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Workmen's Compensation—Course of Employment

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recapitulating the New York law on the subject. Trespass is an intentional harm at least to the extent that the actor must intend the act which amounts to or results in an unlawful invasion. Such invasion must be a proximate or inevitable result of the actor's wilful act, or one which is done so negligently that it amounts to a wilful act.

The instant case was concerned with an alleged underground movement of noxious fluid (gasoline) from defendant's storage tank to plaintiff's water well. The only evidence adduced tended merely to prove that plaintiff's well water contained a heavy concentration of gasoline similar in type to that stored in defendant's tank on adjacent property.

The leading case in New York, and the first of its sort to be ruled on, is *Dillon v. Acme Oil Co.*[30] There, defendant oil company was exonerated from liability for the pollution of plaintiff's well on adjoining property caused by defendant's discharge on to its land of chemicals permeating the soil. Absent negligence and knowledge of subterranean water courses, there can be no liability if such courses became contaminated by a person's carrying on a legitimate business with care and skill.

The decision in the *Dillon* case as precedent precludes a finding of liability in the instant case, for in the latter there was not even a showing that defendant intentionally permitted gasoline to permeate the soil, while in the former, chemicals were intentionally discharged. Hence, the general rule in New York evolves, that excepting activities of an extra hazardous nature, an unintentional or non-negligent physical invasion of another's property will not subject the actor to liability for harm ensuing therefrom.[31]

XII. Workmen's Compensation

Course of Employment

The requirement of law that injuries, to be compensable, must arise "out of and in the course of the employment"[1] often has necessitated a searching analysis of questions of fact.[2] Several such cases were decided this term.

30. 49 Hun 565, 2 N. Y. Supp. 289 (Sup. Ct. 1888).

31. Restatement, Torts, § 166; *N. Y. Steam Co. v. Foundation Co.*, 195 N. Y. 143, 87 N. E. 765 (1909).

1. Workmen's Compensation Law § 10.

2. Such problems as frolic and detour, tests of re-entry, business v. pleasure, *inter alia*, have caused the courts some uneasiness. For recent discussions in this jurisdiction, see, *e. g.*, 3 Buffalo L. Rev. 167 (1953); Comment, *Diversionary Activities in Workmen's Compensation*, 17 Albany L. Rev. 283 (1953).

In *Penzara v. Maffia Bros.*,[3] claimant, employed as a handyman in an automobile supply and repair shop, was permitted during slack time to work on his own automobile, and while thus engaged, was struck in the eye by a clip he was fashioning for his own use. The employer expressly conceded that he permitted use of company tools for these personal activities during business hours, and supplied and paid for parts thus used by his employees.

The court found (Van Voorhis, J., dissenting) that the injury was compensable, and observed that the case fell squarely within the meaning of a passage in *Davis v. Newsweek Magazine*[4] where it was concluded after a review of cases involving social or recreational activities:

> Careful examination of these cases reveals that there is one operative factor common to all. In each and every instance the employee had been directed, *as part of his duties,* to remain in a *particular* place or locality until directed otherwise or for a specified length of time. In those circumstances, the rule applied is simply that the employee is not expected to wait immobile, but may indulge in any *reasonable* activity at that place, and if he does so the risk inherent in such activity is an incident of his employment.[5]

Congdon v. Klett[6] involved an accident which occurred while the employee was swimming, with permission of the employer, in the employer's swimming pool adjacent to the business property. It appeared that this was customary, but there was evidence that the injury occurred shortly after working hours, although the recreation may have been initiated earlier.

Here the court denied recovery, again quoting *Davis,*[7] and distinguishing *Penzara*[8] on grounds it comprised a situation within the intent of the *Davis* dictum, while in the instant case the recreation was undertaken off the business premises, and the

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3. 307 N. Y. 15, 119 N. E. 2d 570 (1954).

4. 305 N. Y. 20, 27-28, 110 N. E. 2d 406, 409 (1952); noted, 3 BFLO. L. REV. 59 (1953).

5. But the *Penzara* dissent here suggested that claimant was not merely passing time because he was required to be present, and contended that the injury resulted from the hazards of an activity voluntarily undertaken and in no way directed or organized by the employer.

6. 307 N. Y. 218, 120 N. E. 2d 796 (1954).

7. *Supra,* note 4.

8. *Supra,* note 3. Judge Van Voorhis did not join in distinguishing and upholding *Penzara.* As noted above, he had there dissented. The *Congdon* decision was otherwise unanimous.

presence of the employee, while tolerated, was not required by the employer.[9]

It may be noted that in both cases the court emphasized the *Davis* formulation, which it apparently regards as controlling in recreation cases.[10] But the application of this rule is still far from clear; for example, whether the court would have permitted recovery if claimant in the *Congdon* case had sustained injury during working hours, although not on the business premises, is arguable, as is the question whether the location of the pool within the working area would have resulted in a different decision.

Perry v. Town of Cherry Valley,[11] presented the question whether the death of a town superintendent of highways while he was blasting rock on privately owned lands was compensable. It appeared that the performance of such work was a custom of some twenty years' duration; town equipment was used, and the town collected fees for the service.

