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Workmen's Compensation - Hazardous Nature of Employer's Business

David M. Ellison Jr.

court based its decision in the instant case, seems to be consistent with civilian principles of tort liability by providing, in part, that "anyone who is injured or damaged by the agent or broker by any wrongful act done in the furtherance of such business or by any fraud or misrepresentation by the agent or broker may sue for the recovery of the damage before any court of competent jurisdiction."[16] The court found that the statute placed real estate brokerage in the status of a public business, vested with a public interest and subject to police regulation. This being true, it reasoned that the defendant owed a duty to the public and since the plaintiff was a member of the public, he was entitled to have his offer communicated by the defendants to the vendor.[17] Although the court's action could perhaps be sustained under other theories, both at common law and under civilian principles, it is submitted that the ground on which the decision was based, that of giving effect to the legislative policy of requiring high standards of conduct by real estate agents, is sound.

Charles W. Howard, Jr.

WORKMEN'S COMPENSATION — HAZARDOUS NATURE OF EMPLOYER'S BUSINESS

Plaintiff, a saleslady and beauty operator employed by a retail concessionaire aboard a steamship, was injured[1] and brought suit under the Louisiana Workmen's Compensation Act,[2] alleging total and permanent disability. She contended that the presence of the employer's concession aboard a steam-powered vessel rendered it a hazardous business within the coverage of the act, despite the fact that her employer neither owned nor

16. LA. R.S. 37:1447 (1950).

17. *Cf.* Zichlin v. Dill, 157 Fla. 96, 25 So.2d 4 (1946), cited by the majority in the instant case. The court there found that the Florida statutes regulating real estate brokerage created a duty of fair dealing to the plaintiff by the defendant broker, inasmuch as the statutes granted a virtual monopoly to engage in a lucrative business and required that applicants for brokerage licenses be trustworthy, honest, and bear a reputation for fair dealing.

1. The sequence of events surrounding the accident were as follows: Plaintiff was sunbathing on the ship's deck when, upon attempting to arise, a sudden roll of the ship caused her to slip and fall. Such circumstances present very unusual and somewhat difficult problems as to whether the injury was one "arising out of" and "in the course of" the employment. The manner in which the court disposes of these problems in granting recovery is very interesting, although unfortunately beyond the scope of this Note.

2. LA. R.S. 23:1021 *et seq.* (1950). For complete discussion of hazardous businesses, see MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE c. 5 (1951).

operated the vessel. The trial court rendered judgment in favor of plaintiff and the insurer appealed. *Held,* affirmed. The fact that plaintiff was required as a part of her regular duties to be aboard an engine-powered vessel was sufficient to render the retail merchandise business hazardous within the meaning of the Workmen's Compensation Act. *Rosenquist v. New Amsterdam Casualty Co.,* 78 So.2d 225 (La. App. 1955).

In order for a business to be classified as hazardous within the meaning of the Workmen's Compensation Act, it must be either specifically designated as hazardous by the act or its operations must involve certain enumerated hazardous features.[3] Businesses which are not included in either of these categories, even though they are clearly hazardous in fact,[4] can be brought within the scope of the act only by express agreement between employer and employee.[5] Sometimes, however, desired flexibility in the interpretation of the act can be achieved by resort to the so-called "omnibus provision" which renders a business hazardous if it entails the "operation of boilers, furnaces, engines and other forms of machinery."[6] Louisiana courts have frequently relied upon this provision to extend the coverage of the act to businesses which would otherwise be regarded as non-hazardous.[7] This has been especially evident with regard to those businesses which entail the operation of motor vehicles.[8] In the leading case on this subject,[9] the court was able to regard a truck driver as

3. LA. R.S. 23:1035 (1950).

4. Hecker v. Betz, 172 So. 816 (La. App. 1937); Adkins v. Holsum Cafeteria, 159 So. 758 (La. App. 1935); Foret v. Paul Ziblich Co., 137 So. 366 (La. App. 1931); Dejan v. Ujffy, 14 Orl. App. 230 (La. App. 1917).

5. See LA. R.S. 23:1035 (1950), providing in part: "The question of whether or not a trade, business, or occupation not named herein is hazardous may be determined by agreement between the employer and employee or by submission at the instance of either to the court having jurisdiction over the employer in a civil case. The decision of the court shall not be retroactive in its effect."

6. LA. R.S. 23:1035 (1950).

7. Scott v. Dalton Co., 1 So.2d 412 (La. App. 1941) (in cases where employees are injured in a business not mentioned, the court may consider the duties required, and whether they are hazardous, although the business of the employer is not listed as hazardous): Crews v. Levitan Smart Shops, 171 So. 608 (La. App. 1937) (the fact that the defendant's business of operating a clothing store is not generally hazardous was held to be of no importance since in conjunction with the store he operated a gasoline engine); see Byas v. Hotel Bentley, Inc., 157 La. 1030, 103 So. 303 (1924) (hotel employee).

8. Collins v. Spielman, 200 La. 586, 8 So.2d 608 (1942); Haddad v. Commercial Motor Truck Co., 146 La. 897, 84 So. 197 (1920); Pierce v. Farm Development Corp., 39 So.2d 154 (La. App. 1949); Ridgell v. Tangipahoa Parish School Board, 17 So.2d 55 (La. App. 1944); Moritz K.C.S. Drug Co., 149 So. 244 (La. App. 1933); Richardson v. Crescent Forwarding & Transportation Co., 135 So. 688 (La. App. 1931).

