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## RAILROADS - DAMAGES UNDER EMPLOYERS' LIABILITY ACT - USE OF ANNUITY PAYMENTS UNDER RAILROAD RETIREMENT ACT IN MITIGATION OF DAMAGES

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RAILROADS — DAMAGES UNDER EMPLOYERS' LIABILITY ACT — USE OF ANNUITY PAYMENTS UNDER RAILROAD RETIREMENT ACT IN MITIGATION OF DAMAGES\* — A recent decision<sup>1</sup> raised the question of the right of a railroad defendant, against whom suit had been brought under the Federal Employers' Liability Act of 1908,<sup>2</sup> to plead in mitigation of damages plaintiff's eligibility for an annuity under section 2(3) of the Railroad Retirement Act of 1937.<sup>3</sup> The court, holding that plaintiff was not eligible for an annuity under the provisions of the Retirement Act, found it unnecessary to pass on the issue. It is proposed in this comment to suggest and analyze the more important arguments on which the solution of the problem, left undecided by that decision, will hinge and to determine, as far as possible, the probable course of judicial action when a determination of the question shall be required.

I.

In a broad sense the issue raised is not entirely new. Since 1860<sup>4</sup> the courts have been grappling with various aspects of the problem that arises whenever a defendant seeks, in mitigation of damages, to prove that plaintiff's injury was alleviated by the receipt of services or pecuniary benefits conferred on plaintiff because of the injury for

\*The writer is indebted to Paul R. Brown, of Fuerst & Brown, Cleveland, Ohio, for helpful suggestions in the preparation of this comment, though the responsibility for the comment is the writer's. An analysis of the problem suggested by this comment, arriving at the opposite conclusion, will be found in an article by George Gildea of Katzenbach, Gildea & Rudner, Trenton, New Jersey, published in the April 1938 issue of the Railway Association Bulletin.

<sup>1</sup> *McCarthy v. Palmer*, (D. C. N. Y. 1939) 29 F. Supp. 585.

<sup>2</sup> 35 Stat. L. 65, 45 U. S. C. (1934), § 51 et seq.

<sup>3</sup> 50 Stat. L. 309, § 2 (a), 45 U. S. C. (Supp. 1938), § 228b (a): "The following-described individuals . . . shall . . . be eligible for annuities after they have ceased to render compensated service to any person. . . (3) Individuals, without regard to age, who on or after the enactment date are totally and permanently disabled for regular employment for hire and shall have completed thirty years of service."

<sup>4</sup> *Althorf v. Wolfe*, 22 N. Y. 355 (1860), probably represents the earliest recognition of the problem.

which he is demanding damages. Almost without exception this plea has been denied. Thus, evidence that the plaintiff, in an action for personal injuries, had received benefits from either life<sup>5</sup> or accident<sup>6</sup> insurance policies has been, without exception, rejected by the American courts. In all but four states mitigation of damages has been refused although plaintiff, while disabled, had received all or part of his salary.<sup>7</sup> And, under the American rule, defendant has not been allowed to prove in mitigation of damages that plaintiff had become entitled to pension payments as a result of the injury.<sup>8</sup>

On the basis of a fourfold analysis of the legal relationships existing between the parties, the Vermont court, in an early case,<sup>9</sup> refused to admit evidence of payments under an accident policy as grounds for mitigation of damages. Determining that the defendant and the insurer were neither joint tortfeasors nor in legal privity, the court held that payment by the insurer could not discharge the defendant from his obligation as a wrongdoer. Accordingly, the court concluded, payments on the policy were collateral to the remedy against defendant and if, as asserted, plaintiff should be restricted to a single recovery, the defendant, and not the insurer, would be primarily liable. Subsequent decisions have rephrased these observations,<sup>10</sup> but the essential

<sup>5</sup> The cases dealing with this problem are collected and annotated in 67 L. R. A. 87 at 92 (1905); 18 A. L. R. 678 (1922); 22 A. L. R. 1558 (1923); 95 A. L. R. 575 at 577 (1935). The rule is further discussed in 8 AM. & ENG. ENCYC. LAW, 2d ed., 690 (1898); 8 R. C. L. 554 (1915); 17 C. J. 929 (1919); 15 AM. JUR. 615 (1938). For application of the rule under the Employers' Liability Act, see *Brahnam v. Baltimore & O. R. R.*, (C. C. A. 4th, 1914) 220 F. 35.

