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Kentucky Law Journal

Volume 55 | Issue 1 Article 8

1966

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Recommended Citation
Waitman, James T. (1966) "Kentucky Adopts the Positional Risk Doctrine: Chance for a New Approach," *Kentucky Law Journal*: Vol. 55 : Iss. 1 , Article 8.
Available at: https://uknowledge.uky.edu/klj/vol55/iss1/8

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KENTUCKY ADOPTS THE POSITIONAL RISK DOCTRINE: CHANCE FOR A NEW APPROACH

I. INTRODUCTION

Since the inception of workmen's compensation legislation, courts have had difficulty with the common provision that an injury, to be compensable, must arise out of the victim's employment.[1] Attempts at interpretation and application of this requirement have produced three major judicial theories—the peculiar or increased risk doctrine, the actual risk doctrine, and the positional risk doctrine.

The best description of these approaches is found in Larson, *Workmen's Compensation*,[2] the definitive treatise on workmen's compensation law. According to Larson, compensation is awarded under the peculiar or increased risk doctrine

> only when [the injury] arises out of a hazard peculiar or increased by that employment, and not common to people generally. The doctrine in practice has produced many exclusions which are difficult to reconcile with the purposes of compensation legislation, most conspicuously in the street risk cases (e.g., injuries to solicitors due to normal traffic hazards) and cases of injury by lightning, freezing, sunstroke and the like.[3]

Larson treats the actual risk doctrine as follows:

> Under this doctrine, a substantial number of courts are saying, "We do not care whether this risk was also common to the public, if in fact it was a risk of this employment." It is a more defensible rule than the peculiar or increased risk doctrine, since there is no real statutory basis for insisting upon a peculiar or increased risk, as long as the employment subjected claimant to the actual risk that injured him. One effect is to permit recoveries in most street risk cases and in a much greater proportion of act-of-God cases.[4]

Larson then describes the positional risk doctrine:

> 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. . . . This theory supports compensation . . . in cases of stray bullets, roving lunatics, and other situations in which the only connection of the employment with the injury is that its obligations placed the employee in the particular place at the particular time when he was injured by some neutral force. . . .[5]

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[1] See KY. REV. STAT. ch. 342, § 342.005 (1942), for the Kentucky provision.

[2] LARSON, WORKMEN'S COMPENSATION (1952).

[3] *Id.* § 6.20. Street risks include all perils normally associated with the street. The "street risk doctrine" arose as an exception to the peculiar or increased risk doctrine. Under the street risk doctrine, street injuries to workers whose employments necessitate their working in the streets are compensated, even though the public at large is subjected to the same hazards.

[4] *Id.* § 6.30.

[5] *Id.* § 6.40. It might be well to point out here that, when applied to situa-

(Continued on next page)

By way of example, when a carpenter cuts himself with a saw, compensation is awarded under all three of the above theories, since his injury is clearly caused by his employment. On the other hand, if he dies of food poisoning from the breakfast his wife prepared for him at home, his death is not compensable, since it arises out of his personal life only.

But what if our carpenter runs out of nails, goes across the street to buy some more, and is struck by a car on the way back? Or what if, after he returns to work, he is killed by a bolt of lightning? These are examples of "neutral risks," that is, risks "neither personal to the claimant nor distinctly associated with the employment."[6] It is in the area of neutral risks that courts have found it most difficult to determine whether an injury arose out of the employment.

As Larson points out, application of the peculiar or increased risk doctrine to neutral risk cases often produces results which seem arbitrary and unfair. The actual risk approach has also proved unsatisfactory. However, the key to an effective solution of the problem may lie in a well-considered use of the positional risk doctrine.

The Court of Appeals of Kentucky recently adopted the positional risk doctrine,[7] thereby opening the door to the development of a new approach to the entire neutral risk problem. Kentucky, largely freed from the restrictions of precedent, now has the opportunity of applying its new rule to neutral risks in such a way as to overcome many of the difficulties which have so long plagued the courts.

The purpose of this Note is to suggest a fresh attack on the neutral risk problem, including a re-definition of the word "neutral." First, however, it will be necessary to examine the present status of the positional risk doctrine in Kentucky law.

