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When Is Workers' Compensation Payable for Subsequent Nonemployment Injuries?—In Search of the Minnesota Rule

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WHEN IS WORKERS' COMPENSATION PAYABLE FOR SUBSEQUENT NONEMPLOYMENT INJURIES?—IN SEARCH OF THE MINNESOTA RULE

DAVID J. MOSKAL†

After an employee suffers a compensable work-related injury, should additional workers' compensation benefits be paid when that injury is a factor in causing a subsequent injury not incurred in the course and scope of employment? Courts and commentators have made little progress in formulating a satisfactory method for analyzing and resolving this issue. In this Article Mr. Moskal examines the methodologies that have been applied to determine the answer to the question posed by the title of this Article. After reviewing the Minnesota Supreme Court's inconsistent treatment of this issue, Mr. Moskal proposes an approach that provides a more equitable and predictable result by balancing the interests of employees and employers.

I. INTRODUCTION ........................................... 184

II. THE TRADITIONAL METHOD FOR DETERMINING COMPENSABILITY OF WORKPLACE INJURIES ........ 186

A. The "Arising out of" Requirement ..................... 186
B. The "in the Course of" Requirement .................... 190
C. The Relation Back Doctrine .......................... 191

III. METHODOLOGIES USED IN DETERMINING COMPENSABILITY OF SUBSEQUENT NONEMPLOYMENT INJURIES .............................................. 192

A. The Proximate Cause Rule .......................... 193
B. Professor Larson's Approach .......................... 198
C. The Minnesota Cases ............................... 203

IV. A SUGGESTED APPROACH ............................. 210

A. Effecting Change ................................... 210

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183
Employees’ work-related injuries frequently contribute to, or are aggravated by, subsequent nonemployment injuries. Determining when “secondary” injuries are compensable is a controversial issue in workers’ compensation law. A simple example illustrates the problem. Consider a situation in which a carpenter sustains a compensable eye injury. While convalescing at home, the carpenter accidently amputates a finger while performing some home remodeling with an electric saw. Testimony is offered that the amputation occurred, in part, because of the carpenter’s impaired vision resulting from the earlier compensable work injury. Should

1. Employees’ work related injuries may also contribute to, or be aggravated by, subsequent employment injuries. If a subsequent employer has any liability, contribution from an earlier employer in limited situations may be appropriate. See Goetz v. Bulk Commodity Carriers, 303 Minn. 197, 226 N.W.2d 888 (1975). The Goetz court indicated that:

Factors to be taken into consideration in reaching an apportionment decision include, but are not limited to, the nature and severity of the initial injury, the employee's physical symptoms following the initial injury and up to the occurrence of the second injury, and the nature and severity of the second injury.

*Id.* at 200, 226 N.W.2d at 891.

Subsequently, in Jensen v. Kronick's Floor Covering Serv., 309 Minn. 541, 245 N.W.2d 230 (1976) (per curiam), the court refused to permit apportionment of compensation for occupational disease among multiple employers. As a result of the* Jensen *court's holding, the employee's last employer at the time of disablement usually bears the entire responsibility for paying workers' compensation benefits. See also* Michels v. American Hoist & Derrick,* 269 N.W.2d 57, 59 (Minn. 1978) (apportionment “applicable only in those rare cases in which substantial and almost uncontroverted medical testimony will permit a precise allocation of responsibility between or among different employers”).

If the subsequent employer is not able to obtain contribution from an earlier employer, reimbursement from the State Special Fund may be possible. Presently, Minnesota law allows reimbursement for compensation paid in excess of 52 weeks and $2,000 in medical expenses. See* Minn. Stat. § 176.131(1) *(1980). In order to obtain reimbursement, however, the initial injury has to be formally registered prior to the subsequent injury. See* id. § 176.131(4).


2. The terms “secondary” injuries and “subsequent non-employment” injuries are used interchangeably throughout this Article.
workers' compensation benefits be paid?\(^3\)

Other perplexing compensation questions are imaginable. What should be the result when an amputee drowns in a boating accident, if the amputee's right arm had been severed earlier as a result of a compensable employment injury? Should it make any difference that prior to the amputation the employee was an Olympic class swimmer?\(^4\)

In resolving subsequent nonemployment injury disputes, courts have reached opposite conclusions on virtually indistinguishable facts.\(^5\) This Article seeks to clarify the confusion that attends the question of when subsequent nonemployment injuries are compensable. An examination of this topic is especially appropriate due to the scant treatment this issue has received from legal commentators.\(^6\)

\(^3\) The California appellate court answered this question in the affirmative. See State Comp. Ins. Fund v. Industrial Accident Comm'n, 176 Cal. App. 2d 10, 1 Cal. Rptr. 73 (1959). The court stated, "[S]o long as the original injury operates even in part as a contributing factor [of the second injury] it establishes liability." Id. at 17, 1 Cal. Rptr. at 78.

Professor Larson is critical of this decision because it would arguably allow compensation for any subsequent injury partially caused by the original injury. See 1 A. Larson, The Law of Workmen's Compensation § 13.11, at 3-364 (1978).

\(^4\) In addition to the hypothetical swimming accident, a random sampling of subsequent nonemployment injury cases includes:

Claimant, while his leg is in a cast, impulsively tries to catch a child about to fall down the church steps at a wedding reception, and because of the cast falls down the steps himself; claimant, while his hand is healing from a compensable injury, deliberately engages in a boxing match, and aggravates his wound, which then becomes infected; claimant carelessly takes bichloride of mercury from a bottle labeled "poison" instead of the aspirin he meant to take to relieve the pain of a compensable injury; claimant, with his bandages soaked in alcohol because of a compensable injury, lights up a cigarette in violation of specific warnings and is severely burned; claimant slips and falls on the way from visiting the doctor for treatment of a compensable injury.


\(^5\) Compare Brown v. New York State Training School for Girls, 285 N.Y. 37, 32 N.E.2d 783 (1941) (compensation denied when employee injured as a result of accidently taking bichloride of mercury tablets instead of aspirin in absence of evidence that mistake was caused by disorientation due to prior work-related injury) with Elliott v. Industrial Accident Comm'n, 21 Cal. 2d 281, 131 P.2d 521 (1942) (compensation granted when employee died after mistakenly ingesting insect spray labeled as "wine" to "calm" his stomach); and Pedersen v. Maple Island Inc., 256 Minn. 21, 97 N.W.2d 528 (1959) (compensation proper for injuries resulting from automobile accident when employee was traveling to employer-approved doctor for treatment of initial injury) with Snowbarger v. M.F.A. Central Co-op., 349 S.W.2d 224 (Mo. 1961) (compensation denied for automobile injuries sustained in car accident when employee was traveling to family doctor's office for treatment of initial injury).

\(^6\) See 1 A. Larson, supra note 3, §§ 13.00-12; Larson, supra note 4. Besides Profes-
In attempting to fashion an answer to the question posed by the title of this Article, an examination of the traditional test for determining when workers' compensation is payable will be canvassed initially. Next, the majority's, Professor Larson's and the Minnesota Supreme Court's method of determining when workers' compensation is payable for subsequent nonemployment injuries will be analyzed. Finally, a suggested test for determining when subsequent nonemployment injuries should be compensable will be offered.

II. THE TRADITIONAL METHOD FOR DETERMINING COMPENSABILITY OF WORKPLACE INJURIES

Prior to determining when subsequent nonemployment injuries are compensable, it is essential to understand the circumstances under which initial work-related injuries are compensable. Such an understanding is necessary to view subsequent nonemployment injuries in their proper perspective. Most states, including Minnesota, borrowing a phrase from the 1897 English workers' compensation statute, permit workers' compensation only if an injury "arises out of" and occurs "in the course of" an employee's employment. Employees have the burden of proving these cumulative requirements.

A. The "Arising out of" Requirement

The phrase "arising out of" employment refers to the causal

7. See infra notes 12-36 and accompanying text.
8. See infra notes 45-60 and accompanying text.
9. See infra notes 61-80 and accompanying text.
10. See infra notes 81-142 and accompanying text.
11. See infra notes 143-90 and accompanying text.
12. See Workmen's Compensation Act, 1897, 60 & 61 Vict., c. 37, § 1. Liability under this act "depended not on who was at fault for the accident, but on whether it arose out of the employment, while the employee was engaged therein." S. Horovitz, Injury and Death Under Workmen's Compensation Laws 5 (1944).
13. Professor Larson indicates that "[f]orty-two states, and the Longshoremen's and Harbor Workers' Compensation Act, have adopted the entire British Compensation Act formula: injury 'arising out of and in the course of employment.'" I A. Larson, supra note 3, § 6.10 at 3-1 (footnote omitted). Minnesota's arising out of and in the course of employment requirement is contained in Minn. Stat. § 176.021(1) (1980).
connection between the employment and injury. Common-law concepts of legal cause, however, are not determinative. As Professor Larson notes, "Plainly, if the original draftsmen of the compensation acts had meant to say 'caused by the employment' they would have done so." Although arising out of employment does not mean proximately caused by the employment, the injury must find its origin in the employment. Absent the requisite causal connection, the arising out of side of the equation is not satisfied.

15. See, e.g., Swenson v. Zacher, 264 Minn. 203, 207, 118 N.W.2d 786, 789 (1962); Fisher v. Fisher, 226 Minn. 171, 174, 32 N.W.2d 424, 426 (1948); 1 A. Larson, supra note 3, § 6.00, at 3-1; Bradt, An Examination of the "Arising out of" and the "in the Course of" Requirements Under the Minnesota Workers' Compensation Law, 6 WM. MITCHELL L. REV. 533, 542 (1980).

16. See Barlau v. Minneapolis-Moline Power Implement Co., 214 Minn. 564, 578, 9 N.W.2d 6, 13 (1943) ("By 'causal connection' is meant not proximate cause as that term is used in the law of negligence, but cause in the sense that the accident had its origin in the hazards to which the employment exposed the employee while doing his work.").

17. Larson, supra note 4, at 609.

18. In Hanson v. Robitshek-Schneider Co., 209 Minn. 596, 297 N.W. 19 (1941), the court stated:

It is significant that in defining compensable accident the workmen's compensation law makes no mention of cause or causation as such. Impliedly, it thereby rejects or at least modifies the standard of proximate causation determinative in tort litigation. Therefore, care must be exercised lest long judicial habit in tort cases allows judicial thought in compensation cases to be too much influenced by a discarded or modified factor of decision.

It is apparent that the new standard "arising out of and in the course of" employment does not require that the latter be the proximate cause of injury. If the legislature had meant that it would have said so . . . . The phrase "out of" expresses a factor of source or contribution rather than cause in the sense of being proximate or direct. Id. at 598-99, 297 N.W. at 21.

Professor Kirwin also notes that under Minnesota's personal injury definition, MINN. STAT. § 176.011(16) (1980), employees need not prove proximate causation between their employment and injury. See Kirwin, Compensation for Disease Under the Minnesota Workers' Compensation Law, 6 WM. MITCHELL L. REV. 619, 663-64 (1980).

19. In Barlau v. Minneapolis-Moline Power Implement Co., 214 Minn. 564, 9 N.W.2d 6 (1943), the court affirmed the compensation court's decision granting benefits for a fall resulting from an epileptic seizure. In so holding, the court stated:

The accident arose out of the employment if there was a causal connection between the employment and the injury. By "causal connection" is meant not proximate cause as that term is used in the law of negligence, but cause in the sense that the accident had its origin in the hazards to which the employment exposed the employee while doing his work.

Id. at 578, 9 N.W.2d at 13 (citations omitted) (emphasis added).

