscript{18} it would appear that only the federal courts have denied consent judgments collateral estoppel effect. In \textit{United States v. International Bldg. Co.}\textsuperscript{29} the Supreme Court departed from its earlier holdings which considered a consent judgment to be a judicial determination worthy of collateral estoppel effect.\textsuperscript{20} Instead, the court held that absent a showing that the issues raised by the pleadings, were determined either by the court or that the agreement between the parties was based upon the merits and not some collateral consideration, collateral estoppel would not apply.\textsuperscript{21}

Since the \textit{International Bldg. Co.} case involved the depreciation basis of a building for tax purposes, it may be possible to explain the court's holding as a reluctance to apply the doctrine of collateral estoppel broadly in federal tax cases.\textsuperscript{22} However, the scope of the decision has not been limited to tax cases.


\textsuperscript{16} \textit{Donohue v. St. Louis Public Service Co., supra} note 1, at 82.

\textsuperscript{17} \textit{Taylor v. Hawkinson, 306 P.2d 797} (1957); \textit{but see Wheeler v. Trefftz, supra} note 8.

\textsuperscript{18} \textit{Hellstrom v. McCollum, 324 Ill. App. 385, 58 N.E.2d 295} (1944). \textit{See also Burgess v. Consider H. Willett, Inc., 311 Ky. 745, 225 S.W.2d 315} (1949), while the court used broad language in denying estoppel effect, the case actually involved a question of mutuality.

\textsuperscript{19} \textit{345 U.S. 502} (1955).

\textsuperscript{20} \textit{Last Chance Mining Co. v. Tyler Mining Co., supra} note 10, at 691.

\textsuperscript{21} \textit{United States v. International Bldg. Co., supra} note 18, at 506.

\textsuperscript{22} \textit{Commissioner v. Sunnen, 333 U.S. 591} (1948): Sunnen assigned patent royalties to his wife which she applied to her income tax returns. The Tax Court found that Sunnen retained sufficient interest in the royalty contracts and control of the income derived from them to justify taxing the income as his. An earlier decision holding the arrangement valid did not work an estoppel in litigation regarding income taxes for different years where decisions of the court have changed the applicable legal principles in the interim—even though the facts be similar or identical. \textit{Western Maryland Ry., 289 U.S. 620} (1933). Prior decision allowed corporation to deduct from income an amortized discount on bonds sold by the corporation's predecessor. In a subsequent action involving like deductions for later years, the court held the prior judgment worked an estoppel against the United States. The court ruled that the identical questions were involved: the language of the Revenue Acts, the regulations issued by the Treasury, and the facts of the sale of the bonds and successive ownership remained unchanged.
In Lawlor v. National Screen Service Corp.,23 an antitrust action, the court in applying the International Bldg. Co. rule, held that where there had been no hearing, no stipulation of fact and no showing that the issues were determined by the court, the judgment had no collateral estoppel effect.24 United States v. Eastport Steamship Corp.25 involved a claim to recover charter hire. It was held (again relying on the International Bldg. Co. case) that the prior consent judgment was inoperative as an estoppel unless the merits were actually litigated and determined.26

Plaza Express Co. v. Galloway27 held that the interpleader proceeding brought requiring decedent’s administrator and widow to interplead and have the issue of cause of death adjudicated, was an equitable proceeding not triable before a jury. Therefore, in Missouri, a defendant faced with the possibility of defending a personal injury action and a wrongful death action is left in a difficult position. If the defendant interpleads decedent’s administrator and widow to determine the cause of death, Plaza precludes a jury determination of the issue in the interpleader proceeding, while Donohue works an estoppel to prevent relitigation of the issue once judgment has been entered in the interpleader proceeding, even when entered by consent. The result is that by interpleading to avoid the possibility of double litigation (vexation)28 or double recovery,29 a defendant gives up the right to have a jury determine the cause of death.

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Trapp v. United States, 177 F.2d 1 (10th Cir. 1949). The Court held that the income received from certain oil and gas leases could not be claimed as community property for tax purposes. A prior judgment which permitted the arrangement would not support a plea of estoppel where that judgment was entered pursuant to written stipulations of the parties. The court said that the doctrine of collateral estoppel is to be applied narrowly in cases involving income taxes for different years. Tait v. Commissioner, 78 F.2d 193 (3d Cir. 1935). The case involved facts similar to those in International Bldg. Co. The court held that the rate for depreciation allowed in one year is not conclusive in fixing the rate for subsequent years—each case depends upon its own individual facts and evidence. Paul, Res Judicata in Federal Taxation, in SELECTED STUDIES IN FEDERAL TAXATION (2d ser.) 104 (1938); Griswold, Res Judicata in Federal Tax Cases, 46 YALE L. J. 1320 (1937); Annot., 92 L.Ed. 913 (1947).

24. Id. at 935.
26. Id. at 801; Fruehauf Trailer Co. v. Gilmore, 167 F.2d 324 (10th Cir. 1948).
27. Downs v. United Rys., 184 S.W. 995 (Mo. 1916).
29. Supra note 2, at 24. For a possible solution, see dissenting opinion, at 26.
EVIDENCE—UNREASONABLE SEARCH AND SEIZURE—
SCOPE OF EXCLUSIONARY RULE

Diener v. Mid-American Coaches, Inc.*

Plaintiff sued defendant bus company on the theory of res ipsa loquitur for injuries received when the bus in which he was riding ran off an embankment after colliding with an oncoming automobile. The driver of the automobile was killed in the accident. Plaintiff claimed that the trial court committed error by allowing defendant's expert to testify that a blood sample drawn from the body of the deceased automobile driver indicated that he was intoxicated. This evidence tended to rebut the res ipsa presumption and to establish the negligence of the other driver as the cause of the accident. Plaintiff argued that "... said evidence was incompetent because obtained by the unlawful desecration of a dead body amounting to an unconstitutional search and seizure, repugnant to common ideas of decency" and that "those who participated in this procedure were guilty of a crime, and the use of the data obtained was against public policy; that only evidence lawfully obtained may be adduced." The court held the evidence was competent and admissible.

As a general proposition, the admissibility of evidence is not affected by the means through which it was obtained unless obtained by a search and seizure in violation of constitutional guarantees. But even where the search and seizure has violated the constitution, the right to complain is personal to the party so aggrieved.

The rationale underlying the Fourth Amendment prohibition against unlawful search and seizure and its operation as an exclusionary rule of evidence is rooted in the principles of 18th century "natural law" and "natural rights." John Locke and his contemporary liberal philosophers, upon whom the framers of the American Constitution relied so heavily, held the view that every man has the "natural right" to be secure in his home and person. Furthermore, since harsh and tyrannical government was the chief invader of this right, Locke and others directed their proposals toward the restraint of governmental action. Traditionally, therefore, the Fourth Amendment prohibition has been held to apply only to searches and seizures involving state action.

