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Administrative Law—Workmen's Compensation

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section of a bus commits a crime.²⁵ Incredible as it does seem, a physician's license to practice medicine in this State could be suspended on such bases.

The court leaves these questions to the good sense and judgment of the Board of Regents. However, what considerations should influence the Regents in their determination of the mode of punishment, and how severe it shall be, is not for the court to consider. In fact, the court is wholly without jurisdiction to review such questions.²⁶

The construction of this statute, to include a crime, anywhere committed, as a basis for suspension of a physician's license, coupled with the grant of uncontrolled discretion to the Board of Regents as to what matters to consider in making a determination, and what discipline to mete out, raises fundamental and substantial questions as to the constitutionality of the delegation. This question the court did not consider at all.

Without some guides governing the exercise of discretion in this area, "there would be no effective restraint upon unfair discrimination or other arbitrary action by the administrative official."²⁷ A statute's validity is to be judged not by what has been done under it, but by what might be done under it.²⁸

Workmen's Compensation

a. *Course of Employment*: Injuries are compensable under the Workmen's Compensation Law only if they arise "out of and in the course of employment."²⁹ Common law concepts of scope of employment are not to confine the determination of that question.³⁰

Decided in the 1952-1953 term were two cases involving the question whether the risks of travel were also the risks of employment. In *Lewis v. Knappen Tippetts Abbett Engineering Corp.*,³¹

25. ALA. CODE, 1940, tit. 48, § 301 (31A); LA. REV. STAT., 1950, tit. 45, § 195; N. C. GEN. STAT., 1950, §§ 62-121.71, 62. 121.72.

26. *Sagos v. O'Connell*, 301 N. Y. 212, 93 N. E. 2d 644 (1950). There the court said, at 214, 93 N. E. 2d at 645:

"Under § 1296 of Art. 78 of the Civil Practice Act we find no provision for the judicial review of the measure of punishment imposed as an incident to disciplinary action ordered by an administrative board . . . where . . . the Appellate Division has upheld a finding of a statutory violation which is made the sole basis for such punishment."

27. *Small v. Moss*, 279 N. Y. 288, 299, 18 N. E. 2d 281, 285 (1938).

28. *Packer Collegiate Inst. v. Univ. of State of N. Y.*, 298 N. Y. 184, 81 N. E. 2d 80 (1948).

29. WORKMEN'S COMPENSATION LAW § 10.

30. *Cardillo v. Liberty Mut. Ins. Co.*, 330 U. S. 469 (1946); *Matter of Waters v. Taylor Co.*, 218 N. Y. 248, 112 N. E. 727 (1916).

31. 304 N. Y. 461, 108 N. E. 2d 609 (1952).

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an engineer, hired in New York, was sent by his employer to Israel to advise the government there on railroad problems. His work almost completed, he took a sightseeing trip to Jerusalem where he was killed by unidentified Arabs who attacked the United Nations convoy in which he was traveling. The court affirmed (4-3) the award. In *Davis v. Newsweek Magazine*,³² the four week vacation of the science editor of a magazine was extended, and money given him by his employer, so he might visit additional places of scientific interest for use in his work. En route between two places in his itinerary he stopped at a summer resort, and, hot and tired, went for a swim. He was fatally injured in a dive. The award here was reversed (4-3).

The two cases are close. Six judges maintained a consistent position, the three dissenters in each case voting with the majority in the other.

The distinction between the cases, if indeed there is one at all, lies apparently in the fact that whereas the engineer in the *Lewis* case was sent on his travels by the employer, the science editor in the *Davis* case voluntarily undertook his trip. Judge Cardozo said, in *Matter of Mark's Dependents v. Gray*:³³

The decisive test must be whether it is the employment or something else that has sent the traveler forth upon the journey or brought exposure to its perils . . . To establish liability the inference must be permissible that the trip would have been made though the private errand had been cancelled.

The deaths of the employees in both cases resulted not from the travels themselves, but from a deviation from those travels. Using the common-sense viewpoint of the average man³⁴ it is difficult to perceive any vital difference between the cases grounded on the question of why the employee undertook his journey.

The death of an insurance investigator was held (5-2) not to be in the course of employment, when he was killed in an automobile accident while returning on Monday morning to the area where he worked; from his summer home in the Catskill Mountain region. The trip there Friday evening was personal, and although when Monday came he had to retrace his route and return to work, the work did not create the necessity for travel.³⁵ This result is consistent with the doctrine holding that an employer in-

32. 305 N. Y. 20, 110 N. E. 2d 406 (1953).

33. 251 N. Y. 90, 93, 167 N. E. 181 (1929).

