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Article 11

Workmen's Compensation Act - Exclusice Remedy Provision - Effect on Husband's Action for Loss of Consortium

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sin Court adopts such an intermediate view in the instant case. The Court points out: that the testatrix failed to do anything to the phrase, "The last three named legatees are my first cousins" (one of whom is the deceased legatee through whose name she drew the line in question); that the pencil lines and notations on the instrument were lightly drawn; and that the testatrix was a good business woman who had had her will drawn by competent attorneys and would hardly have expected to accomplish its change in this way. The court decides that this is not indicative of a finality of decision, but is perfectly consistent with an intention to revise her will at a future time and that therefore no intent to revoke can be inferred.

LAWRENCE BINDER

Workmen's Compensation Act—Exclusive Remedy Provision—Effect on Husband's Action For Loss of Consortium — Action by Frederick Guse against the A. O. Smith Corporation to recover damages for loss of consortium. Plaintiff's wife, an employee of defendant corporation was injured through the negligence of defendant's employees during the course of her employment. Employer and employee both being subject to the Wisconsin Workmen's Compensation Act, Mrs. Guse was awarded compensation thereunder. Plaintiff, contending that his cause of action was independent of, and not derived from his wife's cause of action for her personal injury, claimed that the Act had not extinguished actions for loss of consortium by the husband of an injured employee and commenced this action. Defendant in its answer alleged that the wife's recovery of benefits under the Act constituted the exclusive remedy against the Defendant by her or her dependents, including Plaintiff, and further, that because of Plaintiff's failure to give written notice to Defendant of his injuries within the period prescribed in section 330.19 (5) Wisconsin Statutes, his action was not maintainable. Plaintiff appealed from a summary judgment dismissing his complaint. *Held:* Where employee and employer are subject to the provisions of the Workmen's Compensation Act, the liability of the employer for injuries sustained in the course of employment is solely under the Act, and there is no liability in tort. The husband's action per quod consortium amisit constituting an injury for which an employer might be liable at common law was abrogated by the provisions of section 102.03 (2), Wisconsin Statutes. The husband's action was further barred by reason of his failure to give written notice within the period

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mark much more likely to be made by an inexperienced person who was considering a revision or change and contemplated that these words should not be included in a new draft." City Nat. Bank v. Slocum, 272 F. 11, Certiorari denied 257 U.S. 637, 42 S.Ct. 49 (1921).

prescribed by section 330.19 (5), Wisconsin Statutes. *Guse v. A. O. Smith Corporation, 260 Wis. 403, 51 N.W. (2d) 24 (1952).*

The nature of employers' liability under workmen's compensation laws, and the basis for recovery thereunder, has been the subject of some interesting litigation, and even more interesting solutions thereto.[1] While legislative bodies in enacting such laws acknowledged that the employer's liability thereunder was to be based solely on the statutes and not on tort or contract principles, and while the socio-economic aims and objectives of this type of legislation received general approbation and acceptance, the legislative enactments themselves and judicial interpretations concerning the limitations and extensions thereof have been far from uniform. Centuries of application of the principles of duty, breach of duty, negligence, fault and proximate cause to personal injury cases gave place only grudgingly to the realization that workmen's compensation acts are completely dissociated from the principles of common law tort liability.[2]

Compensation acts are of two types, compulsory and elective. Wisconsin's act is of the latter type, and as is generally the case with this type, provides that employers who accept its terms shall, under certain conditions, compensate injured employes without regard to questions of negligence and fault; and that employers who do not accept the Act shall be deprived of such common law defenses as contributory negligence and assumption of risk; on the other hand, employes electing to be bound by the terms of the Act are restricted to the amount and type of recovery permitted thereunder. To effect the laudable purpose of the Act, liberal interpretation of its terms was deemed essential and was accordingly prescribed at an early stage in its history.[3] One area of conflict with which this direction to liberal interpretation has dealt is that concerning how far the *exclusive remedy* provisions of the acts have abrogated the common law rights of action of employes, and those connected with them, who are entitled to compensation under the Act. The principal case is one involving this problem.

The section of the Wisconsin Workmen's Compensation Act controlling in this case reads:

> "Where such conditions (employment and compensable injury) exist, the right to the recovery of compensation pursuant to the provisions of this chapter shall be the exclusive remedy against the employer."[4]

The court in the principal case, in analyzing this statute held that it leads

[1] Arthur Larson, *The Nature and Origins of Workmen's Compensation,* 37 CORN. L. Q. 206 (1952).

