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# Workmen's Compensation - Right of Persons Not Dependent to Recover in Tort

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parently, the court will not categorically presume that the parties intended either the law of the place of the execution of the contract or of the place of the employment to govern their contract;<sup>38</sup> but it will take into consideration *all of the various factors* as tending to show the intent of the parties. The applicability of the act to any particular case will depend upon its peculiar facts. The place of the contract, the place of the employment and the place of the industry of the employer will still be of prime importance. The place of the injury and the residence of the parties, although of comparatively slight importance, will also be considered.

An additional procedural point in the decision is worthy of mention. The Louisiana court accepted the prevailing view in overruling the pleas of *res judicata* and *estoppel*. Proceedings may be brought in a state under its applicable Workmen's Compensation Act, although the act of another state also is applicable.<sup>39</sup> The fact that an award was made under the act of another state does not bar a subsequent proceedings, but a credit is allowed for the amount already received.<sup>40</sup> In this case credit was voluntarily given.

J. C. W.

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WORKMEN'S COMPENSATION—RIGHT OF PERSONS NOT DEPENDENT TO RECOVER IN TORT—An employee was injured while in the course of employment, and died thirteen hours later as a result of having been burned and scalded by steam and hot water emanating from a defective stationary engine. Plaintiffs, a brother and sister, not dependents, but sole heirs of their brother, brought this action to recover damages *ex delicto* under Article 2315 of the Civil Code. The court *held* for the defendants saying that a contract of employment to do hazardous work is governed exclu-

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case with reference to the nature of the work to be done, the place of performance, the domicile of the parties, etc.—all with a view of discovering the true intent of the parties." *Hunt v. Magnolia Petroleum Co.*, 10 So. (2d) 109, 112 (La. App. 1942): "and his proven intention not to reside permanently in the State of Texas where the last job was to be performed."

38. In contracts generally, the majority of the courts of the United States, while also seeking the intention of the parties, indulge in presumptions as to the place intended. It is usually presumed that the place of performance is intended. Cf. *Stumberg, Principles of Conflicts of Laws* (1937) 209.

39. American Law Institute, *Restatement of the Law of Conflict of Laws* (1934) 489, § 402.

40. *Id.* at 489, § 403.

sively by the provisions of the compensation law, not only with respect to the right and remedy of the employee himself, but as to all persons designated by Article 2315 of the Civil Code as having a right of action to recover for death by wrongful act. *Atchison v. May*, 10 So. (2d) 785 (La. 1942).

The question of the right of persons not entitled to compensation under Workmen's Compensation Acts to sue in tort for the wrongful death of a relative has given occasion for little active consideration by the courts. The instant case is the first to reach the Louisiana Supreme Court on this issue, and it raises two problems—one of statutory interpretation, the other a social problem which lies at the root of such legislation. Article 2315 of the Civil Code<sup>1</sup> provides:

“Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the children, including adopted children, or spouse of the deceased, or either of them, and in default of these, in favor of the surviving father and mother or either of them, and in default of any of the above persons, then in favor of the surviving brothers and sisters, or either of them. . . .”

The Louisiana Employers' Liability Act<sup>2</sup> provides:

“The rights and remedies herein granted to an employee or his dependent on account of a personal injury for which he is entitled to compensation under this act shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, relations, or otherwise, on account of such injury.”

The crux of the problem in the instant case apparently turns on the interpretation of this section of the Employers' Liability Act. Justice McCaleb, in presenting the opinion of the court, submitted the cases of *Philps v. Guy Drilling Company*<sup>3</sup> and *Colorado v. Johnson Iron Works*<sup>4</sup> as authority for holding that a contract of employment to do hazardous work is governed exclu-

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1. Art. 2315, La. Civil Code of 1870, as last amended by Act 159 of 1932, § 1.

2. La. Act 20 of 1914, § 34, as last amended by La. Act 38 of 1918 [Dart's Stats. (1939) § 4423]. See also La. Act 20 of 1914, § 3, as amended by Act 85 of 1926 [Dart's Stats. (1939) § 4393].

3. 143 La. 951, 79 So. 549 (1918).