It is from this background that two kinds of cases have emerged as being

1. 378 S.W. 2d 509 (Mo. 1964).
2. Brief for Respondent, p. 4, id.
5. See development in note 8, infra.
6. See notes 24, 25, infra.
within the scope of the exclusionary rule: (1) criminal cases, since the direct action of the state against the individual is the heart of the controversy, and (2) certain forfeiture proceedings, since while they are civil in form they are criminal in nature.

Most courts have refused to extend the exclusionary rule to purely civil cases, and, while there have been recent allusions to the applicability of the rule to civil suits, there is little authority in point. Furthermore, the cases inaccurately draw the line between civil and criminal proceedings, when the real distinction appears to be the presence or absence of the proscribed state action.

Some judges have applied the exclusionary rule to civil cases, and have done so even where there is no state action involved. They argue that "the unlawful search violates the identical privacy, whether its fruits are used to convict in a criminal prosecution or to forfeit a personal right in a divorce action," and that "here we deal not with criminal sanctions, but constitutional guarantees granted to the individual to be secure in his home. The balance to be maintained between morality and law must be tipped in favor of that consideration resting on our fundamental law." This approach seems to ignore the historical development of the unlawful search and seizure doctrine just as much as the civil-criminal distinction.

Wigmore supports general admissibility of illegally obtained evidence in both civil and criminal actions. He contends that for reasons of justice and expediency it is simply not worth the time and trouble to make an issue of the collateral matter of how the evidence was obtained. Its admission does not condone police-state tactics; rather, the illegality is merely ignored in the particular litigation. Moreover, the aggrieved party still has other means of redress available.


11. 31A C.J.S. Evidence, supra note 4.


15. 8 Wigmore, Evidence, supra note 4, at 6:

As a general rule, our legal system does not attempt to do justice incidentally and to enforce penalties by indirect means. A judge does not [7] attempt, in the course of a specific litigation, to investigate and punish all offenses which incidentally cross the path of the litigation. Such a practice would offend our system of law in several ways. (1) It amounts to trying a violation of law without the proper complaint and process which are
Missouri Supreme Court Rule 33.03(a) is directly aimed at state action, and, in applying the exclusionary principle to criminal cases, the courts of this state have apparently followed the civil-criminal distinction. In Diener, however, the Missouri Supreme Court implies that it would have been willing to exclude evidence on the grounds of illegal search and seizure in a civil case, had there been state action and had plaintiff standing to raise the issue. If this is correct, the clearly worded Rule 33.03(a) providing for exclusion in a criminal case when the evidence is seized by a peace officer could become a minimum standard of protection. The court would be free to expand it by opinion whenever state action is involved, regardless of whether the case is civil or criminal.

Another feature of the current Missouri rule which could limit its expansion is the provision that the evidence must be seized by a peace officer. How broad is this term? In Diener it was the coroner's "hireling" who took the blood, and a Missouri coroner does have some duties as a "Conservator of the Peace." The gist of the statutes relating to the coroner seems to be, however, that while he does possess certain authority of a police nature in the absence or at the request of the sheriff, his duties relating to inquests are a separate facet of his responsibility. The taking of the blood sample is not related to his duties as a conservator of the peace.

Another limitation on the exclusionary rule of evidence is that the right to be free from unconstitutional searches and seizures is a personal right. Only persons who are "aggrieved" may complain; those merely prejudiced by the use of evidence illegally seized from another may not. Other cases say that the right to essential for its correct investigation. (2) Determination of incidental violations jeopardizes the primary litigation by delaying, interrupting, confusing and sometimes frustrating it. (3) It does all of this unnecessarily and gratuitously; the persons harmed by the supposed incidental violations have direct means of redress available and should not be allowed to attend to their complaints in this indirect and possibly tardy manner. (4) The judicial rules of evidence were never meant to be used as an indirect method of punishment. To punish the incidental violation by rendering evidence obtained thereby inadmissible in the primary litigation is to enlarge improperly the fixed penalty of the law, that of fine or imprisonment, by adding to it the forfeiture of some civil right through loss of the means of proving it.

16. Mo. Sup. Ct. R. 33.03(a):
A person aggrieved by an unlawful search and seizure made by a peace officer and against whom there is pending any criminal proceeding growing out of the subject matter of the said search and seizure, may file in the court in which such proceeding is pending, a motion to suppress the use in evidence of the articles taken by means of such seizure and any evidence gained by the peace officers by means of such search.” (Emphasis added.)

17. § 58.180, RSMo 1959.
18. §§ 58.180, 58.155, 58.190, 58.200, 544.120, 544.140, RSMo 1959.
20. 77 N.J. Super. 328, 186 A.2d 499 (1962) (abortionist sought to invoke the privilege against the admission of the results of an examination of the victim on the grounds that her constitutional guaranty had been violated.).
assert the protection is held only by persons with a proprietary interest in the articles seized or by persons owning or in possession of the premises searched. The Missouri Supreme Court held in Diener that plaintiff had no standing to raise the illegal search and seizure issue. "There is no . . . relationship between plaintiff and McNamee [the deceased driver] which would entitle plaintiff to raise the question of a violation of constitutional guarantees enjoyed by McNamee." The court's statement suggests, however, that although the right is personal to the actual victim of the search and seizure, perhaps the next of kin or personal representative of a deceased victim might have standing to challenge the evidence.

Plaintiff's vague objection also suggested a relationship between unconstitutional search and seizure and (1) the right of privacy and (2) a property interest in the body of McNamee. The court relied on Fretz v. Anderson in saying "The right of privacy is a personal one which in the absence of statute dies with the person to whom it is of value and cannot be claimed by his estate or next of kin or by a stranger." Regarding the "property interest" contention, the court noted that plaintiff and McNamee were strangers and that plaintiff had no interest in the body which would allow him to complain of its mutilation or desecration. Inferentially, a relative or personal representative could have successfully asserted this argument since it is generally accepted that there are quasi-property rights in a corpse which belong to the proper parties.

Plaintiff objected also on the ground that "There was no evidence . . . that the coroner's hireling who took the blood . . . did so with the consent of the next of kin, at the lawful direction of any responsible public officer or in accordance with any lawfully established procedure." In answering this the court merely said that the record was "silent" on the question of whether the doctor had the consent of the next of kin to draw the blood, which apparently means that plaintiff had at least the burden of going forward with evidence that the procedure was in fact unlawful, a burden which he did not sustain.

