

Workmen's Compensation Insurers - A Duty to Inspect?

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Repository Citation

Madeline Hebert, *Workmen's Compensation Insurers - A Duty to Inspect?*, 34 La. L. Rev. (1974)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol34/iss4/11>

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effect of their decision to only future cases. The change of a statute from "constitutional" to "unconstitutional" or from "unconstitutional" to "constitutional" is not a change in the statute nor a change in the constitution; it is a change in judicial decision interpreting both and should be treated accordingly.

Mark Graham

WORKMEN'S COMPENSATION INSURERS—A DUTY TO INSPECT?

Plaintiff, injured at work when a cable on a crane broke, sued his employer's workmen's compensation insurance carrier as a third-party tortfeasor, alleging that the insurer had gratuitously undertaken to inspect the working premises, and in so doing negligently failed to detect and remove the cause of plaintiff's injuries. The Louisiana First Circuit Court of Appeal *held* since there was no undertaking by the insurance carrier either gratuitous or contractual to inspect for plaintiff's benefit it owed him no legal duty. *Kennard v. Liberty Mutual Insurance Company*, 277 So. 2d 170 (La. App. 1st Cir. 1973).

Whether the employer's workmen's compensation insurer can be liable as a third-party tortfeasor has been the subject of much controversy.¹ More often than not the decisions have turned on the question of the insurer's immunity under the exclusive remedy provisions² of the workmen's compensation acts, probably because the courts

1. See, e.g., *Beasley v. McDonald Eng. Co.*, 287 Ala. 189, 249 So. 2d 844 (1971); *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 199 N.E.2d 769 (1964); *Fabricius v. Montgomery Elev. Co.*, 254 Iowa 1311, 121 N.W.2d 361 (1963); *Smith v. American Empl. Ins. Co.*, 102 N.H. 530, 163 A.2d 564 (1960); *U.S. Fid. & Guar. Co. v. Theus*, 493 P.2d 433 (Okla. 1972); *Kerner v. Employer's Mut. Liab. Ins. Co.*, 35 Wis. 2d 391, 151 N.W.2d 72 (1967). See generally 2 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 72.90 (1970).

2. Some state workmen's compensation statutes explicitly grant to the workmen's compensation insurer the same immunity from third-party tort actions that is enjoyed by the employer by means of the exclusive remedy provision. See, e.g., WIS. STAT. ANN. § 102.03 (2) (Supp. 1961), amending WIS. STAT. ANN. § 102.03 (1957), which provides that "the right to the recovery of compensation pursuant to this chapter shall be the exclusive remedy against the employer and the workmen's compensation insurance carrier." This particular provision was interpreted in *Kerner v. Employer's Mutual Liability Insurance Co.*, 35 Wis. 2d 391, 151 N.W.2d 72 (1967) and discussed in a comparison with Michigan law in *Ray v. Transamerica Insurance Co.*, 10 Mich. App. 55, 158 N.W.2d 786 (1968). Cf. LA. R.S. 23:1032 (1950), which states in part: "The rights and remedies herein granted to an employee or his dependent on account of a personal injury . . . shall be exclusive of all other rights and remedies of such employee"

sought to avoid difficult problems of substantive tort law.³ Preempting that issue, the court in the instant case addressed the question of the insurer's legal duty to the plaintiff arising out of the insurer's allegedly negligent inspection of the working premises. The insurer owes no more duty than any third person to inspect for the benefit of a worker simply because an opportunity to do so arises; the basic duty of safety inspection and maintenance rests solely with the employer.⁴ The basic inquiry is whether its inspections, by failing to obviate conditions dangerous to workers, results in tort liability.⁵

The Restatement (Second) of Torts⁶ suggests the circumstances

In other state statutes which contain vague exclusive remedy provisions similar to Louisiana's, the cases have liberally interpreted them to grant immunity to the insurer. *See, e.g.,* Mustapha v. Liberty Mut. Ins. Co., 268 F. Supp. 890 (D.R.I. 1967); Donohue v. Maryland Cas. Co., 248 F. Supp. 588 (D. Md. 1965); Kotarski v. Aetna Cas. & Sur. Co., 244 F. Supp. 547 (E.D. Mich. 1965); Mull v. Aetna Cas. & Sur. Co., 120 Ga. App. 791, 172 S.E.2d 147 (1969). The decision in *Kotarski* was rejected by the Supreme Court of Michigan in *Ray v. Transamerica Insurance Co.*, 10 Mich. App. 55, 158 N.W.2d 786 (1968).

