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## McCarty v. Workman's Compensation Appeals Board

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## McCarty v. Workman's Compensation Appeals Board

The traditional office Christmas party replete with alcoholic beverages was dealt a damaging, if not fatal, blow when the California Supreme Court handed down the decision of *McCarty v. Workman's Compensation Appeals Board*.<sup>1</sup> It may appear, at first glance, that *McCarty* is an innovative twist or a radical departure in the area of Workman's Compensation Law. But upon a reading of the case and a review of the precedent used, this was neither an innovative twist nor a radical departure but rather an application of the various tests and standards which have been used by California courts for well over twenty years to decide cases involving analogous questions.

Daniel McCarty, an employee of Apartment Plumbers, Inc., died when he drove into a railroad signal pole on his way home from his employer's office Christmas party. McCarty's wife applied for death benefits under Labor Code section 4702,<sup>2</sup> claiming essentially

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1. 12 Cal. 3d 677, 527 P.2d 617, 117 Cal. Rptr. 65 (1974).

2. CAL. LABOR CODE § 4702 (W. 1971):

Except as provided in the next paragraph, the death benefit in cases of total dependency, when added to all accrued disability indemnity, shall be the sum of twenty thousand dollars (\$20,000) except in the case of a surviving widow and one or more dependent minor children, in which case the death benefit shall be forty thousand dollars (\$40,000) and except as otherwise provided in Sections 4553 and 4554. In cases of partial dependency the death benefit shall be a sum equal to four times the amount annually devoted to the support of the dependents by the employee, not to exceed the sum of forty thousand dollars (\$40,000). The death benefit in all cases shall be paid in installments in the same manner and amounts as temporary disability indemnity, payments to be made at least twice each calendar month, unless the appeals board otherwise orders.

Disability indemnity shall not be deducted from the death benefit and shall be paid in addition to the death benefit when the original injury resulting in death occurs after the effective date of the amendment to this section adopted at the 1949 Regular Session of the Legislature.

Every computation made pursuant to this section shall be made only with reference to death resulting from an original injury sustained after this section as amended during the 1968 First Extraordinary Session of the Legislature becomes effective; provided, however, that all rights presently existing under this section shall be continued in force.

that her husband became intoxicated at his employer's place of business, and that as a proximate cause of his subsequent intoxication drove into the railroad signal pole. The wife was awarded the death benefits by the referee, but the Workman's Compensation Appeals Board granted reconsideration and denied the award. The California Supreme Court issued a writ of review.

The high court laid down the essential facts involved in *McCarty*. The employees of Apartment Plumber's, Inc., including McCarty, frequently remained on the company premises after normal working hours to "discuss business and social matters, drink beer and liquor, play poker, and shoot craps."<sup>3</sup> The Court further states that "the owner-managers participated in these activities, and often purchased the refreshments with company funds."<sup>4</sup> McCarty's wife testified that "he (McCarty) would come home from work late, with evidence of drinking about 75 percent of the time."<sup>5</sup>

On the date of McCarty's fatal accident, the employees were allowed to leave work early even though they were paid for a full working day. Several employees remained after and as one of the owner-managers testified were "talking, drinking and playing poker."<sup>6</sup> The party was joined by business acquaintances and the other owner-manager. Most of the liquor came from gifts the company had received; this supply was supplemented, according to some witnesses, "by liquor drawn from a company stock purchased for use as gifts to customers, suppliers, union officials, and plumbing inspectors."<sup>7</sup>

McCarty left for home about five o'clock in the evening, but re-joined the party an hour later, bringing with him more poker money and more liquor. The Court summed up the events that subsequently transpired:

... when the party broke up about nine o'clock McCarty was visibly drunk. Schlossberg (one of the owner-managers) and a foreman both offered to drive McCarty home, but he refused. As we have noted, while driving home, McCarty lost his life when he collided with a railroad signal pole. At the time of his death he

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3. 12 Cal. 3d at 680, 527 P.2d at 618, 117 Cal. Rptr. at 66.

4. *Id.*

5. 12 Cal. 3d at 680, 527 P.2d at 619, 117 Cal. Rptr. at 67.

6. *Id.*

7. 12 Cal. 3d at 681, 527 P.2d at 619, 117 Cal. Rptr. at 67.

had a blood alcohol content of .26 percent, well above the minimum needed to impair driving ability.<sup>8</sup>

The Court held that Ms. McCarty was entitled to death benefits under Labor Code 4702,<sup>9</sup> since her husband's death was within the scope of his employment with Apartment Plumber's. Justice Tobriner, writing the majority opinion, found McCarty's actions and subsequent death to be within the scope of employment in that the "activity was conceivably of some benefit to the employer"<sup>10</sup> and that "drinking parties had become a recognized, established, and encouraged custom at Apartment Plumber's. . . ."<sup>11</sup>

Justice Tobriner's decision was founded on the scope of employment concept. The standards he used to arrive at and justify his conclusion were the "benefit to the employer" theory and the "customarily incident to employment" theory.<sup>12</sup> These two standards have been used in numerous California decisions dating back well over twenty years;<sup>13</sup> they are certainly not creative new standards devised by the 1974 California Supreme Court to cope with the particular set of facts involved in *McCarty*.

