Chapter 9: Workers' Compensation

Laurence S. Locke
CHAPTER 9

Workers' Compensation

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§ 9.1. Compensation for Injuries in Auto Accident En Route to Medical Treatment for Work-Related Injury. An employee's personal injury is compensable when it arises out of and in the course of employment. An early line of cases, however, denied benefits for a personal injury resulting from the use of streets in the course of employment, on the ground that the injury did not arise out of the "peculiar risks" of the employment, but rather out of the risks of the street common to every traveler. The only exception to this general rule applied to workers for whom the street was their workplace. This restriction on the compensability of street risks led to a legislative amendment that broadened the basis of protection, providing compensation for an employee who "receives a personal injury . . . 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." This legislative action antedated the judicial re-interpretation of the enabling language of the workers' compensation act — "arising out of and in the course of employment" — by abandoning the "peculiar risk" rule in favor of the current "actual risk" construction. Under the modern construction, without the street risk amendment, compensation would be due for an injury resulting from street risks encountered by one who acts consistently within the course of employment.

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§ 9.1. 1 G.L. c. 152, § 26; LOCKE, WORKMEN'S COMPENSATION, 29 MASS. PRACTICE SERIES §§ 211-12 (2d ed. 1981) [hereinafter LOCKE].
2 Colarullo's Case, 258 Mass. 521, 155 N.E. 425 (1927); see LOCKE, supra note 1, at § 217 nn. 50-55.
3 Keaney's Case, 232 Mass. 532, 122 N.E. 739 (1919) (teamster); see LOCKE, supra note 1, at § 217 nn. 56-58.
5 Caswell's Case, 305 Mass. 500, 26 N.E.2d 328 (1940) and its progeny. The modern trend is described in LOCKE, supra note 1, at § 212 and its applicability to street risk cases in § 217.
of his employment pursuant to the specific terms of his contract of hire.\(^6\)

The case discussed in this section, however, holds that injuries resulting from an ordinary street risk are controlled by the amendment, as liberally informed by the modern trend of decision.

In a case of first impression, the Supreme Judicial Court held in *McElroy's Case* that injuries sustained in an auto accident while an employee is en route to medical treatment of a work-related injury are compensable under the "street risk" amendment.\(^7\) The Court recognized that such an injury was commonly considered to "arise out of and in the course of employment" in other jurisdictions,\(^8\) but held that in Massachusetts this second injury was governed by the requirements of the "street risk" amendment to section 26.\(^9\) The Court held that the claimant's injury en route to medical treatment fell within the terms of the amendment.\(^10\)

In *McElroy*, the employee worked for General Motors Corporation in Framingham. He suffered a back injury on April 28, 1978 on the assembly line and received weekly benefits for disability until January 16, 1979, when he returned to light duty. He later transferred to the assembly line and suffered a recurrence of his back pain. He stopped work on February 15, 1980, was examined by the plant physician and was treated by his private physician. On March 21, 1980, while driving his own car to an appointment with the private physician, he was involved in an automobile accident and sustained "catastrophic injuries."\(^11\) The employee's subsequent disability was related solely to his automobile accident.\(^12\)

General Motors, a self-insurer, conceded that the claimant was temporarily totally disabled from February 15, 1980 to March 21, 1980, but contested any liability for the injuries resulting from the automobile accident. After a hearing, a single member of the Industrial Accident Board found that the employee had been traveling at the time of the accident for the purpose of obtaining medical treatment for a work-related injury "and ruled as a matter of law that injuries sustained in such an accident are compensable under [chapter 152, section 26]."\(^13\) The review-

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\(^6\) D'Angeli's Case, 369 Mass. 812, 343 N.E.2d 368 (1976) (injury to truck driver on superhighway; street risk amendment not mentioned; Court required only that activity be incidental to and not inconsistent with employment).


\(^8\) Id. at 747, 494 N.E.2d at 4 (citing six jurisdictions that have held that the "second injuries" are compensable). See also 1 A. Larson, Workmen's Compensation § 13.13 (1985) cited by the Court.


\(^10\) McElroy's Case, 397 Mass. at 750, 494 N.E.2d at 5.

\(^11\) Id. at 744, 494 N.E.2d at 2.

\(^12\) Id.

\(^13\) Id.
ing board adopted both the findings and decision of the single board member. On appeal to the superior court, however, the judge reversed the decision of the board on the grounds that (1) the decision was not based on adequate subsidiary findings, and (2) injuries sustained on a trip to obtain medical treatment are not compensable as a matter of law under section 26. The claimant appealed and the Supreme Judicial Court granted the self-insurer’s application for direct appellate review. The Court reversed the superior court’s ruling.

The Court’s decision first dealt with the adequacy of the single member’s findings. Because decisions of the board are to be upheld unless wholly lacking in evidentiary support or requiring a different conclusion as a matter of law, the Court reviewed the evidence. According to the Court, the employee’s own testimony that he was traveling to Marlborough to see his doctor was sufficient support for the member’s finding.

The Court further held that the general principle that “the board should make such specific and detailed subsidiary findings as will enable the reviewing court to determine with reasonable certainty whether correct rules of law have been applied” was “intended to safeguard the function of the reviewing court, and not to regulate the precise form of the board’s decision.” The Court stated that the member’s decision contained adequate subsidiary findings to support his ultimate conclusion regarding medical treatment.

The Court then directed its attention to the main issue in the case, which it stated in the following language: “whether an employee’s injuries sustained in a motor vehicle accident while traveling to a doctor’s office for treatment of a work-related injury are compensable under [chapter 152, section 26].” The decision, although it makes an indirect reference to the auto accident as a “second” injury, treats the case as though the accident were an original injury. The Court conceded that the street risk

14 Id.
15 Id. at 745, 494 N.E.2d at 2.
16 Id.
17 Id. at 750, 494 N.E.2d at 5.
18 Id. at 745, 494 N.E.2d at 3 (citing Corraro’s Case, 380 Mass. 357, 359, 403 N.E.2d 388 (1980)). This principle is a basic axiom in workers’ compensation jurisprudence, see Locke, supra note 1, at § 583.
19 McElroy’s Case, 397 Mass. at 746, 494 N.E.2d at 3.
20 Id. (citing Messersmith’s Case, 340 Mass. 117, 120, 163 N.E.2d 22, 24 (1959)). See Locke, supra note 1, at § 532.
21 McElroy’s Case, 397 Mass. at 746, 494 N.E.2d at 3.
22 Id.
23 Id. at 746–47, 494 N.E.2d at 3.
24 Id. at 747, 494 N.E.2d at 4. The Court recognizes that the majority of jurisdictions which have “addressed this issue have held these second injuries are compensable.” Id.
provision is "closely related" to the clause "arising out of and in the course of his employment," which directly precedes it in the statute.\textsuperscript{25} While the controlling principles under each clause tend to converge, the Court determined that the employee's injuries must be analyzed under the separate "street risks" provisions to determine whether they are compensable.\textsuperscript{26}

The street risks provision sets up two tests, both of which must be met if the injury is to be compensable. First, the employee must be "actually engaged . . . in the business affairs or undertakings of his employer" at the time of the accident. The Court reasoned that the employee's journey to the doctor's office "for treatment of a work-related injury has its genesis in, and is necessitated by, the employment relationship."\textsuperscript{27} The Court considered a necessary inquiry to be whether the employer had any interest in the trip and derived any advantage from it.\textsuperscript{28} Because a work-related injury caused the trip, both the employee and the employer benefited from the treatment.