20. The arising out of and in the course of requirements are analogous to an equation. When both requirements are present, the equation equals compensation. If only one requirement is satisfied, the equation never permits an award of compensation. As Professor Malone notes, "The requirement, then, is dual, and it must be satisfied in toto. It is not enough that the accident either happened during the course of employment or that it arise.
Most courts, including Minnesota, apply the increased-risk doctrine when determining whether an injury had its origin in the employment. Under this doctrine, two requirements must be satisfied. First, the injury must arise out of a hazard increased by the employment. Second, the injury cannot be common to the public in general. The increased-risk doctrine, however, is of little assistance in providing a framework for determining which secondary injuries are compensable. Theoretically, all subsequent nonemployment injuries result, in part, from a hazard that was increased by the employment at the time of the initial injury.


Professor Schneider concurs in this analysis. He states:

There must be a conjunction of the two requirements to permit a recovery of compensation. The two elements must co-exist. They must be concurrent and simultaneous. One without the other will not sustain an award; yet the two are so entwined that they are usually considered together in the reported cases.

6 W. SCHNEIDER, WORKMEN'S COMPENSATION § 1542, at 3-4 (footnotes omitted).

Professor Larson, however, cautions that the arising out of and in the course of requirements should not be examined separately from one another; he believes that both requirements overlap and interact. Any deficiencies in the strength of one test can then be made up by strong points in the other test. See 1 A. LARSON, supra note 3, §§ 29.00-.10 (1978).

23. See Hough v. Drevdahl & Son Co., 281 N.W.2d 690, 692 (Minn. 1979) (per curiam); Lickfett v. Jorgenson, 179 Minn. 321, 323, 229 N.W. 138, 138 (1930); State ex rel. People's Coal & Ice Co. v. District Court, 129 Minn. 502, 503, 153 N.W. 119, 119 (1915); 1 A. LARSON, supra note 3, §§ 6.30, 8.41-.42.
24. See 1 A. LARSON, supra note 3, § 13.11. Professor Larson states:

A distinction must be observed between causation rules affecting the primary injury... and causation rules that determine how far the range of compensable consequences is carried, once the primary injury is causally connected with the employment. As to the primary injury, it has been shown that the "arising" test is a unique one quite unrelated to common-law concepts of legal cause, and it will be shown later that the employee's own contributory negligence is ordinarily not an intervening cause preventing initial compensability. But when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of "direct and natural results," and of claimant's own conduct as an independent intervening cause.

Id. § 13.11, at 3-348 (footnote omitted).

Professor Larson also notes:

At the outset of this analysis, it is a salutary precaution to recognize that the legal principles involved are not capable of being reduced to some simple unitary formula. For example, it will not do merely to announce that the causation principle applicable to the range-of-consequence problem is the same as that applicable to the initial compensable injury... . . .

Larson, supra note 4, at 612.
25. Using this reasoning, the California Court of Appeal awarded compensation to a
Therefore, unless the secondary injury is the sole cause of the ensuing disability, 26 or a court attributes the secondary injury to an intervening cause, 27 the first prong of the increase-risk doctrine always is satisfied.

The requirement that the injury not be common to the general public is of even less assistance in resolving subsequent nonemployment cases. 28 Research has failed to reveal any case law in which a court has examined this requirement in a secondary injury case. 29

A carpenter who cut off his finger at home. The amputation occurred, in part, due to an earlier compensable eye injury. See State Comp. Ins. Fund v. Industrial Accident Comm'n, 176 Cal. App. 2d 10, 20, 1 Cal. Rptr. 73, 80 (1959). Professor Larson is critical of this decision because “a line must be drawn somewhere short of that drawn by the California court.” Larson, supra note 4, at 613. Dictum in Wallace v. Judd Brown Constr. Co., 269 Minn. 455, 131 N.W.2d 540 (1964), also implicitly rejects the California rule for reasons similar to those expressed by Professor Larson:

Thus, while the workmen’s compensation laws are generally construed liberally in favor of the injured employee, it is evident that a line must be drawn somewhere in cases involving subsequent injuries or else an employer who has discharged his obligation as to the original injury will become an insurer up to a full 100-per-cent permanent disability as a result of any aggravation or recurrence of the original injury, no matter how it is caused.

Id. at 460, 131 N.W.2d at 544 (emphasis added).

26. For example, in Gaspers v. Minneapolis Elec. Steel Castings Co., 290 N.W.2d 743 (Minn. 1979), the supreme court affirmed a denial of compensation benefits to an employee who claimed that a roller skating accident aggravated a prior work-related back injury. The supreme court reasoned that the roller skating incident was the sole cause of the employee’s subsequent disability. See id. at 745.


In Gerhardt v. Welch, 267 Minn. 206, 125 N.W.2d 721 (1964), the court stated:

When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to the claimant’s own negligence or misconduct.

Id. at 209, 125 N.W.2d at 723 (quoting 1 A. Larson, The Law of Workmen’s Compensation § 13.00 (1952)).

For a discussion of the role that intervening cause plays in subsequent nonemployment injury cases, see infra notes 48-52 and accompanying text.

28. See generally 1 A. Larson, supra note 3, § 13.11, at 3-348.

29. The absence of case law examining this requirement is understandable. The carpenter’s amputation examined in the Introduction to this Article, illustrates the difficulty of applying the second half of the increased-risk test. Members of the general public usually do not have defective vision. Since the cause of the amputation was the carpenter’s defective vision that resulted from an earlier compensable injury, the second injury may have resulted from a risk beyond that confronted by the public generally. All members of the general public, however, are susceptible to amputating fingers while engaging in home carpentry. How broadly the general public is viewed, therefore, determines whether the initial employment increased the risk of a subsequent nonemployment injury.
Because of the absence of any analysis of the second prong of the increased-risk doctrine in secondary injury cases, it is of little value in determining the compensability of such injuries.

B. The "in the Course of" Requirement

The phrase "in the course of" employment refers to the time, place, and circumstances of an employee's injury. Generally, the "in the course of" employment requirement is not satisfied unless an employee sustains an injury "while engaged in, on, or about the premises where his services require his presence as a part of such service at the time of the injury and during the hours of such service."

Subsequent nonemployment injuries do not occur in the course of employment because such injuries do not occur on the emp-

30. See, e.g., Swenson v. Zacher, 264 Minn. 203, 207, 118 N.W.2d 786, 789 (1962) ("[T]he term 'in the course of' refers to the time, place, and circumstances of the accident causing the injury."); 1 A. Larson, supra note 3, § 14.00, at 4-1 ("An injury is paid [sic] in the course of the employment when it takes place within the period of the employment"); 6 W. Schneider, supra note 20, § 1542(c), at 19-20 ("In the course of employment points to the time, place, and circumstances under which an accident takes place, and simply means 'while the employment was in progress.'").

31. Minn. Stat. § 176.011(16) (1980). In Stepan v. J.C. Campbell Co., 228 Minn. 74, 36 N.W.2d 401 (1949), the court stated that the workers' compensation act "does not purport to cover workmen except while they are engaged in, on, or about the premises where their services require their presence as part of such services and during the hours of such workmen." Id. at 76-77, 36 N.W.2d at 403. Notwithstanding the language of Minn. Stat. § 176.011(16) (1980), and cases such as Stepan that construe the statute according to its plain language, the Minnesota court has not always required injuries to occur on the employment premises during the regular hours and duties of employment. As Mr. Bradt notes:

Although this statute [Minn. Stat. § 176.011(16) (1980)], would appear to prohibit compensation unless an injury occurs on the employment premises during the regular hours and duties of employment, it has not been so construed. Rather, any act outside an employee's regular duties is compensable if undertaken in good faith to advance the employer's interest. This is true even if the employee's assigned work is not being furthered. Moreover, the time when the employee is serving the employer need not coincide with the period for which wages are paid.

Bradt, supra note 15, at 548-49 (footnotes omitted). Mr. Bradt's analysis is adequately supported by Minnesota case law. For example, in Blattner v. Loyal Order of Moose, Moose Club Lodge 1400, 264 Minn. 79, 117 N.W.2d 570 (1962) the court commented:

The term "hours of service" must not be construed so narrowly as to include only that for which the worker is paid or only those moments which he actually spends at a shovel, machine, or workbench. An injury to a workman may arise out of and in the course of his employment even if he is not actually working at the time of his injury.

Id. at 83, 117 N.W.2d at 573 (quoting Olson v. Trinity Lodge, No. 282, A.F. & A.M., 226 Minn. 141, 145, 32 N.W.2d 255, 258 (1948)).
employer’s premises during the employee’s hours of service. Consequently, the in the course of side of the equation is never satisfied in subsequent nonemployment injury cases.

C. The Relation Back Doctrine

Under a traditional analysis, subsequent nonemployment injuries neither arise out of, nor occur in the course of an employee’s employment. Few courts have considered whether the arising out of and in the course of requirements must be satisfied in subsequent nonemployment injury cases. Some courts, however, have concluded that if the subsequent nonemployment injury was a natural consequence of the original compensable injury, then the secondary nonemployment injury “relates back” to the original injury.

Under the “relation back” doctrine, the subsequent nonemployment injury is bootstrapped into a compensable event by requiring that only the initial injury satisfy the arising out of and in the course of requirements. The primary task for courts that expressly or implicitly utilize the relation back doctrine is determining the reasonable parameters of liability in subsequent nonemployment

32. See 1 A. Larson, supra note 3, § 13.11, at 3-365 (“Since, in the strict sense, none of the consequential injuries we are concerned with are in the course of employment, it becomes necessary to contrive a new concept, which we may for convenience call “quasi-course of employment.”); 49 N.C.L. Rev. 583, 585-86 (1971) (“The real difficulty of analysis in statutory terms is encountered when the ‘in the course of employment’ inquiry is made. Due to the nonapplicability of the ‘in the course of the employment’ inquiry to subsequent off-the-job injuries and the recognition that all secondary injuries were not intended to be compensable, courts have sought some concept to limit the employer’s liability for a causally related injury.” (footnotes omitted)).

33. As indicated above, see supra notes 15-20, unless both the arising out of and in the course of side of the equations are satisfied, workers’ compensation may not be awarded. Why courts award workers’ compensation benefits for subsequent nonemployment injuries when the equation is lacking important requirements is explored later in the Article. See infra notes 35-36 and accompanying text.

34. See supra notes 15-33 and accompanying text.

III. METHODOLOGIES USED IN DETERMINING COMPENSABILITY OF SUBSEQUENT NONEMPLOYMENT INJURIES

Because an "arising out of" and "in the course of" analysis does not easily lend itself to resolving which subsequent nonemployment injuries should be compensable, courts have resorted to different modes of analysis. The majority rule requires that the subsequent nonemployment injury be proximately caused by the prior compensable injury. Courts following this approach permit compensation for the subsequent nonemployment injury only if the initial compensable injury is one of the "direct and natural causes of the subsequent injury."

A growing minority of courts have adopted Professor Larson's approach to resolving subsequent nonemployment injury problems. Professor Larson suggests that all employee conduct occurring subsequent to the initial compensable injury be placed into two categories. The first category includes all injuries occurring because of necessary and reasonable actions undertaken because of the initial injury. All subsequent nonemployment injuries falling within the first category are compensable unless the employee can be said to have intentionally violated an express or

36. As the Minnesota Supreme Court noted in Wallace v. Judd Brown Constr. Co., 269 Minn. 455, 131 N.W.2d 540 (1964):

[A] line must be drawn somewhere in cases involving subsequent [nonemployment] injuries or else an employer who has discharged his obligation as to the original injury will become an insurer up to full 100-percent permanent disability as a result of any aggravation or recurrence of the original injury, no matter how it is caused.


