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***Roberts v. Burlington Industries*—Workers' Compensation for the Death of a Good Samaritan**

For a death to be compensable under North Carolina's Workers' Compensation Act,¹ the deceased employee must have died as a result of an "accident arising out of and in the course of [his] employment."² In *Roberts v. Burlington Industries, Inc.*³ the North Carolina Court of Appeals addressed for the first time the issue whether these requirements can be satisfied when an employee is killed while attempting to render emergency assistance to a complete stranger. In its decision, reversing the denial of the claim by the North Carolina Industrial Commission, the court held that a death occurring in such an emergency rescue situation can qualify for coverage under the Act.⁴

This Note analyzes the court of appeals' decision in *Roberts* and concludes that the decision, although morally satisfying, is legally unsound. As will be discussed below, the *Roberts* court put forth several theories to support a finding of coverage. None of these theories, however, was sufficient to allow compensation. In actuality, the court based its decision on unfounded notions of desirable public policy, thereby awarding compensation for a death the North Carolina General Assembly did not intend the workers' compensation system to bear.

The facts of *Roberts* are quite tragic. On a rainy night in November 1982, Timothy Lee Roberts, a young furniture designer employed by Burlington Industries, was driving home from the airport following a day-long business trip.⁵ At approximately the same time, local law enforcement officials were removing William Desmond Winters, Jr., a transient from Smithfield, Tennessee, from a Howard Johnson's restaurant for failure to pay for his meal.⁶ Almost immediately thereafter, a car struck and killed Winters as he was walking down the interstate entrance ramp adjacent to the restaurant.⁷ Roberts was at this time

1. N.C. GEN. STAT. §§ 97-1 to -122 (1985).

2. *Id.* §§ 97-2(10), (6).

3. 86 N.C. App. 126, 356 S.E.2d 794 (1987). The author of this Note was employed as a summer associate for the law firm representing Burlington Industries in *Roberts v. Burlington Industries, Inc.*, but was not involved in any aspect of the case.

4. *Id.* at 136, 356 S.E.2d at 800.

5. *Id.* at 127, 356 S.E.2d at 795. Although Roberts and the other Burlington Industries employees on the trip arrived back at the airport at about 5:30 p.m., Roberts was not injured until approximately 7:30 p.m. His whereabouts during the interim are uncertain. On the date of the accident certain lines of Burlington Industries furniture were on display at the J.C. Penney's Furniture Showroom in a nearby shopping mall; therefore the Industrial Commission determined that it was possible that Roberts had spent this time examining furniture there, or possibly at another furniture showroom. *Id.* at 129-30, 356 S.E.2d at 797. Because Roberts had resumed the normal route to his home from the airport at the time he was killed, the court found that how he spent the missing time was not relevant in determining whether workers' compensation benefits should be awarded. *Id.*; see *infra* note 11.

6. *Roberts*, 86 N.C. App. at 127-28, 356 S.E.2d at 795. As he was leaving the restaurant, Winters stated that he intended to lie down on the interstate entrance ramp adjacent to the restaurant so that he would be arrested and have a warm place to spend the night. Record at 9, *Roberts* (No. 8610IC1160) (counsel's stipulation of facts).

7. *Id.* The stipulated facts indicated that Winters' body came to rest approximately 126 feet from the point of impact, in the paved and traveled portion of the ramp. Record at 9, *Roberts* (No. 8610IC1160) (counsel's stipulation of facts).

driving down that same ramp. When he saw Winters had been injured, Roberts stopped to offer his assistance.⁸ As he was attempting to wave traffic around Winters' body, Roberts was struck by two cars and killed.⁹

Deputy Commissioner Shuping of the North Carolina Industrial Commission initially heard the claim for workers' compensation death benefits on behalf of Roberts' wife and young daughter.¹⁰ The Deputy Commissioner determined that although Roberts' death occurred in the course of his employment,¹¹ the death did not arise out of the employment;¹² therefore, he denied compensation.¹³ The full Commission later adopted the position of the Deputy Commissioner.¹⁴

Plaintiffs appealed to the North Carolina Court of Appeals, which reversed the Industrial Commission's ruling.¹⁵ The court used three different tests to support its finding that Roberts' death arose out of his employment. First, the court applied the employer-benefit test, determining that Roberts' death arose out of his employment because his acts benefited Burlington Industries by increasing the employer's goodwill.¹⁶ Second, the court applied the positional-risk test, concluding that Roberts' death arose out of his employment because the employment brought Roberts to the position where he encountered a stranger in need of assistance and was subsequently killed.¹⁷ Last, the court applied the increased-risk test and determined that the risk Roberts encountered was not a risk that was common to the public.¹⁸ In addition to these three tests, the court supported its decision on the underlying policy reason that such humanitarian

8. *Roberts*, 86 N.C. App. at 128, 356 S.E.2d at 795. Roberts was actually the second "Good Samaritan" on the scene. Another person, David Smith, had already stopped to aid Winters. Upon stopping his car, Roberts asked Smith if the authorities had been called. Roberts stated that he had seen law enforcement officials at the Howard Johnson's Restaurant and that he would go to contact them. Roberts returned to the scene within five to eight minutes. By the time Roberts was actually struck, a third man, James Cook, was also on the scene. *Id.*

9. *Id.*

10. Chapter 97, sections 38 and 39 of the North Carolina General Statutes govern the award of workers' compensation death benefits to the dependents of the deceased employee. See N.C. GEN. STAT. §§ 97-38 to -39 (1985).