Second, the employee must be "actually engaged, with his employer's authorization . . . " within the meaning of the street risks provision. The Court noted that whether the facts of \textit{McElroy} satisfied the second test was a more difficult question.\textsuperscript{29} Although it was uncontested that the employer had not \textit{expressly} authorized the trip, the Court reasoned that authorization could be inferred from the employer's conduct (its knowledge that the employee was being treated by the private physician)\textsuperscript{30} and the workers' compensation act itself.\textsuperscript{31} An employer is required under section 30 of the Act to pay the reasonable and necessary medical expenses resulting from the injury,\textsuperscript{32} and an employee has a corresponding

\begin{itemize}
\item \textit{Id.} at 749, 494 N.E.2d at 4-5.
\item \textit{Id.} at 749, 494 N.E.2d at 5 (citing Caron's Case, 351 Mass. 406, 409-10, 221 N.E.2d 871, 874 (1966) (employment impelled driver to make trip; crash while returning from company dinner party); Papanastassiou's Case, 362 Mass. 91, 93, 284 N.E.2d 598, 600 (1972) (chemist returning in evening to laboratory to check test results held not to be engaged in independent or private enterprise)). The Court compares Jarek's Case, 326 Mass. 182, 93 N.E.2d 533 (1950) (reversing an award of compensation as matter of law where an employee left his place of employment to tell his wife that he would be working late; the decision held that the employee was merely engaged in a private undertaking).
\item \textit{Id.} at 749, 494 N.E.2d at 5 (citing \textit{Jarek's Case}, 326 Mass. at 182, 93 N.E.2d at 533).
\item \textit{Id.} at 749, 494 N.E.2d at 5.
\item \textit{Id.} at 750, 494 N.E.2d at 5.
\item \textit{Id.}
\item \textit{Id.} at 750, 494 N.E.2d at 5 (citing Levenson's Case, 346 Mass. 508, 510-13, 194 N.E.2d 103, 104-05 (1963) (reasonable cost of trip to Florida on physician's order, to avoid intractable back pain aggravated by harsh winter climate in Massachusetts, held to be necessitated by a work-related injury)).
\end{itemize}
duty to submit to medical treatment “in order to avoid exacerbating his injury or prolonging his absence from work.” The Court held, in conclusion, that the employee’s “authority” to visit his physician “arises from the rights and duties of the parties under [chapter 152, section 30 and 45].”

The Court reaches the right result: the judgment of the superior court is reversed and the board’s award of compensation is affirmed. Nevertheless, the Court treated the case as if the auto accident was a separate personal injury which had to be found compensable under section 26, independent of both the compensable injury of April 28, 1978, and the recurring pain and disability which the self-insurer had conceded was caused by that injury and the return to heavy work. The Court framed the issue in this manner: “whether an employee may be awarded compensation for injuries suffered in an automobile accident occurring while the employee was en route to a doctor’s office for treatment of a work-related injury.” In McElroy, however, the automobile crash was not the original work-related injury. Rather, the injury of April 28, 1978 — or the recurrence on February 15, 1980, — was the initial injury, and the self-insurer had conceded its liability for these injuries as well as for the ensuing disability up to the date of the auto accident. The company questioned only whether its liability extended to the disability resulting from the auto accident. The issue before the Court was essentially a question of causal relationship concerning whether the disability from the auto accident, the “second injury,” was within the chain of causation resulting from the “primary” injuries.

It has long been the law in workers’ compensation that an insurer is responsible for all the consequences of an injury arising out of the employment, provided causal connection is shown and the chain of causation has not been broken by the intervention of some independent agency. For example, the consequences of medical treatment are compensable, even if increased disability or death result.

34 Id.
Id. at 744, 494 N.E.2d at 2.
Id. at 743, 494 N.E.2d at 1-2. The Court in its decision. See McElroy’s Case, 397 Mass. at 747, 494 N.E.2d at 4 (citing 1 A. Larson, WORKMEN’S COMPENSATION § 13.13 (1985)).
35 Locke, supra note 1, at §§ 222-25 (Supp. 1984).
36 Morse’s Case, 345 Mass. 776, 189 N.E.2d 530 (1963) (quadriplegia from emboli to the brain during surgery necessitated by a work injury); Atamian’s Case, 265 Mass. 12, 163 N.E. 194 (1928); Burns’s Case, 218 Mass. 8, 11, 105 N.E. 601, 602 (1914) (classic case involving death from bedsores following a spinal injury).
In *Maguire's Case*, the Appeals Court, however, did not apply this analysis to a case of a teacher who was returning to her home to retrieve forgotten medication for treatment of a work-related injury. Instead, the court considered whether the street risk injury arose out of the obligations, conditions or incidents of the employment. The board denied compensation and the court affirmed the denial. In its decision, the court reviewed many of the cases from other jurisdictions involving injuries while driving to receive medical treatment. The majority of these cases recognized “that the employer lacks the opportunity to exercise any control over a trip for medical treatment [but] . . . nevertheless . . . the risk of injury while seeking statutorily required medical treatment should, on balance, be born by the employer rather than the employee.” The court concluded that this justification did not apply to *Maguire's Case* because “. . . there are no comparable statutory or common law duties involved where the employee is simply returning to his home to retrieve medicine forgotten there.” The Supreme Judicial Court in *McElroy* referred to *Maguire's Case* in a footnote, pointing out that the Appeals Court, although it cited favorable cases from other jurisdictions, did not address the question of whether injuries sustained while traveling to obtain medical treatment are compensable under section 26. The Court, of course, made this very holding in *McElroy's Case*.

The Court’s rationale imposes an extra burden on the claimant. Not only must he show that he has sustained the primary injury arising out of and in the course of employment, but he must show that his “second injury” is also compensable independently, under the terms of the street risks amendment. This would not be necessary if the issue was treated as one of causal relation or “chain of causation.”

There exists another difficulty with the Court’s decision in *McElroy*, namely the Court’s insistence on treating the street risk amendment as a distinct basis for compensability, with specific requirements that must be met. A more reasonable holding would have resulted if the Court had interpreted the 1927 street risk amendment as overcoming a now obsolete line of regressive decisions and had held that, by 1986, the amendment was merged into the broadened interpretation of “arising out of and in the course of employment.” This interpretation was suggested to the

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42 Id. at 341, 451 N.E.2d at 449. See Locke, supra note 1, at § 223 (Supp. 1984); Locke, Workmen's Compensation 1983 ANN. SURV. MASS. LAW § 7.2.
44 Id.
45 McElroy's Case, 397 Mass. at 747 n.1, 494 N.E.2d at 3 n.1.
46 Id. (emphasis in original).
47 See D'Angeli's Case, 369 Mass. 812, 343 N.E.2d 368 (1976) (truck driver injured when
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Court in 1960 in *Simmons’s Case*;48 however, the Court there stated that it was not necessary to make that step. Sixteen years later the Court did not even consider this extension as a possibility. This evolution of workers’ compensation law has yet to be taken by the Court.

The decision is otherwise salutary. The Court adopts the same position as that of the overwhelming majority of jurisdictions which afford compensation to employees who sustain an injury while proceeding to obtain medical treatment for a work-related injury. It also enlarges the scope of the street risk amendment, particularly in its construction of the words “employer’s authorization.” Finally, it makes clear the meaning of its requirement that decisions of the Industrial Accident Board must make such specific and detailed subsidiary findings as will enable the reviewing court to determine whether correct rules of law have been applied. *McElroy* thus continues the strong direction of our courts toward a liberal construction of the workers’ compensation act.

§ 9.2. Injury in auto accident returning from dinner and evening recreation as arising “In Course Of” employment; Rights of Massachusetts employees temporarily on duty. Where it applies, the workers’ compensation act is the exclusive remedy available to an employee seeking reparation from his employer for an injury arising out of and in the course of his employment.1 The employer’s immunity has been extended by judicial decision2 and by statute3 to protect employees from tort actions brought by a co-employee. The immunity granted by Massachusetts law applies to Massachusetts residents employed by Massachusetts firms even though they are temporarily in another state while engaged in activities consistent with their Massachusetts employment.4 In *Frassa v. Caulfield*, these established principles required summary judgment for the defendant in a wrongful death and survival action brought against a fellow employee. The employees were in the course of their employment at the time of a fatal automobile accident, and were returning to a night’s

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3 G.L. c. 152, § 15, as amended by Acts of 1971, c. 941, § 1 (abolition of sweeping immunity within so-called “common employment” does not include insured employer “and said insured persons employees.”). See also Locke, supra note 1, at § 663.

