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Vincent P. Furlong

deliberately designed to stimulate sex feelings and to act as an aphrodisiac whereas an obscene book has no such immediate and dominant purpose, although incidentally this may be its effect.[60] This will not be considered since it is the purpose of this writing to show that the present censorship statutes are unconstitutional. It will have to remain to be determined whether a narrowly-drawn statute can meet the "clear and probable danger" test.

June A. Murray

TEST FOR OCCUPATIONAL DISEASE

I. INTRODUCTION

The problem of recovery under workmen's compensation statutes for occupational diseases has been a thorny one since the inception of stautory liability in this area. Originally recovery was denied in most instances under the theory that such disablement was not the result of an accident, the latter being a pre-requisite for liability.[1] This result was somewhat tempered by equating diseases incurred as a consequence of sudden or fortuitous occurrences or of a traumatic event to injuries as a result of accidents.[2] However, even with this, a vast number of diseases incidental to employment were left uncovered for it is settled that there can be no recovery for disablement as a result of an occupational disease unless the workmen's compensation law specifically so authorizes.[3]

With the passage of time, the various states enacted specific legislation in this area[4] until at the present time all but three states provide at least minimal coverage.[5] These statutes may be divided roughly into two categories:[6] those which

60. See JACKSON, THE FEAR OF BOOKS 121-135 (1932); ST. JOHN-STEVAS, OBSCENITY AND THE LAW 2 (1956). *United States v. Ulysses, supra,* note 59. It is this writer's view that if section 22(a) were drafted so as to describe only "pornographic" matter (as was involved, concededly, in *Brown v. Kingsley Books,* 1 N. Y. 2d 177, 134 N. E. 2d 461 (1956)) the statute would be constitutional. See 6 BUFFALO L. REV. 155, 156, n.5, 157 (1957). This determination involves another fact question—What is pornographic and what is not? However this will bring an end to the prosecution of books which can be said to have *any* literary merit or which were written for any legitimate purpose. It would also appear that under such a statute, the intent of the author may take on added importance although the subjective element could be handled, as it is at the present time, by determining his intent as it may be gleaned from the book, itself.

1. *State ex rel. Cashman v. Sims,* 130 W.Va. 430, 43 S.E.2d 805 (1947).

2. *Elkhorn Coal Corp. v. Kerr,* 203 Ky. 804, 263 S.W. 342 (1924); *Renkel v. Industrial Commission,* 109 Ohio St. 152, 141 N.E. 834 (1923).

3. *Henry v. A. C. Lawrence Leather Co.,* 231 N.C. 477, 57 S.E.2d 760 (1950); *State ex rel. Cashman v. Sims,* 130 W.Va. 430, 43 S.E.2d 805 (1947).

4. *E.g.,* N. Y. WORKMEN'S COMPENSATION LAW § 3 (2).

5. Kansas, Mississippi and Wyoming do not provide for occupational disease coverage.

6. Most of the statutes have other differences within the two major categories. See, e.g., COLORADO STAT. ANN. c. 97, §451 (c), (e) wherein special requirements for recovery for silicosis are provided.

allow recovery for specific diseases[7] and those which allow recovery for occupational diseases in general[8] or in addition to specifically named diseases.[9] In those states which restrict recovery to certain diseases (as well as in those states which have no provisions for occupational disease coverage) the test of "a sudden or fortuitous event" remains applicable to those diseases not covered.[10] In the remaining states the general test has become: Was the disease a natural incident of the particular employment?[11] While seemingly simple in its terms, the test has received far from consistent application. This article will attempt to present the accepted view as culled from a myriad of judicial opinions and statutory constructions.

II. THEORY OF RECOVERY

Workmen's compensation statutes allow recovery for injuries arising out of and in the course of the employment.[12] These qualifications have been interpreted to mean, not that the injury be caused by the nature of the employment but rather 'that the injury be caused by the fact that the employee was employed.[13] Liberality of application has further reduced this in effect to the point where recovery may be had merely because the injury occurred while the employee was "on the job."[14] While there are many conflicting decisions, the distinction between "risks of the job" and "risks of everyday life" is seldom made except in those instances where recovery has been traditionally denied.[15]

In the area of occupational disease, however, liberality has been slower to arrive. It has never been denied that the industry must be an actual cause of the disease and not merely the situs—the distinction between "risks of the job" and "risks of everyday life" has been preserved. Thus, a person who becomes afflicted with an infectious disease by reason of drinking from a public fountain while at work would probably not recover under a theory of occupational disease;[16] on the

