WORKMEN'S COMPENSATION AND THE COFFEE BREAK: AN ADJUSTMENT IN THE LAW

ROBERT L. JOHNSON

The common law system of jurisprudence finds its strength in the ability to adjust to the changing needs of society; yet, in order that there be stability in the law this change must necessarily be quite slow.[1] When the adjustments of the case law fail to keep pace with the sociological changes, statutes are often enacted to close the gap. The law of workmen's compensation is a prime example of this type of remedial legislation.

Larson in his treatise on workmen's compensation attributes the development of the workmen's compensation statutes to two basic influences. The first was the sudden increased mechanization of industry in the nineteenth century. This increase left society with many workmen injured in various types of industrial accidents.[2]

Coinciding with the increased number of injured employees was the decrease in the remedies available to these people because of the defenses developed by the common law courts in the field of tort law. By the end of the nineteenth century this "produced in the United States a situation ripe for radical change" in the form of a wave of workmen's compensation statutes.[3] The first such legislation appeared in Massachusetts in 1904, and by 1920 all but eight states had passed some form of workmen's compensation law.[4]

Tort law did not provide the workman with an adequate remedy because it was often difficult for him to prove negligence.[5] More-

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[1] POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 2 (rev. ed. 1954).

[2] 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION 27 (1952) cites a German survey made in 1907 which indicated the following causes of industrial accidents: (1) negligence of the employer 16.81%, (2) negligence of the employee 28.89%, (3) inevitable accidents connected with employment 42.05%; The dissent in Salmon v. Bagley Laundry Co., 334 Mich. 471, 74 N.W.2d 1 (1955) pointed out that the injured workman is the by-product of our increased mechanization and referred to a study by the United States Bureau of Labor Statistics that one American is killed or crippled every three minutes in industrial accidents.

[3] 1 LARSON, *op. cit. supra* note 2, at 36.

[4] *Ibid.*

[5] See note 2 *supra.*

over, when there was negligence on the part of the employer, the workman was often denied recovery because of the defenses of assumption of risk, contributory negligence and the fellow servant rule.[6] Workmen's compensation legislation rectified this situation because its theory was not based on the fault concept,[7] but upon the principle that such injuries should be considered a part of the cost of doing business. By this means the ultimate burden of payment for such injuries rests on the public in the form of higher priced goods.[8]

In view of this background, some consideration should be given to the effect on the law of workmen's compensation of one of our most fundamental American institutions — the coffee break. Bear in mind the magnitude of this ritual. Each morning forty-five million office and factory workers go on their coffee breaks and, in the year 1961 alone they consumed eleven billion cups of coffee, which is enough to float two ships through all the locks in the St. Lawrence Seaway.[9] This adds up to about fourteen days of paid time off in the work year.[10]

With so many people pausing from their work during the day for a coffee break or other rest period, it is not surprising that quite a few people sustain injuries of various types during their break. Many of these injured persons file workmen's compensation claims, and it often becomes necessary to decide whether the particular injury arose out of and in the course of employment. This comment is mainly concerned with injuries occurring off the employer's premises, but reference will be made to several types of rest period injuries.

In the days before World War II when the coffee break was not so common, it was generally felt that off-premises injuries sustained during a break were not in the scope of employment.[11] During the war, the coffee break grew in popularity and the courts began to make the adjustment and find that the coffee break was a part of the employment, and therefore in its course.

Two cases which best illustrate the old view are *Callaghan v. Brown*, 218 Minn. 440, 16 N.W.2d 317 (1944) and *Salmon v. Bagley Laundry Co.*, 344 Mich. 471, 74 N.W.2d 1 (1955). In the *Callaghan* case the deceased was a boiler fireman, and for thirty years his employer had

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[6] 1 LARSON, *op. cit. supra* note 2, at 25.
[7] 1 LARSON, *op. cit. supra* note 2, at 7.
[8] 1 LARSON, *op. cit. supra* note 2, at 301; 1 SCHNEIDER, WORKMEN'S COMPENSATION 3 (1941); 1 STAN. L. REV. 126 (1948).
[9] READER'S DIGEST, Sept. 1961, p. 226.
[10] U.S. NEWS & WORLD REPORT, Jan. 18, 1957, p. 61.
[11] 99 C.J.S. *Workmen's Compensation* §220 (1958) cites the older view that such injuries are not compensable because the employer has no right to control the employee.

allowed him to go across the street to a small cafe for coffee. One morning while crossing the street for that purpose, he was struck by an automobile and killed. The Minnesota court said his death was not in the scope of employment because "he was where he was solely in furtherance of his own personal desires and accommodation."[12] By the majority opinion in the *Salmon* case, the Michigan Supreme Court also followed the older view, but the excellent dissent by Justice Smith set out in detail the more modern trend. In this case, the employees had a right to a ten minute coffee break as specified in their union contract.[13] The plaintiff was returning from coffee at a nearby restaurant when she slipped on the ice outside her employer's laundry and was injured. The court denied her claim for compensation on the grounds that the employer did not have the right to control her actions during this break.[14] In a stinging dissent, Justice Smith pointed out that "one of the most prolific sources of this mass of litigation is the effort to read into the act definitions and concepts taken from the field of torts. This is not a tort field. The tort concept cannot cope with it. . . ."[15]

