CHAPTER 51 "ACCIDENTAL" INFECTIONOUS DISEASES

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SCOPE

The contraction of disease is deemed an injury by accident in most states if due to some unexpected or unusual event or exposure. Thus, infectious disease may be held accidental if the germs gain entrance through a scratch or through unexpected or abnormal exposure to infection.

§ 51.01 Summary of Accidental-disease Statutes

Infectious diseases are usually subjected to both of the tests discussed in the preceding sections--unexpectedness and definiteness of time--and in addition have certain special obstacles to surmount under particular statutes. A number of statutes cover diseases following upon injury,¹ and some expressly rule out all other diseases.² Even when this exclusion is not express, it is sometimes implied under the doctrine expressio unius exclusio alterius.³ Other statutes contain such requirements as violence to the physical structure of the body,⁴ hazardous connection to the employment,⁵ or injury producing objective symptoms.⁶
FOOTNOTES:

Footnote 1. *E.g.*, Indiana Code Ann. § 22-3-6-1(e).

Footnote 2. *E.g.*, Mont. Rev. Codes Ann. § 39-71-119 not only defines "injury" by indicating what it is, but also by indicating what an injury is not. Among other things, the term "injury" "does not include a disease that is not caused by an accident."


Footnote 6. LSA-R.S. 23-1021 (although Louisiana now uses the term "objective findings" rather than objective symptoms).


§ 51.02 Abnormal Entry of Germs as Accident

The first inroads made by disease into the accident concept under state compensation acts were in the type of case involving the entry of germs through some scratch or lesion, however slight. The scratch was found helpful in satisfying both the tests of unusualness and definiteness. Unusualness could be based on the "abnormality" of the method of entry, and definiteness of time was easier to find than when illness was the result of gradual absorption or inhalation of germs over an extended period. Both these arguments are used in the leading American case, *Connelly v. Hunt Furniture Company*. ¹ In this case an embalmer's helper handled a gangrenous corpse and then transmitted the infection to himself by scratching a pimple on the back of his own neck. The court, in awarding compensation, said:

Germs may indeed be inhaled through the nose or mouth, or absorbed into the system through normal channels of entry. In such case their inroads will seldom, if ever, be assignable to a determinate or single act, identified in space or time.... For this as well as for the reason that the absorption is incidental to a bodily process both natural and normal, their action presents

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itself to the mind as a disease and not accident. Our mental attitude is
different when the channel is abnormal or traumatic, a lesion or a cut.  

On this reasoning, compensation has been repeatedly awarded for such
infectious diseases as anthrax, transmitted through a scratch on the hand
or a pimple on the neck, blastomycosis acquired by squeezing a pimple on
the face, hepatitis from an accidental needle stick, HIV infection
contracted by a health care worker or corrections officer who came in
contact with an infected individual, blood poisoning contracted through an
abrasion on the hand, and a corneal lesion developing from a traumatic eye
injury caused by a sharp dust particle which admitted a virus.

On the same reasoning, a disease which is acquired by the bite of an insect
is an accident. Thus, malaria contracted as a result of a mosquito bite, or
Rocky Mountain spotted fever or Lyme disease from a tick bite are injuries
by accident.

**FOOTNOTES:**


Footnote 2. 147 N.E. 366, at p. 367.


(1920).


Footnote 5.1. Sun Home Health Visiting Nurses v. Workers' Comp. App. Bd. (Noguchi), 815
acquired hepatitis C as a result of an accidental needle stick was entitled to compensation.

Footnote 6. Jackson Township Volunteer Fire Co. v. Workmen's Comp. Appeal Bd., 140
Association, a division of the fire company. He responded to a report of an automobile
accident. The victim was pronounced dead at the scene. In the process of assisting others
remove the body from the wreck, claimant got some of the victim's blood and body fluids on
his hands and shirt. Later that evening he received a call from the coroner who advised him
to go to the hospital. It had been discovered that the accident victim had AIDS and hepatitis.
Blood was drawn for tests and claimant received shots to prevent hepatitis. He sought
reimbursement for the tests and shots. The fire company refused to pay for the medical
services, claiming the workers' compensation statute required reimbursement only for
medical expenses arising from an injury under the Act. It argued that claimant had suffered
no injury and was due no reimbursement.


