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C H A P T E R 3

Workmen's Compensation Law

LAURENCE S. LOCKE

§3.1. **Coverage of the Workmen's Compensation Act: Elimination of elective coverage categories.** The purpose of the Massachusetts Workmen's Compensation Act¹ is to provide prompt and adequate wage compensation for the employee and his family in the event of injury or death occasioned by the employment.² It is therefore desirable that all persons whose livelihood is based upon wages or salaries be covered by workmen's compensation. However, no state compensation act provides protection for all such persons. Exceptions to the Acts' compulsory coverage, based upon considerations of administrative convenience or political expediency, have only been gradually eliminated.³ Amendments to the Massachusetts Workmen's Compensation Act, enacted during the 1972 SURVEY year, do, however, provide protection for a wider range of employees.

The original Massachusetts Workmen's Compensation Act was elective, with both the employer and the employee having an option to come within the provisions of the Act.⁴ All employments were then within its scope. In 1943, however, the Act was amended so that all employments were divided in three categories: compulsory, elective and excepted.⁵

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§3.1. ¹ G.L., c. 152, §§1-75.

² Devine's Case, 236 Mass. 588, 592, 129 N.E. 414, 415 (1921).

³ Report of the National Commission on State Workmen's Compensation Laws, c. 1, §C(1) (1970).

⁴ Acts of 1911, c. 751, adding G.L., c. 152. The Act contained incentives for the employer to provide coverage. An insured employer was immune from personal injury actions at law by a covered employee (G.L., c. 152, §23); further, an uninsured employer was deprived of the three common law defenses of assumption of risk, contributory negligence and the fellow-servant doctrine (G.L., c. 152, §§66, 67).

Upon being hired by an insured employer, an employee could forego coverage by retaining his common-law rights to an action by law for any personal injuries occasioned by the employment. G.L., c. 152, §24. It is arguable, however, that this so-called "election" of the employee was a meaningless form, since no employer would retain an employee who chose to retain his common-law rights.

⁵ Acts of 1943, c. 529, amending G.L., c. 152.

The great majority of employments fell in the compulsory category, in which the employer was required to provide for the payment of compensation, on penalty of a fine or imprisonment.⁶ In the elective category fell a smaller number of employments, and only a few employments were exempted from the operation of the Act. An uninsured employer was still subject to the loss of his three common-law defenses.⁷

In 1971, the employments subject to the requirement of compulsory coverage were: workers engaged in hazardous employment;⁸ persons employed by employers of four or more persons;⁹ farm laborers;¹⁰ and laborers, workmen, mechanics and nurses employed by religious, charitable or educational institutions.¹¹ Coverage was thus compulsory for about 85 percent of the employees working either in Massachusetts or for Massachusetts employers; there still remained, however, a significant group for which the Act was elective. These included persons employed by employers of three or less persons,¹² seasonal, casual, or part-time domestic servants,¹³ and persons other than laborers, workmen, mechanics or nurses employed by religious, charitable or educational institutions.¹⁴

Certain employments were entirely excluded from the coverage of the Act, such as masters of and seamen on vessels engaged in interstate or foreign commerce, and professional athletes under special circumstances,¹⁵ but their numbers were few and the exceptions were either required by federal law or well-justified by other considerations.¹⁶ This could not be said of the employments that still remained elective in 1971. For injured workers and their families, it made no sense that they be deprived of workmen's compensation simply because the wage earner was employed by an employer of three or less persons who chose not to provide coverage, or simply because he was a school teacher or social worker employed by a religious, charitable or educational institution that chose not to elect compensation protection for all its employees.

⁶ G.L., c. 152, §25C.

⁷ See note 4, *supra*.

⁸ G.L., c. 152, §1(4)(c). See LOCKE, WORKMEN'S COMPENSATION, 29 Mass. Practice Series §102 (1968) [hereinafter cited as Locke].

⁹ G.L., c. 152, §1(4)(c). See Locke, §103.

