WORKMEN'S COMPENSATION—PICKING UP OF HITCHHIKERS CONSTITUTES SUFFICIENT WORK-CONNECTION TO ESTABLISH COMPENSABILITY UNDER THE NEW JERSEY WORKMEN'S COMPENSATION ACT—*White v. Atlantic City Press*, 64 N.J. 128, 313 A.2d 197 (1973).

On the morning of April 13, 1971, John B. White left his residence in Atlantic City and drove toward his employer's place of business in Pleasantville, New Jersey.[1] His duties included loading newspapers into his automobile and delivering them at scattered stops along a 20-25 mile route.[2] While still close to his home, he picked up two hitchhikers who requested a ride to a bus station. There was evidence that the drive to the bus station required a detour of several blocks from the route that White normally followed to get to work. There was a further showing, however, that even by taking the alternate route, which passed by the bus station, he would lose no appreciable time.[3] While the car was stopped at a red light, the hitchhikers "returned [White's] favor by committing acts of felonious assault and robbery upon him."[4] White subsequently filed for compensation benefits pursuant to the New Jersey Workmen's Compensation Act.[5]

Atlantic City Press, White's employer, denied liability on three grounds: (1) There was no employment relationship; (2) even if such relationship were found to exist, the coming-and-going rule precluded

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1 White v. Atlantic City Press, 64 N.J. 128, 131, 313 A.2d 197, 198 (1973).

2 *Id.* at 131, 313 A.2d at 199.

3 *Id.* The petitioner testified that he had picked up hitchhikers on prior occasions but "had never encountered or known of harmful incidents." *Id.*

4 *Id.* at 130, 313 A.2d at 198. White received injuries for which he was hospitalized, but returned to work a week later. *Id.* at 131, 313 A.2d at 199.

5 N.J. STAT. ANN. § 34:15-7 (1959) provides:

> When employer and employee shall by agreement, either express or implied, as hereinafter provided, accept the provisions of this article compensation for personal injuries to, or for the death of, such employee by accident *arising out of* and in the course of his employment shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in sections 34:15-12 and 34:15-13 of this title in all cases except when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury, and the burden of the proof of such fact shall be upon the employer.

(emphasis added).

The Act, which abolished the common law negligence actions and defenses in the employment situation, is a form of social insurance which

> extends its "beneficent provisions" alike to the "weak and sick" as to the "strong and able" so long as those of either class come under its provisions and sustain a compensable accident.

Swift & Co. v. Von Volkum, 131 N.J.L. 83, 85, 34 A.2d 897, 898 (Sup. Ct. 1943).

recovery; and (3) picking up a hitchhiker relieved the employer of liability even if the other criteria were satisfied.[6]

The judge of compensation found for White on the first two grounds, but held for his employer on the third.[7] The petition was dismissed and the decision was affirmed by the appellate division in an unreported *per curiam* opinion.[8] The New Jersey supreme court subsequently granted certification.[9]

Justice Pashman, speaking for the court in *White v. Atlantic City Press*,[10] accepted the findings of the compensation judge concerning the existence of an employment relationship.[11] He further found that in the instant situation "the use of the car was both a necessity as well as an established practice," and it was used in connection with White's employment.[12] Thus, the case fell within the ambit of an exception to the coming-and-going rule which recognizes recovery when the nature of the employment dictates the use of an automobile for the benefit of both the employer and the employee.[13] Since compensability under

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6 White v. Atlantic City Press, 64 N.J. 128, 130, 313 A.2d 197, 198 (1973).

7 *Id.* The trial judge relied upon Beh v. Breeze Corp., 2 N.J. 279, 66 A.2d 156 (1949), as the basis for his holding. White v. Atlantic City Press, 64 N.J. at 130, 313 A.2d at 198. *Beh* held that hitchhiking was "a source of danger to life, limb and property" and as such did not arise out of the employment. 2 N.J. at 284, 66 A.2d at 158.

8 White v. Atlantic City Press, No. A-269971 (N.J. Super. Ct. App. Div., April 24, 1973).

9 White v. Atlantic City Press, 63 N.J. 497, 308 A.2d 662 (1973). In White's petition for certification, he contended:

> Discrimination against persons who pick up hitchhikers is a psycological [*sic*] phenomenon attributable in part to many judges whose higher social status inhibits their acceptance of the fact that hitchhiking is a common and lawful method of travel.

Petitioner's Brief for Certification at 1, White v. Atlantic City Press, 64 N.J. 128, 313 A.2d 197 (1973).

10 64 N.J. 128, 313 A.2d 197 (1973).

11 *Id.* at 133, 313 A.2d at 200. The test utilized by the court was whether the conclusion "could reasonably have been reached," considering all credible evidence in the record and giving due regard and weight to the findings of the trial judge below. *Id.* at 133-34, 313 A.2d at 200. *See* De Angelo v. Alsan Masons Inc., 122 N.J. Super. 88, 89-90, 299 A.2d 90, 91 (App. Div.), *aff'd*, 62 N.J. 581, 303 A.2d 883 (1973).

12 64 N.J. at 135, 313 A.2d at 201. The court found it inconceivable that White, as a newspaper deliveryman, could effectuate his deliveries in any other reasonable manner than by using his own automobile. It concluded that to require the use of two cars to avoid the harshness of the coming and going rule would be "preposterous." *Id. See* Begley v. International Terminal Operating Co., 114 N.J. Super. 537, 543, 277 A.2d 422, 426 (Union County Ct. 1971), *cert. denied*, 61 N.J. 155, 293 A.2d 385 (1972).

