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Workmen's Compensation--Employee--Independent Contractor

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in emergencies are not measured by the conduct expected of one acting under normal circumstances.[21] However, an emergency created by the defendant's own negligence affords him no excuse for his subsequent acts which cause injury to the plaintiff.[22] Since the Kentucky court concluded in the *Richards* case that the accident was one which naturally follows from inexperience, it seems that it should become unnecessary to determine whether or not the defendant was confronted with an emergency. Also, the separation of the act of pressing the accelerator from defendant's subsequent actions seems to be a tenuous distinction. Such a distinction, used by the court to indicate the existence of an emergency, can lead only to confusion as to the precise grounds upon which the finding of an absence of negligence was predicated.

CONCLUSION

In the final analysis, the *Richards* case reaches a correct and sound result. The Kentucky court seems to have recognized the distinction between assumption of risk and contributory negligence and has not followed the *Porter* case in declaring that the two doctrines are identical. It seems, however, that the disposition of cases involving inexperienced drivers and guests with knowledge of such inexperience would be greatly facilitated if the negligence question were determined according to a particular standard of care. Under such a test the problem would be viewed from a different perspective, in that the conduct of the defendant would be the prime consideration. The use of such a standard would, in many cases, render the determination of an assumption-of-risk question unnecessary and diminish the use of confusing distinctions in order to lower the degree of care required of an inexperienced driver.

Allen Prewitt, Jr.

WORKMEN'S COMPENSATION—EMPLOYEE—INDEPENDENT CONTRACTOR. Claimant, while hauling coal from company's tipple to a railroad loading ramp, was permanently injured when his truck overturned. Claimant used his own truck, was paid by the ton, and paid operating expenses of the truck. He worked only when the company's truck could not handle all production; at that time the company's truck

[21] Prosser, *op. cit. supra* note 2, § 32, at 137; Pratt Fruit Co. v. Sparks Bros. Bus Co., 313 Ky. 593, 233 S.W.2d 92 (1950).

[22] See, *e.g.*, Craddock v. Torrence Oil Co., 322 Mich. 510, 34 N.W.2d 51 (1948).

driver would blow his horn in front of claimant's home as a signal for him to haul a load. He arranged his affairs so that he was available whenever needed. He was required to help load the company truck while at the mine and was told where to haul his load of coal. His earnings varied from $7 to $100 per week. No withholding tax, social security, or like deductions were taken from his pay. The company had a workmen's compensation notice posted which advised employees that they would work under the Act unless notice to the contrary was given the company. Claimant testified that he saw the notice and assumed he was covered. There was a conflict in testimony as to whether he hauled supplies for the company.

On these facts the Workmen's Compensation Board found claimant an independent contractor and therefore denied compensation. The circuit court reversed, holding claimant an employee. *Held:* Reversed. *Locust Coal Company v. Bennett,* 325 S.W.2d 322 (Ky. 1959).

In holding this truck driver an independent contractor, the Court of Appeals cited three workmen's compensation cases, a vicarious liability case, and section 220(2), *Restatement of Agency,*[1] as the basis for its decision. An examination of the cases cited will show the confusion existing in the decisions on this question. In the first case, *Hacker v. Hacker,*[2] the driver was held an independent contractor where he hauled coal for the company from a mine to a loading ramp in his own truck, the operating expenses of which he paid. This driver was paid on a tonnage basis, no deductions were made for

[1] Restatement, Agency § 220 (1933).
Definition of servant
(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.
(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
(a) the extent of control which, by the agreement, the master may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer; and
(i) whether or not the parties believe they are creating the relationship of master and servant.

[2] 296 S.W.2d 713 (Ky. 1956).

social security or income taxes, and he was not required to haul a specific number of loads or work a specific number of hours. Neither the fact that he was informed that hauling was to be done at night, the fact that he was required to shovel up spilled coal, nor the fact that he had been "fired" for violation of the company's rule against carrying passengers was sufficient to constitute him an employee.

