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Workermen's Compensation-Third-Party Actions-Employer's Recovery on an Implied Warranty

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WORKMEN'S COMPENSATION—THIRD-PARTY ACTIONS—EMPLOYER'S RECOVERY ON AN IMPLIED WARRANTY—Plaintiff seeks to recover the amount of a workmen's compensation award paid to his employee as a result of injuries received when an exhaust valve malfunctioned causing a press which the employee was operating to double-trip. Defendant, an independent parts supplier who had sold plaintiff the valve, moved to dismiss the complaint because of insufficiency of evidence to sustain the verdict and plaintiff's legal incapacity to sue. On appeal from an order denying the motion to dismiss, *held*, affirmed, one judge dissenting. Plaintiff has two independent causes of action, one against the manufacturer on an assigned negligence theory,[1] and another against the supplier for breach of implied

[1] N. Y. WORKMEN'S COMP. LAW § 29 (2) provides: "If such injured employee . . . has taken compensation under this chapter but has failed to commence action against [a third party] within the time limited . . . , such failure shall operate as an assignment of the cause of action against such other to . . . the person, association, corporation, or insurance carrier liable for payment of such compensation."

warranty of fitness, the damages in either case to be measured by the amount of compensation the employer paid to his employee. *General Aniline & Film Corp. v. A. Schrader & Son,* 13 App. Div. 2d 359, 215 N.Y.S.2d 861 (1961) (per curiam).

At common law it was well established that the employer could sue the supplier of a defective product for his damages on an implied warranty of fitness. The foreseeable damages included sums which the employer was legally obligated to pay an injured employee as a result of a suit brought by the employee against him plus any property damage caused by the defective product.[2] Since the advent of workmen's compensation acts the employer's main opportunity to recoup the losses directly attributable to a third party's negligence has been through a subrogation procedure contained in most compensation acts.[3] Generally, this procedure allows an employer to maintain a lien on any recovery from an action by his employee against the third-party tortfeasor up to the amount of compensation paid;[4] or under certain conditions, the employer is subrogated to the cause of action possessed by his employee with which he may pursue the negligent manufacturer.[5] This type of action under the various acts is *ex delicto* and not *ex contractu* as is the case with an implied warranty recovery. The subrogation procedure is almost exclusively used by an employer in attempting to recover the amount of compensation paid out under the act. Thus, the question is raised in the principal case whether an employer can bring an implied warranty of fitness action to recover this same amount paid to the injured employee under the New York Workmen's Compensation Law.

One of the major factors contributing to confusion in this area is the great variety of compensation statutes which govern the employer's rights against third parties. At one extreme, some statutes clearly specify that any action by an innocent employer against a third party who caused injury to his employee must be based on the subrogation procedure which allows only an action for personal injuries.[6] On the other hand, there are statutes which can be construed as not to restrict the employer's remedy

2 Boston Woven Hose & Rubber Co. v. Kendall, 178 Mass. 232, 59 N.E. 657 (1901); London Guar. & Acc. Co. v. Strait Scale Co., 322 Mo. 502, 15 S.W.2d 766 (1929), 64 A.L.R. 936; John Wanamaker, New York v. Otis Elevator Co., 228 N.Y. 192, 126 N.E. 718 (1920).

3 Ohio and West Virginia do not have subrogation clauses.

4 2 LARSON, WORKMEN'S COMPENSATION LAW § 71.20 (1952).

5 *Ibid.*

6 "Where both employer and employee have elected to come under this act, the provisions of this act shall be exclusive, and such election shall be held to be a surrender by such employer and such employee . . . of their right to any other method, form, or kind of compensation, or determination thereof . . . ." MONT. REV. CODES ANN. § 92-204 (1947). See WASH. REV. CODE § 51.24.010 (Supp. 1959).

but to allow recovery on any grounds possessed by the employer.[7] Between these approaches range a number of statutes capable of being interpreted to correspond with either view, and the New York act is one of these.[8] The courts have pursued opposite lines of reasoning in interpreting the statutes. First, there is a strong desire to prevent the double recovery against a negligent manufacturer which might result from a personal injury suit by the employee and an action by the employer for breach of warranty of fitness.[9] Secondly, the courts find it distasteful to abrogate a common-law right when this would result in freeing from liability the supplier who would otherwise have been held liable, and placing the entire burden on the innocent employer.[10]

The principal case attempts to harmonize the subrogated negligence cause of action with one based on implied warranty. The court feels that the concern over multiple recovery is easily resolved by proper court procedures.[11] Another factor which neutralizes the double recovery problem is that section 29 of the New York statute admits the possibility of two suits for a maximum period of six months. Under the provisions of this section the employee must bring his action against the negligent third party no later than one year after the injury occurred or within six months after claiming compensation, whichever period is shorter.[12] Failure to bring a timely action bars any action by the employee against a third party. Should an employer seek to recover on a warranty theory he would find it difficult to prove the requisite damages until the employee obtained compensation, and therefore he would be encouraged to withhold his suit until the compensation was awarded. On the other hand, if the employer's suit is brought

7 FLA. STAT. § 440.39 (2) (1961); LA. REV. STAT. ANN. § 23.1101 (1950).

8 N.Y. WORKMEN'S COMP. LAW § 29.

9 See Van Wie v. United States, 77 F. Supp. 22 (N.D. Iowa 1948); Murray v. Dewar, 6 Wis. 2d 411, 94 N.W.2d 635 (1959); United States Cas. Co. v. Hercules Powder Co., 4 N.J. 157, 72 A.2d 190 (1950). See also 2 LARSON, *op. cit. supra* note 4, §§ 77.10-.20; McCoid, *The Third Person in the Compensation Picture: A Study of the Liabilities and Rights of Non-Employers*, 37 TEXAS L. REV. 389, 450-51 (1959); Comment, 2 STAN. L. REV. 810 (1950); Comment, 8 WASH. & LEE L. REV. 124 (1951).