II. THE PRESENT STATE OF THE LAW

Let us begin with a detailed consideration of *Corken v. Corken Steel Prods., Inc.*,[8] the case in which the Kentucky Court of Appeals renounced its previous stand and adopted the positional risk doctrine.

(Footnote continued from preceding page)
tions in which the injury has no connection with the non-employment life of the employee, and when its only connection with the employer or the employment is that the employment put the employee at the time and place where harm struck, the actual risk doctrine should be sufficient to produce recovery. This is so because, in such situations, the physical position of the employee is of so great an importance that it is thought of as being itself an active cause of the injury, whereas generally one's physical existence and position is taken for granted and is considered too passive a thing to be treated as part of the chain of causation.

[6] LARSON, *op. cit. supra* note 2, § 6.40.

[7] Corken v. Corken Steel Prods., Inc., 385 S.W.2d 949 (Ky. 1965).

[8] 385 S.W.2d 949 (Ky. 1965).

Irvin Corken, Jr., was employed by the defendant corporation as a salesman. In November, 1961, while getting into his car on his way to call on customers, "he was deliberately shot and killed by a stranger acting without provocation or discernible reason of any kind, evidently a madman."[9] The Workmen's Compensation Board denied a claim for compensation by Corken's dependents on the ground that the accident did not arise out of the employment. The circuit court affirmed.

The Court of Appeals reversed, saying,

> We accept the view that causal connection is sufficient if the exposure results from the employment. . . . Corken's employment was the reason for his presence at what turned out to be a place of danger, and except for his presence there he would not have been killed. Hence it is our opinion that his death arose out of the employment.[10]

The Court then overruled the case of *Lexington Ry. Sys. v. True*,[11] a Kentucky precedent closely in point, quarreling with its requirement of foreseeability. *Corken* reads as follows:

> The theory that an injury must be incidental, or the hazard peculiar, to the nature of the employment is fundamentally indistinguishable from the principle of proximate cause, or foreseeability. The True opinion, for example, equates causation with "likelihood."[12]

The *Corken* Court also overruled all "other cases [turning upon] . . . the principle that the injury must result from a risk peculiar to the work."[13]

Let us examine *True* in more detail. There, a street car employee, driving his bus along a city street, was shot by a boy who was carelessly firing a rifle at birds and other objects. The Workmen's Compensation Board denied the widow's claim for compensation. The circuit court reversed. The Court of Appeals reversed the ruling of the circuit court, deciding the case on the narrow ground that the risk of being accidentally shot by a boy with a rifle is greater in the country than on city streets. Thus, it reasoned, the risk was not a street risk, and the street risk doctrine was inapplicable. Therefore, the injury did not arise out of the employment.

What is the significance of *True's* being overruled? It is closely in point with *Corken*, and it was necessary for it to be treated there. However, it might have been distinguished on the facts. It might simply have been criticized; that the risk of being struck by a stray

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[9] *Ibid.*
[10] *Id.* at 950.
[11] 276 Ky. 446, 124 S.W.2d 467 (1939).
[12] 385 S.W.2d 949, 950.
[13] *Id.* at n.1.

bullet is indeed a street risk is easily argued. Or the Court might have overruled *True* and gone no further. But the *Corken* opinion does go further; it seemingly rejects the peculiar or increased risk doctrine altogether, and it does so in language which, on its face, would ordinarily connote full acceptance of the doctrine of positional risk.

Larson is the first supporting authority cited in *Corken*. The Court refers to section 10.12, which carries the title "Stray bullets as positional risks." There Larson discusses injuries from bullets and other flying objects and argues that to apply the positional risk doctrine is sound in such situations.

Corken also relies on three cases from sister jurisdictions. In the first, *Industrial Indem. Co. v. Industrial Acc. Comm'n,*[14] a waitress was struck by a stray bullet fired at a customer by his irate wife. Compensation was awarded on the basis of the positional risk theory.

