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Workmens' Compensation—Effect of Common Law Recovery Against Employer on Employee's Claim for Workmen's Compensation

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in the event."[57] This points up a basic conflict between the majority and the dissent. The majority feels that plaintiff's name here appears in "a stale or outdated news item that was no longer a matter of general public interest or concern."[58] The dissent, on the other hand, took the position that since all these facts were in the public domain, plaintiff's right of privacy was not infringed by republishing the same facts at a later date. However whether the fire is still a newsworthy event, and thus privileged (in common law states), or not, seems beside the point, the relevant inquiry being the purpose behind the publication. The purpose here is not that of disseminating information; at least not to the exclusion of the advertising intent. The fact that it is the article that is used for advertising rather than plaintiff's name as such, does not make the mention of the name "incidental."

This decision is consistent with the interpretation of the statute as protecting the sentiments, thoughts and feelings of an individual.[59] If the interest protected was commercial exploitation from the subject's viewpoint, i.e., some advantage gained by the user because of the use of this particular subject's name,[60] there would be greater merit in the dissent's stand. But where it is the plaintiff's feelings that are protected, and the commercial context is merely the nature of the use by the publisher that is required by the statute, the courts should be liberal in applying the statute. It does not seem that this prohibition will be as readily applied to names appearing in novels, short stories, and on stage and screen, as the dissent fears, because the purpose of such publications is not as flagrantly commercial as that in the present case. This case suggests that the Court is willing to protect the individual as far as possible, but the interplay of interests, privileges, and statutory requirements makes it difficult to perceive a rule that can be applied with confidence from one case to another. For example, it is hard to foretell what the result would be in a case where the news article was of very recent origin, or where it had no relation to the user's business, or where it is difficult to avoid use of plaintiff's name.

WORKMEN'S COMPENSATION

EFFECT OF COMMON LAW RECOVERY AGAINST EMPLOYER ON EMPLOYEE'S CLAIM FOR WORKMEN'S COMPENSATION

In *Martin v. C. A. Production Company*,[1] claimant, an employee of defendant company, was assaulted and struck in the face by an intoxicated visitor at a closing night cast party. Claimant attended the party at the invitation of Ray Bolger (star of the show) and his wife Gwen Rickard (a

57. Id. at 285, 196 N.Y.S.2d 982.
58. Id. at 282, 196 N.Y.S.2d 979.
59. Hofstadter, The Development of the Right of Privacy in New York (1954).
60. See supra note 50.

1. 8 N.Y.2d 226, 203 N.Y.S.2d 845 (1960).

partner in the defendant company). Claimant initially filed a claim for compensation, but, when defendant company thereafter filed a notice of controversy, alleging that the accident did not arise out of and in the course of employment, he commenced a personal injury action in the Supreme Court against Ray Bolger, Gwen Rickard, defendant company, his assailant, and the owner of the theater. The personal injury action was subsequently settled for $7500. Of this amount, $2500 was paid by defendant company's insurance carrier and $5000 by another carrier on behalf of Gwen Rickard. Subsequent to the settlement of the common law action, claimant reopened the compensation proceedings against defendant company.

There was proof that, as a general custom, members of a cast are expected to attend closing night parties and that claimant regarded attendance as a part of his job as well as good business. In these circumstances, the Board was able to find that the affair, which continued on the very stage where the work was done, was so related to the employment as to be deemed a continuance of it, and that the injury sustained by claimant arose out of and in the course of employment. Therefore, the Board allowed claimant the deficiency between his action at law and his compensation award.

The novel issue raised by this series of events is whether claimant, after having instituted an action at law against his employer, and having recovered by settlement, should be precluded from recovering a deficiency award under Workmen's Compensation against the same employer for the same injury. The Appellate Division unanimously affirmed the Board's finding that claimant was not precluded from proceeding with his claim.[2] The Court of Appeals reversed,[3] holding that the prior prosecution and settlement of claim in an action at law against the employer for the same injuries constituted a bar to a subsequent compensation claim against the same employer for injuries found to have been acquired in the course of employment.

The majority felt that the issue raised by this case was not novel, but that claimant should be precluded on the authority of *Russell v. 231 Lexington Ave. Corp.*[4] On this particular ground of the decision, it appears that the dissenting opinion is sounder, since, as will be shown, the *Russell* case is not completely in point.