40. See 1 A. LARSON, supra note 3, § 131.11, at 3-365 to -366.

41. See id.; infra notes 61, 64-67 and accompanying text.
implied employer prohibition. The second category consists of any subsequent nonemployment injuries that do not fall within the first category. All subsequent nonemployment injuries falling within the second category are compensable unless they result from intentional or negligent employee acts.

A. The Proximate Cause Rule

Once an employee sustains a compensable injury and later sustains a nonemployment injury, most courts allow compensation for the subsequent injury if the original injury is "one of the direct and natural causes of the subsequent injury." Even if the subsequent nonemployment injury is totally independent, and not merely an aggravation of the initial injury, compensation is permitted if the secondary injury is proximately caused by the initial injury. If the subsequent nonemployment injury is the result of an intervening cause, however, compensation is generally denied. Normally, an employee's negligence is not considered in resolving workers' compensation issues, but, sometimes an employee's neg-

42. See 1 A. LARSON, supra note 3, § 3.11, at 3-365 to -366; infra notes 68-69 and accompanying text.
43. See 1 A. LARSON, supra note 3, § 13.11, at 3-365 to -366; infra notes 62, 70 and accompanying text.
44. See 1 A. LARSON, supra note 3, § 13.11, at 3-365 to -366; infra notes 71-72 and accompanying text.
46. See, cases cited supra note 37.

When one turns to the question whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, most courts have adopted a quite different causation principle, based essentially upon the concept of "direct and natural result," and of the claimant's own conduct as an independent intervening cause.

Larson, supra note 4, at 610.
48. Professor Larson's insight is instructive:

The right to compensation benefits depends on one simple test: Was there a work-connected injury? Negligence, and, for the most part, fault, are not in issue and cannot affect the result. Let the employer's conduct be flawless in its perfection, and let the employee's conduct be abysmal in its clumsiness, rashness and ineptitude: if that accident arises out of and in the course of the employment, the employee receives his award.

1 A. LARSON, supra note 3, § 2.10, at 5. In determining compensation questions in Minnesota, employee negligence is irrelevant. See Snyder v. General Paper Corp., 277 Minn. 376, 384, 152 N.W.2d 743, 748 (1967); Radermacher v. St. Paul City Ry., 214 Minn. 427, 435, 8 N.W.2d 466, 470 (1943); McGough v. McCarthy Improvement Co., 206 Minn. 1, 5, 287 N.W. 857, 860 (1939), overruled in part on other grounds, Williams v. Holm, 288 Minn.
ligence is viewed as an intervening cause sufficient to bar recovery in secondary injury cases. Some courts that bar recovery because of an employee's negligence resort to the legal fiction that the employee's negligence does not bar recovery but rather, the conduct is examined to determine the legal cause of the subsequent nonemployment injury. The justification for denying all recovery because of an employee's negligence is weak because resort to a legal fiction is necessary. The result of this analytic shortcoming is that some courts require an employee's conduct to amount to more than "mere negligence" before barring compensation under the proximate cause approach.

Several drawbacks are apparent in the application of the proximate cause rule. First, in many cases a total denial of recovery results because of the contribution of an employee's negligence to the subsequent nonemployment injury. Injecting negligence into

371, 374, 181 N.W.2d 107, 109 (1970). These cases were mandated by MINN. STAT. § 176.021(1) (1980), which provides:

Every such employer is liable for compensation according to the provisions of this chapter and is liable to pay compensation in every case of personal injury or death of his employee arising out of and in the course of employment without regard to the question of negligence, unless the injury was intentionally self-inflicted or when the intoxication of the employee is the proximate cause of the injury.


49. See Johnnie's Produce Co. v. Benedict & Jordan, 120 So. 2d 12, 13 (Fla. 1960) ("If a claimant, knowing of certain weaknesses, rashly undertakes activities likely to produce harmful results, the chain of causation is broken by claimant's own negligence."); Williams Constr. Co. v. Garrison, 42 Md. App. 340, 400 A.2d 22 (1979); Jones v. Huey, 210 Tenn. 162, 357 S.W.2d 47 (1962); 49 N.C.L. REV. 583, 587 (1971) ("Once the doctrine of intervening cause raises its head, the employee's negligence as an intervening cause must be reckoned with even though the workmen's compensation acts eliminated any inquiry into negligence in the formula for recovery.").


51. See id. at 587-88 ("The assertion that an inquiry into the claimant's negligence is not made to deny recovery for contributory negligence but to determine if the negligence is the legal cause of the injury provides a weak justification for insinuating negligence back into the formula for recovery.").

52. Id.; see Swanson v. Williams & Co., 278 A.D. 477, 481, 106 N.Y.S.2d 61, 66 (Sup. Ct. 1951) (mere carelessness not sufficient to bar recovery); cf. 1 A. LARSON, supra note 3, § 13.12, at 3-377 to -378 ("Even getting drunk, if it represents nothing more than carelessness, has been held not to break the chain of causation." (footnote omitted)).

53. See Johnnie's Produce Co. v. Benedict & Jordan, 120 So. 2d 12, 13 (Fla. 1960); Jones v. Huey, 210 Tenn. 162, 168-69, 357 S.W.2d 47, 49-50 (1962). In Gaspers v. Minneapolis Elec. Steel Castings Co., 31 Minn. Workmen's Comp. Dec. 367, aff'd on other grounds, 290 N.W.2d 743 (Minn. 1979), the compensation court denied all recovery for an em-
the analysis to bar all recovery is at odds with the no-fault underpinnings of workers' compensation theory. Moreover, the outmoded notion that any misconduct by a personal injury claimant will bar recovery has largely been abandoned in favor of comparative fault systems in most jurisdictions.

The employee who reinjured his back in a roller skating accident. In so holding, the compensation court stated:

It appears to this Court that the activity of roller skating here with knowledge of his back was just that type of "rash undertaking" Professor Larson spoke of that involves the doctrine of intervening cause. We find that the subsequent injury to Mr. Gaspers' back is not compensable because of his negligent act.

Id. at 370-71.

54. Professor Horovitz states:

(C)ompensation laws were enacted as a humanitarian measure, to create a new type of liability,—liability without fault,—to make the industry that was responsible for the injury bear a major part of the burdens resulting therefrom. It was a revolt from the old common law and the creation of a complete substitute therefor . . . .

S. HOROVITZ, supra note 12, at 7-8 (footnotes omitted). Professor Larson concurs in this analysis and comments:

The right to compensation benefits depends on one simple test: Was there a work-connected injury? Negligence, and, for the most part, fault, are not in issue and cannot affect the result. Let the employer's conduct be flawless in its perfection, and let the employee's be abysmal in its clumsiness, rashness and ineptitude: if the accident arises out of and in the course of the employment, the employee receives his award. Reverse the positions, with a careless and stupid employer and a wholly innocent employee: the same award issues.

Thus, the test is not the relation of an individual's personal quality (fault) to an event, but the relationship of an event to an employment. The essence of applying the test is not a matter of assessing blame, but of marking out boundaries.

1 A. LARSON, supra note 3, § 2.10. For an examination of the various rationales behind the enactment of workers' compensation see, Bradt, supra note 15, at 535 n.1.

Second, some courts using the proximate cause approach require that subsequent nonemployment injuries be foreseeable before being compensable. Although some states require foreseeability of the resultant harm before allowing recovery in common-law tort actions, an injury need not be foreseeable as a condition precedent to recovery of workers' compensation benefits. The

56. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 43, at 251-52 (4th ed. 1971); Kirwin, supra note 18, at 669-70. See generally H. HART & A. HONORÉ, CAUSATION IN THE LAW 230-60 (1959). Minnesota, however, does not require that a defendant could have anticipated the particular injury which did happen. Schulz v. Feigal, 273 Minn. 470, 476, 142 N.W.2d 84, 89 (1966). Accordingly, in Dellwo v. Pearson, 259 Minn. 452, 107 N.W.2d 859 (1961), the court held that the "trial court erred in making foreseeability a test of proximate cause" because "negligence is tested by foresight but proximate cause is determined by hindsight." Id. at 456, 107 N.W.2d at 862. Minnesota's landmark decision in this area was written by Justice Mitchell in Christianson v. Chicago, St. P., M. & O. Ry., 67 Minn. 94, 69 N.W. 640 (1896), where he stated that "if the act itself is negligent, then the person guilty of it is equally liable for all of its natural and proximate consequences, whether he could have forseen them or not." Id. at 97, 69 N.W. at 641.

Minnesota's treatment of foreseeability is consistent with the Restatement which provides that "[i]f the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have forseen the extent of the harm or the manner in which it occurred does not prevent him from being liable." RESTATEMENT (SECOND) OF TORTS § 435(1) (1965).

57. Professor Larson explains:

[What relevance has foreseeability if one is not interested in the culpability of the actor's conduct? There is nothing in the theory of compensation liability that cares whether the employer foresaw particular kinds of harm or not. The only criterion is connection in fact with the employment, whether it is foreseeable in advance, or apparent only in retrospect. This criterion cannot in any logical sense be made to depend on foreseeability. For example, suppose that a wheel flew off a high speed machine, and splashed molten metal from a vat onto the controls of a sprinkler system, which, in turn, set off the sprinklers, which wet a hot light bulb, which exploded just as claimant was yawning, with the result that claimant swallowed a piece of glass. Any such set of improbabilities, of the sort familiar to first-semester tort students, would at an early stage pass out of the bounds of foreseeability, if the word has any connection with reality at all. And yet, if claimant was working at his job, there can be no doubt that he is entitled to compensation, for the injury was clearly connected with his work, although the causal sequence was unforeseeable.

1 A. LARSON, supra note 3, § 6.60, at 3-8 to -9. Professor Larson's views were quoted with approval in Voight v. Rettinger Transp., Inc., 306 N.W.2d 133, 139 n.8 (Minn. 1981). Notwithstanding Voight, the Minnesota Supreme Court's use of foreseeability as a test for determining when workers' compensation is due is confusing. Professor Kirwin notes:

In Weidenbach v. Miller, 237 Minn. 278, 291, 55 N.W.2d 289, 296 (1952), the court, in upholding a denial of benefits for a truck driver's death from trying to
foreseeability test is rejected in workers' compensation cases because it plays no role in determining whether an injury arises out of and in the course of employment. By using the foreseeability test to determine when a secondary injury is compensable, courts have returned to one of the evils of the common law that workers' compensation statutes were designed to eliminate.

Finally, courts applying the proximate cause approach have not rescue a person who had fallen through ice in a lake, reasoned that it could not “have been contemplated by reasonable persons that [the truck driver] would expose himself to the risk of [the rescue attempt] as an incident to the employment in which he was engaged.” This was apparently directed to the “in the course of” rather than the “arising out of” requirement; the opinion’s next sentence referred to “scope of the employment,” and the court earlier in the opinion quoted with approval Horovitz, The Litigious Phrase: “Arising out of” Employment, 3 NACCA L.J. 15, 39 (1960), stating, inter alia, that “it is not necessary that the injury be one which ought to have been foreseen or expected” and “[t]he risk insured is not only the foreseeable one.” Id. at 282, 55 N.W.2d at 291.

Kirwin, supra note 18, at 670 n.255.

Mr. Bradt also recognizes the confusing manner in which the Minnesota court has treated foreseeability in workers' compensation cases. See Bradt, supra note 15, at 543 & n.34, 563-64.

