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Certain Aspects of the Development of Section 29 of the New York Workmen's Compensation Act

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(2) That Section 8 of the Court of Claims Act has transformed an unenforceable obligation into an actionable right and applies the rule of *respondet superior* to the state.

(3) That insofar as some courts have been lax in extending Section 8 to include political subdivisions of the state, as was obviously intended by its general language, the statute be amended to bring these local bodies within its purview.

It is only by express legislative enactment that we can hope to align the mass of confusing decisions on the subject of charitable, state and municipal hospital liability.

HARRY LORBER.

CERTAIN ASPECTS OF THE DEVELOPMENT OF SECTION 29 OF THE NEW YORK WORKMEN'S COMPENSATION ACT

Introduction

When the New York Workmen's Compensation Law first became effective,¹ the remedy of the employee injured in the course of certain specified employments² was exclusively in compensation, unless the injury resulted proximately from the tortious act of a third person,³ or unless the employer failed to provide compensation insurance as required by the law.⁴ Where the employee was injured by the negligence or wrong of a third person, Section 29 provided that he could claim compensation or pursue his common law remedy against the tortfeasor.⁵ He could not do both, except to the extent

¹ The Workmen's Compensation Law was enacted by N. Y. Laws 1913, c. 816 (eff. Dec. 16, 1913) as Chapter 67 of the Consolidated Laws. Constitutional authorization to enact this law (N. Y. Const. Art. I, § 19) was not given to the legislature until Jan. 1, 1914. To assure the constitutionality of the statute the legislature reenacted it by N. Y. Laws 1914, c. 41. A previous attempt to enact a workmen's compensation law was made by the legislature by N. Y. Laws 1910, c. 647, but it was declared unconstitutional in *Ives v. South Buffalo R. Co.*, 201 N. Y. 271, 94 N. E. 431 (1911).

² The law covers certain hazardous employments, and all employments, with certain exceptions, in which four or more operatives are engaged. N. Y. WORK. COMP. LAW § 3.

³ Prior to N. Y. Laws 1934, c. 695, a co-employee was a "third person"; *Judson v. Fielding*, 227 App. Div. 430, 237 N. Y. Supp. 348 (3d Dept. 1929); *Shelter v. Grobsmith*, 143 Misc. 380, 257 N. Y. Supp. 353 (1932).

⁴ N. Y. WORK. COMP. LAW § 11; N. Y. WORK. COMP. LAW § 52 (the employer's failure to comply with the Act is a misdemeanor).

⁵ *Traveler's Ins. Co. v. Brass Goods Mfg. Co.*, 239 N. Y. 273, 146 N. E. 377 (1925); *Schubert v. Finkelstein*, 244 N. Y. 483, 155 N. E. 906 (1927); *Miller v. New York Rys.*, 171 App. Div. 316, 157 N. Y. Supp. 200 (2d Dept. 1916); *Roecklein v. American Sugar Refining Co.*, 222 App. Div. 540, 226 N. Y. Supp. 375 (2d Dept. 1928); *Sabatino v. Crimmins*, 102 Misc. 172, 168 N. Y.

that if he filed due notice of his election to sue the third person, he could thereafter claim compensation for any deficiency between what he had actually recovered in his action and what he could have recovered had he elected to take compensation.⁶ If the employee claimed compensation he was required to assign his cause of action against the third person to the person liable to pay the compensation.⁷ The assignment carried with it the right to recover all the damages which the employee might have had if he had sued.⁸ This meant that the insurance carrier⁹ might recover a greater amount than the award of compensation. What, then, of the surplus, if any, above the amount of compensation for which the carrier was liable? Could the carrier retain the entire fund, or was the amount above the compensation charged with a trust in favor of the injured employee? It is this aspect of Section 29¹⁰ that will be dealt with here, together with

Supp. 495 (1918); *Louis Bossert & Sons v. Piel Bros.*, 112 Misc. 117, 182 N. Y. Supp. 620 (1920).

