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Third Party Actions Under Workmen's Compensation Act

J. WESTWOOD SMITHERS

At common law any person who wrongfully injures another, intentionally or negligently, is liable to compensate such other person for his damages if the injured person is himself free from contributory fault. If the tortfeasor is a servant, acting within the scope of his employment, his employer (or master) is also liable to answer for the wrong under the long-established doctrine of *respondeat superior*, with certain exceptions in which immunity is granted to the state, or subdivisions thereof, and to charitable institutions. The trend in modern times has been to narrow, or to entirely abolish, such immunity. By the Federal Tort Claims Act, for example, the United States has waived its governmental immunity and there has been an increasing demand for the adoption of similar statutes by the several States.

Nevertheless there is an area, under the present law of Virginia, in which not only the private, business employer, but also his servant who tortiously cripples or kills another, is granted absolute immunity from civil liability for his wrong. It is the thesis of this brief monograph that the Virginia law in this respect should be changed by judicial decision or legislative fiat.

The situation alluded to arises under the Workmen's Compensation Act of Virginia. At common law, if an employee suffers injury through the negligent breach of a duty owed to him by his employer, he is entitled to recover his damages from the employer and there is, of course, no arbitrary ceiling on the amount of damages recoverable. But at common law the employer was able to avail himself of the defenses of contributory negligence, assumption of the risk, and the fellow servant doctrine, with the result that in approximately 80% of the cases the employee lost his case and received no compensation for his injuries. Horowitz, *Workmen's Com-*

pensation, p. 3 (1944). On the other hand, in the remaining 20% of the cases in which the employee was successful in breaking through the common law defenses of his employer he was able to recover full compensation for his injuries, there being no limit on the amount of damages which a court or jury might award to him.

In the early years of this century the concept of Workmen's Compensation was accepted in this country. Originating in Germany in 1884 and enlarged in England in 1897, the idea of compensating a workman for his injuries—not on the basis of negligence, but on the relation of his injuries to his job—gained universal favor. Horowitz, *op. cit.*, p. 5. Under these acts the workman was to be compensated for injuries “arising out of and in the scope of his employment” regardless of fault or lack of fault on the part of his employer. But at the same time the liability of the employer was to be limited so that he would no longer be liable to pay full compensation for the employee's injuries nor be at the mercy of common law juries. Under the Virginia act, adopted in 1918 and frequently amended, an employer can never be required to pay compensation, even in the most aggravated sort of case, exceeding the amount of \$14,000.00. Va. Code Ann. § 65-68. If an employee is killed, even by the negligence of the employer himself, the latter's liability is limited to the amount of \$10,500.00 plus burial expenses not to exceed \$300.00. Va. Code Ann. § 65-62. It is easily seen, therefore, as the Supreme Court of Appeals has said, that the Workmen's Compensation Act was in the nature of a compromise between employer and employee. *Humphrees v. Boxley Bros. Co.*, 146 Va. 91, 135 S. E. 890 (1926).

The essential element of the compromise was that an employee accepting the Act would give up his common law rights against his employer in exchange for new rights against his employer given to him by the Act. “The reason for the employer's immunity [from common law liability] is the *quid pro quo* by which the employer gives up his normal defenses and assumes automatic liability, while the employee gives up his right to common law verdicts.” Larson, *Work-*

men's Compensation, § 72.20 (1952 with 1961 supplement).

This surrender of the employee's common law right against his employer is provided for in § 65-37 of the Code:

The rights and remedies herein granted to an employee . . . shall exclude *all other rights and remedies* of such employee, his personal representative, parent, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death. (Emphasis added.)

If this language were not qualified (as originally it was not), it might be interpreted to mean that the employee gives up his common law rights against everyone in the world. But § 65-38 of the Code clearly recognizes that the employee still has his common law rights against third-party tortfeasors. In providing for subrogation of the employer to the employee's rights against third parties, § 65-38 says that "the making of a lawful claim against an employer for compensation under this Act . . . shall operate as an assignment to the employer of any right to recover damages which the injured employee . . . may have against *any other party* for such injury or death. . . ." This would seem to mean that the Act does not deprive the employee of his common law rights against *any other party* than his employer.

But § 65-99 of the Code must also be considered here. It provides:

Every employer subject to the compensation provisions of this Act shall insure the payment of compensation to his employees in the manner hereinafter provided. While such insurance remains in force *he or those conducting his business* shall only be liable to an employee for personal injury or death by accident to the extent and in the manner herein specified. (Emphasis added.)

