

## THE COMMON LAW RIGHT OF ACTION FOR OCCUPATIONAL DISEASE IN PENNSYLVANIA.

In recent years many, perhaps the majority, of employers of labor have exhibited a constantly increasing care for the safety of their employees. Much of this admirable work has been done without any coercion, but much of it has been stimulated, if not entirely instigated, by the constantly increasing liability to which employers are being subjected towards employees injured by work accidents. One of the most striking effects of the workmen's compensation acts now in force is the great diminution in the number of accidents reported since they have gone into effect. Even in those jurisdictions having no such laws, a somewhat less, though still considerable impetus has been supplied by the acts which regulate the condition of employment and require the employers under penalty to provide protection for their work people.<sup>1</sup> These acts vary greatly in the extent of the protection required, but all of them enlarge, or at least define, the master's common law liability to provide a proper working place for his workmen. And a great majority of courts in construing them have held that a workman continuing in his employment with knowledge that the statutory provisions for his safety have not been complied with and that his work is therefore made unduly dangerous, does not assume the risk of injury resulting from the breach of the statute.<sup>2</sup>

In these two ways accidents are made costly to employers and self-interest has operated as a spur to compel the less considerate employers to follow the lead of their more considerate and humane brethren and take part in this safety campaign. But while there have been an almost infinite number of cases in which

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<sup>1</sup> For the sake of brevity, these acts will be termed "Factory Acts," though perhaps the term is neither completely accurate or universally recognized as appropriate.

<sup>2</sup> *Narramore v. Cleveland, C. C. & St. L. R. R. Co.*, 96 Fed. Rep. 298 (1898), and cases cited therein by Taft, J.; *Spring Valley Coal Co. v. Padding*, 210 Ill. 342 (1904); *Green v. American Car Co.*, 163 Ind. 135 (1904); *Swick v. Aetna Cement Co.*, 147 Mich. 454 (1907); *Durant v. Coal Co.*, 97 Mo. 62 (1888); *Fitzwater v. Warren*, 206 N. Y. 655 (1912); *Hall v. Slade*, 39 Wash. 447 (1905); *West v. Belfield Co.*, 128 N. W. Rep. 992 (Wis. 1910). *Contra*, *Marshall v. Norcross*, 191 Mass. 568 (1906); *Rays v. Railroad*, 107 Minn. 260 (1909); *Langlois v. Dunne Mills*, 25 R. I. 645 (1904).

employees injured by external violence have recovered heavy damages against their employers in actions either at common law or under the provisions of "factory" acts or employers' liability acts, there have been only a few cases in which an employer has been forced to pay damages to an employee incapacitated from labor by a disease contracted in his employment. Thus, though there is a growing perception of the necessity of protecting workmen not only from accidents but from disease, though acts have been passed prohibiting certain trades because of their inherently unhealthy character, though acts are in force in most of the American states imposing penalties upon those employers who provide their workmen with unnecessarily unhealthy work surroundings and though many manufacturers have voluntarily devoted considerable time and money to making their plants healthy as well as safe, the fear of civil liability at the suit of the sufferer has been absent as an incentive to coerce into line with their efforts those employers whose actions are determined solely by financial considerations.\*

Has a workman suddenly or gradually contracting disease by poisoning or infection or through constant subjection to unsanitary work conditions a right of action either at common law or by statute? There have been many cases both in Pennsylvania and in other American jurisdictions where an inexperienced employee has recovered for diseases due to poisoning or infection against a master who, knowing that the work assigned to the employee contained such risks, failed to warn him of their existence and to instruct him as to the precautions necessary to avoid them.

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\* While many of the workmen's compensation acts are so worded as to admit, if the English decisions on the language copied in those acts be valid, of a construction which would include occupational diseases as a subject of compensation, the one act which has been so construed is that in force in Massachusetts. *In re Hurle*, 104 N. E. Rep. 336 (1914); *Johnson v. London Guarantee & Accident Co.*, Case 230, "Reports of cases under the Massachusetts Workmen's Compensation Act," July 1, 1912, to June 30, 1913, p. 371.