In the second case, *Gargiulo v. Gargiulo,*[15] an employee suffered an eye injury when a boy standing on adjacent property accidentally shot him with an arrow. The New Jersey court found that the incident satisfied the test that, for recovery to be had, the employment must have been a contributing cause of the accident or the accident must have been due to a risk reasonably incident to the employment. The court said, "But for the compliance with his allotted work directive requiring his presence at the particular time and place in question, the injury would not have been inflicted."[16]

Lastly, *In re Baran's Case*[17] involved the shooting of an employee by a boy with a rifle. Said the Massachusetts court, "The employment brought the employee in contact with the risk of being shot by the particular bullet which struck him."[18] Recovery was allowed. This and the other two cases are also discussed in Larson, section 10.12.

The three cases cited in *Corken*, then, deal only with injuries accidentally caused by strangers discharging weapons. The section of Larson referred to considers various flying objects originating from sources connected with neither the employer nor the employee. *Industrial Indemnity* and *Gargiulo* clearly adopt the positional risk doctrine, while *Baran* speaks more in terms of actual risk. Although it is often difficult to be certain, if it is correct to say that *Baran* is an

[14] 97 Cal. App. 804, 214 P.2d 41 (1950). Commented upon, 5 NACCA L.J. 56 (1950), with some discussion of positional risk.
[15] 13 N.J. 8, 97 A.2d 593 (1953).
[16] *Id.*, 97 A.2d at 596.
[17] 336 Mass. 342, 145 N.E.2d 726 (1957).
[18] *Id.*, 145 N.E.2d at 727.

actual risk case, it is a good example of how recovery can be reached in such situations without the necessity of employing the positional risk doctrine.

The *Corken* opinion, then, does not seem to limit the possibilities for the future application of the doctrine it announced. The doctrine is stated in terms broad enough to include all neutral risks. Yet the cases referred to, which involve two stray bullets and one arrow, present a narrow picture. If the Court meant to indicate that, in the future, the logic of *Corken* would be used in all neutral cases, why did it confine its case references to such a limited area? If it meant to make a narrow holding, and had in mind no purpose to extend the rule to analogous situations, why did it employ the broad, unqualified expressions that are found in the opinion? The language directs us neither one way nor the other. One is left with the impression that this question was intentionally left open, awaiting further persuasion.

To what extent has the *Corken* rule been limited by subsequent decisions? It has been cited in but two cases. The first of these is *Black v. Tichenor.*[19] Tichenor was injured in an automobile accident while riding with Black, his fellow employee. The mishap occurred one Sunday night on route to a nearby town where they were to commence their work duties Monday morning. Their employment as auditors necessitated their making the trip.

Tichenor sued Black for negligence and received a favorable verdict. Black appealed on the grounds that, since the injury was sustained in the course of and arose out of their employment, a suit for negligence could not be maintained against him, a fellow employee.[20] The Court held, *inter alia,* that the injury arose out of the employment. The *Corken* rule was applied, even though the same result could probably have been reached on these facts by using the increased risk doctrine. *Black* can therefore serve as precedent for applying the positional risk doctrine to street risks.

The other case, just handed down, is *Gordon v. Jefferson County Fiscal Court.*[21] A watchman in a garage was killed when his car fell onto him from a grease rack. The Court distinguished *Corken* and denied the claim. Since there was no neutral risk in *Gordon,* not to apply *Corken* was correct, as will be argued subsequently. However, there is a suggestion in *Gordon* that the fact that Corken used his automobile in his work was important to the outcome of his case.

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[19] 396 S.W.2d 794 (Ky. 1965).
[20] See Miller v. Scott, 339 S.W.2d 941 (Ky. 1960).
[21] 403 S.W.2d 278 (Ky. 1966).

Since Corken's car had nothing to do with his death, this position seems untenable. It is apparently no more than careless dictum. *Gordon* stands for the proposition that the claimant must carry the burden of proving that the injury arose out of the employment, despite the adoption of the positional risk theory.

Both the language in *Corken* and the holding in *Black* indicate that *Corken* will not be restricted to its peculiar facts; it will at least be applied to all street risk cases. Will it be extended to cover all neutral risks? Will it be extended to all risks, including personal ones, thereby eliminating the "arising out of" requirement althogether?

