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Torts and Workmen's Compensation: Workmen's Compensation

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Several interesting propositions were announced in the decision. First, damages were allowed for depreciation in the value of the car during the interval between its seizure and its return to plaintiff plus one thousand dollars for "humiliation, mortification and mental anxiety, and for physical discomfort and inconvenience as a result of the deprivation of use and enjoyment of his car during the period of its seizure and detention."⁹ With respect to these latter items the approach of the Louisiana court differs from the usual common law position under which the plaintiff would be entitled to indemnity for the deprivation of use and enjoyment of the car, which would usually amount to the rental value of the vehicle during the period affected. Emotional and non-pecuniary losses are usually denied in such cases, although if the conduct of defendant were oppressive, an award of punitive damages would be permitted at common law. In the *Hernandez* case it was conceded that the defendant did not act arbitrarily, oppressively, or in bad faith. In fact, the right to possession of the car was in good faith dispute during the entire period of its detention. The second point involved in the *Hernandez* case related to the defendant's plea of prescription. Normally the prescriptive period of one year runs from the time of wrongful seizure. Here, however, where the title to the property was in litigation in a separate dispute, the court properly announced that the present claim could not have been effectively prosecuted until title had been determined. Hence the running of the prescriptive period was postponed until final judgment in the title controversy.

WORKMEN'S COMPENSATION

*Wex S. Malone**

Work Which Is Not Part of Employer's Trade, Business, or Occupation

Two years ago the Supreme Court decided the case, *Meyers v. Southwest Region Conference Association of Seventh Day Adventists*,¹ in which it concluded that a church organization is a business, trade, or occupation within the meaning of the Workmen's Compensation Statute. As this writer pointed out in a pre-

9. *Id.* at 401, 111 So.2d at 324.

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1. 230 La. 310, 88 So.2d 381 (1956).

vious issue of this symposium,² this decision is sound in regarding an organization supported by a substantial group as being appropriately included within the compensation principle. However, in the *Meyers* case the Supreme Court fortified its opinion by the following observation as to the nature of a business: A business, said the court, "is that which busies or engages time, attention, or labor as a principal serious concern or interest."³ Under this broad definition (which was not necessary to justify the conclusion that a church is a business within the meaning of the statute) many sustained activities of a purely private or domestic character would be included.

Last year this definition was put to test in *McMorris v. Home Indemnity Insurance Company*.⁴ An employee of a federal agency devoted nine weeks of accumulated vacation leave to the construction of a home for his own use. He hired claimant and seven other workers to assist in this project. Claimant sustained an injury and instituted suit for compensation. Recovery was allowed by the Court of Appeal for the First Circuit, which emphasized the above definition of a business from the *Meyers* case.⁵ The opinion of the court of appeal also stressed the fact that the work being done by claimant was of a type customarily performed by professional contractors for profit. However, this judgment was reversed by the Supreme Court and *McMorris'* claim was dismissed. The Supreme Court reverted to its earlier position in the familiar decision, *Shipp v. Bordelon*, wherein it had observed:

"It is not enough that the employee shall be performing work of the character falling within the designated trades, businesses, or occupations, but it must be done 'in the course of the employer's trade,' etc., in certain trades, businesses, etc. In other words, the work must be of that character, and the employer must be engaged in that line of work as a trade, business, or occupation, in order that the Act may apply. . . ."⁶

Causal Relation Between Strain and Stomach Ulcer

*Cutno v. Neeb Kearney and Company*⁷ is a decision worthy of note even though the principal issue was one of fact. Cutno, who

2. 17 LOUISIANA LAW REVIEW 350 (1957).

3. 230 La. 310, 319, 88 So.2d 381, 384 (1956).

4. 236 La. 292, 107 So.2d 645 (1959).

5. 94 So.2d 471 (La. App. 1st Cir. 1957).

6. 152 La. 795, 797, 94 So. 399, 400 (1922).

7. 237 La. 828, 112 So.2d 628 (1959).

was a victim of duodenal ulcers, suffered a perforation and hemorrhage on the job while engaged in lifting hundred pound sacks. The trial court's judgment dismissing his compensation claim for failure to show a causal connection was reversed by the Supreme Court. Previous decisions of the courts of appeal had refused to recognize that strain and stress can aggravate an ulcer condition.⁸ Also noteworthy in the *Cutno* case is the court's reaffirmation of the proposition that no unusual exertion is necessary in order to qualify a strain as an "accident" within the meaning of the Compensation Statute;⁹ nor is the claim for compensation weakened by the fact that the pre-existing ulcerated condition of the stomach would have eventually ended in hemorrhage and perforation even though the exertion in question had not taken place.¹⁰ Moreover, the adverse effect of the stress and strain need not manifest itself at once, so long as a causal relationship between the two is established to the satisfaction of the trier.