58. See 1 A. LARSON, supra note 3, § 6.60, at 3-9 to -10 ("'arising out of employment' and 'foreseeability' . . . are drawn from different worlds—the one the world of fault, the other the world of work"); Bradt, supra note 15, at 564 ("[T]he foreseeability test is inappropriate in a 'no-fault' compensation system and fosters litigation because of the necessity of a hind-sight application."); Kirwin, supra note 18, at 670 n.255 ("Foreseeability does not seem to be an appropriate concept for either 'arising out of' or 'in the course of' analysis."); 49 N.C.L. REV. 583, 587 (1971) ("foreseeability has no place in the determination of compensability").

59. Prior to the enactment of workers' compensation laws common law tort principles such as the foreseeability requirement, prevented most employees from receiving any compensation after suffering industrial injuries. See W. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 1-52 (1936); 1 A. LARSON, supra note 3, § 4.30. Professor Horovitz notes that prior to the enactment of workers' compensation legislation, 80% of all employee versus employer personal injury cases were lost or uncompensated. In the remaining 20%, the physician's bills, lawyer's fees and other expenses "often ate up a substantial portion of the award." S. HOROVITZ, supra note 12, at 3-4 & n.5.

The common law’s "three evil sisters"—contributory negligence, the fellow servant rule, and assumption of the risk—were perhaps the most difficult problems employees had to overcome to obtain recovery in tort.


The fellow servant exception to the rule of a master's vicarious liability was first formulated in Priestly v. Fowler, 150 Eng. Rep. 1030 (Exch. Ch. 1837). Under this doctrine, employees assumed as a matter of law the risk that his coemployees would be negligent. Chief Justice Shaw's landmark opinion in Farwell v. Boston & Worcester Ry., 45 Mass. 49
formulated an acceptable intervening cause standard. Consequently, most decisions following the majority rule are explainable only in result-oriented terms.

B. Professor Larson's Approach

Professor Larson proposes that courts determine which subsequent nonemployment injuries are compensable by application of the following two rules:

(1) When the injury following the initial compensable injury arises out of a quasi-course activity, such as a trip to the doctor's office for treatment of the initial injury, the chain of causation should not be deemed broken by mere negligence in the performance of that activity, but only by intentional conduct which may be regarded as expressly or impliedly prohibited by the employer; (2) When, however, the injury following the initial compensable injury does not arise out of a quasi-course activity, as when a claimant with an injured hand engages in a boxing match, the chain of causation may be deemed broken by either intentional or negligent claimant misconduct. Professor Larson labels incidents falling within the ambit of the former category as "quasi [in the] course of employment" injuries. Those incidents falling within the latter category are delineated as "non-quasi [in the]
The range of compensable consequences for quasi-course of employment activities extends to all injuries occurring because of an employee's necessary and reasonable actions undertaken in light of the initial injury. Mere employee negligence will not defeat recovery for quasi-course injuries. Thus, if an employee accidently takes bichloride of mercury tablets instead of his prescribed medicine, his subsequent injury should be compensable. Similarly, compensation is appropriate if an employee's primary injury is aggravated by a physician's negligent medical treatment.

Suppose, for example, the category of activity is that of subsequent treatment of the compensable injury—clearly a quasi-course activity. If the employee fault is simple negligence, as in carelessly taking bichloride of mercury tablets by mistake for aspirin although the bottle was plainly marked "Poison," under this test the subsequent injury would be compensable, and this seems to be the right result. To deny compensation in these circumstances, which the court in fact did, seems unduly harsh, in view of the straight-line sequence between the initial injury and the act of reaching for the aspirin, and in view of the comparative mildness of the claimant's fault in inadvertently picking the wrong bottle out of the medicine cabinet.

Prior Minnesota case law supports Professor Larson's general rule. When an employee suffers additional injuries because of an accident in the course of a journey to a doctor's office occasioned by a compensable injury, the additional injuries are generally held compensable. If the journey takes place immediately after the first injury occurs, the chain of causation is most readily visible, as when an employee was being rushed to a hospital following a compensable injury and sustained further injury when the ambulance was involved in a collision. But, quite apart from the element of immediacy, a fall or automobile accident during a trip to a doctor's office has usually been considered sufficiently causally related to the employment by the mere fact that the work-connected injury was the cause of the journey, without any necessity of showing that the first injury in some way contributed to the fall or accident.

In Minnesota the special-errand doctrine was first recognized in Nehring v. Minnesota Mining & Mfg. Co., 193 Minn. 169, 258 N.W. 307 (1935). In that case an electrician called by his employer on a Sunday to replace a fuse was killed in a motor-vehicle accident.
However, if the quasi-course injury results from conduct that constitutes an express or implied employer prohibition, recovery is denied. To illustrate when compensation should be denied because of the violation of an implied-employer prohibition, Professor Larson uses an example of an employee whose compensable injury is healing in a timely manner. To quicken the healing process the employee travels to a witch doctor for treatment. The witch doctor twists the employee’s neck producing total paralysis. Because the employee should have known that the employer would have prohibited such an exotic form of “medical” treatment, the claimant is not entitled to compensation.

All activities that the employee was engaged in at the time of the second injury that are not undertaken because of the prior injury are non-quasi injuries. These injuries are compensable only if the employee, in causing the subsequent nonemployment injury, while returning home. Id. at 170, 258 N.W. at 307-08. The Nehring court held that an employee requested by his employer to perform a special off-duty errand was within the course and scope of his employment from the moment the employee left home until the moment he returned. Id. at 171, 258 N.W. at 308. The Nehring court quoted with approval from an earlier United States Supreme Court decision:

While service on regular hours at a stated place generally begins at that place, there is always room for agreement by which the service may be taken to begin earlier or elsewhere. Service in extra hours or on special errands has an element of distinction which the employer may recognize by agreeing that such service shall commence when the employee leaves his home on the duty assigned to him and shall continue until his return. . . . In such case the hazards of the journey may properly be regarded as hazards of the service and hence within the purview of the compensation act.

Id. at 173-74, 258 N.W. at 309 (quoting Voehl v. Indemnity Ins. Co., 288 U.S. 162, 169-70 (1933)).

It was not until 1963, however, that the Minnesota Supreme Court indicated a test for applying the special-errand rule. In Youngberg v. Donlin Co., 264 Minn. 421, 119 N.W.2d 746 (1963), the court stated:

From an examination of the authorities which discuss the so-called special errand rule it appears that it has been applied where (a) there is an express or implied request that the service be performed after working hours by an employee who has fixed hours of employment; (b) the trip involved on the errand be an integral part of the service performed; and (c) the work performed, although related to the employment, be special in the sense that the task requested was not one which was regular and recurring during the normal hours of employment.

Id. at 425, 119 N.W.2d at 749.

Because Youngberg’s third factor is not satisfied in the traveling to doctor cases, it is difficult to understand why the Hendrickson court lumped the prior Minnesota cases in this area in the special-errand category.

See 1 A. Larson, supra note 3, § 13.11, at 3-366 (compensation improper when injury results from “intentional conduct which may be regarded as expressly or impliedly prohibited by the employer”).

69. See id. § 13.11, at 3-363 to -364.
70. See id. § 13.11, at 3-366.
was not negligent or did not intentionally engage in an activity that his employer expressly or impliedly prohibited. Professor Larson uses an example to clarify the scope of the non-quasi injury rule. An employee whose arm was broken at work subsequently beats his wife when his arm is not completely healed. As a consequence of the beating, the arm is refractured. A person with a healthy arm could have beaten his spouse in the same manner without injuring his arm. Professor Larson concludes that compensation should not be awarded for the refractured arm because of the employee’s intentional misconduct.

Professor Larson’s approach is subject to criticism on at least three grounds. First, most secondary injuries are not so conveniently extreme as those of the witch doctor and spouse-beating cases. More realistic situations are not so easily solved using Professor Larson’s analysis. Consider an employee whose workplace-injured arm has just been soaked in alcohol and bandaged by the company nurse. Outside the physician’s office the employee lights a cigarette, ignites the bandages, and badly burns his arm. Whether compensation should be granted under Professor Larson’s liability rules is uncertain. Because of the employee’s location when he sustained his burn injury, he may no longer have been engaged in a quasi-course of employment activity. Similarly, reasonable persons could differ on whether the employee was negligent or whether he violated an implied employer prohibition. Professor Larson’s approach is suspect because it depends on one’s ability to easily place a case in one of the two-tiers of his analysis. The above example illustrates that categorization may be difficult in many subsequent nonemployment activities. There-

71. See id.
72. See id.; § 13.11, at 3-363 to -368.
73. Professor Larson acknowledges this criticism. See id. § 13.11, at 3-368 (“Most cases will not be as conveniently extreme as those of the witch doctor and the boxing match.”).
74. Professor Larson offers similar factual illustrations as falling within the quasi-course category. See id. § 13.11, at 3-368. Because lighting the cigarette was not undertaken because of the prior injury, the injury arguably could be handled by the non-quasi-course rule.
75. Illustrative of the manner in which reasonable persons could differ as to whether the employee was negligent in the bandage burning hypothetical are Whiting-Mead Commercial Co. v. Industrial Accident Comm’n, 178 Cal. 505, 173 P. 1105 (1918), Fischer v. R. Hoe & Co., 224 A.D. 335, 230 N.Y.S. 755 (1928), and McDonough v. Sears, Roebuck & Co., 127 N.J.L. 158, 21 A.2d 314 (Sup. Ct. 1941), aff’d, 130 N.J.L. 530, 33 A.2d 861 (N.J. 1943). In Whitney-Mead compensation was awarded, while in the latter two cases the court denied benefits.
fore, one of the principal reasons for departing from the proximate cause test—certainty in application—is lost.

Second, Professor Larson's approach, because it relies on intentional and negligent conduct as its measuring sticks for determining the compensability of subsequent nonemployment injuries, focuses its primary concern on intervening and proximate causes as a means of limiting recovery. When stripped of its excess verbiage Professor Larson's test is little more than the majority proximate cause rule. Quasi-course of employment activities that result in a second injury are by necessity caused by an initial employment injury. Similarly, if a non-quasi-course activity results in a secondary injury due to an employee's negligence, the employee's acts, in Professor Larson's view, have "superseded" any relationship between the first and second injuries. As such, Professor Larson's approach suffers from the same criticisms that render the majority rule suspect.