13 64 N.J. at 135, 313 A.2d at 201. The court stated:

> "[R]ight to compensation rests upon the principle that whenever an employee, because of contract, necessity, express permission or established and accepted practice, uses his car regularly or frequently in connection with his employment and for the employer's benefit, he is within the scope of his employment when transporting the car to and from the place of employment in order to have it available for such use."

this exception attaches at the moment the employee enters the vehicle, recovery was permitted under the Workmen's Compensation Act.[14]

The third issue raised by Atlantic City Press presented the court with an opportunity to reevaluate the hitchhiker doctrine in New Jersey. The court held that the act of picking up hitchhikers is no longer a disqualified deviation from the employment in all cases.[15] Rather, it retains a sufficient work-connection for the act to "arise out of" such employment.[16]

The history of the hitchhiker doctrine reveals a conflict among some of the jurisdictions that have considered the issue. One of the earliest cases to allow compensation was the 1936 decision of the Nebraska supreme court in *Goodwin v. Omaha Printing Co.*[17] Goodwin was employed as a salesman, and while driving to a business appointment in Columbus, Ohio, he allowed a hitchhiker to ride with him. The passenger, after requesting to be let out, produced a gun and ordered Goodwin to leave the automobile. As Goodwin was complying, the hitchhiker fatally shot him.[18]

An action was instituted by Goodwin's widow pursuant to the workmen's compensation law of Nebraska.[19] Following an analysis of

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Id. (quoting from Begley v. International Terminal Operating Co., 114 N.J. Super. 537, 543, 277 A.2d 422, 426 (Union County Ct. 1971), *cert. denied*, 61 N.J. 155, 293 A.2d 385 (1972)).

The coming-and-going rule has historically been a bar to employee recovery. In order for compensability to have been found, injury must have taken place on the employer's premises. Accidents which occurred while going to or coming from work were not compensable since they neither arose out of nor occurred in the course of employment. The harshness of this rule soon became apparent and over the years many exceptions have been found, including the one used by the court in *White*. *See generally* Note, *The Going and Coming Rule*, 41 N.D.L. REV. 185 (1964). In *White*, Justice Pashman stated: "It is axiomatic that exceptions to the rule have been so numerous that they have almost swallowed the rule." 64 N.J. at 134, 313 A.2d at 200; Hammond v. Great Atlantic & Pacific Tea Co., 56 N.J. 7, 12, 264 A.2d 204, 206 (1970). This was first suggested in Horovitz, *Workmen's Compensation: Half Century of Judicial Developments*, 41 NEB. L. REV. 1, 51 (1961). The author noted that there are at least 19 exceptions to the rule. *Id.* at 50-51.

14 *See* 64 N.J. at 134, 313 A.2d at 200.

15 *Id.* at 141, 313 A.2d at 204. The court placed emphasis on the following facts: The deviation was only a few blocks, an alternative route was available, and the deviation was minor in comparison with other fact situations where recovery had been allowed. *Id.* See Rainear v. C.J. Rainear Co., 63 N.J. 276, 307 A.2d 72 (1973), and the cases cited therein for a list of fact situations to which the court was alluding.

16 64 N.J. at 140, 313 A.2d at 203-04.

17 131 Neb. 212, 267 N.W. 419 (1936).

18 *Id.* at 213, 267 N.W. at 420. The record disclosed that Goodwin used his own automobile in his employment and he was reimbursed on a per mile basis. *Id.* at 212, 267 N.W. at 420.

19 NEB. REV. STAT. § 48-101 (1968) provides compensation

[w]hen personal injury is caused to an employee by accident or occupational

the so-called street-risk cases,[20] in which the Nebraska courts had allowed compensation, the court stated:

> While it is true that highway robbery and murder are sometimes committed on the highways, yet it cannot be said that such acts are so common that the inviting of a "hitchhiker" to ride in the car is anything more than a charitable act.[21]

The court reasoned that even if Goodwin had not picked up the hitchhiker, he may "have been shot and robbed anyway."[22]

New Jersey, however, took a contrary position in *Beh v. Breeze Corp.*[23] The supreme court in *Beh* denied compensation to a claimant who had been robbed and assaulted by a hitchhiker. The plaintiff was a salesman temporarily working out of his company's Detroit office. He was required to use his own car and was reimbursed on a per mile basis. While driving from Chicago, Illinois, to Muskegon, Michigan, he picked up a hitchhiker during a snow storm. When they stopped for a meal at a roadside diner, the hitchhiker noticed that Beh was carrying a large sum of money. After lunch the rider took out a pistol and proceeded to rob Beh. Beh was shot and killed while attempting to resist.[24]

The court found that picking up a hitchhiker was neither necessary for the accomplishment of decedent's employment, nor an express duty of such employment.[25] Additionally, it found that the nature of Beh's

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disease, arising out of and in the course of his or her employment, of which the actual or lawful imputed negligence of the employer is a natural and proximate cause . . . .

20 The street-risk doctrine is most commonly applied to highway robbery situations. It has been referred to as the "common application of the general rule granting compensation when the assault arises out of a risk associated with the situs of the work." 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 11.11(c), at 3-127 (1972) [hereinafter cited as A. LARSON]. *See, e.g.*, Coster v. Thompson Hotel Co., 102 Neb. 585, 168 N.W. 191 (1918).

The court in *Goodwin* found assault by a hitchhiker to be included within the street-risk doctrine and further found that "[r]obbery is generally planned and committed not because of but regardless of the acts and wishes of the victim." 131 Neb. at 216, 267 N.W. at 422.

21 131 Neb. at 216, 267 N.W. at 421-22.

22 *Id.*, 267 N.W. at 422.

23 2 N.J. 279, 66 A.2d 156 (1949).

24 *Id.* at 281-82, 66 A.2d at 157. The court conceded that the incident arose "in the course of" the employment and thus the analysis focused upon whether it arose "out of" the employment. *Id.* at 282-83, 66 A.2d at 157. The court noted that neither Beh's employer nor his employment contract had either forbidden him or encouraged him to pick up hitchhikers. *Id.* at 282, 66 A.2d at 157.