9. Haddad v. Commercial Motor Truck Co., 146 La. 897, 84 So. 197 (1920).

engaged in a business entailing the "operation of machinery" simply by classifying the entire motor vehicle as a "machine." By this approach, coverage has been extended to include loaders[10] and riders[11] of motor vehicles as persons engaged in hazardous occupations.[12] Thus it now appears that the mere fact that plaintiff is near machinery while in the course of his employment may be sufficient to render his employment hazardous.[13] However, several recent cases involving the operation of motor vehicles have required, as a prerequisite to a determination of whether a particular business is hazardous, that the motor vehicle involved either be owned by the employer or at least be operated in his business by one of his employees.[14] In these cases, the mere fact that the businesses involved exposed their employees to vehicles owned and operated by third persons was not regarded as sufficient to bring the businesses within the scope of the act.

In the instant case, the court apparently characterized the entire vessel on which the retail merchandise business was conducted as a "machine" and regarded plaintiff's situation as analogous to that of a rider aboard a motor vehicle.[15] More importantly, however, the court failed to require, as an essential element of such a "hazardous business," that the vessel involved

10. Snear v. Eiserloh, 144 So. 265 (La. App. 1932); Richardson v. Crescent Forwarding & Transportation Co., 135 So. 688 (La. App. 1931).

11. Steiffel v. Valentine Sugars, 188 La. 1091, 179 So. 6 (1938); Comeaux v. South Coast Corp., 175 So. 177 (La. App. 1937); Crews v. Levitan Smart Shops, 171 So. 608 (La. App. 1937); *contra*: Lewis v. A. Moresi Co., 196 So. 70 (La. App. 1940); Allen v. Yantis, 196 So. 530 (La. App. 1940); Tregre v. Kratzer, 148 So. 271 (La. App. 1933) (farming vehicles involved).

12. In the great majority of cases arising on the subject the plaintiff has been the driver of the vehicle in question and accordingly, great emphasis has been placed upon the operation of "engines and other forms of machinery" as a basis for recovery, rather than upon other dangers such as traffic hazards. See Comment, 7 LOUISIANA LAW REVIEW 415, 418 (1946): "Emphasis has always been on operation of the engine."

13. Ryland v. R. & P. Const. Co., 19 So.2d 349 (La. App. 1944) (night watchman whose duty was to guard dormant machinery); Washington v. Sewerage & Water Board, 180 So. 199 (La. App. 1938) (water boy on construction job); Dyer v. Rapides Lbr. Co., 154 La. 1091, 98 So. 677 (1923) (night watchman who cleaned dormant engines). See MALONE, WORKMEN'S COMPENSATION LAW AND PRACTICE 117 (1951): "It is not necessary that the work itself be hazardous if its performance . . . obliges him to be near machinery or substances which characterize the business as hazardous."

14. Fields v. General Casualty Co. of America, 36 So.2d 843 (La. App. 1948), criticized, 11 LOUISIANA LAW REVIEW 192 (1951); Reazor v. First National Life Insurance Co., 28 So.2d 527 (La. App. 1946).

15. Rosenquist v. New Amsterdam Casualty Co., 78 So.2d 225, 228 (1955): "[A]ny employee whose duties bring him in contact with motor-driven vehicles is protected by the workman's compensation law. This being so, we can think of no reason why a business conducted on an ocean-going vessel should not be held to be hazardous."

be either owned or operated by plaintiff's employer.[16] Inasmuch as the steamship was absolutely essential to the operation of plaintiff's business and, in effect, rendered the business one which entailed[17] "the operation of engines and other forms of machinery," the finding of the court seems justifiable. Although the court did not indicate whether it would extend the reasoning of the instant case to other situations, the decision could possibly be regarded as an abandonment of the requirement that the vehicle be either owned or operated by the employer for the business to be hazardous. If the result of the instant case is followed, there is a possibility the courts will extend coverage to curb-service establishments, drive-in theaters, and other similar businesses that frequently expose their employees to the dangers of motor vehicles owned and operated by third persons. If they do so, however, the courts should take great care to restrict coverage to those businesses in which the operation of motor vehicles is absolutely vital and to deny coverage to those which merely expose their employees to motor vehicles in an incidental manner. With this restriction as a safeguard, the modified rule should pose no threat of abolition to the distinction between hazardous and non-hazardous businesses and there should be no fear of administrative difficulties.

David M. Ellison, Jr.

16. *Cf.* Fields v. General Casualty Co., 36 So.2d 843 (La. App. 1948) (in denying recovery to an employee injured while loading a customer's truck, the court emphasized that "in all of the cases cited by counsel for plaintiff, the employer either owned or operated, or borrowed and operated, or used and controlled the motor vehicle").

17. See *The Work of the Louisiana Supreme Court for the 1949-1950 Term — Torts and Workmen's Compensation*, 11 LOUISIANA LAW REVIEW 191, 192 (1951): "[T]he act requires only that the business must 'entail . . . the operation of . . . engines and other forms of machinery.' The dictionary defines 'entail' as 'to involve as a necessary accompaniment or result.' It seems that when a proprietor . . . profits from the regular presence and use of such vehicle his business may fairly be said to be to 'entail' the operation of motor vehicles, even though his employees do not drive them.