22. State v. Engberg, 377 S.W.2d 282 (Mo. 1964); State v. Martin, 347 S.W.2d 680 (Mo. 1961); State v. Askew, 331 Mo. 684, 56 S.W.2d 52 (1932).
24. 5 Utah 2d 290, 300 P.2d 642 (1956).
25. Id. at 296, 300 P.2d at 646.
27. But see, Streipe v. Hubbuch Bros. & Wellendorf, supra note 4, which held that there is no right of property, in the usual sense, in a body, that a corpse is not a "possession" within the contemplation of the constitutional guaranty, and that an autopsy performed without consent of the next of kin was not an "unreasonable search and seizure."
31. The court in State v. Hepperman, 162 S.W.2d 878, 887 (Mo. 1942), citing 20 Am. Jur. Evidence § 396 (1939) stated, "... the burden is on the [party opposing the admission] to offer evidence and affirmatively demonstrate the illegality of the search and seizure." This suggests that the opponent may even have the burden of persuasion.
The decision in *Diener* is sound for several reasons: (1) There was no evidence of the illegality of the search and seizure; (2) Plaintiff's constitutional right was not violated; (3) There was no relationship between the plaintiff and the victim of the search and seizure which would permit him to complain; (4) The victim's relatives were not complaining; (5) It is a civil case. The importance of the case, however, is that the court did not base its decision on the distinction between civil and criminal cases. This is better analysis since the real basis of the exclusionary rule lies in the historical concept of natural rights abridged by state action, regardless of the nature of the suit.

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TORTS—DUTY OF POSSESSOR OF LAND TO FIREMEN

*Bartels v. Continental Oil Co.*,¹  
   
   George Bartels, a captain in the Kansas City, Missouri fire department, was in a Kansas City, Kansas street² fighting a gasoline fire on defendant's property, when one of its inadequately vented storage tanks exploded and rocketed into the street, engulfing him in a ball of fire. Plaintiffs recovered in a wrongful death action, and the Missouri Supreme Court affirmed, holding that the evidence supported a finding of existence of hidden danger known to the possessor and failure to warn the fireman of a danger which he was not bound to accept as a usual peril of his profession.

In cases like *Bartels*, where the issue is the negligence of a possessor of land, the extent of the duty owed depends on whether the injured person was a trespasser,³ licensee,⁴ or invitee.⁵ Most public officials acting in performance of their duties have been classed as invitees,⁶ but the place of firemen (and policemen) in the traditional scheme of classification has caused considerable difficulty.

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¹ 384 S.W.2d 667 (Mo. 1964).
³ One who is on another's land without the possessor's consent or a privilege to be there. *Restatement, Torts* § 329 (1934).
⁴ One privileged to be on the land for his own benefit by virtue of the possessor's consent. *Glaser v. Rothschild*, 221 Mo. 180, 120 S.W. 1 (En Banc 1909); *Restatement, Torts* § 330 (1934); *Restatement* (Second), *Torts* § 330 (Tent. Draft No. 5, 1960).
⁶ E.g., *Jennings v. Industrial Paper Stock Co.*, 248 S.W.2d 43 (K.C. Mo. App. 1952) (public health inspector); *Paubel v. Hitz*, 339 Mo. 274, 96 S.W.2d
Obviously firemen coming onto the land in the performance of their duties are not trespassers. Missouri\footnote{follows the majority rule that they are licensees.} until recently when the Illinois case of Dini v. Naiditch treated firemen as invitees,\footnote{only special fact situations warranted invitee status.} some states consider them sui generis.\footnote{Notably, the majority view is the result of starting with the duty the court feels the landowner owes firemen and working back to the category that prescribes that duty. Because firemen are privileged to be anywhere on the premises at any time, the duty owed invitees, to use reasonable care to keep the premises safe or warn of dangers present, would exist at all times and include the entire premises. The possessor has little opportunity to prepare for firemen since they come in emergencies and at unexpected times and places, so most courts say that invitee status would put an overly severe burden on the possessor. Many also point out that because firemen enter under a privilege given by law they are not invited in the legal sense and so they cannot be invitees. The only category left is that} 1

\begin{enumerate}
\item 369 (1936) (postman); Boneau v. Swift & Co., 66 S.W.2d 172 (St. L. Mo. App. 1934) (livestock inspector); Fred Howland, Inc. v. Morris, 143 Fla. 189, 196 So. 472 (1940) (building inspector); Sheffield Co. v. Phillips, 69 Ga. App. 41, 24 S.E.2d 834 (1943) (meter reader); Toomey v. Sanborn, 146 Mass. 28, 14 N.E. 921 (1888) (garbage collector).
\item 13. E.g., Anderson v. Cinnamon, supra note 7; Shypulski v. Waldorf Paper Products Co., supra note 11; Beehler v. Daniels, supra note 8.
\item 14. E.g., Anderson v. Cinnamon, supra note 7; Lunt v. Post Printing & Publishing Co., supra note 8 (it is not an invitation even if the possessor turns
of licensee; therefore firemen are licensees.\textsuperscript{15}

Once firemen are classed as licensees, all that remains is to apply the duty owed in the particular jurisdiction to the facts. The \textit{Restatement of Torts} view is that the possessor owes a duty to warn or make safe as to known dangerous conditions which the licensee is not likely to discover.\textsuperscript{16} Missouri has never adopted this view, following instead the majority view that the licensee takes the premises as he finds them, the possessor's only duty being not to injure him by willful and wanton misconduct or active negligence.\textsuperscript{17}

The result under either view can be admittedly harsh.\textsuperscript{18} As might be expected, the courts have developed ways of giving firemen more protection. One way is to treat firemen sui generis and require duties not necessarily incident to any particular status.\textsuperscript{19} Another, in effect, treats firemen as invitees when they are rightfully using the approaches that are prepared and kept open as a means of access to the property for those entitled to enter.\textsuperscript{20}

The \textit{Bartels} case involves the hidden dangers doctrine, a widely recognized addition to the duty owed licensees. Stated simply, where the possessor knows the fireman is on the premises and has the opportunity, he has a duty to warn of known hidden dangers the licensee is unlikely to discover.\textsuperscript{21}

In cases in other jurisdictions involving injury to firemen, hidden dangers have included oil saturated soil,\textsuperscript{22} stored benzol,\textsuperscript{23} seeping gasoline in a closed room,\textsuperscript{24} a recently drained gasoline storage tank,\textsuperscript{25} an inadequately vented gasoline

in the alarm); Woodruff v. Bowen, supra note 8; Aldworth v. F. W. Woolworth Co., supra note 8; Shypulski v. Waldorf Paper Products Co., supra note 11.

\textsuperscript{15} It is beyond the scope of this note to evaluate the arguments. For criticism see 2 HARPER & JAMES, Torts § 27.14; 47 CORNELL L.Q. 119, 121 (1961).

\textsuperscript{16} \textit{Restatement, Torts} § 345 (1934) covers persons entering in the exercise of a privilege independent of the possessor's consent. Comment b makes the duty owed to them the same as that owed a licensee, which is covered in § 342. Cf. \textit{Restatement (Second), Torts} § 345 (Tent. Draft No. 5, 1960), retaining this and adding the rule of the Meiers case, supra note 11. For statement of the \textit{Meiers} rule see text referred to at note 20, infra.

