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Insurance - Risks and Causes of Loss - Is the Cumulative Effect of Radium Burns an Accidental Injury

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say that their illegality hinges upon the nature of their actual use.[12] However, under any type of statute forbidding gambling devices it is generally held that a machine is illegal if it pays off in tokens exchangeable for merchandise or usable for free plays.[13]

The major controversy arises when the only "pay-off" by the machine is the opportunity to play automatically registered free games obtained by achieving a certain minimum score. The majority of jurisdictions state that free games represent amusement and are things of value or property and therefore fall within the statutory prohibitions [14] or that they fall within this category because they offer the necessary lure to indulge in a gambling instinct.[15] Nevertheless, in a large minority of the jurisdictions the word "property" in statutes similar to that involved in the case treated here is construed to mean something more tangible such as goods, chattels, effects, or choses in action, and is said not to include the trivial free amusement provided by free plays on a pinball machine.[16]

North Dakota has a unique manner of dealing with gambling devices in that she prohibits them as lotteries.[17] The only case tried under this section to date, states that a pinball machine for which the player pays a valuable consideration and receives an opportunity, chiefly dependent upon chance, to win a prize or award which is property, is a lottery as prohibited by law.[18] In holding in this manner, the court declared that the exclusive right to operate an amusement device was a form of property. In short, pinball machines are illegal under North Dakota law if they award free games. However, the statute has not been vigorously enforced in this state.

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INSURANCE—RISKS AND CAUSES OF LOSS—IS THE CUMULATIVE EFFECT OF RADIUM BURNS AN ACCIDENTAL INJURY?—Plaintiff entered into a contract to supply a manufacturing concern with a patented process, materials and equipment for producing a radioactive ointment. An employee of the manufacturer sued plaintiff in tort for radium burns suffered over a period of several months while the employee was operating an emanator used in the production of the ointment. It was alleged that plaintiff was negligent in

12. State v. Wiley, 232 Iowa 443, 3 N.W.2d 620 (1942); State v. Six Slot Machines, 166 Kan. 361, 201 P.2d. 1039 (1949); State v. Hightower, 156 S.W.2d 327 (Tex. Civ. App. 1941).

13. *E.g.* Giomi v. Chase, 47 N.M. 22, 132 P.2d 715, 718 (1942); Commonwealth v. Bowman, 267 Ky. 602, 102 S.W.2d 382 (1936).

14. State v. Wiley, 232 Iowa 443, 3 N.W.2d 620 (1942); Commonwealth v. Rivers, 323 Mass. 379, 82 N.E.2d 216 (1948); Giomi v. Chase, 47 N.M. 22, 132 P.2d 715 (1942).

15. Painter v. State, 163 Tenn. 627, 45 S.W.2d 46 (1932).

16. Washington Coin Mach. Ass'n. v. Callahan, 142 F.2d 97 (D.C. Cir. 1944); State v. Waste, 156 Kan. 143, 131 P.2d 708 (1942); *In re* Wigton, 151 Pa. Super. 337, 30 A.2d 352 (1943).

17. It was provided in §9660, N.D. Comp. Laws (1913), that "the playing of an amusement device, commonly called a pinball machine, which is played for a consideration and which offers to the player an opportunity, dependent chiefly upon chance, to win the right to extended free use of the device for periods of varying duration, is a lottery." When this section was carried over into the 1943 code, the language quoted above was not included in the revised section. However, the Notes of the Revision Committee state that the change in language was not intended to affect the meaning of the statute. N.D. Rev. Code §12-2401 (1943); N.D. Code Revision Notes §12-2401 (1943).