A more modern view, the "Personal Comfort Doctrine," treats workmen's compensation as remedial legislation intended to be liberally construed, and makes an almost complete break with the torts field. The best statement of this doctrine is that "employees who, within the time and space limits of their employment, engage in acts which minister to their personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred. . . ."[16]

The first step in allowing the employees to be more comfortable was the realization that they needed a lunch break, and it followed that accidents occurring during the lunch break were within the scope of employment.[17] Once the lunch break became firmly entrenched, the employees began asking for rest periods, and the courts following the personal comfort doctrine sustained them in their bid.

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[12] Callaghan v. Brown, 218 Minn. 440, 16 N.W.2d 317, 318 (1944).

[13] U.S. NEWS & WORLD REPORT, Jan. 18, 1957, p. 61 states that "a study by the U.S. Department of Labor indicates that at least one fourth of all wage agreements have coffee-break clauses."

[14] Salmon v. Bagley Laundry Co., 344 Mich. 471, 74 N.W.2d 1 at 3 (1955).

[15] *Id.* at 6.

[16] 1 LARSON, *op. cit. supra* note 2, at 297.

[17] In 1919 the Kansas Supreme Court gave compensation to a young girl who was injured while playing on a hand truck during her lunch break. Thomas v. Procter & Gamble Mfg. Co., 104 Kan. 432, 179 Pac. 372, 6 A.L.R. 1145 (1919). More recently it was held that injuries sustained in a noon time soft ball game were compensable. Tocci v. Tessler & Weiss Inc., 28 N.J. 582, 147 A.2d 783 (1959).

The Supreme Court of Wisconsin has been a leader in extending this doctrine.[18] In 1958 it criticized the *Callaghan* case for ignoring the personal comfort doctrine and the *Salmon* case for applying the antiquated "control test."[19] The court said: "Once an employee has entered into the course of his employment, the test to be applied in determining whether he has removed himself therefrom is that of deviation. . . . An act which ministers to the employee's comfort while on the job is not such deviation because it is incidental to, and not wholly apart from, the employment."[20]

The essence of the personal comfort doctrine is that the act of the employee in making himself more comfortable is not solely for his own accommodation, but is an incident of his employment because he is more productive when he is reasonably comfortable.[21]

The worker is given a good deal of latitude in making himself comfortable in that what he does to refresh himself need not be strictly necessary if it is reasonably incidental to the employment. This depends both on the practices permitted in the particular plant or office, and on the customs of the employment environment generally.[21] In this regard it is interesting to note that the United States Court of Appeals for the Tenth Circuit took judicial notice of the fact that the coffee break is becoming accepted, and is beneficial to both employee and employer because it results in more efficiency and a greater output.[22]

Under the personal comfort doctrine the physical boundaries of the employer's premises do not determine the legal boundaries of the scope of employment. In the following cases it was held that the employee was entitled to workmen's compensation for injuries sustained in off-premises accidents during coffee breaks: a night watchman murdered in a cafe which was in view of the car lot he was guarding,[23] a secretary returning from a restaurant across the street,[24] a factory employee returning from a coffee shop about a block away from the plant,[25] and a bus driver crossing the street after leaving a cafe.[26] The theory of each of these decisions was that the coffee break

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[18] The Wisconsin court said it was committed to the personal comfort doctrine in American Motors Corp v. Industrial Comm'n, 1 Wis. 2d 261, 83 N.W.2d 714, 716 (1957); for a general discussion of this doctrine see WIS. L. REV. 91 (1960).

[19] Krause v. Western Cas. & Sur. Co., 3 Wis. 2d 61, 87 N.W.2d 875 (1958).

[20] *Id.* at 882.

[21] 1 LARSON, *op. cit. supra* note 2, at 301.

[22] Mitchell v. Greinetz, 235 F.2d 621, 625 (1956).

[23] United States Fid. & Guar. Co. v. Croft, 95 Ga. App. 114, 91 S.E.2d 110 (1955).

[24] Caporale v. State Dep't of Tax & Fin., 153 N.Y.S.2d 738 (1956).

[25] Bodensky v. Royaltone, Inc., 163 N.Y.S.2d 908 (1957).

[26] City Bus Co. v. Lockhart, 103 Okla. 171, 229 P.2d 586 (1951).

was an incident of the employment because it was reasonably necessary to the employee's comfort.