4 Sahacerski, 373 Mass. at 304, 366 N.E.2d at 1245.
lodging after dinner and an evening’s entertainment while temporarily on assignment in New Hampshire.\textsuperscript{5} 

The employees, Frassa and Caulfield, were Massachusetts residents employed by a Massachusetts accounting firm to conduct an audit of the records of a private school in New Hampshire. They traveled to the school on June 19, 1978 in Caulfield’s car. The employer was required to pay for mileage and to reimburse both men for their expenses. The men stayed overnight in a room at the school but had to take their evening meal out of the school. On the third day, the audit was not yet completed, and they drove for dinner to a restaurant about one-half hour from the school. After dinner they drove for an additional half-hour to an establishment where they listened to a band and drank some beer, and then drove to “yet another establishment” for further entertainment.\textsuperscript{6} “Shortly after midnight . . . and at a point about a ten minute drive from the school, Caulfield failed to negotiate a turn on the road, the car tipped over, and Frassa was killed.”\textsuperscript{7} 

The employees were covered by workers’ compensation insurance under chapter 152, and Frassa did not reserve his common law rights under section 24.\textsuperscript{8} Within a month of the injury, Frassa’s widow filed a claim for compensation benefits. Although a single member of the Industrial Accident Board denied the claim, the parties, on May 21, 1984, entered into a lump sum settlement for $155,500, approved by the board under section 48. The agreement “expressly provided that it was not an acknowledgement that Frassa was acting in the course of his employment at the time of the accident.”\textsuperscript{9} The action against Caulfield was brought on November 17, 1978.\textsuperscript{10} The case was reported to the Appeals Court by the superior court.\textsuperscript{11} 

The Appeals Court remanded the case to the superior court to enter a judgment for the defendant.\textsuperscript{12} In reaching its decision, the court made two rulings: (1) that Massachusetts law should be applied to give immunity to the defendant co-employee from a tort action brought for an injury arising in the course of employment, where the employer provided workers’ compensation insurance; and (2) although the men had gone to two places of entertainment after dinner, the injury sustained while returning to their lodgings arose in the course of employment. Both holdings were well within established precedent.

\textsuperscript{6} Id. at 106, 491 N.E.2d at 658.
\textsuperscript{7} Id.
\textsuperscript{8} Id.
\textsuperscript{9} Id. at 106–07, 491 N.E.2d at 658.
\textsuperscript{10} Id.
\textsuperscript{11} Id.
\textsuperscript{12} Id. at 113, 491 N.E.2d at 662.
The preliminary inquiry concerning the choice of applicable law was disposed of based on *Saharceski v. Mancure.* 13 *Saharceski* involved the application of Massachusetts law barring suits against co-employees for injuries sustained in Connecticut, where the plaintiff and defendant were both residents of Massachusetts employed by a Massachusetts company and were merely passing through Connecticut at the time of the injury. Connecticut law allowed a tort suit against a co-employee. Although traditionally, torts are governed by the law of the place of injury, the Supreme Judicial Court felt that there were substantial reasons for applying Massachusetts law, which barred suits against co-employees for injuries sustained in the course of employment, where the employer was insured under the Massachusetts Workers’ Compensation Act. *Saharceski* referred to the “reasonable expectations of the parties” and held that “[r]efERENCE TO THE LAW OF THE PLACE OF COMMON EMPLOYMENT PROVIDES BOTH A CERTAIN SOURCE OF THE RESOLUTION OF THE ISSUE AND ASSURANCE THAT THE ABILITY TO MAINTAIN A TORT ACTION WILL NOT TURN SOLELY ON THE FORTUITOUS CIRCUMSTANCE OF WHERE THE ACCIDENT TAKES PLACE.” 14

The court’s decision in *Frassa* dismissed the plaintiff’s attempts to distinguish *Saharceski.* According to the court, all the significant contacts (residence, place of employment and applicable workers’ compensation law) were in Massachusetts; and the employees’ presence in New Hampshire, though for several days, was temporary and part of their normal duties. 15 Even if the court were to have looked to the law of New Hampshire, it was likely that a New Hampshire court would itself apply the Massachusetts law. 16 Interestingly, the *Frassa* court’s decision referred to the fact that the “plaintiff ha[d] already collected substantial workers’ compensation benefits by way of a lump sum . . . .” 17 even though the settlement agreement explicitly provided that it was not an admission that the injury arose in the course of the decedent’s employment. The settlement, nonetheless, was an indication of the significant interest that the Massachusetts court had in applying Massachusetts law to the wrongful death action against the co-employee.

The court then turned to the main question, whether Frassa and Caulfield were “acting in the course of their employment at the time of the accident which caused Frassa’s death.” 18 The applicable principles are

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13 373 Mass. 304, 366 N.E.2d 1245 (1977); See Locke, supra note 1, at § 9, at n.49; § 50, at n.64. For a more detailed discussion of *Frassa* regarding the choice of law issue, see supra Conflict of Laws, chapter 7, section 3.
16 *Id.* (citing LaBounty v. American Ins. Co., 122 N.H. 738, 451 A.2d 161 (1982)).
18 *Id.* at 109, 491 N.E.2d at 660.
again well decided. Although ordinarily injuries sustained going to and coming from work are not compensable under the so-called “going and coming” rule, that rule does not apply to employees who have no fixed place of employment. To quote the classic language of Caswell’s Case, “An injury arises out of the employment if it arises out of the nature, conditions, obligations or incidents of the employment; in other words, out of the employment looked at in any of its aspects.”

Where injuries are incurred while an employee is traveling and ‘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.’ The court found no difficulty in viewing reasonable travel to and from the evening meal on the night of the accident as clearly “impelled by the nature and conditions of the employment.” The precise question then was whether the travel at the time of the accident was reasonable or whether the trips to two places for personal entertainment had “irreparably severed” “the chain which

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19 Id. See also Locke, supra note 1 at §§ 262–65.
20 Frassa, 22 Mass. App. Ct. at 109, 491 N.E.2d at 660. In Frassa, the court cites Wormstead v. Town Manager of Saugus, 366 Mass. 659, 666–67, 322 N.E.2d 171, 176 (1975) and the cases cited therein. In Wormstead, a police captain who was the commanding officer on the 5 P.M. to 1 A.M. shift was injured while returning to the police station after a lunch break. As permitted by regulations, he took the break from 8:00 P.M. to 8:45 P.M. and ate the meal at his home. He was paid for the period of the break and carried his police revolver while picking up some papers at home connected to an investigation. There was evidence that on other occasions he had performed police duties, including making arrests, during his lunch break. On these facts, the Court held that his injury had arisen “in the course of” his employment and thus, he was not barred by the “going and coming” rule. The applicable statute, chapter 41, section 111F, was construed as analogous to the Workers’ Compensation Act.

The Frassa court also relied on Swasey’s Case, 8 Mass. App. Ct. 489, 493–94, 395 N.E.2d 884, 887 (1979), where a temporary employee assigned for a prolonged period to work out of state was injured when his car went off the road while returning home to Massachusetts for a weekend. The Appeals Court held that when viewing his employment as a whole, the travel was “impelled” by the nature, conditions and obligations of his job.

Several other cases were cited in Frassa concerning this issue. See Frassa, 22 Mass. App. Ct. at 110, 491 N.E.2d at 660.

21 Frassa, 22 Mass. App. Ct. at 110, 491 N.E.2d at 660 (citing Caswell’s Case, 305 Mass. 500, 502, 26 N.E.2d 328, 330 (1940) (hurricane caused factory wall to crumble upon employee); also Bator’s Case, 338 Mass. 104, 106, 153 N.E.2d 765, 767 (1958) (employee slipped stepping from one hand truck to another to find a more comfortable place to rest during the lunch hour); Papanastassiou’s Case, 362 Mass. 91, 93, 284 N.E.2d 598, 600 (1972) (chemist returning to laboratory in the evening, from his home, to check the progress of a test)).