25 *Id.* at 283, 66 A.2d at 158. The court stated:

> [T]he peril was clearly separable from his line of duty; the nature of his duties did not expose him to danger except through his own independent act; there was no causal connection between the accident and the conditions attending the transactions of the employer's business.

employment did not expose him to the danger of street robbery and denied the existence of a causal connection between the accident and such employment.[26] Since "[t]he pick-up was purely a charitable incident for the accommodation of the hitch-hiker," the court reasoned that it was outside of the employment and could not be viewed as benefiting the employer either directly or indirectly.[27]

The supreme court holding in *Beh* reversed a contrary result reached a year earlier by the former supreme court which had considered the same case.[28] The former court viewed *Beh* as analogous to *Foley v. Home Rubber Co.*,[29] in which a salesman traveling on the Lusitania during World War I was killed when the ship was hit by a torpedo.[30] The former court reasoned that in both instances the injury

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Id. This seems to have been a total rejection of the positional-risk concept that was adopted four years later in Gargiulo v. Gargiulo, 13 N.J. 8, 97 A.2d 593 (1953). Using the "but for" test it could have been argued that the duties of his employment did in fact expose him to the dangers of the highway. While the court recognized this, it was explicitly rejected. 2 N.J. at 284, 66 A.2d at 158. *See* notes 41-48 *infra* and accompanying text.

26 2 N.J. at 283, 66 A.2d at 158. The *Beh* court reached a contrary position to that taken by the Nebraska supreme court in *Goodwin*. The court in *Beh* held that "[t]he accident was not directly attributable to a risk of the highway." *Id.* Larson places the act of picking up hitchhikers within the street-risk doctrine. 1 A. LARSON, *supra* note 20, § 11.11(c), at 3-127 to 3-129. This approach is similar to that taken by the court in *Goodwin*.

27 2 N.J. at 283, 66 A.2d at 158. The court believed it to be "common knowledge that accommodating hitch-hikers is a source of danger to life, limb and property," and it therefore felt that picking up riders could in no way advance the business of the employer. *Id.* at 283-84, 66 A.2d at 158.

28 137 N.J.L. 431, 60 A.2d 273 (Sup. Ct. 1948). When *Beh* reached the appellate level in 1948, the court of errors and appeals was the highest court in the state and the supreme court had intermediate appellate jurisdiction. The supreme court was composed of a chief justice and eight associate justices pursuant to the New Jersey Constitution of 1844. The supreme court justices additionally sat on the court of errors and appeals along with a chancellor and six specially appointed members. McConnell, *A Brief History of the New Jersey Courts*, 7 N.J. DIGEST 349, 352-53 (West 1954).

Beh reached the court of last resort in 1949. On September 15, 1948, the Judicial Article of the Constitution of 1947 became effective and provided for a supreme court consisting of a chief justice and six associate justices. The newly created supreme court was established as the highest court in the state and the appellate division of the superior court replaced the former supreme court as the intermediate appellate tribunal. *Id.* at 355-56.

29 89 N.J.L. 474, 99 A. 624 (Sup. Ct.), *aff'd*, 91 N.J.L. 323, 102 A. 1053 (Ct. Err. & App. 1917).

The court in *Foley* noted that the employer had knowledge of the risks involved, and thus if Foley was killed by a collision or shipboard fire there would be no question of compensability. 89 N.J.L. at 478, 99 A. at 626.

Of interest is the court's analysis distinguishing the case before it from Hulley v. Moosbrugger, 88 N.J.L. 161, 95 A. 1007 (Ct. Err. & App. 1915). *See* 89 N.J.L. at 477, 99 A.2d at 625. For a discussion of *Hulley v. Moosbrugger*, see notes 52-55 *infra* and accompanying text.

30 89 N.J.L. at 475, 99 A.2d 624-25. Foley was returning on the Lusitania from a

was one of the risks of travel and, as such, "arose out of" the employment.[31]

The *Beh* court did not agree with the court below and found *Foley* clearly distinguishable:[32]

> The granting of rides to unknown people seeking them for unknown reasons is not a risk of the highway but a self imposed risk brought about by the motorist himself.[33]

Thus, the act of picking up a hitchhiker was deemed to be a disqualified deviation and not sufficiently work-connected to "arise out of" the employment.

In determining whether an injury "arises out of" the employment, the New Jersey courts have not resorted to any strict legal formula,[34] but have instead adhered to a flexible, fact-oriented approach.[35] An injury is deemed to "arise out of" the employment when the risk "might have been contemplated by a reasonable person, when entering the employment, as incidental to it."[36] A causal connection between the

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business trip to London and evidence showed that his employer had knowledge of the trip as well as the means of transportation utilized. The court in finding that the accident "arose out of" the employment placed emphasis on the fact that the employer knew of the risk. *Id.* at 481, 99 A. at 627.

31 137 N.J.L. at 433, 60 A.2d at 274. The court supported this contention by citing the traditional broad construction given to the compensation statute. *Id. See* Belyus v. Wilkinson, Gaddis & Co., 115 N.J.L. 43, 178 A. 181 (Sup. Ct. 1935), *aff'd*, 116 N.J.L. 92, 182 A. 873 (Ct. Err. & App. 1936).

32 2 N.J. at 284, 66 A.2d at 158.

33 *Id.* at 283-84, 66 A.2d at 158.