In *Feitig v. Chalkley*, 185 Va. 96, 38 S. E. 2d 73 (1946), the Supreme Court of Appeals of Virginia was confronted with an issue which it spelled out in these words:

The specific inquiry is—Do the words, “any other party,” as used in [Code § 65-38] include a co-employee or fellow servant, or is a co-employee or fellow servant included in the phrase, “those conducting his business,” found in [§ 65-99]? 185 Va. at p. 101, 38 S. E. 2d at p. 75.

The court held that an injured workman’s fellow servant or co-employee is a person within the meaning of the phrase, “those conducting his [i.e. the employer’s] business” and hence is immune from liability in a common law action for injuries which he has negligently caused.

It should be remembered that before the adoption of the Act the fellow servant rule gave immunity to the master but did not affect the liability of the servant who immediately caused harm to his fellow servant. “Of course, the [fellow servant] doctrines here considered do not affect the liability of the servant, whose negligence caused the injury, to the servant injured. . . . [T]here is nothing in the fellow servant situation to change that liability.” 2 Mechem, *Agency*, § 1647 (1914). Under the Act, as interpreted by the Virginia court, the employer is liable to pay compensation, while the negligent servant who caused the harm is immune from common law liability and is, of course, not liable to pay compensation under the Act.

But the Virginia court in *Feitig v. Chalkley* did not rest its decision on an interpretation of Code § 65-99 alone. It pointed out that if an injured servant could recover in a common law action against his negligent fellow servant, then under § 65-38 the employer would be subrogated to the injured servant’s right of action to the extent of compensation paid by the employer under the Act. The result would be that

the Act would not cover the entire field of industrial accidents. . . . Instead of the loss of such industrial accidents being cast upon business as an expense thereof, the wages of fellow workmen will become an ultimate insurance fund for the exoneration of both industry and compensation insurance carriers for the ultimate loss.

Instead of providing relief to workmen, it will place in the power of employers and compensation insurance carriers the right to recoup from workmen loss which should be borne by the business. 185 Va. at p. 104, 38 S. E. (2d) at p. 76.

The result reached has been justified as follows:

There is certainly ample justification in compensation theory for extending immunity to fellow employees. By working in industry, a worker not only runs the risk of being injured, but of negligently injuring others. Both risks are inherent in the business, and in neither situation is the individual employee in a position to sustain the economic loss. Note, *Tort Immunity and Workmen's Compensation*, 39 Va. L. Rev. 951, 957 (1953).

In any event, the statement quoted above from the court's opinion would seem to have disposed of the precise issue before the court. But it proceeded to go beyond the immediate and "specific inquiry" to say:

When the theory, the history and the broad purposes of the act are considered, it would seem that "other party," as used in section [65-38], refers exclusively to those persons who are *strangers to the employment and the work*, and does not include those who have accepted the act and are within the express terms of section [65-99]—"he, (employer) or those conducting his business." 185 Va. at p. 104, 35 S. E. 2d at p. 76. (Emphasis added.)

In *Sykes v. Stone & Webster*, 186 Va. 116, 41 S. E. 2d 469 (1947), this new notion that "any other party" means a "stranger to the employment and the work" was applied to a limited extent in an action brought by the personal representative of a deceased employee of a sub-contractor to recover for his death caused by the negligence of the principal contractor. The plaintiff relied on the statute, now § 65-5, providing that:

Nothing in this act shall be construed to make, for the purposes of the act, the employees of an independent contractor the employees of the person or corporation employing or contracting with such independent contractor.

Nevertheless the court held that the principal contractor was the "statutory employer" of the sub-contractor's employee because the Act (in those sections now numbered 65-26 through 65-29) makes the owner, contractor, and sub-contractor liable to pay compensation under the Act to any workman employed by a sub-contractor engaged in "any work which is a part of his [i.e. the owner's, contractor's, or sub-contractor's] trade, business or occupation" as if the workman had been immediately employed by him.

It clearly appears to be the purpose of section 20(a) [now §§ 65-26 through 65-29] to bring within the operation of the Compensation Act all persons engaged in any work that is a part of the trade, business or occupation of the original party who undertakes as owner, or contracts as contractor, to perform that work, and to make liable to every employe engaged in that work every such owner, or contractor, and subcontractor, *above* such employe. But when the employe reaches an employer in the *ascending* scale, of whose trade, business or occupation the work being performed by the employe is not a part, then that employer is not liable to that employe for compensation under section 20(a) [now §§ 65-26 through 65-29]. At that point paragraph 5 of section 12 [now § 65-5] intervenes and the employe's right of action at common law is preserved. 186 Va. at p. 122, 41 S. E. 2d at p. 472. (Emphasis added.)