Finally, Professor Larson's approach results in an all or nothing recovery for employees. If full recovery is allowed, a windfall is received by those employees whose secondary injury is caused by their own negligence. If all recovery is barred, the employer avoids all liability even though the initial employment injury may be a substantial contributing cause of the secondary injury. When the initial employment injury is a substantial contributing cause of the subsequent nonemployment injury, the employee should be afforded at least a partial recovery, thereby requiring industry to bear a proportionate share of the costs of such injuries. Any other result is inconsistent with the growing trend toward applica-

76. Another commentator also has noted this criticism:
Professor Larson's use of intentional and negligent conduct as determining the outer limits of the range of compensable consequences for a work-related injury still focuses the court's attention on intervening and thus proximate causation as a limitation on recovery. Such an analysis is subject to the same criticism as a proximate cause inquiry unrefined by "quasi course of" language.
49 N.C.L. REV. 583, 589 (footnote omitted).
77. See id.
78. See id.
79. By precluding a partial recovery in such instances, courts are acting inconsistent with one of the rationales for adopting workers' compensation statutes. Professor Schneider states that workers' compensation laws were enacted "to shift the burden of accidental injuries from the workmen to the industry rather than on society as a whole, and to treat the cost of personal injuries incidental to the employment as a part of the cost of the business." W. SCHNEIDER, supra note 20, § 3, at 3-5 (footnotes omitted). Professor Horovitz concurs in Professor Schneider's reasoning. See S. HOROVITZ, supra note 12, at 470.
tion of comparative fault concepts.\textsuperscript{80}

\section*{C. The Minnesota Cases}

The Minnesota Supreme Court has not followed a consistent approach in resolving the six subsequent nonemployment injury cases it has decided in recent years. The court appears to have followed the majority proximate cause rule a number of times.\textsuperscript{81} On other occasions, the court apparently embraces Professor Larson's approach.\textsuperscript{82} Some Minnesota cases, however, apply neither a proximate cause nor Professor Larson's approach.\textsuperscript{83} Because of the Minnesota Supreme Court's use of various approaches in deciding subsequent nonemployment injury cases, it is difficult to draw any firm conclusions concerning what the "Minnesota rule" is on this subject.\textsuperscript{84}

In \textit{Eide v. Whirlpool Seeger Corp.},\textsuperscript{85} the employee sustained a compensable back injury.\textsuperscript{86} As a result of the injury, the employee underwent surgery for removal of a ruptured disc.\textsuperscript{87} Subsequently, while engaged in a game of badminton, the employee suffered an injury to his left knee that had no relation to his earlier back injury.\textsuperscript{88} Because of the rigid cast placed on his left leg, the em-

\begin{itemize}
\item \textsuperscript{80} See supra notes 53-55 and accompanying text; infra note 152 and accompanying text.
\item \textsuperscript{81} The proximate-cause approach, with its intervening cause pitfalls, apparently was followed in \textit{Eide v. Whirlpool Seeger Corp.}, 260 Minn. 98, 109 N.W.2d 47 (1961). In \textit{Eide} the court stated:
\begin{quote}
Of course, there may be situations where aggravation of the original injury requiring additional medical or hospital care is the result of such unreasonable, negligent, dangerous or abnormal activity on the part of the employee that it can be said that such additional care was not a natural consequence flowing from the primary injury. In such cases, of course, the additional services required for treatment would not be compensable.
\end{quote}
\textit{Id.} at 102, 109 N.W.2d at 49-50 (citations omitted).
\item \textsuperscript{82} See infra notes 100-08 and accompanying text (discussing Wallace v. Judd Brown Constr. Co., 269 Minn. 455, 460, 131 N.W.2d 540, 544 (1964)).
\item \textsuperscript{83} For example, in Hendrickson v. George Madsen Constr. Co., 281 N.W.2d 672 (Minn. 1979), the Minnesota Supreme Court was faced with a situation where an employee testifying at a hearing for additional benefits for his work-related shoulder injury died of a heart attack. The compensation court in awarding benefits relied on Professor Larson's quasi-course of employment doctrine. \textit{Id.} at 674. Reversing the compensation court, the supreme court held that such an award would be inconsistent with public policy. \textit{Id.} at 675.
\item \textsuperscript{84} Conclusions distilled from the Minnesota cases are offered later in the Article. See infra notes 130-42 and accompanying text.
\item \textsuperscript{85} 260 Minn. 98, 109 N.W.2d 47 (1961).
\item \textsuperscript{86} \textit{Id.} at 99, 109 N.W.2d at 48.
\item \textsuperscript{87} \textit{Id.}
\item \textsuperscript{88} See \textit{id.} at 100, 109 N.W.2d at 48.
\end{itemize}
ployee had to swing his left foot in an awkward manner to move around. Ambulating in this fashion exacerbated the employee’s original back injury. Under these circumstances, the court upheld an award of further medical and hospital care for the employee’s back condition. In so holding, the Eide court stated that “where an industrial accident creates a permanently weakened physical condition which an employee’s subsequent normal physical activities may aggravate to the extent of requiring additional medical or hospital care, such additional care is compensable.”

The Eide court recognized, however, that some subsequent nonemployment injuries should not be compensable:

Of course, there may be situations where aggravation of the original injury requiring additional medical or hospital care is the result of such unreasonable, negligent, dangerous or abnormal activity on the part of the employee that it can be said that such additional care was not a natural consequence flowing from the primary injury. In such cases, of course, the additional services required for treatment would not be compensable.

Subsequently, in Gerhardt v. Welch, an employee whose work injury allowed him to walk only with the aid of crutches died in a fire that destroyed his home. The employee’s dependents argued that the employee was unable to escape the fire because of his disability. The court affirmed a denial of benefits because of the absence of proof that the employee’s disabled condition contributed to his death. The court, however, “conceded that if Gerhardt was unable to escape the fire because of his disabled condition his dependants are entitled to compensation.” The Gerhardt court indicated that such a result would be mandated if

the primary injury is shown to have arisen out of and in the course of employment, [because] every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause.

89. See id. at 100, 109 N.W.2d at 49.
90. See id.
91. See id. at 102, 109 N.W.2d at 50.
92. Id. at 101, 109 N.W.2d at 49.
93. Id. at 102, 109 N.W.2d at 49-50.
94. 267 Minn. 206, 125 N.W.2d 721 (1964).
95. See id. at 207-08, 125 N.W.2d at 722-23.
96. See id. at 208, 125 N.W.2d at 723.
97. Id. at 209-11, 125 N.W.2d at 724-25.
98. Id. at 209, 125 N.W.2d at 723.
attributable to the claimant’s own negligence or misconduct.99

Ten months later, in a decision that did not cite or comment upon the Gerhardt dictum, the court decided Wallace v. Judd Brown Construction Co.100 In Wallace, the Minnesota Supreme Court quoted Professor Larson’s quasi and non-quasi in the course of employment concepts for the first time.101 Wallace sustained an injury in 1955 when he fell from a railroad tank car.102 As a result of this work-related incident, he sustained a fracture to his lower left leg.103 Approximately five years later, while assisting in the razing of his brother’s home, he fell from an eight foot high platform.104 The fall resulted in a second fracture of his lower left leg.105 Medical testimony indicated that the second fracture was more likely to occur because the first fracture reduced the employee’s ability to flex his knee.106 Greater knee flexibility would have reduced the impact of the fall.107 Notwithstanding the medical testimony, the court denied compensation benefits for the employee’s injured knee because the new injury was the result of an “occurrence” that had no causal relation to the original injury.108

In Andeen v. Emmaus Nursing Home,109 the supreme court affirmed the compensation court’s decision awarding benefits in a back aggravation case. The employee in Andeen injured her back in August, 1973, while sliding across the front seat of an automobile.110 Three months later she aggravated her back; first, while carrying a

99. Id. (quoting 1 A. Larson, The Law of Workmen’s Compensation § 13.00 (1952)).
100. 269 Minn. 455, 131 N.W.2d 540 (1964).
101. Id. at 460, 131 N.W.2d at 544 (referring to Professor Larson’s concepts as an “appropriate pair of principles.”).
102. See id. at 456, 131 N.W.2d at 541.
103. See id.
104. Id. at 456, 131 N.W.2d at 542.
105. See id.
106. See id. at 456-57, 131 N.W.2d at 542.
107. See id.
108. The Wallace court commented:
Applying these principles to the admitted facts of this case—the subsequent injury was the result of the breaking of the two-by-four on which petitioner stood. His previous injury had absolutely nothing to do with the occurrence which caused his fall. If his stiff leg had caused him to fall, we might well have a different case, but no one contends that his disability had anything to do with the breaking of the two-by-four. The most that can be said is that medical evidence will sustain a finding that once he had fallen he was more likely to sustain an injury because his stiff leg would not absorb a shock as well as a normal leg; but in determining causal relationship it would seem that we must look to the occurrence that made the injury possible rather than to the result that followed.
Id. at 460-61, 131 N.W.2d at 544-45 (emphasis added) (footnote omitted).
109. 256 N.W.2d 290 (Minn. 1977) (per curiam).
110. Id. at 291.
bag of groceries and, later, while riding a bus. The employer contended that the latter injuries were intervening causes that necessitated a reduction of benefits. In a per curiam opinion, the supreme court rejected the employer’s argument stating: “[T]he aggravations of Mrs. Andeen’s condition were natural consequences flowing from the injury sustained in August and thus should have no affect on the amount of compensation to which she is entitled.”

A situation in which an employee, while testifying at his compensation hearing for additional benefits for a work-related shoulder injury, died of a heart attack, was addressed by the Minnesota court in *Hendrickson v. George Madsen Construction Co.* The parties stipulated that the stress of the employee’s appearance at the compensation hearing contributed to his heart attack. In awarding benefits the compensation court relied on Professor Larson’s quasi-course of employment doctrine. Although the briefs of both parties invited an analysis of Professor Larson’s theories, the court declined to decide the case on that basis. Instead it held that as a matter of public policy, compensation does not extend to a heart attack sustained by an employee while testifying in his own behalf at a compensation hearing when the heart attack, although caused in part by the stress of the hearing, is medically unrelated to the injury for which compensation benefits were originally requested.

111. See id. at 292. The Minnesota Supreme Court’s opinion in Andeen does not specify the type of subsequent activities which allegedly aggravated the employer’s back condition. A review of the supreme court briefs in Andeen, however, indicates that the subsequent aggravations resulted from carrying a bag of groceries, and riding a bus. See Relators’ Brief and App. at 4, 16-17, Andeen v. Emmaus Nursing Home, 256 N.W.2d 290 (Minn. 1977).

112. See 256 N.W.2d at 292.

113. Id.

114. 281 N.W.2d 672 (Minn. 1979).

115. See id. at 673.

116. Id. at 674; see 1 A. Larson, supra note 3, § 13.11, at 3-365.

117. Id. at 675.

118. See id. at 674.

119. See id. at 675. A result of the Hendrickson holding is the implicit overruling of a 1975 compensation court decision. In Paszkiewicz v. Winona Plumbing Co., No. 708-10-3100 (Minn. Workers’ Comp. Ct. App. June 25, 1975), the employee sustained a compensable lumbar disc syndrome from a lifting incident at his employment on February 21, 1973. On March 1, 1974, the employee died of a heart attack. His wife sought benefits, successfully contending that the fatal heart attack was a result of emotional trauma experienced by the decedent when he met with the workers’ compensation carrier’s claim adjuster on February 15, 1974.
Most recently in *Gaspers v. Minneapolis Electrical Steel Castings Co.* the supreme court affirmed a denial of compensation benefits to an employee who claimed that a roller skating accident aggravated a prior work-related back injury. In 1969 the employee sustained a work-related back injury requiring a laminectomy and resulting in a twenty percent permanent partial disability of the back. Seven years later, he attempted roller skating. To avoid colliding with a young child, the employee reached out, grabbed the child, and swung him to his right side. While doing this, he twisted his back and immediately felt a sharp pain in the same area of his back where the 1969 injury occurred. A second laminectomy in the same location was necessary, resulting in a substantial absence from work.

The compensation court held that the employee’s subsequent non-employment injury was not compensable because roller skating was a “rash undertaking” and, therefore, constituted an intervening cause. Specifically, the compensation court stated,

> It appears to this Court that the activity of roller skating here, with knowledge of his back, was just that type of rash undertaking Professor Larson spoke of that involved the doctrine of intervening cause. We find that the subsequent injury to Mr. Gaspers’ back is not compensable because of his negligent acts.

The Minnesota Supreme Court affirmed the compensation court’s holding, but did not discuss the intervening cause/employee negligence issue. The supreme court based its holding on the employee’s inability to prove that the initial injury was a substantial contributing cause of his subsequent disability. The court found that the compensation court’s resolution of medical fact issues should be affirmed because the employer’s physician testified that the roller skating injury was not an aggravation of the earlier employment related injury.

