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Workmen's Compensation

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> Such special administrator shall not be liable to an action by any creditor of the deceased, and the time for limitation of all suits against the estate shall begin to run from the time of granting letters testamentary or of administration in the usual form, in like manner as if such special administration had not been granted.

The supreme court held that the trial court was correct in sustaining respondent's demurrer to the complaint, and affirmed the trial court's order dismissing the complaint. The case is consistent with two previous Washington cases: In *re Holm's Estate,* 141 Wash. 475, 252 Pac. 145 (1927), and *Ward v. Magaha,* 71 Wash. 679, 129 Pac. 395 (1913), which both held that a special administrator has no power to exercise the powers and duties conferred upon a regular administrator, such as the allowance of claims. The cases all emphasize the fact that a special administrator is authorized to do little other than collect and preserve the effects of the deceased pending appointment of a personal representative.

WORKMEN'S COMPENSATION

Longshoremen's Act—Right to Sue Fellow Employees. Can an employee covered by the Longshoremen's and Harbor Worker's Compensation Act[1] sue his fellow employee? The Washington Supreme Court in *Ginnis v. Southerland*[2] has said no. In that case a longshoreman, injured while working on the S.S. Santa Anita, owned by the Grace Lines, Inc., elected to sue the master of the vessel rather than receive compensation under the act. Southerland, the master, did not deny his alleged personal negligence but raised the defense that he was an agent of the Grace Lines, Inc., which was also the employer of the injured workman. He claimed that since his employer was immune under the compensation act,[3] he, as agent, shared the Grace Lines' immunity. The court held that the acts of the agent were the acts of the employer because he acted through his employer.[4] Thus, the master was not a third person under section 933 of the act,[5] which permits the workman to sue "some person other than the employer." Therefore, the master was necessarily excluded from liability by section 905,[6] which states that the liability of the employer under the

[1] 44 STAT. 1424 (1927), 33 U.S.C. 901-950 (1952).

[2] 50 Wn.2d 557, 313 P.2d 675 (1957).

[3] 44 STAT. 1426 (1927), 33 U.S.C. 905 (1952). "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative....

[4] Ginnis v. Southerland, 50 Wn.2d at 558, 313 P.2d 675 (1957): "The privity between principal and agent is expressed in the ancient maxim *qui facit per alium facit per se.* Therefore, the master's negligent act was the act of the Grace Lines, Inc., and appellants were not injured by the act of *some person other than the employer.*"

[5] 44 STAT. 1440 (1927), 33 U.S.C. 933a (1952). "If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide, to receive such compensation or to recover damages against such third persons."

[6] Note 3 *supra.*

act is exclusive and in place of all other liability of the employer to the employee.

The liability of fellow employees is not specifically covered by the federal act. The Washington court partially fills this gap in the statute by an application of the theory of *respondeat superior*. Since the usual result in the application of this doctrine is the establishment of the employer's liability rather than the exemption of the employee from liability, the theory of the court, that an employee is immune if his employer is immune, imports an unusual twist to the theory.

The abolition of a worker's common-law right of action against a co-worker who negligently harms him depends, obviously, on an interpretation of the statute.[7] Since the longshoremen's act does not specifically abolish this right, the Washington court's decision rests on a determination that the statute impliedly requires this result. It is submitted that the determination of the implications of the act should rest upon an analysis of its purposes and policies rather than upon a conceptualistic adaptation of the doctrine of *respondeat superior*. In most states having compensation statues, the immunity to common law suits is extended only to the employer in the absence of a specific statutory provision.[8] The reason most often cited for this position is that in the exchange for sure and swift compensation the worker has given up the right to sue his employer but not his fellow employee, because the fellow employee is not a party to such an agreement and has given up nothing in return for such an immunity.[9]

It would appear that a contrary view should not be adopted unless to permit the action would defeat the purpose of the compensation act. It is quite possible that the Washington court has attributed to the longshoremen's act the same purpose that lies behind the Washington Workmen's Compensation Act.[10] The Washington act declares that the purpose of the act is to withdraw all phases of the workman's injuries from private controversy except as provided for in the act,[11] and the act specifically exempts the fellow employee from third party actions.[12]

There is no comparable provision in the federal act indicating such

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[7] Zimmer v. Casey, 296 Pa. 529, 146 Atl. 130 (1929). Contra, Landrum v. Middaugh, 171 Ohio St. 608, 160 N.E. 691 (1927). (Where the court held that a foreman in a factory was the alter ego of the employer and exempt from liability.)