<sup>6</sup> See authorities cited in note 5, supra.

<sup>7</sup> Under the New York-Alabama rule, receipt of salary bars any recovery for loss of time. *Drinkwater v. Dinsmore*, 80 N. Y. 390 (1880); *Travis v. Louisville & N. R. R.*, 183 Ala. 415, 62 So. 851 (1913). Under the Pennsylvania-Missouri rule, such payments are available for mitigation unless paid as a gratuity. *Quigley v. Pennsylvania R. R.*, 210 Pa. 162, 59 A. 958 (1904); *Moon v. St. Louis Transit Co.*, 247 Mo. 227, 152 S. W. 303 (1912). An excellent discussion of the prevailing doctrine and the minority rules will be found in *Motts v. Michigan Cab Co.*, 274 Mich. 437, 264 N. W. 855 (1936). Cases are collected and annotated in 67 L. R. A. 87 at 89 (1905); 18 A. L. R. 678 (1922); 22 A. L. R. 1558 (1923); 95 A. L. R. 575 at 580 (1935).

<sup>8</sup> Cases collected and annotated in 67 L. R. A. 87 at 94 (1905); 18 A. L. R. 678 at 689 (1922); 22 A. L. R. 1558 (1923); 95 A. L. R. 575 at 580 (1935). The leading case is *Geary v. Metropolitan St. Ry.*, 73 App. Div. 441, 77 N. Y. S. 54 (1902). The rule is discussed in 3 SHEARMAN and REDFIELD, NEGLIGENCE, 6th ed., § 765 (1913). The English courts, following *Baker v. Dalgleish Steam Shipping Co.*, [1922] 1 K. B. 361, have reached the opposite result.

<sup>9</sup> *Harding v. Townshend*, 43 Vt. 536 (1871).

<sup>10</sup> Subrogation was relied on by *Pack, J.*, in *Harding v. Townshend*, 43 Vt. 536 at 539 (1871), when he said: "It would seem to be a perversion of justice to subrogate the wrongdoer who has caused the loss, to the rights of the injured party as to his remedy against the insurer." Other courts have relied on the concept that defendant must pay for all the damage he had done, regardless of what plaintiff receives. Thus in

principles have been developed, without substantial change, into the so-called "collateral source doctrine,"<sup>11</sup> most comprehensively expounded by Miller, J., in *Clark v. Berry Seed Company*:<sup>12</sup>

"The weight of authority is conclusive to the effect that a defendant owes to the injured compensation for injuries, the proximate cause of which was his own negligence, and that the payment by a third party cannot relieve him of his obligation; that regardless of the motive impelling their payment, whether from affection, philanthropy or contract, that the injured is the beneficiary of the bounty, and not the defendant who caused the injury."

As a corollary to this doctrine it is apparent that where the defendant was actually the source of the benefits, mitigation of damages should be allowed. Thus it has been held that a defendant could show in mitigation of damages that he had paid the plaintiff's medical expenses<sup>13</sup> and, in an action by a landlord against his tenant for destruction of leased property, that the defendant had purchased insurance on the property, which had been paid to the plaintiff.<sup>14</sup>

Which of these two correlative principles should control where the plaintiff has received, or is eligible for, an annuity under the Retirement Act depends upon the construction to be given that act when construed along with the Carriers Taxing Act.<sup>15</sup> The Taxing Act provides the source of the pension funds of the Retirement Act<sup>16</sup> by levying, on all employees' salaries up to \$300 per month, an income tax on employees and an excise tax on employers varying from 2¾ per cent in 1937 to 3¾ per cent in 1948.<sup>17</sup> While at first glance such pay-

*Tubb v. Lief*, [1932] 3 W. W. R. (Sask.) 245 at 247, it was said that "the fact that the plaintiff has provided against accident and is entitled to certain benefits from an insurance policy in the event of accident or sickness occurring does not diminish the wrong done him by the accident, nor the liability of the wrongdoer to pay for such wrong." Still other courts have emphasized the argument that though plaintiff may not be entitled to more than one recovery, defendant is not in a position to raise the question since it is primarily liable for the injury. *Harding v. Townshend*, supra; *Cunnien v. Superior Iron Works Co.*, 175 Wis. 172, 184 N. W. 767 (1921).