In the *Russell* case, the dependent mother of the deceased employee filed a notice of election to sue, as a third-party defendant, the corporation which was later found to be deceased's employer. The mother who shared in the proceeds of the third-party action settlement, was later precluded from asserting a compensation claim against the same defendant for the same injuries. It must be noted, however, that decedent's employer was sued in good faith as a third-party defendant at a time when the identity of the deceased's employer

2. 9 A.D.2d 550, 189 N.Y.S.2d 528 (3d Dep't 1959).
3. Supra note 1.
4. 266 N.Y. 391, 195 N.E. 23 (1935).

was in doubt. Therefore, although the defendant was later found to be claimant's employer, the Court based its decision on the finding that since defendant was sued as a third-party responsible for the injury and not as the employer, the action at law against him as a third-party constituted a binding election under Section 29 of Workmen's Compensation Law as it then existed, which provided for a binding election between Workmen's Compensation and a third-party action at law. The present case differs from the latter in at least two aspects. Section 29 of Workmen's Compensation Law does not, at present, require an employee to make a binding election.[5] Secondly, it could not be contended that defendant's employer in this case was sued as a third party, as is contemplated by Section 29. The existence of the employer was not in doubt here as it was in the *Russell* case.

It is possible that if the *Russell* case were to be decided today under the present text of Section 29, the decision would be different. In any case, it does not seem that the case should be used as direct authority for the proposition that an employee who recovers by settlement in an action at law from his employer's carrier at a time when the existence of the employer is not in doubt is precluded from recovering a deficiency under Workmen's Compensation against the same employer.

The majority has ably distinguished those cases relied on by claimant which merely recognize the well-settled principle that there is no binding election when an employee pursues a remedy which is unavailable,[6] or where the action at law is voluntarily dismissed by the employee.[7] In the case at bar there has been much more than a voluntary dismissal of an action or the pursuit of an unavailable remedy. The claimant has here successfully terminated, by settlement, his action at law. Although the majority has not explicitly stated that claimant has made a binding election between two inconsistent remedies, they have, however, authoritatively stated, that claimant is barred by a form of estoppel. That is, by reason of the successful position thus taken in the prior action, claimant comes within the rule that a claim made or position taken in a former action or judicial proceeding will estop the party from making any inconsistent claim or taking a conflicting position in a subsequent action or judicial proceeding to the prejudice of the adverse party.[8] Whereas neither claimant reached a successful position in their action at law in the *Tate* or the *Bellini* case, claimant here has recovered by settlement from

5. N.Y. Workmen's Comp. Law § 29:
If an employee entitled to compensation under this chapter shall be injured or killed by the negligence or wrong of another not in the same employ, such injured employee . . . , need not elect whether to take compensation and medical benefits under this chapter or to pursue his remedy against such other . . . .

6. Tate v. Etate of Dickens, 276 App. Div. 94, 93 N.Y.S.2d 504 (3d Dep't 1949).

7. Bellini v. Great American Indemnity Co., 299 N.Y. 399, 87 N.E.2d 426 (1949).

8. Houghton v. Thomas, 220 App. Div. 415, 221 N.Y. Supp. 630 (1st Dep't 1927); Senstack v. Senstack, 7 Misc. 2d 1012, 166 N.Y.S.2d 576 (Sup. Ct. 1957).

the employer's carrier. The inconsistency of claimant's positions in the two actions lies in the fact that in the action at law he could not have recovered if defendant were his employer and the injury arose out of or in the course of employment,[9] whereas in the compensation proceedings, it was necessary for claimant to show the injury arose in the course of employment before recovering. In the case of *Doca v. Federal Stevedoring Company*,[10] it was held that an award of compensation constituted a finding by the Board that the employee's injury arose out of and in the course of employment and the finding was binding and conclusive so that the claimant could not bring a common-law action. It appears reasonable that the reverse should be true in the present case.

Therefore, despite the fact that the majority has seemingly misused the *Russell* case as binding authority, their decision appears sound, both as a matter of law, based on the theory of estoppel outlined above, and as a matter of policy which emanates from the Workmen's Compensation Law itself.