34 Tocci v. Tessler & Weiss, Inc., 28 N.J. 582, 587, 147 A.2d 783, 785 (1959). *See, e.g.*, Green v. DeFuria, 19 N.J. 290, 296, 116 A.2d 19, 22 (1955); Gargiulo v. Gargiulo, 13 N.J. 8, 13, 97 A.2d 593, 595 (1953); Saintsing v. Steinbach Co., 1 N.J. Super. 259, 264, 64 A.2d 99, 101 (App. Div. 1949) (by implication).

35 Tocci v. Tessler & Weiss, Inc., 28 N.J. 582, 587, 147 A.2d 783, 785 (1959). The court in *Tocci* recognized that

> [t]he continued sweeping generality of the statutory language and its judicial definition suggest the conscientious endeavor to maintain a liberally just line between those accidental injuries which may be said to have had some work connection and those . . . unrelated to the employment.

Id.

36 Bryant v. Fissell, 84 N.J.L. 72, 78, 86 A. 458, 461 (Sup. Ct. 1913). *See also* Geltman v. Reliable Linen & Supply Co., 128 N.J.L. 443, 446-47, 25 A.2d 894, 896 (Ct. Err. & App. 1942). The "arising out of" requirement is enunciated in N.J. STAT. ANN. § 34:15-1 (1959) which provides in pertinent part:

> When personal injury is caused to an employee by accident arising out of and in the course of his employment . . . he shall receive compensation therefor from his employer . . . .

This phrase was borrowed from the English statute, The Workmen's Compensation Act of 1897, 60 & 61 Vict., c. 37, § 1(1) which stated:

> If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . pay compensation . . . .

See also 1 A. LARSON, *supra* note 20, § 6.00, at 3-1.

employment and the accident must be shown in order to satisfy the "arising out of" requirement.[37] To establish this causal connection, it must appear that the employment contributed in some manner to the injury, and that the risk of harm was reasonably incidental to the work to be performed.[38] A risk has been determined to be sufficiently incidental to the employment when it is either directly connected with a workman's duties in fulfilling his employment, or is indirectly connected to an employment of a special nature.[39] In the developmental stages of this concept, causation was defined solely in terms of quantitative risk and compensation was disallowed in cases where an injury was not logically connected to the employment.[40]

The hardships and inequities caused by the inherent limitations of this approach led the New Jersey supreme court to adopt the positional-risk, or "but for" doctrine.[41] This theory supports compensation in

> 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, meaning by "neutral" neither personal to the claimant nor distinctly associated with the employment.[42]

An example of the use of this doctrine is *Gargiulo v. Gargiulo*,[43] where an employee was struck in the eye by a stray arrow while burning trash

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37 Causation is defined in the traditional tort sense of legal or proximate cause: To be the legal cause of an accident, the employment must be a cause in fact or actual cause thereof, and also either be a direct cause . . . or, if there be intervening causes, they must not be of such a nature as to constitute superseding causes.

F. HARPER, LAW OF TORTS § 213, at 432 (1933) (footnote omitted).

38 *See* Tocci v. Tessler & Weiss, Inc., 28 N.J. 582, 586-87, 147 A.2d 783, 785 (1959); Bryant v. Fissell, 84 N.J.L. 72, 78-79, 86 A. 458, 461 (Sup. Ct. 1913).

39 Belyus v. Wilkinson, Gaddis & Co., 115 N.J.L. 43, 47, 178 A. 181, 184 (Sup. Ct. 1935), *aff'd*, 116 N.J.L. 92, 182 A. 873 (Ct. Err. & App. 1936). *See also* Note, *Arising "out of" and "in the Course of" the Employment Under the New Jersey Workmen's Compensation Act*, 20 RUTGERS L. REV. 599, 601 (1966).

40 The courts denied compensation in early cases particularly when "skylarking" was involved. *E.g.*, Savage v. Otis Elevator Co., 136 N.J.L. 419, 56 A.2d 595 (Sup. Ct. 1948) (air hose sprayed on worker's face); Budrevie v. Wright Aeronautical Corp., 135 N.J.L. 46, 50 A.2d 147 (Sup. Ct. 1946) (horseplay in freight elevator); Staubach v. Cities Serv. Oil Co., 127 N.J.L. 577, 24 A.2d 193 (Sup. Ct. 1942) (throwing gasoline near employee working with a torch). Compensation was further denied in situations where the injury was caused by an unknown assailant and for no motive. *E.g.*, Bobertz v. Board of Educ., 135 N.J.L. 555, 52 A.2d 827 (Ct. Err. & App. 1947); Giles v. W.E. Beverage Corp., 133 N.J.L. 137, 43 A.2d 286 (Sup. Ct. 1945); Schmoll v. Weisbrod & Hess Brewing Co., 89 N.J.L. 150, 97 A. 723 (Sup. Ct. 1916).

41 Gargiulo v. Gargiulo, 13 N.J. 8, 12, 97 A.2d 593, 595 (1953).

42 1 A. LARSON, *supra* note 20, § 6.40, at 3-4. The author comments that very few jurisdictions are willing to accept the full implications of this doctrine. *Id.*

43 13 N.J. 8, 97 A.2d 593 (1953).

on the property of his employer. The arrow was shot by a child and the injury was concededly accidental.[44] The court did not feel constrained by the traditional requirement of direct connection and found that although there must be causation between the accident and the employment, foreseeability of the injury was not a viable criterion.[45] Instead, utilizing the positional-risk test, the court reasoned:

> 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.[46]

It concluded that any injury suffered by an employee while performing duties at the direct order of an employer is a sufficient contributing cause to satisfy the work-connection requirement.[47]

The ascendency of the positional-risk doctrine showed a practical awareness by the supreme court of the fact that an employee is as vulnerable to uncontemplated and uncontrolled accidents as he is to the normal hazards of his employment.[48] A logical extension of this realistic liberalism was a reevaluation of the "skylarking" or horseplay situations.[49]

New Jersey was one of the first jurisdictions to deny compensation

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44 *Id.* at 10, 97 A.2d at 594. The petitioner could not tell "where the arrow came from and heard only a cry, 'Look out,' before he was struck." As a result of his injuries he lost an eye. *Id.*

45 *Id.* at 12, 97 A.2d at 595.