The court held (Van Voorhis, J., dissenting) that although the work was performed pursuant to contracts which were violative of municipal authority,[12] the employee's death was compensable[13] so long as the legality of his employment status was unquestioned.[14]

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9. In passing, the court suggested that to grant an award here ". . . would serve to warn employers that, if they concern themselves with the social and recreational activities of their employees, even though the activities be conducted after hours and be totally unconnected with the work for which the employees have been hired, they run the risk of being subjected to liability for every accident and injury arising from such activities." 307 N. Y. at 223-224, 120 N. E. 2d at 799.

10. These cases, of course, are to be distinguished from those in which the employer organizes and sponsors athletics or other activities as a fringe benefit to employees. See, *Tedesco v. General Electric Co.*, 305 N. Y. 544, 114 N. E. 2d 33 (1953); *Wilson v. General Motors Corp.*, 298 N. Y. 468, 84 N. E. 2d 781 (1949).

11. 307 N. Y. 427, 121 N. E. 2d 402 (1954).

12. A town is a municipal corporation, TOWN LAW §2. Its powers are derived from the Legislature, *Wells v. Town of Salina*, 119 N. Y. 280, 23 N. E. 870 (1890); *Holroyd v. Town of Indian Lake*, 180 N. Y. 318, 73 N. E. 36 (1905); and are confined to public purposes, *Mayor v. Ray*, 19 Wall. 468 (1875); *Wells v. Town of Salina, supra*. "No power is vested in the town board to use highway machinery for private individuals . . . and such a use would not in any sense be a town purpose." 3 OP. ST. COMPTROLLER 234, 235 (1947).

13. Under WORKMEN'S COMPENSATION LAW §2 (3), a municipal corporation is an employer; and injuries to its employees engaged in hazardous work are compensable. WORKMEN'S COMPENSATION LAW §3 (1). The fact that decedent was an officer of the town does not disqualify him from coverage. TOWN LAW §20 (1); *Dann v. Town of Veteran*, 278 N. Y. 461, 17 N. E. 2d 130 (1938).

14. ". . . Where the employment has been entered upon and the relationship of employer and employee established, the violation of any statute, whether penal or otherwise, does not render the Workmen's Compensation Law inapplicable." *Ulrich v. Terminal Operating Corp.*, 186 Misc. 145, 146, 59 N. Y. S. 2d 226, *aff'd*, 271 App. Div. 930, 67 N. Y. S. 2d 590 (2d Dep't 1947). *Cf. Clarke v. Town of Russia*, 283 N. Y. 272, 28 N. E. 2d 833 (1940), in which compensation was denied where it appeared that decedent was a member of the Town Board, and his contract of employment was void *ab initio*, in view of the instructions to the Board that its members could not be hired to work on highways.

The dissent suggested that the legality of decedent's employment status was not unchallengeable: "[W]hen he contracted to do private work for a private individual, in a legal sense he ceased to act as the superintendent of highways . . ."[15] and thus lost his status as an employee.[16]

But the majority found on the authority of *Dann v. Town of Veteran*[17] that the illegality of the work contract did not affect the validity of decedent's employment for purposes of Workmen's Compensation, distinguishing *Clarke v. Town of Russia*[18] on grounds that the employment contract in that case was illegal in its inception.

Aggravation of Injuries

In *Sullivan v. B & A Const., Inc.*,[19] claimant had previously suffered two compensable injuries to his right knee, as a result of which his knee occasionally "locked" so that he was temporarily deprived of use of his right leg. The court unanimously held[20] that injuries suffered in an automobile accident wherein claimant's knee locked so that he was unable to apply the brake, were not compensable.

Claimant admitted that his knee had locked several times previously while he was driving. It was found that although the accident almost certainly would not have occurred but for the original knee injuries, the chain of causation was broken by claimant's own act of driving despite knowledge of his disability and the hazards involved.[21]

There has been some conflict of authority as to whether the prior compensable injury must be the "proximate" cause of the subsequent injury, or merely a "but for" cause. A substantial

15. 307 N. Y. at 432, 121 N. E. 2d at 405.

16. A contract between a municipality and one of its officers is against public policy and is illegal. *Beebe v. Supervisors of Sullivan County*, 64 Hun 377, *aff'd* 142 N. Y. 631, 37 N. E. 566 (1894). Such a contract is wholly void, not merely voidable. *Clarke v. Town of Russia, supra*, note 14; 10 McQUILLAN, MUNICIPAL CORPORATIONS (3d ed. 1949), 196-197. A compensation award was not be based on a void, illegal contract. *Swihura v. Horowitz*, 242 N. Y. 523, 152 N. E. 411 (1926); *Herbold v. Neff*, 200 App. Div. 244, 193 N. Y. Supp. 244 (3d Dep't 1922).

17. *Supra*, note 13. It may be noteworthy that in the *Dann* case coverage was specifically provided for claimant by name in the insurance contract.

18. *Supra*, note 14.

19. 307 N. Y. 161, 120 N. E. 2d 694 (1954).

20. Reversing 282 App. Div. 788, 122 N. Y. S. 2d 571 (3d Dep't 1953), which had unanimously upheld an award by the Workmen's Compensation Board.

21. For the same rule in other jurisdictions, see, 1 LARSON, WORKMEN'S COMPENSATION LAW 183-184 (1952), and Note, 102 A. L. R. 790 (1936).