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Federal Employees Compensation Act-Measure Of Damages In Action Against Third-Party Defendant

the problem in reaching the more desirable result that would afford injured longshoremen the inclusive type coverage.

Hopefully, the decision in *Marine Stevedoring* is not indicative of an incipient trend toward a further increase of judicial legislation through interpretation of the Longshoremen's Act. Congress alone must act to rectify the incongruities in the Act. Yet given prolonged congressional silence in this area, the courts may well continue to ignore the bounds of judicially permissible activity in order to effect a more certain system of compensation for injured longshoremen.

JAMES K. CLUVERIUS

FEDERAL EMPLOYEES COMPENSATION ACT— MEASURE OF DAMAGES IN ACTION AGAINST THIRD-PARTY DEFENDANT.

The Federal Employees' Compensation Act provides for a recovery against the United States when a federal employee is injured in the course of his employment.[1] The employee's exclusive remedy under the Act is a proceeding to obtain compensation which is paid regardless of any showing of fault.[2] However, where the negligence of a third party has contributed to the injury, the employee's cause of action against that tortfeasor is preserved.[3] In such a suit, the third party may attempt to implead the United States in an effort to obtain either contribution or indemnity. When this attempt is unsuccessful and a verdict is rendered for the employee against the third party, the problem becomes one of determining what proportion of the total damages should be assessed against this defendant.

In *Murray v. United States*,[4] a government employee was injured in a falling elevator in a building leased by the United States. After having received benefits under FECA, she sued the lessor of the build-

[1]Federal Employees' Compensation Act, 5 U.S.C. § 8102 (Supp. III 1968). Hereinafter referred to as FECA.

[2]*Id.* § 8116(c); *see* United States v. Demko, 385 U.S. 149 (1966); Patterson v. United States, 359 U.S. 495 (1959); Johansen v. United States, 343 U.S. 427 (1952); Sanders v. United States, 387 F.2d 142 (5th Cir. 1967).

[3]Federal Employees' Compensation Act, 5 U.S.C. § 8131 (Supp. III 1968).

[4]405 F.2d 1361 (D.C. Cir. 1968).

ing alleging negligence. Relying on the Federal Tort Claims Act,[5] the lessor sought to implead the United States pursuant to Rule 14 of the Federal Rules of Civil Procedure.[6] The lessor advanced two separate claims: one for contribution and the other for indemnity. The United States Court of Appeals for the District of Columbia Circuit affirmed the trial court's dismissal of these claims.

While the District of Columbia recognizes the doctrine of contribution between joint tortfeasors,[7] the doctrine is limited by the principle that there can be contribution only where there is joint liability in tort to the plaintiff by both defendants.[8] The liability of the United States under FECA is separate and exclusive.[9] Therefore, as a matter of law, the government is not a joint tortfeasor with the third party, and contribution cannot be permitted since there is no common liability to the employee.[10] Thus the court held that the exclusive liability provision of FECA prohibited a claim against the government for contribution.[11]

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[5]"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under *like circumstances* . . . ." Federal Tort Claims Act, 28 U.S.C. § 2674 (1964) (emphasis added). It has been held that by virtue of this Act, the government has consented to be impleaded in an action for contribution. United States v. Yellow Cab Co., 340 U.S. 543 (1951). However, the government cannot be impleaded in a case where a private party could not be impleaded under the local law. *See* United States v. Yellow Cab Co., 340 U.S. 543 (1951); *cf.* United States v. Inmon, 205 F.2d 681 (5th Cir. 1953); Ford v. United States, 200 F.2d 272 (10th Cir. 1952).

[6]"At any time after commencement of the action a defending party . . . may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." FED. R. CIV. P. 14(a).

[7]George's Radio, Inc. v. Capital Transit Co., 126 F.2d 219 (D.C. Cir. 1942).

[8]Yellow Cab Co. v. Dreslin, 181 F.2d 626 (D.C. Cir. 1950).