22 Frassa, 22 Mass. App. Ct. at 110, 491 N.E.2d at 660 (citing Caron’s Case, 351 Mass. 406, 409, 221 N.E.2d 871, 874 (1966) (fatal car accident returning home after midnight from company dinner; though the employees had stayed after the dinner and had several drinks, it was the employment — the company dinner — which had made the trip home necessary)).

linked the dinner trip to the business of the employer." The court concluded, without deciding whether the two trips for entertainment were within the concept of reasonable travel, that the injury did not occur during such side trips, but rather, occurred while the employees were returning home at the place and under the same conditions as they would have had they proceeded directly to the school from dinner. Any "deviation" had been "cured," and therefore the injury would have been compensable under Massachusetts workers' compensation law and the plaintiff barred from maintaining the action by the fellow employee rule.

The section of the opinion discussing the application of the fellow employee rule, although rendered in a tort action, deals essentially with issues of compensation law. The decision rests broadly on the statutory language of section 26, "arising out of and in the course of employment," and does not limit itself to the "street risk" amendment. A more narrow approach, reaching the same result, would have been to treat the case as one within the category of "traveling employees." The law makes clear that employees whose duties involve travel away from the employer's premises are considered to be in the course of employment throughout the course of such travel, including travel to sleeping quarters and restaurants. This is equally true whether the case is looked at under the general language of section 26 or under the street risk amendment.

The above principle was applied to an employee, working for a prolonged period out of state on a temporary job, who was killed while driving to his home in Massachusetts to spend the weekend with his family. The court considered the street risk as within the general principles applicable to injuries arising in the course of employment and held that because conditions of employment impelled the trip, the accident could properly be found to be within the "risk of the street while actually engaged . . . in the . . . undertakings of his employer." The leading case nationwide

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24 Id.
25 Id. at 111 n.6, 491 N.E.2d at 661 n.6 (citing cases in Massachusetts where compensation has been denied on the basis of personal deviation from employment-impelled travel: Judkins' Case, 325 Mass. 226, 52 N.E.2d 579 (1943); Belyea's Case, 355 Mass. 721, 247 N.E.2d 372 (1969); and Maguire's Case, 16 Mass. App. Ct. 337, 451 N.E.2d 446 (1983)).
28 The Frassa decision was filed on April 23, 1986, about six weeks before McElroy's Case, 397 Mass. 743, 494 N.E.2d 1, filed June 12, 1986, and discussed above in section 2 of this chapter.
29 Locke, supra note 1 at § 267.
31 Id. at 494, 395 N.E.2d at 887.
involving the compensability of injuries to traveling workers (although not a street risk case) is a Massachusetts case, *Souza's Case*, which is often considered, along with *Caswell's Case*, as establishing the contemporary standard for construing "arising out of and in the course of employment."  

Under the "traveling employee" rule, the precise question remains whether at the time of the injury the employees were still on a personal errand (i.e. seeking unreasonable entertainment) or were returning to their lodging under essentially the same conditions as would have prevailed apart from any intervening entertainment. The case creating an obstacle to compensability was *Belyea's Case*, mentioned by the decision in footnote 4. In *Belyea*, the Court upheld a denial of compensation for a fatal truck accident 5 hours after the last delivery, where it was not shown that the claimant had regained the route he might have taken to the employer's garage. The employee's "deviation" to visit several taverns en route had not been cured. In that case, the Court relied on specific findings of fact in the board decision. In contrast, there were no findings of fact in *Frassa* indicating that the employees had regained the route to the school or that the conditions of the driver or the road were the same as they would have been if the men had not stopped off for entertainment after dinner. Nonetheless, the court made these inferences and found the injury to arise as a matter of law within the course of employment and the wrongful death action was therefore barred under the fellow employee rule. It is hard to avoid the inference that the court was influenced by the large lump sum settlement; if the claimant and the insurer had not also considered that the fatal accident had arisen in the course of employment, why would such a substantial settlement have been made?  

Taking the decision in *Frassa* together with the decision in *McElroy's Case* discussed in section 1 of this chapter, one returns to the characterization made by this author, that the Massachusetts courts tend to "ignore the distinction" between cases that come under the general rubric of "arising out of and in the course of employment" and those that come under the "street risk" amendment, thereby treating "all street risks as covered under a large canopy, with stripes of alternating colors."
§ 9.3. Prima Facie Evidence: Chapter 152, Section 7A, Presumptions and Burdens of Proof. In workers' compensation cases, the burden of proof is on the claimant. This burden is difficult to meet when the principal witness, the injured employee, is unavailable to testify. To help the claimant in such cases, the legislature, in 1947, created the presumption that a claim falls within the provisions of the Act when the employee is killed or is mentally unable to testify.\(^1\) The presumption disappeared, however, when rebutted by "substantial evidence to the contrary."\(^2\) The frailty of this presumption led to the 1971 amendment of subsection 7A.\(^3\)

The section now reads,

In any claim for compensation where the employee has been killed, or is found dead at his place of employment or is physically or mentally unable to testify, it shall be prima facie evidence that the employee was performing his regular duties . . . and that the claim comes within the provisions of this chapter.

Even if substantial evidence of non-compensability is introduced, there is still prima facie evidence of compensability if the conditions of the amendment are met. But if no evidence is introduced disputing compensability, the prima facie evidence is uncontrolled and requires a finding for the claimant. The statute is unclear, however, as to how soon after the injury the employee must be "unable to testify" for the amendment to apply.

During the Survey year, the Appeals Court broached, but did not fully analyze this issue of timing and the inability to testify. In Collins's Case,\(^4\) the employee was a general laborer whose duties included snow plowing and road building. He was performing his regular duties removing gravel from a truck, placing the gravel in a wheelbarrow and depositing it in a trench on March 23, 1973, when fellow employees found him slumped to the ground. He was taken to a hospital where the examining physician found slurred speech and paralysis. Although the employee's speech returned to normal an hour after his arrival, his condition worsened during the first twenty-four hours of hospitalization.\(^5\) At the hearing, a single member of the Industrial Accident Board denied the claimant's motion that subsection 7A be applied, reasoning that the employee's current inability to testify did not satisfy the conditions of the section.

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\(^2\) Lapinsky's Case, 325 Mass. 13, 88 N.E.2d 642 (1949). "Substantial evidence to the contrary" is deemed as evidence which "a reasonable mind might accept as adequate to support a conclusion." Goddu's Case, 323 Mass. at 401, 82 N.E.2d at 234.

\(^3\) Acts of 1971, c. 702.


Instead, the member found that the statute requires an immediate connection between the work place and the employee's death, injury or disability.\(^6\) The Appeals Court found this conclusion to be error, as it was undisputed that the incident had occurred while the claimant was working at his place of employment, that he became disabled and unable to testify within the first twenty-four hours, and that he never regained his mental abilities.\(^7\) According to the court, these factors sufficiently met the requirements of the statute. Once in effect, the statute established prima facie evidence of a causal relationship between the employment and the injury.\(^8\)

The court then considered whether there was any evidence which controlled the prima facie effect of the amendment. The insurer had introduced the reports of two medical experts asserting that the employee's disability was not related to his work activities. The claimant made a motion before the single member, renewed before the reviewing board, to strike the opinion evidence of the experts on the ground that the opinions were predicated on facts not in evidence.\(^9\) Both experts based their opinions on hearsay statements contained in a hospital record, never entered into evidence.\(^10\) The history obtained by the admitting physician noted that the claimant was seated and working at the rear of his truck when he suddenly lost the strength to get to his feet and that his speech became garbled.\(^11\) Both experts referred to this history and based their opinions, in part, on this sequence of events. They were not asked if their opinions would have differed had they received information that the employee was engaged in heavy stressful activity at the time of the incident.\(^12\)

The expert testimony offered by the claimant recognized that an important issue in determining causal connection was the extent of physical effort exerted by the employee prior to the incident.\(^13\) The only documentary evidence presented on this issue, however, was the employer's first report of injury, admitted without objection, which stated that "there was tremendous physical exertion used when trying to close [the scuttle door] resulting in [the employee's] collapse."\(^14\) There was direct evidence from both a fellow employee and the employee's son, received during

\(^6\) Id. at 559, 488 N.E.2d at 48.
\(^7\) Id.
\(^8\) Id. at 559, 488 N.E.2d at 48. The court declined to rule on whether the statute would apply to a later testimonial incapacity.
\(^9\) Id. at 560, 488 N.E.2d at 49.
\(^10\) Id. at 561, 488 N.E.2d at 49.
\(^11\) Id.
\(^12\) Id. at 562 n.10, 488 N.E.2d at 50 n.10.
\(^13\) Id. at 560, 488 N.E.2d at 49.
\(^14\) Id. at 560-61, 488 N.E.2d at 49.
the lucid interval in the hospital, that the employee had been unloading stone from the truck through the scuttle. According to the employee, moving the scuttle required substantial effort, and the last thing he remembered was trying to shut the scuttle door. The claimant's expert felt that the heavy repetitive work was a factor in precipitating the incident, while light work would have no effect on the employee.

