

If, as in the instant case, an affirmative duty is prescribed to prevent a possible defamiation, *a fortiori*, the courts should ordain a duty of affirmative action in the preservation of life and limb. By applying what might be called the "exertion test," an affirmative duty to act would arise if in the eyes of the ordinary moral man so to act would not necessitate an effort so arduous or impracticable that it could not reasonably be expected to be undertaken.

Difficulties of determining upon whom the duty ordinarily should devolve, and of ascertaining whether such persons were not incapable of acting will remain.¹¹ But this is just another instance in law demanding cautious judicial scrutiny.

Workmen's Compensation—Compensable Injuries—Disfigurement—[New Jersey].—The plaintiff's face was badly scarred by acid during the course of his employment, and the workmen's compensation bureau awarded compensation to him for the disfigurement. On *certiorari* to review a judgment of the court of common pleas affirming the order of the bureau, *held*, reversed. Compensable disabilities under the act are only those causing an inability to perform work. Thus disfigurement cannot be the basis of an award. *Everhardt v. Newark Cleaning & Dyeing Co.*²

This decision does not seem in accord with the purpose of workmen's compensation acts. The most widely accepted basis for employer's liability in general is the *entrepreneur* theory, that a loss resulting from the hazards of business should be borne by the business, rather than by the individual selected by chance.³ This item, added to the expense of the business, will ultimately be borne by the consumer who should pay the costs of the business that serves him.

In the application of the *entrepreneur* theory to workmen's compensation, the courts have taken two liberal views on the principle underlying the determination of compensable injuries, neither of which justifies the result in the instant case. Many courts have determined that compensation should be paid to the worker as a wage-earner, that any injury resulting in a loss of earning power is compensable.⁴ And the loss of earning power may result from ineligibility to obtain employment as well as from a physical inability to perform work.⁵ Other courts have taken the more realistic view that compensation should be paid for physical impairment as such, irrespective of its effect upon earning power or ability to perform work.⁶ The New Jersey Supreme Court in *Hercules Powder Co. v. Morris*⁶ said, "This impairment may not prove to be so conspicuous in the ability to produce wages, in the industrial world, but there are other

¹¹ Pound, *Law and Morals* 72 (1924).

² 189 Atl. 926 (N.J. Sup. Ct. 1937).

³ See Douglas, *Vicarious Liability and Administration of Risk* I, 38 Yale L. J. 584, 586 (1929); Laski, *The Basis of Vicarious Liability*, 26 Yale L. J. 105 (1916).

⁴ *American Knife Co. v. Sweeting*, 250 U.S. 596 (1919); *Gorrell v. Battelle*, 93 Kan. 370, 144 Pac. 244 (1914); *Ball v. William Hunt & Sons, Ltd.*, [1912] App. Cas. 496.

⁵ *Gorrell v. Battelle*, 93 Kan. 370, 144 Pac. 244 (1914); *Superior Mining Co. v. Industrial Comm'n*, 309 Ill. 339, 141 N.E. 165 (1923).

⁶ *Hercules Powder Co. v. Morris*, 93 N.J.L. 93, 107 Atl. 433 (1919) (loss of one testicle held compensable); *Cameron Coal Co., v. Dunn* 85 Okl. 219, 205 Pac. 503 (1922) (permanent injury to finger held compensable, though same job was retained at an increased wage.)

⁶ Note 5, *supra*.

spheres for the employment of human energy, talents, and the possession of physical attributes besides the industrial world into the activity of which the defendant is entitled to bring, possess, and enjoy all the physical attributes with which nature endowed him." In confining compensable disability to "that which disqualifies the employee from doing work in whole or in part," the court in the instant case ignored its previous decision in *Hercules Powder Co. v. Morris*⁷ and accorded no significance to the diminution of the claimant's earning power, admitted by the court, through the determent of future employment. New Jersey decisions, cited by the court as authority that a loss of earning power is not sufficient to make a disability compensable, held rather that a loss of earning power is not necessary and awarded compensation for the physical impairment alone.⁸

The compensation acts of numerous states contain specific provisions making disfigurement compensable,⁹ and the New Jersey act does not; yet the court's argument from this fact is unconvincing. In the section of the New Jersey act providing for the schedule of payments, after an enumeration of twenty-two various losses, it is provided, "In all lesser or other cases involving permanent loss, *or* where the usefulness of a member or any physical function is permanently impaired, the compensation shall be . . ." ¹⁰ The use of *or* in this provision, together with the enumeration of losses inconceivably related to the ability to do work,¹¹ would seem clearly to indicate that the legislature intended compensation to be awarded in all cases of physical impairment without regard to a loss of function or ability to perform work.

⁷ *Id.*

⁸ *De Zeng Standard Co. v. Pressey*, 86 N.J.L. 469, 92 Atl. 278 (1914), *aff'd* *Pressey v. De Zeng Standard Co.*, 88 N.J. 382, 96 Atl. 1102 (1915); *Burbage v. Lee*, 87 N.J.L. 36, 93 Atl. 859 (1915).

⁹ For examples see Ill. Rev. Stats. 1937, c. 48, § 145 (c); Mason's Minn. Stats. 1927, c. 23A, § 4274 (38); Cahill's N.Y. Consol. L. 1930, c. 66, § 15 (t).

¹⁰ N.J. Stats., Cum. Supp. 1924, § 236-11 (w) (*italics added*).

¹¹ See N.J. Stats., Cum. Supp. 1924, § 236-11 (l), (m), and (n) (complete and partial loss of any one toe), and § 236-11 (u) (loss of hearing in one ear).