11. In North Carolina if an employee's work requires him to travel, he is held to be "within the course of" his employment during the entire trip, except when a distinct departure or deviation is shown. *Clark v. Burton Lines*, 272 N.C. 433, 438, 158 S.E.2d 569, 572 (1968). Therefore, because the accident resulting in Roberts' death occurred while Roberts was on his way home from the airport following a business trip it was "in the course of" his employment. *Roberts*, 86 N.C. App. at 131, 356 S.E.2d at 797. Satisfaction of this requirement was not an issue on appeal. *Id.*

12. The Deputy Commissioner found that "Mr. Roberts' untimely death did not arise out of his employment, but instead arose from the voluntary, albeit indisputably commendable, humanitarian act of a good citizen and 'good Samaritan' . . ." *Roberts*, 86 N.C. App. at 130, 356 S.E.2d at 797.

13. *Id.*

14. *Id.*

15. *Id.* at 136, 356 S.E.2d at 800-01. On appeal from the Industrial Commission, the court was limited to two questions: (1) whether evidence was sufficient to support the findings of fact; and (2) whether the findings of fact justified the decision. *Id.* at 129, 356 S.E.2d at 796. The court of appeals determined that the full Commission "erred by concluding as a matter of law that Mr. Roberts' injury did not arise out of his employment." *Id.* at 131, 356 S.E.2d at 797.

16. *Id.* at 133, 356 S.E.2d at 798-99.

17. *Id.* at 134, 356 S.E.2d at 799.

18. *Id.* at 136, 356 S.E.2d at 800.

acts should be encouraged.¹⁹

A brief examination of the requirements for a recovery under the North Carolina Workers' Compensation Act, and of the tests that have been used to address these requirements, is helpful in analyzing the court's decision in *Roberts*. The dual requirements for a recovery in North Carolina, as well as in forty-one other states, are that the accident both occur "during the course of" the employment and "arise out of" the employment.²⁰

The "in the course of" requirement is generally interpreted to refer to the time, place, and circumstances of the accident.²¹ In reference to the task of determining whether a particular injury satisfies this requirement, one commentator has stated that the "court-made law [dealing with the 'in the course of' requirement] has filled out to the point that it might be possible to make fairly dependable predictions on coverage under almost any given set of facts involving the time and place of the accident or the activity of the worker when he was injured."²² An example in which the injury clearly satisfies the "in the course of" requirement is when the accident resulting in the injury occurs on the employer's premises, during the employee's normal working hours, while the employee is engaged in his normal employment activity.

The second of the dual requirements, the "arising out of requirement," is generally interpreted to refer to the origin or cause of the injury.²³ The purpose of this requirement is to ensure that "the risk that brought about the accident be related in some way to the nature of the employment."²⁴ One commentator has observed that "[i]f the cost of employee injuries is to be absorbed ultimately by consumers, it is essential as a matter of policy for workmen's compensation to exclude from coverage all accident risks that do not result from engaging in the

19. *Id.*

20. 1 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 6.10, at 3-1 (1966). The North Carolina Supreme Court has stated that "the concepts of 'arising out of' and 'in the course of' employment are distinct elements, both of which must be established before compensation may be allowed." *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 251, 293 S.E.2d 196, 198 (1982). Although North Carolina courts continue to adhere to the dual requirements, they have adopted a boot-strapping technique that makes it easier for the injured worker to satisfy the requirements. Specifically, the North Carolina Supreme Court has described the "arising out of" and "in the course of" requirements as "parts of a single test of work-connection" so that "deficiencies in the strength of one factor are sometimes allowed to be made up by strengths in the other." *Watkins v. City of Wilmington*, 290 N.C. 276, 281, 225 S.E.2d 577, 581 (1976).

21. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531-32 (1977); *Wilson v. Town of Mooresville*, 222 N.C. 283, 285, 22 S.E.2d 907, 910 (1942); *Schmoyer v. Church of Jesus Christ of Latter Day Saints*, 81 N.C. App. 140, 142, 343 S.E.2d 551, 552 (1986); *Warren v. City of Wilmington*, 43 N.C. App. 748, 750, 259 S.E.2d 786, 788 (1979); *Harless v. Flynn*, 1 N.C. App. 448, 455, 162 S.E.2d 47, 52 (1968).