¹⁰ G.L., c. 152 §1(4)(c). See Locke, §104.

¹¹ G.L., c. 152, §1(4)(a). See Locke, §106. Coverage for employees of the Commonwealth or of any political subdivision is provided for in Sections 69-75 of the Act, which were added to the Act in 1913 (Acts of 1913, c. 807). Coverage is compulsory for laborers, workmen, mechanics and nurses employed by such public agencies. G.L., c. 152, §§69, 74. By implication, coverage is elective for employees of such public agencies other than laborers, workmen, mechanics and nurses. *Id.*, §25B. See Locke, §107.

¹² G.L., c. 152, §1(4)(c). See Locke, §103.

¹³ G.L., c. 152, §1(4)(b). See Locke §105.

¹⁴ G.L., c. 152, §1(4)(a). See Locke, §106.

¹⁵ G.L., c. 152, §1(4), first paragraph. See Locke, §§72, 113.

¹⁶ For example, professional athletes are exempt only if their contracts provide for the payment of wages during periods of disability resulting from their employment. *Id.*

The courts have long recognized that it is the public policy of the Commonwealth that all employers should come under the Act.¹⁷ During the 1972 SURVEY year the Massachusetts legislature finally eliminated most of the elective coverage categories, thereby bringing most of the formerly elective employments into the compulsory category.¹⁸ This amendment brings the Massachusetts Act into almost full compliance with the standards of coverage recommended by the National Commission on State Workmen's Compensation Laws.¹⁹ The one elective category now remaining,²⁰ that of seasonal, casual, or part-time domestic servants, was kept as elective in an attempt to favor the thousands of householders who employ day help, baby sitters, or snow removers. There is, however, no moral justification for exempting from the protection of the Act the day-worker who breaks her hip on a loose scatter rug or the babysitter who is scalded while heating the baby bottle. Insurance coverage could easily be provided as a rider on the homeowner's or apartment-dweller's household policy. An amendment is needed to include even these employees within the compulsory coverage category.²¹

§3.2. Coverage of the Workmen's Compensation Act: Enforcement of compulsory coverage. Although, under the Massachusetts Workmen's Compensation Act,¹ coverage of most employments is now compulsory, enforcement of the requirement of compulsory coverage has always been difficult. The only direct enforcement procedures are found in Section 25C of the Act. Under that section, an employer who has not provided coverage for employees in compulsory categories is subject to a criminal penalty in the form of a fine of not more than \$500, imprisonment for not more than one year, or both. If the employer is a corporation, both the president and the treasurer can be held personally liable. Section 25C also gives the Division of Industrial Accidents the power to bring complaints against non-complying employers in district court. These penalties have had little impact on an employer who through neglect or design has failed to provide coverage.

¹⁷ "The workmen's compensation act is to be construed broadly to include as many employees as its terms will permit." Warren's Case, 326 Mass. 718, 719, 97 N.E.2d 184, 186 (1951). See also Clark v. M. W. Leahy Co., Inc., 300 Mass. 565, 569, 16 N.E.2d 57, 59 (1938).

¹⁸ Acts of 1972, c. 374, §1. Section 3 limits the provisions of the amendments to insurance contracts entered into on and after the effective date of the act, September 3, 1972.

¹⁹ Report of the National Commission on State Workmen's Compensation Laws, c. 2, §A (1972).

²⁰ Technically, coverage for employees of public agencies, other than laborers, workmen, mechanics and nurses, is still elective. See footnote 11, *supra*. The question of whether coverage for such employees should be made compulsory is moot, however, since the Commonwealth and virtually all political subdivisions have elected to cover all their employees. Locke, §107.

²¹ Legislation to this effect is being introduced in the 1973 legislature.

§3.2. 1 G.L., c. 152, §§1-75.

