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Workmen's Compensation--Co-Employees Lability for Personal Injury to Fellow Worker

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WORKMEN'S COMPENSATION—CO-EMPLOYEES LIABILITY FOR PERSONAL INJURY TO FELLOW WORKER.—P was injured in the course of daily work for his employer and received disability payments under the Alaska Workmen’s Compensation Act. This action was initiated to obtain damages for personal injury from Ds, P's immediate supervisors, whose alleged negligence had caused his injury. Ds moved to dismiss the complaint contending that P had failed to state a basis upon which relief could be granted. Ds contended that since the employer was protected from a personal injury action by the Workmen’s Compensation Act that they, as agents of the employer, should be considered as the employer and not as third parties, thereby extending the employer's immunity to Ds. Held, denying the motion to dismiss the complaint, that an employee who has received compensation under the Alaska Workmen’s Compensation Act may sue a supervisory employee for alleged negligence which caused the injury. Where the applicable statute does not specifically exempt a co-employee from an action for damages, he should be considered a third party and answerable in damages to his fellow employees even though the injured employee is entitled to compensation from the common employer. Ransom v. Haner, 174 F. Supp. 82 (Alaska Dist. 1959).

The question presented by this case has been answered in various jurisdictions by divergent holdings. Each holding is rendered slightly different from that of other jurisdictions by the language of the statute of the particular state. Where the subject of co-employee's liability has been covered by the Workmen’s Compensation Act, [hereinafter referred to as Act] there is of course a lesser need for interpretation, and little if any litigation has arisen on this specific question. The question as presented by the principal case is: when the employer is covered by the Act and one of his employees negligently injures another employee, does the immunity afforded the employer by the Act extend to the negligent employee and render him immune from an action at law for damages by the injured employee? Unless the employee is to be considered a third party under the Act, he enjoys such immunity. The real question is one of statutory interpretation since even the employer's immunity is derived strictly from the statute. This immunity abrogates the injured party's common law right to sue for damages and replaces it with an assurance of compensation under the Act. The principal case states in very precise language that the majority of jurisdictions have held a co-employee to be a third party under the Act and thus
amenable to an action for damages for his own negligence. See, 58 Am. Jur., Workmen's Compensation § 61 (1948); Annot., 106 A.L.R. 1059 (1937). However, the minority holding is supported by a considerable authority. It should be observed that compensable injuries under the various statutes do not include intentional injuries inflicted by a fellow worker or intentional self-inflicted injuries. 1 Schneider, Workmen's Compensation § 2 (3d ed. 1941). The remedy, if any, in such cases is in an action at law.

The Alaska court cited two West Virginia cases, Makarenko v. Scott, 132 W.Va. 490, 55 S.E.2d 88 (1949) and Hinkelman v. Wheeling Steel Corp., 114 W.Va. 269, 171 S.E. 538 (1933), as authority to support the majority rule. The Hinkelman case involved an action for damages against a doctor in the employ of a corporation covered by the West Virginia Workmen's Compensation Act, W.Va. Code ch. 23 (Michie 1955). Plaintiff recovered compensation and then sued the doctor for malpractice because of a subsequent aggravation of the injury. The court interpreted the Act to include the doctor under the employer's immunity which precluded a recovery by the plaintiff. The Makarenko case was then cited by the Alaska court as overruling the Hinkelman case and bringing the West Virginia view into line with the majority holding. This would appear to be somewhat inaccurate, for in fact, the Hinkelman case was overruled by Tawney v. Kirkhart, 130 W.Va. 550, 44 S.E.2d 634 (1947). In that case the court expressly overruled the Hinkelman decision and held that only the employer was protected from common law liability by the immunity under the statute. This opinion was followed by a very strong dissent which expressed a number of reasons to preclude a reversal of the former rule.

At the time of the Makarenko decision, March 1, 1949, the West Virginia Act was silent as to a co-employee's liability to his fellow worker for a negligently caused injury. In the same year and month, March 10, 1949, the West Virginia Legislature by an amendment specifically included a co-employee in the statutory immunity. The amendment went into effect on July 1, 1949. W. Va. Acts, 1949, ch. 136; W.Va. Code ch. 23, art. 2 § 6a (Michie 1955) provides: "The immunity from liability set out in the preceding section shall extend to every officer, manager, agent, representative or employee of such employer when he is acting in furtherance of the employer's business and does not inflict an injury with deliberate intention." Apparently the legislature did not agree with the court's interpretation and enacted the above cited amendment as a clear
statement of legislative intent with respect to this question. In the later case of Crawford v. Parsons, 141 W. Va. 752, 92 S.E.2d 913 (1956), the constitutionality of the new amendment was upheld against an attack which charged that the law was arbitrary and capricious legislation, and that it deprived one of his common law right to sue a negligent tortfeasor. In light of the amendment and the Crawford decision it would seem that an employee in West Virginia now enjoys the same immunity as his employer when the employer is covered by the Act.

Even though an employee is not held liable for his ordinary negligence on the job under the present West Virginia law, it is not intended that a worker's duty not to injure his co-worker be extinguished or in any way lessened. The statute contemplates only ordinary negligence, and gross, wanton or malicious actions are still the proper subjects of an action at law for damages.

In 1 Schneider, Workmen's Compensation § 3 (3d ed. 1941), it is said that the general purpose of Workmen's Compensation statutes is to remove the burden of industrial accidents from the employee and place such expense back in the industry as a cost of the goods produced. A further purpose is to permit the injured employee to avoid the tangles of litigation and to acquire compensation as rapidly as possible, as well as immediate medical attention. See also, Mains v. Harris Co., 119 W. Va. 730, 197 S.E. 10 (1938). The present West Virginia law would seem to more effectively accomplish the above stated purpose, since now a worker must look to the statute for compensation and cannot sue his co-worker for damages. The rule adopted by the Alaska court makes it possible, in some cases, to charge the negligent worker with the expense of these accidents, as was done in the principal case. The present West Virginia statute presents what appears to be the more practical view with respect to this question and in theory is contra to the holding of the principle case.

W. E. M.

Torts—Concurrent Causes.—Combined actions were brought for the wrongful deaths of passengers in an airplane manufactured by D. The widows of the deceased passengers alleged improper construction as negligence. The trial court charged the jury that where an injury may result from one of several causes, for only one of which D is responsible, the burden rests with P to individuate