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Equity's Bill of Discovery: A Unique Application in the Field of Products Liability

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EQUITY'S BILL OF DISCOVERY: A UNIQUE APPLICATION IN THE FIELD OF PRODUCTS LIABILITY

INTRODUCTION

In the past five to ten years, litigation in the area of products liability has substantially increased. Prior to 1962, an injured party who brought a products liability suit would base his action upon either a negligence or breach of warranty theory. Under both forms of recovery obstacles often minimized the chances for success. In *Greenman v. Yuba Power Products Inc.*,[1] the California Supreme Court held the doctrine of strict liability in tort applied to cases involving liability for injuries caused by defective products. Because this decision provided a new method of recovery, the number of suits brought in products liability has substantially increased.

This comment will explore one type of fact situation which often arises in the area of products liability: A, while in the employ of B, suffers bodily injury while operating machinery in the course of employment. An action in products liability could exist on the premise that the injury resulted from a faulty or defective machine. The injured party, A, is afforded a remedy in most instances through workmen's compensation insurance.[2] But a problem arises when A seeks to recover damages for the injury against the manufacturer because the machine was defective. Recovery under this approach would not be determined by a fixed schedule and could thus afford a more realistic compensation for the actual injury suffered.

Before A has reasonable grounds for filing a suit against the manufacturer, he must first have in his possession the manufacturer's name and, of greater importance, evidence which would tend to prove that the injury was the proximate result of a defect in the machine. A's best interests are served when these requirements are fulfilled prior to filing suit. Both on the federal[3] and state[4]

1 59 Cal. 2d 57, 27 Cal. Rep. 697, 377 P.2d 897 (1962).

2 Ill. Rev. Stat. ch. 48, § 138.5 (1971).

No common law or statutory right to recover damages from the employer, his insurer, his broker, any service organization retained by the employer, his insurer or his broker to provide safety service, advice or recommendations for the employer or the agents or employees of any of them for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury. (note: said Act does not prohibit a suit against the manufacturer of a defective machine).

3 Fed. R. Civ. P. 27(a):

(1) *Petition.* A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of the United States may file a verified petition in the United States district court in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of

levels, procedures exist which permit the taking of depositions prior to proposed litigation. The provisions "are not designated for discovering grounds for bringing action, but only for perpetuating evidence already known."[5] They do not provide for discovery as our example requires.

The injured party could file a suit based upon his injuries; however, to recover he should have in his possession evidence which would show the injury was the proximate result of a defect in the machine. Such evidence might be secured by photographing, expertly inspecting, or impounding the machine. Since the pre-trial procedures are not broad enough to encompass these situations, the injured party will find his need satisfied only by equity's bill of discovery.

This comment will analyze how equity's bill of discovery can be used prior to litigation, to secure books, documents and *other things* in the possession of the employer and, when necessary, to ascertain the proper party defendant. Such information will enable A to determine whether an action in products liability against the manufacturer of the machine would lie.

Pure Bill of Discovery

Historically, equity's bill of discovery was most often utilized after a complaint was filed. Even at common law, however, facts arose where a bill of discovery seeking information was needed prior to the commencement of an action at law, but at no time in pursuit of relief.[6] This rarer form of the bill is referred to as equity's "pure bill of discovery." The court in *Peyton v. Werhane*[7] stated:

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the expected action and his interest therein, 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, 4, the name or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

[4] Ill. Rev. Stat. ch. 110A, § 217(a) (1971):

(1) Petition. A person who desires to perpetuate his own testimony or that of another person regarding any matter that is or may be cognizable in any court or proceeding may file a verified petition into the court of the county in which the action or proceeding might be brought or had or in which one or more of the persons to be examined reside. The petition shall be entitled in the name of the petitioner as petitioner and against all other expected parties or interested persons, including unknown owners, as respondents and shall show: (i) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, (ii) the names or a description of the persons interested or whom he expects will be adverse parties and their addresses so far as known, and (iii) the names and addresses of the persons to be examined, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition for the purpose of perpetuating their testimony.

[5] Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 Tenn. L. Rev. 737, 744 (1937).

[6] S. Puterbaugh, Ill. Chancery Pleadings & Practice, 511 (7th ed. 1930).

[7] 126 Conn. 382, 11 A.2d 800 (1940).

> There is a distinction between the bill of discovery and relief and what is technically considered a 'pure bill of discovery.' The latter is to obtain evidence to be used in *some suit other than that in which discovery is sought.* Pure bills of discovery are favored in equity and are sustained in all cases, unless some well-founded objection exists against the exercise of the court's jurisdiction.[8] [Emphasis supplied]

In *Peyton* the plaintiff, a widow, wished to secure information which would allow her to obtain an extension of time for presenting her claim against her late husband's estate in the probate court. Equity entertained the bill for discovery to satisfy plaintiff's need so that a basis for commencing a suit at a later time could be established.