Two other provisions, Sections 66 and 67, attempt to compel compliance by drastically increasing the employee's common law rights against a non-complying employer. An employee injured in the course of his employment may bring an action at law for personal injuries against a non-complying employer. In this action, the employer is deprived of his common law defenses of contributory negligence, assumption of risk, and the fellow-servant doctrine, and the employee is not required to show that the employer was negligent.² Thus, in effect the employee is permitted full tort damages on a showing that he has sustained an injury arising out of and in the course of employment;³ in other words, the employee need establish only that he would have been entitled to workmen's compensation.⁴

Thus in an action brought by an injured employee under Sections 66 and 67, the only issue often will be whether the injury arose out of and in the course of employment. That was the only issue faced by the Supreme Judicial Court in the case of *Albert v. Welch*.⁵ In that case the plaintiff was a truck driver employed in *hazardous employment* by a company with *more than three employees*; therefore, the employer was required to insure,⁶ but he had nonetheless failed to carry the required insurance. The plaintiff-employee had removed a broken fuel pump from his truck, and had placed it on the fender. As he reached for the cab door to remove his jacket and the ignition key, the truck caught fire and the plaintiff was badly burned. Deprived of workmen's compensation, he brought a tort action against his employer.

After the plaintiff's opening statement at trial, the defendant's motion for a directed verdict was granted. On appeal the defendant argued that the injury was caused by the plaintiff's removal of the fuel pump. Such an action was a mechanic's duty, and not a truck driver's; therefore, the injury did not arise out of the plaintiff's employment as a truck driver. The Court made short shrift of the issue, holding that the circumstances of the injury outlined in the opening brought it within the standards of Sections 66 and 67. In the Court's view, the injury happened when the plaintiff attempted to retrieve his jacket and the keys. The Court then held that the injury "arose out of and in the course of employment" by using a broad definition of that phrase as it is used in the Workmen's

² Id. §§66, 67.

³ As discussed in §3.1., a personal injuries action against an employer who failed to exercise a coverage *option* is similar. There, however, the employee must still show that the injury was caused by the employer's negligence. G.L., c. 152, §§66, 67.

⁴ "The purpose [of §§66, 67] . . . is to place the employee of an employer who is not a subscriber under the workmen's compensation act as nearly as possible in the same position as is the employee of an employer who is a subscriber." *Zarba v. Lane*, 322 Mass. 132, 134, 76 N.E.2d 318, 319 (1947). See *Locke*, §654.

⁵ 1971 Mass. Adv. Sh. 1561, 274 N.E.2d 821.

⁶ G.L., c. 152, §1(4)(c).

Compensation Act;⁷ and it stated explicitly that “[t]hese standards are the same in a tort action against an employer who has not complied with the requirements of the Workmen’s Compensation Act.”⁸

Unfortunately, the twin devices of criminal punishment and absolute tort liability may be of little avail to the injured employee of a non-complying employer. The non-complying employer is usually a “fly-by-night” outfit, difficult to sue and often judgment-proof. The expansion of compulsory coverage effected by the 1972 amendment highlights the need for more adequate protection for the employees of non-complying employers. It is suggested that the legislature establish a fund for payment of compensation to injured employees of non-complying employers. Claims for compensation from the fund could be governed by the same procedures that apply to workmen’s compensation claims.⁹ Upon the acceptance of the claim, the fund could be subrogated to the common law rights of the employee against the employer, for the amount of the claim.¹⁰

§3.3. Employee: Juror not considered employee of county. In *John R. O'Malley's Case*,¹ the Supreme Judicial Court was faced with the issue of whether a superior court juror is an employee of the county that called him to duty. The claimant sought workmen’s compensation benefits for an injury sustained by a swinging door while on his way to the jury waiting room. After noting that this was a case of first impression and that only one of the five states that had considered the question had allowed recovery, the Court ruled that a juror is not an employee. “None of the criteria necessary for an employer-employee relationship exist between the county and the juror.”²