[9]The Act provides that "[t]he liability of the United States . . . is exclusive and instead of all other liability of the United States . . . ." with respect to an employee covered by the statute. Federal Employees' Compensation Act, 5 U.S.C. § 8116(c) (Supp. III 1968).

[10]Busey v. Washington, 225 F. Supp. 416 (D.D.C. 1964). Where the United States is not liable in tort to the employee, it cannot be held liable in contribution for his injuries. Maddux v. Cox, 382 F.2d 119 (8th Cir. 1967). Similar results are reached under state workmen's compensation acts with exclusive liability provisions and under the federal Longshoreman's and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901-950 (1964), which contains an exclusive liability provision "nearly identical to . . . the Federal Employees' Compensation Act . . . ." Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597, 602 (1963). *See* American Mut. Liab. Ins. Co. v. Matthews, 182 F.2d 322 (2d Cir. 1950); Coates v. Potomac Elec. Power Co., 95 F. Supp. 779 (D.D.C. 1951); Liberty Mut. Ins. Co. v. Vallendingham, 94 F. Supp. 17 (D.D.C. 1950).

[11]A contrary result was reached by the Supreme Court in Weyerhaeuser Steamship Co. v. United States, 372 U.S. 597 (1963), where it was held that the exclusive

The lessor also claimed indemnity from the United States on the theory that the government had impliedly contracted to maintain the premises in a safe manner.[12] Such a claim would not be barred by the exclusive liability provisions of FECA.[13] However, the claim here was barred by the Tucker Act[14] which limits district court

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liability provision of FECA did not limit the admiralty rule of divided damages in collisions involving mutual fault. The effect of the decision was to allow contribution between a ship owner and the government-employer in spite of the fact that the employee had recovered benefits under FECA. During the same term of court a judgment was vacated in Treadwell Construction Co. v. United States, 372 U.S. 772 (1963). The lower court had denied contribution where a government employee covered by FECA had obtained a judgment from a third-party defendant. Drake v. Treadwell Constr. Co., 299 F.2d 789 (3d Cir. 1962). On remand the trial court permitted contribution and the government did not appeal.

These rulings were relied upon by a federal district court in holding that the manufacturer of a machine, which had injured a NASA employee, could bring a third-party action against the government nothwithstanding the provisions of FECA. Hart v. Simons, 223 F. Supp. 109 (E.D. Pa. 1963). However, the ultimate settlement between the parties dismissed the third-party claim and there was no contribution. *See* Murray v. United States, 405 F.2d 1361, 1364-65 n.12 (D.C. Cir. 1968).

Subsequent cases have declined to follow the *Weyerhaeuser* rule and the case has apparently been limited to claims arising in admiralty. *See, e.g.,* Wien Alaska Air Lines, Inc. v. United States, 375 F.2d 736 (9th Cir.), *cert. denied,* 389 U.S. 940 (1967); United Air Lines v. Wiener, 335 F.2d 379 (9th Cir.), *cert. denied,* 379 U.S. 951 (1964). *Weyerhauser* was distinguished in the District of Columbia in Busey v. Washington, 225 F. Supp. 416 (D.D.C. 1964).

The result of these recent developments is that the *Weyerhaeuser-Treadwell-Hart* line of cases should not be authoratatively relied upon by a third-party claiming contribution from the United States where a government employee has been injured. *But see* Thornock, *Exclusive Remedy Provision of the Federal Employees' Compensation Act—Fact or Fiction?,* 42 MILITARY L. REV. 1 (1968).

[12]While contribution distributes the loss among the tortfeasors, indemnity shifts the entire burden of the loss to the tortfeasor who, either by an express agreement or by operation of law, is found to be primarily responsible for the injury. *See* W. PROSSER, TORTS § 48, at 278 (3d ed. 1964).

[13]The reason for this is that the basis for idemnity is not a common liability in tort to the plaintiff, but a contractual relationship between the defendants. Thus indemnity may be allowed even though the tort liability of the United States to its employee has been replaced by a statutory scheme.