⁶ *O'Brien v. Lodi*, 246 N. Y. 46, 157 N. E. 925 (1927).

⁷ *Sabatino v. Crimmins*, 102 Misc. 172, 168 N. Y. Supp. 495 (1918); *Godfrey v. Brooklyn Edison Co.*, 115 Misc. 21, 187 N. Y. Supp. 263 (1921).

⁸ *Traveler's Ins. Co. v. Brass Goods Mfg. Co.*, 239 N. Y. 273, 146 N. E. 377 (1925); *Lang v. Brooklyn City R. Co.*, 217 App. Div. 501, 217 N. Y. Supp. 277 (1st Dept. 1926).

⁹ "Insurance carrier" or "carrier" as used in this note includes employers who are self insurers, the state insurance fund, and private insurance companies. In short, these terms refer to the person who is liable for the payment of compensation. There is an important distinction between an assignment to the "employer" and an assignment to the person liable for the payment of compensation when such person is not the employer. Under the Federal Longshoremen's and Harbor Workers' Compensation Act the assignment is to the employer and if he sues and recovers a judgment it belongs to him in its entirety. The employer's insurance carrier cannot sue in his own name without joining the employer, and in such case the carrier may only indemnify himself, and the excess, if any, belongs to the employer. *Globe Indemnity Co. v. Atlantic Lighterage Corp.*, 271 N. Y. 234, 2 N. E. (2d) 640 (1935).

¹⁰ N. Y. WORK. COMP. LAW § 29 provides: "1. If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, need not elect whether to take compensation under this chapter or to pursue his remedy against such other but may take such compensation and at any time either prior thereto or within six months after the awarding of compensation, pursue his remedy against such other subject to the provisions of this section. If such injured employee, or in case of death, his dependents, take or intend to take compensation under this chapter and desire to bring action against such other, such action must be commenced not later than six months after the awarding of compensation and in any event before the expiration of one year from the date such action accrues. In such case, the state insurance fund, if compensation be payable therefrom, and otherwise the person, association, corporation or insurance carrier liable for the payment of such compensation, as the case may be, shall have a lien on the proceeds of any recovery from such other, whether by judgment, settlement or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under or provided or estimated by this chapter for such case and the expenses for medical treatment paid by it and to such extent such recovery shall be deemed for the benefit of such fund, person, association, corporation or carrier. Notice of the commencement of such action shall be given within

the changes in Section 29 regulating assignments of claims against third persons to the insurance carriers, and the problems which have arisen, or may arise from the various amendments to the section. Particular attention will be directed to the 1935 amendment which gave the employee the right to two-thirds of any excess recovery where the carrier sued the third person, and to the important change of 1937 which allows the employee to claim compensation and also to sue the third person responsible for his injury.

Legislative Development of Section 29

In its original form, Section 29¹¹ provided that if an injured employee elected to take compensation, he had to file a notice of his election and execute an assignment of his cause of action, if any, against the third person who caused the injury. Once a binding election was made it was irrevocable.¹² If the employee chose to sue the third person he was free to do so as the statute did not alter his common law rights, but on the contrary, it gave him new and additional rights.¹³ The statute did not require the employee to file any notice of election to sue the third person, but if he failed to do so, he could not thereafter claim a deficiency in compensation in the event that his recovery was less than he could have had in compensation.¹⁴ After bringing an action against the third person the employee lost

thirty days thereafter to the commissioner, the employer and the insurance carrier upon a form prescribed by the commissioner.

"2. If such injured employee, or in case of death, his dependents, has taken compensation under this chapter but has failed to commence action against such other within the time limited therefor by subdivision one, such failure shall operate as an assignment of the cause of action against such other to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation. If such fund, person, association, corporation or carrier, as such an assignee, recover from such other, either by judgment, settlement or otherwise, a sum in excess of the total amount of compensation awarded to such injured employee or his dependents and the expenses for medical treatment paid by it, together with the reasonable and necessary expenditures incurred in effecting such recovery, it shall forthwith pay to such injured employee or his dependents, as the case may be, two-thirds of such excess, and to the extent of two-thirds of any such excess such recovery shall be deemed for the benefit of such employee or his dependents. * * *

"6. The right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee, or in case of death his dependents, when such employee is injured or killed by the negligence or wrong of another in the same employ."