22. Malone, *The Limits of Coverage in Workmen's Compensation—The Dual Requirement Reappraised*, 51 N.C.L. REV. 705, 711 (1973). Courts have formulated special rules that apply to common fact situations. For example, the "special errand" rule and the "dual purpose" doctrine are two such rules used by the North Carolina courts to determine whether an injury arises out of the employment. See *Felton v. Hospital Guild of Thomasville*, 57 N.C. App. 33, 291 S.E.2d 158, *aff'd without precedential value*, 307 N.C. 121, 296 S.E.2d 297 (1982).

23. *Robbins v. Nicholson*, 281 N.C. 234, 238, 188 S.E.2d 350, 353 (1972); *Wilson v. Town of Mooresville*, 222 N.C. 283, 285, 22 S.E.2d 907, 910 (1942); *Schmoyer v. Church of Jesus Christ of Latter Day Saints*, 81 N.C. App. 140, 142, 343 S.E.2d 551, 552 (1986).

24. Malone, *supra* note 22, at 711.

productive process or that are not enhanced by that process in some determinable way."²⁵

Although the "in the course of" requirement is well-defined, the "arising out of" requirement remains quite nebulous. It is clear, however, that risks *distinctly* associated with the employment, such as "machinery breaking, objects falling, explosives exploding, tractors tipping, fingers getting caught in gears, [and] excavations caving in" satisfy the "arising out of" requirement in all jurisdictions.²⁶ In other cases which are not so clear cut, a number of different tests are used to determine whether an injury arises out of the employment. The three tests applied by the *Roberts* court were the increased-risk test, the employer-benefit test, and the positional-risk test.²⁷

The first test applied by the *Roberts* court was the increased-risk test. The increased-risk test has long been used in North Carolina to determine whether an injury "arises out of" the employment.²⁸ For an injury to "arise out of" the employment under this test, "some risk inherent to the employment must be a contributing cause of the injury, and the risk must be one to which the general public would not have been equally exposed apart from the employment. In other words, the employment must have increased the risk of such injury occurring."²⁹

The second test used by the *Roberts* court in its determination that Roberts' death arose out of his employment was the employer-benefit test.³⁰ Under this test, "an injury arises out of the employment when it occurs while the employee is engaged in some activity that he is authorized to undertake and that benefits, directly or indirectly, the employer's business."³¹ In applying this test, courts look to "whether the employee acts for the benefit of his employer to any appreciable extent or whether the employee acts solely for his own benefit or purpose

25. Malone, *supra* note 22, at 705. The author further illustrated the utility of the "arising out of" requirement as follows:

The fact that the injury befell the worker while he was "on the job" would not be sufficient in itself to warrant an award of compensation. For example, one might trip and fall anywhere. Is the fact that a worker trips on the threshold of his place of employment sufficient justification for transferring his accident costs to those who ultimately buy his employer's goods, while the cost of a similar mishap occurring at the worker's own door is to be supported by the worker himself, by charity, or by public assistance?

Malone, *supra* note 22, at 711-12.

26. 1 A. LARSON, *supra* note 20, § 7.10, at 3-12.

27. According to Professor Larson, the currently used interpretations of the "arising out of" requirement can be divided into three categories: the actual-risk test, the positional-risk test, and the increased-risk test. 1 A. LARSON, *supra* note 20, §§ 6.10, 6.30 -.50, at 3-1 to -6. The test used by the majority of jurisdictions is the increased-risk test. 1 A. LARSON, *supra* note 20, §§ 6.10, 6.30 -.50, at 3-1 to -6.

28. See *Cole v. Guilford County*, 259 N.C. 724, 727, 131 S.E.2d 308, 311 (1963); *Sandy v. Stackhouse, Inc.*, 258 N.C. 194, 198, 128 S.E.2d 218, 221 (1962); *Harless v. Flynn*, 1 N.C. App. 448, 455, 162 S.E.2d 47, 52 (1968).

29. *Roberts*, 86 N.C. App. at 131, 356 S.E.2d at 798 (citations omitted) (citing *Guest v. Brenner Iron & Metal Co.*, 241 N.C. 448, 454, 85 S.E.2d 596, 600-01 (1955); *Pittman v. Twin City Laundry & Cleaners*, 61 N.C. App. 468, 472, 300 S.E.2d 899, 902 (1983)).

