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Statute of Limitations--Federal Employers' Liability Act-- Continuing Wrongs

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STATUTE OF LIMITATIONS—FEDERAL EMPLOYERS' LIABILITY ACT—CONTINUING WRONGS.—*P* was employed by *D* from 1924 until the 9th day of September, 1952. His duties involved the operation of an air hammer. As a result of a defect in the air lines, the hammer would suddenly stop and cause severe jolts, afflicting *P* with arthritis. During the period of employment *P* was unaware that the physical condition for which he now claims damages existed. *P* brought an action against his employer under the Federal Employers' Liability Act on August 31, 1955. *Held*, that the trial court did not err in deciding that the action was not barred by the three-year limitation provision of the act, since the statute of limitations did not begin to run on the claim until the employee was relieved of the jolting work on September 10, 1952, less than three years before the action was commenced. *Fowkes v. Pennsylvania Ry.*, 264 F.2d 397 (3d Cir. 1959).

The tort cases involving the question of the statute of limitations in regard to continuing wrongs disclose the application of a variety of doctrines. At the one extreme is the idea that the limitation period runs from the time of the wrong, while at the other extreme, the proposition is that the period runs only from the time of diagnosis. The interpretation of when the period begins to run is related to three distinct areas, viz; common law actions, actions under the Federal Employers' Liability Act, and actions under workmen's compensation statutes.

In each area, the issue under consideration is to determine at what precise time the action is to be deemed accrued. In resolving this issue, the courts have evolved a fine distinction between the event which gives rise to the action and the event which starts the running of the limitations on the action. Attention is focused upon each of four possible results accepted in various situations.

I. Period as running from the time of negligence or wrong.

By the weight of authority the statute of limitations runs regardless of whether the injured party has knowledge of a cause of action or of the facts out of which this right arises. *Scott v. Rinehart & Dennis Co.*, 116 W. Va. 319, 180 S.E. 276 (1935). Since in certain cases the injured party is unaware of any damages, it seems clear that the practical effect of this rule is to start the statutory period running before a suit can be maintained.

In *Pickett v. Aglinsky*, 110 F.2d 628 (4th Cir. 1940); *Street v. Consumers Mining Corp.*, 185 Va. 561, 39 S.E.2d 271 (1946); *Scott v. Rinehart & Dennis Co.*, *supra*; *Boyd v. Beebe*, 64 W. Va. 216, 61 S. E. 304 (1908): the view is taken with more or less distinctness, that as against a cause of action exposing one to, and resulting in a disease, the period of limitation commences to run from the time of negligence.

In *Scott v. Rinehart & Dennis Co.*, *supra*, *P* commenced his action in October, 1933 to recover for the negligence of the defendant employer which resulted in *P* contracting silicosis by exposure in certain work which ended in September, 1931. *P* urged that he brought the action immediately after he learned or had cause to suspect his diseased condition. The action failed as it was not timely under the code provision which prescribed limitations as ". . . one year next after the right to bring the same shall have accrued, and not after, . . ." W. VA. CODE ch. 55, art. 2, § 12 (Michie, 1931). "As a general rule, the statute of limitations commences to run against a cause of action at the time of its accrual." 12 MICHIE JUR., *Limitation of Action* § 23 (1950). It is important to note that the language of the applicable provision of the code has changed over the years in regard to the time limitation. W. VA. CODE ch. 55, art. 2 § 12 (Michie Supp., 1959). However, in *Pickett v. Aglinsky*, *supra*, the court applying West Virginia law stated that although the language of the statute has varied slightly since its inception, its meaning has not.

The courts which hold that the period runs from the time of the negligence or wrong, justify the result by the rationale that occasional hardships are necessarily incident to a rule that arbitrarily makes legal remedies expire with the mere lapse of time. *State ex rel. Papadopoulos v. Industrial Comm'n*, 130 Ohio St. 77, 196 N.E. 780 (1935).