The Court applied two tests in making its determination. The Massachusetts Workmen’s Compensation Act defines an employee as “every person in the service of another under any contract of hire, express or implied.”³ Thus, for a worker to be an employee, he must be working pursuant to a contract, express or implied, oral or written. In applying this test, the Court first noted that the statutory definition implies a *voluntary* relationship. Thus the Court has held that a prisoner is not an employee; his enforced labor does not meet the voluntary contract test.⁴ Applying

⁷ “An injury arises out of the employment if it arises out of the nature, conditions, obligations or incidents of the employment. . . .” 1971 Mass. Adv. Sh. 1561, 1562, 274 N.E.2d 821, 822, citing *Caswell's Case*, 305 Mass. 500, 502, 26 N.E.2d 328, 330 (1940). For a comprehensive discussion of the various activities which are held within the definition of “arising out of employment,” see Locke, chapters 10 and 11.

⁸ 1971 Mass. Adv. Sh. 1561, 1563, 274 N.E.2d 821, 822.

⁹ See G.L., c. 152, §§5-25.

¹⁰ Legislation to this effect is being introduced in the 1973 legislature.

§3.3. ¹ 1972 Mass. Adv. Sh. 677, 281 N.E.2d 277.

² *Id.* at 679, 281 N.E.2d at 279.

³ G.L., c. 152, §1(4).

⁴ *Greene's Case*, 280 Mass. 506, 182 N.E. 857 (1932). Similarly, a welfare recipient obliged to perform labor for a town as a condition of his receipt of bene-

the voluntary contract test to the present case, the Court held that a juror is not an employee, since his service is the result of a statutory duty, and not voluntary contract negotiations.⁵

Even if the worker's service complies with the contract test, Massachusetts courts have also made a distinction between "employees" and "independent contractors," allowing workmen's compensation claims only if the worker is an "employee."⁶ The distinction rests on the usual common law test of "right of control."⁷ Applying this test, the Court held that a juror is not an employee of the county. "The county merely provides the facilities and other personnel for the court and the jurors. It exercises no control over the juror's work. Any control and direction exercised over the juror is by order of the court."⁸

Although the decision may satisfy the mind, it leaves the heart hungry. It has the arid virtue of conceptual logic, but no understanding of social policy. The Court should note that workmen's compensation is a segment of the over-all system of wage replacement, social insurance, or income maintenance. The real issue for the Court should be: what is the most appropriate way to provide economic support and medical care for the juror who suffered injury while serving the county as a juror? Should he be left to his own devices? Should he be left to the tender mercies of public welfare? Or would it not be better to spread the cost of income loss and medical care over the citizens of the county through the device of workmen's compensation? If the latter suggestion seems to distort the common-law construction of "employee," then it should be a compelling reason to adopt a broader interpretation of "employee," suitable to the purposes of a social insurance system.

§3.4. Injuries to which the Act applies: Going and coming rule.¹ In

fits has been held not to be an employee of the town for purposes of workmen's compensation. *Scordis's Case*, 305 Mass. 94, 25 N.E.2d 226 (1940).

⁵ "The juror cannot refuse service nor can the county terminate the service." *John R. O'Malley's Case*, 1972 Mass. Adv. Sh. 677, 679, 281 N.E.2d 277, 279.

⁶ *Brigham's Case*, 348 Mass. 140, 202 N.E.2d 597 (1964). Cases applying the distinction are collected and analyzed in *Locke*, §§142-148.

⁷ "If in the performance of his work an individual is at all times bound to obedience and subject to direction and supervision as to details, he is an employee; but if he is only responsible for the accomplishment of an agreed result in an agreed manner, he is an independent contractor." *Brigham's Case*, 348 Mass. 140, 141-142, 202 N.E.2d 597, 598 (1964). Some students of workmen's compensation feel that the test for distinguishing between an employee and an independent contractor is inappropriate in the context of workmen's compensation. The distinction was developed in connection with the law of agency to help determine if a master should be held vicariously liable for the torts of his servants. Such a distinction has questionable validity in social legislation where the issue is not injury *caused* by the employee, but injury *suffered* by him. See *Locke*, §141, n.9.