Following his refusal to strike the opinions of the insurer's experts, the single member adopted the experts' conclusions and denied the claim for compensation on the ground that the claimant had failed to prove that the injury sustained arose out of and in the course of employment. The Appeals Court held that it was error for the member to deny the motion to strike the opinions of the insurer's experts, since there was no substantive evidence to support the history taken by the admitting physician in the hospital. The insurer had argued that because the hospital records were "open to the inspection of the parties" by chapter 152, section 20, the experts were entitled to rely on the history taken upon admission. Rejecting this argument, the court stated that the medical history could not be regarded as part of the evidentiary record merely by reason of section 20 and, on section 20 alone, could not serve as a basis for the opinions of the insurer's expert witnesses. The court held that where specific facts are in controversy, "expert opinion . . . must be based on either the expert's direct personal knowledge, on evidence already in the record or which the parties represent will be presented during the course of the trial, or on a combination of these." Because no evidence was introduced to prove the facts of the history on which the insurer's experts relied, the court conceded that the experts' opinions should have been stricken.

Turning to the issue of the appropriate remedy, the court noted that the injury had occurred in 1973, thirteen years before the decision. According to the court, it would be unlikely that corroborative evidence would be found to establish the hospital history. Nevertheless, because the member's error in disregarding subsection 7A and denying the claim-
ant's motion to strike the medical opinions may have misled the insurer, the court concluded that the case should be recommitted to the board for further proceedings.\textsuperscript{23}

The \textit{Collins} decision reinforces the power and usefulness of subsection 7A as a tool in assisting the claimant in meeting his or her burden of proof. Even if 7A was extended only to cases where the employee was unable to testify at the time of trial and had been rendered testimonially disabled from the moment of injury, the court's holding that a lucid interval in the first twenty-four hours after employment injury did not nullify the subsection is a small, but important step toward application of the subsection where there is an earlier or longer lucid interval.

The decision is also an important reminder that the rules of evidence prevailing in the trial courts of the Commonwealth apply to hearings before the Industrial Accident Board.\textsuperscript{24} The specific holding in \textit{Collins's Case} was incorporated in a rule governing the admission of medical reports.\textsuperscript{25} This new procedure, established by the Acts of 1985, chapter 572, creates an independent reviewing board with prescribed powers to scrutinize the decisions of the single members.\textsuperscript{26} It will now be the responsibility of the Industrial Accident Reviewing Board to review and screen for possible errors in a timely fashion.

\textbf{§ 9.4. Mutual Mistake at Time of Settlement: Rescission Approved by Industrial Accident Board.} During the \textit{Survey} year, the Supreme Judicial Court, in a case of first impression, adopted the "unknown injury" rule for avoiding a release for personal injuries "on the ground of mutual mistake if the parties at the time of signing the agreement were mistaken as to the existence of an injury, as opposed to the unknown consequences of known injuries."\textsuperscript{1} In doing so, the Court limited \textit{Tewksbury v. Fellsway Laundry, Inc.}\textsuperscript{2} to its holding that a release cannot be avoided because the injuries prove more serious than the releasor had believed them to be at the time of the release. The Court also declined to follow language in \textit{McCarthy's Case}\textsuperscript{3} which stated that the parties are bound by a lump sum settlement approved by the Industrial Accident Board and that all

\textsuperscript{23} Id.

\textsuperscript{24} This principle is incorporated in the \textit{Rules of the Department of Industrial Accidents, Mass. Admin. Code} tit. 452, § 1.11(4) (1986).

\textsuperscript{25} Mass. Admin. Code tit. 452, § 1.11(5).

\textsuperscript{26} G.L. c. 152, § 11C.


\textsuperscript{2} 319 Mass. 386, 65 N.E.2d 918 (1946).

\textsuperscript{3} 226 Mass. 444, 115 N.E. 764 (1917).
The rights of the employee are thus terminated. In adopting the unknown injury rule, the Court followed the "great weight of authority in other jurisdictions," a leading text writer, and the Restatement of Contracts. According to the Court's reading of these sources, where it is found that the injured person at the time of the settlement was suffering from a serious and unknown injury which the parties did not intend to cover by the settlement, a personal injury release may be set aside. The Court rejected fears that such a decision would jeopardize the willingness of parties to enter into settlement of personal injury claims, noting that the actual circumstances which would justify rescission of such a release "will be exceedingly rare."

Michael LaFleur was injured at work in January 1975, when a forklift blade fell on his right foot. The company doctor told him that the x-ray showed no fracture or other complications. He returned to work two weeks later but continued to experience pain. The insurer's doctor told LaFleur that he was suffering from a sprain of his big toe, and was subsequently offered a desk job by the employer but was then fired in May 1976, when he failed to report for work. In August 1976, after filing a claim with the Industrial Accident Board, LaFleur entered into a lump sum agreement with the employer's insurer for $4,000. The agreement was signed on the standard form which recited that the payment was "in redemption of the liability for all weekly payments now or in the future due me under the Workmen's Compensation Act for all injuries" received from the accident. The Industrial Accident Board approved the settlement under chapter 142, section 48 in November 1976.

LaFleur continued to experience pain in his right foot. In January 1977, he was diagnosed as "having arterial occlusive (Buerger's) disease." Several operations were unsuccessful in combatting the disease. LaFleur eventually had both legs amputated above the knee and was confined to a wheelchair.

LaFleur filed a complaint against the employer and its insurer in the superior court seeking to have the lump sum agreement rescinded on the ground of mutual mistake and the case recommitted to the Industrial Accident Board. He moved for partial summary judgment, and submitted
an affidavit by a professor of surgery who had examined LaFleur and concluded that his Buerger’s disease “existed at the time of the accident,” that it had been aggravated by the accident, that it was “completely separate, and distinct in nature” from the sprained toe,” and that “the forklift accident was causally related to the amputation of LaFleur’s legs.”

The employee also introduced the defendant’s answers to interrogatories as well as his own affidavit “which indicated that none of the parties knew at the time of the settlement that he was suffering from Buerger’s disease or that the forklift accident had aggravated his condition.”

The superior court judge denied LaFleur’s motion for summary judgment, and entered judgment for the defendants. He reasoned that “[a]n incorrect prediction of the future, notwithstanding the inaccuracy proceeds from mutual ignorance of an essential fact, is not grounds for setting aside a release which the parties have fairly and freely undertaken.”

The judge called the settlement a “bargain” struck by the parties, each represented by counsel. The employee “could not complain if the amount of the lump-sum agreement turned out to be too small” nor could the insurer “if the amount was, on hindsight, too large.”