> The clearest exception to the exclusive-liability clause [of compensation statutes] is the third party's right to enforce an express contract whereby the employer agreed to indemnify the third party for the very kind of loss which the third party has been made to pay to the employee. A familiar example is the situation in which an employee is injured because of the condition of the premises, and recovers from the landlord who leased the premises to the employer....

A. LARSON, 2 WORKMEN'S COMENSATION § 76.41, at 235-36 (1968).

See also with respect to implied contracts of indemnity, Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124 (1956); United Air Lines v. Wiener, 335 F.2d 379 (9th Cir.), *cert. denied,* 379 U.S. 951 (1964).

[14]The district courts shall have original jurisdiction ... of:

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jurisdiction to contract claims not exceeding $10,000.[15] In addition, the court refused to decide the issue with respect to the lessor's claim for noncontractual indemnity as it was not briefed "except in summary, undeveloped and unsupported terms."[16]

Once it has been determined that the third party is entitled to neither contribution nor indemnity, it is necessary to consider the basis to be used in determining the amount which the injured plaintiff will be entitled to recover in his suit against the negligent third party. This is a crucial consideration because a jury verdict may be greatly in excess of the statutory compensation.[17] The court in *Murray* stated that damages against the lessor-defendant would be "limited to one-half of the amount of damages sustained by [the] plaintiff, assuming the facts would have entitled the owner to contribution from the employer if the statute had not interposed a bar."[18] This rule was justified on the ground that FECA gave an assured recovery to the employee regardless of any showing of fault.

In reaching its decsion, the court relied upon *Martello v. Hawley*,[19] which involved a collision between two automobiles. The plaintiff, after entering into a settlment agreement with the driver of one automobile, proceeded to bring suit against the owner of the other

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(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded ... upon any express or implied contract with the United States ....

Tucker Act, 28 U.S.C. § 1346(a) (1964).

[15]"Appellant's brief says it is possible for a verdict to be rendered for less that $10,000, but since there obviously was and is no intent to limit the idemnity claim to this amount, this is without significance." Murray v. United States, 405 F.2d 1361, 1366 (D.C. Cir. 1968).

[16]The court noted however that the cases in this area appear to be in conflict. Murray v. United States, 405 F.2d 1361, 1367 (D.C. Cir. 1968). The most articulate view, and probably the prevailing one as well, is that a claim for noncontractual indemnity stands on the same ground as a claim for contribution in tort and is similarly barred by the exclusive liability provisions of FECA. Thus the United States Court of Appeals for the Ninth Circuit has held that "a claim for non-contractual tort indemnity can be maintained only where there is tort liability on the part of the indemnitor to the person injured." Wien Alaska Air Lines, Inc. v. United States, 375 F.2d 736, 737 (9th Cir.), *cert. denied*, 389 U.S. 940 (1967). *Accord*, United Air Lines v. Wiener, 335 F.2d 379 (9th Cir.), *cert. denied*, 379 U.S. 951 (1964).

[17]*See, e.g.*, American Dist. Tel. Co. v. Kittleson, 179 F.2d 946 (8th Cir. 1950), as noted in A. LARSON, 2 WORKMEN'S COMPENSATION § 7610, at 229 (1968), where the employee's statutory recovery was $6,800 while the jury assessed his damages at $60,000.

[18]405 F.2d at 1366.