Sweet v. Kolosky[27] awarded compensation to a supermarket employee who fell on a public sidewalk outside a drug store after a coffee break. This court founded its decision on the basis that the employee was guaranteed a coffee break in her union contract and the only way she could exercise her right was to leave the market, as there were no facilities on the premises for coffee.[28] In this way, the Minnesota court did not have to overrule the *Callaghan* case but was able to distinguish it on the theory that in *Sweet v. Kolosky* the employee had a contractual right to a coffee break, but in *Callaghan v. Brown* the employee had merely been permitted to take a break. It would seem that the personal comfort doctrine takes a more logical approach as it does not depend on the technical terms of an employment contract, but considers the over-all purpose of workmen's compensation in protecting the injured employee and recognizes that a rest period is an incident of employment because it is beneficial to the employer also.

At the present time there has been no decision in Arizona on the precise facts here involved. However, in spite of some language to the contrary[29] it would not be at all surprising if the Arizona Supreme Court uses the personal comfort doctrine in solving any future problem of off-premises accidents occurring during coffee breaks or other rest periods.

This result would seem to follow from statements already made by the Arizona Supreme Court in deciding previous workmen's compensation cases. It is characteristic of the personal comfort doctrine that the workmen's compensation statutes are liberally construed to give the utmost protection to the injured employee and that the employee's actions in making himself reasonably comfortable are incidental to employment. Both of these characteristics have been found in the decided Arizona cases. *Ocean Acc. & Guar. Corp. v. Industrial Comm'n*[30] states that compensation laws should be "given a liberal construction, with a view of effectuating their evident purpose of placing the burden of injury and death upon industry. . . ." An interesting expression of the principle behind workmen's compensation is

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[27] 259 Minn. 253, 106 N.W.2d 908 (1960).

[28] *Cf.* Salmon v. Bagley Laundry Co., 344 Mich. 471, 74 N.W.2d 1 (1955). In both of these cases the union contract guaranteed the employees a coffee break, but the results were opposite.

[29] Strauss v. Industrial Comm'n, 73 Ariz. 285, 288, 240 P.2d 550 (1952) states that "as a general proposition, the liability of an employer ceases when the employee leaves the premises where he is employed."

[30] 32 Ariz. 265, 272, 257 Pac. 641 (1927).

found in *Goodyear Aircraft Corp. v. Industrial Comm'n*:[31]

> When a machine is broken it must be repaired. When an appliance is worn out it must be renewed. When, through accident arising out of the course of his employment, a worker is injured, he should be allowed due compensation, and the cost for such compensation is a charge against industry to the same extent as repair to a broken machine.

Pacific Fruit Express Co. v. Industrial Comm'n[32] recognizes that acts reasonably necessary to the employee's comfort are incidental to employment.[33]

Considering these statements as to general matters of policy in the field of workmen's compensation, notice in particular the case of *Goodyear Aircraft Corp. v. Industrial Comm'n*.[34] In that case the employee was injured when a soft drink bottle exploded as he was lowering it into a water cooler. It was decided that the accident arose out of and in the course of employment. Briefly, this was the basis of the court's decision. The Arizona Constitution provides that workmen should be compensated for injuries caused or contributed to by a "necessary risk or danger of such employment."[35] The *Goodyear* case states that the legislature has gone further than was required by the constitution. Instead of limiting compensation to those injuries caused by *necessary* risks, the statutes allow compensation for "accidents arising out of and in the course of the employment. The act widens the fields of accidents."[36] The court then set out its test for determining if a particular injury arises in the course of employment.

> It seems to be settled beyond any doubt that an accidental injury arises in the course of employment (1) when it occurs . . . within the period of employment (2) at a time where the employee had a right to be in the performance of his duties and (3) while either fulfilling his duties or engaged in doing something incidental thereto. . . ." (numbers added.)[37]

In noting that the employee remains within the course of his employment while doing acts not strictly in the line of his duties, but

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[31] 62 Ariz. 398, 402, 158 P.2d 511 (1945).
[32] 32 Ariz. 299, 306, 258 Pac. 253 (1927).
[33] It should be pointed out that in Pacific Fruit Express Co. v. Industrial Comm'n *supra*, note 32, the claimant was denied compensation for injuries incurred during an unauthorized rest period. However, the court noted that there was no evidence that it was the habit or custom of the employees to take rest periods, or that the employer had any knowledge of such a custom if it existed.
[34] 62 Ariz. 398, 158 P.2d 253 (1927).
[35] ARIZ. CONST. art. 18, § 10.
[36] Goodyear Aircraft Corp. v. Industrial Comm'n, 62 Ariz. 398, 409, 158 P.2d 511 (1945).
[37] *Id.* at 411.

only incidental thereto, the court makes the following statement:

> [W]e find many decisions to the effect that getting fresh air, smoking, resting, or eating food or ice cream, quenching thirst by water, beer or wine, taking a bath, use of telephone or toilet or other facilities, washing, pressing working clothes, and transportation to and from work are treated as arising out of the employment:[38]

Thereafter, a number of cases were cited, some of which dealt with off-premises injuries. The sum total of these statements would therefore make it appear that the Arizona court takes the liberal view in awarding compensation to employees because of accidents occurring during the performance of activities incidental to the actual employment, and might award compensation to a workman injured on a coffee break outside his employer's place of business.

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[38] *Id.* at 413.