The Industrial Accidents Commission of Michigan held that occupational diseases fell within the scope of the Michigan Act, but their decision was reversed upon an appeal. *Adams v. Acme White Lead Works*, 148 N. W. Rep. 485 (Mich. 1914), and the New Jersey and California acts have also been construed, one by a court of common pleas and the other by an industrial accidents commission of that state, as excluding occupational disease.

In some of these cases the poisoning or infection was sudden and due to a particular exposure,<sup>4</sup> in others it was slow and gradual and due to the cumulative effect of a long continued exposure.<sup>5</sup> But in no case in or outside of Pennsylvania has any action been maintained for disease, whether of sudden or slow infection, except where the employer has a knowledge of the risk superior to that which the servant had or might reasonably be expected to have. Either the knowledge of the servant or the obvious character of the danger<sup>6</sup> and the means necessary to avoid or minimize it, or, on the other hand, the master's ignorance that there was a reasonable probability of danger of such poisoning or infection<sup>7</sup> would negative a right of action at common law. In no case has a right of action been maintained by an employee, who, knowing that his employer has by his viola-

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<sup>4</sup>In the Pennsylvania case of *Wagner v. Jayne Chemical Works*, 147 Pa. 475 (1892), the plaintiff, a day laborer doing outside work, was ordered to do some work in connection with the process of making "dinitro-benzole." Experiencing discomfort from the fumes evolved by that process he left the work but returned to it at the order of the defendants' superintendent and upon his assurance that the fumes were not dangerous. He was allowed to recover for the "sickness" which resulted from his inhaling the fumes. *Accord*: *Hewett v. Woman's Hospital Aid Association*, 73 N. H. 556 (1906), where an inexperienced nurse was allowed to recover from her employer which had assigned her to the charge of an infectious case without informing her of its character or without warning her of the precautions she should take to avoid infection; *Span v. Ely*, 15 N. Y. Sup. Ct. 255 (1876), the defendant, a physician, employed the plaintiff to whitewash a house in which a patient had died of small-pox, falsely assuring him that it had been thoroughly disinfected; *Fidelity Trust Co. v. Winconsin Iron & Wire Co.*, 145 Wis. 385 (1911), plaintiff's decedent poisoned by drinking water from a tank containing cyanide of potassium; *Yellow Pine Co. v. Noble*, 101 S. W. Rep. 276 (Tex. 1907); *Meany v. Standard Oil Co.*, 55 Atl. Rep. 653 (N. J. 1903), in both of which the plaintiffs were overcome by fumes of oil.

<sup>5</sup>*McCray v. Varnish Co.*, 7 Pa. Super. Ct. 610 (1898), gangrene caused by continuous exposure to fumes generated in the manufacture of varnish; and see the very recent case of *Duffy v. India Refining Works*, Pa. Super. Ct. (1914), where the Pennsylvania Superior Court allowed recovery for the loss of a finger of a female employee who had been allowed without warning to continue at work with her hands so sore and inflamed as to greatly increase the risk of infection; *Pigeon v. Fuller*, 156 Cal. 691 (1909), lead poisoning; *Texas, etc., Co. v. Gardner*, 29 Tex. Civ. App. 90 (1902), slow poisoning by chemicals in lye vat of which the plaintiff had charge; *Fox v. Peninsular, etc., Co.*, 84 Mich. 676 (1891), slow arsenical poisoning of plaintiff whose task was to stir vats of paris green.

<sup>6</sup>*McKenna v. Atlantic Refining Co.*, 227 Pa. 124 (1910), and cases cited in notes 4 and 5 *supra*, all of which base the plaintiff's right to recover on his ignorance and inexperience.

<sup>7</sup>*Corcoran v. Wanamaker*, 185 Pa. 496 (1898); *Hysell v. Swift*, 78 Mo. App. 39 (1898).

tion of a statutory requirement failed to remove or lessen the risk to his workmen of poisoning or infection, sudden or slow, has none the less continued in the employment and by reason of his resultant exposure, been poisoned or infected. The problem, which it is the purpose of this paper to discuss, is the present existence of such a right of action in Pennsylvania.