¹¹ See note 6, *supra*.

¹² See note 7, *supra*; *Schubert v. Finkelstein*, 244 N. Y. 583, 155 N. E. 906 (1927); *Breital v. Hinderstein*, 236 App. Div. 203, 258 N. Y. Supp. 237 (3d Dept. 1932).

¹³ *Lester v. Otis Elevator Co.*, 169 App. Div. 613, 155 N. Y. Supp. 524 (1st Dept. 1915).

¹⁴ *Ibid.*

his right to claim a deficiency in compensation if he discontinued or compromised the suit without the carrier's consent.¹⁵

An amendment in 1916¹⁶ added a directory provision relative to the method of election to be followed where the employee was killed and left minor dependents surviving.

In 1917 important changes were made. Whereas formerly the employee had to file an assignment of his cause of action against a third person with his claim for compensation, by this amendment the assignment was made to operate automatically at the time an award was made. Thus, the assignment became effective by operation of law¹⁷ upon the making of an award,¹⁸ and not at the time of electing compensation.¹⁹ Another important change was made by the 1924 amendment,²⁰ but it does not concern the present discussion.²¹ Furthermore an amendment in 1934 took from the injured employee or his surviving dependents the right to sue co-employees for negligence or wrong producing the injuries.²²

In 1935, a very important amendment was enacted,²³ It provided that where the employee's cause of action had been assigned to the carrier, the employee was to be paid two-thirds of any recovery in excess of the sum necessary to indemnify the carrier. The fact that the employee is allowed only two-thirds of any excess, and the further fact that prior to this amendment he received no part of it, indicates that the legislature took an arbitrary stand in an attempt to compromise a situation which savored of unjust enrichment on one hand, and an increase of insurance rates on the other.

The last material amendment to Section 29 was enacted in 1937.²⁴

¹⁵ *O'Brien v. Lodi*, 246 N. Y. 46, 157 N. E. 925 (1927).

¹⁶ N. Y. Laws 1916, c. 622, § 29.

¹⁷ *Sabatino v. Crimmins*, 102 Misc. 172, 168 N. Y. Supp. 495 (1918); *Godfrey v. Brooklyn Edison Co.*, 115 Misc. 21, 187 N. Y. Supp. 263 (1921); *Lunn v. Andrews*, 152 Misc. 568, 274 N. Y. Supp. 432 (1934); *Bellanger v. Economy Engineering Co.*, 156 Misc. 688, 282 N. Y. Supp. 325 (1935).

¹⁸ The awarding of compensation did not bring about an assignment where the employee had not claimed compensation and refused to accept payment of the award from the insurance carrier. *Dyer v. Central Savings Bank*, 137 Misc. 509, 242 N. Y. Supp. 74 (1930).

¹⁹ N. Y. Laws 1917, c. 705, § 29.

²⁰ N. Y. Laws 1924, c. 499, § 29.

²¹ N. Y. WORK. COMP. LAW § 15, subs. 8 and 9 provide that the insurance carrier must pay \$500 into each of two rehabilitation funds where an employee is killed and there are no survivors entitled to compensation. The 1924 amendment of Section 29 gave the insurance carrier "a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representative of the deceased." See *Phoenix Indemnity Co. v. Staten Island Rapid Transit Co.*, 224 App. Div. 346, 230 N. Y. Supp. 747 (2d Dept. 1928); (1929) 42 HARV. L. REV. 447; (1930) 5 ST. JOHN'S L. REV. 133.