II. *Period running from Time of Last Exposure.*

The second line of authorities hold as did the court in the principal case. In that case, the federal court, relied on a Pennsylvania decision in *Plazak v. Allegheny Steel Co.*, 344 Pa. 422, 188 Atl. 130 (1936), in holding that in a situation where the relationship is continuous, as in that of master and servant, the master's default is regarded as a single wrong which continues so long as the employment continues. If the action is brought within the statutory period

after cessation of employment, recovery is allowed. The rule that the period commences to run from the date of the last exposure is followed in: *Michalek v. United States Gypsum Co.* 76 F.2d 115 (1935); *Biglioli v. Durotest Corp.*, 44 N.J. Super. 93, 129 A.2d 727 (1957).

The *Rinehart* case, *supra*, in holding that the period runs from the time of negligence or wrong, is not necessarily inconsistent with the instant case. In the former *P* was barred from recovery when the action was not brought until two years after ceasing work, the limitations on such actions being one year. It is conceivable that the injury may have been deemed a continuing one had the action been instituted within the statutory period after ceasing work. However, as the action was not timely the issue was not before the court to decide, recovery being barred in either event.

In balancing on the one hand, the hardships probably imposed upon the wrongdoer, that is, he might have to meet a claim involving acts committed years before, against the injustice more certainly imposed upon the person wronged, these authorities hold that the limitations do not start running until the continuous wrongful conduct has terminated.

III. Period as Running from the Time the Injured Person Knew or Should Have Known of His Right To Sue.

The trend of some cases is to take a more liberal interpretation of the time when the statutory period commences to run. This is apparent in *Urie v. Thompson*, 337 U.S. 163 (1949), where the court held that a three year statute of limitations began to run at the time *P* knew or should have known that he had sustained an injury, rather than when he was first exposed to the injurious silica dust. The court reasoned that the running of the statute of limitations prior to the time *P* had reason to know of his injury could not be intended by any humane legislative plan and that such a consequence could not be "reconciled with the traditional purposes of statutes of limitations." An even broader view was taken in *City of Miami v. Brooks*, 70 So.2d 306 (Fla. 1954), where it was held that the statute of limitations begins to run only upon notice of the invasion of a legal right.

IV. Period as Running Against Workmen's Compensation Claims.

The question as to when the limitation period commences to run against a workman's claim to compensation for disease or injury

contracted during employment is primarily one of the language and construction of the compensation and occupational disease statutes. However, if Workmen's Compensation statutes do not furnish a remedy for occupational diseases incurred in the course of employment, the courts will presume that the legislature intended to preserve the common-law remedy. *Canterbury v. Valley Bell Dairy Co.*, 142 W. Va. 154, 95 S.E.2d 73 (1956).

Under West Virginia law, in order for an employee to be entitled to any compensation for silicosis ". . . application must be . . . filed in the office of the commissioner within two years from and after the last day of the last continuous period of sixty days or more during which the employee was exposed. . . ." W. VA. CODE ch. 23, art. 4 § 15 (Michie, 1955). In cases involving this provision of the statute the rule that the period is computed from the last exposure is followed in: *Richardson v. State Compensation Comm'r.*, 137 W. VA. 819, 74 S.E.2d 258 (1953); *Hodges v. Workmen's Compensation Comm'r.*, 123 W. Va. 563, 17 S.E.2d 450 (1941).

By a specific provision of the statute involved in *American Radiator & Standard Sanitary Corp. v. Hayden*, 285 Ky. 684, 149 S.W.2d 6 (1941), no application for compensation on account of silicosis was to be considered "unless made within one year after the last injurious exposure to silica dust."

There appears to be a current trend towards a more liberal view in regard to the running of limitations in case of continuing wrongs, *Urie v. Thompson*, *supra*. Also, to a great extent, the harshness of a rule that would bar one from recovering for a wrong before he is capable of ascertaining that he has been wronged, has been alleviated by workmen's compensation statutes and recovery, in the proper instance, under the Federal Employers' Liability Act. However, courts are not in the business of making law and any changes must of necessity come about by legislative action. In *Scott v. Rinehart & Dennis Co.*, *supra*, the court cited with approval, the statement in *Fee v. Fee*, 10 Ohio 470, 36 Am. Dec. 103 (1841), in holding that once a judicial trend has been established, courts hesitate to introduce any exception which might be deemed an encroachment upon the legislative branch of the government.

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