⁸ *John R. O'Malley's Case*, 1972 Mass. Adv. Sh. 677, 679, 281 N.E.2d 277, 279.

§3.4. ¹ The author acknowledges the assistance he has obtained in writing this section from his office associate, Seth Emmer, Esq., B.C. Law 1971, and Leland Ware, B.C. Law 1973.

theory, to be entitled to the benefits of the Workmen's Compensation Act, an employee must sustain an injury which in some way was occasioned by his employment. This concept is embodied in Section 26 of the Act, which describes a compensable injury as ". . . a personal injury arising out of and in the course of his employment, or arising out of an ordinary risk of the street while actually engaged, with his employer's authorization, in the business affairs or undertakings of his employer."² The two alternative tests contained in the statute constitute a single concept, best summarized in the phrase, "work-connection." The real question sought to be comprehended by the tests is this: is the injury closely enough connected with the employment that the cost of wage loss and medical care should be placed on the employer through his insurance company—or so remote to the employment that the risk should be borne by the employee or some other social or personal loss-sharing system? During the 1972 SURVEY year the Supreme Judicial Court decided two cases which required the Court to interpret the tests contained in Section 26.

In *Margaret M. Ware's Case*,³ the claimant worked in one of the many retail stores in a large shopping center. On the day of her injury, she had her lunch at a place within the shopping center, went to a supermarket to purchase a drink for her afternoon break, and was returning to work on the common sidewalk when she accidentally fell and injured herself. The single member and Reviewing Board⁴ denied her compensation on the finding that her injury did not arise out of and in the course of her employment. On appeal to the superior court the denial of compensation was affirmed and the claim dismissed. The Supreme Judicial Court affirmed the dismissal, holding that the facts did not *require* the conclusion that the accidental fall on the sidewalk arose out of and in the course of her employment. Therefore the board's decision was held conclusive, and the denial of compensation affirmed.⁵

Ordinarily on judicial review, the question before the court is whether there is any evidence of record or any inferences that can reasonably be drawn therefrom on which the decision of the board can be sustained.⁶ It is the *duty* of the court, however, to set aside the decision of the board,

² G.L., c. 152, §26.

³ 1972 Adv. Sh. 1007, 282 N.E.2d 673.

⁴ When a claim for compensation is not accepted by the insurer, the injured party may request an administrative hearing with a single member of the Division of Industrial Accidents. G.L., c. 152, §7. The decision of the single member is reviewable by the Reviewing Board of the Division of Industrial Accidents, G.L., c. 152, §10; the final decision of the board is subject to judicial review. G.L., c. 152, §11.

⁵ *Ware's Case*, 1972 Mass. Adv. Sh. 1007, 1008, 282 N.E.2d 673, 674.

⁶ "It is the exclusive function of the board to consider and weigh the evidence and to ascertain and settle the facts." *Chapman's Case*, 321 Mass. 705, 707, 75 N.E.2d 433, 435 (1947). The full statement of the relative powers of the board and the court on review in *Chapman's Case* is the most comprehensive of the many pronouncements of the court on this point, which is axiomatic in compensation cases. See *Locke*, §583.

where a different conclusion is required by law.⁷ This duty of the court is particularly important when a conclusion of law masquerades as a finding of fact. In the instant case, there was no dispute as to the facts; therefore, there was no fact-finding function for the board to perform. The only question was one of law: did the claimant's injury arise out of and in the course of her employment? The Court's routine affirmance of the board's legal conclusion, in a rescript opinion, amounted to an abandonment of the function of judicial review.

Had the Court approached Ware's claim in the proper framework, it arguably would have been required to reverse the administrative decision and uphold the claim. Where the employee has a *fixed place of employment* and *regular hours of work*, it has traditionally been considered that the cost of injuries occurring on the way to and from work should not be placed on the employer.⁸ This is the so-called going and coming rule. Applying the rule itself to the instant case, the denial of Ware's claim can easily be justified. Ware worked in a store, and was required to punch a time clock both upon arriving and leaving work, and at the beginning and end of her lunch break. She was injured on her way back to the store at the conclusion of her lunch break. Therefore, according to the going and coming rule, her injury did not arise out of and in the course of her employment, since, when injured, she was merely "going" back to work.