46 *Id.* at 13, 97 A.2d at 596. The employment brought Gargiulo "unwittingly into the line of fire of the arrow, where he would not have been except for his employment." *Id.*

47 *See id.*

48 *See id.* One author has suggested that *Gargiulo* defines the outside limitations of positional-risk in New Jersey. Malone, *Workmen's Compensation*, 8 RUTGERS L. REV. 97 (1953).

> A strong argument can be made that while the worker is engaged in actively answering the orders of his employer he should be protected against virtually any risk that brings about an accident. Casuistry here would seem to side with injustice.

Id. at 101. Case law since *Gargiulo* neither accepts nor rejects the author's contention.

49 One author has defined horseplay as

> the colloquial term referring to sportive and playful acts often used legalistically to describe the conduct of employees who skylark or prank, doing injury to themselves or to others.

Comment, *Horseplay by Employees*, 15 CLEV.-MAR. L. REV. 104, 104 (1966) (footnote omitted). The early American decisions followed the English cases which had denied compensation to the innocent, non-participating victims. *See, e.g.*, Armitage v. Lancashire & Yorkshire Ry., [1902] 2 K.B. 178. American case law denied such compensation until Judge Cardozo, in his landmark decision of Leonbruno v. Champlain Silk Mills, 229 N.Y. 470, 128 N.E. 711 (1920), distinguished between the aggressor-participant and the innocent victim in allowing recovery. *Id.* at 471, 128 N.E. at 711.

to employees engaged in horseplay[50] and recognized no distinction between the aggressor-participant and the innocent victim.[51] In *Hulley v. Moosbrugger*,[52] the court of errors and appeals, relying primarily on English precedent,[53] strictly construed the "arising out of" employment section of the compensation act and held that horseplay was outside the scope and intent of that provision.[54] Later New Jersey decisions reaffirmed the position taken in *Hulley* and consistently denied compensation.[55]

Despite the trend in other jurisdictions towards awarding recovery to the non-participating victim,[56] it was not until 1955, in the landmark case of *Secor v. Penn Service Garage*,[57] that the New Jersey supreme court adopted the majority view. The plaintiff in *Secor* was a 22-year-old gas station attendant. While performing his services, some fuel overflowed onto his clothing.[58] After being asked by one of his employers

50 Hulley v. Moosbrugger, 88 N.J.L. 161, 95 A. 1007 (Ct. Err. & App. 1915). At that time only Massachusetts had case law even analogous to the issue. *See* McNicol's Case, 215 Mass. 497, 102 N.E. 697 (1913). In *McNicol's Case*, compensation was awarded to an employee who died as a result of injuries sustained from an assault by an intoxicated coworker. *Id.* at 500, 102 N.E. at 698. The court in *Hulley* found that the facts in *McNicol's Case* did not constitute "skylarking" and noted that there was no precedent in New Jersey which allowed compensation in horseplay situations. 88 N.J.L. at 165, 95 A. at 1009.

51 One court has emphatically declared:

> We are of opinion that an employer is not liable under the Workmen's Compensation act . . . to make compensation for injury to an employe which was the result of horse-play or sky-larking, so called, whether the injured or deceased party instigated the occurrence or took no part in it . . . .

Hulley v. Moosbrugger, 88 N.J.L. 161, 169, 95 A. 1007, 1010 (Ct. Err. & App. 1915) (citation omitted).

52 88 N.J.L. 161, 95 A. 1007 (Ct. Err. & App. 1915).

53 *Hulley* has been criticized for blindly following English precedent. *See* Note, 29 YALE L.J. 669 n.20 (1920).

54 88 N.J.L. at 169, 95 A. at 1010. *See* note 40 *supra* and accompanying text. The court emphasized that the assault by the co-workers was "the doing of a negligent act as an individual tort-feasor, for which his employer was not responsible." 88 N.J.L. at 168, 95 A. at 1010.

55 *See, e.g.*, Mountain Ice Co. v. McNeil, 91 N.J.L. 528, 103 A. 184 (Ct. Err. & App. 1918) (ice cream salesman's skull fractured during scuffle with co-worker); Savage v. Otis Elevator Co., 136 N.J.L. 419, 56 A.2d 595 (Sup. Ct. 1948) (air hose sprayed in worker's face); Budrevie v. Wright Aeronautical Corp., 135 N.J.L. 46, 50 A.2d 147 (Sup. Ct. 1946) (horseplay in freight elevator); Staubach v. Cities Serv. Oil Co., 127 N.J.L. 577, 24 A.2d 193 (Sup. Ct. 1942) (throwing gasoline near employee working with a torch); Powers v. Y.M.C.A. of Bayonne, 17 N.J. Misc. 261, 8 A.2d 189 (Workmen's Comp. Bureau 1939) (pin boy injured by another who sportfully threw a bowling ball at him).

56 *See* 1 A. LARSON, *supra* note 20, § 23.10 n.1, at 5-102 to 5-103 and cases cited therein. *See generally* Horovitz, *Assaults and Horseplay Under Workmen's Compensation Laws*, 41 ILL. L. REV. 311, 315-25 (1946).

57 19 N.J. 315, 117 A.2d 12 (1955). *Secor* is discussed in Note, 22 NACCA L.J. 175, 180 (1958).

