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Employer's Liability in Hiring Physically Unfit Employee

TORTS

EMPLOYER'S LIABILITY IN HIRING PHYSICALLY UNFIT EMPLOYEE

An employee sued his employer in tort[1] for personal injuries caused when the employee's serious heart disease was aggravated by hard manual labor. The complaint alleged that the employer required a physical examination at the time of hiring, which disclosed the heart ailment; but that the employee was unaware of the disease and the employer did not inform him of it although the employer knew that strenuous labor would be likely to cause harm. It was further alleged that the employer had breached two duties: that of refraining from assigning the employee hard manual labor, and that of informing him of his infirmity. The trial court gave judgment for the employee. On appeal, the Supreme Court of Maine reversed, holding the complaint defective in

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27. Recent cases rejecting these grounds are: Schneiderman v. U.S., 320 U.S. 118 (1942); Strecker v. Kessler, 95 F.2d 976 (C.C.A. 5th 1938); Ex parte Fierstein, 41 F.2d 53 (C.C.A. 9th 1930); Communist Party v. Peek, 20 Cal.2d 536, 127 P.2d 889 (1942); State v. Reeves, 5 Wash. 2d 637, 106 P.2d 729 (1940).

1. The employee in the principal case did not bring his action under the Maine Workmen's Compensation Act because that Act provides for recovery against employers only when the injury was caused by an "accident." Me. Rev. Stat. (1944) c. 26, §8. Here the heart injury resulted gradually from the work and did not result directly from a sudden strain. Cf. Comer's Case, 130 Me. 373, 156 Atl. 516 (1931), where a pre-existing heart ailment, aggravated by a sudden strain, was held to be "accidental" within the meaning of the Maine statute. See also Brown's Case, 123 Me. 424, 123 Atl. 421 (1924): "Sudden heart dilatation caused by a strain would be we think in ordinary parlance called accidental."

absence of an allegation that the employer knew or should have known that the employee did not know of his own heart ailment. *Glidden v. Bath Iron Works Corp.*, 54 A.2d 528 (Maine 1947).

Few cases have considered whether an employee may recover in tort from his employer for injuries resulting primarily from physical unfitness of the employee for the work undertaken. Where it has been sought to impose liability on the employer, the cases have been argued on the theory that the employer's duty is based solely on his knowledge of the employee's infirmity and the likelihood of injury from certain types of work. The instant case presents an interesting aspect of this problem in that the employer's knowledge was acquired through a pre-hiring physical examination. The substance of the holding is that an employer owes no duty to warn nor to refrain from hiring for hard manual labor an employee whom the employer knows to be in poor physical condition, unless the employer also knows that the employee is unaware of his own ailment. The court, in finding essential this knowledge on the part of the employer, rested its decision upon a presumption that an employee "is almost always aware of his unfitness."[2] If there is a basis for the presumption, it follows that the employer may reasonably assume that the employee has chosen what degree of care is commensurate for his own protection.[3] The presumption invoked by the court was created by an early Massachusetts case.[4]

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2. Instant case at 532.
3. If the presumption is to apply, it may serve to bring the case within a well known principle that "the mere relation of master and servant can never imply an obligation upon the part of the master to take more care of the servant than he may reasonably be expected to take of himself." Wood v. William Kane Mfg. Co., 257 Pa. 13, 101 Atl. 73, 74 (1917). But more likely it would serve to bring the case within the scope of the doctrine of assumption of risk. And in this sense the employee would have been presumed to have contemplated the risk of injury as an incident of his employment. The principle stated broadly is that "While the various kinds of risks often shade one into the other, we may state generally that a servant assumes (1) such dangers as are ordinarily and normally incident to his occupation, and as a workman of mature years is presumed to know them whether he does or not." Boatman v. Miles, 27 Wyo. 481, 199 Pac. 933, 935 (1921). And by its nature "The rationalization of voluntary assumption of risk in this sense is that it negatives the existence of a duty on the part of the defendant and establishes his freedom from negligence." Harper, "Torts" §130 (1933).
4. Crowley v. Appleton, 148 Mass. 98, 18 N.E. 675 (1888). Labatt,

It may be argued that as to certain types of internal physical defects, the average wage earner is almost always *unaware* of his unfitness. This would be true, for example, of defects which only a physician's examination will disclose. When a pre-hiring physical examination required by the employer discloses a defect of this type, it seems more reasonable that the employer should have the duty of informing the employee of his condition. Such a duty may be simply discharged, and would place no serious burden upon the employer.