<sup>11</sup> For text and digest discussions of the rule, see: 1 SUTHERLAND, DAMAGES, 4th ed., § 158 (1916); 8 AM. & ENG. ENCYC. LAW, 2d ed., 690 (1898); 8 R. C. L. 554 (1914); 17 C. J. 929 (1919); 15 AM. JUR. 615 (1938) and cases there cited. For discussions by courts, see: *Regan v. New York & N. E. R. R.*, 60 Conn. 124, 22 A. 503 (1891); *Roth v. Chatlos*, 97 Conn. 282, 116 A. 332 (1922).

<sup>12</sup> 226 Iowa 262 at 271, 280 N. W. 505 (1938).

<sup>13</sup> *Goodwin v. Giovenelli*, 117 Conn. 103, 167 A. 87 (1933).

<sup>14</sup> *Publix Theatres Corp. v. Powell*, (Tex. Civ. App. 1934) 71 S. W. (2d) 237.

<sup>15</sup> 50 Stat. L. 435 (1937), 45 U. S. C. (1938 Supp.), § 261 et seq.

<sup>16</sup> *Alton R. R. v. Railroad Retirement Fund*, (D. C. D. C. 1937) 16 F. Supp.

955.

<sup>17</sup> 50 Stat. L. 437, §§ 2, 3 (1937), 45 U. S. C. (1938 Supp.), §§ 262, 263.

ments would seem clearly to indicate that defendant was the source of the benefits and should, therefore, prevent application of the collateral source doctrine, at least one plausible argument has been advanced which leads to a contrary result. This argument was suggested in *Overland Construction Co. v. Sydnor*,<sup>18</sup> wherein the court, holding that the collateral source doctrine precluded mitigation where medical expenses were paid by the Ohio Industrial Commission out of funds to which defendant had contributed, said "such payments are not, in reality, paid by the employer but by the ultimate consumer as a cost of production."<sup>19</sup> Whether this argument is to be considered justifiable or so tenuous that it is little more than a rationalization,<sup>20</sup> having as its sole value circumvention of the rule which precludes utilization of the collateral source doctrine, will depend ultimately upon the court's determination of the intent of Congress and the policy that motivated the legislation. If, as a result of this decision, the approach suggested in the *Overland* case is adopted, defendant's plea must be denied; if it is rejected, defendant will have overcome only one of the hurdles which stand in the way of sustaining the plea. These questions of intent and policy, for reasons of convenience, the writer proposes to consider in detail as a separate section. Suffice it, at this juncture, to say that back of the determination of congressional intent will lie the court's reaction to the broad policy dilemma that to allow mitigation will enable the defendant to use the humanitarian provisions of the Retirement Act to exculpate its own wrong, while to refuse mitigation will, in effect, enable the plaintiff to recover double compensation for a single injury.

## 2.

Section 5 of the Employers' Liability Act<sup>21</sup> provides:

"That any contract, rule, regulation, or device whatsoever, the purport or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void: *Provided*, that in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any

<sup>18</sup> (C. C. A. 6th, 1934) 70 F. (2d) 338.

<sup>19</sup> *Ibid.*, p. 340.

<sup>20</sup> Carried to its logical conclusion, the doctrine of the *Overland* case would not preclude mitigation. If the ultimate consumers are considered the source of the annuities, there is no reason why it should not also be recognized that they are the source of damage payments under the Employers' Liability Act; this being true, the consumer is the source of both the annuity and damages and the collateral source doctrine should not preclude mitigation. For this analysis of the Employers' Liability Act, see the opinion of Rogers, D.J., in *Fulgham v. Midland R. R.*, (C. C. Ark. 1909) 167 F. 660 at 663.