²² N. Y. Laws 1934, c. 695; *Judson v. Fielding*, 227 App. Div. 430, 237 N. Y. Supp. 348 (3d Dept. 1929); *Shelter v. Grobsmith*, 143 Misc. 380, 257 N. Y. Supp. 353 (1932); *Mittman v. Meyerson*, 19 N. Y. S. (2d) 575 (1940).

²³ N. Y. Laws 1935, c. 328, § 29.

²⁴ N. Y. Laws 1937, c. 87, § 29. A later amendment, N. Y. Laws 1937, c. 684, merely numbered the divisions of the section.

By it, the employee may claim compensation and also, provided he brings his action within six months of the making of an award, sue the third person. If he follows this course, the insurance carrier is given a lien on the recovery, after the deduction of the reasonable and necessary expenses, including attorney's fees, for the compensation paid, or in case compensation is to be paid periodically, for an amount to be determined by the industrial board based upon the survivorship annuitants table of mortality, the remarriage tables of the Dutch Royals Insurance Institution and such facts as the board may deem pertinent.²⁵ If the employee does not sue within six months, the carrier becomes the assignee of the cause of action, but if successful he must pay to the employee two-thirds of the excess in the manner provided by the 1935 amendment. Like the change in the method of assignment brought about by the 1917 amendment, the section as it now stands makes the employee's cause of action pass to the carrier by operation of law if the employee does not bring suit within six months.

Effects of the 1935 and 1937 Amendments

The title of Section 29 has always contained the word "subrogation", but the text of the section prior to 1935 provided for an *assignment* of the employee's cause of action to the carrier without specifying whether subrogation in its primary sense, *i.e.*, indemnification, was intended, or whether the carrier was to be "substituted" for the employee,²⁶ not only in the action against the third person, but also in the right to retain beneficially the entire recovery.²⁷

²⁵ N. Y. WORK. COMP. LAW §29, subd. 2.

²⁶ Referring to a similar provision of the Virginia Workmen's Compensation Law, the Supreme Court of that state held that the insurance carrier's rights did not rest upon the principle of subrogation. *U. S. Fidelity and Guaranty Co. v. Blue Diamond Coal Co.*, 161 Va. 373, 170 S. E. 728 (1933).

²⁷ No New York court has written an opinion in a case where it was necessary to decide if the carrier became the owner of the entire amount recovered from a third person. In *Casualty Company of America v. A. L. Swett Electric Light and Power Co.*, 174 App. Div. 825, 162 N. Y. Supp. 107 (4th Dept. 1916), the court had before it an action by an insurance carrier against a third person whose negligence was alleged to have caused the employee's death. After holding that the carrier's recovery was not limited to indemnification, the court stated that the judgment might be regarded as impressed with a trust to reimburse the carrier and to pay the surplus to the employee's legal representatives. Substantially the same question was involved in *U. S. Fidelity v. N. Y. Ry.*, 93 Misc. 118, 156 N. Y. Supp. 615 (App. T. 1916), but the court held that the recovery of the carrier was to be limited to indemnification, as a narrow interpretation should be placed upon "subrogation" because the statute was in derogation of the common law rule that causes of action for personal injuries are non-assignable. The assignment of the cause of action by the person entitled to compensation to the carrier was held to make it the latter's property in *Traveler's Ins. Co. v. Padula*, 224 N. Y. 397, 121 N. E. 348 (1918). But despite this holding, in *Bossert v. Piel Bros.*, 112 Misc. 117, 119, 182 N. Y. Supp. 620, 622 (1920) the court said, in reliance upon the *Swett* case, *supra*:

Until the 1935 amendment, an employee who was injured by a third person and who elected to take compensation was limited to the award, although the person liable to pay it might, by virtue of the assignment to him of the employee's cause of action against such third person, recover a larger sum. The person liable to pay compensation was subrogated to the employee's cause of action to the extent that he became the absolute owner of the entire recovery, and not merely entitled to indemnify himself for the amount of the award.²⁸ The 1935 amendment effected a change in the substantive rights of the employee and the insurance carrier by giving to the former a right to two-thirds of any excess recovered by the carrier.²⁹ No