A growing number of state legislatures have amended their statutes to protect the insurer from tort liability in response to decisions which have found them amenable to suit. The best example is New Hampshire's amendment following the decision in *Smith v. American Employers Insurance Co.*, 102 N.H. 530, 163 A.2d 564 (1960); N.H. Rev. Stat. Ann. § 281:14 (1966). *See also* PA. STAT. ANN. tit. 77, § 501 (1967) (which vitiated the holding of *Mays v. Liberty Mutual Insurance Co.*, 323 F.2d 174 (3d Cir. 1963)); ILL. REV. STAT. ch. 48, § 138.5 (1967) (an amendment probably motivated by *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 199 N.E.2d 769 (1964)).

3. Compare *Mustapha v. Liberty Mut. Ins. Co.*, 268 F. Supp. 890 (D.R.I. 1967) (which was decided on the basis of the immunity problem), with *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 199 N.E.2d 769 (1964) (which grapples with the multifaceted tort issue).

4. LA. R.S. 23:13 (Supp. 1964): "Every employer shall furnish employment which shall be reasonably safe for the employees therein. They shall furnish and use safety devices and safeguards . . . and shall do every other thing reasonably necessary to protect the life, health, safety and welfare of such employees."

5. The insurer's position in this respect is similar to that of an executive officer or supervisory employee of an employer, who may be liable as third-party tortfeasor if the duty of inspection has been delegated to them and they inspect negligently. *See, e.g.,* *Adams v. Fidelity & Cas. Co.*, 107 So. 2d 496 (La. App. 1st Cir. 1958); *Hebert v. Blackenship*, 187 So. 2d 798 (La. App. 3d Cir. 1966), *commented upon in* 33 LA. L. REV. 325 (1973); *Canter v. Koehring Co.*, 283 So. 2d 716 (La. 1973). In *Canter* the court reviewed the problem of liability based on malfeasance or misfeasance (doing an act wrongly) versus liability based on nonfeasance (omitting an act), reiterating that the omission-commission dichotomy is no longer relevant in determining whether there has been a breach of duty by the officer. Analogizing this situation to that of the insurer who negligently inspects, it seems the insurer's liability should not be ruled out by the mere characterization of its inspection as a failure to act, or nonfeasance.

6. RESTATEMENT (SECOND) OF TORTS § 324A (1965): "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as

in which one who undertakes gratuitously to render services to another may be liable to that person who is physically harmed as a result of the negligent rendering of those services: (1) when his failure to exercise reasonable care has increased the risk of harm; (2) when he has undertaken to perform a duty owed by another to the injured person; or (3) when the harm is suffered because the injured person or the other has relied upon the gratuitous undertaking. Basically the undertaking, in this case a safety inspection, must have worsened the condition of the worker, either by creating the safety hazard or by causing him or his employer to rely on the adequacy of the inspection, lulling them into a false sense of security that safe conditions did in fact prevail. Applying these criteria to the instant case, it is difficult to find an increase in the physical harm to plaintiff or reliance by either the plaintiff or his employer on the inspection to their detriment. Nowhere is it demonstrated that the inspection was performed for the benefit of the employer or the employee; it could well have been an undertaking merely for the purpose of determining the extent of the risk involved and for reevaluating the feasibility of maintaining the insurance contract.⁷ Nor is it shown that the employee was even

necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance on the other or the third person upon the undertaking." Note that the effect of condition (b), like condition (c), is essentially a requirement of reliance. This rule has been cited frequently in cases which hold that the insurer does owe a legal duty to the injured employee. See *Evans v. Liberty Mut. Ins. Co.*, 398 F.2d 665 (3d Cir. 1968); *Clark v. Employers Mut. of Warsaw*, 297 F. Supp. 286 (E.D. Pa. 1969); *Bartolotta v. U.S.*, 276 F. Supp. 66 (D. Conn. 1967); *Gerace v. Liberty Mut. Ins. Co.*, 264 F. Supp. 95 (D.D.C. 1966); *Vidulich v. Greater New York Mut. Ins. Co.*, 80 N.J. Super. 15, 192 A.2d 596 (1963); *De Jesus v. Liberty Mut. Ins. Co.*, 423 Pa. 198, 223 A.2d 849 (1966). Some decisions have not found reliance to be essential to the insurer's liability. See *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 86, 199 N.E.2d 769, 779 (1964): "We think it clear under the law that defendant's liability for the negligent performance of its undertaking, as distinguished from a failure to perform, is not limited to such persons as might have relied upon it to act but extends instead to such persons as defendant could reasonably have foreseen would be endangered as the result of negligent performance." See also *Corson v. Liberty Mut. Ins. Co.*, 110 N.H. 210, 265 A.2d 315 (1970); *Smith v. American Empl. Ins. Co.*, 102 N.H. 530, 163 A.2d 564 (1960).