[19]300 F.2d 721 (D.C. Cir. 1962).

automobile.[20] The judgment was more than twice the amount of the settlement and the judgment-defendant sought contribution from the settling-defendant. The court held that the judgment-defendant was required to pay only one-half of the total verdict.[21] While recognizing that this result necessarily reduced the plaintiff's recovery, the court indicated that "by his settlement, the plaintiff has sold one-half of his claim for damages. Anything else would be unfair to the settling tort-feasor, who has bought his peace...."[22] The underlying policy reason for such a rule is the apparent desire to encourage settlements.[23] If contribution were allowed the settlment would be meaningless since it would only be a final determination of maximum liability where the verdict against the judgment-defendant was equal to or less than twice the amount of the settlement.[24]

In extending the result of the settlement cases to the principal case, *Murray* focuses on the fact that contribution is not permitted in either situation, while ignoring the basic and inherent differences between the two situations. A close examination of the situation where the plaintiff is covered by a compensation act will demonstrate that the *Martello* rule is distinguishable and should be limited to cases where there has been a voluntary settlement between the parties.

Under FECA, the employee has an assured recovery; whereas there is no such assurance in the settlement situation, nor can the

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[20]No statutory compensation scheme was involved.

[21]"[W]e now hold *in the factual circumstances of this case* that when settlement is made with one joint tort-feasor and later a verdict is obtained against the other, and the jury finds that *the settling tort-feasor should contribute,...* the defendant tort-feasor should be required to pay only ... one-half the total original verdict." Martello v. Hawley, 300 F.2d 721, 724 (D.C. Cir. 1962) (emphasis added). *See also* Knell v. Feltman, 174 F.2d 662 (D.C. Cir. 1949).

[22]300 F.2d at 724.

[23]"[The settlement compromise] must be given effect to relieve [the settling defendant] from all liability ... otherwise persons in [a] similar position will not be likely to make compromises." McKenna v. Austin, 134 F.2d 659, 665 (D.C. Cir. 1943).

[24]Suppose that the plaintiff settled with defendant *A* for $5,000 and received a judgment against defendant *B* for more than twice the amount of the settlement, *e.g.*, $12,000. If the settlement is to be given full effect, *A* cannot be required to pay more than $5,000. But, if contribution is allowed each defendant will be required to pay one-half of the verdict, or $6,000. Thus *A*'s liability would exceed the amount agreed upon in the settlement and the settlement would have no effect as a final determination of *A*'s maximum liability.

On the other hand, where the verdict is equal to twice the amount of the settlement, *i.e.*, $10,000, there is no problem in allowing contribution, since each defendant would be liable for only $5,000. Where the verdict is for less than twice the settlement, *e.g.*, $8,000, and contribution is permitted, each defendant would pay only $4,000. Thus *A*'s liability would not exceed the maximum amount provided for by the settlement.

statutory recovery be fairly treated as a settlement. The employee is automatically entitled to a fixed amount by virtue of the fact that the injury occurred during the course of his employment. Furthermore, FECA provides that the government is subrogated to any recovery by the employee to the extent of the compensation which has been paid.[25] Thus, part, if not all, of the plaintiff's recovery from the third party must be repaid to the government. However, this is not true in the settlement situation where the plaintiff keeps his recovery from both defendants.[26] Finally, the policy reason for the *Martello* rule is inapplicable, since there is no need to adopt a result designed to encourage settlements where both parties have their rights and liabilities predetermined by statute.

The United States Court of Appeals for the Fifth Circuit, in *Parker v. Wideman*,[27] considered the measure of damages to be assessed against the third party and reached a result which directly conflicts with the *Murray* measure of damages. In *Parker*, a guard employed by the federal government was engaged in transporting federal prisoners. He was injured when the automobile in which he was traveling collided with another vehicle. After having received compensation under FECA, he sued the driver of the government's automobile for his negligence in causing the accident. The jury found that the defendant was liable to the employee. However, it assessed his damages at "none" [sic] dollars presumably because the defendant had introduced evidence that the employee had received benefits

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[25]Federal Employees' Compensation Act, 5 U.S.C. § 8132 (Supp. III 1968).

[26]For example, if the employee has received $5,000 in compensation and there is a judgment against the defendant for $12,000, the employee's final recovery will be $6,000. The reason for this result is that under the *Murray* rule, the defendant pays only one-half of the verdict, or $6,000. The employee must then reimburse the government for the $5,000 which he received under FECA. Thus he is left with only $1,000 of his recovery from the defendant. This is added to his original compensation of $5,000 and the total recovery is $6,000. It should be noted that under the *Murray* rule the employee will *never* recover more than one-half of his total damages in any case where the jury's verdict exceeds twice the amount of the compensation paid.