30. *Id.*

31. *Id.* (citing *Long v. Asphalt Paving Co.*, 47 N.C. App. 564, 566, 268 S.E.2d 1, 3 (1980)).

or that of a third person."³²

The third test applied by the *Roberts* court was the positional-risk test. Other state courts have applied this test to determine whether benefits should be awarded in emergency rescue cases.³³ Under this test, "[a]n injury arises out of the employment if it would not have occurred *but for* the fact that the conditions and obligations of the employment placed claimant in the position where he was injured."³⁴ The degree of work-relatedness required by this test is much less than that required under the increased-risk or employer-benefit tests because it allows recovery when 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."³⁵ A "neutral" force is a force that is "neither personal to the claimant nor distinctly associated with the employment."³⁶

The primary significance of the *Roberts* decision is the court of appeals' adoption of the positional-risk test. Although other state courts have applied this test, *Roberts* is only the second North Carolina case to do so. More importantly, the first North Carolina case to apply this test, *Felton v. Hospital Guild of Thomasville*,³⁷ has no precedential value as it was affirmed by the North Carolina Supreme Court on a three-three split.³⁸ Because the degree of work-connection required under the positional-risk test is much less than under the other tests used by North Carolina courts to address the "arising out of" issue, the adoption of this test represents a major shift from past decisions.

Although the application of the positional-risk test is new for North Carolina courts, other jurisdictions have applied it to award compensation in emergency rescue cases.³⁹ In the landmark case on this issue, *O'Leary v. Brown-*

32. *Guest v. Iron & Metal Co.*, 241 N.C. 448, 452, 85 S.E.2d 596, 600 (1955).

33. 1 A. LARSON, *supra* note 20, § 6.50, at 3-6; *see, e.g.*, *Food Products Corp. v. Industrial Comm'n*, 129 Ariz. 208, 210-11, 630 P.2d 31, 34 (1981); *In re D'Angeli's Case*, 369 Mass. 812, 817-18, 343 N.E.2d 368, 371 (1976). According to Professor Larson, "An important and growing number of courts are accepting the full implications of the positional-risk test." 1 A. LARSON, *supra* note 20, § 6.50, at 3-6.

34. 1 A. LARSON, *supra* note 20, § 6.50, at 3-6.

35. 1 A. LARSON, *supra* note 20, § 6.50, at 3-6.

36. 1 A. LARSON, *supra* note 20, § 6.50, at 3-6.

37. 57 N.C. App. 33, 291 S.E.2d 158, *aff'd without precedential value*, 307 N.C. 121, 296 S.E.2d 297 (1982).

38. *Felton v. Hospital Guild of Thomasville*, 307 N.C. 121, 121-22, 296 S.E.2d 297, 297 (1982). Plaintiff in *Felton*, as part of her employment, was required to pick up items from a local bakery on her way to work. She was injured when she slipped and fell on ice in her driveway while getting in her car to go to the bakery. In a law review note analyzing *Felton* soon after it was decided, the commentator stated:

The most troublesome aspect of *Felton* . . . is the court's interpretation of the "arising out of employment" requirement. . . . In *Felton*, plaintiff's injury was not the result of a risk peculiar to her employment. As Judge Whichard observed in dissent, plaintiff's injury was the result of a hazard encountered by everyone venturing outdoors on the morning in question, whether or not they were employed by defendant.

Note, *Worker's Compensation*, 61 N.C.L. REV. 1243, 1247-48 (1983).

39. *O'Leary v. Brown-Pacific-Maxon Inc.*, 340 U.S. 504, 507 (1951); *Food Products Corp. v. Industrial Comm'n*, 129 Ariz. 208, 210-11, 630 P.2d 31, 34 (1981); *In re D'Angeli's Case*, 369 Mass. 812, 817-18, 343 N.E.2d 368, 371 (1976); *Big "2" Engine Rebuilders v. Freeman*, 379 So. 2d 888, 890 (Miss. 1980).

Pacific-Maxon, Inc.,⁴⁰ the United States Supreme Court awarded compensation under the Longshoremen's Workers' Compensation Act to the dependents of an employee who drowned in an attempt to rescue a complete stranger from a dangerous channel located adjacent to an employee-maintained recreation facility.⁴¹ In support of its award of compensation, the Court stated:

[T]he test of recovery is not a causal relation between the nature of employment of the injured person and the accident. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the "obligations or conditions" of employment created the "zone of special danger" out of which the injury arose.⁴²

In light of this standard, the result in *O'Leary* seems justified. The standard enunciated by the *O'Leary* Court, however, is not the standard employed by the North Carolina courts. Unlike the Court in *O'Leary*, the *Roberts* court did not dispense with the requirement of either an employer benefit or a causal connection between the employment and the injury. It is entirely inconsistent that the *Roberts* court could follow the decision in *O'Leary*, an extreme application of the positional-risk test, while still stating that in North Carolina "[t]here must be some causal connection between the employment and the injury,"⁴³ or that the injury must occur while the employee is engaged in some activity that benefits the employer.⁴⁴

In addition to being inconsistent with the *O'Leary* decision, the facts of *Roberts* are distinguishable from those of the state court cases cited by the *Roberts* court in support of its contention that the positional-risk test should be applied in an emergency rescue case.⁴⁵ First, in each of the cited cases, the nature of the employee's job specifically involved travel, and the accident occurred while the employee was traveling during his normal working hours.⁴⁶ Therefore, the "in course of" aspect in these cases would be considered quite strong and would warrant a finding that the risk was work-connected. This distinction is illustrated by the Mississippi Supreme Court's statement in *Big "2" Engine Rebuilders v. Freeman*⁴⁷ that "[w]hen [, for example, the] claimant is . . . a . . . driver who is certain to encounter collisions along the highway, it is easy to see

40. 340 U.S. 504 (1951).

