

Workmen's Compensation--Liability of Employer in Common Law Action for Damages Resulting from a Disease Not Enumerated in the Statute (Barrencotto v. Cocker Saw Co., Inc., 266 N.Y. 139 (1934))

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But this construction gives a special meaning to Section 220 which disregards the distinction there made between service in general and service by a sheriff when process is delivered to him for that purpose. Such interpretation should not be made unless the intent of the legislature clearly points to that construction.¹³ Generalization by the court of the meaning of "personal service" under Section 17¹⁴ does not seem warranted,¹⁵ nor does their disregard of the evident distinction found in Section 220.

J. T. B., JR.

WORKMEN'S COMPENSATION—LIABILITY OF EMPLOYER IN COMMON LAW ACTION FOR DAMAGES RESULTING FROM A DISEASE NOT ENUMERATED IN THE STATUTE.—His claim having been dismissed by the State Industrial Board, plaintiff brought this action at law. He alleged that he was an employee of the defendant and that in the course of his employment in defendant's factory he inhaled dust and other impurities which caused him to contract silicosis. The defendant is charged with failure to exercise reasonable care in the performance of duties imposed by statute and common law.¹ The disease from which the plaintiff is suffering is not an "occupational disease" for which the statute imposes a liability on the employer to provide compensation.² The defendant, having complied with the Workmen's Compensation Law in all respects, moved to dismiss the complaint under rules 106 and 107 of the Rules of Civil Practice. This was denied and on appeal *held*, affirmed. In cases not covered by the statute, the Workmen's Compensation Law (Consol. Laws, ch. 67) does not bar an action at law by the employee against the employer to recover damages sustained through his contracting an occupational disease not enumerated in the statute, by reason of the alleged negligence of the employer. *Barrencotto v. Cocker Saw Co., Inc.*, 266 N. Y. 139, 194 N. E. 61 (1934).

¹³ *People v. Long Island R. Co.*, 194 N. Y. 130, 87 N. E. 79 (1909).

¹⁴ *Supra* note 1.

¹⁵ *People v. Richards*, 108 N. Y. 137, 150, 15 N. E. 371, 376 (1888); *Pardy v. Boomhower Grocery Co.*, 178 App. Div. 347, 164 N. Y. Supp. 775, 777 (3d Dept. 1917); *In re Kassam's Estate*, 141 Misc. 366, 252 N. Y. Supp. 706 (1931), *aff'd without opinion*, 235 App. Div. 609, 255 N. Y. Supp. 835 (1st Dept. 1931).

¹ *Flike v. Boston & Albany R. R. Co.*, 53 N. Y. 549 (1873); *Daurizio v. Merchants Despatch Transp. Co.*, 152 Misc. 716, 274 N. Y. Supp. 174 (1934).

² N. Y. WORKMEN'S COMPENSATION LAW (1922) §3, subd. 2, and §§11, 38, 48; see 73 A. L. R. 543, citing *Williams v. Guest*, *Keen and Nettlefolds*, 18 B. W. C. C. (Eng.) 535 (1925) for the proposition that silicosis is not an accidental personal injury arising out of and in the course of employment but is an industrial disease. The burden of proof is on the plaintiff to set forth facts showing that the statute does not apply. *Nulle v. Hardman*, 185 App. Div. 351, 173 N. Y. Supp. 236 (1st Dept. 1918).