A very different result is reached in the settlement situation. Thus, where the plaintiff settles with defendant *A* for $5,000 and there is a judgment against defendant *B* for $12,000, the plaintiff's total recovery will be $11,000. Under the *Martello* rule, *B* pays one-half of the verdict, or $6,000. This is added to the $5,000 which the plaintiff received in settlement from *A* and the total recovery is $11,000. In contrast to the result under *Murray*, the plaintiff here will *always* recover more than one-half of his damages measured by the jury's verdict.

[27]380 F.2d 433 (5th Cir. 1967).

under FECA. The court remanded the case for a trial on the sole issue of damages on the ground that

> the compensation received by the appellant [employee] under the Federal Employees' Compensation Act does not mitigate the damages which the appellee [third party] is obligated to pay for injuries sustained by the appellant as the result of his negligence.[28]

This conclusion is in accord with that reached by Oleck in his treatise on *Damages to Persons and Property,* where he states that under FECA, "[b]eneficiaries may recover full damages from the third party for an injury sustained."[29] A similar result is also reached under state workmen's compensation acts.[30]

In enunciating its measure of damages, *Murray* suggests that it is unjust to impose a greater liability on the third party where his co-defendant is the government and contribution is barred by FECA, than where the other tortfeasor is a private individual and contribution would be permitted. However, it should be recognized that the *Murray* rule applies only where contribution from the government would have been permitted in the abscence of FECA; *i.e.,* where the government's negligence is found to have contributed to the employee's injury.

However, where two non-governmental defendants have negligently caused a single injury, each is liable for the entire amount of the damages suffered by the plaintiff.[31] Thus even in the case

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[28]*Id.* at 436. Thus the Fifth Circuit is in direct conflict with the District of Columbia Circuit on this point.

[29]H. OLECK, DAMAGES TO PERSONS AND PROPERTY § 444C (The Federal Employees' Compensation Act & Third Party Suits While Accepting Compensation), at 964.20 (1961). "As any compensation paid the employee must be refunded by the employee after he has recovered damages, the payment of such compensation is not a defense to the suit against the third party tortfeasor; neither can it be proved in mitigation of damages." *Id.* at 964.24. Research has not disclosed other cases which have specifically discussed the measure of the employee's recovery from the third party where the employee has also received benefits under FECA.

[30]*See* Feeley v. United States, 337 F.2d 924 (3d Cir. 1964) (recognizing the rule that damages may not be diminished on account of workmen's compensation recoveries in Pennsylvania); Maccarone v. A/S Inger, 262 F.2d 569 (2d Cir. 1959) (employee's rights under workmen's compensation in New York are irrelevant to a determination of his damages); United Gas Corp. v. Guillory, 207 F.2d 308 (5th Cir. 1953) (under Louisiana law a third party is liable for the full amount of the damages suffered); Powell v. Wagner, 178 F. Supp. 345 (E.D. Wis. 1959) (compensation under Ohio law does not inure to the benefit of the defendant and may not be considered to diminish the amount awarded by the jury).

[31]The RESTATEMENT OF TORTS § 879 (1939) provides that "each of two persons who is independently guilty of tortious conduct which is a substantial factor

where contribution is permitted, the plaintiff could bring an action solely against the third party and recover the entire amount of his damages from him. It is the responsibility of the defendant to secure contribution wherever possible. The doctrine of contribution relates to the rights and liabilities of the defendants toward each other, and the fact that it may not be invoked in a given case should have no effect upon the recovery by the plaintiff.[32]

The major difficulty with the rule adopted in *Murray* is that while the court holds that the third party is not entitled to contribution from the United States, the effect of its decision is in fact to allow contribution when viewed through the eyes of the defendant who pays the same amount to the plaintiff as he would in a case where he receives contribution.[33] On the other hand, the plaintiff can never receive more than one-half of his actual damages measured by the jury's verdict.[34] As a result, the employee receives a smaller recovery when he is employed by the United States than when he is employed by a private corporation under a workmen's compensation act.[35] Moreover, the employee also recovers a smaller amount in the

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in causing a harm to another is liable for the entire harm. . . ."