7. See, *e.g.*, IDAHO CODE ANN. § 72-1204.
8. See, *e.g.*, UTAH CODE ANN. § 35-2-3.
9. See, e.g., N. Y. WORKMEN'S COMPENSATION LAW §3 (2).
10. *State ex rel. Cashman v. Sims*, 130 W.Va. 430, 43 S.E.2d 805 (1947).
11. *Goldberg v. 954 Marcy Corp.*, 276 N.Y. 313, 12 N.E.2d 311 (1938); *Harman v. Republic Aviation Corp.*, 298 N. Y. 285, 82 N.E.2d 785 (1948); *LeLenko v. Wilson H. Lee Co.*, 128 Conn. 499, 24 A.2d 253 (1942); *Carter v. International Detrola Corp.*, 328 Mich. 367, 43 N.W.2d 890 (1950).
12. See, *e.g.*, N. Y. WORKMEN'S COMPENSATION LAW §10.
13. For an extreme example, see *Employers' Liability Assur. Corp. v. Industrial Accident Commission*, 37 Cal. App. 2d 567, 99 P.2d 1089 (1940).
14. *Wiseman v. Industrial Accident Commission*,——Cal. 2d——, 297 P.2d 649 (1956).
15. *Compare Mack v. Reo Motors*, — Mich. —, 76 N.W.2d 35 (1956) *with Wiseman v. Industrial Accident Commission*, — Cal. 2d —, 297 P.2d 649 (1956); see Notes, 6 BUFFALO L. REV. (1957), *infra.*, this issue.
16. *Maddeo v. I. Dibner & Bros., Inc.*, 121 Conn. 664, 18 A.2d 616 (1936) (tuberculosis resulting from crowded, unsanitary conditions); *Mills v. Columbia Gas Const. Co.*, 246 Ky. 464, 55 S.W.2d 394 (1932) (contaminated drinking water).

other hand, had he injured himself at the same fountain, he would doubtlessly receive compensation.[17] A compensable injury is not dependent upon special hazards of the employment whereas an occupational disease must have been caused by conditions which are not present in industry in general but which are peculiar to the industry or type thereof in which the disease was incurred.

The courts are generally in accord as to the above distinction although a few states, because of their liberal statutes, have virtually abolished the requirement for peculiarity of hazard in the field of occupational disease.[18] An area of dispute has arisen, however, as to whether the industry must be the sole cause of the disease (that is, whether the disease must be of the nature which the normal person might incur solely as a result of being employed under such conditions). The problem of the employee who is predisposed or susceptible to the particular disease in question has produced a multitude of seemingly conflicting decisions.

III. THE CONFLICT

The conflict noted above is perhaps best illustrated through the medium of example:

1. X Company is a printing establishment. During the course of its operations certain fumes are emitted. While there has been no history of dermatitis in the plant, A, who is allergic to such fumes, contracts the disease. Recovery will probably be allowed.[19]

2. B has a congenital back defect. As a result of his day to day employment activities his defect is aggravated. He can point to no specific injury nor can he show that his fellow workers have been similarly afflicted. Recovery will probably be denied.[20]

While there seems to be good reason why B should not recover since his own physical disposition has caused the affliction, such rationale should apply equally to A. It is the writer's opinion that this "conflict" is a result, not of disagreement between or within jurisdictions, but rather of differences in the fact situations of the cases in question. There are two distinctions to be noted in the above examples. In Example 1 A was employed by an industry which had a hazard peculiar to it, whereas in Example 2, B was performing tasks which are common to industry as a whole. Further, B was afflicted with an actual defect whereas A's predisposition was merely a susceptibility. Thus A, despite his allergy, might be considered "normal" and B, because of his physical defect, might be considered

17. *Alabama Concrete Pipe Co. v. Berry*, 266 Ala. 204, 146 So. 271 (1933); *Widell Co. v. Industrial Commission*, 180 Wis. 179, 192 N.W. 449 (1923).
18. *E.g.*, WIS. STAT. c. 102.01 (2).
19. *LeLenko v. Wilson H. Lee Co.*, 128 Conn. 499, 24 A.2d 253 (1942).
20. *Detenbeck v. General Motors Corp.*, 309 N.Y. 558, 132 N.E.2d 840 (1956).

"abnormal." This distinction was the basis of an award for contraction of epicondylitis (tennis-elbow) where it was shown that the employee's predisposition consisted of a susceptibility rather than an actual pre-existing defect.[21] Behind such awards is probably the thought that, lacking a pre-existing defect, it is impossible to say that the "normal" person would not contract such a disease or that a person who contracts such a disease is not "normal."