The question resolves itself into three principal heads:

(1) Is disease contracted a damage for which, standing alone, the sufferer is entitled to recover in an action at law?

(2) Is there any duty known to the common law or created by statute, which obligates an employer to so equip his plant as to prevent his employees contracting unnecessary diseases therein?

(3) Is there any rule of law which affords the defendant a defense or bars the plaintiff from recovery in the case of disease contracted, which does not operate in the case of violent injury to the body?

Where the disease is one the sole origin of which can be clearly traced to some wrongful act or omission, there are numerous instances, though few in comparison with the myriad of recoveries for injuries to the body by external violence, in which actions have been successfully maintained though no other harm has been suffered. Disease is equally legal damage where the defendant is guilty of wrongful action toward one standing in no voluntary relation to him<sup>8</sup> and where his wrong consists in an omission of a duty imposed on him by such a relation.<sup>9</sup> And the

<sup>8</sup> So in *Pritchard v. Gas Co.*, 2 Pa. Supt. Ct. 179 (1896), and *Carmody v. Boston Gas Co.*, 162 Mass. 539 (1895), the plaintiffs were allowed to recover for disease resulting from inhaling gas negligently allowed to escape from the defendant's pipes.

<sup>9</sup> In *Coy v. Indianapolis Gas Co.*, 146 Ind. 655 (1896), the plaintiff was allowed to recover damages against a gas company which failed to furnish gas to him, thus rendering the house so cold that his ill child suffered a relapse and died; so in *Ballou v. Prescott*, 64 Me. 305 (1872), *Becker v. Janinski*, 27 Abbott's New Cases, 45 (N. Y. 1891), *Blackburn's Administrators v. Curd*, 106 S. W. Rep. 1186 (Ky. 1908), recovery was allowed against a surgeon who ceased to attend a patient while the latter still required his attention, and thus impeded his recovery; so druggists improperly compounding prescriptions so as to be poisonous or mislabelling poison as harmless drugs, have been frequently held liable for the illness caused thereby; *Davis v. Guarnieri*, 45 Ohio, 470 (1887), *Norton v. Sewall*, 106 Mass. 143 (1870), *Thomas v. Winchester*, 6 N. Y. 397 (1852), and cases cited in notes 3 and 4.

voluntary relation of master and servant, employer and workman, is no exception.<sup>10</sup> The cases cited show clearly that the common law recognizes a right to health, the violation of which by positive action between strangers is a legal wrong. In those social relations, in which persons associate themselves or their property with one another, the common law recognizes no difference between the duty to make full disclosure of conditions making that association dangerous to the health of an associate and the duty to disclose conditions threatening violent injury to his body. And as the relation of master and servant is only one of the numerous voluntary associations necessary to social life, it is not surprising to find that here too there are cases which affirm and none which deny the existence of a duty to inform one's employee of any condition known to oneself and neither known or obvious to him, which makes the work assigned to him a peril to his health.<sup>11</sup> Why then have no actions been brought or maintained for occupational disease in the stricter sense of that term?

A study of the cases defining the extent of the master's protective duty toward his servants, shows a constantly increasing care required of the master. The law here, as in so many other fields in which it regulates the social relations of individuals *inter se*, reflects the change of public opinion, which is no longer content to regard its ideals, though expressed in the most revered documents, as literally true, but insists on looking realities squarely in the face. However eloquently the Declaration of Independence may proclaim all men free and equal, however much early judges might inveigh against the insult to workingmen implied in requiring employers to take care of them, modern opin-

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p. 514 of Bohlen's Cases on Torts; so caterers, purveyors and manufacturers of foodstuff have been held liable to those poisoned by food sold or prepared by them, *Bishop v. Weber*, 139 Mass. 411 (1885), *Tomlinson v. Armour & Co.*, 75 N. J. L. 748 (1907), and cases cited in Bohlen's Cases on Torts, p. 518, note 2; so one who knowing that his premises is infected, leases it to another without notifying him of the fact, is as fully liable if the lessee or his family in consequence contract disease as he would be to a tenant physically injured by a latent defect in a floor or ceiling, known to the lessor and concealed by him, *Minor v. Sharoon*, 112 Mass. 477 (1883), *Cutter v. Hamlen*, 147 Mass. 471 (1888), *Blake v. Ranous*, 25 Ill. App. 486 (1887), *Maywood v. Logan*, 78 Mich. 135 (1889).