[8] 2 LARSEN, WORKMEN'S COMPENSATION, § 72 *et seq.*

[9] *Ibid.*

[10] RCW 51.04.

[11] RCW 51.04.010.

[12] RCW 51.24.010.

a purpose, and the federal courts have not imputed this to it. These courts, in discussing various other common law rights of action by the injured longshoreman, have stated that the act was intended to enlarge, not restrict, the worker's rights,[13] thereby sustaining a plausible inference that the cause of action against the fellow employee is not excluded.

It is evident that subjecting the fellow employee to a tort action does not hamper the remedial effects of the statute, since compensation is always available. It can be argued, however, that the burden of compensation would then be shifted from the employer to the negligent co-worker because of the provision permitting the subrogation of the injured employee's rights against third persons to the employer upon acceptance of compensation under the statute.[14] In those jurisdictions that sustain the liability of the fellow employee, this subrogation is permitted against the negligent co-worker.[15] The underlying basis is to permit the ultimate loss to fall on those persons responsible,

[13] Seas Shipping v. Seiracki, 328 U.S. 85 (1945), (The court held the owner of a vessel liable as a third party under maritime law to a longshoreman working for a stevedore because of the lack of seaworthiness of the vessel); The Pacific Pine, 31 F.2d 152 (1929), (The injured longshoreman working for a stevedoring company could sue the vessel as a third party over the objection that the remedies in the longshoreman's act were exclusive. The court compared the longshoremen's act with section 5, page 356, of the Laws of Washington, 1911 (RCW 51.32.010), which states that payment of compensation to an injured worker shall be in lieu of any and all rights of action whatsoever against any person whomsoever, and stated that, in the longshoremen's act there appeared no all-inclusive sweeping aside of old rights and remedies.); Rederii v. Jarka Corp., 26 F. Supp. 304 (1939), (The employer of an injured stevedore raised the objection that the workman could not proceed against a vessel as a third person in the act because his remedies under the act were exclusive; therefore, the vessel's owner, who had been held liable in a third party action to the injured longshoreman, could not maintain an action of indemnity against the workman's employer. The court held in permitting the action that the workman's remedies were not restricted by the act, but enlarged.) *Hitaffer v. Argonne*, 183 F.2d 811 (D.C. Circ. 1950), cert. den., 340 U.S. 852 (1950) (The court held that a wife has a cause of action for loss of consortium against the employer even though her injured husband was covered by the longshoremen's act. The court held that section 905 did not preclude her cause of action because it was a separate claim although it arose from the same facts that would have excluded an action against the defendant employer by the longshoreman.).

[14] 44 STAT. 1440 (1927), 33 U.S.C. 933(b) (1952). "Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person."; 44 STAT. 1440 (1927), 33 U.S.C., 933(b) (1952). "Such employer on account of such assignment may institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceedings."; *Seas Shipping v. Seiracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946).

[15] 2 LARSEN, WORKMAN'S COMPENSATION, § 72.10.

[16] A later case in the Ohio jurisdiction, *Morrow v. Hume*, 131 Ohio St. 319, 3 N.E.2d 39 (1936), permitted an employee, covered by workmen's compensation, to sue a fellow employee who was driving a car negligently which the injured workman was riding in. The court distinguished the prior *Landrum* case on the grounds that the fellow employee was not in the direct control of the immune employer, although he was admit-

after the initial policy of providing sure relief to the employee has been fulfilled. That such a basis underlies the longshoremen's act is apparent from the subrogation provision. Since the fellow employee is not a party to the immunity granted by the compensation act, having given up nothing to warrant such an immunity, it would seem that he does not stand in any different relationship than would another third party as to the ultimate loss.

Conceivably, the court's decision is not so broad that it exempts all fellow employees. The factual pattern before the court concerned the master of the vessel. In future litigation it can be logically contended that the exemption applies only to those employees who hold a supervisory or managerial position.[16]

Until the federal courts adopt a contrary position to that of the Washington court, at least the supervisory fellow employee of the injured workman is exempted from common law liability in tort under the longshoremen's act in Washington.

Third Party Tort Action by a Workman Under the Industrial Insurance Act Against a Physician for Malpractice. The Washington court in *Shortridge v. Bede*[1] has determined that an injured workman covered by the Washington Industrial Insurance Act[2] can sue a physician for malpractice incurred during treatment of a pre-existing injury. Shortridge, the workman, suffered a bilaterial hernia while in the course of his employment. He contacted an independent physician, the respondent Bede. In an operation for the repair of the hernia, a vasectomy was performed, that is, his spermatic ducts were mistakenly tied or severed without his consent, causing him to become sterile. On discovery of his condition, he elected to sue the respondent in tort.[3] The superior court sustained a demurrer on the basis of *Ross v. Erickson Construction Co.*[4] The Washington supreme court overruled the demurrer.