\textsuperscript{17} E.g., Anderson v. Cinnamon, supra note 7; Twine v. Norris Grain Co., 226 S.W.2d 415 (K.C. Mo. App. 1950) and citations therein; Porchey v. Kelling, 335 Mo. 1034, 185 S.W.2d 820 (1945) (wherein the doctrine is said to be the majority rule).

\textsuperscript{18} E.g., Hamilton v. Minneapolis Desk Mfg. Co., 78 Minn. 3, 80 N.W. 693 (1899).

\textsuperscript{19} The cases indicate the duty owed lies somewhere between that owed to a licensee and that owed an invitee. See, e.g., cases cited supra note 11. \textit{But see 5 VAND. L. REV.} 248, 249 (1952) where it is said to lie between that owed to a trespasser and that owed a licensee, and 47 CORNELL L.Q. 119, 122 (1961) to the effect that no new standard of care has been imposed.

\textsuperscript{20} Meiers v. Fred Koch Brewery, supra note 11.

\textsuperscript{21} "Hidden danger" is not the same as "dangerous condition." See Annot., 55 A.L.R.2d 525 (1957) for collection of cases.


\textsuperscript{23} Mason Tire & Rubber Co. v. Lansinger, 108 Ohio St. 377, 140 N.E. 770 (1923).


\textsuperscript{25} James v. Cities Service Oil Co., 66 Ohio App. 87, 31 N.E.2d 872 (1939).
storage tank,\textsuperscript{26} escaping gas,\textsuperscript{27} the presence of explosives,\textsuperscript{28} and significantly, a structurally defective wall.\textsuperscript{29} On the other hand, an open elevator well,\textsuperscript{30} a split acetone container,\textsuperscript{31} an open excavation,\textsuperscript{32} stacked containers of petroleum products,\textsuperscript{33} and the mere presence of gasoline\textsuperscript{34} have not been considered hidden dangers.

Missouri's leading case on firemen, \textit{Anderson v. Cinnamon},\textsuperscript{35} recognized this doctrine, but it was the court's opinion that it is unusual hazard that requires warning to licensees. Harmful chemicals, explosives and other inherently dangerous materials developed by modern science and industry, no doubt, would be within this rule at least under circumstances where licensees could not be expected to know of their presence or effect.\textsuperscript{36}

The injury in that case resulted from a structurally defective porch. In denying recovery, the court said "we do not think the rule requiring warning in the case of unusual hazard from explosives should be applied to the same extent to structural conditions generally."\textsuperscript{37} This language is important in discussing the Bartels case.

The law of Kansas, where Bartels was injured,\textsuperscript{38} controlled.\textsuperscript{39} Kansas had never decided this question, so the Missouri court applied the general rules of status and the possessor's duty.\textsuperscript{40} Since Missouri is in accord with these rules,\textsuperscript{41} the result would probably be the same in a case controlled by Missouri law.

Plaintiffs contended that because the fireman was off the premises his status was unimportant,\textsuperscript{42} but the court did not answer this argument, proceeding to discuss law applicable to injuries occurring on the land. Thus it would seem this decision would apply in the usual case where the injury does occur on the land. \textit{Anderson} held a structurally defective porch was not an unusual hazard;
Bartels held an inadequately vented gasoline storage tank was a hidden danger. In comparing the two, it is clear that the Bartels result is within the Anderson language. The real importance of the case lies in a comparison of the language used in each case—previously defined terms of art meaning different things, the use of which suggests that Bartels enlarges a possessor's duty.

If Bartels were the first case on the subject it could be argued that the outcome of the case was more important than the words used to achieve it, and therefore not too much should be inferred from semantic differences. Similarly, if it were not a major point it could be argued that precise language is not to be expected on collateral matters. In both cases, however, the question was directly in issue; thus the words can be taken as having been carefully chosen in awareness of their implications.

The court in Anderson treated "hidden danger" and "unusual hazard" as having different meanings, the former apparently being broader. Thus if a court chose to say a possessor must warn of hidden dangers, and at the same time rejected the phrase "unusual hazard," it would be reasonable to suppose many things would be included in the former that would not logically be included in the latter. Whether the difference is one of kind or degree is not so important here as the fact that there is a difference.

In deciding Bartels, the court, having before it the "unusual hazard" test of Anderson, spoke throughout of "hidden dangers." Independent of the facts of either case, it is reasonable to suppose a reason for the change, especially when consistent language would be desirable if no difference were intended.

Turning now to the cases, there can be no doubt that "harmful chemicals, explosives, and other inherently dangerous materials" can reasonably include gasoline. Substituting terms, Anderson then characterized gasoline as an unusual hazard. Having once called it one thing, why should the court later call it something else? The change was not required; if the court wanted to limit itself to the earlier dictum, it could have used the unusual hazard test and still affirmed the judgment. Having used broader language, the court may have intended a broader test; one that would encompass structural defects.

Further support for this conclusion comes from comparing the way the Missouri Supreme Court in each case used Shypulski v. Waldorf Paper Products Co., which held a structurally defective wall to be a hidden danger. In Anderson, the case was cited and distinguished on its facts. Yet in Bartels, it was quoted approvingly for the proposition that it makes little sense not to require the possessor to give a warning, when he can do so, that could alert firemen to hidden dangers that might injure them. Besides there being a structural defect in the Shypulski case, if this is a part of the court's reasoning, it is equally applicable whether firemen are likely to be engulfed in a ball of fire or fall through a defective porch. Thus Anderson could be decided differently today.

Regardless of the accuracy of the analysis, the shift in terms casts sufficient

44. Anderson v. Cinnamon, supra note 7, at 310, 282 S.W.2d at 449.
doubt on the law to be a factor in settlements and litigation. If the analysis is correct, the possessor in Missouri now has a duty to warn firemen of known structural defects that are unlikely to be discovered, provided he knows the firemen are present and has an opportunity to warn them. This writer hopes the analysis is correct. It is a step toward a society that requires men always to deal with one another reasonably, regardless of either's status.

Ronald E. Smull

TORTS—TRESPASS—IMMUNITY OF STATE'S INDEPENDENT CONTRACTOR

Rector v. Tobin Construction Co. 3

Defendant construction company, which was under contract with the State Highway Commission to build a bridge across a nonnavigable, natural watercourse, constructed within the right of way an earthen fill across the bed of the stream to be bridged. The fill's height was approximately seven feet and a metal drain pipe three feet in diameter ran through the fill parallel with the stream permitting the normal flow of the stream to pass through. Heavy rain then occurred and plaintiff's farm land was flooded damaging his crops. This action was brought to recover double damages under Section 236.270, RSMo 1959 which provides that a person who obstructs a watercourse to the damage of another must forfeit to the injured party double damages. The trial court rendered judgment for defendant. The court of appeals reversed and remanded for a new trial finding defendant trespassed. The supreme court agreed that the evidence was sufficient to support a charge of trespass q.c.f., but found for defendant.