[2] *Ibid.*

[3] Borgnis v. Falk Co., 147 Wis. 327, 133 N.W. 209 (1911).

[4] WIS STATS. (1949) sec. 102.03 (2). As originally enacted by Chap. 50, Laws of 1911, this statute was entitled sec. 2394-4, and read: "Liability for the compen-

irresistably to the conclusion that the legislature intended the compensation recoverable by injured employes under the Act to be a complete substitute for the tort liability of employers at common law to employees and all connected with them. In support of this conclusion, Chief Justice Fritz first of all directs attention to the reasoning in the case of *Borgnis v. Falk Co.*[5] which set forth the then highly controversial purposes for which the Wisconsin Workmen's Compensation law was enacted, i.e., the substitution of an absolute, limited and determinate liability of employers for the uncertain and unsatisfactory common law tort liability for industrial injuries. The court then proceeds to an examination of cases which illustrate the purely statutory nature of an employer's liability under the Act. It would seem that most of the cases cited are distinguishable on their facts from the instant case. Four of these cases, *Anderson v. Miller Scrap Iron Co.*,[6] *Knoll v. Shaler*,[7] *Clark v. Chicago M. St. P. & P. R. Co.*,[8] and *Heist v. Wisconsin-Minnesota Light & Power Co.*[9] involved actions by representatives or dependents of deceased employes against the decedents' employers. In each case it was held that the employer sustained no tort liability to employes or their dependents and that their sole liability was for compensation under the Act. The *Saxhaug v. Forsyth Leather Co.*,[10] and *Vick v. Brown*[11] cases involved actions by dependents of deceased employes against negligent third parties, while the case of *Buggs v. Wolff*[12] was an action by an injured employe against such a third party. In each of the latter cases it was held that an employer was not a tortfeasor as to an injured or deceased employe and hence there could be no common liability between such employers and third parties who as to the employes were tortfeasors. Thus, the principles of contribution and release applicable to joint-tortfeasors were not applicable. Further, since the Act provides for recovery of compensation by injured employes, and in the event of their death by specially designated classes of dependents, the employers had already paid or were required by the terms of the Act to pay, compensation under the Act.

Common to all of the above noted cases is a reference to the *exclusive remedy* provisions of the statute under consideration. In the

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sation hereinafter provided for, in lieu of any other liability whatsoever, shall exist against an employer for any personal injury accidentally sustained by his employee, and for his death." The revisor's bill which changed this section to its present form in 1931 expressly negated any intent to change its meaning.

[5] *Supra*, note 3.

[6] 169 Wis. 106, 107 N.W. 275 (1919).

[7] 180 Wis. 66, 192 N.W. 399 (1923).

[8] 214 Wis. 166, 252 N.W. 685 (1934).

[9] 172 Wis. 393, 179 N.W. 583 (1920).

[10] 252 Wis. 376, 31 N.W. (2d) 589 (1948).

[11] 255 Wis. 147, 38 N.W. (2d) 716 (1949).

[12] 201 Wis. 533, 230 N.W. 621 (1930).

Clark case,[13] the court stated that an employer bound by the Workmen's Compensation Act sustained no tort liability to its workmen or their dependents. Similarly, in the *Vick v. Brown* case,[14] the court said: "The liability of (employer) . . . to (employee) . . . and his dependents is solely under the Workmen's Compensation Law. There is no liability in tort." In the *Saxhaug v. Forsyth Leather Co.* case,[15] the widow of a deceased employe, clearly a dependent under section 102.51 (1) of the Act, was the Plaintiff, and as a dependent her sole cause of action against the employer was under the terms of the Act. As to her, the employer could not be a tortfeasor. In connection with these considerations, attention is invited to the fact that the Plaintiff in the principal case based his claim on the alleged breach of an independent duty owed to him by the Defendant, and not as an employe or dependent. Though the plaintiffs in the *Anderson*[16] and *Knoll*[17] cases were also dependents, the references therein to the *exclusive remedy* provisions appear to be less definitive in their scope. In the *Anderson* case[18] the court held that an employer covered by the Act, in the event of an injury to an employee:

> ". . . becomes liable therefore in the manner and to the extent prescribed by the workmen's compensation act, and he has no other or different liability. The right of the employee to recover the compensation provided for by the Act is exclusive of all other remedies against the employer for any injury which the employee may sustain, and in the event of his death the same limitation applies to his personal representatives."