Taking the latter possibility first, there is perhaps some danger that *Corken* will be applied to cases involving personal risks. To do so would be to step into the trap inherent in the language of the positional risk theory. For instance, it might be said of a man murdered by his wife's paramour while at work that "his employment was the reason for his presence at what turned out to be a place of danger, and except for his presence there he would not have been killed,"[22] without any showing that the employment made the victim more vulnerable to his aggressor. This result seems contrary to both the letter and spirit of the requirement that the injury arise out of the employment. It must be kept in mind that the positional risk doctrine developed in relation to neutral risk cases only. Alone, it is hardly an adequate test of the central question to be decided—whether or not the risk of the injury suffered was a personal one, to be borne by the employee—and it should not be used as such. Notice, however, that there is less danger in the Kentucky statement of the doctrine than in the broader "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."[23] Further, the result in the *Gordon* case, discussed above, may be authority for not applying the *Corken* doctrine to cases in which there is a personal risk, but the facts of *Gordon* being less than clear, that case is of doubtful value as precedent.

Whatever the situation regarding the personal risk problem, the Court of Appeals has yet to apply the positional risk doctrine to neutral risks in any conclusive manner. This area, the most troublesome, was impliedly reopened by the *Corken* opinion and is open still. Kentucky is thus presented with the opportunity of solving the neutral risk problems which have been so vexing to state courts in the past.

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[22] 385 S.W.2d 948, 950.

[23] LARSON, *op. cit. supra* note 2, § 6.40.

III. SUGGESTIONS CONCERNING NEUTRAL RISKS

Larson describes a neutral risk as one which is "neither personal to the claimant nor distinctly associated with the employment."[24] This definition (and perhaps it is not even intended as a definition) is not satisfactory. When the result of a case depends upon whether there is a causal connection between the injury and the employment, compensation is always awarded when the risk seems "distinctly associated with the employment." It is never awarded when the risk appears to be personal. This is the matter to be determined. The Larson formulation provides no solution; it begs the question. In Larson, the category of neutral risk includes all cases which are doubtful, and it becomes a catch-all for miscellaneous uncertainties.

"Neutral" can be used to greater advantage. In any case in which an injury is caused in part by some force or occurrence external to the person injured (diseases are thus excluded), two factors may be isolated, the person and the external force. Thus, the following definition is suggested. *When it is clear that the causes of the external force are in no significant way connected with either the employment or the personal life of the victim, the risk of being injured by that force may be said to be truly neutral.* Thus, acts of God, most street risk incidents and some assaults, among others, are neutral.

"Neutral" under this definition becomes a third category, easily distinguishable from both "personal" and "employment-connected." The latter two categories tend to shade into one another in close cases, as always, but this tendency is the less for having excluded neutral cases from the spectrum. The category of neutral is kept distinct with little difficulty.

Consider some examples. Applying the Larson definition to the *True* case, was the risk of being accidentally shot by a boy with a rifle "neither personal to the claimant nor distinctly associated with the employment"? The answer is uncertain. It is arguable that it was distinctly associated with the employment by virtue of its being a street risk. On the other hand, strained reasoning can result in the conclusion that the risk was personal, as evidenced by the opinion.

Use of the suggested definition would have eliminated the necessity for the tenuous argument found in *True*. Thinking of "neutral risk" as a separate category clarifies matters. True's death was caused by the concurrence of two factors, his position in place and time, and the boy's careless ignition of the rifle. The latter factor is the "external force or occurrence." It is clear that the causes of the boy's actions

[24] *Ibid.*

were in no way connected either with True's employment or with his personal life. That the risk of the injury suffered was a neutral one is obvious when the suggested definition is employed, but the question is clouded under Larson's approach.

Another example is the case of *Fuqua v. Dep't of Highways.*[25] Fuqua was clearing brush on a highway right of way. When a sudden storm broke, he was told to seek shelter, and he took refuge in a nearby garage. He was killed by a bolt of lightning which struck the garage. To determine whether or not the risk of being struck by lightning in this situation was neutral, Larson would ask two questions: "Was the risk personal?" "Was the risk distinctly associated with the employment?" It might be argued that the risk was distinctly associated with the employment in that Fuqua's work made him more vulnerable to the elements. There is no confusion under the proposed definition: the cause of the lightning clearly had no connection either with Fuqua or with his cutting brush.