Then comes *Cutshin Coal Company v. Campbell*[3] where the driver was held an employee even though he owned his own truck on which he paid operating expenses and was paid on a tonnage basis. This case could have been decided on the principle of estoppel alone since the claimant had been told he was covered by workmen's compensation. However, the court chose to emphasize that the driver had been working for the company for seven years and also that he was performing an integral part of the business, quoting with approval *Partin-Lamdin Lumber Company v. Frazier*[4] where the court said:

> It is clear to us that the deceased was not engaged in an independent occupation of furnishing a specialized service to produce a predetermined result, but that he worked regularly for appellant under continuing and changing instructions in the performance of daily work that was an integral part of appellant's business.[5]

The court concluded its opinion by distinguishing the *Hacker* and *Napier* cases on three points: (1) the truckers there were engaged in independent busniesses; (2) the Workmen's Compensation Board found that the claimants were not employees; and (3) the element of estoppel was absent. These cases thus were not controlling. The court in the *Campbell* case could have reached its decision solely on the fact that the Board had found the claimant to be an employee[6] or on the element of estoppel. The element of estoppel, however, was mentioned by the court as merely indicative of what the parties thought their relationship was, which of itself was not enough to decide the case either way. Moreover, the court expressly elected to rest the decision, not on estoppel, but on the principle stated in the *Frazier* case quoted above.

The third case cited by the court, *Sigmon Ikerd Company v. Napier*,[7] involved facts similar to the *Hacker* and *Campbell* cases, except that in this case the claimant had sometimes hired his own truck drivers for whom he paid social security taxes and had listed

[3] 309 S.W. 2d 39 (Ky. 1957).
[4] 308 S.W.2d 792 (Ky. 1957).
[5] *Id.* at 793.
[6] The general rule is that the finding of the Board on a question of fact will not be set aside if there is substantial evidence to support it. International Harvester Co. v. Poff, 331 S.W.2d 712 (Ky. 1960).
[7] 297 S.W.2d 917 (Ky. 1956).

himself as self-employed for income tax and social security purposes. In this case the claimant was held an independent contractor.

These cases and the principal case could all have been decided in favor of the claimant by application of the "integral part of the business" test, one of the tests stated in the *Frazier* case. Surely hauling coal away from coal mines such as was involved in these cases is an integral part of the mine operators' business. This would be a question of law for the court under the rule of *Brewer v. Millich*[8] discussed below. It would seem that the duration of the arrangement, stressed in the *Campbell* and *Frazier* cases, would not be relevant to this test in itself. The digging of coal would be an integral part of the business whether the miner worked one day or ten years.

In all three cases cited and the principal case, there was an absolute right in the company to terminate the "contract" at any time; this does not look like the usual independent contract.[9] "The absolute right to terminate the relationship without liability is not consistent with the concept of independent contract."[10] According to the court's own principle as enunciated in *Bowen v. Gradison Constr. Co.*[11] and *Browns, Bell & Cowgill v. Soper*,[12] the unrestricted power to terminate the employment is the most conclusive factor in showing an employment relation. Also, in each case the claimant was performing an integral part of the company's business by hauling coal from the tipple to the railroad. Yet in three cases the claimant was held an independent contractor and in the other he was held an employee.

The case cited by the court to illustrate the *Restatement* test is a vicarious liability case.[13] Thus, the court seems to imply that there is no distinction between classifying persons as employees or independent contractors for application of vicarious liability and for workmen's compensation purposes. This is a wide departure from the theory announced in the *Brewer* case where the court said, "[T]he approach to be used is that of determining the relation of employer-employee under the Workmen's Compensation Act rather than of master and servant or principal and agent in tort actions."[14]

The test stated in section 220(2) of the *Restatement of Agency*[15] is used for decision of vicarious liability cases where the purpose is to allocate the burden of loss from accidents arising in the course of

[8] 276 S.W.2d 12 (Ky. 1955). One factor of control is enough.
[9] *Id.* at 16.
[10] 1 Larson, Workmen's Compensation § 44.35, at 654 (1952).
[11] 236 Ky. 270, 277, 32 S.W.2d 1014, 1017 (1930).
[12] 287 Ky. 17, 22, 152 S.W.2d 278, 280 (1941).
[13] Sam Horne Motor & Transportation Co. v. Gregg, 279 S.W.2d 755 (Ky. 1955).
[14] Brewer v. Millich, 276 S.W.2d 12, 15 (Ky. 1955).
[15] Quoted note 1 *supra.*

employment as between the alleged employers and strangers injured by the alleged employees. The Workmen's Compensation Act allocates the burden of accidents as between the alleged employers and the alleged employees who are themselves injured.