18. Middlemas v. Strutz, 71 N.D. 186, 299 N.W. 589 (1941).

failing to inform the employee of the dangers connected with the work. Defendant refused to defend the plaintiff, contending that the injury was not within the terms of a general liability policy it had issued to plaintiff because the injury was not caused by a sudden happening and therefore did not arise out of an "accident." Plaintiff settled out of court and sued defendant to recover the costs of the settlement. *Held*, judgment for plaintiff. Injuries arising from an accident include those which occur by reason of a series of unforeseen events which have a delayed effect terminating in an ascertainable injury. *Canadian Radium & Uranium Corp. v. Indemnity Insurance Co.*, 411 Ill. 325, 104 N.E.2d 250 (1952).

Recovery has been allowed both in the United States [1] and England [2] for injuries received by a person where a series of events, and not one specific event, have caused the injury even though it could not be decided which event was the final cause. This has included recovery for cancer,[3] X-ray burns,[4] silicosis,[5] tuburculosis,[6] skin-poisoning,[7] gas poisoning [8] and typhoid fever.[9] In interpreting insurance policies the courts have consistently construed the term "accident" liberally in favor of the insured,[10] for it is held that the desire of a business man to protect himself is the main inducement toward purchasing the insurance.[11]

Since the middle of the last century all states have passed Workmens Compensation Acts,[12] requiring that an injury must be caused by some

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1. Zajkowski v. American Steel & Wire Co., 258 Fed. 9 (6th Cir. 1918).

2. "In a case in which the contraction of disease is the injury for which compensation is to be given it cannot be material that the disease was contracted by reason of a succession of scratches suffered over a period of some four months. I am going to quote from his judgment (Lord Birkenhead) in Innes (or Grant) v. Kynoch (88 L.J.P.C. at page 87 (1919) "an interval is assumed (perhaps rightly) before the assault, which is the accident, followed by the infection or contraction of disease, which is the injury." Here there was a succession of assaults extending from January to April. In April, at any rate, there resulted an injury; the contraction of the disease was the injury. To my mind, it is immaterial that the accidents, the scratches, were sustained over successive periods of time." Burrell & Sons v. Selvage, 90 L.J.K.B. (n.s.) 1340, 1342 (1921).

3. Boal v. Electric Storage Battery Co., 98 F.2d 815 (3d Cir. 1918) (improper ventilation in acid room).

4. King v. Travelers Insurance Co., 123 Conn. 1, 192 Atl. 311 (1937) (insured dentist received X-ray burns on fingers); "We are of the opinion that, when an unusual, unexpected, and unforeseen injury or death results from an intentional act of the insured, the ensuing injury or death is caused by accidental means," and "the chain of causation is unbroken and progressive from the start of the first exposure to the breaking of the skin. It is one continuous accident." Murphy v. Travelers Insurance Co., 141 Neb. 41, 2 N.W.2d 576, 578 (1942) (improper instructions given as to use of machine).

5. Jones v. Rinehart, 113 W.Va. 414, 168 S.E. 482 (1933) (improper ventilation furnished employees); *accord*, Globe Indemnity Co. v. Banner Grain Co., 90 F.2d 774, 783 (8th Cir. 1937). In allowing recovery at common law where it was refused under Workmens Compensation Act the court said, "We think the trial court rightly held that the word 'accident' in the insurance policy carried the broader meaning."

6. Maryland Casualty Co. v. Pioneer Seafoods Co., 116 F.2d 38 (9th Cir. 1940) (improper living quarters furnished).

7. Oscar Heineman Corp. v. Standard Surety & Casualty Co. of New York, 289 Ill. App. 358, 7 N.E.2d 389 (1937) (failure to furnish employees gloves).

8. Pickett v. Pacific Mutual Life Insurance Co., 144 Pa. 78, 22 Atl. 871 (1891) (insured killed by gas seepage in well).

9. John Rissman & Son v. Industrial Commission, 323 Ill. 459, 154 N.E. 203 (1926) (employer furnished impure drinking water).

