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Recent Developments: Sterry v. Bethlehem Steel Corporation: Employer Liability Outside of the Workmen's Compensation Act

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Recent Developments

Sterry v. Bethlehem Steel Corporation: EMPLOYER LIABILITY OUTSIDE OF THE WORKMEN'S COMPENSATION ACT

The Court of Special Appeals of Maryland held that the Workmen's Compensation Act (Act) did not provide the exclusive remedy for alleged aggravation of a work-related injury if the aggravation was a result of *intentional* medical malpractice. In *Sterry v. Bethlehem Steel Corporation*, 64 Md. App. 175, 494 A.2d 748 (1985), the court ruled that an employee has an option to bring a common law action against his employer under MD ANN. CODE art. 101, § 44 (1957), when his work-related injuries are aggravated by the intentional medical malpractice of his employer through his employer's physicians.

Mr. Sterry, a Bethlehem Steel employee, injured his back at his place of work in September, 1970. He was hospitalized because of the injury but returned to work in December, 1970. On his return he began receiving follow-up medical care from the company physician. The follow-up medical care was supplied by Bethlehem Steel in compliance with MD. ANN. CODE art. 101, § 37(a) (1957). In August, 1971, Mr. Sterry filed for and began receiving workmen's compensation payments for his injury and he continued under the care of the company physician until June, 1979 when he voluntarily ceased treatment. His treatment during these eight and one half years consisted primarily of prescription medication for pain alleviation. He was referred to a neurologist and neurosurgeon for evaluation of his continued pain in 1978. Both consulting physicians notified the company doctor that they felt Mr. Sterry was addicted to his pain medication. In September, 1979, a myelogram performed at the direction of the neurosurgeon was diagnostic of several ruptured vertebral discs. Mr. Sterry underwent spinal surgery and an unsuccessful detoxification program while under the care of the neurosurgeon. Mr. Sterry retired in 1980.

Suit was brought by Mr. Sterry in the Circuit Court of Baltimore County alleging that the Bethlehem Steel physician caused him to become addicted to narcotics during treatment of his work-related injury. The court granted Bethlehem Steel's motion for summary judgment. On appeal, the appellant claimed that he was not limited to compensation under the Act for aggravation of his injuries and his drug addiction because they were due to intentional acts of fraud and malpractice by Bethlehem Steel and its physicians to keep Mr. Sterry working and unaware of the extent of his medical problems. Under Section 44 if an injury results from the "deliberate intention of his employer to produce such injury," the employee will have the option of receiving workmen's compensation or of bringing a common law action against the employer. Under this section the court held that if the allegations are "sufficient to state a claim for the deliberate intention of appellee to produce the injury," the appellant is able to bring a civil suit against the appellee. *Sterry v. Bethlehem Steel Corp.*, 64 Md. App. at 188.

Prior to the *Sterry* decision, workmen's compensation was held to be the exclusive remedy for aggravation of workplace injuries due to physician or hospital malpractice. Larson, *Workmen's Compensation Law*, § 13.21 (1979). In *Nazario v. Washington Adventist Hospital, Inc.*, 45 Md. App. 243, 412 A.2d 1271 (1980), the court noted that this doctrine was "universally held" and that "the court could see no reason Maryland should not follow the universal rule." *Id.* at 246, 412 A.2d at 1273.

In the *Sterry* case, however, the court did not rely on *Nazario* but referred extensively to *Young v. Hartford Accident and Indemnity*, 303 Md. 182, 492 A.2d 1270 (1985), a decision in which the court found that the appellant was not limited to compensation under the Act by her employer's compensation insurer for alleged intentional infliction of emotional distress because it was an intentional act. The appellant had been assaulted at work and claimed both physical and emotional injury as a result. Hartford asked that the appellant be examined by a psychiatrist of their choice on the issue of emotional injury.

The appellant's private psychiatrist warned Hartford that she had attempted suicide previously and that having to submit to a second exam might cause further psychological stress. Four days after the required psychiatric exam, the appellant attempted suicide. She then brought suit alleging that Hartford "intended to inflict emotional distress in order to cause her to drop the claim or commit suicide." *Young*, 303 Md. at 189. There was no claim in this suit of medical malpractice, and in fact, the examining physician found that her emotional trauma was real and compensable. The court of appeals ruled that this allegation of intentional infliction of emotional distress satisfied the criteria of Art. 101 § 44 and allowed her to bring a common law action against Hartford.