It is submitted that the court should have stuck to the theory announced in the *Brewer* case. The test in section 220(2) is a restatement of the common law concerning vicarious liability. As such, it places a great deal of emphasis on the element of control, since this was one of the primary justifications for vicarious liability at common law.[16] Whatever the validity of the control test for vicarious liability cases,[17] it should have no place in workmen's compensation law, which arose purely from legislative enactments.[18] The legislature has expressly directed that the statutes on this subject are to be liberally construed.[19]

The purpose of the workmen's compensation statutes is to distribute the loss from industrial accidents by including this loss in the cost of the product.[20] To effectively accomplish this purpose it is necessary to put the burden of such loss upon the persons who can most readily include it in the cost of the product, the producer for the general market.[21] Where the purpose to be achieved is the inclusion of the cost of accidents in the price of the product, it does not matter whether any control is exercised or not, so long as the worker is continuously engaged in the production of a commodity which is his principal link with the general economy. The amount of control exercised upon a worker does not affect his contribution toward the finished product nor his dependency upon his wages as a means of sustaining life.

The United States Supreme Court has adopted the idea of defining an employee in relation to the purposes of the legislation under which the determination is made. That Court, in *National Labor Relations Board v. Hearst Publications, Inc.*,[22] where newsboys were held employees and not independent contractors under the National Labor Relations Act, said that the meaning of "employee"

[16] See Prosser, Torts § 62, at 351 (2d ed. 1955). See also dissenting opinion of Milliken, J., in New Independent Tobacco Whse. No. 3 v. Latham, 282 S.W.2d 846, 849 (Ky. 1955).

[17] See Prosser, Torts § 62, at 351 (2d ed. 1955). It is suggested that economic and social policy, not control is the real motivation for vicarious liability. Thus the control test may not now be valid even for the purposes for which it was developed, and perhaps, never was.

[18] See Bowen v. Gradison Constr. Co., 236 Ky. 270, 32 S.W.2d 1014 (1930).

[19] Ky. Rev. Stat. § 342.004 (1959).

[20] See Phil Hollenbach Co. v. Hollenbach, 181 Ky. 262, 273, 204 S.W. 152, 157 (1918).

[21] *Id.* at 275, 204 S.W. at 157.

[22] 322 U.S. 111 (1944).

in doubtful situations should be determined by underlying economic facts indicating the type of protection intended by the Act. Again in *United States v. Silk*,[23] decided under the Social Security Act, and in *Rutherford Food Corporation v. McComb*,[24] decided under the Fair Labor Standards Act, the court reiterated that "employees" were workers who in economic reality were part of an integrated unit of the employer's business.[25]

The modern trend in workmen's compensation is to adopt what has been called the "relative nature of the work test."[26] To classify a workman as an independent contractor using this test, it should be found that (1) he is not dependent to any appreciable extent upon income from this work, or that (2) the services he renders are such that he can distribute the burden of loss himself; or (3) that the character of the work is such that it has only an intermittent relation to the alleged employer's business.[27] The essence of this test is the nature of the claimant's work in relation to the regular business of the employer.

Larson explains the test in this way:

> This test, then, which for brevity will be called the 'relative nature of the work' test, contains these ingredients: the character of the claimant's work or business—how skilled it is, how much of a separate calling or enterprise it is, to what extent it may be expected to carry its own accident burden and so on—and its relation to the employer's business, that is, how much it is continuous or intermittent, and whether the duration is sufficient to amount to the hiring of continuing services as distinguished from contracting for the completion of a particular job.[28]

It is submitted that the decision in the principal case is an unfortunate step by the Court of Appeals in applying a test with little relation to the true purpose of the workmen's compensation statutes. In addition, at present it makes it unduly difficult to predict whether certain persons will be classified as employees or independent contractors. This is unfortunate from the point of view of the employee since he cannot know whether he is entitled to the benefits of workmen's compensation. It is also unfortunate for the employer since

[23] 331 U.S. 704 (1947).
[24] 331 U.S. 722 (1947).
[25] For an interesting illustration of how the question of the employment relation can be determined by interpreting the statute so as to give the protection intended, see Walling v. American Needlecrafts, Inc., 139 F.2d 60 (6th Cir. 1943), and Glenn v. Beard, 141 F.2d 376 (6th Cir. 1944). In these two cases the court held that persons were employees and independent contractors respectively under identical facts because of a difference in the purpose of the legislation involved.
[26] 1 Larson, Workmen's Compensation § 43.54, at 635 (1952).
[27] *Id.* § 43.50.
[28] *Id.* § 43.52, at 633.

he cannot be certain whether or not he will be liable, and if so, whether his liability will be in tort or under the Workmen's Compensation Act.

The court should abandon the test used for vicarious liability and interpret workmen's compensation law in the light of its purpose as social legislation. In this way the court can not only add coherence to its decisions on the employee-independent contractor question, but it can insure that the persons for whom the legislation was passed are given its protection.

John C. Darsie, Jr.