41. *Id.* at 508-09.

42. *Id.* at 506-07. According to Professor Larson, "[t]he *Brown-Pacific-Maxon* case adopts the positional risk theory in its purest form, by finding work-connection if the employment merely brings the employee to the place where he encounters a moral obligation to rescue a stranger." 1 A. LARSON, *supra* note 20, § 28.33, at 5-423.

43. *Roberts*, 86 N.C. App. at 131, 356 S.E.2d at 797.

44. *Id.* at 131, 356 S.E.2d at 798.

45. *See Food Products Corp. v. Industrial Comm'n*, 129 Ariz. 208, 208-09, 630 P.2d 31, 31-32 (1981); *In re D'Angeli's Case*, 369 Mass. 812, 813-15, 343 N.E.2d 368, 369-70 (1976); *Big "2" Engine Rebuilders v. Freeman*, 379 So. 2d 888, 889 (Miss. 1980).

46. *See Food Products Corp.*, 129 Ariz. at 208-09, 630 P.2d at 31-32 (delivery truck driver, en route to first delivery, injured while assisting a stranger); *D'Angeli's Case*, 369 Mass. at 813-15, 343 N.E.2d at 369-70 (1976) (mechanic, returning from routine work performed outside employer's premises, injured while removing obstruction from highway); *Big "2" Engine*, 379 So. 2d at 889 (route salesman injured while assisting a motorist in apparent distress).

47. 379 So. 2d 888 (Miss. 1980).

the connection between the work and the contact with the emergency.'⁴⁸ In contrast, "Roberts' employment as a furniture designer did not require him to be on the public highways on a regular basis," and therefore the connection between his job and the emergency he encountered was less foreseeable.⁴⁹

A second distinction between *Roberts* and the cited state court cases is that in the latter the employers were appealing awards of compensation, whereas in *Roberts* the Industrial Commission had denied compensation. The awards of compensation by the respective commissions in the cited cases are significant because of the deference the courts were willing to give to the decisions of the respective commissions. The reluctance of the courts to reverse the commissions' decisions was expressly acknowledged in two of the cited cases. For example, the Massachusetts Supreme Court in *In re D'Angeli's Case*⁵⁰ stated: "The decision of the board is to stand unless it is unsupported by the evidence, or tainted by error of law. This is so *even if a different finding could have been made by the board.*"⁵¹ The court concluded it would sustain the general finding of the reviewing board if possible.⁵² The court in *Big "2" Engine Builders* also shared this view, stating that because that was "at least a 'doubtful case,'" the court would affirm the award.⁵³ Because of the deference those courts were willing to give to the decisions of the respective commissions, these cases do not provide sufficient support for the *Roberts* court's decision.

Although, for the reasons discussed above, the state court decisions cited in *Roberts* do not support an award of compensation in that case, other state court decisions do indicate that the decision in *Roberts* is valid. One such case is *Reilly v. Weber Engineering Co.*,⁵⁴ in which an employee was killed while attempting to rescue a child who had become entangled in some electrical wires. In supporting its award of compensation, the New Jersey Court quoted extensively from the *O'Leary* opinion.⁵⁵ One factor that distinguishes *Reilly* from *Roberts* is that the employee in *Reilly* came into contact with the emergency only because he had been instructed by the secretary in charge of his office to investigate the cause of a commotion near the employer's premises.⁵⁶

A second case that supports the *Roberts* decision is *Edwards v. Louisiana Forestry Commission*.⁵⁷ The employee in *Edwards*, a fire towerman, was on duty in his tower when he witnessed a dog attacking a child.⁵⁸ The employee suffered

48. *Id.* at 892 (quoting 1 A. LARSON, *supra* note 20, § 28.22, at 5-421).

49. Brief for Appellee at 13, *Roberts*, 86 N.C. App. 126, 356 S.E.2d 794 (1987) (No. 8610IC1160).

50. 369 Mass. 812, 343 N.E.2d 368 (1976).

51. *Id.* at 815, 343 N.E.2d at 370 (quoting *Ritchie's Case*, 351 Mass. 495, 496, 222 N.E.2d 687, 688 (1966)) (emphasis added).

52. *Id.* (quoting *Demetre's Case*, 322 Mass. 95, 98, 76 N.E.2d 140, 142 (1947)).

53. *Big "2" Engine Builders*, 379 So. 2d at 892.