10. Mutual Life Insurance v. Hurni Packing Co., 263 U.S. 167 (1923).

11. Siverstein v. Metropolitan Life Insurance Co., 254 N.Y. 81, 171 N.E. 914 (1930); Bird v. St. Paul Fire and Marine Insurance Co., 224 N.Y. 47, 120 N.E. 86, 87 (1918), "Our guide is the reasonable expectation and purpose of the ordinary business man when making an ordinary business contract."

12. 1 Larson, Workmens Compensation Law, §41.00 (1st Ed. 1952).

unforeseen and unexpected event.[13] The original Workmens Compensation Acts did not allow an employee to recover for an occupational disease,[14] but that rule has now been changed by statutory ammendment in forty-four states.[15]

Many jurisdictions have held the Workmen's Compensation Acts to mean that the accident causing the injury must be a present happening,[16] or one traceable to a specific time and place.[17] This interpretation has been broadened by several courts recently.[18] Each consecutive contact has been held to be a specific event, thereby allowing recovery as in the principal case. This reasoning has been applied in cases of pneumonoconiosis,[19] hand blisters caused by continuous contact [20] and hand rash caused by the use of harsh soaps.[21] Even in Missouri, where recovery is denied by statute except where the accident happened suddenly and violently,[22] an employee has been allowed to recover for the loss of the use of his hands caused by blisters [23] and lead poisoning caused by inhaling impregnated air.[24] The courts have held that "suddenly" does not imply "instantaneously," [25] and even if it did there is no reason for saying that each contact with the assaulting force is not sudden and violent even though the injury could not be seen until after the first few contacts.[26] This line of reasoning is only necessary in applying the Workmens Compensation Acts since the definition of "accident" under the Acts has been limited by statute. The definition has never been applied to common law accidents except in New York. The courts of New York have quite often been influenced in rendering a judgment by the interpretation given to "accident" in the Workmens Compensation Acts instead of adhering to the common law definition as generally applied throughout our system of jurisprudence.[27] The insurance company in the

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13. Globe Indemnity Co. v. Banner Grain Co., 90 F.2d 774 (8th Cir. 1937) (inhaling grain dust); *accord*, Peru Plow Co. v. Industrial Commission, 311 Ill. 216, 142 N.E. 546 (1924) (recovery under Workmen's Compensation denied where workman's lungs were filled with dust in shop); Golden v. Lerch Bros., 211 Minn. 30, 300 N.W. 207 (1941) (insurer not liable to employer where workman contracted tuberculosis and silicosis) (strong dissent); Castly v. City of Eveleth, 173 Minn. 564, 218 N.W. 126 (1928) (fireman contracted pneumonia); Lerner v. Rump Bros., 241 N.Y. 153, 149 N.E 334 (1925) (recovery denied under Workmens Compensation where refrigeration worker contracted pneumonia).

14. Billo v. Allegheny Steel Co., 328 Pa. 97, 195 Atl. 110 (1937) (silicosis).

15. 1 Larson, Workmens Compensation Law, §41.11 (1st Ed. 1952).

16. Liondale Bleach Works v. Riker, 85 N.J.L. 426, 89 Atl. 929 (1914) (recovery denied where eczema was caused by acids).

17. Taylor Dredging Co. v. Travelers Insurance Co., 90 F.2d 449 2nd. Cir. 1937) (tuberculosis, recovery denied); Tomnitz v. Employers Liability Assurance Co., 343 Mo. 321, 121 S.W.2d 745 (1938).

18. Aldrich v. Dole, 43 Idaho 30, 249 Pac. 87 (1926).

19. DeFilippo's Case, 284 Mass. 531, 188 N.E. 245 (1933).

20. American Maize Products Co. v. Nichipordick, 108 Ind. App. 502, 29 N.E.2d 801 (1940).

21. Webb v. New Mexico Publishing Co., 47 N.M. 279, 141 P.2d 333 (1943).

22. "The word 'accident' as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event happening suddenly or violently, with or without human fault and producing at the time objective symptoms of an injury . . ." Mo.R.S. §287.020 (2) (1949).

