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Workmen's Compensation Law

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action." This is the latest example of that perennial distrust of party testimony and of the jury which has appeared so often in statute and decision; in fact the reason assigned as justification for the original Guest Statute was that it would tend to prevent perjurious collusion between host and guest to the ruin of insurers. That the notion also reflects upon the bar is perhaps beside the point, and in any event it is likely that one who dwells in the groves of Academe should not question it. It will be the rare case in which, in some fashion, the requirement cannot be met, and it is almost a certainty that it will not be applied to those cases where the plaintiff's theory is that he was not a guest at all.

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WORKMEN'S COMPENSATION LAW

The 1957 Legislature passed two bills, H.B. 267 (Chapter 70) and H.B. 617 (Chapter 196), which effected significant changes in the industrial insurance laws of the state of Washington. The most important of these changes are described and discussed below.

Action Against Persons Whose Negligence Caused Compensable Injury or Disease. A basic *quid pro quo* underlies all workmen's compensation statutes. The employer makes substantial concessions as the price of his limited, but absolute, liability. In exchange, the employee gives up some of his rights to bring damage suits for injuries he has sustained.[1]

The Washington statute is no exception. RCW 51.04.010 provides:

> All phases of the premises are withdrawn from private controversy . . . sure and certain relief for workmen, injured in extra-hazardous work, and their families and dependents is hereby provided . . . to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this Act . . . to that end all civil actions and all civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this Act provided.[2]

But all workmen's compensation statutes recognize that where the negligence of a "stranger" or a "third person" was the cause of com-

[1] Larson, Workmen's Compensation Law, § 71.20 (1952).

[2] RCW 51.32.010 provides: "Each workman... or his family or dependents... shall receive compensation... and, except as in this title otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever..."

[3] Larson, Workmen's Compensation Law, § 72 (1952).

pensable injury to a workman in the course of employment, the "stranger" or "third person" should not be absolved of his obligation to pay the usual amount of damages for such injury.

The statutes of the several states vary, however, on the question of who is a "stranger" or a "third person." In most jurisdictions the "stranger" or "third person" against whom negligence actions may be brought for compensable industrial injuries includes all persons other than the injured person's own employer. Co-employees, employers of employees working on the same project, and physicians whose malpractice aggravates the compensable injury may be reached in a damage action.[3]

The Washington statute has never defined the term this broadly, although from 1911 to 1927 it permitted a negligence action against a person "not in the same employ" provided that the injury occurred to the workman away from the plant of his employer; and from 1927 to 1929 it permitted a negligence action against such persons even though the workman sustained the injury in the plant of his employer.[4]

However, since 1929 the Washington Act has excluded from the concept of the "third person" against whom the workman may bring a negligence action "any employer or any workman under the Act . . . if at the time of the accident such employer or such workman was in the course of any extra-hazardous employment under this Act."[5] Thus, Washington has been one of the three states (the others being Alabama and Illinois) that have undertaken to immunize from a negligence action the "entire membership of the state's compensation family."[6] Indeed, the Washington Act has extended the immunity further than the acts of the other two states.[7]

There has been considerable dissatisfaction in some quarters with the "exclusive remedy" principle of workmen's compensation law, even in those states where the injured worker loses only his cause of action against his own employer. This dissatisfaction has sprung largely from the inadequacy of benefits available under workmen's compensation laws. Those benefits are not only rigidly limited by statute, but they also fail to provide compensation for some items of loss, e.g., facial disfigurement. Thus, the argument has been made that the employee

[4] See Holmes, *Actions Against Persons Whose Negligence Caused Compensable Injury or Disease*, p. 2 (unpublished manuscript, School of Law, University of Washington, 1957).
[5] RCW 51.24.010 (proviso).
[6] Larson, Workmen's Compensation Law, § 72.40 (1952).
[7] *Id.*

has, under workmen's compensation laws, given up more than he has received; that he has been the victim of a bad bargain.[8]

The point is illustrated by the recent Washington decision in *Hand v. Greyhound Corp.*[9] In that case, the workman suffered severe facial burns, which are not compensable under the Washington statute. Nontheless, he was barred from bringing a negligence action against the defendant, who was not his employer, because it was engaged in extra-hazardous work at the time of the injury.