Perhaps the most effective way to elaborate how traditional and consequently predictable the *McCarty* decision was is to compare it with a 1952 California Supreme Court decision, *Liberty Mutual Insurance Co. v. Industrial Accident Commission*.<sup>14</sup> As a matter of laying the groundwork for such a comparison, a recital of the facts of *Liberty* is in order.

The employer involved in *Liberty* was Swafford and Company which operated a store and restaurant as a concession in a summer resort in the Sierras. Mr. Swafford hired Dahler, a college student, to work around the camp as a dishwasher and helper. Swafford established a daily routine for Dahler, which afforded Dahler between two and three hours of free time each afternoon. During this free time, Dahler enjoyed various recreational activities, one of which was swimming. He swam in a stream which was not on the portion of property occupied by the concession. Swafford, the employer, knew that Dahler swam occasionally and never com-

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8. *Id.*

9. CAL. LABOR CODE § 4702 (W. 1971).

10. 12 Cal. 3d at 682, 257 P.2d at 620, 117 Cal. Rptr. at 68.

11. 12 Cal. 3d at 683, 527 P.2d at 621, 117 Cal. Rptr. at 69.

12. 12 Cal. 3d 677, 527 P.2d 617, 117 Cal. Rptr. 65.

13. *Liberty Mut. Ins. Co. v. Industrial Acc. Com.*, 39 Cal. 2d 512, 247 P.2d 697 (1952); *Winter v. Industrial Acc. Com.*, 129 Cal. App. 2d 174, 276 P.2d 689 (1954); *Satchell v. Industrial Acc. Com.*, 94 Cal. App. 2d 473, 210 P.2d 867 (1949).

14. 39 Cal. 2d 512, 247 P.2d 697 (1952).

mented on it. Dahler assumed it was permissible for him to swim. One afternoon, during his free time Dahler dived into the stream, struck a mudbank and injured himself. Clearly, the issue involved is the same issue involved in *McCarty*, i.e. whether the employee's injury is compensable as arising out of and in the course of employment.

In *Liberty*, the employee was denied benefits arising out of the injury; the Court concluded from the facts of *Liberty*:

... the only inference which can reasonably be drawn from the evidence is that Dahler's injury occurred while he was engaged in a personal recreational activity on his own free time in an area without the orbit of his employment and beyond the control or dominion of his employer. Under such circumstances, it cannot be said that the injury was sustained in the course of or incidental to his employment, or that it was proximately caused by the employment.<sup>15</sup>

Why did Dahler lose in *Liberty* and Ms. McCarty win in *McCarty*? The answer can be traced back to the standards already well established in California. An example is the language used by the Court of Appeal in *Employers' Liability Assurance Corporation v. Industrial Accident Commission*.<sup>16</sup> In this 1940 case, the Court said:

The true rule to be derived from the cases is that the injury is compensable if received while the employee is doing those reasonable things which his contract of employment expressly or impliedly authorizes him to do.<sup>17</sup>

The Court went on and stated the standards it used in determining whether a particular act fell within or arose out of the employment relationship and also defined the policy consideration within which such standards are to be viewed:

If the particular act is reasonably contemplated by the employment, injuries received while performing it arise out of the employment, and are compensable. In determining whether a particular act is reasonably contemplated by the employment, the nature of the act, the nature of the employment, the custom and usage of a particular employment, the terms of the contract of employment, and perhaps other factors should be considered. Any reasonable doubt as to whether the act is contemplated by the employment, in view of this

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15. 39 Cal. 2d at 517, 247 P.2d at 700.

16. 37 Cal. App. 2d 567, 99 P.2d 1089 (1940).