The pure bill was also applied in *Coca Cola Corp. v. City of Atlanta.*[9] The City of Atlanta wanted the names of the stockholders in Coca Cola Corp. who resided in Atlanta so that a tax assessment could be levied. In a similar case, *Brown v. McDonald,*[10] equity's bill of discovery was also granted. The plaintiff alleged that stock was registered in the name of a nominal holder and the bill was brought to determine the real owners.

As recently as 1969 the Illinois appellate court sustained equity's pure bill of discovery in *City of Chicago v. Hart Building Corp.*[11] The plaintiff, City of Chicago, filed *only* a bill for discovery. The bill was not ancillary to any other pending proceeding. The city sought to recover information from a receiver who had been discharged. The information requested was in the possession of the defendant and not available to the plaintiff. The court pointed out that the nature of the proceedings filed by the City of Chicago was an equitable bill of discovery. Further, the court stated: "we hold that no error was committed when the city commenced these proceedings with its petition for disclosure."[12]

Ample authority thus exists to sustain a bill of discovery which is not ancillary to a pending suit. This fact is very significant when applied to the products liability example. The bill permits the injured party to determine if a cause of action exists without first filing a complaint. If a complaint were filed, the injured party, through statutory discovery techniques, might determine that no grounds exist for holding the manufacturer liable. Thus he might expose himself to the sanctions of Sec. 41 of the Illinois Civil Practice Act[13] designed to

[8] *Id.* at 803.
[9] 152 Ga. 558, 110 S.E. 730 (1922).
[10] 133 F. 897 (3d Cir. 1905).
[11] 116 Ill. App. 2d 39, 253 N.E.2d 496, *cert. den.* 398 U.S. 950 (1969).
[12] Id. at 49, 253 N.E.2d at 501.
[13] Ill. Rev. Stat. ch. 110 § 41:
Untrue Statements.) Allegations and denials, made without reasonable cause and not in good faith, and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court at the trial.

deter the filing of spurious pleadings. Moreover, this approach is time consuming, expensive, and often requires the taking of numerous depositions. The machine would still have to be inspected, but the defect which caused the injury may have been corrected to permit the employer's continued use of the machine. Thus A's basis for commencing the action might no longer exist.

Examination and Inspection of Potential Evidence

"In common practice the purpose of discovery is to obtain evidence for use at the trial."[14] The major import of the bill of discovery becomes evident when applied to the products liability example. In order for the injured party to determine whether sufficient grounds exist to file a suit against the manufacturer of the machine, he must first determine if the machine's malfunctioning caused the injury. The bill of discovery would provide a means for such a determination.

> Every bill is, in reality, a bill of discovery; but the species of bill usually distinguished by the title is a bill for discovery of facts resting in the knowledge of the defendant, or of deeds or writings, or other *things*, in his custody or power.[15]

Federal[16] and state[17] statutes allow for the inspection of documents, objects or tangible things; however, inspection is permitted *only after* the suit is commenced. As already explained, equity's bill of discovery provides for the in-

[14] Brusselback v. Cago Corp., 20 F. Supp. 293, 294 (S.D.N.Y. 1937).

[15] Mitford & Tyler, Equity Pleading & Practice 151 (1876) (emphasis added).

[16] Fed. R. Civ. P. 34(a):

Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

[17] Ill. Rev. Stat. ch. 110A, § 214 (1971):

At any time after the commencement of an action any party may move for an order directing any other party or person to produce for inspection, copying, reproduction, and photographing specified documents, objects, or tangible things, or to permit access to real estate for the purpose of making surface or subsurface inspections or surveys or photographs, or to disclose information calculated to lead to the discovery of the whereabout of any of these items, whenever the nature, contents, or condition of such documents, objects, tangible things, or real estate is relevant to the subject matter of the action. On the hearing the court may make any order that may be just. If the party or person claims that the item is not in his possession or control or that he does not have information calculated to lead to discovery of its whereabouts, he may be ordered to submit to examination in open court or by deposition regarding such claim. If requested, the party producing documents shall furnish an affidavit stating whether the production is complete in accordance with the requirement of the order.

spection of the machine prior to the filing of the suit and thus insures the fullest protection of plaintiff's rights.

