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TORTS

NUMBER OF ACCIDENTS UNDER A "PER ACCIDENT" CLAUSE

In contracting with the City of New York to construct subway platforms, the plaintiffs agreed to be absolutely liable for any damage caused to the owners or occupants of adjacent, abutting or overhead property as a result of the construction. The defendant in *Arthur A. Johnson Corp. v. Indemnity Ins. Co.*[1] sold the plaintiffs a conventional comprehensive general liability policy combined with an additional indorsement under which the defendant agreed to indemnify the plaintiffs for the liability assumed under the contract. The limits of liability in the policy were $50,000 for each accident and $100,000 for aggregate operations.

The construction work necessitated the digging of a trench, the removal of vault walls under the sidewalk, and the building of two separate, temporary cinder block walls in front of two separate, but adjoining, buildings. Because of an unusually heavy rainfall which flooded the trench, one of the temporary walls collapsed at 5:10 p.m., flooding the basement of the building, and fifty minutes later the other wall collapsed with the same result in that building.

Several claims based on the flooding resulted in liability well over $50,000, but the insurer, arguing that only one accident occurred and relying on the liability limitation for each accident, paid only $50,000. The plaintiffs, however, contended that two separate accidents occurred and brought the present action to require the defendant to pay the remainder of the claims. The issue was whether, under an insurance policy containing a specific liability limitation for "each accident," two closely related occurrences are properly considered as a single accident or as two separate accidents. The Appellate Division[2] held that there were two accidents and awarded judgment to the plaintiffs;[3] the Court of Appeals affirmed.

The "one-or-two accident" problem is one of first impression in New York. In construing the policy language, "each accident," the court is guided by what kind of protection an ordinary man intends to secure in procuring a policy.[4] The Court of Appeals enumerates three different approaches which courts have used to ascertain whether there is one or more accidents when several persons are injured, or their property damaged. The first approach, on which the defendant relies, is that where one proximate, uninterrupted cause (the flooding of the trench, according to the defendant) results in injury or damage, there is one accident.[5] The English rule is that the number of persons injured de-

1. 7 N.Y.2d 222, 196 N.Y.S.2d 678 (1959).
2. Pursuant to N.Y. Civ. Prac. Act §§ 546-548, this case was submitted upon an agreed statement of facts; therefore, if the action is in the Supreme Court, it must be tried and judgment rendered by the Appellate Division.
3. 6 A.D.2d 97, 175 N.Y.S.2d 414 (1st Dep't 1958).
4. Tonkin v. California Ins. Co., 294 N.Y. 326, 62 N.E.2d 215 (1945); Abrams v. Great Am. Ins. Co., 269 N.Y. 90, 199 N.E. 10 (1935).
5. Hyer v. Inter-Insurance Exchange, 77 Cal. App. 343, 246 P. 1055 (1926).

termines the number of accidents.[6] The third approach, which the Court of Appeals endorses, is to determine whether there is one unfortunate event or occurrence.[7] In applying its own theory, the Court found that the collapse of separate walls of two buildings at different times constituted two accidents, but that no matter which theory is applied to this case, the conclusion must be that there were two accidents, for under the first theory, the proximate cause of the injury was the collapse of two distinct walls, and under the second theory, the property of two persons was damaged.

The three-approach analysis of the problem by the Court of Appeals is more confusing than illuminating because the third approach merely rephrases the issue by substituting "event" for "accident." As long as there are two distinct events, the Court will find two accidents; however, Judge Van Voorhis, in his dissent, too quickly generalizes by equating this theory to the English rule, for under this theory the possibility clearly exists that two persons may be injured in one unfortunate event. To substantiate the third theory, the Court relies on several cases, but appears not to have grasped the legal theory expounded in them. A sounder analysis of these cases which construe "each accident" within a policy shows that the courts have adopted elements of two general rules of law, not a third. Some courts construe the "per accident" clause as refering to the cause of the accident. If one act is the sole proximate cause of several injuries, there is only one accident, for the court looks only to the cause. Thus, if a truck hits a train and damages sixteen railroad cars owned by fourteen persons, only one accident has occurred.[8] Other courts construe the "per accident" clause from the point of view of the persons injured, rather than from the point of view of proximate cause. The effect or result is the guidepost in determining the number of accidents. Thus, if an oil well erupts and damages the property of three nearby property owners, three accidents have occurred.[9] In arriving at a conclusion under either rule, the court will usually consider the factors of time and space between the events.[10]

The Court of Appeals in the present action endorses neither general rule, but relies on authority from both rules to formulate its own "unfortunate event" theory. This new theory is not actually a true test which can be applied to a given fact situation and have a result then predicted. Under this theory, the Court will examine the facts of each case and determine whether there is one unfortunate event or more.

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6. South Staffordshire Tramways v. Sickness & Acc. Assur. Assn., 1 G.B. 402 (1891).
7. St. Paul-Mercury Indem. Co. v. Rutland, 225 F.2d 689 (5th Cir. 1955); Anchor Casualty Co. v. McCaleb, 178 F.2d 322 (5th Cir. 1949).
8. St. Paul-Mercury Indem. Co. v. Rutland, supra note 7; Truck Ins. Exchange v. Rohde, 49 Wash.2d 465, 303 P.2d 659 (1957); Hyer v. Inter-Insurance Exchange, supra note 5.
9. Anchor Casualty Co. v. McCaleb, supra note 7; Kuhn's of Brownsville Inc. v. Bituminous Casuality Co., 197 Tenn. 60, 270 S.W.2d 358 (1954).
10. 55 A. L. R.2d 1300 (1957).