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120. 290 N.W.2d 743 (Minn. 1979).
121. *Id.* at 745.
122. *Id.* at 744.
123. *Id.*
124. *Id.*
126. *Id.*
127. *See* 290 N.W.2d 744-45.
128. *See* *id.* at 745.
129. *See* *id.* The compensation court’s opinion does not indicate that the court found
A synthesis of *Eide, Gerhardt, Wallace, Andeen, Hendrickson,* and *Gaspers* yields the following conclusions. First, under *Eide* any aggravation of the original injury appears to be compensable unless the aggravation is the result of an “unreasonable, negligent, dangerous or abnormal activity.”130 Second, under *Gerhardt,* “every natural consequence that flows from the [initial] injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to the claimant’s own negligence or misconduct.”131

Third, after *Wallace,* the Minnesota rule for subsequent nonemployment injuries becomes unclear. While *Eide* focused on whether there was an aggravation of the original injury,132 *Wallace* shifted the focus to whether the new injury was the result of an “occurrence” that had a causal relation to the original injury.133 This uncertainty was compounded by the *Wallace* court’s approval of Professor Larson’s quasi/non-quasi course of injury concepts.134 Arguably, Professor Larson’s theories for subsequent nonemployment injuries were adopted by the Minnesota court. The *Wallace* court, however, after discussing Professor Larson’s concepts, never applied them in denying compensation.135 Perhaps *Wallace’s* only consistency with *Eide* and *Gerhardt* was its reference to proximate cause.136 All three decisions appear to require that the subsequent injury be a direct and natural result of the primary compensable injury.

Fourth, *Andeen* appears to return to the *Eide-Gerhardt* standard. Under *Andeen* any aggravation of the original injury is compensable only if the employee’s subsequent injury naturally flows from

the employer’s physician’s testimony more persuasive. Rather, the compensation court simply denied benefits because it viewed the employee’s activities as too rash for a person with his physical limitations. See *Gaspers v. Minneapolis Elec. Steel Castings Co.,* 31 Minn. Workers’ Comp. Dec. 367, 371 (1979). In that event, the Minnesota Supreme Court should have remanded the case for findings of fact on the medical issue, instead of affirming the decision.

130. See *Gaspers v. Minneapolis Elec. Steel Castings Co.,* 290 N.W.2d 743, 745 (Minn. 1980).

131. See *Gerhardt v. Welch,* 267 Minn. 206, 209, 125 N.W.2d 721, 723 (1964).


134. See id. at 460, 131 N.W.2d at 544.

135. See id. at 460-61, 131 N.W.2d at 544.

136. See id. at 459-60, 131 N.W.2d at 544-45.
the initial injury. As in *Eide* and *Gerhardt*, however, the court failed to specify any factors to help practitioners determine which secondary injuries naturally flow from the initial injury.

With the *Hendrickson* decision, the Minnesota rule on subsequent employment injuries becomes even more uncertain. Because the parties stipulated that the stress of the employee's appearance at the compensation hearing was a contributing cause of the heart attack, the subsequent injury was arguably a direct result of the primary injury, yet compensation was denied. The *Hendrickson* court's refusal to decide the case by using Professor Larson's theories may be an implicit rejection of them. After *Hendrickson* it appears that compensation for subsequent employment injuries will be granted only if public policy so requires and a proximate cause relationship exists between the injuries. Unfortunately, the *Hendrickson* court gave no guidelines for determining when public policy warrants compensation or when a subsequent nonemployment injury is a direct and natural consequence of a previous compensable injury.

Finally, *Gaspers* emphasized the need for credible medical testimony to support any award for a subsequent nonemployment injury. In the absence of sufficient medical testimony that the initial injury was a substantial contributing cause of the subsequent nonemployment disability, compensation will be denied. Because the *Gaspers* court failed to indicate that the compensation court's intervening cause analysis was improper, the supreme court apparently has returned to the use of the proximate cause approach.

In summary, the Minnesota rule regarding subsequent nonemployment injuries, is, at best, confusing. The Minnesota court apparently has embraced a mixture of the proximate cause rule

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137. See *Andeen v. Emmaus Nursing Home*, 256 N.W.2d 290, 292 (Minn. 1977) (per curiam).
139. See *id*.
140. See *Gaspers v. Minneapolis Elec. Steel Castings Co.*, 290 N.W.2d 743, 745 (Minn. 1979).
141. See *id*.
142. The Minnesota Supreme Court recently had an opportunity to clarify its prior decisions. In *Schander v. Northern States Power Co.*, 320 N.W.2d 84 (Minn. 1982), an employee sustained serious injuries in an automobile accident while returning home from a retraining course. *Id.* at 85. The employer paid the employee's retraining expenses, including mileage costs. *Id*. In awarding compensation, the compensation court found the facts to be sufficiently analogous to those in *Pedersen v. Maple Island Inc.*, 256 Minn. 21, 97 N.W.2d 285 (1959), and *Fitzgibbons v. Clarke*, 205 Minn. 235, 285 N.W. 528
and Professor Larson's liability theories, with public policy concerns also given consideration.

IV. A SUGGESTED APPROACH

A. Effecting Change

Any reform of Minnesota's subsequent nonemployment injury law could result from either judicial or legislative action. Be-

(1939). Id. Pedersen and Fitzgibbons fall within the general rule permitting compensation for injuries suffered while traveling to or from doctors when such travel is necessitated by an employment-related injury.

Reversing the Workers' Compensation Court of Appeals, the Minnesota Supreme Court stated:

We are not convinced, however, that there is a sufficiently direct relationship between employment and injuries sustained by an employee while returning from his retraining course to his home to justify the conclusion that during that time he is in the course of employment. Obviously, the employer exercised no control over, and derives no benefit from, the employee's choice of route. Moreover, the employee during the course of his travel is exposed to the same risks as all other members of the general public and in the absence of exceptional circumstances the coverage of the Workers' Compensation Act does not extend to such risks. In Hendrickson we recognized that workers' compensation is a "pure creature of the legislature" and declined judicially to extend coverage to a non-work-related event. The court's decision sheds no new light on how subsequent nonemployment injuries should be resolved. The court appears to require "a sufficiently direct relationship between employment and [subsequent] injuries." Id. This may be a return to the proximate cause test. However, the court also appeared to view this area of workers' compensation law as a question of public-policy line drawing for which the legislature is better suited to fix the ambit of coverage.

The Minnesota court should have considered Schander under two different principles, first, whether the employee's need for retraining and for traveling home from a retraining course was a substantial contributing cause of the subsequent injury. See infra notes 153-76 and accompanying text. This would have resulted in affirmance of the compensation court's decision. Second, the supreme court could have resolved Schander by application of the travel-as-part-of-service doctrine. Mr. Bradt notes that "[w]hen the employee receives a substantial payment or reimbursement for travel expenses, or payment for the time spent traveling, the entire journey normally will be in the course of employment." Bradt, supra note 15, at 559-60 (footnotes omitted). Application of this doctrine would have resulted in affirmance of the compensation court's decision because Schander's mileage expenses were paid by the employer. For additional discussion of this doctrine, see 1 A. Larson, supra note 3, § 16.30, at 4-160.

143. Several commentators have expressed the view that courts are better suited than legislatures to develop new or modify existing liability doctrines. See Fleming, Foreword: Comparative Negligence at Last—By Judicial Choice, 64 CALIF. L. REV. 239, 273-82 (1976); Keeton, Comment on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide? 21 VAND. L. REV. 906, 915 (1968); Peck, The Role of the Courts and Legislatures in the Reform of Tort Law, 48 MINN. L. REV. 265, 268 (1963). The best judicial analysis of this issue is contained in Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975), where the California Supreme Court, in a substantial portion of its opinion, rejected defendant's argument that any adoption of comparative negligence concepts must be by the legislature, not the court. Id. at 813-23, 532 P.2d at 1232-39, 119 Cal. Rptr. at 864-71.

144. Several courts have indicated that legislative enactment is preferable to judicial
cause determining rules of liability for this area has recently been viewed as a legislative function,145 it may be more appropriate if change from past practice occurred by means of legislative reform.146 However, change need not occur solely through legislation.

Judicial reform is appropriate for several reasons. First, much of the confusion in the subsequent nonemployment injury area is due to Minnesota Supreme Court decisions.147 Consequently, the court should take the initiative in formulating liability rules that clarify its prior holdings. Second, an active judicial role would assist, not confront, the legislative branch.148 Should the legislature disagree with the court’s development of liability rules in this area, it could reject or modify the court’s solutions through subsequent legislation.149

Third, legislative performance to date has not inspired confidence in treatment of controversial areas of workers’ compensation law. No bills have been introduced, much less enacted, that provide a framework for resolving subsequent nonemployment injury disputes. The Minnesota legislature’s inaction is implicitly due to its desire for judicial development of appropriate rules.150

Finally, ample precedent exists for judicial initiative in develop-


We hold, therefore, that Hendrickson’s injury sustained while pursuing a compensation claim against the employer is not compensable. We are being called upon to make a policy decision as to how far the limits of compensable coverage should be extended by judicial decision. Considering the history of workers’ compensation as a pure creature of the legislature, it would be an improper exercise of the judicial function to extend coverage to nonwork-related events occurring during the compensation claim process. Any extension of coverage to such injuries is properly a matter for legislative action.

Id. at 675.

146. But see Fleming, supra note 143, at 273-82; Keeton, supra note 143, at 915; Peck, supra note 143, at 268.

147. See supra notes 82-142 and accompanying text.

148. See Fleming, supra note 143, at 275.

149. See id.

Recent Minnesota Supreme Court case law also reflects that court's desire to refine workers' compensation law to provide for an equitable method of allocating payments to all participants in that system.152

151. See Henderson, Expanding the Negligence Concept: Retreat from the Rule of Law, 51 IND. L.J. 467, 468 (1976). One recent commentator concludes:

In this era of tort reform, Minnesota has emerged as one of the leaders in the advancement of tort law. Minnesota's first tort reform decision occurred in 1920 when the court abolished charitable immunity. See Mulliner v. Evangelischer Diakonissenverein, 144 Minn. 392, 398, 175 N.W. 699, 701 (1920). In the past twenty years, the Minnesota Supreme Court has been extremely active in the reform of tort law. For example, the court has abolished sovereign immunity, see Nieting v. Blondell, 306 Minn. 122, 132, 235 N.W.2d 597, 603 (1975); Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 292, 118 N.W.2d 795, 803 (1962), abrogated parent-child immunity, see Silesky v. Kelman, 281 Minn. 431, 442, 161 N.W.2d 631, 638 (1968); Balts v. Balts, 273 Minn. 419, 433, 142 N.W.2d 66, 75 (1966), eliminated for the purpose of automobile accidents the doctrine that imputes the negligence of a servant to a master so as to bar a third-party suit by the master, see Weber v. Stokely-Van Camp, Inc., 274 Minn. 482, 491, 144 N.W.2d 540, 545 (1966), applied strict liability in products liability cases, see McCormack v. Hankscraft Co., 278 Minn. 322, 339-40, 154 N.W.2d 488, 501 (1967), allowed a wife to recover for her loss of consortium, see Thill v. Modern Erecting Co., 284 Minn. 508, 513, 170 N.W.2d 865, 869 (1969), abrogated interspousal immunity, see Beaudette v. Frana, 285 Minn. 366, 371-73, 173 N.W.2d 416, 420 (1969), merged assumption of the risk in the secondary sense with contributory negligence, see Springrose v. Willmore, 292 Minn. 23, 24, 192 N.W.2d 826, 827 (1971), abolished the legal status of property entrants as the determinative factor for the liability of property owners, see Peterson v. Balach, 294 Minn. 161, 164, 199 N.W.2d 639, 642 (1972), allowed a manufacturer to obtain indemnity from an installer who failed to discover the defect in the manufacturer's product, see Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362, 367-68 (Minn. 1977), ruled that a third party can obtain limited contribution from a negligent employer under the Minnesota workers' compensation statute, see Lambertson v. Cincinnati Corp., 312 Minn. 114, 128-30, 257 N.W.2d 679, 689 (1977), recognized a cause of action from wrongful conception, see Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 174 (Minn. 1977), discussed in Comment, Wrongful Conception, 5 WM. MITCHELL L. REV. 464 (1979), held that a strictly liable manufacturer can obtain contribution from a negligent cotortfeasor and that contributory negligence can be compared with the strict liability of a cotortfeasor under the Minnesota comparative negligence statute, see Busch v. Busch Constr., Inc., 262 N.W.2d 377, 393 (Minn. 1977), noted in 5 WM. MITCHELL L. REV. 517 (1979), and adopted the doctrine of informed consent in medical malpractice cases. See Cornfeldt v. Tongen, 262 N.W.2d 684, 699 (Minn. 1977).