It will be noted that in *Sykes v. Stone & Webster* the notion of a *quid pro quo* is adhered to. Since the sub-contractor's employe has a right to recover statutory compensation under the Act from the principal contractor, it is held that he has no common law right of action against him.

In tracing the chronological development of the law in

Virginia it should be noted that in *Sears-Roebuck v. Wallace*, 172 F. 2d 802 (1949), it was held that an employee of a sub-contractor who was not engaged in any work that was a part of the owner's "trade, business or occupation" had not been given any right against the owner by the Workmen's Compensation Act and *therefore* was entitled to maintain a common law action against the owner.

And in *Coker v. Gunter*, 191 Va. 747, 63 S. E. 2d 15 (1951), the rule of *Feitig v. Chalkley*, *supra*, was adhered to.

It was in 1954, in an interpretation of Virginia law by the Federal Court of Appeals for the Fourth Circuit, that a significant departure was made. In *Doane v. Dupont*, 209 F. 2d 921 (1954), the court held that an owner's employee who had been injured through the negligence of servants of an independent contractor (called "sub-contractor" in § 65-26)—doing work under contract with the owner—could not recover from such contractor for his injuries because the contractor was not a "stranger to the business and the work" of the owner. Here for the first time the Virginia Workmen's Compensation Act was construed to deprive an injured employee of his common law right to recover for injuries tortiously inflicted upon him by servants of an independent contractor even though the Workmen's Compensation Act admittedly gave him no right to statutory compensation from such contractor. As between the injured employee and the defendant contractor there was no *quid pro quo* to support this result. Furthermore, the owner-employer and his compensation insurance carrier, having paid the limited compensation provided for in the Act, could not recover any reimbursement from the actual wrongdoers. (This interpretation of the Act was contrary to that long held by the Industrial Commission of Virginia, as evidenced by a letter from Mr. W. L. Robinson, Examiner, printed in the appellant's brief in the case at pp. 27-29.)

It should be noted that the Federal Court ignored the point made in *Sykes v. Stone & Webster*, *supra*, that an injured employee had a right to recover compensation under the Act from any "employer in the *ascending* scale" and *therefore*

could not maintain a common law action against him. (Emphasis added.) Here for the first time, it was held that an injured workman could not recover at common law from an independent contractor in the *descending* scale even though the Workmen's Compensation Act gave him no right to statutory compensation from him. It may be repeated that there was no *quid pro quo* here. Dupont was held immune from liability of any kind to ten employees of the Texas company who were "severely injured" because of the alleged negligence of Dupont's engineer and technician in handling a product of "dangerous character."

Apparently the Fourth Circuit Court of Appeals was not aware of the fact that the very same question of Virginia law had been considered four years earlier by the United States Court of Appeals, District of Columbia Circuit. In *Haw v. Liberty Mut. Ins. Co.*, 180 F. 2d 18 (1950), an employee of the owner, engaged in a building job on the owner's property in Arlington, Virginia, was injured through the negligence of an independent contractor who had agreed to do the excavation work. The Liberty Mutual Ins. Co., having paid Virginia Workmen's Compensation benefits to the injured workman, brought action as his subrogee against the independent contractor and for his use. The court said:

This case does not involve a question of liability to a member of the general public, having no connection with the construction work. Here a worker is alleged to have been injured through the fault of another worker, hired and paid for by a different employer, but engaged in the same general undertaking. In such a situation . . . where workmen's compensation is available, the question is presented whether that employer should be made liable to the injured man in a suit for damages. . . . In this case, both parties regarded Virginia law as governing. . . .

Giacomo [the injured workman] was . . . entitled to workmen's compensation from [his employer]. It is arguable that the accident which happened to him was simply one of the industrial risks which workmen's compensation was designed to cover [citing *Feitig v. Chalkley*,

supra, and *Sykes v. Stone & Webster, supra*]. On the other hand, full redress is not always produced by the statutory compensation formula. And apart from recompense to the employee, the compensation insurer had an interest in any possible recovery which may be obtained against a third party responsible for the industrial accident. We do not think that the facts of the instant case require a departure from the ordinary application of the rules of *respondeat superior*. We find affirmative support for this result in the Virginia compensation act, which specifically provides for full recovery from a third party tortfeasor, for the benefit of both the injured employee and the compensation insurer [citing § 65-38 and § 65-108].