Footnote 7. Arkansas Dept. of Correction v. Holybee, 46 Ark. App. 232, 878 S.W.2d 420 (1994). The claimant here was an employee of the Department of Corrections and was bitten by an HIV infected inmate. The employer argued that the reasonable medical care to treat the injury was simply the cleansing, suturing, and bandaging of the bite wound. The court, however, approved the Commission's holding that the diagnostic and preventive measures for AIDS, tetanus, hepatitis and other infectious diseases were reasonably necessary for treatment of the claimant’s injury.

Footnote 8. Mid-South Packers, Inc. v. Hanson, 253 Miss. 703, 178 So. 2d 689 (1965). Treatise cited.


See also Mace v. Scanlon, 111 Ohio App. 309, 171 N.E.2d 922 (1960). Injury to the rectum followed by infection caused death from Hodgkin's disease, eight months later. Death benefits affirmed on evidence that Hodgkin's disease results from infection.


But see Bird v. Somerset Hills Country Club, 309 N.J. Super. 517, 707 A.2d 1033 (1998). The court upheld the determination that Lyme disease contracted by an employee who was a groundskeeper for a golf course, was an occupation disease. Given his duties the chance for exposure to the disease at work was much higher than at home.

§ 51.03 Normal Entry of Germs as Accident

It is not surprising that some courts should be unwilling to let the grave decision on compensability or noncompensability of diseases arising out of the employment turn on such trifles as the presence of a tiny scratch or pimple or bite. The germ invasion itself, whether assisted by a break in the skin or not, was soon pictured by many courts as an accidental and even traumatic event in itself. Perhaps the improvement of the magnifying power of microscopes had something to do with it. As pictures began to appear in
magazines showing bacteria blown up to the size of twenty-two-caliber cartridges, it became easier for courts to visualize the impact of a germ in the same terms as the impact of any other tangible substance. And so, with the support of a number of vivid similes to the general effect that getting hit by a germ is like getting hit by anything else, the contraction of disease through "normal" channels began to be recognized as a possible kind of accidental injury. Thus, the impact of anthrax bacilli on the eye of a woolsorter was likened to the impact of sparks from an anvil. The same bacillus found itself classed with the serpents when the Pennsylvania court, in awarding compensation for anthrax contracted by contact with infected hides, said:

Here, the anthrax germ, a distinguishable entity, came into actual contact with deceased, thus gaining an entrance into his body, and his neck began to swell and discolor; therefore the complaint from which McCauley died can be traced to a certain time when there was a sudden or violent change in the condition of the physical structure of his body, just as though a serpent, concealed in the material upon which he was working, had unexpectedly and suddenly bitten him....

The South Dakota court called upon the analogy of chemical poisoning to justify an award for ingestion of the botulinus germ in preserved food eaten by the employee:

There is no substantial distinction between the consuming of this poisonous food and chemical poisoning or the drinking of a virulent poison by mistake.

And the Utah court said, in awarding compensation for death from enteritis acquired by mouth while handling diseased animals:

If the inhalation of gas... is an injury, is there any reason why the inhalation or swallowing of germs is not an injury?

As the law now stands, so far as the "accident" test is concerned, standing alone and uncomplicated by any special definitions or exclusions relating to disease, the majority of cases hold the unexpected contraction of infectious disease to be injury by accident. There is an impressive line of cases ruling out such disease, but on examination of the statutory background, it will be found that in almost every case the statute contained the limiting clause.
about disease resulting from injury, as in New York, Pennsylvania, Idaho, Kentucky, and Texas, or some special definition of "accident" or "injury" aimed at excluding disease, such as the former Minnesota requirement of sudden and violent injury to the physical structure of the body at the very time of accident. Oddly enough, the most restrictive decision on infectious disease was produced by a state, Ohio, whose statute contains no accident requirement at all.

The "accidental" character of the infection has usually been attributed simply to the unexpected appearance of the germs in the water or food. For example, the act of drinking contaminated water, in ignorance of its dangerous condition, is itself an accidental event. The "injury" is the harmful work promptly undertaken by the bacilli, although some time may be required to bring it to its conclusion. As the Wisconsin court put it in the Vennen case:

[T]his typhoid affliction is attributable to the undesigned and unexpected occurrence of the presence of bacteria in the drinking water furnished him by the defendant, as an incident to his employment.... [T]he drinking of the polluted water by the deceased was an accidental occurrence...