152. For example, in Lambertson v. Cincinnati Corp., 312 Minn. 114, 257 N.W.2d 679 (1977), an injured employee sued the manufacturer of a defective machine press. The manufacturer brought a third party action against the injured party's employer claiming that the employer negligently failed to install safety devices. See id. at 126-27, 257 N.W.2d at 686-88. The jury found all parties causally negligent, apportioning 15% of the negli-
B. A Suggested Approach

A satisfactory approach to the problem of subsequent nonemployment injuries should balance the competing interests of employees and employers. Employees wish to be paid workers' compensation benefits for any secondary injury no matter how weak the causal nexus to the original employment, or how culpable the employee's conduct. Employers, on the other hand, see no reason for paying any workers' compensation benefits in subsequent nonemployment injury cases. A satisfactory approach should allow some measure of recovery when the earlier injury contributes to or aggravates the subsequent injury. Likewise a satisfactory approach should reduce or even deny recovery depending on the extent to which the claimant's misconduct contributes to the subsequent injury.

This Article suggests that the following judicial standard or legislative enactment would result in a more equitable and less confusing method for resolving subsequent nonemployment injury cases. This format is used for ease in possible legislative enactment. Judicial adoption of the suggested subsequent nonemployment injury rules could easily occur by simply deleting the term "subdivision" before each paragraph, and omitting subdivision four in its entirety.

...
disputes, while balancing the conflicting needs and desires of labor and industry:

Subdivision 1. *When an employee has sustained a compensable employment injury he is entitled to workers' compensation benefits for any subsequent nonemployment injury if the initial employment injury was a substantial contributing factor in causing the subsequent nonemployment injury.*

A subsequent nonemployment injury is any injury that is caused in part or is aggravated by a prior compensable injury under chapter 176, and which was sustained under circumstances in which the claimant would not otherwise be entitled to workers' compensation benefits.

Subdivision 2. *In determining the amount of workers' compensation benefits that a claimant or dependent is entitled to under this section, the total amount of benefits awardable shall be reduced by the percentage of fault attributable to the claimant or decedent in causing the subsequent nonemployment injury. This apportionment of fault shall be effected pursuant to chapter 604.*

Subdivision 3. *Subsequent nonemployment injuries are not compensable unless the claim is brought within ten years of the date of the initial employment injury, and within three years of the date of the subsequent nonemployment injury, and notice of the subsequent nonemployment injury is given to the employer within 180 days of such injury.*

Subdivision 4. *If any provision of this section or the application thereof to any person is held to be invalid, such invalidity shall not affect the provisions or application of this Act, which can be given effect within the invalid provision or application thereof, and to this end the provisions of this section are severable.*

Subdivision 1 requires as the only element of causation that the initial work-related injury be a substantial contributing factor in causing the subsequent nonemployment injury. As a general rule of law, an initial work-related injury is not compensable unless the employment is a substantial contributing factor in causing the em-

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154. As in the application of chapter 604 to regular negligence causes of action, if the fault of the claimant in a subsequent nonemployment injury case exceeds the contributory fault of the initial employment injury, recovery is barred. *See Minn. Stat. § 604.01(1) (1980).*
ployee's ensuing disability.\textsuperscript{155} There is no reason why the substantial contributing factor test should not be equally applicable to subsequent nonemployment injuries.

Although there are no Minnesota workers' compensation decisions that define substantial contributing factor, the Minnesota court has attempted to give meaning to these terms by drawing upon analogies from the law of negligence.\textsuperscript{156} The Minnesota Supreme Court often has found the substantial contributing factor

\begin{itemize}
\item In Klapperich v. Agape Halfway House, Inc., 281 N.W.2d 675 (Minn. 1979), the court stated:
\begin{quote}
[T]he establishment of medical causation from a work-related activity does not in and of itself establish legal causation for purposes of awarding workers' compensation benefits. This is so because such medical causation might be so insignificant or happenstance that the work-related activity cannot be said to be a substantial contributing cause of the heart attack.
\end{quote}
\textit{Id.} at 680.

In an occupational disease setting in which an employee suffering pulmonary emphysema recovered benefits, the court stated that the employee's physician "opined that the characteristics of Scott's employment [as a car starter for an auto dealer] 'had quite a bit to do with his lung disease,' and were a substantial causative factor." Scott v. Southview Chevrolet Co., 267 N.W.2d 185, 187 (Minn. 1978) (footnote omitted).

Language similar to that used in \textit{Klapperich} and \textit{Scott} may be found in earlier Minnesota cases. See, e.g., Kleman v. Ford Motor Co., 307 Minn. 218, 221, 239 N.W.2d 449, 451 (1976) (compensation awarded in heart attack case when physician testified that employment was "not a substantial causal factor in employee's death"); Roman v. Minneapolis St. Ry., 268 Minn. 367, 380, 129 N.W.2d 550, 558 (1964) ("It is only necessary for relator to show that the 1940 fall was a 'legal cause' of the disc protrusion, that is, an appreciable or substantial contributing cause."); \textit{cf.} Sieger v. Knox & Peterson, 160 Minn. 185, 189, 199 N.W. 573, 574 (1924) (compensation awarded in assault case because employment was "much more than the mere occasion for the assault"). Additionally, the compensation court requires that the employment be a substantial contributing cause of any personal injury or occupational disease. See Melville v. County of Dakota, 31 Minn. Workers' Comp. Dec. 271, 275 (1978) (job not substantial contributing factor in heart attack); Hartigan v. City of Sauk Centre, 29 Minn. Workers' Comp. Dec. 338, 341 (1977) (stress from employment substantial contributing cause of heart condition); Holm v. United Parcel Serv., 26 Minn. Workers' Comp. Dec. 564, 567 (1973) (substantial contributing cause satisfied).

Interestingly, Professor Kirwin notes that "the Minnesota court has not spoken of a general substantial-factor requirement for arising-out-of issues in the personal injury context." Kirwin, supra note 18, at 673 (footnote omitted). Because of the case law cited in this footnote, this author respectfully disagrees with Professor Kirwin's analysis.

\textsuperscript{155} In Klapperich v. Agape Halfway House, Inc., 281 N.W.2d 675 (Minn. 1979), the court stated:
\begin{quote}
[T]he establishment of medical causation from a work-related activity does not in and of itself establish legal causation for purposes of awarding workers' compensation benefits. This is so because such medical causation might be so insignificant or happenstance that the work-related activity cannot be said to be a substantial contributing cause of the heart attack.
\end{quote}
\textit{Id.} at 680.

\textsuperscript{156} For example, in Roman v. Minneapolis St. Ry., 268 Minn. 367, 129 N.W.2d 550 (1964), the court stated that "[i]t is only necessary for relator to show that the 1940 fall was a 'legal cause' of the disc protrusion." \textit{Id.} at 380, 129 N.W.2d at 558. "Legal cause" is a term often used in negligence terminology. In Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200 (1960), the court indicated that "[t]he important question is whether the employment is a proximate contributing cause of the disability." \textit{Id.} at 322, 101 N.W.2d at 206. Use of the "proximate contributing cause" language appears to be appropriated from negligence law. \textit{Accord} Forseen v. Tire Retread Co., 271 Minn. 399, 136 N.W.2d 75 (1965).
test critical in resolving negligence cases. These Minnesota decisions adopt the view expressed in section 431(a) of the Restatement (Second) of Torts that requires the negligent conduct to be “a substantial factor in bringing about the harm.”

The concept of substantial factor is explained in comment a to that section as follows:

The word “substantial” is used to denote the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called “philosophic sense,” which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called “philosophic sense,” yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

Under section 433, if the complained of conduct was an insignificant factor in causing the injury, then the substantial factor test is not satisfied. The alleged negligent conduct, however, need not be the sole cause of the ensuing injury to satisfy the substantial contributing factor test. All causes that fall between the continuum of “merely negligible” and “sole cause” will satisfy the test.

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157. See DeCourcy v. Trustees of Westminster Presbyterian Church, 270 Minn. 560, 563, 134 N.W.2d 326, 328 (1965); Johnson v. Evanski, 221 Minn. 323, 328, 22 N.W.2d 213, 216 (1946); Smith v. Carlson, 209 Minn. 268, 272, 296 N.W. 132, 134 (1941); Peterson v. Fulton, 192 Minn. 360, 364, 256 N.W. 901, 903 (1934); Kirwin, supra note 18, at 672 (“The Minnesota court has adhered to the substantial-factor approach in a number of negligence cases.” (footnote omitted)).

158. See cases cited supra notes 159-60.

159. RESTATEMENT (SECOND) OF TORTS § 431(a) (1965).

160. Id. § 431(a) comment a.

161. See id. § 433 comment d.

162. RESTATEMENT (SECOND) OF TORTS § 433 provides:

The following considerations are in themselves or in combination with one another important in determining whether the actor’s conduct is a substantial factor in bringing about harm to another:

(a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;

(b) whether the actor’s conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;

(c) elapse of time.

Id.

Certainly, if an actor’s conduct can be a substantial factor in bringing about the harm to another when there are a “number of other factors,” the alleged negligent conduct need not be the sole cause of the ensuing disability.
The substantial contributing factor test is used in both negligence\textsuperscript{163} and workers' compensation\textsuperscript{164} cases. Because of the similarities between negligence and workers' compensation theory,\textsuperscript{165} the definition of that term as used in the law of negligence also should apply when the same term is used in workers' compensation cases, including subsequent nonemployment injury disputes. Proper use of the substantial contributing factor test should satisfy the \textit{Wallace} court's quest for "a line [that] must be drawn somewhere in cases involving subsequent [nonemployment] injuries."	extsuperscript{166} To illustrate the "line-drawing" that the substantial contributing factor test permits in the subsequent nonemployment injury context, its effect on past Minnesota secondary injury cases is instructive.

In \textit{Hendrickson v. George Madsen Construction Co.},\textsuperscript{167} an employee died of a heart attack while testifying at his compensation hearing.\textsuperscript{168} The parties stipulated that the stress of the employee's appearance at the compensation hearing was a contributory cause of the heart attack.\textsuperscript{169} Rather than reversing the compensation court's decision awarding dependency benefits, the supreme court should have remanded the case for a determination of whether the stress of the compensation hearing was a substantial contributory factor in causing the heart attack.

A different result also would be reached in \textit{Wallace v. Judd Brown Construction Co.},\textsuperscript{170} in which the employee sustained a subsequent nonemployment injury when he fell from a platform.\textsuperscript{171} An earlier work-related injury resulted in the employee having a reduced ability to flex his knee. A greater ability to flex would have reduced the impact of the subsequent fall and injury.\textsuperscript{172} The court acknowledged that credible medical testimony was given regard-
ing the effect of the first injury upon the secondary injury;\(^\text{173}\) nevertheless the court denied compensation benefits, ignoring the relationship between the secondary injury and the original injury.\(^\text{174}\) Certainly the employee’s activities at the time of the secondary injury had no relationship to his initial injury.\(^\text{175}\) The substantial contributing factor test appears to have been met in Wallace. Compensation benefits should have been awarded.

