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Disability Benefit Law--Development of Employer's Liability from Common Law, New York Employer's Liability Act and New York Workmen's Compensation Act

Margaret O'Donnell

other states respond to such an enactment, and there is a strong likelihood that they will do so because of the acuteness of the problem, there can no longer be any objection that a state's sovereignty is being violated.

MAURICE F. BEHRENS, JR.

DISABILITY BENEFIT LAW — DEVELOPMENT OF EMPLOYER'S LIABILITY FROM COMMON LAW, NEW YORK EMPLOYER'S LIABILITY ACT AND NEW YORK WORKMEN'S COMPENSATION ACT

The most recent achievement in the development of the New York Workmen's Compensation Act is the Disability Benefits Law, which provides for an insurance system permitting weekly payments to employees who are absent from work due to disability not arising out of their employment. Before venturing a detailed analysis of the Disability Benefits Law a brief review of the steps in the development of this phase of the law will be made so as to indicate the lines of demarcation between the common-law liability of the employer to the employee and the employee's rights under the presently existing statutes enacted for his benefit.

Common Law

At common law the employer's obligation to the employee was limited to the use of reasonable care in providing a safe place to work and safe equipment.[1] If these conditions were met, it was virtually impossible for the employee to recover damages for injuries sustained in the absence of active negligence on the part of the employer. But even where the employer failed to use reasonable care or was actively negligent, the "unholy trinity" [2] of defenses, *i.e.*, contributory negligence, assumption of risk and the fellow servant rule—were available to him. Where he failed to exercise reasonable care the defense of assumption of risk enabled him to escape liability in many cases for the employee not only assumed all of the risks inherent in the performance of his duties, but if he continued working with

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a reciprocity basis so that jurisdiction could be obtained over the delinquent. Laws of N. Y. 1949, c. 807, §§ 4, 5. For a discussion of this enactment, see Legis., 24 ST. JOHN'S L. REV. 162 (1949).

[1] Indermaur v. Dames, L. R. 1 C. P. 274 (1866); Dobbie v. Pacific Gas & Electric Co., 95 Cal. App. 781, 273 Pac. 630 (1928); Byrne v. Eastmans Co., 163 N. Y. 461, 57 N. E. 738 (1900); Toy v. United States Cartridge Co., 159 Mass. 313, 34 N. E. 461 (1893).

[2] PROSSER, TORTS 512 (1941).

knowledge that dangerous conditions existed, he was held to have assumed the risk and could not recover. This would follow even though he notified the employer who failed to rectify the dangerous conditions.[3] Again, whether the employer failed to exercise reasonable care or was actively negligent, the usual tort defense of contributory negligence was available to him. The third in this trio of defenses frequently resulted in the greatest hardship to the employee, for if the injury occurred solely through the negligence of a fellow employee the master was completely devoid of responsibility. Thus, the general rule that a master is responsible for the torts of his servant had no application where the tort was committed against a fellow servant. In the comparatively rare instance where the employee still had a good case in spite of these defenses, there was a very real difficulty in proving negligence. Often the only means of doing so was by the testimony of fellow employees who were reluctant to testify against the employer for fear of losing their jobs and facing the economic insecurity such a situation would induce.

Employer's Liability Law

The first legislative attempt to alleviate the burden of the employee was the Employer's Liability Law[4] which modified two common-law defenses of the employer—*i.e.,* the fellow servant rule and the assumption of risk. The act provides that an employee who is himself in the exercise of due care and diligence (not contributorily negligent) and is injured:

1. through the negligence of an employer in failing to discover or remedy defects in the works, ways, machinery or plant, or through the negligence of any person intrusted by him with the supervision of them; or

2. by reason of the negligence of anyone in authority,

shall have the same right of compensation and remedies against the employer as he would have if he were not an employee;[5] and if the injury results in death the right of action survives.[6]

The fellow servant rule was modified to the extent that recoveries could be had for the negligence of one who acted in a supervisory capacity. Under the original act, the negligence had to arise

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[3] Crown v. Orr, 140 N. Y. 450, 35 N. E. 648 (1893); Kline v. Abraham, 178 N. Y. 377, 70 N. E. 923 (1904); Davidson v. Cornell, 132 N. Y. 228, 30 N. E. 573 (1892).

[4] First enacted in 1902 as part of the LABOR LAW, Laws of N. Y. 1909, c. 6. Later reenacted as the EMPLOYER'S LIAB. LAW, Laws of N. Y. 1921, c. 121.

[5] N. Y. EMPLOYER'S LIAB. LAW § 2.