"Paying the compensation the employer may then sue the wrongdoer, and all that is recovered above the amount paid as compensation is for the benefit of the injured employee." *Royal Indemnity Co. v. J. G. White*, 120 Misc. 332, 198 N. Y. Supp. 264 (1923) held that the carrier could recover in the stead of the employee, but indicated that the carrier was not entitled to a surplus remaining above the amount necessary to indemnify him. The next decision referring to this question took the view that the assignment to the carrier vested in him a beneficial interest in the entire recovery. *Matter of Zirpola v. Casselman, Inc.*, 237 N. Y. 367, 143 N. E. 222 (1924). Finally, just before the 1935 amendment of Section 29, the question came squarely before the court in *Tracy v. American Mutual Liability Ins. Co.*, 266 N. Y. 536, 195 N. E. 188 (1935), wherein the court decided that the assignment was absolute and vested the beneficial interest in the entire recovery in the insurance carrier.

²⁸ This statement applies to all cases in which the employee is alive and to cases where all those who are entitled to share in his estate are dependents. But if some of the distributees are not dependents entitled to compensation, the insurance carrier has a right only to the portion which the dependents would take as distributees. As the cause of action may not be split, the deceased employee's administrator, and not the insurance carrier, must bring the action. *U. S. Fidelity & Guaranty Co. v. Graham & Norton Co.*, 254 N. Y. 50, 171 N. E. 903 (1930). That the cause of action may not be split, see *Lang v. Brooklyn City Ry. Co.*, 217 App. Div. 501, 217 N. Y. Supp. 277 (1st Dept. 1926).

²⁹ N. Y. Laws 1935, c. 328, § 29 ("Subrogation to remedies of employees. If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, shall, before any suit or any award under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commissioner may by regulation prescribe. If such injured employee, or in case of death his dependents, elect to take compensation under this chapter, the awarding of compensation shall operate as an assignment of the cause of action against such other to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation. If such fund, person, association, corporation or carrier, as such an assignee, recover from such other, either by judgment, settlement or otherwise, a sum in excess of the total amount of compensation awarded to such injured employee or his dependents and the expenses for medical treatment paid by it, together with the reasonable and necessary expenditures incurred in effecting such recovery, it shall forthwith pay to such injured employee or his dependents, as the case may be, two-thirds of such excess, and to the extent of two-thirds of any such excess such recovery shall be deemed for the benefit of such employee or his dependents. * * *

"The right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee, or in case of death his dependents, when such

procedural change was wrought by this amendment.

An amendment in 1937 materially changed the procedure, and, although a contrary view has been expressed by the Court of Appeals, it seems also to have made a substantive change.³⁰ The amendment gives the employee the right to take compensation and thereafter to sue the third person responsible for his injury, provided he brings his action within six months after receiving an award,³¹ and provided further that the action is brought within one year from the date of the injury.³² Under this last amendment the insurance carrier has a lien upon the employee's recovery for the amount of compensation paid, or which he may be required to pay, if compensation be payable periodically. In the latter event, as the extent of the carrier's liability is not immediately determinable, it is to be estimated by the industrial

employee is injured or killed by the negligence or wrong of another in the same employ. § 2. This act shall take effect immediately.”)