On LaFleur’s appeal, the Supreme Judicial Court transferred the case on its own motion and reversed. In its decision, the Court first noted that section 48 of the Workmen’s Compensation Act authorizes the parties to enter into a lump sum agreement in redemption of the employer’s liability for medical expenses and benefits. Such an agreement must be approved by the board. “Once approved by the board, this agreement precludes reopening of the case except upon a showing of fraud or mutual mistake.” Jurisdiction to set aside the agreement on either of these equitable grounds rests with the superior court.
The decision then sets forth the well established legal principles underlying the doctrine of mutual mistake. "Where there has been a mistake between the parties as to the subject matter of a contract, there has been no 'meeting of the minds,' and the contract is voidable at the election of the party adversely affected."16 "The mistake must be shared by both parties, and must relate to an essential element of the agreement."17 "The mistake must involve a fact capable of ascertainment at the time the contract was entered into, and not a mere expectation or opinion about future events."18 "A contract will not be rescinded for mutual mistake where one party was aware at the time the contract was signed that he had limited knowledge as to essential facts, but nonetheless assumed the risk that circumstances would prove to be other than as expected."19

The cases cited by the Court in this discussion were all commercial cases involving real estate matters, sale of goods or property, or annuities. None involved personal injuries. The Court, nevertheless, then cited

or cancelling an agreement for dependency benefits on an alleged mutual mistake reversed; only the superior court had such authority in equity). See Locke, supra note 4, at § 420. 16 LaFleur, 398 Mass. at 257–58, 496 N.E.2d at 830 (citing Jeselsohn v. Park Trust Co., 241 Mass. 388, 392, 135 N.E. 315, 317 (1922) (mistaken belief of both parties that when assignment was made, the mortgage conveyed a lot on which a house had been built, not, as was the fact, an unbuilt lot)). 17 LaFleur, 398 Mass. at 258, 496 N.E.2d at 830 (citing Century Plastic Corp., 333 Mass. 531, 534, 131 N.E.2d 740, 742 (1956) (release settling suit for payment of goods sold in 1946 not intended by any of the parties to release a defendant from liability for two transactions involving goods sold in 1950); Cavanaugh v. Tyson, Weare & Marshall Co., 227 Mass. 437, 444, 116 N.E 818, 820 (1917) (nature of fill in which piles were to be driven not "of the very essence of the contract . . . in the sense that it is one of the things contracted about;" contract not voidable because fill turned out to be boulders and rock, not soft material as parties had believed)). 18 LaFleur, 398 Mass. at 258, 496 N.E.2d at 830 (citing Cook v. Kelley, 352 Mass. 628, 632, 227 N.E.2d 330, 333 (1967) (contract for sale of newspaper cannot be rescinded because of buyer's erroneous and unilateral mistaken belief that the paper's publishing rights would last at least three years); Aldrich v. Travelers Insurance Co., 317 Mass. 86, 88, 56 N.E.2d 888, 889 (1944) (life annuity contract made in 1940 cannot be rescinded because annuitant died in 1941 of cancer unknown to either the purchaser or the insurance company at the time the annuity contract was made; the purchaser's state of health and life expectancy was not a fact, but merely an "expectation . . . assumption, opinion or probability" and neither side could rescind the contract because the risk turned out to be greater than either or both assumed it would be)). 19 LaFleur, 398 Mass. at 258, 496 N.E.2d at 830 (citing Aldrich, 317 Mass. at 188, 56 N.E.2d at 889; Covich v. Chambers, 8 Mass. App. Ct. 740, 749, 397 N.E.2d 1115, 1121 (1979) (developer purchasing acreage to be used for residential subdivision cannot rescind purchase on ground of mutual mistake as to adequate drainage for necessary septic systems where the buyer voluntarily assumed that risk and the mistake, if any, was unilateral). Note court's discussion of "clear and convincing evidence" standard of proof at 8 Mass. App. Ct. at 746, 747, 397 N.E.2d at 1119–20). See also Maloney v. Sargisson, 18 Mass. App. Ct. 341, 346, 465 N.E.2d 296, 299–300 (1984).
Tewksbury v. Fellsway Laundry\textsuperscript{20} in which the Supreme Judicial Court, for the first time, decided a case involving an attempt to set aside a release for personal injuries on the ground of mutual mistake. In an action for personal injuries, the defendant, in Tewksbury, asserted that a release signed by the plaintiffs barred any subsequent claims. The plaintiff, however, then brought a bill in equity to have the releases declared null and void and sought a permanent injunction against the defendant as a defense to the later personal injury claim. The defendant’s demurrers were sustained and the plaintiff appealed. After setting forth the facts, the Court affirmed the action of the lower court and dismissed the plaintiff’s appeal.\textsuperscript{21} In Tewksbury, the minor plaintiff was struck and injured on July 7, 1943 by a truck driven by an employee of the defendant. Aside from sustaining injuries to her face, right hip and right groin, she also suffered a fracture of the right femur. She remained under a physician’s care until December 1, 1943 when the doctor told the plaintiff’s mother that the injuries “had entirely cleared up and that she had made a complete recovery to good health.”\textsuperscript{22} Relying on the opinion of the doctor, the mother settled her claim and that of the plaintiff for $1800, and executed two releases discharging her claim for consequential damages and that of the plaintiff for all claims “ensuing from the aforementioned accident.”\textsuperscript{23} An agreement for judgment was filed in court and on December 22, 1943 execution was issued and returned endorsed as satisfied. “[T]hereafter (on April 1, 1944), the plaintiff became afflicted with an ‘aggravated and perilous condition of osteomyelitis of the right leg . . . [a] condition . . . directly, solely and exclusively a result of the accident and injuries hereinbefore set forth.’”\textsuperscript{24} The plaintiff set forth that at the time of the execution of the releases and the agreement for judgment the parties “were unaware of the ‘latent and inchoate osteomyelitis condition of the plaintiff’ and . . . as a result entered into the settlement without taking into account the ‘actual and true injuries’ sustained by the plaintiff. The releases and agreement in judgment . . . were executed by reason of a material mistake of fact.”\textsuperscript{25} Despite these statements, which on the pleadings the defendants had assumed were true, the 1946 Court held that the demurrers were rightly sustained. The Court made two holdings. First, [i]t is settled in this Commonwealth that one who executes a release for consideration for the injuries then known cannot, on the subsequent dis-

\textsuperscript{20} 319 Mass. 386, 65 N.E.2d 918 (1946).
\textsuperscript{22} Id.
\textsuperscript{23} Id. at 387, 65 N.E.2d at 919.
\textsuperscript{24} Id. The Court was apparently quoting from the plaintiff’s bill in equity.
\textsuperscript{25} Id. (quoting from the plaintiff’s bill of complaint).
covering of injuries not known or suspected at the time of settlement, obtain a cancellation of the release on the ground of mutual mistake and that the release is binding in the absence of fraud or concealment. 26

Second,

the great weight of authority supports the view that a release of a claim for personal injuries cannot be avoided merely because the injuries proved more serious than the releasor believed them to be at the time of executing the release, and that, in order to invalidate a release on account of mutual mistake, the mistake must relate to a past or present fact material to the contract and not an opinion respecting future condition as a result of the present facts. 27

The superior court judge, in denying LaFleur's motion for summary judgment, relied on the broad language of Tewksbury and did not assess whether LaFleur represented a mutual mistake as to a past or present fact material to the settlement or to the consequences of the injury which turned out to be more serious than anticipated. On appeal, the Supreme Judicial Court focused on this issue. The Court considered the first holding in Tewksbury to be unwarranted by the facts of the case, which involved osteomyelitis developed after the release was signed. 28 According to the LaFleur Court, Tewksbury dealt with "a situation in which the consequences of an injury turned out to be more serious than expected." 29

In LaFleur, however, the Court stated that

26 Id. Of the two cases cited directly in support of this proposition, only one involved personal injuries, and that case involved a release under a personal accident policy in which the releasor agreed to accept disability payments for six weeks and to fully discharge "all claims which I have or may have on account of the personal injuries sustained." Wood v. Mass. Mut. Acc. Ass'n, 174 Mass. 217, 54 N.E. 541 (1899) (later death from embolism allegedly result of sprain injury). Of the four cases cited with the rubric, "See also ... " only one involved personal injury, Walsh v. Fore River Shipbuilding Co., 230 Mass. 89, 119 N.E. 680 (1918) (shipyard worker executed agreement 23 days after injury accepting ten weeks of disability payments plus medical bills "in full satisfaction and discharge of all claims accrued or to accrue ... "). The Walsh Court made no reference to what disability the plaintiff suffered beyond the ten weeks, but upheld a directed verdict for the defendant on the strength of the release alone, in the absence of any showing of fraud or false representation. The plaintiff was not even seeking rescission on the ground of mutual mistake.