[6] *Id.* § 3.

out of an act of superintendence,[7] but by an amendment in 1910, the master became liable for the acts of one in authority regardless of the character of such act.[8]

The question of assumption of risk became one of fact and not of law. Necessary risks, *i.e.*, those inherent in the nature of the employment, are still deemed to be assumed as a matter of law but all other risks become a question of fact for the jury.[9]

The Employer's Liability Act did not abolish any existing common-law causes of action and it has been held that a cause of action at common law and one under the Act may be set up in the same complaint.[10] In order to come within the Act, however, it is necessary to follow the procedure outlined in the statute, providing for written notice to the employer[11] and setting time limits within which the action must be commenced.[12] Contributory negligence, by Section 5 of the Act, becomes a defense to be pleaded and proved by the defendant and thus creates a departure from the New York common-law rule in tort actions that the burden of proving freedom from contributory negligence rests with the plaintiff.

Sections 9 through 15 provide for an optional compensation plan which may, when adopted by the employer and employee, become the exclusive remedy of such employee in the event he is in-

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[7] Larson v. Brooklyn Heights R., 134 App. Div. 679, 119 N. Y. Supp. 545 (2d Dep't 1909), *aff'd*, 202 N. Y. 563, 96 N. E. 1118 (1911).

[8] Pedlow v. Oswego Construction Co., 217 N. Y. 506, 112 N. E. 379 (1916), *affirming* 162 App. Div. 840, 147 N. Y. Supp. 750 (4th Dep't 1914).

[9] In Persons v. Bush Terminal Co., 68 Misc. 573, 575, 576, 125 N. Y. Supp. 277, 278, 279 (Sup. Ct. 1910), the court said: "The language of this statute manifests a clear purpose to limit and change the basis upon which the employee should henceforth be held to have assumed a risk not necessary to the occupation. Except as to necessary risks, the employee's assent is not to be inferred from his continuance in the service after discovery or information of the danger. Such continuance after knowledge of the risk is not to be considered as an assent to the existence or continuance of such risk of injury therefrom; on the contrary, it now becomes a question of fact for the jury to decide, whether the employee understood and assumed such risk of injury, subject, in a proper case, to the power to set aside a verdict rendered contrary to the evidence. The new test is not the simple one, whether the risk was known or observed by the employee. Even if the employee had been informed of the danger, his assent does not follow therefrom. The test now is, whether the circumstances are such as plainly lead to the conclusion that the risk was understood and was voluntarily assumed by the employee. This intent of the Legislature is not defeated or narrowed by the expression as a matter of law. The previous rule which raised an implied assent from his going on with the work was a matter of legal inference. This inference seems now rejected, both as a basis for instruction to the jury and for a ruling of the court on the sufficiency of proof. . . . Something beyond mere knowledge of the danger is now required to establish that the employee understood and assumed the risk himself, so as to relieve the employer from his duty."

[10] Mulligan v. Erie R., 99 App. Div. 499, 91 N. Y. Supp. 60 (2d Dep't 1904).

[11] N. Y. EMPLOYER'S LIABILITY LAW § 3.

[12] *Ibid.*

jured by an accident arising out of and in the course of employment. These provisions are a direct forerunner to the Workmen's Compensation Act which we will next consider.

Workmen's Compensation Act

In 1910 New York enacted the first Workmen's Compensation Act [13] which was declared unconstitutional the following year on the ground that there could be no liability without fault or contract.[14] To overcome this objection the New York State Constitution was amended in 1913 [15] to permit the enactment of a Workmen's Compensation Act and in 1917 the United States Supreme Court upheld the New York Compulsory Workmen's Compensation Act.[16] This Act created new substantive rights. A theory of strict liability replaced the common-law contract theory of liability, and the test of liability became the relation of the injury to the job and not to the fault or negligence of the employer or his representatives.

Under the Workmen's Compensation Act as it exists today, the employer is liable for any injury arising out of and in the course of the employment, without regard to fault as to the cause of the injury, except where it is caused solely by the intoxication of the injured employee while on duty or by his wilful intention to bring about the injury or death of himself or another.[17]

The term "out of" the employment has come to mean as the result of the employment while "in the course of" has been interpreted as dealing with the time, space and circumstances of the occurrence of the injury. In order to come within the provisions of the Workmen's Compensation Act, therefore, the employee must show that both of these elements are present. Occupational disease, though not accidental, comes within the purview of the Act due to a special provision.[18]

Participation in a compensation plan under the Act is compulsory in any occupation listed in Section 3, and Section 11 makes the liability of the employer exclusive in any employment under Section 3, except that if he fails to insure his employees they, or their representatives, have a right of election—either an amount equal to compensation or an action at common law, in which case contributory negligence is immaterial and the employer may not avail himself of any of the common-law defenses discussed.