In the *Knoll* case[19] the court held that:

> "As has been many times stated, this is a substitute for the liability of the employer at common law. . . . It seems clear therefore that, when the Legislature provided by section 2394-4 that the compensation under the act 'shall be the exclusive remedy against the employer for such injury or death,' it was intended to include, and did include, all injuries for which the employer might be liable at common law . . ."

Unless in making these statements, the courts had reference solely to the particular fact situations of the cases, quite clearly, the above quotations seem to support the holding that the Act entitles certain classes to compensation, and abrogates the common law rights of action of those not embraced within its terms.

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[13] *Supra,* note 8.
[14] *Supra,* note 11, p. 155.
[15] *Supra,* note 10.
[16] *Supra,* note 6.
[17] *Supra,* note 7.
[18] *Supra,* note 6, p. 115.
[19] *Supra,* note 7, p. 69.

The court also finds a basis for its decision in the case of *Deluhery v. Sisters of St. Mary.*[20] This was an action by the father of a minor child to recover for medical expenses incurred in the treatment of injuries sustained by the minor in the course of her employment with the defendent. Again the court held that the exclusive liability of defendent to its employes was under the terms of the Act, hence it necessarily followed that the father's common law right was barred. It should be noted that the Act binds the employer to pay for such medical expenses, so that the employer's statutory liability to pay such expenses is clearly substituted for his common law liability to pay as a tortfeasor. It should also be noted that no demand was made on the employer to pay these expenses. Unfortunately, the Act contains no such express provisions substituting statutory liability for the loss of the Plaintiff in the principal case.

Danek v. Hommer,[21] was a New Jersey case which is clearly in point both on facts and holding. In that case the court held that:

> ". . . it was the intention of the New Jersey Legislature in adopting the Workmen's Compensation Act, to enact a complete substitute for these previously unsatisfactory remedies in tort on the part of employee and those connected with him. . . ."

Since the problem is one of statutory interpretation, the applicable section of the New Jersey Workmen's Compensation Law should be referred to.

> "Such agreement (to come within the terms of the act) shall be a surrender of the parties thereto of their rights to any other method . . . of compensation . . . and shall bind the employee himself and for compensation for his death . . . his personal representatives, his widow, and next of kin. . . ."[22]

The express wording of the statute and the precedent of cases on the precise problem in question in New Jersey[23] would clearly appear to validate the holding contra to the husband-plaintiff, yet the court in the *Danek* case[24] went so far as to say that the plaintiff might have made a good argument from a verbalistic standpoint, contending that the wording of the statute is not as express as it should be in the light of the well known principle that statutes in derogation of the common law are to be strictly construed, if early New Jersey decisions holding otherwise had not been permitted to stand by the legislature for so long without change in the law. Since the Wisconsin Statute is not as definitive on this point as the New Jersey Statute, and the Wisconsin court had no

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[20] 244 Wis. 254, 12 N.W. (2d) 49 (1943).
[21] 14 N. J. Super. 607, 82 A. (2d) 659 (1951).
[22] R.S. 34:15-8, N.J.S.A.
[23] Burns v. Vilardo, 26 N.J.M. 277, 60 A. (2d) 94 (1948).
[24] *Supra,* note 21.

previous cases in point on which to rely, the weight accorded the *Danek* case[25] may seem questionable.

In *Hitaffer v. Argonne Co. Inc.*,[26] a wife was permitted to recover for loss of consortium resulting from injuries received by her husband in the course of employment with defendent company. The husband had received compensation under The Federal Longshoremen and Harbor Worker's Compensation Act. Section 905 of that act provided that:

> "The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representatives, husband or wife, parents, dependents. . . ."

The court interpreted this section to apply only to the case of one suing in the employee's right, and Judge Clark in reference to the section stated that:

> "Moreover it would be contrary to reason to hold that this Act cuts off independent rights of third persons when the whole structure demonstrates that it is designed to compensate injured employee's rights. . . . It can hardly be said that it was intended to deprive third parties of independent causes of action where the Act does not even purport to compensate them for any loss. . . ."[27]

The Wisconsin court in rejecting the applicability of this case to the principal case pointed to the difference in the statutory provisions and held that the continuing tort liability attached to the employer by that decision and the authorities relied on therein[28] was inimicable to the Wisconsin Workmen's Compensation Act. On the factor of statutory differences, it would appear that the New Jersey statute bears closer resemblance to the provisions of the Federal Longshoremen and Harbor Worker's Compensation Act than it does to Wisconsin's *exclusive remedy* provision, and that the decision in the *Hitaffer* case[29] is more surprising in view of the statute there applicable, than the instant decision (or one contrary to it) appears in the light of the somewhat general terms of the Wisconsin statute.