It might have been thought that the Virginia Supreme Court of Appeals, at its first opportunity, would have repudiated the Fourth Circuit Court of Appeals' interpretation of Virginia law and reached a result consistent with that in the *Haw* case. But it was not so to be. In 1957, the Virginia court had the case of *Rea v. Ford*, 198 Va. 712, 96 S. E. 2d 92 (1957), in which an employee of a general contractor was killed through the alleged negligence of an employee of a sub-contractor and the negligence of the sub-contractor, himself, in furnishing a dangerously defective crane. The Virginia court adopted the reasoning of the Fourth Circuit Court of Appeals in the *Doane* case without reservation, saying:

In the present case Ford, the defendant, was no stranger to the business of . . . the principal contractor. On the contrary . . . Ford was a sub-contractor engaged in an essential part of the work which the principal contractor had to do. Thus he was not an "other party" within the meaning of Code, § 65-38. Like the principal contractor, Ford was under the canopy of the Workmen's Compensation Act and not subject to an action at law for damages for injury to or death of Rea who was engaged in the same work. Code. § 65-37, *supra*. 198 Va. at p. 717, 96 S. E. 2d at p. 96.

Here, again, the reader should be reminded that the result of this decision was to grant absolute immunity from liability of any kind to a sub-contractor whose own negligence, as well as that of his servant, allegedly caused the wrongful death of the plaintiff's intestate.

In *Kramer v. Kramer*, 199 Va. 409, 100 S. E. 2d 37 (1957), the Virginia court had a case in which the relationship of the deceased employee and the defendant was neither "ascending" nor "descending," but horizontal. An employee of one independent contractor was killed through the alleged negligence of another independent contractor. Both contractors were engaged in construction work on new portions of a church building and since it was held that their work was not within the "trade, business or occupation" of the owner (the church) the Workmen's Compensation Act did not preclude recovery. The court said:

If the employee of one independent contractor cannot sue another independent contractor at common law, *it must be because under the compensation law the plaintiff is the employee of the defendant*, which would mean that the defendant was liable for compensation to the employees of the plumbing, heating, painting, and all other contractors with whom the church contracted to do part of the work on the church building. 199 Va. at p. 418, 100 S. E. 2d at p. 44. (Emphasis added.)

Here we see a re-affirmation of the *quid pro quo* idea which is at the basis of the Workmen's Compensation Act. Since the plaintiff had not been given any substitute right against the defendant by the Workmen's Compensation Act, he retained his right to recover from the defendant in a common law action.

Two years later, this principle was either lost sight of or deliberately discarded in *Anderson v. Thorington*, 201 Va. 266, 110 S. E. 2d 396 (1959). In its opinion the court apparently dismissed the *Kramer* case as resting on the ground that the plaintiff's employer and the defendant independent contractor were engaged in work which "was not a part of

the trade, business or occupation of the church so as to make it liable [to pay statutory compensation] under Section 65-26."

But it neglected to re-state the significance of the last clause in that statement, which has been quoted above. Anderson, an employee of a New York firm of consulting engineers, was injured through the negligence of employees of a construction company (Thorington) during the construction of a bridge. The firm by which Anderson was employed was a general contractor in relation to the owner. Thorington was another general contractor. The Workmen's Compensation Act did not give Anderson any rights against Thorington. But it was interpreted as taking away his common law rights against Thorington.

The court reasoned that under Code § 65-26 the employees of the Engineers had a right to statutory workmen's compensation from the owner and that the employees of Thorington had a like right.

Thus the employees of the Engineers, including Anderson, and the employees of Thorington were statutory fellow servants. This being so, Anderson could not maintain an action at law against the negligent servants of Thorington who caused his injury [citing *Feitig v. Chalkley, supra*]. Neither may Anderson maintain this common law action against Thorington, the principal of the alleged negligent servants, for this would entitle Thorington to seek indemnity from its negligent employees which would be tantamount to permitting Anderson to sue such negligent employees directly.

And so Anderson, a project inspector for Parsons, Brinckerhoff, Hall & McDonald, consulting engineers of New York, is found to be a "fellow servant" of the employees of the Thorington Construction Company, Inc., a Virginia construction company.