<sup>10</sup> See cases cited in notes 4 and 5, *supra*.

<sup>11</sup> See cases cited in notes 4 and 5, *supra*.

ion recognizes that men politically free and equal may be economically bound hand and foot to their economic superiors. But the courts move slowly and neither should, nor do, express the most advanced views of the social worker but rather enforce the settled opinion of the mass of society and they are particularly loathe to take any step which seems to lead into a new territory, even though the boundary is purely external and accidental, the old and new being in their essential attributes the same. This of itself might sufficiently account for the fact that while judicial decisions have given the servant a constantly increasing protection against bodily injury by violence, the duty to make work conditions as sanitary as they may be made without interfering with the practical operation of a plant is no where even suggested. But there was another and very practical reason why at common law no workman has recovered for occupational disease. Whatever theory one uses to account for it,<sup>12</sup> the common law was and is irrevocably committed to the position that where a servant knew just what unsafe or unhealthy conditions he would encounter if he entered or remained in his master's employment and still chose to start or continue therein, he assumed the risk and could not complain of the consequences. Now occupational diseases, those of gradual growth caused by constant contact with slow contagion or continued work under unsanitary conditions, are usually so inherent in and unavoidable from the very character of the trade that few workmen enter such a trade without realizing the danger they run of contracting it and no one can remain in it sufficiently long to be infected without seeing its victims everywhere about him. Even if it be a disease not necessarily inherent in the trade, but due to the unnecessarily unsanitary conditions of the work place or machinery provided by his

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<sup>12</sup> To the writer it has always seemed absurd to speak of a common law duty to provide a safe work place or proper tools or to do any of the other things which are so glibly called the master's non-delegable duties, when mere knowledge of the violation of this so-called duty, brought home to the person to whom it is said to be owed, is a complete defense for its breach. To call that a duty, is a contradiction in terms. In reality the duty is only to see to it that one's workman knows, or has the opportunity to observe if he but use his sense, the conditions under which he will be required to work if he enters or remains in the employer's service, so that he may intelligently determine to take or leave it as it is.

employer, this condition and what it implies is as well, if not better, known to the employees as to their employer or his superintendents and foremen. Any one who knows anything of workers in necessarily or unnecessarily unhealthy trades cannot fail to realize that they are under no illusion as to the risks they run.<sup>13</sup> So long, therefore, as knowledge of an unsanitary work condition excused an employer from performing any duty he might owe to make it sanitary, it was of no practical moment even to discuss its existence.

But whether employers did or did not owe any common law duty to provide healthy as well as safe work conditions, there are many statutes now in force in Pennsylvania which specifically require them to take certain very definite precautions, the obvious purpose of which are to prevent unnecessary diseases among their employees.<sup>14</sup> The important question is whether a workman who contracts disease in consequence of his employer's dis-

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<sup>13</sup> Nothing in the writer's experience has been more grim and terrible than the matter of fact manner in which persons employed in such trade, in their testimony before the Industrial Accidents Commission of Pennsylvania, accepted as a matter of course the certainty that sooner or later they themselves must succumb to occupational disease. Their attitude to their trade may be expressed in the salutation of the Roman gladiators, "Hail, Caesar, we about to die salute thee."