54. 107 N.J. Super. 254, 258 A.2d 36 (1969).

55. *Id.* at 260-61, 258 A.2d at 40.

56. *Id.* at 260, 258 A.2d at 39.

57. 221 La. 818, 60 So. 2d 449 (1952).

58. *Id.* at 820, 60 So. 2d at 449.

a hernia when he rushed down the tower stairway to rescue the child.⁵⁹ The Louisiana Court of Appeals denied compensation on the basis that there was no connection between the rescue effort and the employment, and no benefit to the employer.⁶⁰ The Louisiana Supreme Court, citing the recently decided *O'Leary* opinion, reversed the court of appeals and awarded compensation.⁶¹ In addition to relying on the *O'Leary* decision, the *Edwards* court analogized to cases allowing recovery for injuries incurred during "horse play," stating that "emphasis is no longer placed on a particular act and its tendency to forward the employer's work in determining whether an injury is compensable."⁶² Although *Edwards* was later set aside on procedural grounds, it apparently continues to represent the Louisiana view on the emergency rescue issue.⁶³ It is important to note, however, that North Carolina and Louisiana have not been consistent in their views concerning workers' compensation. Specifically, while Louisiana "pioneered in the development of the positional risk doctrine,"⁶⁴ North Carolina courts, until *Roberts* and *Felton*, had continued to rely on the increased-risk and employer-benefit tests.

Following its application of the positional-risk test, the *Roberts* court applied a second test, the increased-risk test, to support its decision that Roberts' death arose out of his employment. As stated earlier, the increased-risk test has frequently been used in North Carolina to address the "arising out of" requirement.⁶⁵ In applying this test, the court in *Roberts* sought to distinguish the facts surrounding Roberts' death from those of other cases in which the employees' injuries were held not to have arisen out of their employment "because the hazards [giving rise to the injuries] were ones to which the general public was equally exposed."⁶⁶ Examples of such public hazards include dog bites, armed robberies, and choking to death.⁶⁷ In justifying its decision that the risk involved in *Roberts* was an increased risk, the court stated that "Mr. Roberts' affirmative act of humanitarianism was, by its selfless nature, not something generally done by all."⁶⁸ Regardless of the accuracy of this statement, Roberts' employment did not increase his selflessness. It is most likely that Roberts would have taken the same actions regardless of his employment situation. In addition, the presence of two other men on the scene, also offering their assistance at the time Roberts was killed indicates, happily, that this type of selfless behavior is not as

59. *Id.*

60. *Edwards v. Louisiana Forestry Comm'n*, 49 So. 2d 53, 55 (La. Ct. App. 1950), *rev'd*, 221 La. 818, 60 So. 2d 449 (1952).

61. *Edwards*, 221 La. at 839, 60 So. 2d at 456.

62. *Id.* at 824, 60 So. 2d at 451.

63. 1 A. LARSON, *supra* note 20, § 28.23, at 5-425 n.57 (Cum. Supp. Dec. 1987).

64. 1 A. LARSON, *supra* note 20, § 28.23, at 5-425 (Cum. Supp. Dec. 1987).

65. See *supra* text accompanying notes 28-29.

66. *Roberts*, 86 N.C. App. at 135, 356 S.E.2d at 800.

67. *Id.* (citing *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E.2d 529 (1977) (employee killed by armed robber in parking lot); *Bartlett v. Duke Univ.*, 284 N.C. 230, 200 S.E.2d 193 (1973) (employee choked to death during dinner on business trip); *Plemmons v. White's Serv., Inc.*, 213 N.C. 148, 195 S.E. 370 (1938) (service station attendant died following dog bite)).

68. *Id.* at 136, 356 S.E.2d at 800.

rare as the court suggested. Based on these factors, the court's characterization of the risk in *Roberts* as an increased risk was unwarranted.

In addition to the application of the positional-risk and increased-risk tests, the court in *Roberts* also supported its award of compensation on the basis of the employer-benefit test.⁶⁹ The court determined that Burlington Industries benefited as a result of the goodwill generated by the various newspaper articles and a trade paper article naming Roberts as an employee of Burlington Industries who was killed while acting as a good Samaritan.⁷⁰ Although the employer-benefit test is well established in North Carolina, the facts of *Roberts* can be distinguished from other cases applying this test because the latter have involved some degree of business connection between the injured party and the employer. One such case is *Guest v. Brenner Iron and Metal Co.*⁷¹ In *Guest* the employee stopped at a service station to use the station's air hose to fill the tires of his employer's car.⁷² As the employee was inflating the tires, the car of a service station customer stalled, and the service station operator requested the employee's assistance in pushing the disabled vehicle.⁷³ The employee agreed to help, and was subsequently injured when the car he was pushing was struck by a third car.⁷⁴ Because the employee was using the service station's air hose to inflate the tires of his employer's car at the time the request for assistance was made, the North Carolina Supreme Court held that the injury was compensable, as the employee was rendering assistance in exchange for a benefit to his employer.⁷⁵ The court explicitly stated, however, that its facts were "distinguishable from cases where the act of the employee, characterized as 'chivalric,' or 'an errand of mercy,' or 'the act of a good Samaritan,' is wholly unrelated to the employment."⁷⁶ Because Roberts' acts fall within the stated exception, *Guest* is not controlling.