17. 37 Cal. App. 2d at 573, 99 P.2d at 1092.

state's policy of liberal construction in favor of employee, should be resolved in favor of the employee.<sup>18</sup>

This test is essentially the criteria used by the *McCarty* Court and the *Liberty* Court in determining the characterization of the particular activities there involved. The two standards relied most heavily upon in *McCarty* to find that *McCarty's* death was proximately caused by activities which arose out of the course of employment were the "benefit to the employer" test and "the custom and usage" test.<sup>19</sup>

The "benefit to the employer" test, although not specifically mentioned in *Employers' Liability*, has been used in a number of cases since that 1940 case. For example, in *Liberty* the court states that "where the recreational activity was conceivably of some benefit to the employer, the compensation award was sustained as incidental to the employment."<sup>20</sup> Such language would seem compatible with the policy standards of liberal construction in favor of employees as espoused in *Employers' Liability*. It, therefore, appears that any benefit, even of minimal value, would be sufficient to find that the activity in question should be compensable and, although clearly the language of the case justifies such a broad construction, the Court in *Liberty* felt that the employee's activities in that case presented absolutely no benefit to the employer.<sup>21</sup> The Court commented that the actions of the employee could be construed as "... yielding neither advantage nor benefit to the employer, [and therefore] must be held to have been wholly without the compass of the compensation law."<sup>22</sup>

Whereas *Liberty* failed the benefit test, *McCarty* was found to have passed it. Tobriner stated in *McCarty*, regarding the frequent drinking parties on the premises of the employer:

such gatherings served both to foster company comraderie, and to provide an occasion for the discussion of company business. We conclude that since the owners of the company authorized these gatherings, which conceivably benefited the company, employee attendance falls within the scope of employment.<sup>23</sup>

Clearly, the employer is realizing some benefit from such a situation, not only from the discussion of company business, but also from the general benefits that accrue from company goodwill.

This benefit standard was used in both cases. It was found want-

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18. 37 Cal. App. 2d at 573-74, 99 P.2d at 1092.

19. 12 Cal. 3d 677, 527 P.2d 617, 117 Cal. Rptr. 65 (1974).

20. 39 Cal. 2d 512, 517, 247 P.2d 697, 700 (1952).

21. 39 Cal. 2d 512, 247 P.2d 697 (1952).

22. 39 Cal. 2d at 516, 247 P.2d at 699.

23. 12 Cal. 3d 677, 682, 527 P.2d 617, 620, 117 Cal. Rptr. 65, 68 (1974).

ing in *Liberty* and found acceptable in *McCarty*. In both cases it was one of the decisive elements used in the ultimate determination of the respective Courts.

The second standard used in *McCarty* involves an analysis of whether the activity has become a customary incident of the employment relationship. This standard has been used in many cases, one of which was *Employers' Liability*, where it was phrased as "the custom and usage of a particular employment . . ." <sup>24</sup> For purposes of continuing the comparison, this standard will be examined through the decisions of *Liberty* and *McCarty*.

In *Liberty* the Court found that the employee's recreational pursuits were not customarily incident to the employment relationship. At the time the employee commenced his summer job, nothing was mentioned by his employers about recreational activities or more specifically of the stream where the accident occurred. It appears that the employer knew of the swimming activities of the employee, but was not in a position to object, since the stream was off the property over which the employer had control and since there was not even a remote connection between the activity involved and the employment duties of the employee. In *California Casualty Indemnity Exchange v. Industrial Accident Commission*, the Court commented, "there must be some connection between the injury and the employment other than the mere fact that the employment brought the injured party to the place of the injury". <sup>25</sup> The *Liberty* Court summed up its holding and stated that, notwithstanding the liberal policy in favor of the employee, "it nevertheless does not appear possible to stretch its broad purpose to cover a case such as this". <sup>26</sup>

While the facts of *Liberty* failed to bring it within the "customarily incident" standard, the California Supreme Court felt that the situation as involved in *McCarty* fell within the standard. Clearly, from the facts involved in *McCarty*, it can be gleaned that it was a customary practice of the employers to allow its employees to drink after working hours, it was customary for liquor to be on the premises of the employer and it was customary for Daniel

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24. 37 Cal. App. 2d 567, 573, 99 P.2d 1089, 1092 (1940).

25. 190 Cal. 433, 436, 213 P. 257, 258 (1923).

26. 39 Cal. 2d 512, 515, 247 P.2d 697, 699.

McCarty to drink on the employer's premises prior to going home. The Court had little difficulty in drawing the conclusion that "drinking parties have become a recognized, established, and encouraged custom at Apartment Plumbers (the employers)".<sup>27</sup> Very succinctly and very simply, the traditional standard was applied and it was found to draw the instant situation within the scope of employment. Again it is incumbent to point out that the two primary standards used to bring the activities of the parties within the scope of employment are two of the same standards which have been used repeatedly by California courts.<sup>28</sup>

Having concluded an analysis of what *McCarty* said, perhaps it would be worthwhile to speculate as to what was not said in *McCarty*. For instance, would Ms. McCarty have recovered if there had been no history of after work drinking parties, and in fact the only party in question was the employer's annual Christmas party? This is the situation of the great bulk of employers and yet many of them have ceased giving Christmas parties because of *McCarty*. Were they justified in their reaction? To attempt to answer this hypothetical fact situation it would seem apparent, in light of what has already been written in this note, that the particular facts must be measured up to the time-honored standards which were adhered to in *McCarty* and many previous cases.

