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Recent Developments: Liscombe v. Potomac Edison Co.: Contributory Negligence - Still a Complete Bar to Recovery

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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



grossly negligent. The court held that once it was established that Liscombe was contributorily negligent as a matter of law it was up to Liscombe to prove gross negligence on the part of the defendants. Evidence at trial showed that the defendants were aware of the dangerous position of the overhead lines, because one month before a similar, less serious, accident occurred. However, the court found that Potomac and Hagerstown acted reasonably in trying to prevent further accidents. The evidence showed red flags had been hung from the wires, oral warnings were given to all trucks entering the plant, and Potomac had staked out a new route for the wires. After an examination of the facts, the court found the defendants acted reasonably under the situation and were not guilty of gross negligence.

The court dismissed Liscombe's last argument, that the issue of last clear chance should have been left for the jury, by holding the doctrine inapplicable in this case. The court, citing *Sanner v. Suard*, 236 Md. 271, 203 A.2d 885 (1964), held that in Maryland the last clear chance doctrine has no application when the negligence of the plaintiff is concurrent with the negligence of the defendant, and the defendant had no opportunity to avoid the accident after the original negligence. In the case at bar no such opportunity was afforded to the defendants.

The court of appeals' decision in *Liscombe v. Potomac Edison Co.* reaffirms the Maryland judiciary's position that a plaintiff guilty of negligence, however slight, is completely barred from recovery. The burden placed upon the defendant in electrical shock cases is slight. In the absence of wanton or reckless conduct on the part of the defendant, a person who knew or should have known that a wire is dangerous, and puts himself close enough to it to receive a shock, is contributorily negligent as a matter of law and is thus barred from recovery.

—Stephen Markey

**American Federation of State,
County, and Municipal Employees v.
State of Washington: NINTH
CIRCUIT REJECTS COMPARABLE
WORTH**

In *American Federation of State, County, and Municipal Employees v. State of Washington*, 770 F.2d 1401 (9th Cir. 1985), the United States Court of Appeals for the Ninth Circuit held that the state's decision to base compensation on the competitive market rather than on a theory of comparable worth did not establish its liability

under a disparate impact analysis. The court held that the state's participation in the market system did not allow the inference of discriminatory motive so as to establish its liability under a disparate treatment theory, since the state did not create the market disparity and was not shown to have been motivated by impermissible sex-based considerations in setting salaries.

The State of Washington was sued in the United States District Court for the Western District of Washington by two unions: the American Federation of State, County, and Municipal Employees, (AFSCME), and the Washington Federation of State Employees, (WFSE), on behalf of a class of 15,500 state employees who work or have



worked in jobs consisting of at least seventy percent female employees. The district court found that the state discriminated on the basis of sex by compensating employees in predominately female jobs at lower rates than employees in predominately male jobs, where the jobs were found to be although dissimilar, of comparable worth to the employer. The district court found Washington State in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 200e-2(a) (1982).

The State of Washington sets its employee salaries at rates comparable to the prevailing market rates in the public and private sectors. Market rates are determined by a process of surveys, hearings, and state budget analyses. In 1974, the state conducted a wage disparity study entitled "The Willis Study" which found a

wage disparity of about twenty percent to the disadvantage of employees in jobs held predominately by women for jobs of comparable worth held predominately by men. Comparable worth was determined by a four-prong test: knowledge and skills, mental demands, accountability, and working conditions. Similar surveys were conducted in 1976 and 1980. In 1983, the state adopted a ten-year plan to correct the disparity.

The district court ordered immediate implementation of a system of compensation based on comparable worth as well as back pay. The district court based its determination of sex discrimination on two theories: disparate impact and disparate

treatment. Disparate impact discrimination involves a facially neutral employment practice that, without business justification, has a disproportionately adverse impact upon members of a group protected under Title VII. Proof of intent is not required, because, where a practice is specific and focused, the question is whether the employer's explanation for the compensation policy reveals that it is a pretext for discrimination. For disparate treatment analysis, discriminatory intent is an essential element. Under the disparate treatment theory, to establish intent, it is insufficient for the plaintiff to show that the employer was merely aware of the adverse consequences of a compensation policy. The plaintiff must show that the employer chose the policy, at least partly, because of its adverse effects.