³⁰ In *Hession v. Sari Corp.*, 283 N. Y. 262, 28 N. E. (2d) 712 (1940), *rev'g*, 258 App. Div. 969, 16 N. Y. S. (2d) 951 (2d Dept. 1940), N. Y. Laws 1935, c. 328, § 29, was in effect when plaintiff was injured. He elected compensation, but brought suit, after the 1937 amendment (N. Y. Laws 1937, c. 684, § 29, eff. Sept. 1, 1937) was enacted, against defendant, a third person who allegedly caused his injuries. In holding that the employee might maintain the action the court said: “In short, the 1937 amendment of section 29 affected only matters of judicial procedure and consequently was applicable to the plaintiff's alleged previously existing cause of action.” Actually, the 1937 amendment does bring about a change in substantive rights. To illustrate: Assume the award to be \$1,000 and the recovery from the third person to be \$2,000. Under the 1935 amendment, if the employee sued he would recover \$2,000, but he could not also claim compensation. If he elected compensation he would receive an award of \$1,000, and two-thirds of the surplus recovered by the insurance carrier, a total of \$1,666.66. As the statute now stands, the employee may take the award of \$1,000, and, provided he brings suit within six months thereafter, sue the third person, recovering \$2,000 on which the carrier has a lien for \$1,000 for the compensation paid. Here the employee receives a total of \$2,000. If the employee takes an award of \$1,000 and fails to bring suit against the third party within six months thereafter, the carrier may sue and recover \$2,000 of which he retains \$1,000 for compensation paid, and one-third of the balance, paying the employee two-thirds or \$666.66. Here the total received by the employee in compensation and damages is \$1,666.66. Apparently there is no substantive change because under both statutes the employee receives \$2,000 *when he is the plaintiff* in the action against the third person, and only \$1,666.66 *when the carrier is the plaintiff*. In reality there is a substantive change, because under the 1935 amendment the carrier obtained a vested right to one-third of any surplus above the amount of the award, and the employee, by accepting the award, precluded himself from suing the third person. Now the carrier does not receive a vested right to one-third of any surplus upon the making of the award, as he formerly did, but only if the employee fails to sue the third person within six months after an award has been made. If the court meant to hold in *Hession v. Sari*, *supra*, that the 1937 amendment destroyed the right to one-third of any surplus which vested in the insurance carrier when an award was made to Hession, it would seem that the section violates the 14th Amendment of the U. S. Constitution.

³¹ N. Y. WORK. COMP. LAW § 29, subd. 1.

³² *Ibid.* The one-year period of limitation is for the benefit of the insurance carrier and may not be used as a defense by the third person. *McCue v. J. F. Shea Co.*, 24 N. Y. S. (2d) 307 (1940).

board "upon the basis of the survivorship annuitants table of mortality, the remarriage tables of the Dutch Royal Insurance Institution and such facts as it may deem pertinent".³³

The 1935 amendment gave the employee a right to two-thirds of the excess recovered by the insurer, but it carried with it no assurance that there would be any such excess even though the employee's actual damages were far greater than the award. The statute did not compel the carrier to sue, as the legislature evidently thought the carrier's desire to be indemnified and to share in one-third of the excess recovery would afford sufficient incentive. Primarily the carrier would be interested in indemnity. The employee had no control over the conduct of the action, and the possibility certainly was present that in any doubtful case the carrier would prefer to compromise for an amount equal to the award, rather than to risk an adverse verdict in an attempt to secure full damages. Then too, in many cases the carrier might have been the insurer of the tortfeasor as well as that of the employer. In such cases it is very doubtful that the insurer would bring suit against itself, and it is just as doubtful that it would "compromise" the claim in a manner which would provide a surplus for the employee.

The present procedure is apparently much fairer and better designed to saddle the loss on the wrongdoer. The employee, unlike the carrier, is primarily interested in a recovery which will provide something in excess of the amount of the award. It is to his advantage, therefore, to prosecute the action with all his energy, for he has everything to gain and nothing to lose. Practically, of course, in many cases he will not be in such a favorable position to sue as the carrier because of his limited resources, but the carrier's interest in the outcome would undoubtedly result in its offering the employee every assistance.

The nature of the carrier's lien was discussed by the trial court in *Butcher's Mutual Casualty Co. v. Emerald Cab. Corp.*³⁴ In that case an employee of the plaintiff's assured was injured by a taxicab owned by the defendant on December 28, 1937—after the 1937 amendment. The employee brought suit and thereafter settled her claim against the defendant. Prior to that time the plaintiff insurance carrier advanced \$30.00 for medical expenses which the employer is bound to provide under Workmen's Compensation Law, Section 13, subdivision c.³⁵ This section gives the employer "an additional cause

³³ N. Y. WORK. COMP. LAW § 29, subd. 2.