The court based its decision on the following rule found in a 1953 volume of C.J.S. concerning the liability of a contractor working for the state: "Where he [the independent contractor] performs his work in accordance with plans and specifications and is guilty of neither negligence nor wilful tort, he is not liable for any damage that might result." The court decided that trespass q.c.f. is not a wilful tort and since defendant contractor was not negligent he could not be liable. If the contractor had been negligent, he would have been held liable for the injuries which resulted; but since he committed the more flagrant intentional tort of trespass, he was not liable. If a person working under contract with the state is held liable for negligent acts then surely he should also be held liable for intentional acts of trespass; however, the above rule has lead the Missouri Supreme Court to a contrary result.

1. 377 S.W.2d 409 (Mo. En Banc 1964).
3. Supra note 1, at 414 the two torts are distinguished.
The original source of the rule is the case of Ference v. Booth & Flinn Co.\textsuperscript{5} decided in 1952 which cites 40 C.J.S. Highways section 212 (1944) as authority. This section says "The contractor, and not the highway authority, is liable for damages resulting from his own tortious acts in the performance of the contract, as where he is negligent, or commits an unauthorized trespass on the property off the right of way." The Ference case took this 1944 rule and mistakenly paraphrased it by substituting the words "wilful tort" for unauthorized trespass.\textsuperscript{6} C.J.S. in 1953 cited this new rule stated in Ference and inserted it under States in volume 81 and the Missouri Supreme Court adopted it as the basis for its decision in the instant case.

The earlier 1944 C.J.S. rule\textsuperscript{7} finding a contractor liable for negligence and trespass is overwhelmingly supported by American cases. As was stated in Rector a contractor is liable for negligence;\textsuperscript{8} however, contrary to our court all other jurisdictions with the exception of Pennsylvania, which continues to follow their anachronistic rule of Ference v. Booth & Flinn Co.,\textsuperscript{9} hold a contractor liable for his trespass in performance of work for the state.\textsuperscript{10} Some states have gone even further than the majority of jurisdictions by holding the State Highway Commission liable for the trespass of independent contractors working for the commission.\textsuperscript{11} Surely an independent contractor employed by a state should not be afforded more immunity from tort actions than a State Highway Commission which is a recognized agency of the state and therefore is normally considered immune to suits without its consent. The logical effect of this Missouri case will be to permit contractors working under contract with the state to trespass with impunity but not permit them to be negligent. This inconsistency can only lead to confusion as to the liability of a contractor working for the state of Missouri.

Another interesting question which arises in this case is whether or not defendant actually committed a trespass, as the court of appeals\textsuperscript{12} decided and the supreme court\textsuperscript{13} agreed. Under the law as it now stands in Missouri as to the flooding of streams caused by an obstruction, defendant was clearly liable as a

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5. 370 Pa. 400, 403, 88 A.2d 413, 414 (1952).
6. Supra note 1, at 414.
8. Supra note 1, at 413.
9. Supra note 5.
12. Rector v. Tobin Construction Co., supra note 2, at 821: "The flooding of another's land by blocking a stream constitutes a trespass."
13. Rector v. Tobin Construction Co., supra note 1, at 414: "... the non negligent intentional construction by the defendant resulted in harm to the plaintiff in a way sufficient to support a charge of trespass q.c.f."
trespasser q.c.f.; but the correctness of the Missouri courts application of the law of trespass to the area of flooding is confused.

The Restatement of Torts defines a trespasser as "one who intentionally and without a consensual or other privilege enters land in the possession of another or any part thereof or caused a thing or third person so to do." In comment k following this definition it is pointed out that in causing a thing to enter the land of another it is not necessary in order to be a trespasser that the foreign matter be thrown directly upon the other's land. "It is enough that an act is done which will to a substantial certainty result in the entry of foreign matter." However, the resulting entry of foreign matter must be immediately and directly occasioned by the act of the trespasser and not merely a consequence resulting from the complained of act. The application of the distinction between consequential and immediate injury is where Missouri courts differ from most other courts in the area of obstructed water courses.

This distinction between immediate and consequential invasion of one's property rights is clearly stated in the case of Suter v. Wenatchee Water Power Co. Here the defendant built a canal prior to 1899 to carry irrigation water which overflowed and damaged plaintiff on June 10, 1900.

15. Restatement, Torts § 158 (1934).
16. Ibid.
18. Roundtree v. Brantley, 34 Ala. 544 (1858):
But trespass has, in the law, a well ascertained and fixed meaning. It refers to injuries which are immediate and not consequential. It would be a perversion of language to denominate an act, which produced a consequential injury, a trespass.
If a person pour water on my land, the injury is immediate; but if he stops up a watercourse on his own land . . . in consequence of which water afterwards runs therefrom into my land, the injury is consequential, and will not render the act itself a trespass.
Above taken from Chitty, Pleadings (6th ed. 1851) at 146. Hicks v. Drew, 117 Cal. 305, 309, 49 Pac. 189, 190 (1897):
One of the best tests by which to distinguish trespass is found in the answer to the question, when was the damage done? If the damage does not come directly from the act, but is simply an after result from the act, it is essentially consequential, and no trespass.
Although the court proposes the test of asking when the damages were done, it would have been more accurate to ask when the wrong occurred since this is the way the court applied the test. The determining factor in deciding whether an action of trespass q.c.f. or trespass on the case is proper is whether the wrong occurs immediately upon the doing of the act and not whether the damages occur immediately. For an example of the wrong occurring immediately but the damages later and discussion of the problem see Arvidson v. Reynolds Metal Co., 125 F. Supp. 48 (W.D. Wash. 1954). See Annot., 29 A.L.R.2d 447 (1953) for comprehensive treatment of liability for floods caused by debris.
19. 35 Wash. 1, 76 Pac. 298 (1904).
Such injury so resulting must necessarily have been consequential, and not the direct result of wrongful force applied to the respondent's [plaintiff's] lands, as must have been true to create a trespass. "It is not trespass to flow the lands of another with water by erecting a dam below his land, for any one may lawfully build a dam on his land, and the act being injurious only in consequences, is to be redressed by an action on the case."20

Thus this case, as most American cases, distinguishes between immediate and consequential wrongs and concludes if the invasion is not immediate then the action of trespass as distinguished from trespass on the case can not be maintained. However, in Missouri as exemplified by the instant case this distinction is not made concerning obstructed water courses.