<sup>14</sup> The Act of May 2, 1905, P. L. 352, requires that 250 cubic feet of air space be provided for every person employed and that the workrooms, halls and stairways shall be kept clean and sanitary. Exhaust fans to carry off poisonous or injurious dust, fumes or gases created by machinery or materials are required to be installed where women are employed by the Act of July 25, 1913, §11, P. L. 1024, and in all establishments where lead or its derivatives are manufactured by the Act of July 26, 1913, P. L. 1363, and "blowers" are required to be installed to carry off the dust created by "emery wheels" or "belts," Act of July 24, 1913, P. L. 970, while Section Eleven of the Factory Act of 1905, P. L. 352, requires that exhaust fans be provided for carrying off of fumes, gases and dust. The Lead Poisoning Act of July 26, 1913, *supra*, requires the installation of lavatories so that the employees in certain forms of lead manufacturing may wash off the accumulation of poisons, dust, *etc.*, before going home or eating lunch and the provision of lunch rooms separate from the working rooms and free from poisonous substances and fumes, and also provides for the periodic medical inspection of workmen employed in such trades.

The Act of July 25, 1913, P. L. 1024, contains somewhat similar provisions (§11) applicable only to establishments where women are employed and also provisions (§12) requiring "clean and pure" drinking water to be supplied by, *inter alia*, "proper pipe connections with water mains which furnish water for domestic purposes," and also provisions (§9) as to toilet accommodations, which are perhaps designed to safeguard the modesty as well as the health of female employees. The Act of April 4, 1913, P. L. 42, which requires a room to be provided in which metal workers may change their clothes is clearly designed to protect them from the grave risk of

regard of these statutory duties, may recover from him damages for the pain and suffering caused thereby, for the expense of his illness, and for the resulting loss of earning power.

We are thus brought to a consideration of the third question, "Is there any rule of law which affords the defendant a defense or bars the plaintiff from recovery in the case of disease contracted, which does not operate in the case of injury sustained to the body?"

It is settled in a long line of Pennsylvania decisions that a workman who enters or continues in an employment, knowing that his master has failed properly to guard machinery or to take any other of the precautions he is required by statute to take to protect his work people from violent bodily injury, does not assume the risk of or forfeit his right to recover damages for such an injury resulting from his master's disregard of his statutory duties.<sup>15</sup>

There is nothing in the language or general purpose of the acts, regulating the conditions permissible in industrial establishments, to suggest any different result when the employer violates his statutory obligations to protect the health of his employee. The effect of the decisions is to put the workman who suffers violent bodily injury through his master's known breach of such a statute in the same legal position as though his master knew and the workman neither knew or ought to have known of the condition which injured him. As, then, it is decided in *Wagner v. Jayne Chemical Works*,<sup>16</sup> that a servant, put to work under conditions known to the master to threaten the servant's health

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catching colds, pneumonia, etc., through going out from their hot working places into the cold air in their sweaty work clothes.

Most important of all is Section Fourteen of the Act of June 2, 1913, P. L. 396, which gives to the Industrial Board created by that act power "to make, alter, amend and repeal the general rules necessary to provide for the reasonable and adequate protection of the life, health, safety and morals of all persons employed in the industrial establishments of the State of Pennsylvania." While these broad powers have not been as yet exercised, there is every reason to believe that the board will in the near future make rules and regulations to provide not only for the safety but for the health of such workers.

<sup>15</sup> *Jones v. American Caramel Co.*, 225 Pa. 644 (1909); *Valjago v. Carnegie Steel Co.*, 226 Pa. 514 (1910); *Fagley v. Lycoming Rubber Co.*, 231 Pa. 446 (1911).

<sup>16</sup> Note 4, *supra*.



by contagion or poison, may recover for the resulting infection or poisoning if by reason of his inexperience he is himself ignorant of the danger, a workman, though knowing that his work conditions are unsanitary, should, if they are due to his master's disobedience of an express statutory requirement, recover for a disease shown clearly to have resulted therefrom. In theory at least, the right of action appears clear and it therefore seems inexplicable that, of the many victims of unsanitary conditions clearly within the statutory prohibition, no one has as yet brought an action to recover damages against his delinquent employer. This may in part be explained by the ignorance of the victims and by the reluctance of their legal advisers to make a new departure, but in all probability it is largely, if not principally, due to the practical difficulty of establishing by admissible and satisfactory proof the causal connection between the illness and the breach of statute.