Another North Carolina case illustrating the necessity for some business relationship between the injured party and the employer in order for the employer-benefit test to apply is *Lewis v. Kentucky Central Life Insurance Co.*⁷⁷ In *Lewis* the employee was a salesman who was injured in an attempt to aid a

69. *Id.* at 133, 356 S.E.2d 798-99.

70. *Id.* "Several local newspapers carried the story and noted that Mr. Roberts worked for Burlington," and "[a] trade publication called 'Furniture Today' ran an article on Mr. Roberts calling him a furniture designer for Burlington who died 'in the act of being a good Samaritan.'" *Id.*

71. 241 N.C. 448, 85 S.E.2d 596 (1955).

72. *Id.* at 453, 48 S.E.2d at 600.

73. *Id.*

74. *Id.*

75. *Id.* "*Guest v. Brenner Iron & Metal Co.*, establishes squarely the proposition that if employees are receiving aid from a third person which is benefiting their employer, their reciprocating with help to the third person is also a benefit to the employer." 1 A. LARSON, *supra* note 20, § 27.22(a), at 5-341.

76. *Guest*, 241 N.C. at 454-55, 85 S.E.2d at 601. The court in *Roberts* stated that although Roberts' assistance was "undoubtedly the act of a very good Samaritan," his act was not "the kind of unconditional assistance that the Court in *Guest, supra*, reasoned to be unrelated to the employment." *Roberts*, 86 N.C. App. at 133, 356 S.E.2d at 798. The court failed, however, to note any specific distinguishing factors.

77. 20 N.C. App. 247, 251, 201 S.E.2d 228, 231 (1973).

known customer with whom negotiations for new dealings were under way.⁷⁸ As stated by Professor Larson, "When the person assisted stands in some business relation to the employer, the employer benefit is relatively obvious."⁷⁹ Because Winters, the person assisted by Roberts, was a complete stranger, as well as a transient who lacked even the money to pay for his dinner, it is clear that he did not occupy a business relationship of any kind with respect to Burlington Industries.

In addition to the absence of a business relationship between Winters and Burlington Industries, Deputy Commissioner Shuping determined that any benefit resulting to Burlington Industries was "too remote and immeasurable" to satisfy the employer-benefit requirement.⁸⁰ The court of appeals disagreed, stating that although the extent of the benefit to Burlington Industries was uncertain, it was sufficient to support an award of coverage under the employer-benefit test.⁸¹ The court's finding in this respect can be contrasted with that of *Food Products Co. v. Industrial Commission*,⁸² one of the cases cited by the *Roberts* court in support of its application of the positional-risk test. The employee in *Food Products* argued that compensation should be awarded to him under either the increased-risk test or the employer-benefit test.⁸³ With respect to the latter, the employee argued that "humanitarian acts by an employee benefit society as a whole and could benefit the employer indirectly by increasing business goodwill or by increasing the overall likelihood of rescue for the employer in the future."⁸⁴ In rejecting this contention, the *Food Products* court quoted a previous case that observed "the presumed benefit [to the employer] may be stretched so thin as to become fiction."⁸⁵ Although *Roberts* presents a stronger case for a finding of an employer benefit than *Food Products*, due to the various articles written about *Roberts*, it is unlikely that such articles resulted in any real benefit to Burlington Industries.

Even if the employer-benefit test indicated that compensation should be allowed in *Roberts*, it is questionable whether the application of the test under these facts would be equitable. In arriving at his decision in this case, the Deputy Commissioner noted that "decendent's heroic act would have likely remained one of [an] anonymous [sic] stranger had he not been tragically killed."⁸⁶ This observation raises the question whether it is fair to compensate an employee who is killed in this situation, and not an employee who is "just" seriously injured. Or, consider an employee who is killed in this same manner, but no newspaper articles are written about the accident. It is somewhat disconcerting to

78. *Id.* at 248-49, 201 S.E.2d at 229-30.

79. 1 A. LARSON, *supra* note 20, § 27.22(a), at 5-35 (Cum. Supp. Dec. 1987).

80. *Roberts*, 86 N.C. App. at 133, 356 S.E.2d at 799.

81. *Id.*

82. 129 Ariz. 208, 630 P.2d 31 (1981).

83. *Id.* at 211, 630 P.2d at 34.