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[13] Laws of N. Y. 1910, c. 615.
[14] Ives v. South Buffalo Ry., 201 N. Y. 271, 94 N. E. 431 (1911).
[15] N. Y. CONST. Art. I, § 19.
[16] N. Y. Central R. R. v. White, 243 U. S. 188 (1917), *affirming* 216 N. Y. 653, 110 N. E. 1051 (1915).
[17] N. Y. WORKMEN'S COMPENSATION LAW § 10.
[18] *Id.* § 3(2).

The effect of these two sections has been to render the Employer's Liability Law virtually obsolete since the list of occupations under the Workmen's Compensation Act is extremely comprehensive.

Under the provisions of the Act, the cost of all medical and hospital services and any necessary appurtenances are to be met by the employer [19] and the claimant is subject to medical examination by doctors selected by the compensation board.[20] No compensation, other than the medical benefits provided for by Section 13, is paid for the first seven days of disability unless the disability lasts more than 35 days, in which case compensation is allowed from the date of disability.[21]

The amount of compensation is based on the weekly wage of the disabled employee [22] according to a schedule set forth in Section 15.[23] Should the injury result in death, provision is made for the payment of death benefits to the survivors of the deceased employee.[24]

All insurance premiums are paid by the employer [25] and the administration expenses are paid out of the fund.[26]

The purpose of the Workmen's Compensation Act therefore is to reimburse the employee for expenses incurred due to injuries sustained because of his employment and to compensate him for any disabilities resulting therefrom.

Disability Benefits Law

The Workmen's Compensation Law has been amended [27] and a new article, to be Article 9, has been enacted making it compulsory for employers coming within its purview to provide compensation for employees who are disabled as a result of non-occupational injury or sickness, *i.e.*, not arising out of and in the course of employ-

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[19] *Id.* § 13.
[20] *Id.* § 13(d).
[21] *Id.* § 12.
[22] *Id.* § 14.
[23] The provisions of N. Y. WORKMEN'S COMPENSATION LAW § 15 concerning the percentage of wages paid are substantially as follows: (1) Permanent total disability—66-2/3% of average weekly wage during continuance of disability. (2) Temporary total disability—66-2/3% of average weekly wage to be paid during continuance of disability but not in excess of $6,500.00. (3) Permanent partial disability—66-2/3% of average weekly wage to be paid for period set out in statute. (4) Temporary partial disability resulting in decrease of earning capacity—2/3 of difference between average wage before the accident and his wage earning capacity after the accident, but shall not exceed $5,500.00. (5) Compensation may not exceed $32.00 per week nor be less than $12.00 per week, unless earnings were less than $12.00, and in cases of permanent total disability may not be less than $15.00 per week unless actual earnings were less; in each such case the employee shall receive the full amount of his weekly wages.
[24] N. Y. WORKMEN'S COMPENSATION LAW § 16.
[25] *Id.* § 89.
[26] *Id.* § 78.
[27] Laws of N. Y. 1949, c. 600.

ment. We shall first consider some of the more important provisions of the Act.

Any employer who has four or more employees working on at least thirty days in any calendar year is a covered employer under the terms of the Act, and remains such until the end of a year in which he did not employ four or more persons on each of thirty days, and has filed satisfactory evidence thereof with the chairman of the board.[28] An employer succeeding a covered employer whether by operation of law, purchase or otherwise immediately becomes covered.[29]

All employees of such covered employers receive the benefits of the Act unless they belong to a few categories specifically excluded by Sections 201.5 and 201.6. The Act makes provision for compensation to employees in two situations: (1) those who are disabled while employed, and (2) those who are disabled after the first four weeks of unemployment.

I. Disability While Employed

An employee of a covered employer becomes eligible for benefits if he is disabled after the first four weeks of employment or during a period of four weeks after the termination of such employment. If, within four weeks after leaving a covered employer, he commences working for another covered employer, the employee is immediately eligible for benefits with the new employer. An employee is also immediately eligible for benefits when he is hired while receiving unemployment insurance or while receiving benefits for disability commencing after the first four weeks of unemployment, if he would have been eligible for unemployment insurance, except for the disability. In a situation where the employee has been unemployed for a period longer than four weeks and would have been eligible for benefits if he became disabled but is not entitled to unemployment insurance because of lack of qualifying wages, he becomes eligible for benefits under this Act immediately upon employment with a covered employer.[30]

Benefits are payable to employees who become disabled[31] after June 30, 1950, beginning with the eighth consecutive day after disability[32] but the period may not exceed thirteen weeks during any

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[28] N. Y. WORKMEN'S COMPENSATION LAW § 202. An employer meeting these requirements is considered covered from and after January 1, 1950, or the expiration of four weeks following the 30th day of such employment, whichever is the later.

[29] By Section 202.3 any employer who permits an employee to engage another to do work for which the employee is hired, becomes the employer of such person for the purposes of this Act.