34. Urged in *Matter of Masse v. Robinson Co.*, 301 N. Y. 34, 37, 92 N. E. 2d 56, 57 (1950).

35. *Glickman v. Greater New York Taxpayers*, 305 N. Y. 431, 113 N. E. 2d 548 (1953).

jured on his way to the place where he was to render service may not recover.³⁶

In *Tedesco v. General Electric Corp.*,³⁷ the claimant was a member of the General Electric Athletic Association, a membership corporation open only to employees of G. E.'s Schenectady plant. An injury incurred in a soft ball game, part of the athletic program, was held compensable as arising out of and in the course of employment. The court viewed the activities of this association as furthering employee relations and good will for these reasons:

1. the activities were on the employer's premises;
2. there was substantial financial support by employer;
3. there was dominant control by employer;
4. advertising and business advantage benefited the employer.

The case of *Wilson v. General Motors*,³⁸ which denied compensation for a ballgame injury, was distinguished on the basis that the games were in no way connected with the employer and that no business advantage or benefit accrued to it.

Although Workmen's Compensation is not confined by common law concepts of scope of employment,³⁹ apparently the doctrine that the employee be engaged at the time of his injury in activity of benefit to his employer still persists to a degree.

b. *Exclusiveness of Remedy*: Workmen's Compensation is a new system in its entirety, substituted for an objectionable one.⁴⁰ It imposes on the employer liability without fault, and abolishes the application of the doctrines of negligence, contributory negligence, assumption of risk, and negligence of fellow servants in this area, as well as providing that liability of the employer shall be exclusive of any liability at common law.⁴¹ The Legislature intended to bar actions at common law, however, only in those fields in which it had created liability to provide compensation regardless of fault.⁴²

36. *Matter of Kowalek v. N. Y. Consol. R. R. Co.*, 229 N. Y. 489, 122 N. E. 888 (1920); *Pierson v. Interborough Rapid Transit Co.*, 184 App. Div. 678, 172 N. Y. S. 492 (1st Dep't), *aff'd*, 227 N. Y. 666, 124 N. E. 899 (1920).

37. 305 N. Y. 544, 111 N. E. 2d 33 (1953).

38. 298 N. Y. 468, 84 N. E. 2d 781 (1949).

39. See note 30 *supra*.

40. *Shanahan v. Monarch Engineering Co.*, 219 N. Y. 469, 478, 114 N. E. 795, 798 (1916).

41. WORKMEN'S COMPENSATION LAW §§ 10, 11, 38, 39.

42. *Barrencotto v. Cocker Saw Co.*, 266 N. Y. 139, 194 N. E. 61 (1934).

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An interesting problem concerning the exclusiveness of the remedy was posed to the court in this term.⁴³ An employee sued his employer in a common law suit to recover damages for injuries he sustained due to a condition in him known as partially disabling silicosis, which condition, it was alleged, was caused by the defendant's negligence. The granting of defendant's motion to dismiss the complaint under Rules of Civil Procedure 106 and 107⁴⁴ was affirmed by the Court of Appeals.

Silicosis is on the list of occupational diseases for which compensation is payable, but the act specifically provides that compensation is payable for silicosis only when it results in total disability.⁴⁵ The plaintiff claimed the law does not bar this suit, and if the statute were so construed as setting up such a bar, it would be violative of the Fourteenth Amendment to the Federal Constitution as depriving him of any remedy.⁴⁶

On its merits the court holds that the Legislature did not intend the employee should recover possibly heavy damages in the partial stage, and also a later award for total disability.⁴⁷ However, what the court says is *dictum*. In essence the real holding is that a common law suit is not the proper way to test the constitutionality of the bar against such suits. A demurrer to the complaint defeats the plaintiff in his basic contention, right or wrong. Even if the bar should be unconstitutional, plaintiff would still not possess the right to recover damages at common law. The Act of 1935, which allowed recovery for partially disabling silicosis would then be relieved of its invalid amendment and would revive.⁴⁸ Plaintiff's sole remedy is a proceeding under the Workmen's Compensation Law, irrespective of the validity or invalidity of the provisions in question.⁴⁹

Tort Liability of Administrative Official

Generally, if an officer's duty is owing solely to the public, an aggrieved individual has no right of action against an officer for a breach thereof.⁵⁰ But a different public policy operates as to

43. *Cifolo v. General Electric Co.*, 305 N. Y. 209, 112 N. E. 2d 197 (1953).

44. On the grounds: (1) that certain parts of the various causes of action were barred by the lapse of time; (2) none of the counts contained facts sufficient to constitute a cause of action; (3) the court has no jurisdiction of any of the actions.

The court found it unnecessary to deal with the question as to the statute of limitations.

45. WORKMEN'S COMPENSATION LAW §5, subd. 2.

46. *New York Central R. R. v. White*, 243 U. S. 188 (1916).

47. See 2 LARSON, WORKMEN'S COMPENSATION LAW 141 (1952), for cases upholding statutes of other states denying a remedy for partial silicosis disability.

48. The court follows *Powers v. Porcelain Insulator Corp.*, 285 N. Y. 54, 32 N. E. 2d 790 (1951).

49. *Scherini v. Titanium Alloy Co.*, 286 N. Y. 531, 37 N. E. 2d 237 (1941).

50. *Larson v. Marsh*, 144 Neb. 664, 14 N. W. 2d 189, 192 (1944).