³⁴ 169 Misc. 749, 8 N. Y. S. (2d) 746 (1939).

³⁵ N. Y. WORK. COMP. LAW § 13, subd. c ("The liability of an employer for medical treatment as herein provided shall not be affected by the fact that his employee was injured through the fault or negligence of a third party, not in the same employ, unless and until notice of election to sue or the bringing of suit against such third party. The employer shall, however, have an additional cause of action against such third party to recover any amounts paid by him for such medical treatment, in like manner as provided in section twenty-nine of this chapter.")

of action against such third party to recover any amounts paid by him for such medical treatment, in like manner as provided in section twenty-nine of this chapter." The plaintiff sued under this section, but the court held that the "additional cause of action" given by Section 13, subdivision c, had been converted into a lien by the 1937 amendment of Section 29, when the employee brings the action, and that as timely notice was not given to the defendant the lien had been lost. The decision was reversed by the Appellate Term,³⁶ on the ground that the amendment of Section 29 had no effect upon the cause of action given to the employer under Section 13, subdivision c,³⁷ but the suggestion remains that the lien provided for in Section 29 does not attach and become binding upon the defendant by operation of law, but only by giving him seasonable notice of it. Probably this represents a proper interpretation of the provision, because a contrary holding would require the defendant to pay the employee's judgment at his peril, even though he was not aware of the fact that the employee had received an award.

Particular Problems

In its present form the section appears to bring about greater equity than resulted under it prior to 1935. This is its general design, at least, and it manifests a desire on the part of the legislature to extend still further the paternalistic concept which underlies the Act. So many problems are presented by technical "loose ends", however, that it may well be that more often than not the result attained in practice will fall far short of the *desideratum*. The following are a few of the points which appear to the writer to contain the seeds of litigation.

(a)

Subdivision 1 of Section 29 provides that if the employee takes compensation and sues the third party tortfeasor "such action must be commenced not later than six months after the awarding of compensation and in any event before the expiration of one year from the date such action accrues." If the employee fails to commence such action within the time limited, subdivision 2 of Section 29 provides that the failure shall operate to assign the cause of action to the carrier. The statute provides for no other event which will bring about the assignment. What will be the position of the carrier if the employee brings suit just before the period of limitation terminates, but goes no further? The statute does not provide that the employee

³⁶ 174 Misc. 1, 19 N. Y. S. (2d) 685 (1940).

³⁷ See *City of New York v. Steers & Menke*, 167 Misc. 566, 4 N. Y. S. (2d) 292 (1937) (where the city recovered as the employee's assignee and also in its own right under N. Y. WORK. COMP. LAW § 13, subd. c).

must prosecute the action to completion, and it imposes no penalty upon him if he does nothing further, except that if an award has not been made he cannot thereafter claim a deficiency. As the employee commenced suit there was no assignment to the carrier, and as the carrier would only be entitled to a lien if there were a recovery, he has no grounds upon which he could make himself a party to the action, and no legal right to compel the employee to prosecute. If the tortfeasor is a friend or relative of the employee, the latter may in effect discharge the tortfeasor's liability to the carrier by bringing suit and then taking no further action. More dangerous still, is the possibility of the employee entering into a secret settlement with the third party. Or, assume that the employee brings suit within six months of the date of an award, and then immediately discontinues the action. The statute provides that the cause of action will be assigned to the carrier only if the employee fails to bring the action. Here, as the employee "commenced" the action, the statute does not provide for an assignment. Perhaps the courts will hold that "commence" means "commence, continue and prosecute to judgment", but this interpretation would require more than a liberal amount of judicial legislation. If the legislature had meant "commence and prosecute in good faith", it would have been easy enough to say so. Also, it would have been just as easy to add a provision providing for an assignment of the cause of action to the carrier in the event that the employee discontinued suit.