10 See Dayton Power & Light Co. v. Westinghouse Elec. & Mfg. Co., 287 Fed. 439 (6th Cir. 1923), 37 A.L.R. 849 (1925); Johnson v. United States, 133 F. Supp. 613 (E.D.N.C. 1955); Hyland v. 79 West Monroe Corp., 2 Ill. App. 2d 83, 118 N.E.2d 636 (1954); Foster & Glassell Co. v. Knight Bros., 152 La. 596, 93 So. 913 (1922); Midvale Coal Co. v. Cardox Corp., 152 Ohio St. 437, 89 N.E.2d 673 (1949). See also Sterling Aluminum Prods., Inc. v. Shell Oil Co., 140 F.2d 801 (8th Cir.), *cert. denied*, 322 U.S. 761 (1944) which denied a contract recovery but only because of an odd historical development of the death statute and not because the compensation act precluded recovery.

11 Principal case at 364, 215 N.Y.S.2d at 867.

12 N.Y. WORKMEN'S COMP. LAW § 29 (1) provides: "If such injured employee . . . take or intend to take compensation . . . and desire to bring action against such other [third party committing the negligence or wrong], such action must be commenced not later than six months after the awarding of compensation and in any event before the expiration of one year from the date such action accrues."

after the employee's cause of action has expired, there is no possibility of double recovery since only the employer can sue the third party. Although the possibility of multiple recovery exists for a six-month period after the employee is compensated, since the employer has a lien on any recovery by the employee to the extent of the compensation award he would have little to gain in bringing an action himself during this period. In addition, simple joinder requirements would seem to preclude double recovery even during this period.[13]

The majority opinion leaves unanswered, however, the question of the extent to which the new liability will be enforced since warranty recovery may expose to liability parties who would not have been liable at common law. This would occur either where the manufacturer-supplier is not negligent[14] or where the manufacturer-supplier is negligent but the employee was contributorily negligent. In the former case, the manufacturer-supplier would be liable to the employer for any payments made to the employee even absent negligence on the manufacturer's part. And since the workmen's compensation acts oblige the employer to compensate a larger number of injuries than were compensable at common law, the effect of the decision in the principal case is to pass on the expanded scope of liability to the manufacturer-supplier. In the contributory negligence situation the employee has no recourse against the negligent third party either at common law or under the workmen's compensation act. It has been held that the employer would have to pay the compensation award and yet not recover in tort since his contributorily negligent employee has no assignable cause of action.[15] The principal decision clearly seems to allow the employer to proceed against the manufacturer-supplier *ex contractu* and to recover the exact amount of compensation paid. Thus, the no-negligence case would broaden the scope of the common-law coverage while the contributory negligence case would develop a new area of liability.[16] Moreover, the employer now has an additional three years in

13 Section 258 of the New York Civil Practice Act allows joinder of independent and/or alternative causes of action; §§ 193 and 212 allow the joinder of third parties if complete relief can be given or if the causes of action stem from the same transaction.

14 In New York there must be privity to allow a recovery for breach of an implied warranty of fitness; and therefore, without negligence, the employee cannot proceed against anyone except his employer. Canter v. American Cyanamid Co., 12 App. Div. 2d 691, 207 N.Y.S.2d 745 (1960). *But cf.* Randy Knitwear, Inc. v. American Cyanamid Co., 30 U.S.L. WEEK 2421 (N.Y. Feb. 22, 1962).

15 Utica Mut. Ins. Co. v. Amsterdam Color Works, 284 App. Div. 376, 131 N.Y.S.2d 782 (1954), *aff'd*, 308 N.Y. 816, 125 N.E.2d 871 (1955).

16 The dissent questions this result at 366, 215 N.Y.S.2d at 868, "The plaintiff's cause of action against the appellant [supplier] is based on contract to recover for sums spent in compensating the employee for her injuries. The query is—Does an employer . . . have an action of [his] own, exclusive of the Workmen's Compensation Law, for recovery of sums paid to an injured employee against a third party on an *ex contractu*

which to pursue a supplier after any chance of recovery against the negligent manufacturer has been barred by the New York statute of limitations.[17] This anomalous result flows from the fact that the employer's subrogated cause of action, as a personal injury suit, would be limited to three years,[18] while he is allowed six years in which to bring a suit based on contract.[19] It is not clear that the workmen's compensation law was designed to effect this result.

Philip Sotiroff

theory as distinguished from an *ex delicto* theory where the third party is one against whom an action could not be maintained by the employee?"

17 2 CARMODY-WAIT, CYCLOPEDIA OF NEW YORK PRACTICE 201 (1952).

18 Massi v. Alben Builders, 270 App. Div. 482, 60 N.Y.S.2d 494 (1946), *aff'd*, 296 N.Y. 767, 70 N.E.2d 746.

19 2 CARMODY-WAIT, *op. cit. supra* note 17, at 200.