58 19 N.J. at 316, 117 A.2d at 12.

to change his gasoline-soaked attire, he retorted that "he wasn't afraid of that stuff" and proved his point by lighting a match near his trousers. He was engulfed by the ensuing flames and was severely injured.[59]

Although the facts were in dispute, the court reasoned that even if the evidence was to be construed most favorably to the employer, and Secor's actions were in "mock bravado," the deviation was minor and there was sufficient work-connection to warrant compensation.[60] The court gave credence to "the compelling principles underlying the modern authorities" to lend support to its result.[61] Identifying the existence of minor deviations in almost every employment situation, the court stated:

> An employee is not an automaton, and, even when he is highly efficient, he will to some extent deviate from the uninterrupted performance of his work. Such deviation, if it be considered minor in the light of the particular time, place and circumstances, is realistically viewed by both the employer and the employee as a normal incidence of the employment relation and ought not in this day be viewed as legally breaching the course thereof.[62]

While the clearly articulated holding in *Secor* seemed to have judicially settled the issue of horseplay in New Jersey, the legislature felt it important to amend the Workmen's Compensation Act to guarantee this result—at least to non-participating victims. The amendatory measure included specific provisions to compensate the innocent victims of horseplay, but omitted any mention of the participants, thus creating some doubt as to whether the latter would be statutorily barred from recovery.[63]

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59 *Id.* at 317, 117 A.2d at 13.

60 The court in *Secor* distinguished between momentary impulsive deviations and conscious deliberate excursions. *Id.* at 324, 117 A.2d at 16. The latter are represented by the "curiosity" cases exemplified by Robertson v. Express Container Corp., 13 N.J. 342, 99 A.2d 649 (1953). In *Robertson*, the petitioner was eating her lunch on the roof of the building where she was working when she climbed to a higher elevation to see if there was still smoke from a recent fire at Port Newark. *Id.* at 344, 99 A.2d at 650. She fell through a skylight and was seriously injured. In the resulting compensation action, the court found that she was not engaged in any work connected activity

> but was in the course of a promenade for purposes entirely unrelated to her employment over a separate portion of the roof, where, it is clear, she had never been before.

Id. at 348, 99 A.2d 652.

61 19 N.J. at 324, 117 A.2d at 16.

62 *Id.*

63 N.J. STAT. ANN. § 34:15-7.1 (1959) provides:

> An accident to an employee causing his injury or death, suffered while engaged in his employment but resulting from horseplay or skylarking on the part of a fellow employee, not instigated or taken part in by the employee who suffers the accident, shall be construed to have arisen out of and in the course of the

The supreme court addressed this problem in *McKenzie v. Brixite Manufacturing Co.*,[64] where the petitioner was employed as a granule mixer. Johnson, a fellow worker, was busy cleaning an empty barrel with a hot scraper "when petitioner walked by and playfully touched [him] between his buttocks."[65] Startled by the unexpected contact, Johnson instinctively raised his arms, striking and injuring the petitioner. The employer was aware of other such sportive touching incidents among his employees.[66]

The employer contended that the Workmen's Compensation Act[67] barred a claim for compensation by an aggressor-participant. It argued that since the legislature specifically granted compensation to injured non-participants of horseplay and omitted any reference to either instigators or participants, recovery should be barred under the statute.[68] This argument proved unpersuasive to the court, which reasoned that the adoption of the respondent's contentions would in effect constitute a backward step in the progress achieved in the liberalization of the workmen's compensation law.[69] It concluded that minor deviations " 'attributable to normal human tendencies' " are a commercial reality.[70] The legislature, by failing to mention the participants of horseplay, merely "focused [on] the employee intended to benefit by this amendment" and did not intend to exclude other classes such as participants.[71] The court found no reason to invoke the maxim, *expressio unius est exclusio alterius*, and thus allowed recovery.[72]

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employment of such employee and shall be compensable under the act hereby supplemented accordingly.

(footnote omitted).

64 34 N.J. 1, 166 A.2d 753 (1961). This case gives an excellent review of the history of skylarking in New Jersey. *Id.* at 3-5, 166 A.2d at 755.

65 *Id.* at 3, 166 A.2d at 754. There was evidence that " '[e]very man on the job knows that Walter Johnson is goosy; but when he is playing with a bucket of hot asphalt they stay away from him.' " *Id.* at 7, 166 A.2d at 756.

66 *Id.*

67 See note 63 *supra* for text of the statute.

68 34 N.J. at 8, 166 A.2d at 757. For the text of the statute, see note 6 *supra*. The court noted that the legislature was fully aware of the case law which had discussed skylarking in situations in which the employer had knowledge. Since the amendment made no reference to this, however, the court would not do so by implication. 34 N.J. at 8, 166 A.2d at 757.

69 34 N.J. at 8, 166 A.2d at 757. The court agreed with the county court that to hold otherwise

"would in effect be turning back the clock of progress and nullify the liberal interpretation of remedial legislation as intended by the Legislature."

Id. (quoting from the unreported county court opinion).

70 *Id.* at 5, 166 A.2d at 755 (quoting from Secor v. Penn Serv. Garage, 19 N.J. 315, 320-21, 117 A.2d 12, 15 (1955)).