The result of such decisions is not to preclude recovery to the person who suffers from a congenital defect, but to force him to demonstrate that, while he may have been more susceptible to the disease in question, the nature of the hazard was such that the normal person could have contracted it.[22] The decisions in this area reflect an attempt to place the "abnormal" person on equal footing with the so-called "normal" person. Thus, even a person with a congenital defect may recover for an occupational disease if he can show that the particular hazard which was a cause of his affliction is peculiar to the industry involved and further, that it was not only a hazard as to him but to the "normal" person as well.[23]

IV. THE NEW YORK VIEW

New York has followed the general theory as presented in this comment although in specific instances has set down a somewhat rigid test. In *Detenbeck v. General Motors Corp.*[24] recovery was denied to an applicant whose "disease" was traced to a congenital back defect. The Court of Appeals seemingly set forth a rule denying recovery in any instance where it could not be shown that the "normal" person would be similarly afflicted. However, it may be noted that in *Detenbeck,* the activity causing the disease was not peculiar to the industry and that the employee's defect was more than mere susceptibility.[25] While the definition of occupational disease set forth in *Goldberg v. 954 Marcy Corp.*[26] is somewhat restrictive it may be noted that New York has subsequently allowed recovery in allergy cases[27] and in other areas where there was a pre-existing susceptibility.[28]

21. *Samuels v. Goodyear Tire & Rubber Co.,* 317 Mich. 149, 26 N.W.2d 742 (1947).
22. *Pinto v. Competent Fur Dressers,* 297 N. Y. 846, 78 N.E.2d 864 (1948).
23. See note 22 *supra.*
24. 309 N.Y. 558, 132 N.E.2d 840 (1956), 6 BUFFALO L. REV. 75 (1956).
25. Employee was afflicted with a congenital back deformity which was aggravated by his daily duties which consisted of inspecting and lifting boxes.
26. An occupational disease is one "which results from the nature of the employment, and by nature is meant . . . conditions to which all employees . . . are subject, and which produce the disease as a natural incident of a particular occupation, and attach to that occupation a hazard which distinguishes it from the usual run of occupations and is in excess of the hazard attending employment in general . . . ." 276 N. Y. 313, 318, 319, 12 N.E.2d 311, 313 (1938).
27. *Horvath v. Wickwire Spencer Steel Co.,* 275 App. Div. 1014, 91 N.Y.S. 2d 709 (3d Dep't 1949).
28. *Buchanan v. Bethlehem Steel Co.,* 278 App. Div. 594, 101 N.Y.S.2d 1011 (3d Dep't 1951), *aff'd without opinion,* 302 N.Y. 848, 100 N.E.2d 45 (1951).

V. CONCLUSION

It is the writer's opinion that the *Detenbeck* and *Goldberg* decisions present the correct view of the law. A person who is pre-disposed to injury or disease should not be allowed to recover in instances where there is no particular hazard connected with the employment. If there has been a trend in this direction it is fortunate that the *Detenbeck* case has made the rule clear in New York. It is felt that these decisions will not preclude recovery where it has been previously had but that they merely put a limit upon the liability of the employer. An employee will be permitted to recover despite his pre-existing susceptibility provided he can show that the hazard which caused his "disease" is one peculiar to the industry in which he works and provided that it is not convincingly shown that such hazard would not in any event cause a similar affliction in the normal employee.

Vincent P. Furlong

INSURANCE COVERAGE AND INTER-SPOUSE LIABILITY

In 1937 the legislature amended Section 57 of the Domestic Relations Law[1] and removed the common law disability of suits between spouses. This legislation followed soon after decisions by the Court of Appeals which applied the common law rule of nonliability in an action by a wife against a partnership based on injuries caused by the act of her husband who was a partner[2] and to an inter-spouse suit between New York residents upon a foreign cause of action which was sued upon in New York.[3]

At the same time as Section 57 was enacted the former version of what is now Section 167(3)[4] of the Insurance Law was passed. The Section[5] provides, in effect, that no liability policy shall be deemed to insure against any liability of an

1. N. Y. DOMESTIC RELATIONS LAW §57 . . . A married woman has a right of action against her husband for his wrongful or tortious acts resulting to her in any personal injury . . . as if they were unmarried, and she is liable to her husband for her wrongful or tortious acts . . . as if they were unmarried.
2. *Caplan v. Caplan*, 268 N. Y. 445, 198 N. E. 23 (1935).
3. *Mertz v. Mertz*, 271 N. Y. 466, 3 N. E. 2d 597 (1936).
4. N. Y. ISURANCE LAW §167(3). No policy or contract shall be deemed to insure against any liability of an insured because of death of or injuries to his or her spouse or because of injury to, or destruction of property of his or her spouse unless express provision relating specifically therto is included in the policy. Except for the words "of death" which were inserted in 1941 this provision is identical with the former Section 109 (3a) of the Insurance Law. See N. Y. Sess. Laws 1937, c. 669 §2. The 1941 amendment was the result of the decision in *Gen. Acc. Fire And Life Assur. Corp. v. Morgan*, 33 F. Supp. 190 (W. D. N. Y. 1940) which held that the section did not apply to a wronful death action between spouses.
5. Hereinafter the writer shall refer to 167 (3) as the Section.