At common law an employee had a cause of action for a disease arising out of and in the course of his employment due to the negligence of his employer,³ subject to certain defenses which the latter could set up.⁴ Neither the United States Constitution,⁵ nor the State Constitution⁶ limits the reasonable exercise of the power of the legislature to create a new, exclusive system of compensation for injuries sustained by an employee. By statute the legislature has imposed a new liability on the employer,⁷ and, at the same time, has made this liability for injury or death exclusive and in place of any other liability "on account of such injury or death."⁸ To hold, as the appellant contends, that the mere enumeration of certain diseases for which the statute grants a right of compensation leaves the party injured by the employer's negligence entirely without a remedy in the case of a non-enumerated disease would be a strained, unreasonable construction of Section 11 repugnant to the humane and progressive purpose of the Workmen's Compensation Law⁹ for it not only would destroy a long-existing common law right¹⁰ without giving anything in return therefor but would give employers an opportunity to violate with impunity a statute intended for the protection of employees.¹¹ It was doubtful whether the court would have implied, under Section 11 as it originally provided,¹² the construction contended for by the appellant, and extended the statute beyond its subject matter where the legislature did not expressly do so.¹³ Today there is no doubt that to the extent that the field of industrial and occupational disease is not touched by the statute it must be considered that the legislature intended that the common law remedies should continue to exist,¹⁴ and this view is further bulwarked by the present phraseology of Section 11 which

³ *Shinnick v. Clover Farms Co.*, 169 App. Div. 236, 154 N. Y. Supp. 423 (1st Dept. 1915); *Trout v. Wickwire Spencer Steel Corp.*, 195 N. Y. Supp. 528 (1922).

⁴ *Wager v. White Star Candy Co.*, 217 App. Div. 316, 217 N. Y. Supp. 173 (3d Dept. 1926).

⁵ N. Y. Central R. R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247 (1917).

⁶ N. Y. STATE CONST. Art. I, §19.

⁷ N. Y. WORKMEN'S COMPENSATION LAW (1922) §10.

⁸ N. Y. WORKMEN'S COMPENSATION LAW (1922) §11; *Repka v. Fedders Mfg. Co.*, 264 N. Y. 538, 191 N. E. 553 (1934).

⁹ *Trout v. Wickwire Spencer Steel Corp.*, *supra* note 3; *Donnelly v. Minneapolis Mfg. Co.*, 161 Minn. 240, 201 N. W. 305 (1924).

¹⁰ *Supra* note 3; "Rights long existing should not be taken away except by a statute where the purpose to do so is clear." *Judson v. Fielding*, 227 App. Div. 430, 435, 237 N. Y. Supp. 348, 354 (3d Dept. 1929).

¹¹ *Cox v. U. S. Coal and Coke Co.*, 80 W. Va. 295, 92 S. E. 559 (1917); *Jellico Coal Co. v. Adkins*, 197 Ky. 684, 274 S. W. 972 (1923).

¹² N. Y. WORKMEN'S COMPENSATION LAW (1913) §11 as amended by L. 1914, c. 316.

¹³ *Shinnick v. Clover Farms Co.*, *supra* note 3; *Donnelly v. Minneapolis Mfg. Co.*, *supra* note 9.

¹⁴ *Nulle v. Hardman*, *supra* note 2; *Trout v. Wickwire Spencer Steel Corp.*, *supra* note 3; *Wager v. White Star Candy Co.*, *supra* note 4; *List v. Eastman Kodak Co.*, 236 App. Div. 830, 259 N. Y. Supp. 966 (4th Dept. 1932).

expressly limits its scope to the same field to which the new system of compensation is confined.¹⁵ This is the better rule for it is difficult to perceive a satisfactory and reasonable basis for the exemption of employers from liability for diseases caused by their negligence, such diseases being noncompensable under the statute.¹⁶

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¹⁵N. Y. WORKMENS COMPENSATION LAW (1914) §11 as amended by Laws of 1916, c. 622. Though the court has stated the doctrine to be that "the employer's liability is exclusive" both under the old §11 (Shanahan v. Monarch Engineering Co., 219 N. Y. 409, 114 N. E. 795 [1916]) and as it was amended (Repka v. Fedders Mfg. Co., *supra* note 8), still the statement of the court as to exclusive liability is to be considered unimpeachable only as to matters to which it was intended to be applicable, but cannot be deemed to be applicable to matters not under consideration by the court, such as the question under discussion.

¹⁶Jellico Coal Co. v. Adkins, *supra* note 11; Donnelly v. Minneapolis Mfg. Co., *supra* note 9. *Contra*: see Zajachuck v. Willard Storage Battery Co., 106 Ohio St. 538, 140 N. E. 405 (1933).