71 34 N.J. at 8, 166 A.2d at 757. Speaking of the legislature, the court stated:

An important element in *McKenzie* and earlier "skylarking" cases was proof of the employer's acquiescence in the sportive activity.[73] This element of proof, however, was eliminated in *Diaz v. Newark Industrial Spraying, Inc.*[74] In *Diaz*, the plaintiff was hosing down certain frames on his employer's premises. He playfully squirted a co-worker who warned that if it happened again, Diaz "would receive the same treatment."[75] After Diaz repeated his mischievous conduct, the irritated co-worker retaliated by throwing what he thought to be a pail of water at him. The liquid was in fact lacquer thinner which was ignited almost immediately by an open flame under a nearby tank. Diaz was severely burned.[76]

The action was defended on the ground that Diaz failed to prove acquiescence of such activity on the part of the employer and that this infirmity was fatal to Diaz's cause.[77] The court deemed the question of the employer's acquiescence to be immaterial.[78] Rather, it decided that

> the case requires the application of a realistic view of reasonable human reactions to working conditions and associations with people encountered in the course of employment.[79]

Applying this standard, the court held that Diaz's minor deviation was sufficiently work-connected to be compensable.[80]

It limited its amendatory statute to that narrow field and we cannot find any legislative intent to change the original act any further than as expressly declared. *Id.*

72 34 N.J. at 8, 166 A.2d at 757. See Reilly v. Ozzard, 33 N.J. 529, 166 A.2d 360 (1960), wherein the court stated:

> The maxim at best is a mere aid to interpretation. Perhaps more accurately, it usually serves to describe a result rather than to assist in reaching it. The final question is whether in a given context an express provision with respect to a portion of an area reveals by implication a decision with respect to the remainder. The issue is one of intention. The answer resides in the common sense of the situation.

Id. at 539, 166 A.2d at 365. *See* H. BROOM, LEGAL MAXIMS 50-54 (8th ed. 1882). *Cf.* Gangemi v. Berry, 25 N.J. 1, 11, 134 A.2d 1, 6 (1957).

73 *See* 34 N.J. at 3, 166 A.2d at 754. The significance of the employer's acquiescence was recognized, although not factually accepted, as early as 1918 in Mountain Ice Co. v. McNeil, 91 N.J.L. 528, 528-29, 103 A. 184, 185 (Ct. Err. & App. 1918).

74 35 N.J. 588, 174 A.2d 478 (1961).

75 *Id.* at 589, 174 A.2d at 478. There was evidence that Diaz knew little or no English and did not understand the warnings. *Id.*

76 *Id.*

77 *Id.* To support this theory the employer relied on McKenzie v. Brixite Mfg. Co., 34 N.J. 1, 166 A.2d 753 (1961).

78 35 N.J. at 590, 174 A.2d at 479. The court held that the facts of the case "do not encompass the *type* of 'skylarking' which bars recovery." *Id.* (emphasis added). It is difficult after reviewing the case law in this area to conceive of the non-compensable type of skylarking to which the court is alluding.

79 *Id.*

80 *See id.* at 593, 174 A.2d at 481. The court felt that "[t]he act of the claimant in each case was humanly impulsive and relatively minor." *Id.*

A review of the case law since *Beh* reveals a pattern of increasing liberalism in the court's attitude toward compensability. In *Gargiulo*, the court eroded the traditional rule which required an accident to be directly connected with the employment by adopting the positional-risk doctrine.[81] The *Secor* court allowed recovery for injuries sustained by an employee, even though his acts were "impulsive" and far less than prudent.[82] The *McKenzie* court, recognizing the social importance of *Secor's* result, embraced the rationale of that decision and broadly construed an amendment to the Act in order to find compensation for an aggressor-participant of horseplay.[83] In *Diaz*, the court, again relying on the *Secor* rationale, delivered the final blow to *Hulley* and its predecessors by rejecting the need for proof of the employer's acquiescence in "skylarking" situations.[84] *Secor* and its aftermath contrast sharply with the harsh position taken in *Beh* with reference to the picking up of hitchhikers. *White v. Atlantic City Press* presented the court with the opportunity to continue the liberalization of the past two decades by applying it to the hitchhiker doctrine.

After finding that an employment relationship did in fact exist between White and the Atlantic City Press[85] and that the coming-and-going rule did not bar recovery under the Act,[86] Justice Pashman considered the crucial question of whether picking up a hitchhiker was sufficiently work-connected to satisfy the "arising out of" requirement necessary to allow compensability for an injury.[87] The court recognized that *Beh* was "in sharp divergence from the philosophy" espoused by the courts since that decision with reference to the "arising out of" requirement.[88] It noted that in *Beh* the plaintiff was denied recovery because of the "voluntary action of the employee beyond [that] in contemplation by the employer at the time of hiring."[89] In other words, compensation was denied because the employee's act of allowing a hitchhiker to ride was not reasonably foreseeable. However, the court stated that

> foreseeability of the incidence of a particular kind of injury to an employee has always been regarded as immaterial in the rationale of compensation law.[90]

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81 *See* notes 43-49 *supra* and accompanying text.

82 *See* notes 57-63 *supra* and accompanying text.

83 *See* notes 64-72 *supra* and accompanying text.

84 *See* notes 74-80 *supra* and accompanying text.

85 64 N.J. at 134, 313 A.2d at 200. *See* note 11 *supra* and accompanying text.

86 64 N.J. at 135, 313 A.2d at 201. *See* note 13 *supra* and accompanying text.

87 64 N.J. at 137, 313 A.2d at 202. *See* 1 A. LARSON, *supra* note 20, § 6.50, at 3-8.

88 64 N.J. at 137, 313 A.2d at 202. In fact, the court believed that the "gravamen of *Beh*" was the judicial enlargement of the "arising out of" concept. *Id.*

89 *Id.*

90 *Id. E.g.*, Secor v. Penn Serv. Garage, 19 N.J. 315, 319, 117 A.2d 12, 14 (1955).

It further noted that foreseeability was associated with tort law and fault principles, and not with workmen's compensation law. In the law of workmen's compensation, work-connection—not foreseeability—is the main issue to be considered.