The above mentioned statutes relating to the power of courts to order the production of writings or other tangible objects do not affect the jurisdiction of chancery courts regarding pure bills of discovery; they provide a concurrent remedy.[18]

> A court of equity does not lose its jurisdiction to entertain a bill for the discovery of evidence or to enjoin the trial at law until obtained, because the powers of the courts of law have been enlarged so as to make the equitable remedy unnecessary in some circumstances.[19]

The validity of this statement was recognized by an Illinois appellate court as early as 1891 in *Kendallville Refrigerator Co. v. Davis*.[20] The defendant in this case possessed information necessary for the preparation of plaintiff's case. Plaintiff entered into a contract with defendant wherein the defendant was to utilize letters of patent for the construction of refrigeration and cold-storage facilities which belonged to the plaintiff. Defendant was to pay plaintiff twenty-five cents per square foot of construction. Following defendant's breach, plaintiff brought a bill of discovery to determine how much was owed to him on the contract. The bill was granted, as only the defendant possessed records of the extent of construction and the amount due the plaintiff.

A later Illinois case, *Shaw v. Weisz*,[21] stated: "Discovery is incidental to equitable relief and its purpose is to enable the plaintiff to obtain information and prepare his cause for trial on the ultimate issue."[22] In the products liability example too, the information needed by A is in the exclusive possession of his employer. The only way A can prepare his cause for trial on the ultimate issue is by securing such information.

In *Backlund v. General Motors*,[23] the court entertained a bill for discovery arising from an injury very similar to the one mentioned in the example. Plaintiff was employed by General Motors and filed a pure bill for discovery in a court of equity to examine the machine which produced the injury. The Massachusetts' General Laws permit an employee, injured by his employer's defective machine, to obtain a supreme court order to examine the machine:

> *Examination of condition causing injury; court order.* A justice of the superior court may, upon petition setting forth in ordinary language that the servant or employee of a certain person, has been injured in

[18] Peyton v. Wehane 126 Conn. 382, 11 A.2d 800 (1940).

[19] Carpenter v. Winn, 221 U.S. 533, 539 (1911); *see also* Rickly v. Parlin & Brendorff Co., 206 Ill. App. 599 (1916).

[20] 40 Ill. App. 616 (1891).

[21] 339 Ill. App. 630, 91 N.E. 2d 81 (1950).

[22] Id at 642, 91 N.E. 2d at 87. *See also* Golinski v. Adler, 302 Ill. App. 474, 24 N.E.2d 205 (1939); Village of Brookfield v. Pentis, 101 F.2d 516 (7th Cir. 1939).

[23] 352 Mass. 776, 226 N.E. 2d 555 (1967).

> the course of his employment, through some defect in the ways, works or machinery owned or used by the employer, and that it is necessary in order to protect the interests of the injured person that an examination should be made of the ways, works or machinery through whose defect the injury occurred, and after such notice to the employer as any justice of said court may direct or approve, and a hearing, grant an order directing the employer or person in control of such ways, works or machinery to permit the person named in said order to make such examination, under conditions to be set forth in the order.[24]

In the *Backlund* case the Supreme Judicial Court of Massachusetts held that even if the statute permitting the discovery pertaining to the defective machine did not apply to employees, "A bill for discovery, however, would be in aid of an existing or possible action at law permittted by General Law, Chap. 152, Sec. 15, against a third person such as the manufacturer of the allegedly defective machine."[25] Thus, although Massachusetts provides a statutory remedy for the kind of products liability problem discussed here, a Massachusetts court has held that even without such a statute the remedy would be available and be available in aid of an existing or *possible action at law.*[26]

Even when examination of tangible objects did not fall within the statute, the Massachusetts Supreme Judicial Court, in *Owens-Illinois Glass Co. v. Bresnahan*,[27] permitted examination by a bill of discovery. In this case the manufacturer of an allegedly defective bottle, which exploded causing injury to defendant, brought the bill to obtain the remnants of the bottle in order to prepare his defense for a subsequent suit to be brought by the injured party. The court stated:

> The bill falls within the class of bills for discovery only, where no relief is sought. Although discovery is usually sought of documents, *courts of equity have long exercised jurisdiction to grant discovery of ordinary chattels*, and even of real estate. *This jurisdiction does not depend upon statutes*, but is part of the general jurisdiction of a court of equity.[28]

Thus, in jurisdictions which lack statutes designed to assist injured employees in actions against the manufacturer of defective products, recourse is available through equity's bill of discovery.

[24] Mass. Gen. Laws, ch. 153, § 9.

[25] Backlund v. General Motors, 352 Mass. 776, 226 N.E.2d 555 (1967). Mass. Gen. Laws, ch. 152, § 15 reads as follows:

> Where the injury for which compensation is payable was caused under circumstances creating a legal liability in some person other than the insured to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages or against the insurer for compensation under this chapter, but, except as hereinafter provided, not against both.