[30] N. Y. WORKMEN'S COMPENSATION LAW § 203.

[31] *Id.* § 205 lists the disabilities and disability periods for which no benefits are payable.

[32] *Id.* § 204(1).

period of fifty-two consecutive calendar weeks or during any single period of disability.[33] The benefit rate is 50% of the employee's "average weekly wage" [34] with a maximum payment of $26.00 and a minimum of $10.00.[35]

Provision is made to prevent duplication of benefits [36] and if the employee should file for workmen's compensation and the claim be controverted on the ground that the employee's disability was not caused by an act that arose out of and in the course of his employment or by an occupational disease, the employee is entitled to benefits under this Act and if he subsequently receives an award under workmen's compensation the chairman shall have a lien for any reimbursements made under the Disability Benefits Law.[37]

II. Disability While Unemployed

An employee who is not entitled to benefits under the above provisions is eligible for disability benefits while unemployed if he is eligible for unemployment insurance benefits and becomes ineligible within twenty-six weeks after termination of employment solely because of the disability for which he claims benefits provided he was not working for remuneration on the day of the disability.[38]

If none of the conditions discussed so far are met by the employee, he may still be eligible while unemployed provided that he is not entitled to unemployment insurance during the twenty-six week period because of lack of qualifying wages, has evidenced his continued attachment to the labor market and was paid wages of at least $13.00 per week by covered employers in each of twenty calendar weeks during the thirty calendar weeks immediately preceding the date he last worked for a covered employer.[39]

The benefits payable to one who is unemployed, under this section, are the same as if he were employed except that they are not payable beyond the twenty-sixth week of unemployment; and, should the disabled employee be receiving unemployment insurance benefits at the time of the commencement of the disability, he is not subject to the waiting period of seven days.

A special fund for disability benefits has been set up for payments to the unemployed. This fund is to be accumulated by an assessment on the employers and employees to be paid on earnings between January 1, 1950 and June 30, 1950 at rates specified in

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[33] *Id.* § 205(1).
[34] *Id.* § 201(12).
[35] *Id.* § 204(2).
[36] *Id.* § 206(1).
[37] *Id.* § 206(2).
[38] *Id.* § 207(1).
[39] *Id.* § 207(2).

Section 214.1. An annual review of the condition of the fund is to be made and if it is less than the statutory minimum, the chairman may make an assessment against the carriers in order to make up the deficit.[40]

Unlike workmen's compensation which is paid for solely by the employer, the Disability Benefits Law provides that the employee shall contribute an amount equal to one-half of one percentum of his weekly wages after July 1, 1950, but in no case is such contribution to exceed 30 cents per week.[41] The excess of the cost of insurance over the contributions of the employee is to be paid by the employer.[42] It is not necessary that the employer insure through the state fund since broad provisions of Section 211 permit him to utilize private insurance carriers, an existing plan, and even to become a self-insurer where certain conditions are met.

Employers who do not come within the purview of the Act may voluntarily elect to do so upon the approval of the chairman and subject to limitations set forth in Section 212.

There are many more detailed portions of the Disability Benefits Law dealing with the administration, notice and proof of claim, payments, appeals, etc., which need not be discussed here as they are not essential for our purpose.

Conclusion

The gradual development of the relationship between employer and employee from the common law to the present enactment is a striking example of the growth of the law induced by changing economic conditions and social concepts. We have seen the harsh, inexorable attitude of the common law toward the employee reach a stage where the injustice became apparent to all and resulted in the passage of the Employer's Liability Act.[43] That this would prove inadequate under our expanding factory system soon became apparent, and new statutory liabilities were created by the Workmen's Compensation Law.[44] These liabilities were not based on fault or contract but were the expedient solution to a growing problem. Nevertheless, there was still a semblance of the element of liability involved, since the object to be achieved was the compensation of the employee for his injury and reimbursement for expenses attendant therewith, and since it applied only to injuries sustained as a result of the employment.

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[40] *Id.* § 214(2).

[41] *Id.* § 209(3). Such amounts may be withheld by the employer as payroll deductions as authorized by § 209.4.

[42] N. Y. WORKMEN'S COMPENSATION LAW § 210(3).

[43] See note 4 *supra.*

[44] See note 13 *supra.*

With the passage of the Disability Benefits Law, however, we pass from the field of tort liability and enter the field of social insurance. The Disability Benefits Law is more akin to unemployment insurance than workmen's compensation in the method of payment, since it seeks to provide an income for those unable to work rather than compensation for injuries sustained. It fills a gap between workmen's compensation and unemployment insurance by providing for those whose disability is not covered by workmen's compensation and who are unable to secure unemployment insurance because of inability to work. It is the latest achievement in the movement of labor towards economic independence and security.

MARGARET O'DONNELL.