(b)

Although the employee may not compromise his claim against the third person without losing his right to a deficiency award if the amount actually recovered is less than he would have received in compensation, unless the carrier consents,³⁸ there is no similar restriction upon the carrier. If the employee fails to bring suit within six months, he loses control of the action to the extent that the carrier may make a settlement which would deprive the employee of a share in an excess which might be warranted by the injury. True, the employee can protect himself from this consequence by bringing suit within the time limited, but it requires no great amount of imagination to conceive of many cases in which the employee would lack the means to employ counsel to commence the action. If he is fortunate enough to be in a position to sue he is protected from inequitable conduct on the part of the carrier, and in addition, he is entitled to the entire excess. If he cannot sue, he is more or less at the mercy of the carrier, and besides, may share in any excess recovered only to the extent of two-thirds.

³⁸ Roth v. Harlem Funeral Car Co., 268 N. Y. 661, 198 N. E. 545 (1935).

(c)

Assume the employee has no intention of suing the third party, must the carrier wait six months? Causes of action in tort for personal injuries are not assignable except where their assignment is expressly allowed by statute,³⁹ and in this case there is no provision for assignment prior to six months from the date of the award. An employee might be unwilling to bring an action himself, but might have no objection to allowing the carrier to do so, and yet no consent he might give would serve to vest the claim in the carrier. The tortfeasor may be solvent today but bankrupt six months hence. Each minute that suit is withheld may lessen the carrier's chances of being indemnified. Delay in bringing an action can result in loss, and in no case in a benefit that would not be just as available if suit were brought earlier. This provision, as it now stands, operates for the benefit of the wrongdoer without giving either the carrier or the employee any advantage.

Conclusion

Workmen's Compensation Laws are no longer social experiments. They are as essential to industry as they are to labor. They are an integral part of one of the most important branches of our law, for upon their effectiveness depends the potential welfare of millions of employees and their families. The needs which they fill are so closely related to the interests of society that no one can gainsay that anything short of perfection is inadequate. Perhaps unique situations and exceptional cases cannot be fully provided for, but much confusion could be avoided if the section were amended to provide for a joint cause of action in which either the employee or the insurance carrier could make the other a party to the action. Were this done there would be no question of prejudicial inactivity by the employee, or an unfair compromise by the employer. Under such a provision it would not be necessary for the insurance carrier to wait six months if the employee refused to sue. A change of this character, of course, would be merely procedural and would not

³⁹ *Richards v. National Transp. Co.*, 158 Misc. 324, 326, 285 N. Y. Supp. 870, 873 (1936) ("Section 41 of the Personal Property Law expressly prohibits the assignment of a cause of action for personal injuries.

"The issue of public policy causes the court no concern. Repeated holdings set the judicial mind at rest on this point.

"Section 41 of the Personal Property Law is a relic—like remnant of the laws of a social system that one is happy is long dead and buried. In the past champerty and maintenance was a dreaded danger. In the present condition of society we need not fear the same perversion of justice. Consequently our statutes are all that remain of the outworn maintenance and champerty"). *Lang v. Brooklyn City Railroad Co.*, 217 App. Div. 501, 217 N. Y. Supp. 277 (1st Dept. 1926).

necessarily involve a different substantive rule as to the recovery in excess of the award plus the expenses of suit. That is, such a change might give the entire surplus to the employee if he initiated the action, but only two-thirds of it if the carrier took the initiative. However, the writer cannot see that there would be any justification for the perpetuation of this arbitrary rule.

Even though the legislature does not deem it advisable to alter the procedure it certainly should amend the section so as to give the net surplus to the employee. There is no apparent reason why the insurance carrier should receive one-third of the net surplus as a bonus for having brought the action. The entire judgment against the third party tortfeasor represents the actual loss of the employee. His injury, his pain, his suffering are represented by that judgment. It should be his, and the legislature can deprive him of the entire surplus with no more justice, than it could give a surety in an ordinary case a greater sum than is necessary to indemnify him.

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