4. 146 La. 68, 83 So. 381 (1919).

sively by the provisions of the compensation law, not only with respect to the right and remedy of the employee himself, but as to all persons designated as beneficiaries by Article 2315 of the Civil Code having a right or cause of action to recover for death by wrongful act. But it must be noted that in these cases the plaintiffs were entitled to compensation under the compensation act as dependents. It was maintained by the defense that a different result should be reached in a case like the instant one where the petition shows on its face that the deceased left no dependents at all.<sup>5</sup> However, it is further pointed out in the opinion that in *Williams v. Blodgett Construction Company*,<sup>6</sup> reviewing the constitutionality of Section 34 of the Employers' Liability Act, the court held that the rights and remedies provided in that act were exclusive, and brothers and sisters of the deceased were not allowed to maintain an action under Article 2315 of the Civil Code, notwithstanding the plaintiff's allegation that there were no dependents entitled to compensation under the act.

A number of jurisdictions have denied the personal representative of a deceased employee this right declaring that the provision of the compensation act stating that the rights and remedies granted to an employee on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, dependents, or next of kin at common law or otherwise, on account of such injury or death.<sup>7</sup> In conformity with this rule the Florida Supreme Court denied an action in tort to personal representatives notwithstanding that the employee left no dependents to take compensation under the act.<sup>8</sup> These decisions might be vindicated by the positive wording of the statutes, which apparently manifest the legislature's intention to substitute the compensation act in the place

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5. *Atchison v. May*, 10 So.(2d) 785, 788 (La. 1942).

6. 146 La. 841, 84 So. 115 (1920).

7. *McDonald v. Miner*, 218 Ind. 373, 32 N.E.(2d) 885 (1941); *Shanahan v. Monarch Engineering Co.*, 219 N.Y. 469, 114 N.E. 795 (1916); *Liberato v. Royer*, 281 Pa. 227, 126 Atl. 257 (1924), affirmed 270 U.S. 535, 46 S.Ct. 373, 70 L.Ed. 719 (1926). If the defendant could have established the requisite employment he would have prevailed, for the Workmen's Compensation Act furnishes the exclusive method of securing compensation for an injury, and the action for wrongful death will not lie. *Vescio v. Pa. Electric Co.*, 336 Pa. 502, 9 Atl.(2d) 546 (1939). If claimant could have recovered under the Employers' Liability Act for death of deceased, she would have had no cause of action under Article 2315 of the Civil Code. *Dandridge v. Fidelity & Casualty Co. of New York*, 192 So. 887 (La. App. 1939).

8. *Chamberlain v. Florida Power Corporation*, 144 Fla. 719, 198 So. 486 (1940).

of all other liability.<sup>9</sup> The present case, in harmony with this view, was decided under a similar statute.<sup>10</sup>

On the other hand, there is authority for holding the opposite. Awarding damages to a widow on behalf of herself and eight children, only three of whom were dependents within the meaning of the Workmen's Compensation Act, the Minnesota Supreme Court declared that the wrongful death act is not amended or supplemented so as to effect the rights of the next of kin who are not dependents under the compensation act.<sup>11</sup> This view might find support in the numerous decisions, purporting to construe the purpose of such legislation, which explain that the Workmen's Compensation Acts were designed primarily to improve the fortune of the workman and his family,<sup>12</sup> and not to assure the employer of immunity from any liability.

In the present decision the court, without reserve, labels the Employers' Liability Act "social legislation" and presumably justifies their interpretation of the act by social policy. A review of the Louisiana decisions in the matter of the compensation act reveals the court's theory that the purpose of the act is primarily to lift the burden of industrial accidents from the injured workman and place it on industry.<sup>13</sup> The act provides a quicker and more positive remedy to a certain group of persons, and at the

9. Fla. Acts 1935, c. 17481, § 11, Fla. Comp. Gen. Laws Ann. (Skillman, Supp. 1936) § 5966(11) provides "The liability of the employer . . . shall be exclusive and in the place of all other liability . . .;" Minn. Stats. 1937, c. 64, § 3, Minn. Stat. (Mason, Supp. 1940) § 4272-3 uses the same proviso; Ind. Acts 1929, c. 172, § 6, Ind. Stat. Ann. (Burns, 1933) § 40-1206 provides "The rights and remedies herein granted to an employee . . . shall exclude all other rights . . .;" Pa. Acts 1915, No. 333, p. 736, Pa. Stat. Ann. (Purdon, 1939) tit. 77, § 673 provides "such agreement . . . shall operate as a surrender by the parties thereto of their rights . . . other than as provided in . . . this act."