In analogous cases, courts have given employers the duty of informing employees that if they continue in their employment they are likely to suffer impaired health. Courts have labeled the diseases which frequently result from certain types of employment as "occupational diseases." Examples are lead poisoning resulting from exposure to paints;[5] injuries

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in 3 Labatt, "Master and Servant" §1082 (2d ed. 1913), first voiced the presumption utilized by the court in the instant case based upon the reasoning of the Crowley case. The presumption was followed in Tenn. Coal, Iron and R. Co. v. Moody, 192 Ala. 364, 68 So. 274 (1915). One court has expressly repudiated the belief that it is necessary that the employer know of the employee's ignorance of his own physical condition. It stated that "the master's liability is measured *by his own knowledge of the actual facts*, and not by his knowledge of the servant's ignorance of the facts." Hamilton v. Standard Oil Co., 323 Mo. 531, 546, 19 S.W.2d 679, 683 (1929). While this would appear to be a correct statement of the basis of the employer's duty when the presumption is not applied, the reasoning by which the Missouri court reached its result is open to question. Since in that state the employee was not required to prove freedom from contributory negligence, he did not have to show that he was ignorant of his physical unfitness. Therefore, the court held that he need not prove that his employer knew of this fact. Requiring the employee to do so, the court thought, would be placing the burden of proof of a fact upon the employee which he was not obligated to prove. It should be noted that in the instant case, the law of Maine puts the burden of proving freedom from contributory negligence in a personal injury suit upon the plaintiff. Rouse v. Scott, 132 Me. 22, 23, 164 Atl. 872, 873 (1933); Field v. Webber, 132 Me. 236, 241, 169 Atl. 732, 735 (1933). However, the court in the instant case did not rest its decision upon that ground, and to do so would be to indulge in circuitous reasoning. If the presumption that employee is almost always aware of his unfitness is applied, then a showing that the employer knew that the employee was ignorant of his unfitness is necessary to rebut the presumption and to create a duty in the employer to guard the employee from harm. It certainly follows that if the presumption is not indulged in, the required showing is unnecessary. This is so not because of the doctrine of contributory negligence, but simply because in such a view of the case it is not essential in establishing the employer's duty.

5. Atlantic Coast Line R. Co. v. Wheeler, 147 Va. 1, 136 S.E. 570 (1926).

caused by breathing impure air while working in mines;[6] and silicosis acquired while employed in dusty atmospheres, such as in the manufacture of porcelain fixtures.[7] Courts have placed upon employers engaged in industries which create risks of "occupational diseases" the duty of warning their employees of the conditions of employment which are likely to engender diseases.[8]

Injuries from employment usually result from the effect of many factors, including the dangerous character of the work and the physical frailties of the workers. Theoretically, a physically perfect worker could acquire no disease as the result of working under perfect working conditions which create no risk of disease. But practically, neither workers nor working conditions are ever perfect. It is manifest that the healthiest worker may acquire an "occupational disease"; and, conversely, if an employee is in sufficiently impaired physical condition when he begins work, his condition may be aggravated by hard manual labor which his physical superior could perform without harm. In the first type case—"occupational diseases"—the courts have placed the risk of injury upon the employer.. But as illustrated by the principal case, in the second type it is upon the employee. In the first, the employee may recover when he proves that his employer failed to warn him of danger from an "occupational disease" of which the employer was in a position to have greater knowledge than the employee. Here, the basis of the duty is the employer's own greater knowledge of the primary source of the danger, *i.e.*, the unwholesome working conditions.[9] The employee, therefore, need not also prove that the employer knew or should have known that the employee was unaware of the danger from "occupational disease." However, in order to recover for injuries resulting primarily from aggravation of a physical ailment which existed when work was begun, the employee must allege and prove not only that the employer knew of his infirmity because of a physical exam-