The hypothetical amputee’s drowning death mentioned in the Introduction of this Article also provides an interesting compensation problem. If the boater would ordinarily have been able to swim to shore because he had the use of both arms, the substantial contributing factor test is met. If he could never have managed to swim to shore, or remain afloat until rescued, then compensation benefits should be denied.\(^\text{176}\)

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173. See id. ("the medical testimony is such that it will support a finding that a fracture is more apt to result from a fall of this kind when a person’s knee is immobilized because there is not the ability to flex the knee and thereby reduce the impact of the fall").

174. See id. at 460, 131 N.W.2d at 544 ("where the original injury is aggravated by or the injured person sustains a new injury as the result of an occurrence that has no causal relation to the original injury, it must be said that the later injury is not a consequence of the first").

175. It is difficult to perceive of many subsequent nonemployment injuries that result from an “occurrence” that had a causal relation to the original injury. The only cases that would seem to satisfy this test are the going to or returning from the doctor cases. Thus, satisfying the Wallace test in subsequent nonemployment cases is extremely difficult.

176. Ordinarily, the claimant bears the burden of proving entitlement to workers’ compensation benefits. See, e.g., MacNamara v. Jennie H. Boyd Trust, 287 Minn. 163, 166, 177 N.W.2d 398, 400 (1970); Ulve v. Bemidji Coop. Creamery Ass’n, 267 Minn. 412, 420, 127 N.W.2d 147, 152 (1964); Gerhardt v. Welch, 267 Minn. 206, 210, 125 N.W.2d 721, 724 (1964).

In the hypothetical amputee drowning case, however, and similar secondary injury situations, it seems grossly unfair to saddle the claimant with the burden of proving that if he had the use of both arms, he would have been able to swim to shore or float until rescued. What expert could possibly testify with any degree of certainty on this issue?

Once the initial injury increased the risk of harm of the type that actually occurred, the burden should be on the employer to initially prove that the first employment was not a substantial contributing cause of the latter injury. Only then should the burden of proving substantial contributing cause shift to the employee. Such a result finds support in negligence law. See Maryland ex rel. Pumphrey v. Manor Real Estate & Trust Co., 176 F.2d 414, 418 (4th Cir. 1949) (defendant landlord's negligent failure to rid apartment house of rats substantial factor in causing decedent's death from typhus; defendant landlord had burden of proving that required precautions would have proved unavailing); Stockwell v. Board of Trustees of Leland Stanford Jr. Univ., 64 Cal. App. 2d 197, 148 P.2d 405 (1944) (plaintiff struck by BB from third person's gun while cleaning defendant's premises; defendant had burden of proving that it was not negligent in allowing third person on premises); Rovegno v. San Jose Knights of Columbus Hall Ass'n, 108 Cal. App. 591, 291 P. 848 (1930) (absence of lifeguard at swimming pool was cause of child drowning even though it is unknown whether accident would have occurred with guard); Daly v.
If the substantial contributing factor test is satisfied, then, under subdivision 2, inquiry must be made to determine whether the employee or dependent's fault contributed to the secondary injury. Subdivision 2 of this Article's suggested approach is intended to avoid the harsh all-or-nothing results inherent in the proximate cause rule, Professor Larson's approach, and previous Minnesota decisions in this area. This subdivision places a reasonable limit on recovery in subsequent nonemployment injury cases. Although negligence does not ordinarily enter into an analysis of whether a workers' compensation injury is compensable, several reasons justify resort to this doctrine in the subsequent nonemployment injury context. Courts have already injected contributory negligence into their determinations of whether a subsequent nonemployment related injury is compensable. It should not seem too radical an approach to evolve from contributory negligence to comparative negligence in such cases. Any other result is inconsistent with Minnesota's sophisticated comparative fault sys-

Illinois Central R.R., 248 Iowa 758, 80 N.W.2d 335 (1957) (failure to give signal was cause of grade crossing accident even though it was uncertain whether accident would have occurred in any event).

Interestingly some cases hold that when the defendant's negligence increased the risk of harm of the type that in fact occurred, the defendant is in effect estopped from arguing that the same harm might have occurred in any event. In Ascher v. Gutierrez, 533 F.2d 1235 (D.C. Cir. 1976), a medical malpractice case in which the defendant's negligence consisted of abandoning his patient, the court held:

The doctor should not be heard to say—'Even if I abandoned the patient, how do we know I could have helped her if I had stayed?' The patient counted on his best efforts; they might have reduced or eliminated the injury; it will never be known if those efforts could have made any difference; and the reason for this is that Gutierrez's own conduct has rendered such an inquiry speculative. We reject the argument that there was insufficient proof of causation.

Id. at 1238.

Gerhardt v. Welch, 267 Minn. 206, 125 N.W.2d 721 (1964), illustrates the harshness of placing the burden of proving the necessary causal relation between first and secondary injuries on the claimant. In Gerhardt an employee whose initial employment injury required him to walk with the aid of crutches died in a fire that destroyed his home. The court rejected the dependents' argument that the employee was unable to escape the fire because of his employment injury. Apparently, the dependents were unable to find an expert to testify that the work injury was a factor in causing Gerhardt's death. One wonders what type of testimony is needed to satisfy the Gerhardt opinion, perhaps that of a fire marshall. The difficulty of claimants being able to find expert testimony to support Gerhardt-type claims should result in employer's having the initial burden of proof on the substantial contributing factor test.

177. See supra notes 45-60 and accompanying text.
178. See supra notes 61-80 and accompanying text.
179. See supra notes 81-129 and accompanying text.
180. See supra note 54 and accompanying text.
181. See supra notes 48-52 and accompanying text.
Moreover, unless employees whose conduct contributed in some fashion to their subsequent nonemployment injuries receive a partial recovery, industry is insulated from paying a fair and proportionate share of the costs of such injuries.

The comparative negligence defense also provides necessary tradeoffs. In return for the "relaxed" causation rule for subsequent nonemployment injuries in subdivision 1, employers are provided with a comparative negligence defense. Subdivision 2 ensures that Professor Larson's extreme examples of witch doctor treatment and spouse-beating would not be compensable. Partial recovery would occur, however, in the more real life cases in which at least some employee culpability exists.

Another important balancing aspect of the approach suggested by this Article is the employee's ability to obtain at least partial benefits in secondary injury cases without satisfying the arising out of and in the course of requirements. Those requirements are otherwise satisfied in subsequent nonemployment injury cases only through the fiction of the relation back doctrine. If employees receive compensation when under a traditional analysis the arising out of and in the course of test is not satisfied, then it seems only reasonable to provide employers with a partial defense to which they normally would not be entitled in workers' compensation proceedings.

Admittedly, conceptual problems in applying comparative negligence concepts to subsequent nonemployment injuries do exist. Subdivision 2 proposes use of what Professor Steenson has coined an "equitable reduction approach." Instead of comparing the

182. See supra note 152 and accompanying text.
183. Id.
184. See supra note 69 and accompanying text.
185. See supra note 72 and accompanying text.
186. See supra notes 15-33 and accompanying text.
187. See supra notes 34-36 and accompanying text.
188. The problems are analogous to those of comparing a plaintiff's negligence to a defendant's strict products liability. The analogy is grounded in the no-fault rationales used in both strict products liability and workers' compensation. Minnesota has answered the strict products liability question in the affirmative. See Busch v. Busch Constr., Inc., 262 N.W.2d 377, 393-94 (Minn. 1977), noted in 5 WM. MITCHELL L. REV. 517 (1979). Eighteen other states have allowed the merger of comparative negligence with strict products liability; three states have decided that the two doctrines are "inherently incompatible." Comment, Products Liability—Washington Refuses to Allow Comparative Negligence to Reduce a Strict Liability Award, 56 WASH. L. REV. 307, 308-09 nn.8 & 10 (1981) (listing jurisdictions).
189. Professor Steenson explains that the equitable reduction approach "attempts to
degrees of negligence that the first and second injuries contributed to the employee's present condition, the focus is on the employee's or decedent's misconduct. Under this approach the employee or dependent's recovery is simply reduced according to the degree to which the misconduct contributed to the subsequent nonemployment injury. Problems of comparing causation in the abstract are thus avoided. Furthermore, because the focus is on the employee's or decedent's misconduct, problems of comparing causation between the employment and nonemployment injuries do not materialize.

Subdivision 3 of this Article's suggested approach also is necessary to properly balance the needs and desires of labor and industry in the secondary injury context. In return for the "relaxed" causation requirements of subdivision 1, employees must bring their subsequent nonemployment injury claims within ten years of the date of the initial employment related injury. Finality is especially important in this area because the natural degenerative process of all human beings steadily increases the risk of subsequent nonemployment injuries. Workers' compensation is not intended to take the place of health and accident insurance.

Subdivision 4 is a standard severability clause included for the obvious reason of attempting to avoid invalidation of the entire act in the event that one provision of the proposed act is unconstitutional. Although the proposed legislation should pass constitutional muster in its entirety, litigants may challenge its comparative negligence and statute of limitations provisions.

avoid the problem involved in comparing incomparable conduct by ignoring the comparison process and, focusing solely on the plaintiff's misconduct, reducing the plaintiff's recovery according to the jury's perception of the degree to which the plaintiff's misconduct contributed to his injuries." Steenson, The Anatomy of Products Liability in Minnesota: Principles of Loss Allocation, 6 WM. MITCHELL L. REV. 243, 272 (1980).

An employee's negligence normally does not bar a workers' compensation claim. See supra notes 12 & 52. Thus, two classifications of employees exist, only one group being subject to a comparative negligence defense. Another classification exists because MINN. STAT. § 176.151(1) (1980) provides that actions by an injured employee to recover compensation must be made within "three years after the employer has made written report of the injury to the commissioner of the department of labor and industry, but not to exceed six years from the date of the accident." Id. The proposed legislation would permit some injured claimants 10 years to commence their actions.

In determining whether the proposed legislation is constitutional, the court should apply a rational-basis scrutiny. See Ondler v. Peace Officers Benefit Fund, 289 N.W.2d 486, 489 (Minn. 1980) ("a classification which treats one class of persons differently from one another must . . . be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that similarly situated persons will be treated alike."). The rational basis test is satisfied be-
Should either of these provisions be ruled unconstitutional, the entire legislation need not be stricken.

V. CONCLUSION

When subsequent nonemployment injuries are compensable in Minnesota is uncertain. This uncertainty results from the Minnesota Supreme Court's inconsistent treatment of the requirements necessary to prevail in such lawsuits. At times the supreme court has applied the majority rule proximate cause approach. On other occasions, Professor Larson's liability rules have been adopted. Both the proximate cause rule and Professor Larson's approach have serious shortcomings. It is hoped that the proposals contained in this Article will assist either the Minnesota Supreme Court or Minnesota legislature in reforming one of the more confused areas of workers' compensation law.

cause in the absence of the relation-back doctrine, employees suffering subsequent non-
work-related injuries need not satisfy the arising out of and in the course of requirements. See supra notes 34-36 and accompanying text. 191. See supra notes 81-142 and accompanying text. 192. See supra notes 81 & 85-99 and accompanying text. 193. See supra notes 82 & 100-08 and accompanying text. 194. See supra notes 53-60 & 73-80 and accompanying text.