In the present case21 the contractor built the fill and allowed the usual flow of water to proceed by inserting a drainage pipe three feet in diameter parallel with the stream. Therefore, the occurrence of the flood which damaged plaintiff was not substantially certain to happen as a direct result of the contractor's act. In addition the flooding did not occur directly upon the building of the fill but, on the contrary, only after heavy rains occurred. The flooding, therefore, was merely a latter consequence of defendant's act so an action of trespass on the case and not trespass q.c.f. would seem to be proper.

Although the common law forms of action have been abolished, the distinction in the two forms is still vital in the application of established rules of law based on a distinction in trespass and trespass on the case and in construing Missouri statutes dealing with the limitation period for trespass actions,22 magistrate court jurisdiction,23 civil penalties for trespass in the form of multiple damages24 and criminal punishment imposed upon trespassers.25 Since trespass on the case and trespass are two quite different wrongs, this case by reaffirming Missouri's position of not properly distinguishing the two will only lead to confusion in construing the above statutes and in applying established rules of common law.

ROBERT K. WALDO

UNFAIR COMPETITION—PALMING OFF

Sears, Roebuck & Co. v. Stiffel2

In the years 1956-1960 the Stiffel Company had developed a substantial market in their "pole lamps," the lamps being widely advertised in national magazines. At this time Sears, Roebuck & Company began marketing a similar lamp. Stiffel brought a patent infringement and unfair competition suit in the

20. Id. at 5-6, 76 Pac. at 300; Gould, Waters § 210 (3d ed. 1900).
22. § 516.120, RSMo 1959; see Comment, 13 Mo. L. Rev. 166 (1950).
23. § 517.030, RSMo 1959.
24. § 49.490, RSMo 1959.
United States District Court for the Northern District of Illinois. The district court declared the patent invalid but found the Sears lamp to have a "remarkable sameness of appearance" and further that there was a "likelihood of confusion . . . as to the source of the lamps." Thus, under Illinois law, the district court found Sears guilty of unfair competition and granted an injunction and damages. This finding was affirmed on appeal but on certiorari, the Supreme Court of the United States reversed. It should be noted at this point that the district court made no finding that there was a "palming off" of the Sears lamp as that of Stiffel.

The Supreme Court in reversing reiterated the generality that a state, under the law of unfair competition, cannot "set at naught" the federal policies regarding patents established under Art. I, § 8 of the United States Constitution. The Supreme Court recognized that there could be confusion as to the manufacturer of the product, but was of the opinion that without more the copier could not be found guilty of engaging in unfair competition. Thus Sears could not be enjoined from copying the article. The court said:

To allow a State by use of its law of unfair competition to prevent the copying of an article which represents too slight an advance to be patented would be to permit the State to block off from the public something which federal law has said belongs to the public. The result would be that . . . States could allow perpetual protection to articles too lacking in novelty to merit any patent at all under the federal constitutional standards.

After this decision the question is: how far can a state go to prevent copying of an article under the law of unfair competition.

Here the Supreme Court denied any right to recovery because there was nothing more than a copying with resultant confusion as to the source of the product. The Court has established that where an article is unprotected by patent, copyright or trademark the design or appearance belongs to the public and any protection of that appearance or design would be to grant a monopoly prohibited by the federal patent law. Such an article or design which is not so protected may be slavishly copied.

3. Supra note 2.
4. Supra note 1.
5. Id. at 232.
6. Id. at 231.
7. Id. at 232.
However, the Supreme Court has also recognized that when the copier is marketing his goods in such a manner as to “palm off” these goods as those of the original maker, the original maker will be protected under the law of unfair competition.\(^{10}\) In *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* the Supreme Court expressly acknowledged this doctrine when it stated:

Undoubtedly an unfair and fraudulent competition against the business of the plaintiff—conducted with the intent, on the part of the defendant, to avail itself of the reputation of the plaintiff to palm off its goods as plaintiff’s—would, in a proper case, constitute ground for relief.\(^{11}\)

This reasoning has been widely followed in granting protection under the law of unfair competition against such imitators.\(^{12}\) This rule was followed in Illinois by *Stevens-Davis Co. v. Mother & Co.*,\(^{13}\) where the court states:

The courts in this State do not treat the “palm off” doctrine as merely the designation of a typical class of cases of unfair competition, but they announce it as the rule of law itself—the test by which it is determined whether a given state of facts constitutes unfair competition as a matter of law.\(^{14}\)

However in a later line of cases the Illinois court discarded the requirement of palm off as a necessity for protection against such copying; the new test merely required that there be a secondary meaning and that there be confusion in the market place.\(^{15}\)

The above is an illustration of the general confusion in this area, *viz.*, what are the elements of unfair competition a state may consider in granting protection from copying where the product is unprotected under patent, trademark or copyright laws. In some cases the courts indicate that the end sought is to protect the public. So if the plaintiff shows that there is likely to be confusion in the


11. *Supra* note 10, at 549.


market place resulting from the copyist's actions, the plaintiff is entitled to relief under the law of unfair competition.18

On the other hand the majority has continued to require that there be a finding of palming off. A fortiori there must also be a finding that the plaintiff's product had developed a secondary meaning.37

If the above requirements are abolished the plaintiff only need show that there was or will be confusion in the market place resulting from the defendant's copying of plaintiff's product. Any restrictions on the state courts to grant relief for such copying have then become insignificant and the constitutional grant of exclusive jurisdiction in the Congress is in reality meaningless.

In Sears18 the court of appeals upheld the trial court's findings of likelihood of confusion and some actual confusion, findings which the appellate court construed to mean confusion as to the source of the lamp. The court of appeals thought this enough under Illinois law to sustain the trial court's holding of unfair competition, and held Sears liable under Illinois law for doing no more than copying and marketing an unpatented article.19 The Supreme Court recognized that there could be confusion as to the manufacturer of the article but declared that the mere inability of the public to tell the articles apart is not sufficient to grant an injunction or damages for the copying of an article unprotected by the federal patent laws. The Supreme Court further declared that: "Doubtless a State may, in appropriate circumstances, require that goods, whether patented or unpatented, be labeled or that other precautionary steps be taken to prevent customers from being misled as to the source . . . ."20 There still seems to be room for the state courts to grant relief for copying if they find something in addition to the mere copying with the resulting confusion. However, the nature of this "something in addition" seems to be left in doubt. The Supreme Court could have restated the proposition that relief for copying may be granted if there is a finding of palming off under the common law of unfair competition.21 Since there was no such finding in this case the Court could have denied relief on that basis.

16. Nat'l Lead Co. v. Wolfe, 223 F.2d 195, 205 (9th Cir. 1955); Independent Nail & Packing Co. v. Stronghold Screw Prod. Inc., 205 F.2d 921, 925 (7th Cir. 1953); J. C. Penny Co. v. H. D. Lee Mercantile Co., 120 F.2d 949, 954 (8th Cir. 1941). But see Straus v. Notaseme Co., 240 U.S. 179 (1916). In Rosaire v. Baroid Sales Div., Nat'l Lead Co., 120 F. Supp. 20, 23 (S.D. Tex. 1954), the court seems to imply that either palming off or likelihood of confusion with plaintiff's goods is sufficient to support a finding of unfair competition.