The Restatement of Torts rule may profitably be compared with Restatement (Second) of Agency section 354: "An agent who, by promise or otherwise, undertakes to act for his principal under such circumstances that some action is necessary for the protection of the person or tangible things of another, is subject to liability to the other for physical harm to him or his things caused by the reliance of the principal or of the other upon his undertaking and his subsequent unexercised failure to act, if such failure creates an unreasonable risk of harm to him and the agent should so realize." See comments (a) and (b).

7. *Evans v. Liberty Mut. Ins. Co.*, 398 F.2d 665 (3d Cir. 1968); *Gerace v. Liberty*

aware that an inspection had been made by the insurer. Finally, the clear wording of the audit and inspection clause in the insurance policy precluded any reliance by the employer on the safety inspections made by the insurer.⁸

Of course, insurers may clearly expose themselves to liability by contractually obligating themselves to perform the safety and maintenance duties of the employer.⁹ In the absence of a contract, factual circumstances indicating that the insurer was inspecting for the benefit of the employee and for the purpose of assuming the employer's duty might also give rise to liability. This was the situation in two cases¹⁰ in which insurers had carried out extensive, frequent inspections, had made detailed reports to their insureds making safety recommendations, and had advertised their safety inspection programs as part of the insurance benefits. A duty on the part of the insurer would probably not arise merely because the insurer advertised the inspections as part of its policy benefits,¹¹ or because it charged a percentage of its premiums for inspection and safety engineering for the insured.¹² A combination of these factors, however, might induce actual and justifiable reliance by the employer or the employee resulting in liability.

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Mut. Ins. Co., 264 F. Supp. 95 (D.D.C. 1966). The insurer's position here is similar to that of the architects in *Day v. National U.S. Radiator*, 241 La. 288, 128 So. 2d 660 (1961), discussed with approval in the executive officer case of *Canter v. Koehring*, 283 So. 2d 716, 720 (La. 1973). Liability to the plaintiff (whose decedent was killed when a defectively installed boiler exploded) was precluded because their inspections of the work site were not for the purpose of protecting the worker's safety, but for assuring that the specifications of the contract were being carried out.

8. "The company and any rating authority having jurisdiction by law shall each be permitted but not obligated to inspect at any reasonable time the workplaces, operations, machinery and equipment covered by this policy. Neither the right to make inspections nor the making thereof . . . shall constitute an undertaking on behalf of or for the benefit of the insured or others, to determine or warrant that such workplaces, operations, machinery or equipment are safe." *Kennard v. Liberty Mut. Ins. Co.*, 277 So. 2d 170, 171 (La. App. 1st Cir. 1973). The use of this type of clause was foreshadowed in *Hill v. U.S. Fidelity & Guaranty Co.*, 428 F.2d 112, 120 (5th Cir. 1970): "If reliance is a prerequisite to liability the insurer may substantially protect itself in its safety undertakings, and at the same time protect users of the premises who may be the victims of lack of performance, by making unambiguously clear to the insured, that it can rely thereon or that it must not rely." See Comment, 3 CUMBERLAND-SAMFORD L. REV. 118 (1972).

9. *Mann v. Highland Ins. Co.*, 461 F.2d 541 (5th Cir. 1972); *Viducich v. Greater N.Y. Mut. Ins. Co.*, 80 N.J. Super. 15, 192 A.2d 596 (1963).

10. *Hill v. U.S. Fid. & Guar. Co.*, 428 F.2d 112 (5th Cir. 1970); *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 199 N.E.2d 769 (1964).

11. *De Jesus v. Liberty Mut. Ins. Co.*, 423 Pa. 198, 223 A.2d 849 (1966).

12. *Mann v. Highland Ins. Co.*, 461 F.2d 541 (5th Cir. 1972).