The going and coming rule had no sooner been enunciated, however, than exceptions were created to deal with exigent circumstances.⁹ For example, it is settled that injuries on the employer's premises during the lunch hour are compensable, even though the employee is not paid for the lunch period and is free to eat wherever he pleases.¹⁰ Thus, when an employee is injured during a lunch break, the applicability of the going and coming rule has been limited to injuries that do not occur on the employer's premises.¹¹ The question for the Court in the instant case, then, should have been whether the claimant's injury occurred on the "employment premises," as that term has been construed for the purposes of the going and coming rule.

The apparent meaning of the term "employment premises" is the

⁷ Chapman's Case, 321 Mass. 705, 707, 75 N.E.2d 433, 435 (1947).

⁸ Rourke's Case, 237 Mass. 360, 129 N.E. 603 (1921).

⁹ The exceptions are sufficiently numerous that some commentators have suggested that the rule has been swallowed up and should be abandoned. See Horovitz, *Workmen's Compensation: Half-Century of Judicial Developments*, 41 Nebraska L. Rev. 52 (1961); Pound, 15 NACCA L.J. 45, 86-87 (1955); but see LARSON, *WORKMEN'S COMPENSATION LAW* §15.12 (1972) [hereinafter cited as Larson].

¹⁰ Sundine's Case, 218 Mass. 1, 105 N.E. 433 (1914); Hallett's Case, 232 Mass. 49, 121 N.E. 503 (1919); White v. E. T. Slattery Co., 236 Mass. 28, 127 N.E. 597 (1920).

¹¹ This limit on the going and coming rule is based on the assumption that the employee is limited in his choice of a lunch spot by the location of the employment. Larson, §15.50.

building or property owned or occupied by the employer for business purposes. However, on the basis of case precedent, the term has clearly come to include premises neither owned nor leased by the employer, over which he and his employees have a right of passage, such as a common stairway,¹² a passenger elevator furnished for use of all the tenants,¹³ and even a freight elevator which the employee was advised to use by the employer when the stairway to the street had been removed.¹⁴ In a situation even more analogous to the present case, the Court upheld an award of compensation to an employee of a newsstand company injured in the parking lot of a transit company.¹⁵ In that case, the employee was merely going to work at her newsstand in the transit company's terminal; the Court by-passed the going and coming rule by holding that the newsstand company's "premises" included the transit company's parking lot.

In *Ware's Case*, it was clear to the Court that the injury occurred on a sidewalk of the shopping center that provided access to the stores in the center. Further, it was clear from the record that the employer's lease explicitly gave the employer and his employees a right of access to all parking lots, access roads and sidewalks within the shopping center.¹⁶ In denying *Ware's* claim for compensation, the Reviewing Board must have reached the legal conclusion that the injury did not occur on the employment premises. One must question the Court's slavish acceptance of this conclusion. As the cases cited in the previous paragraph clearly show, the term "employment premises" has come to include property over which the employer and his employees have a right of access. If a bus terminal parking lot can be considered as the premises of an operator of a newsstand within the terminal, logic dictates that a common sidewalk of a shopping center should be considered as the premises of an operator of a store within the center, especially when the operator's lease so provides. In these circumstances, it is unfortunate that the Court felt constrained to follow the "finding" of the board and refused to apply the law creatively to the circumstances of the modern business world.

In *Papanastassiou's Case*¹⁷ the Court was again confronted with the question of the applicability of the going and coming rule to the scope of employment tests in Section 26 of the Workmen's Compensation Act. In that case, the employee was killed in an automobile accident at about 10:20 P.M., while driving from his home to his place of employment. Faced with these facts alone, the Court would have been justified in dismissing the claim by applying the traditional going and coming rule.