On the other hand, the *Gordon* case, discussed above, does not involve a neutral risk by the suggested approach. There was no showing, nor any reason to suspect, that Gordon's being crushed by his car was neither personal nor employment-connected. Indeed, the injury seems to have been caused either by personal activities or by employment activities although by which is not altogether clear. Again, the existing test for "neutral" only muddies the water. However, under the proposed test, it is clear at the outset that no neutral risk was involved, making a consideration of that problem unneccessary. *Gordon* presents a good example of how confusion can be avoided by making "neutral" a distinct category.

IV. CONCLUSION

Equipped with a better understanding of what is involved when we say "neutral risk," we may now consider the desirability of applying the positional risk doctrine found in *Corken* in all neutral risk cases. It may be observed at the outset that to do so would be to increase the percentage of awards; nevertheless, this alternative appears better commended by reason.

There are convincing reasons for applying *Corken* to all neutral risks, using "neutral" in the sense suggested above. In the first place, this approach is the most logical and straightforward way of carrying out the mandates of the statute. The "arising out of and in the course of" requirement has one of two purposes. Either it was intended to

[25] 292 Ky. 783, 168 S.W.2d 39 (1943).

limit compensation to injuries clearly caused by the employment, or it was designed to provide awards in all cases except those in which the injury stemmed from non-employment causes. Where the emphasis is placed is determinative of the outcome of neutral risk cases. The injunction that the Kentucky Workmen's Compensation Act[26] "shall be liberally construed on questions of law, as distinguished from evidence,"[27] which has been interpreted to mean that doubts as to the meaning of the law must be resolved in favor of the claimant,[28] answers the question. Injuries from neutral risks are not personal, by any definition. The statute directs, then, that they should be compensated.

Furthermore, the often-repeated purpose of workmen's compensation legislation is to place the burden of the disabled worker's support on the employer or the employer's customers, rather than the general public. It is commonly agreed that this result is reasonable if, and only if, the employment was in some way responsible for the disabling injury. As argued above, when dealing with neutral risks, the physical position of the employee is itself so significant a factor that it may be regarded as one of the causes of the accident. If it is sound to say that the risk of being struck by lightning while asleep in bed is a personal one, is it not at least equally sound that the risk of being struck by lightning while at work be treated as a risk of the employment? And is it not as equitable for the employer to bear the cost in the latter case as for the public to suffer in the former? Application of the positional risk doctrine to neutral risk situations is both sensible and fair.

The recommended approach would supply a uniformity now lacking. Courts have always had difficulty interpreting the phase "arising out of." Decisions too often seem arbitrary and unjustified. There is no sufficient reason for distinguishing among injuries from lightning, stray bullets, violent lunatics and other causes which are neutral under the proposed definition. It is simply not worth the effort and confusion.

Perhaps the strongest argument rests on clarity and ease of application. The positional risk doctrine is simple and readily intelligible, and its application to neutral risk situations is not difficult. If the question is sometimes shifted to whether or not a particular occurrence is a neutral one, and to whether or not an employee was in the course of employment, then the problem is at least seen from the per-

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[26] KY. REV. STAT. ch. 342 (1962).
[27] KY. REV. STAT. ch. 342, § 342.004 (1950).
[28] Adams v. Bryant, 274 S.W.2d 791 (Ky. 1955); Segal, *An Historical Analysis of the Kentucky Workmen's Compensation Law*, 47 KY. L.J. 279, 282 (1959).

spective from which it may most easily be solved; attention is focused directly on the character of the incident which produced the harm.

In conclusion, courts are continuously pressed to reshape, to update, and generally to improve the law. The *Corken* opinion reinforces this pressure and issues a forward invitation for fresh thinking in a heretofore troublesome area. Whatever the details of future Court of Appeals decisions, the invitation, the challenge, must be accepted.

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