23. Lovell v. Williams Bros., 50 S.W.2d 710 (Mo.App. 1932).

24. Soukop v. Employers Liability Assurance Corp., 341 Mo. 614, 108 S.W.2d 86 (1937) (one judge dissented holding the injury an occupational disease).

25. See note 23 *supra*.

26. See note 24 *supra*.

27. Jackson v. Employers Assurance Corp., 248 N.Y.S. 207, 182 N.E. 180 (1932).

principal case cited several New York cases [28] in defense, relying upon the interpretation given the term "accident" in New York.

At the present time approximately one-third of the states allow recovery under the common law only if the accident does not come under one of the categories provided for in the Workmens Compensation Act [29] since the Act is compulsory as to the specifically enunciated injuries.

The statutes of North Dakota require every employer engaged in a hazardous enterprise to be covered by the Workmens Compensation Act [30] and no employer so covered is liable in tort for any injuries suffered by his employees. This pertains to those employers engaged in non-hazardous work also if they comply with the provisions of the Act.[31] While there are no cases directly in point with the principal case in this state it seems likely that the North Dakota court would follow Missouri in circumventing any limitations placed on the term "accident." In a 1941 case [32] the Supreme Court of North Dakota stated that the term "immediately" as used in a liability policy did not mean "instantaneously." However, the court refused to further define the term at that time.

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WORKMEN'S COMPENSATION — INJURIES FOR WHICH COMPENSATION MAY BE HAD — ACTS OF A RECREATIONAL CHARACTER SPONSORED BY EMPLOYER. — Claimant, a member of the General Electric Athletic Association, a membership corporation open only to employees of the General Electric Company, sustained a fracture of the left ankle during a game held on company property. *Held,* claimant was entitled to an award of Workmen's Compensation since the injury arose out of and in the course of his employment. *Tedesco v. General Electric Co.,* 305 N.Y. 544, 114 N.E.2d 33 (1953).

The dismissal of the claim by the Appellate Division was based mainly on the precedent of *Matter of Wilson v. General Motors Corp.*[1] An examination of the facts of that case makes it obvious that it has no sound application to the instant case. In the case of *Wilson v. General Motors* the employees of a plant had organized a softball league, conducting games after hours and off the premises for their own recreation and without any business advantages to the employer. Though the employer did permit conferences relating to

28. Jacobson v. Employers Assurance Corp., 259 N.Y. 559, 182 N.E. 180 (1932); Lerner v. Rump Bros., 241 N.Y. 153, 149 N.E. 334 (1925); Jefferys v. Charles H. Sager Co., 233 N.Y. 535, 135 N.E. 907 (1922).

29. 1 Larson, Workmens Compensation Law, §67.10 (1st Ed. 1952).

30. "Employers who comply with the provisions of this chapter shall not be liable to respond in damages at common law or by statute for injury to or death of any employee, wherever occurring, during the period covered by the premiums paid into the fund." N.D.Rev. Code, §65-0428 (1943).

31. "Any employer carrying on any employment not classed as hazardous under the definition of that term contained in section 65-0102 who complies with the provisions of this title and who shall pay into the fund the premiums provided for under this chapter shall not be liable to respond in damages at common law . . . for injuries to or the death of any employee . . . during the period covered by such premiums, if the injured employee has remained in the service of such employer with notice that the employer has paid into the fund the premiums provided for under the provisions of this title. The continuation in the service of such employer with such notice shall constitute a waiver by the employee of his rights of action as aforesaid." N.D.Rev. Code, §65-0429 (1943).

32. Jacobson v. Mutual Benefit Health & Accident Ass'n., 70 N.D. 566, 296 N.W. 545 (1941) (the statement, "The insurer shall be liable only for such accidental injuries as shall immediately . . . disable the insured." appeared in the policy).

1. 298 N.Y. 468, 48 N.E.2d 781 (1949).