Perhaps in part because of the impetus provided by the *Hand* case, the 1957 Legislature amended RCW 51.24.010 by eliminating the proviso immunizing from a negligence action an "employer or . . . workman . . . [who] at the time of the accident . . . was in the course of . . . extra-hazardous employment."

The deletion of the proviso does not, however, give the injured workman or his dependent the choice of either bringing a damage action or claiming under the statute in every case where the injury was caused by the negligence or wrong of another. This is so because the cause of action provided by RCW 51.24.010 does not arise except where the injury was "due to negligence or wrong of *another not in the same employ.*" [Emphasis supplied.]

Thus, it is clear that persons in the same employ as the injured workman are still immune from a damage action. Morever, since the injured workman has no cause of action against a co-employee, it also seems plain that he has no cause of action, on the theory of *respondeat superior,* against his employer. Certainly it would be anomalous to immunize the co-employe who is the actual tortfeasor while permitting an action against the faultless employer.

The workmen's compensation statutes of most states immunize the injured workman's employer but permit him to sue his negligent co-workers.[10] But there are no state statutes that immunize the negligent co-employee while making the employer liable.[11]

Thus, in the usual situation, the injured workman's employer will remain free from a damage action under the Washington Act. There are situations, however, that will pose difficulties.

Suppose, for example, the workman is employed by a public utility

[8] Sommers & Sommers, Workmen's Compensation, 191 (1954).
[9] 149 Wash. Dec. 129, 299 P.2d 554 (1956).
[10] Larson, Workmen's Compensation Law, § 72.10 (1952).
[11] A number of states, among them Alabama, Colorado, New York, Oklahoma, Oregon, and Utah, extend the immunity to the injured workman's co-employees as well as to his employer. See Larson, Workmen's Compensation Law, § 72.20 (1952).

company and is permanently injured by contact with a high voltage wire negligently located and maintained by his corporate employer. May he sue his employer under RCW 51.24.010 on the ground that his injury was "due to the negligence . . . of *another not in the same employ?*" [Emphasis supplied] The Washington Court permitted an employee to recover against his own employer under the old statute where the latter had defaulted on his obligation to report the payroll and pay premiums.[12] However, the point under discussion here was not raised as a defense.

To pose other troublesome situations, suppose that the tortfeasor was the president of the workman's corporate employer. Such an officer is a "workman" under the Act while doing extra-hazardous work, and is subject to its disabilities even though he has not qualified for its benefits.[13]

Or suppose that the plaintiff's tortfeasor-employer was also a self-employed employee—viz., a working employer. Such a person is not a "workman" under the statute, is not subject to its disabilities until he has qualified for its benefits,[14] but is covered by its immunities.[15]

It is a good guess that the Court will extend the immunity to these and similar situations on the theory that the employer (corporate, individual enterpreneur, or otherwise) who is in compliance with the statute has, in exchange for subjecting himself to a limited, but absolute, liability, acquired an immunity at least as to the persons on whose behalf he is paying premiums.

It is noteworthy, in this connection, that the cause of action created by RCW 51.24.010 is an exception to the general policy of the statute, which extinguishes all rights of action, and, as such, has been given a narrow construction.[16]

Another question which may produce some difficulty is whether the workman has a cause of action when his injury is caused by the negligence of a person who is in the same employ but who, at the time of injury, was not acting in the course of his employment. The cases under the old RCW 51.24.010 holding that an employer or workman is not immune to a damage action unless he was engaged in extra-hazardous work at the time of the injury to the plaintiff,[17] suggest an affirmative

