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Torts—Liability for Disability from Occupational Disease Commences with Medical Treatment Even Where There Is No Loss of Earnings

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plaintiff accepted a risk whose consequences a reasonable man would have perceived.[18] Some of the facts, however, cast doubt on the inspector's foresight of the danger in crossing the trench; he had uneventfully crossed it before, and his companion had immediately and safely preceded him over the same trench. Finally, if one concedes, as the majority additionally stated, that there may have been duty and violation on the defendant's part, should their legal effect have been eliminated by the conduct of the plaintiff in this case? Was the "carelessness" of the inspector of the degree found in other cases of contributory negligence as a matter of law,[19] or was it more analogous to the conduct in worker accident cases left to determination of a jury?[20] The decision may suggest a policy determination that the Court will henceforth hold a specific class of plaintiffs who function daily in an area of many potential dangers, such as a construction site, to a higher order of watchfulness for their own safety than would be demanded of ordinary laymen.

(Mrs.) Josephine Y. King

LIABILITY FOR DISABILITY FROM OCCUPATIONAL DISEASE COMMENCES WITH MEDICAL TREATMENT EVEN WHEN THERE IS NO LOSS OF EARNINGS

In January the claimant, a lathe operator whose work included the machining of both plastic and steel components, noticed a sore developing under his right arm. About a week later a rash erupted on the top of both hands, which subsequently spread to his face, neck and legs. On February 23, he received his first medical treatment therefor, but continued working until October. Medical testimony established that the rash was due to contact with plastic resin at his work. The Workman's Compensation Board, confirming its referee, fixed the date of disablement as February 23, with the result that claimant would receive payment for his medical expenses from that date. The Appellate Division reversed the Compensation Board so far as it had required payment to claimant of medical expenses incurred prior to the time of any wage loss.[1] On appeal, *held*, award reinstated. The board may fix as the date of "disablement" in an occupational disease case the time of physical impairment or need of medical care prior to any loss of wages. *Ryciak v. Eastern Precision Resistor*, 12 N.Y.2d 29, 186 N.E.2d 408, 234 N.Y.S.2d 207 (1962).

Forty-seven states now include "occupational diseases" within their workmen's compensation statutes.[2] Some states have included a definition of the

18. Zurich Gen'l Acc. & Liab. Ins. Co. v. Childs Co., 253 N.Y. 324, 171 N.E. 391 (1930).

19. Townes v. Park Motor Sales, 7 A.D.2d 109, 180 N.Y.S.2d 553 (1st Dep't 1958), *aff'd*, 7 N.Y.2d 767, 163 N.E.2d 142, 194 N.Y.S.2d 37 (1959) (memorandum decision); Utica Mut. Ins. Co. v. Amsterdam Color Works Inc., 284 App. Div. 376, 131 N.Y.S.2d 782 (1st Dep't 1954), *aff'd*, 308 N.Y. 816, 125 N.E.2d 871 (1955).

20. Kaplan v. 48th Ave. Corp., 267 App. Div. 272, 45 N.Y.S.2d 510 (2d Dep't 1943) (cited as authority in Grant v. United States 271 F.2d 651, 655 (2d Cir. 1959)).

1. 15 A.D. 2d 609, 222 N.Y.S.2d 376 (3d Dep't 1961).

2. Alabama, Mississippi and Wyoming do not.

term "occupational disease" in their statutes.[3] Others, such as New York, have left the term undefined. The common element running through the statutes of the various states is that of the distinctive relation of the particular disease to the nature of the employment. So that the term could generally be said ". . . to include any disease arising out of exposure to harmful conditions of employment, when these conditions are present in a peculiar or increased degree by comparison with employment generally."[4]

While the New York Act does not attempt to define the term "occupational disease," only those diseases listed by the statute are compensable.[5] Moreover, the claimant must establish that either death or disability has resulted from the occupational disease[6] and that the disease is attributable to the nature of his employment before compensation will be awarded.[7] Two provisions of the New York statute bear on the question of disability. Section 37 stipulates that ". . . 'Disability' means the state of being disabled from earning full wages at the work at which the employee was last employed."[8] And section 42 provides that ". . . the date of disablement shall be such date as the board may determine on the hearing on the claim."[9] In some New York decisions, where awards granted by the board in occupational disease cases were under review, the court has relied on section 37 as determining criterion of a compensable disability.[10] At the same time, other New York decisions have avoided the inevitable result of adopting section 37 as a yardstick, by citing section 42 as the foundation of their holding.[11] In its opinion in the principal case, the Appellate Division relied on section 37, thus requiring a loss of wages prior to compensable disability.[12]

The Court of Appeals, in a unanimous decision reversing the Appellate Division, has made clear that in occupational disease cases section 37 is not to be taken literally, but rather it is to be read in light of the reasonable meaning of the entire statute.[13] Referring to an earlier decision the Court said: "Our decision in Matter of Slawinski . . . although without opinion,

3. See, *e.g.*, Va. Code Ann. tit. 65, § 65-42 (1952). ". . . the term 'occupational disease' means a disease arising out of and in the course of the employment. No ordinary disease of life to which the general public is exposed outside of the employment shall be compensable, except. . ." (the statute then lists two exceptions, followed by six factors deemed to be determinative on the question whether a given disease did "arise out of the employment.").