This extreme application of the fellow servant rule could hardly have been anticipated in 1837 when the defense was first suggested in an English case, *Priestly v. Fowler*. 3 M.

& W. 1, or in 1841 when it was first adopted in an American case, *Murray v. South Carolina R. Co.*, 1 McMull. L. (S. Car.) 385, 36 Am. Dec. 268, and followed a year later in the Massachusetts case of *Fairwill v. Boston & Worcester R. Co.*, 4 Metc. (Mass.) 49, 38 Am. Dec. 339.

One writer has said:

Very appropriately, this exception was first announced in South Carolina, then the citadel of human slavery. It was eagerly adopted in Massachusetts, then the center of the factory system, where some decisions were then made in favor of great corporations, so preposterous that they have been disregarded in every other state without even the compliment of refutation. 1 Shearman and Redfield, *Negligence, vi*, Introduction (5 ed., 1898), quoted in Horowitz, *Workmen's Compensation*, p. 3 (1944).

And compare this statement of the leading authority in the field of Agency:

Servants employed by different masters engaged in independent pursuits, though working together at the same time and place and for the general accomplishment of the same end, are not usually fellow servants within the rule. To make them such there must be a common employment or the general servant of one master must for the time being have become the special servant of the other in whose service the injury occurred. 2 Mechem, *Agency*, § 1656 (1914).

Less than two months later, in *Williams v. Gresham Co.*, 201 Va. 457, 111 S. E. 2d 498 (1959), it was held that an owner's employee who was injured through the negligence of servants of an independent contractor (when they permitted the follow block of their pile driving apparatus to fall and strike him) had lost his common law rights against the contractor by virtue of the Workmen's Compensation Act, even though the Act gave him no right to statutory compensation from such contractor. The compensation insurance carrier,

having paid the compensation awarded to the injured workman under the Act, could not recover reimbursement from the contractor whose servants had caused the harm.

And in *Floyd v. Mitchell*, 203 Va. 269, 123 S. E. 2d 369 (1962), it was held that the personal representative of an owner's employee could not recover anything from an independent contractor whose servant had negligently caused the employee's wrongful death. See, also, *Home Indemnity v. Poladian*, 270 F. 2d 156 (4th Cir. 1959).

The effect of the decisions which have here been discussed is to take away from an injured employee valuable common law rights against wrongdoers who have injured him, and their employers, without giving him any substitute rights against them in return. It seems unconscionable and unwise as a matter of State policy to grant to anyone a license to injure or kill with immunity from civil liability of any kind. Upon reflection it will be seen that this is the result of the *Doane* case and the Virginia cases that have followed it. Advised as to the present state of Virginia law, a contractor undertaking to do work which is part of the "trade, business or occupation" of the owner or his principal contractor may safely tell his workmen to get the job done with all possible speed, having no regard for the life or safety of any other workmen except those employed by the contractor's sub-contractors. For under the existing *Doane* doctrine a contractor and his workmen will be absolutely immune from civil liability of any kind when they negligently cripple or kill an employee of another employer "engaged in the same operation" and "not a stranger to the employment and the work," unless the injured workman's employer is a sub-contractor below the particular contractor in the hierarchy of contractors engaged in the operation.

In the great majority of states only employers and "statutory employers," who are liable to pay compensation under Workmen's Compensation Acts, are held to be immune from liability in common law actions brought by injured workmen. According to Larson, *Workmen's Compensation*, § 72.32 (1952 with 1961 supplement), only two other states, Florida and

Massachusetts, belong to the minority with which Virginia is presently aligned.

In 1960, a bill was introduced in the Virginia General Assembly (H. B. 564) providing that while an injured employee's rights under the Workmen's Compensation Act should exclude all other rights against his employer, his "statutory employers," (who by the Act are made liable to pay him statutory compensation) and the servants of his employer and statutory employers, nevertheless "nothing contained in this Act shall be construed to take away by implication any other rights and remedies of such employee, his personal representative, parents, dependents, or next of kin, against any other person, at common law or otherwise, on account of such injury, loss of service or death."

This bill was passed by the House of Delegates and was reported favorably by the Courts of Justice Committee of the Senate, but was defeated in the last moments of the session when its proponents were unable to muster an 80% vote of the Senate to waive the required constitutional reading. It is to be hoped that at a future session of the Virginia Legislature the same, or a similar, bill will be enacted into law.