In short, the cases cited by the Court in Tewksbury do not support the sweeping language of this first holding.

27 Tewksbury, 319 Mass. at 389, 65 N.E.2d at 919 (citing cases from other jurisdictions). The Massachusetts cases discussed in supra notes 16–19, which sustain the same proposition in commercial cases, were not mentioned.

28 LaFleur, 398 Mass. at 259 n.5, 496 N.E.2d at 831 n.5. (emphasis in original). The Court, in this note, declined to read Tewksbury broadly to preclude rescission of a release where the parties are mistaken as to the existence of an unknown injury.

The Court also declined to follow the only precedent involving a workers' compensation lump-sum agreement, McCarthy's Case, 226 Mass. 444, 115 N.E. 764 (1917), again regarding the pre-emptive language as likely dicta.

29 LaFleur, 398 Mass. at 259 n.5, 496 N.E.2d at 831 n.5. (emphasis in original).
we are dealing with a separate condition which existed and yet was unknown to the parties at the time of the contract. Although this presents a question of first impression in this Commonwealth, the great weight of authority in other jurisdictions supports the view that a release of claims for personal injuries may be avoided on the ground of mutual mistake if the parties at the time of signing the agreement were mistaken as to the existence of an injury, as opposed to the unknown consequences of known injuries.30

30 Id. at 259, 496 N.E.2d at 831. The decision cites several cases, beginning with Evans v. S.J. Groves & Sons, 315 F.2d 335, 339–341 (2d Cir. 1963). Evans involved a diversity case where the plaintiff, passenger, signed a release for all injuries known and unknown, for a nominal $1, thereby allowing the car owner to receive payment for property damage to the vehicle. No injury was then known but a latent brain injury later manifested itself.

Casey v. Proctor, 59 Cal.2d 97, 110–12, 378 P.2d 579, 587–89 (1963). Casey involved a release in the amount of $490 which was signed 6 days after injury for property damage and personal injuries, known and unknown; plaintiff had an unknown fractured cervical vertebrae. The court held that a releasor may under proper circumstances avoid a release, regardless of its terms, where it appears that unknown injuries existed at the time it was executed. The court noted that the essence of the rule is that the wording of the release is not conclusive and the real question is whether the parties actually intended to discharge liability for unknown injuries. The court listed a number of factors bearing on whether the release was "knowingly made."

Gleason v. Guzman, 623 P.2d 378 (Colo. 1981). In Gleason, a minor plaintiff was struck on the head by a falling vending machine and was admitted to the hospital on two occasions for head injuries. The child's mother hired an attorney who settled the case two years later for $6,114.35 which was approved by the probate court. At the time of the settlement, the minor felt few symptoms and was assured by her physician that she was fully recovered. It later appeared that the child had temporal lobe epilepsy, which had been overlooked but could have been diagnosed with proper tests, and was aggravated by the injury. When the plaintiff, on emancipation, brought a suit, summary judgment was allowed based on the settlement. On appeal, the court reversed and held that it was a question of fact whether at the time of the settlement the guardian and the insurer were mistaken as to the nature of the injuries. The decision contains an excellent analysis of the semantic problems involved in the distinction between unknown injury and unforeseen consequences, on the reasonableness of a layman's reliance on medical advice as to the extent of injury, and on the effect of sweeping language in the release.

Hall v. Strom Construction Co., 368 Mich. 253, 258, 118 N.W.2d 281, 284 (1962). In Hall, the plaintiff was struck on the head by a falling cement block. A release was signed 27 days after injury while the plaintiff was suffering from grand mal epilepsy resulting from a brain injury unknown at the time of settlement. According to the court, relief was available to the releasor when able to prove that the injury — to which the symptoms of delayed disease or disability is proven to be attributable — is mutually unknown when the release is signed and is in return for a nominal consideration. The court utilized strong language on all issues emphasizing the unequal bargaining posture of insurer and of plaintiff, the factor of haste coupled with nominal payment, and reliance of lay plaintiff on medical advice from his own physician as key factors in finding mutual mistake.

Doud v. Minneapolis St. Ry., 259 Minn. 341, 346, 107 N.W.2d 521, 524–25 (1961). In Doud, the victim died from a thoracic aneurysm, separable and distinct from the conditions as they existed at the time of settlement. The release of all claims for injuries known and unknown was held not to bar recovery for "unknown injuries not within the contemplation
The LaFleur Court then looked to the intention of the parties at the time they executed the release. According to the Court, the relevant inquiry is whether there has been a conscious and deliberate intention by the parties to release claims for injuries existing but not known to them at the time of the agreement. In a footnote, the Court referred to two distinct rules on rescission of a settlement agreement "where the release explicitly discharges liability for both known and unknown injuries." The Court declined both approaches and "instead adopt[ed] the view that the intent of the parties must be inferred from the entire circumstances of the agreement, including the language of the release." The language of the standard form of lump sum agreement then used by the Industrial Accident Board merely releases claims "for all injuries received" by the employee on given dates. It does not of itself "clearly or unambiguously indicate that the parties intended to discharge liability for the unknown injury to LaFleur's arterial system . . . ." "Extrinsic evidence may thus be introduced to ascertain whether the parties intended to release liability for LaFleur's unknown injury."

of the parties at the time the release was contracted . . . ." According to the court, whether the parties intended the release to cover unknown injuries is a fact question, not foreclosed by the express language of the release. The court may look "behind the shield of phrasing" to determine what injuries the parties actually contemplated and considered when the settlement was made.

Frahm v. Carlson, 214 Neb. 532, 534-35, 334 N.W.2d 795, 797 (1983). The Frahm court held that a release for all injuries, known and unknown, may be avoided on the grounds of mutual mistake as to the nature and extent of the injury sustained. The mistake must relate to either a present or past fact or facts that are material to the contract of settlement, and not to an opinion as to future conditions. The question is whether the parties were contracting with respect to possible unknown injuries and the releasor intended to relinquish all claims, whether known or unknown (emphasis in original).

Mangini v. McClurg, 24 N.Y.2d 556, 564, 249 N.E.2d 386, 390 (1969). Mangini involved a hip injury unknown at time of settlement even though the plaintiff had pain in the hip area. The court awarded rescission of the settlement based on mutual mistake and on the notion that recission in cases of mutual mistake have "spilled over into the personal injury field." According to the court, these cases are "beset with a special difficulty because the accident and initial trauma are obviously one transaction . . . courts have applied the special rules, by way of analogy, to unknown injuries, treating them as matters not in contemplation at the time of settlement, despite the generality of standardized language in releases." If there is "[c]onscious and deliberate intention to discharge liability from all consequences of an injury, the release will be sustained and bar any future claims of previously unknown injuries." The court emphasized plaintiffs' willingness in personal injury cases to settle for relatively small sums rather than await development of unknown injuries or consequences. Excellent discussion and analysis.