[12] Long v. Thompson, 177 Wash. 296, 31 P.2d 908 (1934).
[13] Koreski v. Seattle Hardware Co., 17 Wn.2d 421, 135 P.2d 860 (1943).
[14] Latimer v. Western Machinery, 42 Wn.2d 756, 259 P.2d 623 (1953); Pink v. Rayonier, 42 Wn.2d 768, 259 P.2d 629 (1953).
[15] Jewett v. Kerwood, 43 Wn.2d 691, 263 P.2d 830 (1953).
[16] See Koreski v. Seattle Hardware Co., 17 Wn.2d 421, 135 P.2d 860 (1943).
[17] Peters v. Snohomish County, 46 Wn.2d 192, 279 P.2d 1085 (1955).

answer. However, the analogy is weakened, if not destroyed, by the fact that the proviso to the old statute made it plain that the immunity did not operate unless, "at the time of the accident, such employer or . . . workman was in the course of . . . extra-hazardous employment."

Other questions involving the meaning of the phrase "another not in the same employ" will doubtless arise. For example, suppose the injured employee (plaintiff) was working for subcontractor A, and the negligent employee (defendant) was working for subcontractor B on the same project. Since, under RCW 51.12.070, the person, firm, or corporation who lets a contract is primarily responsible to the state for all compensation premiums for workers employed on the job, and the general contractor is primarily responsible for reimbursement of the person letting the contract, with a right of proportionate indemnity from each subcontractor, it may be argued that, in a statutory sense, the injured workman and the negligent workman were in the "same employ."

The 1957 Legislature made two other changes in RCW 51.24.010 which are noteworthy. Where the claimant who has a damage action against a third party elects to seek compensation under the Act, his cause of action is assigned to the state for the benefit of the Accident Fund and the Medical Aid Fund. Previously the Department was empowered to prosecute or compromise the cause of action in its discretion. Under the 1957 Amendments the "cause of action . . . may be prosecuted or compromised by the Department in its discretion *in the name of the workman, beneficiaries, or legal representatives.*" [Emphasis supplied.]

Where the workman makes the other choice, that is, brings a damage action, he may, by virtue of the 1957 amendments, "receive benefits payable under this title as if such election had not been made." To the extent that the Department makes such payments to the injured workman or his dependents, it is subrogated to his rights "against the recovery had from such third party and shall have a lien thereupon."

Prior to this change the injured workman could not recover deficiency compensation under the statute until he was in a position to make proofs as to the amount of money "actually collected" from the third person.

Benefits Payable Under the Statute. The 1957 legislature substantially increased the schedule of benefits available under the Act. Lump sum and monthly pension and compensation payments avail-

able under the new schedule have been raised in amounts ranging from 25% to 100% over the payments available under the old schedule. In addition, the following changes were made:

1. A totally and permanently disabled female worker with husband will now be compensated at the same rate as a married man. Prior to the 1957 amendments this was true only when the husband was an invalid.

2. Prior to the 1957 amendments a workman received no compensation for the day of injury and for the three days immediately following. Hereafter this restriction shall not operate if the disability continues for a period of thirty consecutive calendar days from the date of injury.

3. The legislature amended the statute which permits conversion of monthly payments in death and disability cases to a lump sum payment (RCW 51.32.130) by raising the maximum lump sum payment which may be made from $5000 to $8500.

Standing to Appeal Decisions of the Board of Industrial Insurance Appeals. Prior to the 1957 Amendments, RCW 51.52.110 provided that a workman, beneficiary, employer or other person aggrieved by the decision and order of the Board might appeal to the superior court. The 1957 legislature added a proviso reading as follows:

> That whenever the Board has made any decision and order reversing an order of the Supervisor of Industrial Insurance on *questions of law* or *mandatory administrative actions* of the director, the Department of Labor and Industries shall have the right of appeal to the superior court. [Emphasis supplied.]

The amendment was apparently intended to overcome the effect of the decision in *Department v. Cook*.[18]

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[18] 44 Wn.2d 671, 269 P.2d 962 (1954).