Of course, as has been stated repeatedly, the two standards used most extensively in *McCarty* were the "benefit to the employer" test and the "customarily incident test".<sup>29</sup> In attempting to predict or forecast any subsequent judicial decisions, it is prudent to start from the last word by the particular court and work from that point. *McCarty* was the last word to date and the obvious starting point for any speculation.

By the language of the Court itself and from its reliance on *Satchell v. Industrial Accident Commission*,<sup>30</sup> it appears that, even though the *McCarty* Court relied primarily on the traditional tests, as between the benefit to the employer test and the customarily incident to employment test, the latter standard is the crucial one. According to *Satchell* and as reaffirmed by *McCarty*, the customarily incident to employment test is independently sufficient to es-

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27. 12 Cal. 3d 677, 683, 527 P.2d 617, 621, 117 Cal. Rptr. 65, 69.

28. *Liberty Mut. Ins. Co. v. Industrial Acc. Com.*, 39 Cal. 2d 512, 247 P.2d 697 (1952); *Winter v. Industrial Acc. Com.*, 129 Cal. App. 2d 174, 276 P.2d 689 (1954); *Satchell v. Industrial Acc. Com.*, 94 Cal. App. 2d 473, 210 P.2d 867 (1949).

29. 12 Cal. 3d 677, 527 P.2d 617, 117 Cal. Rptr. 65 (1974).

30. 94 Cal. App. 2d 473, 210 P.2d 867 (1949).



tablish "scope of employment". Justice Tobriner in *McCarty* comments as to the conclusion of the *Satchell* Court: "Without considering the question of possible benefit to the employer, the Court upheld a finding that the injury occurred in the scope of employment."<sup>31</sup>

An examination of the hypothetical fact situation needs to be viewed through the litmus paper of the customarily incident to employment standard. The facts of *McCarty* were so aggravated that the standard was met outright. But the facts of the hypothetical situation are much more subtle. As in *McCarty*, there is no history of drinking parties after work nearly seventy-five percent of the time, at which the employees and employers discuss business, play poker, and drink beer. Therefore, where shall the demarcation point be made?

To begin to answer such a question is to break the customarily incident standard into its two component parts and examine each part independently of the other, the two parts being "incident to employment" and "customary to employment". The first part to be analyzed is the incident to employment component. Almost always present in any employment situation, even under the most favorable circumstances, as indeed a Christmas party may be, is some indicia of duress; and even at a party where many of the incidents of employment are broken down, there still remains, perhaps much more sublimated than during a normal working day, the knowledge that this is job-related and as such, the behavior of employees at this ostensibly "social" activity may ultimately have to be accounted for.

There is perhaps the situation where attendance at such a party is mandatory—not mandatory in the sense of a company directive, but mandatory in a much more subtle way. A person's chances for success within a company may be affected by attendance and participation at such an event. There are numerous psychological factors which may arise at such a function which may at least indirectly affect the employment situation. "Incident to employment" therefore could perhaps be found in the hypothetical posed, but the test is "customarily" incident to employment. What of this second component part?

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31. 12 Cal. 3d 677, 683, 527 P.2d 617, 620, 117 Cal. Rptr. 65, 68 (1974).

How frequent or habitual need an occurrence be to be characterized as customary? In *McCarty*, the "parties" occurred, according to McCarty's wife, about seventy-five percent of the time;<sup>32</sup> this is clearly customary. Whereas, in *Liberty*, although the employee swam in the stream frequently enough to establish a customary practice, the Court denied the application of the standard for want of the "incident" ingredient.<sup>33</sup> They found his swimming activities to be completely within his free time and totally without any incidence to his employment. *Webster's Unabridged Dictionary* (2d Ed.) defines custom as "frequent or common use in practice; established usage; social conventions carried on by tradition . . ." As pertains to the hypothetical, is "annually" frequent enough to be "customary"? This is a subjective point and may well depend on one's concept of time. The remainder of the definition refers to established usage and social conventions carried on by tradition. Clearly, a logical argument could be made that, if an employer threw a Christmas party every year, this is tradition, this is established usage, and perhaps this is customary.

Such a conclusion is, of course, highly speculative at this time. But if in fact some future court is in a quandry as how to best deal with the facts presented by the hypothetical situation, it is highly probable that the traditional standards, the benefit to the employer test and the customarily incident to employment test, will be engaged. These standards have been the tools used for several decades by courts in determining whether a certain factual pattern falls within the "scope of employment" and from the indications of *McCarty* these same standards are still viable and appropriate.

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32. 12 Cal. 3d 677, 527 P.2d 617, 117 Cal. Rptr. 65 (1974).

33. 39 Cal. 2d 512, 247 P.2d 697 (1952).