The Wisconsin court joins the majority in aligning itself with those jurisdictions which hold that the workmen's compensation law operates as a complete substitute for all the common law tort liability of an employer to his employees. Reference should be made however to the

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[25] *Ibid.*
[26] 87 U.S. App. D.C. 57, 183 F. (2d) 811 (1950).
[27] *Ibid.*, p. 820.
[28] Rich. v. United States, 177 F. (2d) 688 (2d Cir., 1949), and The Tampico, 45 F. Supp. 174 (D.C. N.Y., 1942) which held that an employer who pays compensation under the Federal Longshoremen and Harbor Worker's Compensation Act is not thereby rendered immune to contribution to third party tortfeasors.
[29] *Supra*, note 26.

statutes of other jurisdictions to determine whether their decisions are predicated on similar bases.

Other jurisdictions have arrived at contrary decisions. In *King v. Viscoloid Co.*,[30] an action by parents of a minor child to recover for loss of earnings following his injury in the course of employment, the court held that the parents' right of action was independent of the child's right to compensation under the compensation act. The statute did not clearly remove the parents' right and the court said:

> ". . . we have no right to conjecture what the legislature would have enacted if they had foreseen the occurrence of a case like this; much less can we read into the statute, a provision which the legislature did not see fit to put there, whether the omission came from inadvertance or of set purpose . . . an existing common law right of action is not to be taken away by statute unless by direct enactment or necessary implication. . . ."[31]

Allen v. Trester[32] was a similar action also decided in the parents' favor. The statute in that jurisdiction refers to the agreement to be bound by the act and states that such agreement:

> ". . . shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation."[33]

It would appear that the question presented in the principal case might have been resolved by a consideration of the nature, in Wisconsin, of a husband's action per quod, i.e., whether independent or derivative. While the court did not discuss this aspect of the problem, its reliance on New Jersey decisions (where such an action is expressly held derivative)[34] and the fact that the Plaintiff used this contention as one of the bases for appeal, probably warrant the conclusion that it did enter into the courts' deliberation. Although there are authorities which hold that a husband's action for loss of consortium is entirely distinct from that which may be maintained by the wife for the original tort itself,[35] Wisconsin holds that such an action is derivative. In *Stuart v. Winnie*[36] a husband's action to recover for loss of his wife's services and for medical expenses incurred on her behalf was barred because of the contributory negligence of the wife. The decision was not based on imputation of negligence, but on the theory that the husband *derived* his cause of action through assignment by operation of law of a part of his wife's cause of action. The husband, in keeping with accepted principles of assignment took his cause of action subject to defenses good against

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[30] 219 Mass. 420, 106 N.E. 988 (1914).
[31] *Ibid.*, p. 989.
[32] 112 Nebr. 515, 199 N.W. 841 (1924).
[33] NEBR. COMP. ST. (1922), sec. 3034.
[34] *Supra*, note 23.
[35] PROSSER ON TORTS, sec. 102, p. 939.
[36] 217 Wis. 298, 258 N.W. 611 (1935).

the wife.[37] Since the Wisconsin Workmen's Compensation Act precludes recovery by the wife except under its terms, and Mrs. Guse had already recovered compensation under that Act, the derivative nature of the husband's cause of action would seem to be dispositive of his contentions here. Conversely, to arrive at the instant decision without reference to the character of an action for loss of consortium would appear to necessitate a strained construction of the statute.

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[37] This *assignment* theory was first definitively set down in the case of Callies v. Reliance Laundry, 188 Wis. 376, 206 N.W. 198 (1925). The theory is discussed in an analysis of the Callies case in 2 UNIV. CH. L. REV. 173 (1935). The application of this rule might present some interesting questions in cases in which the basis for the husband's action is either seduction of the wife, debilitation of the wife through providing her with habit forming drugs, or criminal abortion. Would it be held in these situations that the wife's consent constituted a defense to the husband's action?