The most eloquent statement of the accidental nature of this kind of episode occurs in the Victory Sparkler case, which, although it involved phosphorus poisoning rather than infection, was fully approved in a later typhoid case:

It was by chance that employer did not use due care, and by chance that the vapor of the phosphorus was where its noxious foreign particles could be inhaled by the girl. It was by chance that the inspired air carried these particles into her system, sickening her, and causing a necrosis of the jaw after fortuitously finding a lesion. The injury thus inflicted upon her body was accidental by every test of the word, and its accidental nature is not lost by calling the consequential results a disease... The infection is the accidental injury, and whatever follows in causal connection are but consequences, which measure the duration and effect of the injury. As suggested by Lord Birkenhead in Innes v. Kynoch, [1919] A.C. 765, 770, an ultimate analysis would resolve the facts into (1) the invasion of the bacillus or harmful foreign substance, which may be conceived as a blow or physical assault of far more disastrous consequences than the usual result of larger and more
substantial forces; and (2) the infection or contraction of the disease which is the injury, the assault being deemed the accident.

FOOTNOTES:

Footnote 1. Victory Sparkler & Specialty Co. v. Francks, 147 Md. 368, 128 A. 635, 639 (1925): The introduction of phosphorus into the human body is none the less accidental, if through the medium of a pimple point, an unsound tooth, a scratch or a lesion, or of ingestion or in breathing.


Footnote 7. E.g. Madeo v. I. Dibner & Bro., Inc., 121 Conn. 664, 186 A. 616 (1936). Tuberculosis attributed to crowded, unsanitary conditions and proximity to employees having the disease; time and place not sufficiently definite under statute including "only accidental injury which may be definitely located as to the time when and the place where the accident occurred...."


Footnote 9. See Ch. 51, § 51.03, above.

Footnote 10. Industrial Comm'n v. Cross, 104 Ohio St. 561, 136 N.E. 283 (1922). Typhoid from drinking water; act construed to rule out all such diseases, although the term "accident" is not used in the statute.


§ 51.04 Effect of Disease-following-injury Statute

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The final step is taken when a court decides that the acquisition of infectious disease is compensable even under the rather common coverage formula including accidental injuries and such diseases as arise therefrom.\(^1\) This step is not as difficult as it might appear, for once one has said that the invasion of the germs is itself the injury, one has brought the case within the first part of the formula and need not rely on the second. The transition may be aided by the kind of similes quoted above.\(^2\) The inhalation of germs is as much an injury in its own right as the inhalation of gas.\(^3\) The absorption of bacilli is as much an injury as the absorption of phosphorus.\(^4\) The ingestion of botulinus germs is no less an injury than the drinking of poison.\(^5\) A number of courts, including those of Maryland, Indiana, Utah, and South Dakota, have found it possible to make awards for infectious disease under this type of statute on this general kind of reasoning. An equal number of jurisdictions, however, have found the barrier an insurmountable one.\(^6\)

**FOOTNOTES:**

- Footnote 1. Ch. 51, § 51.01 n.1, *above.*
- Footnote 2. Ch. 51, § 51.03, *above.*
- Footnote 6. See, *e.g.*, Hoffman v. Consumers' Water Co., 61 Idaho 226, 99 P.2d 919 (1940). Typhoid fever contracted while working in polluted water cleaning irrigation ditch; no "mishap, hazard, fortuitous occurrence or misadventure"; statute includes "only such non-occupational diseases as result directly from an injury."

**§ 51.05 Unusual Exposure or Cause**

Accidental character can also be grounded on the unusual-exposure theory, by analogy with the pneumonia cases\(^1\) based on the idea that exposure which is unusual is somehow accidental. This analogy is perfectly capable of supporting, for example, an award to a nurse or other employee who contracts tuberculosis in a tuberculosis sanitarium\(^2\) or smallpox in a smallpox isolation ward,\(^3\) or polio in the polio ward of a hospital,\(^4\) or a teacher who contracts mumps during an epidemic of that disease at the school,\(^5\) a day care worker who contracts ocular herpes,\(^5,1\) or a long-time delivery driver...
who developed interstitial pulmonary fibrosis as the result of exposure to dust particles and other airborne irritants, and an argument has been made for extending the same idea to unusual exposure to typhoid by working in the polluted waters of a flood area, for example. A New York community college secretary who experienced headaches, congestion, nosebleeds, rashes, and a chronic cough when she was relocated to a newly renovated building and who claimed she suffered from "sick building syndrome" was denied benefits, however.