¹² *Sundine's Case*, 218 Mass. 1, 105 N.E. 433 (1914). In this case, the employee was injured during his lunch break on the only stairway which provided access to the rooms rented by his employer.

¹³ *Latter's Case*, 238 Mass. 326, 130 N.E. 637 (1921).

¹⁴ *Adiletto v. Brockton Cut Sole Corp.*, 322 Mass. 110, 75 N.E.2d 926 (1947).

¹⁵ *Mahan's Case*, 350 Mass. 777, 215 N.E.2d 762 (1966).

¹⁶ *Ware's Case*, 1972 Mass. Adv. Sh. 1007, 282 N.E.2d 673.

¹⁷ 1972 Mass. Adv. Sh. 1163, 284 N.E.2d 598.

Other facts in the record, however, forced the Court to consider the so-called "special errand" exception to the going and coming rule. This exception was recognized by the Supreme Judicial Court in 1966,¹⁸ and was used in *Papanastassiou's Case* to affirm the Reviewing Board's award of compensation.

The going and coming rule bars compensation to an employee who is injured while either going to or coming from work.¹⁹ Under the special errand exception, however, protection is provided on trips, including trips between the employee's home and his normal place of work, so long as some *special necessity* of the employment impelled the trip. In general, an employee performs a "special errand" if, with the employer's authorization, he does something not included in his normal duties, or if he performs his normal duties at an unusual time or place.

Thus, a school teacher's death as a result of an automobile crash while returning home from a P.T.A. meeting has been held compensable under the special errand exception.²⁰ The death of a school janitor, killed by an automobile while he was on route to the school to turn on the lights for an evening baseball game, has been held compensable; since his normal hours were from 5:00 A.M. to 3:30 P.M., the court considered his evening work to be a special errand.²¹ A bookkeeper whose normal working week was Monday through Friday was injured while going to work on a Saturday morning;²² a sales clerk requested to come to work on a Sunday morning was injured on her way.²³ In both of these cases the courts found the injuries compensable, noting that even though the work to be performed was similar to the employee's normal work, the requirement to work on the weekend was "special" and thus the travel to work was "in the course of" employment. The special errand exception was adopted in Massachusetts in *Caron's Case*.²⁴ In that case, the employee was killed in an automobile accident while returning from a company dinner which his supervisor had requested him to attend. Finding that it was the employment that impelled the trip, the Court held that the risk of the trip became a hazard of the employment, and upheld the grant of compensation.²⁵

Applying the special errand exception to the *Papanastassiou* case, the Court upheld the board's grant of compensation. Although the employee was a salaried senior research chemist, with usual working hours from 8:30 A.M. to 5:30 P.M., he was free to come and go as he felt necessary

¹⁸ *Caron's Case*, 351 Mass. 406, 221 N.E.2d 871 (1966).

¹⁹ It should be remembered that the going and coming rule only applies if the employee has a fixed place of employment and fixed hours of work. *Larson*, §15.00.

²⁰ *Binet v. Ocean Gate Board of Education*, 90 N.J. Super. 571, 218 A.2d 869 (1966).

²¹ *Kyle v. Greene High School*, 208 Iowa 1037, 226 N.W. 71 (1929).

²² *Bengston v. Greening*, 230 Minn. 139, 41 N.W.2d 185 (1950).

²³ *Impson v. Dillard's Brown-Dunkin Co.*, 489 P.2d 483 (Okla. 1971).

²⁴ 351 Mass. 406, 221 N.E.2d 871 (1966).