[26] *See also* Turner v. Guiliano, 350 Mass. 675, 216 N.E. 2d 562 (1966).

[27] 322 Mass. 629, 79 N.E.2d 195 (1948).

[28] Id. at 630, 79 N.E.2d at 196 (emphasis added). *See also*, Post & Co. v. Toledo, C. & St. L. R. Co., 144 Mass. 341, 11 N.E. 540 (1887); 1 Pomeroy, Equity Jurisprudence, sec. 191 (5th ed. 1941).

Determination of Proper Party Defendant

Once an injured party has established that a cause of action does exist because of a defective machine, a bill of discovery will also provide him with the identity of the machine's manufacturer. Again, this information could be obtained by discovery proceedings after commencement of a suit. However, such information is necessary prior to commencement of the suit. The employment of the bill for this purpose has a long history. Joseph Story, a prominent writer on equity jurisprudence, stated:

> [I]n general it seems necessary, in order to maintain a bill of discovery, that an action should be already commenced in another court to which it should be auxiliary. There are exceptions to this rule, as where the object of discovery is to ascertain who is the proper party against whom the suit should be brought.[29]

Probably two of the earliest cases employing the bill of discovery were *Heathcote v. Fleete*[30] and *Morse v. Buckworth*.[31] In the former case, the bill was for the discovery of the owner of a wharf and a barge. Certain of plaintiff's goods were damaged when the operator negligently upset the vessel. In the latter case, plaintiff's goods were damaged in a fire caused by the negligence of the master or crew of a carrying ship and the bill was brought to ascertain the ship's owners. In both instances, the bill was brought to discover the proper defendants in a *proposed* suit at law. The courts granted the bills in both cases.

In *Brown v. McDonald*,[32] a bill of discovery was brought to determine the real owners of corporate stock. The stock allegedly was registered in the name of a holder. The court allowed the bill of discovery against the nominal holder to discover the identity of the real owners in order that a suit for an unpaid assessment could be brought against the proper parties.[33] The bill has also been used successfully in an action against a labor union for disclosure of the names of its members,[34] and it has been used for the purpose of obtaining united action in matters affecting the common interests of mortgage certificate holders.[35]

In *Bluefield Supply Co. v. Broome*,[36] the plaintiff alleged he sold merchandise to a labor union. The union denied liability for the account. The bill was allowed against the union's president, Broome, to enable plaintiff to secure the names of and proceed against those members who may have been responsible for his claim. Plaintiff alleged this information was denied him and that he would be unable to assert his rights without it.

[29] 2 J. Story, Commentaries of Equity Jurisprudence, § 1483 at 728 (12th ed. 1877).
[30] 2 Vern. 442, 23 Eng. Reprint 883 (1702).
[31] 2 Vern. 443, 23 Eng. Reprint 883 (1703).
[32] 133 F. 897 (3rd Cir. 1905).
[33] *See also* Post & Co. v. Toledo, C. & St. L. R. Co., 144 Mass. 341, 11 N.E. 540 (1887).
[34] Bluefield Supply Co. v. Broome, 121 W. Va. 584, 5 S.E.2d 530 (1939).
[35] Nemerov v. New York Title & Mortgage Co., 149 Misc. 797, 268 N.Y.S. 588 (1933).
[36] 121 W. Va. 584, 5 S.E.2d 530 (1939).

In a case similar to Bluefield the court stated:

> [T]here is another use of discovery, relatively rare, and that is in situations where the plaintiff does not know the identity of those against whom he has a claim, and brings discovery against persons who stand in some legal or equitable relation to them in order to find out against whom to proceed.[37]

In the products liability example, the employer stands in a legal or equitable relation to the injured party and the bill of discovery provides the means to determine against whom to proceed.

Thus ample authority exists for the use of the bill of discovery to ascertain the proper party defendant and to secure the inspection of objects relevant to a proposed action.

Conclusion

Usually, when an employee is injured, as in our example, the employer is unwilling to afford the employee the opportunity to determine the validity of a suit against the manufacturer of the defective machine. The employer's hesitancy is prompted by the fear that he might be involved as a third party defendant in a subsequent action against him by the manufacturer or distributor of the machine. Without a bill of discovery, the injured party's rights would not be fully protected. Thus the technological expansion and the expansion of the liability (without negligence) of manufacturers and distributors for making or selling hazardous products may instill new life into equity's often forgotten bill of discovery.

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[37] Brusselback v. Cago Corp., 20 F. Supp. 293, 294 (S.D.N.Y. 1937).