10. La. Act 20 of 1914, § 34, as last amended by La. Act 38 of 1918 [Dart's Stats. (1939) § 4423] provides "The rights and remedies herein granted . . . shall be exclusive of all other rights and remedies . . ." Id. at § 3 [Dart's Stats. (1939) § 4393] provides "Such an agreement shall be a surrender by the parties thereto of their rights to any other method, form, or amount of compensation or determination thereof than as provided in this act, and shall bind the employee himself, his widow and relations, and dependents as hereinafter defined."

11. *Joel v. Peter Dale Garage*, 206 Minn. 580, 289 N.W. 524 (1940).

12. *Wheeling Corrugating Co. v. McManigal*, 41 F.(2d) 593 (C.C.A. 4th, 1930); *Bowen v. Hockley*, 71 F.(2d) 781, 94 A.L.R. 856 (C.C.A. 4th, 1934); *Corral v. Ocean Accident & Guarantee Corporation*, 42 Ariz. 213, 23 P.(2d) 934 (1933); *Union Iron Works v. Industrial Ace Commission of California*, 190 Cal. 33, 210 P. 410 (1922); *Faber v. Industrial Commission*, 352 Ill. 115, 185 N.E. 255 (1933); *Richards v. Rogers Boiler and Burner Co.*, 252 Mich. 52, 234 N.W. 428 (1928).

13. *Hall v. City of Shreveport*, 157 La. 589, 102 So. 680 (1925); *Barr v. Davis Bros. Lumber Co.*, 183 La. 1013, 165 So. 185 (1935); *Kroncke v. Caddo Parish School Board*, 183 So. 86 (La. App. 1938); *Brownfield v. Southern Amusement Co.*, 196 La. 73, 198 So. 656 (1940); *Puchner v. Employers' Liability Assur. Corporation*, 198 La. 921, 5 So.(2d) 288 (1941).

same time provides for the employer a liability which is limited and determinate. Article 2315 provides a right of action compatible with the theory of heirship<sup>14</sup> and not merely to dependents; but it is only a right to damages for wrongful conduct. It is submitted that the Employers' Liability Act is an entirely different and improved type of remedy, designed to protect a certain class of persons—persons who might become public charges without the aid of the employer. It is for these people that the legislature provided compensation irrespective of fault on the part of the employee, leaving untouched the rights of heirs not dependents.

Suppose in the present case the deceased had lived several months. By the provisions of Article 2315 he would be entitled to *damages* for suffering from scalds and burns resulting from the employer's negligence. Such an action does not abate with the death of the employee, but is transmitted to certain designated heirs, among whom are brothers and sisters.<sup>15</sup> Under the Employers' Liability Act the employee would be entitled to a fixed rate of compensation for disability caused by the accident,<sup>16</sup> or in case of his death, his dependents would be entitled to compensation.<sup>17</sup> In return for the improved remedy afforded *them* by the compensation act, the *employee and his dependents* must give up all other rights on account of such injury. Yet, the effect of the *Atchison* case is to disregard Article 2315 entirely, and substitute therefor the remedy provided by the compensation act—to allow compensation only to dependents.

In a period of war, when oftentimes all members of families are engaged in defense employment, it seems there might be many cases arising under the compensation law where there would be no dependents. It appears to the writer that the *Atchison* case creates an embarrassing situation, where the employer

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14. Art. 945, La. Civil Code of 1870.

15. In the early case of *Chivers v. Roger*, 50 La. Ann. 57, 23 So. 100 (1898), the court pointed out that although an action for damages was personal, and personal actions do not survive the death of the beneficiary, in view of Article 2315, this right exists in favor of certain designated heirs after the death of the beneficiary. But the court did not allow an action by the brothers and sisters of the deceased because they were not designated in the code as heirs to whom the deceased's right was transmitted. However, the effect of this decision has been abrogated by various amendments to Article 2315 which have provided for the survival of the deceased's right of action in favor of certain designated surviving beneficiaries, among whom are included brothers and sisters.

16. La. Act 20 of 1914, §§ 1-2 [Dart's Stats. (1939) §§ 4391-4392].

17. *Id.* at § 8 [Dart's Stats. (1939) § 4398].

is allowed to go "scot free" after failing to provide a safe working place for his employees. To abolish the employer's liability under Article 2315 where there are no dependents is to give him protection for which he does not pay. An unbroken line of decisions interprets the Employers' Liability Act liberally to favor the employee; the present decision interprets it literally to the detriment of his estate. If this is to be the jurisprudence of the court, it is a matter for legislative attention.

*J.J.C.*