It is clearly not enough to prove a breach of the statute and the illness, nor that the one may possibly have caused the other. That the illness was so caused must be shown by a preponderance of evidence. And direct evidence is unavailable. All the plaintiff can do is to show that he has encountered in the defendant's employment an unsanitary condition adequate to cause his disease, supplemented by proof that he has encountered no other condition adequate to cause it, which was not the consequence of any illegal conduct on his employer's part, either because the condition was encountered outside the employment or because while encountered therein, it was a condition which would exist as well where the statutory provisions were obeyed as where they were disregarded.

There are many other situations where from the nature of things direct evidence is often or always unobtainable, and where, therefore, the plaintiff is held to have sufficiently satisfied his burden of proof by showing that the defendant was guilty of wrongful conduct adequate to cause the harm complained of and that there existed no other probable or possibly adequate cause therefor. In such cases courts are inclined, and very possibly rightly inclined, to require that the probability that the injury for

which a plaintiff seeks compensation in damages has a guilty cause must greatly preponderate over the probabilities to the contrary. Indeed there is a tendency to require a preponderance of probability so great as to practically throw on the claimant the burden of excluding anything more than the merest possibility of an innocent origin of his harm. And in any action savoring, as this would, of novelty, it seems highly probable that the claimant would be required to so prove his case.<sup>17</sup> If so, his task would in most cases be hard. He must connect his illness not only with his employment by showing that it was caused by some unhealthy or poisonous condition encountered therein, but he must show that this condition was wrongful and itself the result of the defendant's breach of statute.

Where the object of the statute is to eliminate or lessen certain diseases peculiar to certain trades, or what is substantially the same, very rarely contracted outside of them, the very nature of the illness, except in very exceptional cases, shows with sufficient certainty that it was contracted in the workman's employ-

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<sup>17</sup> However proper such a tendency may be when the only object of permitting the action for damages is to secure a proper compensation to the sufferer, it should not be carried to the same extent where a private right of action is given for the violation of penal statute. While the most obvious purpose of such actions is to compensate the victim, yet they have another extremely important function, that of securing compliance with the provisions of the statute. It is idle at this time of day to take refuge in those broad and misleading generalizations so dear to the legal mind of fifty years ago and protest that damages in private actions are given solely as compensation for the harm done, while punishment must be meted out and obedience to the sovereign will, as expressed in legislative enactments, enforced by the state itself by public prosecution.

There never has been a time when tort actions have not been used to secure respect for individual rights by punishing wilful invasion thereof. Until our administrative machinery is so efficient, so minute and all pervasive, that it can secure the punishment of every violation of every statute, the best guarantee of obedience to statutes designed to protect private rights is the power of the individual victim to mulct the violator in pecuniary damages.

Public authorities may or may not prosecute. If the penalties are heavy there is a reluctance to enforce them, if light, it seems hardly worth while to expend so much effort to attain so small a result. Experience shows that only a very small percentage of violations of "factory acts" have been criminally prosecuted and a still smaller percentage have been punished. On the other hand, the self-interest of the individual sufferer will make his insistence on his right of action certain. Therefore, such private actions should not be discouraged by requiring an impractical certainty of proof that the harm, itself of the very sort from which the statute is intended to protect the sufferer, has resulted from what has been clearly proved to be a violation of its provisions.

ment. But many of the statutory provisions require the employer to provide work places, surroundings and facilities which conform to accepted standards of general sanitation. Here the nature of the disease is by itself no proof that it was contracted in the employment of a master who has disregarded these requirements. It shows, it is true, that his employment was an adequate cause of his disease, and so may have caused it. But it is not enough to show that the defendant's wrongful act is adequate to cause the harm complained of; the plaintiff must go further and prove that there exists no other cause, for which the defendant is not responsible, itself adequate to cause the illness. Unsanitary conditions of this sort though common in many factories and work places are found everywhere,—in the workmen's own homes and in an almost infinite variety of other places. Therefore, the plaintiff must prove that in his life outside his work he had not been subject to such surroundings, which in practice he will rarely if ever be able to do.