17. Warner & Co. v. Eli Lilly & Co., supra note 10, at 531; West Point Mfg. Co. v. Detroit Stamping Co., supra note 9, at 586; Gum, Inc., v. Gunmakers of America, Inc., supra note 9, at 960; James Heddon's Sons v. Millsite Steel & Wire Works, Inc., supra note 9, at 12. In Crescent Tool Co. v. Kilborn & Bishop Co., supra note 9, at 301, Judge Learned Hand stated the essence of the rule when he said: "The defendant, on the other hand, may copy the plaintiff's goods slavishly down to the minutest detail; but he may not represent himself as the plaintiff in their sale."

18. Supra note 2.

19. Supra note 2, at 118.

20. Supra note 1, at 232.

Were it not for the language in the opinion that "because of the federal patent laws a State may not, when the article is unpatented and uncopyrighted, prohibit the copying of the article itself or award damages for such copying," apparently the opinion would allow state courts to continue to give relief under the law of unfair competition upon the finding of palming off. However, the preceding quote casts some doubt on such an interpretation. Justice Harlan, in his concurring opinion in Compco Corp. v. Day-Brite Lighting, evidently places this construction on the majority opinion.

LARRY W. HANNAH

WORKMEN'S COMPENSATION—INJURY BY ACT OF GOD—THE OBSOLESCENCE OF THE INCREASED-RISK DOCTRINE

Schmidt v. Adams & Sons Grocer Co. 1

Defendant was engaged in the wholesale grocery business. Plaintiff was employed by defendant to operate a truck, load, unload and deliver merchandise. While engaged in his duties plaintiff was seriously injured by lightning.

Plaintiff was instructed by his employer to go outside to the employer's warehouse and load groceries into a truck which was backed up to a loading platform. While waiting for the merchandise to be ready for loading, plaintiff was standing with one hand against the building and his other hand upon the truck that he was to load. His hand on the building was three feet from a light switch the electrical wiring of which was not grounded. Then came a flash of lightning. Immediately thereafter plaintiff was found staggering about holding his arm.

Persons other than the plaintiff were also standing in front of the building when the lightning struck, but only the plaintiff was injured. An electrical engineering expert testified that the plaintiff could have been struck directly, that the truck may have been struck, or that the building may have been struck. He said the lightning was probably conducted into plaintiff through the building, but, if so, that particular building was no more likely to attract lightning than any other building of the same height in that area. The same was testified as true in regard to the particular truck involved. The engineer concluded that he could think of no reason why plaintiff's employment had anything to do with the accident.

The request for workmen's compensation was denied by the court in its per curiam opinion because plaintiff had not proven that his injuries arose "out of" his employment. The court concluded:

22. Supra note 4, at 232.
It is not enough that plaintiff was injured while he was regularly employed. He was injured by an act of God; and, unless he was, by reason of his employment, exposed to the risk of being struck by lightning to a greater degree than was the public generally, in the same vicinity, he can not have Workmen’s Compensation for his injuries.\(^2\)

When an employee has been injured by an act of God and seeks relief under workmen compensation statutes, most American jurisdictions follow the increased-risk doctrine. That doctrine is: before an injury to an employee is compensable it must arise out of a hazard increased by or peculiar to employment, and not common to the public generally.\(^3\)

The reasons given by the courts for following the increased-risk rule are not altogether clear. Evidently the courts are concerned about extending the broad liability of employers which is created by compensation statutes. In order to curtail such an extension, they have fallen back upon the tort theory exempting fault-free employers from liability for unforeseen injuries. It is dubious whether the legislatures intended that the increased-risk doctrine be included in the workmen’s compensation statutes. The legislatures could easily have placed such a limitation in the statute had they so desired. Its absence indicates that such a limitation was purposely omitted.\(^4\)

One of the original purposes of the workmen’s compensation statutes was to provide relief for injuries without regard to fault or negligence. The cost of the program was to be borne as an expense of production.\(^5\) Such a program is socially justified because it prevents a worker or his family from becoming wards of the state. Accordingly, such statutes are liberally construed in favor of the employee.\(^6\) The increased-risk doctrine does not follow this design.

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2. Id. at 566.
   
   ... nor is there anything in the language of the act that requires the risk to which the employee is subjected to be different from the risk to which the general public in the community is subjected.
   
   Ind. Ann. Stat. § 40-1202 (1952) states:
   
   ... every employer and every employee ... shall ... respectively ... pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment.

In comparison, § 287.120 (1), RSMo 1959, states:

If both employer and employee have elected to accept the provisions of this chapter, the 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. 


6. See § 287.120, RSMo 1959.
6. § 287.800, RSMo 1959. The court in Clingan v. Carthage Ice & Coal Storage Co., 223 Mo. App. 1064, 1068, 23 S.W.2d 1084, 1085 (Spr. Ct. App. 1930) states in relation to the provision for liberal construction:
This doctrine is slowly being discarded by the courts. Some cases now hold that "peculiar to the employment" is no longer necessary; and "not common to the neighborhood" has received considerable criticism both in this country and in England.  

Many courts, in efforts to avoid the harshness of the increased-risk doctrine, have allowed recovery in certain types of cases, such as heat prostration, involving injuries caused by acts of God. Consequently, a considerable number of law review writers have been critical of applying the increased-risk doctrine to lightning cases but omitting it in heat prostration cases.

Another anomaly has arisen from courts attempting to circumvent a doctrine which they realize is inequitable. A distinction has been made as to whether lightning is an indirect or a direct cause of injury. Relief has been granted in the former but denied in the latter.

Other dissatisfied courts have avoided the increased-risk doctrine by taking

That means that the intent and purpose of the act shall not be frustrated by interpolating, by construction, provisions which are not written therein that will affect the rights of the parties.

7. Eagle River Bldg. & Supply Co. v. Industrial Comm'n, 199 Wis. 192, 225 N.W. 690 (1929) (an injury from freezing). Also see Schroeder & Daly Co. v. Industrial Comm'n, 169 Wis. 567, 173 N.W. 328 (1919). In which the doctrine is seriously restricted.