An examination of the *Beh* court's rationale revealed that it considered the "self-imposed risk" of picking up hitchhikers to be a disqualified deviation from the employment sufficient to establish a lack of work-connection. The court in *White* refuted this contention finding it contrary to the no-fault principle basic to workmen's compensation law.[91] The Workmen's Compensation Act abolished the common law defense of contributory negligence and limits fault "solely to the categories of intentional self-infliction of harm and intoxication."[92] Therefore, since White's actions did not fall within either of these categories, the court sought to determine whether the act of picking up hitchhikers was a " 'risk that grows out of or is connected with what a workman has to do in fulfilling his contract of service.' "[93]

Considering that question, Justice Pashman stated that

> the risk is not beyond the purview of employment connection merely because it is heightened by an act of the employee otherwise within the course of the employment, which might be described as "foolhardy," "negligent," or "foolish". . . .[94]

The court used *Secor* and *Diaz* as examples of cases in which compensation was given to individuals who were somewhat less than prudent in their activities.[95] It further noted that accidents are not to be viewed as taking place in a vacuum. Rather, one must look to " 'the entire nature of the employment, including the risks of human associations and failings and conditions inseparable from the specific work.' "[96] If White's deviation from the employment was found not to be substantial, compensation would lie "regardless of how one might assess such conduct in terms of prudence, judgment, wisdom or human frailty."[97]

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91 64 N.J. at 137, 313 A.2d at 202.

92 *Id.* The language of N.J. STAT. ANN. § 34:15-7 (1959) further provides that in order for fault to lie, intoxication must be "the natural and proximate cause of injury." Case law has held that the intoxication must be the sole cause. 64 N.J. at 137 n.1, 313 A.2d at 202. *E.g.*, Olivera v. Hatco Chem. Co., 55 N.J. Super. 336, 350, 150 A.2d 781, 788-89 (App. Div.), *cert. denied*, 30 N.J. 557, 154 A.2d 449 (1959).

93 64 N.J. at 137, 313 A.2d at 202 (quoting from Belyus v. Wilkinson, Gaddis & Co., 115 N.J.L. 43, 47, 178 A. 181, 184 (Sup. Ct. 1935), *aff'd*, 116 N.J.L. 92, 182 A. 873 (Ct. Err. & App. 1936)).

94 64 N.J. at 138, 313 A.2d at 202. *See* Green v. DeFuria, 19 N.J. 290, 297, 116 A.2d 19, 23 (1955).

95 *See* notes 57-61 and 74-78 *supra* and accompanying text.

96 64 N.J. at 139, 313 A.2d at 203 (quoting from Diaz v. Newark Indus. Spraying, Inc., 35 N.J. 588, 591, 174 A.2d 478, 479 (1961)).

97 64 N.J. at 140, 313 A.2d at 203.

The court considered whether White's actions satisfied the "reasonable human reaction" test utilized in *Diaz*.[98] The act of picking up the hitchhikers was thought by the court to be "an act which occurs countless times on the streets and highways, and in the vast majority of instances without harm."[99] Relying in part upon the decision of the Nebraska supreme court in *Goodwin*, the court decided that the detour was not "a serious deviation in terms of comparison with other fact situations we have held not to be fatal to recovery."[100] Thus, since the employer was the motivating force behind White's presence on the highway at the time of the occurrence, thereby subjecting him to the risk, the court held that "there was work-connection sufficient to render the ensuing injuries such as arose out of the employment."[101]

The Workmen's Compensation Act precludes any litigation which is grounded on common law negligence principles in the employment setting. As a result, the employee is no longer expected to be at all times a "reasonable man" or model worker who always demonstrates the utmost care and diligence on the job. Instead, the court appears to recognize the concept of a "reasonable *human* man" who is allowed momentary lapses from reasonable prudence.[102]

The decision in *White* is to be lauded for its subscription to this philosophy and its expansion of the "arising out of" concept.[103] The

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98 *Id.* at 139, 313 A.2d at 203.

99 *Id.* The court said that the prudence of the act was not at issue for

> the reasonably expectable range of conduct . . . can run the entire gamut from the grossly careless, imprudent, or foolhardy, to the opposite of those characteristics.

Id.

100 64 N.J. at 141, 313 A.2d at 204. For a list of the cases to which the court alludes, see Rainear v. C.J. Rainear Co., 63 N.J. 276, 307 A.2d 72 (1973).

The court cautioned, however, that the decision does not reflect approval of hitchhiking. 64 N.J. at 140 n.2, 313 A.2d at 204. Hitchhiking is prohibited by N.J. STAT. ANN. § 39:4-59 (1973) which provides:

> No person shall stand in a highway for the purpose of or while soliciting a ride from the operator of any vehicle other than an omnibus or a street car.

101 64 N.J. at 140, 313 A.2d at 204 (footnote omitted).

102 It has been suggested that if the court had held for White's employer, it would have reverted to a philosophy which would sanction

> hand[ing] the worker copies of Prosser on Torts, the Motor Vehicle Code, and the Criminal Code and then to admonish the intimidated employee: "If you are injured because of violating any of the rules and prescripts of these authoritative books, you will irretrievably have departed from your employment and you will then have to call upon your health and accident insurer for benefits or rattle a tin cup seeking statutory alms or a seat in the soup kitchens of the welfare rolls."

The Association of Trial Lawyers of America, Newsletter, at 95 (March, 1974).

103 One professor contends that many of the New Jersey compensation courts

> have been increasingly taking a view that the two tests posed by compensation statutes of "arising out" of and "in the course of" are to be treated as disjunctive rather than conjunctive tests. This implies that a finding that either test is satisfied will allow compensation without inquiry being made as to satisfaction of the other test.

decision shows a frank recognition of the true purpose of the Workmen's Compensation Act and the realistic goals that any social insurance plan must strive to achieve. New Jersey has been a leader in the fair and just interpretation of workmen's compensation issues, and the *White* decision can only be viewed as another addition to this highly commendable record.

David J. Gherlone, Jr.

Letter from Professor James Boskey, Seton Hall University School of Law, to author, May 8, 1974, on file at the *Seton Hall Law Review*.