6. Jellico Coal Co. v. Adkins, 197 Ky. 684, 247 S.W. 972 (1923).
7. Jacque v. Locke Insulator Corp., 70 F.2d 680 (C.C.A. 2d 1934), *cert. denied*, 293 U.S. 585 (1934).
8. Cases collected in 105 A.L.R. 80 (1936).
9. Penn. Pulverizing Co. v. Butler, 61 F.2d 311 (C.C.A. 3d 1932); Stevens & Sons Co. v. Daigneault, 4 F.2d 53 (C.C.A. 1st 1925); O'Keefe v. National Folding Box Co., 66 Conn. 38, 33 Atl. 587 (1895); Sweany v. Wabash R. Co., 229 Mo. App. 393, 80 S.W.2d 216 (1935).

ination given at the time of hiring, and did not warn the employee of it, but also that the employer knew or should have known that the employee was unaware of his own infirmity.[10] Of course, the differentiation in the cases arises from the application of the presumption that the employee "is almost always aware of his own unfitness."

By what kind of proof can the employee overcome the presumption? It would appear that circumstantial evidence would be sufficient.[11] Thus, where the employee has submitted a written application on which he stated his belief that he was free from infirmities of the nature disclosed by the examination, it would form the basis of an inference that the employer had knowledge of the applicant's ignorance of his infirmities. And the same would be true where the employee has indicated orally to his employer that he believes himself free from such infirmities. But in many cases where neither a written nor oral assertion by the employee can be proved, the effect of the presumption might be to deny the employee recovery for his injuries.

Numerous reasons have been assigned as a justification for a court's indulging in presumptions.[12] The basis, if any, for the presumption that an employee "is almost always aware of his unfitness," must be the common experience of mankind. It is submitted that the presumption, if there must be a presumption, should be limited to its logical core and should be

10. Thus, in both instances the employer has a greater knowledge of the primary source of danger. In the occupational disease cases, courts presume that the employer's position is one of greater knowledge, and consequently the employer must rebut that presumption if he will successfully justify his failure to warn. However, in the cases of which the principal case is an example, courts presume that the employee's position is the one of greater knowledge, and the employee is required to overcome that presumption by proof that the employer knew or should have known that the employee had no knowledge of his own infirmity.

11. See the instruction given by the trial court to the jury, and not disturbed by the reviewing court on appeal, in Crowley v. Appleton, 148 Mass. 98, 18 N.E. 675 (1888).

12. In an analytical discussion of presumptions, Professor Morgan states that courts and writers agree that a presumption is invoked "because it is believed to be justified on logical grounds by human experience, or because it accomplishes a procedural convenience, or because it furthers a result deemed to be socially desirable, or because of a combination of two or more of these reasons." He reaches the conclusion that "the oft-repeated formulae of the courts respecting presumptions should be scrapped, and presumptions should be classified according to the reasons which justify their creation and existence." Morgan, "Some Observations Concerning Presumptions" 44 Harv. L. Rev. 906, 931 (1931).

rephrased: an employee is almost always aware of those physical defects which are externally apparent, or which though not externally apparent otherwise manifest their presence by impairment of function to such an extent that a reasonably prudent employee would be aware of their existence. Thus, when the applicant has a goiter or hernia externally apparent, it would be reasonable for the employer to assume that the applicant is aware of the defect. But courts disregard the facts of life when, as in the principal case, they mechanically apply the presumption and conclude that employees are presumed to know all of their physical defects—even those which are not externally or functionally apparent, and which only a medical examination can disclose.