84. *Id.*

85. *Id.* (quoting *Hegwood v. Pittman*, 471 P.2d 888, 891 (Okla. 1970)). The court stated that any benefit received by the employer in that case was "tenuous at best." *Id.*

86. Opinion and Award by Lawrence B. Shuping, Jr., Deputy Commissioner, in Record at 30, *Roberts* (No. 8610IC1160).

think that the degree of sensationalism of a particular tragedy could determine whether workers' compensation benefits would be awarded.

Finally, in addition to the application of the three tests discussed above, the court in *Roberts* stated that workmen's compensation benefits should be awarded in this case on policy grounds.⁸⁷ Specifically, the court stated that its holding was "based on a sound policy that seeks to foster in employees acts of humanitarianism such as those displayed by Mr. Roberts in his last few moments alive."⁸⁸ The court also stated that its holding would benefit employers because it would encourage characteristics "that an employer no doubt looks for when hiring employees to impress upon customers the quality of its work force."⁸⁹ Although one commentator, who would likely favor the result in *Roberts*, stated "knowledge that financial assistance is available to one injured in attempting to aid another might induce this favorable action,"⁹⁰ this possibility is not sufficient to justify an award of compensation for an injury that the North Carolina General Assembly did not intend the workers' compensation system to bear. "It is well established in this State that the Workmen's Compensation Act is not intended to provide general health and accident insurance"⁹¹ One commentator has suggested that because these types of acts occur infrequently, workers' compensation should be awarded as "the social desirability of Good Samaritan acts far outweighs the increase in cost to the consumer."⁹² Although the costs may not be great, and it may be "socially desirable" to compensate these types of injuries, these injuries were not meant to be compensated via the workers' compensation system.

The crucial issue in the *Roberts* decision was whether Roberts' death arose out of his employment. In addressing this issue, the court of appeals applied three tests—the positional-risk test, the increased-risk test, and the employer-benefit test—as well as a public policy argument. While the increased-risk and employer-benefit tests are well established in North Carolina, these tests do not support an award of compensation on the facts of *Roberts*. In contrast, although the positional-risk test clearly does support an award of compensation in *Roberts*, North Carolina courts generally have not employed this test. The adoption of the positional-risk test marks a significant and arguably unwarranted change in the degree of work-relatedness necessary to satisfy the "arising out of" requirement. Finally, the court's public policy argument—that coverage should be awarded in this case to encourage such humanitarian acts—is simply too speculative to support its holding.

As stated in the dissenting opinion in *O'Leary*, to award workers' compensation in this type of case is to find the employer liable simply because he is an

87. *Roberts*, 86 N.C. App. at 136, 356 S.E.2d at 800.

88. *Id.*

89. *Id.*

90. Comment, *Workmen's Compensation: A Vehicle for Compensating the Good Samaritan*, 24 BUFFALO L. REV. 857, 860 (1974-75).

91. *Martin v. Georgia-Pacific Corp.*, 5 N.C. App. 37, 41, 167 S.E.2d 790, 792-93 (1969).

92. Comment, *supra* note 90, at 875.

employer.⁹³ This result is something North Carolina courts, with the exception of the *Roberts* court, will not sanction. Although Roberts was deserving of much praise and admiration for his selfless acts, his dependents should not have been awarded workers' compensation for his death.

ADDENDUM

Since this Note was written, the North Carolina Supreme Court reversed the decision of the court of appeals in *Roberts* on the basis that Roberts' death did not arise out of his employment.⁹⁴ In reaching this result, the supreme court relied on analyses consistent with those presented in this Note.

First, the supreme court rejected the argument that compensation should be awarded under the employer-benefit test, stating that the court of appeals' finding of an employer benefit from the newspaper and trade magazine articles was "purely speculative."⁹⁵

Next, the supreme court held that compensation should not be awarded under the increased-risk test because "[d]ecedent's employment did not increase the risk that he would be struck by a car while shielding an injured stranger with no relation to the employment."⁹⁶

Finally, the supreme court rejected the court of appeal's adoption of the positional-risk test, stating that "we have said that the employment may provide 'a convenient opportunity' for the injury or death by accident without providing the cause."⁹⁷ The court concluded that "[t]o grant compensation [in this case] would effectively remove the 'arising out of the employment' requirement from the Act."⁹⁸

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93. *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504, 510 (1950) (Minton, J., dissenting).

94. *Roberts v. Burlington Industries, Inc.*, 321 N.C. 350, 364 S.E.2d 417 (1988).

95. *Id.* at 355, 364 S.E.2d at 421. See *supra* notes 69-86 and accompanying text for this Note's analysis of the employer-benefit test.

96. *Id.* at 358, 364 S.E.2d at 423. See *supra* notes 65-68 and accompanying text for this Note's analysis of the increased-risk test.

97. *Id.* at 359, 364 S.E.2d at 423. See *supra* notes 33-64 and accompanying text for this Note's analysis of the positional-risk test.

98. *Id.* at 360, 364 S.E.2d at 424.