<sup>21</sup> 35 Stat. L. 66, 45 U. S. C. (1934), § 55.

sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.”

This section, while undoubtedly inserted primarily to protect employees from being forced into contracts waiving their rights under the act, and secondarily to allow relief benefit arrangements,<sup>22</sup> appears to be sufficiently comprehensive to include within its scope the problem here under consideration. If mitigation is to be allowed, it is because the employee has been indemnified, in whole or in part, by the receipt of an annuity; and, under the terms of section 5, once this is established the employer is entitled to no more than a set-off for his contribution.<sup>23</sup> In response to this, however, it may well be argued that the section should not be applied in the field of railroad employees' annuities under government regulation, as such payments were clearly beyond the contemplation of Congress when the section was enacted.<sup>24</sup> This argument has been held by the Supreme Court of Illinois<sup>25</sup> of sufficient weight to prevent cumulation of payments due under the State Workmen's Compensation Act and damages, otherwise assessable, under the Employers' Liability Act. Again determination of Congressional intent must determine which argument should prevail. If the provision is given a broad construction, the employer is entitled, at most,<sup>26</sup> to set off his contribution under the Taxing Act; if, on the other hand, the rule applied by the Supreme Court of Illinois prevails, defendant will have overcome another potential legal obstruction to his contention.

### 3.

When confronted with a new problem involving the interpretation of apparently conflicting statutes, courts often place reliance on the

<sup>22</sup> This problem is annotated in 10 L. R. A. (N. S.) 198 (1907); 11 L. R. A. (N. S.) 182 (1908); 47 L. R. A. (N. S.) 38 at 50 (1914); 48 L. R. A. (N. S.) 440 (1914). See also *Wise v. Chicago, B. & Q. R. R.*, 133 Minn. 434, 158 N. W. 711 (1916).

<sup>23</sup> *Bangor & Aroostook R. R. v. Jones*, (C. C. A. 1st, 1929) 36 F. (2d) 886.

<sup>24</sup> The first act of this type was the Railroad Retirement Act of 1934, declared unconstitutional in *Railroad Retirement Board v. Alton R. R.*, 295 U. S. 330, 55 S. Ct. 758 (1935).

<sup>25</sup> *Staley v. Illinois Cent. R. R.*, 268 Ill. 356, 109 N. E. 342 (1915), reversing 186 Ill. App. 593 (1914). It was held that, as the Employers' Liability Act was passed in 1908 and the first workmen's compensation act was passed in 1910, Congress could not have intended to include payments thereunder within the proviso of section 5.

<sup>26</sup> In *McCarthy v. Palmer*, (D. C. N. Y. 1939) 29 F. Supp. 585 at 588, even this was denied defendant. *Moscowitz, D. J.*, said: "the contributions, upon the basis sought to be set off, have relation to the age provisions of the Act and there is no nexus between the purpose for which the contributions in this regard were made and the purpose for which damages in this negligence action are awarded."

doctrine that the legislators are presumed to be cognizant of the existence of prior enactments.<sup>27</sup> Thus a court, compelled to decide the problem presented in this comment, might well hold that Congress, knowing of the existence of the Employers' Liability Act when the Railroad Retirement Act was passed, had it desired to limit recovery under the former, would have done so by explicit provisions. Again, however, an equally convincing argument may be advanced in favor of a contrary holding. Section 8 of the Employers' Liability Act provides:<sup>28</sup>

"That nothing in this Act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress. . . ."

On the theory that Congress is cognizant of prior enactments, a court wishing to allow mitigation might well hold that Congress, knowing of the existence and effect of section 8 of the Employers' Liability Act when it was considering the Retirement Act, had it desired to prevent mitigation, needed only to include a similar section in the new act. From this premise it would follow that Congress, by its silence on this problem, meant to imply that normal rules of mitigation of damages should control whenever the two statutes affected the same situation. Once more either of two equally plausible arguments may be accepted; which shall prevail will, of necessity, be determined by judicial inferences of Congressional intent.