4. 1 Larson, Workmen's Compensation Law, § 41.00 (1952).

5. N.Y. Workmen's Comp. Law § 3(2).

6. Id. § 39.

7. Id. § 40.

8. Id. § 37.

9. Id. § 42.

10. See, *e.g.*, Harris v. Silver Creek Precision Corp., 13 A.D.2d 859, 214 N.Y.S.2d 911 (3d Dep't 1961); Muniak v. ACF Indus., Inc., 6 A.D.2d 923, 175 N.Y.S.2d 807 (3d Dep't 1958).

11. *Accord*, Slawinski v. Williams & Co., 298 N.Y. 546, 81 N.E.2d 93 (1948) (without opinion); Mastrodonato v. Pfaudler Co., 307 N.Y. 592, 123 N.E.2d 83 (1954); Cole v. Saranac Lake Hosp., 282 App. Div. 626, 125 N.Y.S.2d 891 (3d Dep't 1953).

12. 15 A.D.2d 609, 222 N.Y.S.2d 376 (3d Dep't 1961).

13. Instant case at 32, 186 N.E.2d at 409, 234 N.Y.S.2d at 209.

necessarily rejected the statutory constructions approved by the Appellate Division in the present case, and meant as to an occupational disease claim that the employee's right to compensation and the employer's corresponding liability accrue no later than the date when the illness requires medical attention."[14] Moreover, the Court recently held that where a true "accident" situation is present, the requirement of medical care is indicative of a disability in itself regardless of a financial impairment.[15]

The opinion of the Court of Appeals, relying on section 42, takes cognizance of the flexibility granted the board by that section, as a basis for circumventing the loss-of-wage-test where medical evidence has shown a disability prior to a diminution in earning power. If, on the other hand, the construction emphasized by the Appellate Division were adopted, the employer's payroll record would necessarily dictate the date of disablement, thereby leaving section 42 a meaningless appendage. Moreover, the Appellate Division construction, if adopted, would be against the public interest, as it compels the sufferer of an occupational disease who might desire to continue working to quit work in order to get his medical bills paid. In fact, it was the Appellate Division which, in an earlier case reviewing the legislative history of sections 37 and 42 pointed out, that the legislature in 1922, left section 37 as it was, but rewrote the present section 42 such that the board "may determine" the date of disablement. This is indicative of the legislature's intent to allow the board some latitude in settling a controversey. The Court's decision in the instant case, enlarging the scope of workman's compensation is in line with the liberal trend of the majority of the New York decisions.[16]

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APPLICABILITY OF STATUTE OF LIMITATIONS IN BREACH OF WARRANTY AND NEGLIGENCE ACTIONS

In 1944 plaintiff was injected with a radiopaque chemical. Some of the substance allegedly remained in his body causing a cascinoma to develop which required an eye to be removed in 1957. Two years later plaintiff commenced an action for breach of warranty and negligence against the manufacturer. From a dismissal of the action by the Supreme Court, Special Term as time barred,[1] and a unanimous affirmance by the Appellate Division,[2] plaintiff ap-

14. *Ibid.*
15. Mastrodonato v. Pfaudler Co., 307 N.Y. 592, 597, 123 N.E.2d 83, 86 (1954).
16. See, *e.g.*, Masse v. James H. Robinson Co., 301 N.Y. 34, 92 N.E.2d 56 (1950); Kilmas v. Trans Caribbean Airways, 10 N.Y.2d 209, 176 N.E.2d 714, 219 N.Y.S.2d 14 (1961) (heart attack victim); for a case decided since the instant case, *cf.*, Hooper v. Bethlehem Steel Co., 12 N.Y.2d 767, 186 N.E.2d 565, 234 N.Y.S.2d 717 (1962).

1. Schwartz v. Heyden Newport Chem. Corp., 30 Misc. 2d 663, 219 N.Y.S.2d 98 (Sup. Ct. 1961).
2. Schwartz v. Heyden Newport Chem. Corp., 15 A.D.2d 650, 224 N.Y.S.2d 270 (1st Dep't 1962).