Total Disability — Successive Injuries Under Separate Employers

A worker receives a back injury while working for defendant. A few months later he apparently recovers and accepts employment with a new employer. Thereafter he experiences a "catch" in his back while discharging his duties and he is concededly permanently and totally disabled. If the medical testimony establishes satisfactorily that the initial accident was causally connected with the ultimate disability (and suit is instituted within the two-year limitation established by the statute), can the first employer, defendant, be subjected to compensation liability? The Supreme Court gave an affirmative answer in the recent decision, *Finley v. Hardware Mutual Insurance Company*,¹¹ decided last term. It is to be noted that a situation of this type involves two separate inquiries. The first is purely one of fact: Did the first accident play a causal part in bringing about the eventual disability? The answer here is to be afforded

8. *Burks v. Central Surety & Ins. Co.*, 6 So.2d 45 (La. App. 2d Cir. 1942); *Mitchell v. Employers' Liab. Assur. Corp.*, 5 So.2d 152 (La. App. 2d Cir. 1941); *Landry v. Phoenix Utility Co.*, 124 So. 623 (La. App. Or. 1929).

9. For discussion, see MALONE, *LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE* § 214 (1951).

10. Excellent discussion of this point will be found in *Custer v. Higgins Industries*, 24 So.2d 511 (La. App. Or. 1946).

11. 237 La. 214, 110 So.2d 583 (1959).

solely by the medical testimony. The first event that occurred during the employment under the defendant is a cause if the ultimate result — disability following the later strain — would not have occurred without the first accident. It is at this point that the court of appeal had ruled against the claimant and was reversed by the Supreme Court. The second inquiry is purely one of law, or compensation policy — Does the compensation statute protect the worker against the risk of a later accidental aggravation of the result of an earlier accident so as to charge the first employer therefor? The Supreme Court made abundantly clear in Finley's case that such protection is afforded by the statute. The same position had been announced several times before by the courts of appeal of this state. Two of these decisions, *White v. Taylor*¹² and *Brock v. Jones Laughlin Supply Company*,¹³ were cited with approval by the Supreme Court in the *Finley* case. Another court of appeal decision reaching the same conclusion and which may be of interest to the reader is *Estilette v. United States Fidelity & Guaranty Company*.¹⁴ It is also noteworthy that where the second, and aggravating, accident occurs during the course of employment under a new employer the latter may also be chargeable with compensation. He cannot escape his compensation responsibility by pointing to the peculiar susceptibility of the worker to injury by reason of the earlier accident, for the second employer takes the employee as he finds him.¹⁵ Solidary liability is proper in such situations.

*Posthumous Illegitimate Child not Dependent
Member of Family*

During the last term the Supreme Court reversed the Court of Appeal for the Second Circuit¹⁶ and concluded that a posthumous illegitimate child born of an illicit union between the deceased and his concubine who was residing with and dependent on deceased was not a dependent member of the family and hence was not entitled to compensation.¹⁷ The opinion contains the surprising observation that at the time of the worker's death the

12. 5 So.2d 337 (La. App. 2d Cir. 1941).

13. 39 So.2d 904 (La. App. 1st Cir. 1949).

14. 64 So.2d 878 (La. App. 1st Cir. 1953).

15. See MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 272 (Supp. 1959).

16. *Williams v. American Employers Ins. Co.*, 103 So.2d 568 (La. App. 2d Cir. 1958).

17. *Williams v. American Employers Ins. Co.*, 237 La. 101, 110 So.2d 541 (1959).

unborn child was not *actually*, but only constructively, dependent upon deceased. The decision is difficult to appreciate from the standpoint either of logic or of policy. First, it is difficult to understand in what respect such a child is not actually dependent upon the father who was providing food and support for the mother at the time of death. Certainly the fact that sustenance provided by the father reaches the child through the body of the mother should not affect the child's dependency on the father. If so, the courts would be obliged to deny compensation to all illegitimates who were breast fed at the time of the father's death. From the standpoint of compensation policy the decision is even more difficult to appreciate. The statute expressly protects the posthumous legitimate child,¹⁸ thereby recognizing the social need for the protection of children born after the father's death. This need is equally great where the child is illegitimate. This is demonstrated conclusively by the fact that our courts have consistently protected illegitimates as "other dependents."¹⁹ There were two well-reasoned dissenting opinions.

Award of Attorneys' Fees Under Penalty Provision

The provision for fees as penalties under the Insurance Code is limited only by the requirement that the fee must be reasonable. On the other hand, the provision for the fixing of fees under the Compensation Statute limits the fee arbitrarily to twenty percent of the first five thousand dollars of the award and ten percent of any recovery in excess of that amount. These latter limitations in the statute itself are intended as a protection to the employee, for generally the attorneys' fees must be paid out of such award. Where, however, the fee is assessed as a penalty payable by the employer, the purpose of the limitation disappears and it should be ignored, and the fee can be fixed by the court according to the provisions of the Insurance Code. This conclusion was reached recently by the Supreme Court in *Cain v. Employers Casualty Company*,²⁰ where the fee was assessable against the insurer under the Insurance Code. Where the fee is assessed against the employer himself under R.S. 23:1201.2, the statute itself specifically excludes the limitation generally applicable to attorneys' fees in compensation litigation.

18. LA. R.S. 23:1021(3) (1950); *Eason v. Alexander Shipyards*, 47 So.2d 114 (La. App. Orl. 1950).

19. *Caddo Contracting Co. v. Johnson*, 222 La. 796, 64 So.2d 177 (1953); *Thompson v. Vestal Lbr. & Mfg. Co.*, 208 La. 83, 22 So.2d 842 (1945).

20. 236 La. 1085, 110 So.2d 108 (1959).