When an employer, in addition to his failure to warn his employee of physical defects disclosed by an examination, also takes certain affirmative steps to induce the employee to work, liability for the subsequently aggravated defects has been placed upon the employer. For instance, an employer may become liable where he threatens the employee with discharge for failing to perform heavy manual labor.[13] Also, the employer may be liable for "assuring" the employee that he is capable of performing it without injury.[14] Similarly, where the employer requires the employee to submit to medical care when injured at work, the employer is liable for improper diagnosis resulting in subsequent injuries.[15] It is submitted that the cases in this group furnish an analogy upon which the court in the principal case might have reached a different

13. Blue Bell Globe Mfg. Co. v. Lewis, 27 So.2d 900 (Miss. 1946).

14. Hamilton v. Standard Oil Co., 323 Mo. 531, 19 S.W.2d 679 (1929). Although the courts which have imposed liability for "assurances" have not been explicit on what grounds they do so, elements of the tort of deceit can be found lurking in the background and influencing the decisions. It is true that when relationship between parties is of such a character that the law imposes a duty to speak, silence may amount to a misrepresentation. Harper, "Torts" §219 (1933). However, it seems more likely that what the cases mean by "assurances" is that the employer is guilty of negligent use of language, resulting in a misrepresentation of the true conditions of the employment. Harper, "Torts" §76 (1933). A misrepresentation of this sort by the employer is active negligence, *i.e.*, the creation of an unreasonable risk to the employee for which the employer making the misrepresentation will be held liable. Although it might be harsh to impute to the employer an intent to deceive the employee, it does not appear unreasonable to hold the employer negligent in not correcting the employee's misconception of the true facts of the situation when that misconception was created by the employer's conduct.

15. Knox v. Ingalls Shipbuilding Corp., 158 F.2d 973 (C.C.A. 5th 1947).

result. For when a required physical examination at the time of hiring discloses serious physical defects not externally apparent, and the employer nevertheless hires the applicant without warning him of the defects, the employer might be held impliedly to have represented that the employee is physically capable of performing the work. The act of hiring, immediately following the examination, is a representation by conduct which speaks as loud as words of assurance.

It is likely that certain policy considerations moved the court in the principal case. While some of these considerations are persuasive of judicial refusal to impose upon employers the duty to refrain from hiring, they are not equally persuasive of judicial refusal to impose upon employers a duty to warn. As a practical matter, it would be difficult for an employer to undertake in each case to determine the nature and extent of the applicant's infirmity, or the likelihood of injury which would result from it. Further, such imposition of responsibility upon the employer would not be desirable, even from the employee's point of view, since it would result in depriving of a livelihood many afflicted persons who have no choice but to labor.[16] These policy considerations urge against imposing upon the employer the duty to refrain from hiring an applicant known by the employer to be suffering from a disease which might be aggravated by the work undertaken. But such policy considerations do not negative the desirability of imposing on the employer a legal duty to inform the applicant of his infirmity, thereby permitting the applicant himself to make the choice of whether or not he will risk aggravating his condition by undertaking the work.[17]

16. Tenn. Coal, Iron & R. Co. v. Moody, 192 Ala. 364, 68 So. 274 (1915).

17. Cf. Thompson v. United Laboratories, 221 Mass. 276, 108 N.E. 1042 (1915), where the court stated that the purpose of giving warning to an employee is not merely to enable him to work in safety, but is also to enable him to determine whether he should abandon the employment. It should be remembered that imposition upon the employer of a duty to warn his employee of physical defects unknown to the latter may be simply and easily discharged. For presumably if the employer warns the employee, then the employee, having equal knowledge of his physical unfitness, can be taken to have assumed the risk of injury from hard manual labor. In an occupational disease case where the employer warned the employee of the likelihood of his contracting a disease, the employee was held to have assumed the risk of disease when in fact he became afflicted with it. Norfolk & W. R. Co. v. Robinette, 257 Ky. 558, 78 S.W.2d 802 (1935).