"Accident" may also sometimes be found in the occurrence of some mishap creating the exposure. For example, in the McRae case, a tuberculous co-employee coughed directly into the claimant's face. The impact of the germ-laden spray and sputum, caused by the negligent act of the co-employee, was held to be an accident in itself. In the same general class is the incident in the Bobertz case, when a sewer inspector slipped and got his face splashed with sewage full of typhoid germs.

**FOOTNOTES:**

Footnote 1. Ch. 33, above.

Footnote 2. County of Cook v. Industrial Comm'n, 295 N.E.2d 465 (Ill. 1973). Claimant, a pathologist's assistant and lab technician, contracted tuberculosis. He was exposed to the possibility of the disease by his contact with the general public, through his autopsy work at Cook County Hospital, and through his work at the Chicago State Tuberculosis Sanitarium. However, the treating physician's opinion was that tuberculosis was more likely the result of exposure at Cook County Hospital, due to the conditions of exposure that existed there. Award of benefits against Cook County Hospital held supported by the evidence.


Footnote 5.1. Portman v. Camelot Care Ctrs., Inc., No. 03S01-9901-CH-00007, 2000 Tenn. LEXIS 96 (Tenn. Special Workers' Comp. App. Panel Mar. 2, 2000). Following an incident in which a child spit in claimant's eye, the worker contracted ocular herpes. Evidence tended to show that the worker had normal ocular health prior to the incident and had only developed irritation and other symptoms several days after the incident. While claimant's medical expert could not definitively say that the spitting incident caused the herpes, the doctor did testify that there was no evidence that the herpes condition was
caused by anything else. That testimony was sufficient to support a finding that the condition arose from the employment, held the court.


§ 51.06 Need for Legislative Modernization of Accidental-disease Coverage

There is plenty of room for argument on whether the original intention of the drafters, who must have meant something when they wrote in restrictive language about disease coverage, really contemplated the general coverage of infectious diseases produced by some of these decisions. What has actually happened is that, in the interval since these original formulas were penned, virtually all the states have undertaken some kind of occupational disease coverage.¹ Once one becomes accustomed to the idea of compensation for one kind of disease, coverage of all disease actually caused by the employment no longer seems revolutionary. In fact, it now creates something of a paradox when every state cited herein as denying compensation for infectious diseases accidentally contracted has provided legislative coverage of occupational diseases nonaccidentally contracted. The paradox lies in the fact that, at one time, unexpectedness seemed to be an indispensable condition of compensability of diseases; while now, due to the ad hoc coverage of occupational diseases by special legislation, the "expectable" diseases caused by the employment are compensable while the fortuitous and unlooked-for diseases, equally caused by the employment, are in these states left uncovered. The proper solution is a legislative rationalization of the pattern of disease coverage, which could be done in
various ways, the simplest of which is to define accidental injury as including any disease arising out of and in the course of employment, thereby putting accidental and occupational diseases on the same footing.

It must be stressed once more that, if there is any fear of disease coverage getting out of hand, with claims being filed for every case of sniffles that comes along,² the requirement of causal connection with the employment still stands as a bulwark against indiscriminate awards for the common diseases to which everyone is subject. As shown in the chapter on "arising out of the employment,"³ it is no easy matter to establish work-connection in many types of disease claim, even when enforced association with a diseased person or travel through an epidemic area can be proved.

The draft Workmen's Compensation and Rehabilitation Law produced under the auspices of the Council of State Governments⁴ deals forthrightly with both problems. It achieves inclusiveness of diseases generally by defining injury as "any harmful change in the human organism arising out of and in the course of employment." It then, however, goes out of its way to allay the apprehensions of those who suspect that this could lead to indiscriminate inclusion of everyday ailments by adding the statement that injury "does not include any communicable disease unless the risk of contracting such disease is increased by the nature of the employment."

**FOOTNOTES:**

Footnote 1. See Ch. 52, below.

Footnote 2. It is definitely unwise for claimant to characterize his complaint as "sniffles" if he wants to get an award. Claimant made this mistake in her testimony in Horn v. Pals & Solow, 274 App. Div. 860, 82 N.Y.S.2d 87 (1948), rev'd, 299 N.Y. 575, 86 N.E.2d 103 (1949).

Footnote 3. See especially Ch. 5, § 5.05, above.

Footnote 4. Draft prepared by the Council's Advisory Committee on Workmen's Compensation, under the chairmanship of the author. Published by Council of State Governments, 1313 E. 60th St., Chicago, Ill.