But even if the plaintiff prove that his disease has been caused by some condition found in his employment, this is of itself not enough. He must still prove that the condition which caused it was wrongful, as resulting from his employer's disregard of statutory requirements.

We are here considering the many statutes which are intended only to remove conditions making certain trades unnecessarily injurious to the health of those employed therein, not the few statutes which prohibit unhealthy trades.<sup>18</sup> Some of them aim completely to eliminate certain diseases from certain trades. These are diseases which are not inherent and inevitable in the trades but can be eliminated by forbidding the maintenance of conditions and the use of processes, machinery and materials which, while prevalent in the trades and profitable in so far as their removal would entail expense, are not necessary to the existence of the trades, since the product can be made without them and the expense of their removal would not make the trades un-

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<sup>18</sup> Such as the Act of April 9, 1912, which practically prohibits the manufacture of matches containing the more poisonous forms of phosphorous, by imposing upon the product a tax far greater than their market value.

profitable. Such trades, conducted in obedience to the statute, do not tend to cause this form of disease and therefore, if it be contracted by a worker therein its very existence proves that, if it originate in the employment, it must be due to the prohibited conditions, *etc.*, illegally permitted to exist therein.

But as many, if not more, of such statutes are intended merely to lessen in certain trades the prevalence of particular diseases, which nothing short of prohibiting the trades could entirely prevent, these are not intended to make the trades free from the risk of these particular diseases, for some such risk remains even if the statute be most scrupulously observed. They aim to prevent only that unnecessary danger which can be avoided if the precautions required by them are taken. The wrong done the employee by their breach is not that the employment contains some risk but that the risk is unnecessarily and illegally increased. The illegal condition, for which and for which only the employer must answer if harm results, is the excess of unnecessary risk. An employee contracting such a disease must prove not only that his employer has violated the statute but also that his disease is caused thereby. In other words, he must affirmatively prove that his disease is due to that unnecessary excess of risk which it is the object of the statute to prevent and not to that risk which it recognizes as inevitable and does not attempt to remove.

Now while the particular disease is always more prevalent and often more violent and contracted after shorter exposure in an establishment where the statutory requirements are disregarded than in one where they are observed, yet the disease which is threatened in the employment of the most scrupulous employer is the very same as that threatened in the service of the most delinquent. It is therefore clear that the nature of the disease cannot alone prove that it was due to violation of the statute. It still remains uncertain whether it results from the inevitable and permitted risk or to the unnecessary and prohibited excess thereof. It may be that in some diseases the severity of the attack or its appearance after a short exposure may make it possible for medical experts to diagnose it, to a greater or less de-

gree of certainty, as originating in the illegal excess of unsanitary conditions.<sup>19</sup> But there is at least a probability that the plaintiff would have to show that attacks so violent or sudden were unknown or in comparison very rare in properly conducted establishments.<sup>20</sup>

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<sup>19</sup> Where experience has shown that the precautions required by statute do, if observed, greatly reduce the prevalence of such disease, it is evident that the undue prevalence in a delinquent establishment is due to the illegal conditions existing therein. But since even in the best conducted establishment some cases must occur, it seems difficult to say which of them occurring in a delinquent establishment are due to the illegal risk existing therein. Some undoubtedly are, but the problem is to identify them. To admit recovery in one and deny it in another would work injustice as among the sufferers. To grant it in all would be to make the employer answerable for some harm which his illegal act has not caused. Yet to deny recovery to all, though many of them obviously suffer through the employer's wrongdoing, seems to be equally unjust and to unduly penalize the innocent in order to protect the guilty. Perhaps the question like so many others is one of degree. If the number of cases occurring in delinquent establishments is very greatly over the average occurring in those properly conducted, recovery might be properly allowed while refused with equal propriety where the excess of disease is but slight.

<sup>20</sup> This article has discussed only the existence of a right of action for occupational disease resulting from the breach of the factory acts in force in Pennsylvania, it is applicable to all states where there are in force laws designed to protect the health of industrial workers and where the workman is held not to assume the risk of injuries resulting from the breach of factory acts by the mere fact that he continues to work in his employment with knowledge that such acts have been violated.