Sterry is the third in a series of recent cases which demonstrate the Maryland courts' willingness to limit the scope of the exclusivity clause. In *Young v. Hartford, supra*, and a similar case decided the same day, *Gallagher v. Bituminous Fire and Marine Insurance Co.*, 303 Md. 201 492 A.2d 1280 (1985), the court held that a claim of intentional infliction of emotional distress by the employer is not precluded from a civil tort action. Several months later, in *Sterry*, the court allowed the plaintiff to evade the "universally held" doctrine that medical malpractice in a workmen's compensation case is exclusively compensable under the Act. By permitting a semantic manipulation alleging *intentional* medical malpractice, the court appears to provide another manner of egress from the confines of the exclusivity clause.

–Malinda S. Siegel

Liscombe v. Potomac Edison Co.: CONTRIBUTORY NEGLIGENCE – STILL A COMPLETE BAR TO RECOVERY

In *Liscombe v. Potomac Edison Co.*, 303 Md. 619, 495 A.2d 838 (1985), the Maryland Court of Appeals held that a dump truck operator who was aware of overhead powerlines, but nevertheless was electrically shocked when his truck came in close proximity to the lines, was guilty of contributory negligence as a matter of law. In so holding, the court affirmed the lower court's decision to grant the defendants' motions for summary judgment.

In *Liscombe* the plaintiff, Robert D. Liscombe, received a severe electric shock when he raised the bed of his tractor-trailer dump truck into overhead electric lines belonging to the defendant, Potomac Edison. The injury occurred while Liscombe was delivering a load of sand to the co-defendant, Hagerstown Block, on property owned by Martin-Marietta. Liscombe filed suit against Potomac Edison and Hagerstown Block for compensatory and punitive damages for his injuries allegedly sustained because of the defendants' gross negligence. Motions for summary judgment were filed by Potomac Edison and Hagerstown Block on the ground that Liscombe was contributorily negligent as a matter of law. The circuit court granted the defendants' motions for summary judgment, and Liscombe appealed to the court of special appeals. The court of appeals granted certiorari before any consideration by the intermediate appellate court.

On appeal Liscombe alleged that the trial court erred in finding contributory negligence as a matter of law, and in the alternative that contributory negligence is not a defense where the tort is alleged to be based on wanton or reckless conduct. Liscombe also contended that the trial court erred in refusing to permit the issue of last clear chance to go to the jury.

Liscombe claimed that there were three areas of disputed facts which compel the issue of contributory negligence to be determined by the trier of fact. First, whether he had knowledge of a similar accident which occurred one month prior to his injury. Second, whether his truck actually touched the wires or whether the electrical shock was caused by an arcing effect without contact. Third, whether the sunlight affected his ability to see the wires at the time of the accident. The court dismissed these contentions as immaterial, and found that Liscombe knew of the presence and inherent danger presented by the wires and that this was enough to establish his negligence.

The court relied on its decision in *State v. Potomac Edison Company*, 166 Md. 138, 170 A. 568 (1934), in deciding that the undisputed facts were sufficient to find Liscombe guilty of contributory negligence as a matter of law. In this case the court held that "[i]f [the injured person] knew or should have known that the wire was dangerous, it follows as of course that he was negligent in touching it, or in coming near enough to it to receive the shock." *Id.*, at 147, 170 A. at 571. The court went on to identify three elements, as stated in *Stancill v. Potomac Electric Power Co.*, 744 F.2d 861 (D.C. Cir. 1984), which must be established before the plaintiff can be deemed negligent because he assumed the risk. The plaintiff must have "(1) had knowledge of the risk of danger, (2) appreciated that risk and (3) voluntarily exposed himself to it." *Id.* at 866.

While the court in *Stancill* spoke in terms of assumption of risk, in the case at bar the court held these elements also prove negligence in cases involving electrical accidents. The court went on to state that in Maryland, electrical accident cases have historically fallen under the contributory negligence theory rather than assumption of risk.

After determining that the plaintiff voluntarily exposed himself to the admittedly dangerous wires and thus his own negligence contributed to his injury, the court addressed whether the defendants were