4.

Section 12 of the Retirement Act provides that:<sup>29</sup>

"No annuity or pension payment shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated."

This section presents what appears to be the strongest technical argument against allowing defendant's plea. The obvious purpose of the section was to prevent subjecting the employee to the loss, by any method or under any circumstances whatsoever, of the benefits that Congress sought to bestow upon him. To allow these funds to be used in mitigation of damages by deducting their present value from plaintiff's recovery, it might well be argued, amounts to anticipation of payments—clearly prohibited by the terms of this section. Yet an analysis of plaintiff's case could, without doing violence to realities, be held to

<sup>27</sup> 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, 2d ed., §§ 355, 447 (1904).

<sup>28</sup> 35 Stat. L. 66, 45 U. S. C. (1934), § 58.

<sup>29</sup> 50 Stat. L. 316, 45 U. S. C. (Supp. 1938), § 2281.

show that he in no way seeks either to subject the annuity to legal process or to anticipate its payment. Merely using as evidence the present value of an annuity does not in fact anticipate the annuity; it merely shows the proper deduction to be made at this time and the plaintiff is left to collect his annuity when it properly becomes payable. Again, whether the court will reject the evidence, on the ground that it is an attempt to anticipate an annuity, or, looking to the purpose for which it is offered, will admit it, will depend upon the solution of the underlying question of Congressional intent.

## 5.

Recognizing, then, that the courts will be able to find substantial arguments on either side of the question, what are the fundamental matters of policy involved, and how should they be resolved? Reduced to a single issue, the entire problem revolves around the interpretation to be given to the purpose of the Retirement Act and in particular section 2(3).<sup>30</sup> If the purpose of this section is to compensate the employee for his total disability, then, unless mitigation is allowed, he will have received double compensation for a single injury and, despite the argument that such mitigation will allow a wrongdoer to escape the effect of his act, defendant should be granted the relief prayed.<sup>31</sup> If, on the other hand, the sole object of the Retirement Act is the solution of the sociological problem presented by the employee who, having worked out his health and strength by reason of many years of service in a hazardous occupation affected with a public interest, is unable, without some type of retirement benefit, to retain a decent standard of living, then section 2(3) must be construed as merely extending such benefits to a particular class of employees, and the funds so secured should not be available for the reduction of the liability of a tortfeasor.

Keeping in mind the prevailing political and economic theories of Congress at the time of the enactment of the Retirement Act,<sup>32</sup> it would seem clear that it was the latter policy which motivated its passage. This position is made more tenable when it is realized that to construe section 2(3) as a provision for liability would result in compensation without regard to fault where an employee, after thirty years of service, was totally and permanently disabled, while normal

<sup>30</sup> Quoted at note 3, *supra*.

<sup>31</sup> This result is made inevitable by the interpretation given the Employers' Liability Act by *Cain v. Southern R. R.*, (C. C. Tenn. 1911) 199 F. 211 at 212, in which it was held that damages were assessable only on a compensation basis, "excluding all consideration of punitive elements, loss of society, wounded feelings of the survivors and suffering of the deceased."

<sup>32</sup> To the effect that such elements may be considered, see 25 R. C. L. 959, 1035 (1919).



rules of tort liability, supplemented by a doctrine of comparative negligence,<sup>33</sup> prevailed throughout the rest of the apparently homogeneous field. That there is no reason for such a differentiation, it is submitted, is a sufficient basis for its rejection.

In summary, it is the writer's opinion that the Retirement Act was enacted to meet a problem entirely foreign to that dealt with by the Employers' Liability Act, and, consequently, that to allow such mitigation of damages as has been suggested would conflict with the intent of Congress and the objects of the acts; that the intent of Congress should prevail; and that to effectuate that intent the courts will be justified in utilizing those arguments which serve that end, despite the existence of equally logical arguments leading to the opposite result.

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<sup>33</sup> Normal rules of contributory negligence were abrogated by the Employers' Liability Act, 35 Stat. L. 66, § 3 (1908), 45 U. S. C. (1934), § 53.