Section 11 of the Workmen's Compensation Law provides that the liability of the employer under this act shall be exclusive and in place of any common-law liability to the employee. This chapter was designed to assure the workingman protection against loss of earning power through injury sustained in his employment, regardless of how injury occurred or what brought it about, and in return for such new and comprehensive liability the employer is accorded relief from all other liability on account of such injury.[11]

Therefore, it appears obvious that to allow claimant to recover here would do more than, as the majority contends, discourage settlement and encourage vexatious litigation; it would prescribe a method for employees to avoid the purpose of Section 11.

There remains but one point to consider. Certainly it cannot be said this decision violates the purpose of Section 32,[12] which forbids waiver, compromise, or release of an employee's rights to Workmen's Compensation benefits. Defendant employer did not in any way attempt to take advantage of claimant by forcing or coercing him to compromise or waive his right to compensation. Defendant merely settled the common law action brought against him by claimant. As the majority states: "Although Section 32 of the Workmen's Compensation Law (prohibiting compromise and waiver) is intended to protect a claimant from his own improvidence and folly, it was certainly not intended

9. N.Y. Workmen's Compensation Law § 11, provides that the liability of the employer under this act shall be exclusive and in place of any other liability. Therefore, if any employee is to recover against an employer in an action at law, it must be because the so-called employer is not really his employer or that the injury did not arise in the course of his employment.

10. 280 App. Div. 940, 116 N.Y.S.2d 25 (2d Dep't 1952), aff'd 305 N.Y. 648, 112 N.E.2d 424 (1952).

11. Williams v. Hartshorn, 296 N.Y. 49, 69 N.E.2d 557 (1946).

12. N.Y. Workmen's Comp. Law § 32.

to permit harassing and inconsistent actions resulting in unnecessary and prolonged litigation and possibly multiple recoveries."[13]

"IN EMPLOYMENT" UNDER DISABILITY BENEFITS LAW

The New York Disability Benefits Law provides that "employees *in employment* of a covered employer for four or more consecutive weeks . . . shall be eligible for disability benefits. . . . . Every such employee *shall continue to be eligible during such employment*" (emphasis added).[14] Thus, while the Workmen's Compensation Law provides benefits for occupationally-incurred disabilities and the Unemployment Insurance Law for persons, who, though available for work, are unable to continue at work, this law is aimed at bridging the gap between the first two by providing non-occupational disability benefits.[15]

In *Flo v. General Electric Company*,[16] the claimant, a married woman, had been an employee of the General Electric Company for six years when she went on compulsory maternity leave of absence under company rules which required an eight week interval following the birth of the child before the employee could return to work. During the eight week period the claimant was operated upon for causes unrelated to the pregnancy and as a result was disabled for several months.

Claimant applied to the Workmen's Compensation Board, which awarded disability benefits on the ground that the compulsory maternity leave of absence did not constitute a termination of the employment relationship. Upon appeal the Appellate Division dismissed the claim,[17] the majority there taking the view that the employer's liability to pay disability benefits was not dependant on the existence of the employer-employee relationship but, rather upon the ground that the claimant was "in active wage-earning employment at the time."[18]

The Court of Appeals reversed, holding that although the woman was not actually serving her employer during the leave when the disability occurred, the employment relationship had not been severed thereby, and she was entitled to benefits for a disability which, though unrelated to her pregnancy, occurred during her maternity leave.

In each case where the Court has previously construed the meaning of the phrase "in employment" as set forth in Section 203 of the Disability Benefits Law, the interpretation has to a large extent depended on the particular facts. So in *Kriete v. Todd Shipyards*,[19] where an employee had been working

13. Supra note 1 at 230-31, 203 N.Y.S.2d 848 (1960).
14. N.Y. Workmen's Comp. Law, § 203.
15. N.Y. Workmen's Comp. Law § 200.
16. 7 N.Y.2d 96, 195 N.Y.S.2d 652 (1959).
17. 3 A.D.2d 357, 160 N.Y.S.2d 917 (3d Dep't 1957).
18. Id. at 360, 160 N.Y.S.2d 920.
19. 285 App. Div. 36, 135 N.Y.S.2d 471 (3d Dep't 1954), aff'd 308 N.Y. 1027, 127 N.E.2d 866 (1955).