32 LaFleur, 398 Mass. at 260 n.6, 496 N.E.2d at 831–32 n.6.
33 Id.
34 Id. at 260, 496 N.E.2d at 831–32.
35 Id. at 261, 496 N.E.2d at 832 (citing Mickelson v. Barnet, 390 Mass. 786, 460 N.E.2d
The decision lists a number of factors which should be considered when assessing the parties' intent: (1) the language of the agreement; (2) the circumstances of its negotiation and execution; (3) the legal representation of either or both parties; (4) the seriousness of the unknown injury; and (5) the amount paid to the injured person or his estate for the release of the defendant's liability. An unstated premise of this fifth factor is the amount paid by the defendant for the release compared to the risk of severe though unknown injury. According to the Court, "the inquiry should include a consideration as to whether the plaintiff suffers from an unknown injury which is so serious as to indicate clearly that, if it had been known, the release would not have been signed." 36

The Court concluded that it was clear that a genuine factual question was presented regarding the intent of the parties to release all unknown injuries (including Buerger's disease) when the settlement was executed. The case was, therefore, remanded to the superior court where the plaintiff has the burden of proving that the parties did not intend to discharge the employer's liability for the aggravation of the claimant's pre-existing Buerger's disease. 37

Should LaFleur prevail on his claim of mutual mistake and the settlement agreement be rescinded, the claim will be recommitted to the Industrial Accident Board with instructions. Because the defendant in the action before the superior court on the motion for partial summary judgment has submitted nothing in opposition on the other issues, the plaintiff is entitled to an order under Rule 56(d) indicating the facts which are established, to wit, the existence of the unknown injury and its causal relation to the industrial accident. 38

Although LaFleur appears to be an important statement on releases for personal injury claims the decision is unlikely to be of great practical importance in the handling of worker's compensation claims. The particular facts of this case are so unusual that they will be difficult to replicate: the fact that there was a separate injury existing but unknown at the time of the settlement, the fact that an expert physician gave an affidavit to that effect and further swore that the unknown condition of Buerger's disease antedated the injury but was aggravated by it, and the fact that

566, 569–70 (1984) (parol evidence rule no bar to introduction of extrinsic evidence of intent when mistake is alleged)).

36 LaFleur, 398 Mass. at 261, 496 N.E.2d at 832. Other factors mentioned in the cases cited supra note 30 include whether the risk of unknown injury and its possible consequences was the subject of discussion by either party before the settlement and the reasonableness of the contention that the injuries were in fact unknown at the time of the release.

37 Id. at 263, 496 N.E.2d at 833.

38 Id. at 262, 496 N.E.2d at 833.
as a result of this aggravation, the claimant suffered amputation of both legs and was confined to a wheel chair. Clearly if the plaintiff had known such a risk of future injury in a case in which the insurer had accepted the work-related injury as compensable, it is unlikely that he would have settled the case for $4,000.

Furthermore, the 1985 Workers' Compensation Reform Act modified the effect of a lump sum agreement. Under the modified version, if liability has already been established, the settlement will not redeem the liability for payment of medical benefits or vocational rehabilitation even if liability has not yet been established. Under certain circumstances, however, the employee retains the right to reopen the claim on the issue of payment for medical care only.\textsuperscript{39} Additionally, new section 48(1) requires approval of lump sum settlements by the Industrial Accident Reviewing Board, a separate board from the Industrial Accident Board of Administrative Judges who preside over conferences and hearings. This new section is intended to provide a more thorough and objective evaluation of the proposed settlement. For injuries occurring after November 1, 1986, the new section 48(3) also requires that before a lump sum settlement can be approved, the office of education and vocational rehabilitation must review with the employee and his attorney a number of relevant factors, the first of which is “the employee’s rights under this chapter and the effect a lump sum settlement would have upon such rights.” One of the chief things considered by claimant’s counsel and the claimant in deciding whether to enter into a lump sum settlement is whether the settlement is fair in relation to unknown injuries and the unforeseen consequences of known injuries. This is also one of the primary items considered in the pre-settlement discussion with the office of education and in the approval conference before the administrative law judge of the Industrial Accident Review Board. These safeguards and statutory changes in entitlement to future medical benefits make a re-run of \textit{LaFleur} unlikely.

Nevertheless, because \textit{LaFleur} is not limited to workers’ compensation cases, it will have a bearing on personal injury law in general. Although the Court feels that the combination of facts and circumstances are not likely to be repeated, the decision opens up the possibility of complaints for personal injury despite a prior release under conditions which appear to the plaintiff to warrant the attempt. The plaintiff, in addition to the issue of rescission of the release on the ground of mutual mistake of fact as to an existing, separate but known injury, will also have to face the

\textsuperscript{39} Acts of 1985, c. 572, § 52, inserting new section 48 applicable to all injuries arising on or after November 1, 1986. Subsection (2) covers the effect of a lump sum agreement on liability for medical benefits. \textit{See Locke, supra} note 4, Supp. 1987, at § 11.2.
issues posed by statutes of limitation and res judicata if the settlement has been reduced to judgment.\textsuperscript{40} Regardless of whether such complaints come in a trickle or a flood, the Supreme Judicial Court has rendered an important decision which brings Massachusetts cases into line with the majority of jurisdictions.

The policy question underlying the issue of releases resulting from mutual mistake involves the competing interests of encouraging out-of-court settlement of disputed claims and preserving the finality of such settlements versus the fairness of holding a personal injury plaintiff to a so-called "bargain" which in fact he never made. If the personal injury claimant is held bound by the literal terms of the release, he is left to suffer personal injuries without compensation while the party to whom the release is given, usually an insurer, receives a windfall by avoiding liability for a risk it has been paid to assume.\textsuperscript{41} Though couched in terms of "mutual mistake," the courts typically inquire only into the releasor's state of mind and find that he was unaware of the injury; the other party also will be unaware of the injury, but it is less common for the courts to inquire into his state of mind. Generally, "if he [the other party] knew or suspected that there was another injury, the case for rescission would be stronger."\textsuperscript{42} Although the rules governing rescission of a contract on the ground of mutual mistake are set forth in language applicable to contracts, the modern trend has been to look carefully at personal injury releases to make sure they are fairly negotiated and effectively completed.\textsuperscript{43} This trend is reflected in the Restatement of Contracts, Second, section 152 comment f, which discusses releases and particularly emphasizes personal injury releases.\textsuperscript{44} The Restatement acknowledges an injured person's difficulty in knowing the extent of damage to human tissue when injured in that his knowledge cannot be expected to go beyond what he has been told by his physicians, and he should not be held

\textsuperscript{40} LaFleur, 398 Mass. at 261 n.7, 496 N.E.2d at 832 n.7.


\textsuperscript{43} Hall v. Strom Construction Co., 368 Mich. 253, 254, 118 N.W.2d 281, 282 (1962) (citing in footnote the words of Justice Frank in Ricketts v. Pennsylvania R. Co., 153 F.2d 757, 767 (2d Cir. 1946) ("In all likelihood, it is because the courts have sensed the differentiated character of releases of personal injury claims that the 'modern trend' as Wigmore describes it, 'is to . . . develop a special doctrine . . . for that class of cases, liberally relieving the party who signed the release.' WIGMORE, EVIDENCE, § 2416.").

\textsuperscript{44} The language of the Restatement states that "the common recital that the release covers all injuries, known or unknown and of whatever nature or extent, may be disregarded as unconscionable if, in view of the circumstances of the parties, their legal representation, and the setting of the negotiations, it flies in the face of what would otherwise be regarded as a basic assumption of the parties." RESTATEMENT (SECOND) OF CONTRACTS § 152 comment f, at 391 (1981).
accountable for what highly specialized physicians might opine in retrospect.\footnote{Doud v. Minneapolis St. Railway, 255 Minn. 341, 346, 107 N.W.2d 521, 524 (1961).}45

Furthermore, there exists an argument for setting aside releases in appropriate factual settings on the basis of a public interest that victims of injury not become a burden on society. This is not to say that parties may not enter knowingly into a release of both unknown and known injuries for consideration which only later are found to be inadequate for the injuries subsequently discovered. If the courts determine that the possibility of subsequent discovery was carefully considered by the releasor, and that he had adequate legal and medical advice, including advice as to the issue of liability of the defendant and the risk of unknown injury, then the knowing release of rights will not be set aside.\footnote{Mangini v. McClurg, 24 N.Y.2d 556, 564, 249 N.E.2d 386, 391 (1969) ("if . . . there was a conscious and deliberate intention to discharge liability from all consequences of an accident, the release will be sustained and bar any future claims of previously unknown injuries.").} 46 The Court’s carefully researched and clearly worded opinion in \textit{LaFleur} will be an important landmark in the continuing line of cases which bring Massachusetts personal injury law into the contemporary reality.
ERRATUM

Pg. 310, § 10.2:

The block quotation should conclude with "irrelevant."
A new paragraph should begin with, Under Hayes . . . .

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