²⁵ *Id.* at 410, 221 N.E.2d at 874.

in order to fulfill his employment obligations. On the day of the accident, the employee was engaged in a hydrogenation experiment that required periodic readings. The company log book showed that he occasionally worked at night and on weekends and holidays. That evening he decided to return to complete the experiment after working hours and on route he was killed. Under these circumstances, the Court relied on *Caron's Case*, where it had said, "Although each case must be decided on its [own] facts, where it appears that it was the employment which impelled the employee to make the trip, the risk of the trip is a hazard of the employment."²⁶ The Court held that the board was warranted in finding that the decedent's employment "impelled" him to make the trip which led ultimately to his death. As a professional employee, he was required to do whatever he judged necessary to assure the success of his experiments; he had the employer's authorization to conduct work outside of standard working hours, and was free to come and go as he pleased. When killed, he was going to work at an unusual hour to fulfill the obligations of an experiment he had started; therefore, his death fell within the special errand exception to the going and coming rule.²⁷

In holding for the claimant in *Papanastassiou* on the basis of an exception to the going and coming rule, the Court by implication affirmed the existence of the rule itself. More specifically, the Court distinguished *Papanastassiou* from other cases ". . . where the employees were merely going to or coming from the place of business of their employers."²⁸ Included in these distinguished cases was *Chernick's Case*,²⁹ in which the Court reversed an award of compensation to the widow of an installment payment collector. Each day the employee was required to report to his office to pick up his assignments for that day. On the morning of his death, he left home early in order to make a collection left over from the previous day. When killed in an automobile accident, however, he was still on the road that he normally used to get to his office. In denying recovery, the Court held that the facts of the case did not bring it within the special errand exception to the going and coming rule. The implication was that if the employee had been on a special errand when injured, his protection would have begun when he left his home.

In *Smith's Case*,³⁰ the claimant, who was employed by the City of Worcester to do housework at the homes of aged people on welfare, was injured on the public sidewalk while on her way to a home in which she was to work the entire day. One must question the applicability of the going and coming rule to this case, since the employee, who was assigned to homes on a daily basis, arguably had no "fixed" place of employment,

²⁶ *Id.* at 409, 221 N.E.2d at 874.

²⁷ *Papanastassiou's Case*, 1972 Mass. Adv. Sh. 1163, 1165, 284 N.E.2d 598, 600-601.

²⁸ *Id.*

²⁹ 286 Mass. 168, 189 N.E. 800 (1934).

³⁰ 326 Mass. 160, 93 N.E.2d 531 (1950).

other than the welfare office itself. The Court, however, treated the home as a definite "place of employment," regarding it as of no consequence that she was to work there for one day only. Thus the Court denied compensation by applying the going and coming rule.

The third case distinguished was *Collier's Case*,³¹ in which a waitress was assaulted on the sidewalk fifty-eight feet from a restaurant where she worked as she proceeded home at about one o'clock in the morning. The waitress was assaulted by a customer who had left the restaurant one hour before, after a quarrel over her refusal to serve him liquor. Although the injury thus arose from a cause connected with her work, the Court denied recovery on the basis of the going and coming rule.³²

The final case cited by the Court as distinguishable was *Gwaltney's Case*,³³ where the injury occurred on the employee's normal route between a public parking garage and his office. The Court felt that the employment did not begin when the employee left his home in the morning merely because the employee, an investment counsellor, might use the car later in the day to visit two customers.

In citing these cases, the Court merely stated that they were all decided under the going and coming rule. All of the cases, taken together, suggest that the applicability of the going and coming rule can only be determined by paying close attention to the facts of each case. The widespread suburbanization of contemporary business, coupled with the decline in public transportation, create additional risks for the employee. Increasingly dependent on the use of automobiles, the employee often encounters more risks going to and from work than he does on the job. It is hoped that a realistic appraisal of these additional risks will lead to a re-evaluation of the going and coming rule and a realization of the social purposes of workmen's compensation.

³¹ 331 Mass. 374, 119 N.E.2d 191 (1954); criticized in 14 NACCA L.J. 73 (1954) and in 35 B.U.L.Rev. 433 (1955).

³² Compare *Cranney's Case*, 232 Mass. 149, 122 N.E. 266 (1919), in which compensation was awarded after the employee was killed on the premises by a recently discharged former employee. See Locke, §264(5).

³³ 355 Mass. 333, 244 N.E.2d 314 (1969).