8. Mixon v. Kalman, 133 N.J.L. 113, 116, 42 A.2d 309, 311 (1945): "It is not a conclusive test that the danger is common to all, whether in or out of the employment. A risk incident to the performance of the servant's work may include a risk common to all mankind." Martin v. Plaut, 293 N.Y. 617, 59 N.E.2d 429 (1944). Eagle River Bldg. & Supply Co. v. Industrial Comm'n, supra note 7 at 196, 225 N.W. at 691: "It makes no difference that the exposure was common to all out of door employments in that locality in that kind of weather." Craig v. Dover Nav. Co., Ltd., [1939] 4 All E. R. 558 (H.L.), reaffirming the rejection of the increased-risk doctrine and the adoption of the positional-risk doctrine in Lawrence v. Mathews, [1929] 1 K. B. 1.


10. Horovitz, supra note 9, at 51: "There is no adequate reason for preferring those injured by nature's sun or heat, over those injured by nature's lightning, winds or other phenomena."

11. Stout v. Elkhorn Coal Co., 289 Ky. 736, 740-41, 160 S.W.2d 31, 33 (1942): It may be admitted that there is some conflict in the decisions of the courts, but the great majority (with practically unanimity) permits the recovery of compensation under workmen's compensation statutes by those injured by lightning if the current of the stroke is aided or assisted in any manner to seek out and land upon the injured servant where he is directed to and is engaged in his work.

In Van Kirk v. Hume-Sinclair Coal Mining Co., 226 Mo. App. 1137, 49 S.W.2d 631 (K.C. Ct. App. 1932) compensation was granted where the deceased was killed when coming into contact with a cable in water in which he was standing that had become electrically charged when lightning struck it. See, 6 Schneider, WORKMEN'S COMPENSATION, 94 (permanent ed. 1948).
RECENT CASES

judicial notice that the employee’s occupation did increase his risk of being injured.12

Considering the gymnastics in which courts have indulged to avoid the harshness of the increased-risk doctrine, perhaps a more appropriate method for reaching the desired result (in a more logical manner) would be to abandon the rule and adopt either the actual-risk or the positional-risk doctrine.

The actual-risk doctrine provides that whether a risk was common to people in general is immaterial. The determinative factor is whether it was a risk of the employment.13

Several other courts have accepted the argument proposed by the advocates of the positional-risk theory. That theory states that an injury is one arising out of the employment if it would not have occurred had not the employment required the claimant to be in the position where he was when injured.14

New York courts have adopted the actual-risk rule. In Katz v. Kadans & Co.,15 the court rejected the increased-risk doctrine in favor of the actual-risk doctrine. There, the claimant, a dairyman’s chauffeur, was stabbed by an insane man. Subsequently, in Giovine v. United Hebrew Cemetery,16 the court applied that test where an employee was struck by lightning while digging a grave. The court noted that “[h]is employment exposed him to the hazard.”17

Colorado adopted the positional-risk theory in Aetna Life Ins. Co. v. Industrial Comm’n.18 In that case, the deceased, a farm hand, was killed by lightning while returning from the farm of his employer’s neighbor with a team of horses. He was crossing a high, rocky hill near a wire fence when he and his horses were struck. The court held that there was a relationship between the employment and the accident since the deceased’s employment required him to be in the position he was when struck by the lightning.19

In E. I. DuPont de Nemours Co. v. Dehn,20 the Indiana Appellate Court


16. 263 A.D. 772, 30 N.Y.2d 929 (1941).

17. Id., at 772, 30 N.Y.2d, at 930.

18. 81 Colo. 233, 254 Pac. 995 (1927).

19. Id., at 236, 254 Pac., at 995. Burke, C.J., concurring specially said: An affirmance of this judgment establishes the rule that when one in the course of his employment is reasonably required to be at a particular place at a particular time and there meets with an accident, although one which any other person then and there present would have met with irrespective of his employment, that accident is one “arising out of” the employment of the person so injured.

abandoned the increased-risk doctrine in favor of the positional-risk theory. The decedent in that case was struck by lightning in the course of his employment. He was crossing a transfer platform while on his way to shelter in the midst of threatening weather.\(^{21}\)

The decedent in the case of *Harvey v. Caddo De Soto Cotton Oil Co.*\(^{22}\) was killed when a building in which he was working was demolished by a tornado. The Supreme Court of Louisiana in adopting the positional-risk theory said:

In determining, therefore, whether an accident “arose out of” the employment, it is necessary to consider only this: (1) was the employee then engaged about his employer’s business and not merely pursuing his own business or pleasure; and (2) did the necessities of that employer’s business reasonably require that the employee be at the place of the accident at the time the accident occurred?\(^{23}\)

The *Harvey* case does not involve an injury caused by lightning. It would, however, be inconsistent for a court to apply the increased-risk doctrine in a lightning-injury case while ignoring it in a tornado-injury case.\(^{24}\)

For injuries sustained while traveling streets and highways the courts formerly required a showing of an increased risk and that the risk was not peculiar to the public. This rule has now been abandoned by the courts. Today, what has come to be known as the street-risk doctrine is really the actual-risk theory. It is now the majority position taken by the states. If the employment causes the employee to use the street, the risks of the street are the risks of the employment.\(^{25}\)

The objectionability of the increased-risk doctrine is evident from the manner it has been treated by the courts. The conspicuous absence of “increased-risk” language from the workmen’s compensation statute demands that employees be treated more liberally. A half-century spent following a doctrine does not justify the injustice which flows from its application. Proper application of the workmen’s compensation statutes demands that workmen injured by acts of God in the

\(^{21}\) The effect of this decision was weakened when on appeal the Supreme Court of Indiana in *E. L. DuPont de Nemours Co. v. Lilly*, 226 Ind. 267, 79 N.E.2d 387 (1948), chose to affirm the decision on the basis that an increased danger could be found. Significantly, however, the court did not repudiate the positional-risk theory and even cited Burroughs Adding Mach. Co. *v. Dehn*, *supra*, note 4, an unexplained-fall case, which had adopted the doctrine.

\(^{22}\) Id. at 729-30, 6 So.2d at 747 (1942). The court here quoting the test which it had laid down in *Kern v. Southport Mill*, 174 La. 432, 438, 141 So. 19, 21 (1932), in which an employee had been struck by an automobile while returning from an errand upon which he had been sent by his employer.

\(^{23}\) See notes 9 and 10 supra.

\(^{24}\) The court in *Wahlig v. Krenning-Schlapp Grocer Co.*, 325 Mo. 677, 683, 29 S.W.2d 128, 130-31 (1930), said:

>...the Legislature, in our opinion, intended to extend the protection of the law to all employees while in or about *any premises where* they may be engaged in the performance of their duties, and while at *any place where* their services, or any act, task or mission which forms a necessary part of their services, may reasonably require them to be.

See also: *O’Neil v. Fred Evens Motor Sales Co.*, 160 S.W.2d 775 (St. L. Mo. App. 1942); Larson, *supra* note 3, at 75-82.
course of their employment receive their due remuneration without being deprived therefrom by this "relic of the common law theory of liability based on fault, the very theory which the compensation laws attempted to abolish."[26]

EARL BOYD