Prior to the present case, it was commonly thought that the *Ross* case[5] made a physician totally immune from a tort action by a worker for malpractice, when the injury caused by the physician occurred

tedly in the employer's course of business. This case illustrates the artificial distinctions that are possible under the conceptualistic approach taken by the earlier Ohio case and the *Gimnis* case in Washington.

[1] 151 Wash. Dec. 356, 319 P.2d 277 (1957).
[2] RCW 51.04 *et seq.*
[3] RCW 51.24.010.
[4] 89 Wash. 634, 155 Pac. 153 (1916).
[5] See note 4 *supra.*

during treatment of a prior injury sustained in the course of employment by a worker covered by the compensation statute.[6] In that case the worker, injured while in the course of employment, went to a physician who had a contract to do surgical and hospital work for the construction company. After treatment of the injury the worker made a claim under the industrial insurance law and accepted a final award. Subsequently he brought an action for damages against the physician based on malpractice. The court, on appeal, denied recovery, stating that the Industrial Insurance Act abolished all common law remedies for a workman's injuries except those expressly preserved by the act.[7] In the *Ross* case, the court mentioned only that provision preserving common law recovery for intentional torts.[8] No mention was made of the predecessor of RCW 51.24.010, which preserves negligence actions against third parties, except the worker's employer or his fellow employees. The court stated that surgical treatment was an incident to every case of injury or accident. The injury due to the malpractice of the physician therefore was not an independent injury. Since the statute abolished all common law remedies, there could be no recovery for malpractice outside of compensation under the statutory provisions.

This decision was followed without discussion in *Carmichael v. Kirkpatrick*,[9] a case involving an action based on malpractice of a physician who rendered treatment to the worker in accordance with a medical aid contract with the employer. The action was dismissed on the basis of the *Ross* case.

The court in the present case distinguished the *Ross* case on two grounds. The first ground was that the doctor in the Ross case was employed by the employer to render medical aid to the employees, whereas the physician in the instant case was an independent doctor. This distinction is important because RCW 51.24.010 prohibits third party actions by a workman against persons in the same employ. The second ground was that the worker in the *Ross* case had submitted a claim and had accepted a final award compensating him for both injuries. In the instant case the worker had not accepted compensation for any disability caused by the vasectomy, although apparently he had received compensation for time loss caused by the hernia.

The court pointed out that the *Ross* case did not mention the provi-

[6] 2 LARSEN, WORKMEN'S COMPENSATION, § 72.60.
[7] RCW 51.04.010.
[8] RCW 51.24.020.
[9] 185 Wash. 609, 56 P.2d 686 (1936).

sion permitting third party actions which then existed[10] and exists now.[11] Thus, the court concluded that the third party provision permits an action by the employee against the physician who negligently causes him harm during treatment for a compensable injury.

The decision by the court in the present case puts Washington in line with the majority of other jurisdictions which permit third party actions against physicians for malpractice.[12] The result of the *Shortridge* case seems logical and correct. As the court pointed out, the physicians bear none of the costs of the compensation and there can be no inference that they were intended to share in its immunity. The construction of the statute by the Washington court is in line with the action of the 1957 Legislature, which omitted the immunity clause in RCW 51.24.010 for all third parties except the injured workmen's employer and his employees.

The *Shortridge* case, however, leaves unanswered two very important questions. What will be the result where the physician is under a contract with the employer to render medical and surgical aid to the employees? This is one of the distinctions the court draws between the *Shortridge* case and the *Ross* case, although the court in the *Ross* case did not consider this point. Presumably, the question is still open in Washington.

The second question is: What will be the result when compensation has been given for a disability caused by an industrial injury and the degree of disability is subsequently increased by reason of negligent medical treatment by a physician? THEODORE O. TORVE

[10] Laws, 1911, Chapter 74, sec. 3.
[11] RCW 51.24.010.
[12] 2 LARSEN, WORKMEN'S COMPENSATION, § 72.60.
[13] The 1957 Legislature amended RCW 51.24.010 by deleting the following proviso: "Provided, That no action may be brought against any employer or any workman under this title as a third person if, at the time of the accident, such employer or such workman was in the course of any extrahazardous employment under this title."