Comment *a* of that section states that:

> [a] person whose tortious conduct is otherwise one of the legal causes of an injurious result is not relieved from liability for the entire harm by the fact that the tortious act of another responsibile person contributes to the result. Nor are the damages against him thereby diminished.

See also F. HARPER & F. JAMES, TORTS § 10.1, at 695-99 (1956).

[32]"It is no defense for wrongdoers that others aided in causing the harm. Each is responsible for the whole.... Accordingly when one makes full reparation for all the loss, the others are discharged from liability to the injured person.... Where contribution cannot be had between 'joint' tortfeasors, they are relieved from further liability of any kind." McKenna v. Austin, 134 F.2d 659, 664 (D.C. Cir. 1943).

[33]This may be demonstrated by examining the result under both cases where the jury's verdict against the defendant is for $12,000. If contribution were allowed, the defendant would pay the full $12,000, but he would receive $6,000, or one-half of the verdict, from the joint tortfeasor. Thus his net liability would be $6,000. Under the *Murray* rule, the defendant pays one-half of the verdict, *i.e.* $6,000. In either case the defendant has the same net liability to the plaintiff. The result is that in the *Murray* situation the defendant gets indirectly what he cannot get directly. Therefore, the court permits the defendant to avoid the consequences of the denial of contribution under FECA.

[34]*See* note 26 *supra.*

[35]In the latter case, he recovers the full amount of his damages from the third-party defendant. *See* cases cited note 30 *supra.* Thus where a jury verdict is for $12,000, the employee recovers the entire amount. He then must reimburse his employer for the compensation received. Where this was $5,000, the employee pays $5,000 back into the fund, leaving him with $7,000 from the defendant. When this is added to the $5,000 which he initially received as compensation, his total recovery from the employer and the defendant is $12,000, *i.e.,* the assessed amount of his actual damages.

case where the government was negligent than in the case where the injury was caused solely by the tortious conduct of the third party.[36] Yet, at the same time, a pecuniary benefit inures to the third party by the fact that the individual injured was a government employee.

Ideally, the amount which the plaintiff has received under FECA should be deducted from the jury's verdict and the third party should be required to pay the remainder. The government would be entitled to recover the benefits it has paid only where it can demonstrate that it was free from negligence. In that case, the third party would directly reimburse the government by that amount.[37] For example, if the plaintiff received $5,000 under FECA, and the jury, in a separate action against the third party, assessed his damages at $20,000, the plaintiff would receive $15,000 from the third party. If the United States, however, could demonstrate that it was without fault, the third party would pay $5,000 to the compensation fund. The end result is that the employee will be fully compensated for his injury and the judgment-defendant will be liable for the total damages only in the case where the injury was caused solely by his negligence. However, it should be recognized that this result could only be accomplished by legislative action to amend the existing compensation statute.

In the absence of such amendment, it is nevertheless possible for the court to reach an equitable result by changing its point of reference from the third party to the injured employee. Thus the employee should recover the full amount of his damages from the judgment-defendant. This will not result in a double recovery since the government will be subrogated to the recovery to the extent of the compensation which has been paid or which is still payable. Once again the employee will be made whole and the rule will be brought

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[36]The *Murray* rule applies only where the government would have been liable for contribution in the absence of FECA. This means that the government must have been negligent as contribution is allowed only where both defendants are liable in tort to the plaintiff. We have seen that under the *Murray* rule the defendant will be liable for only one-half of the judgment against him. However, where the government was not at fault, the "one-half" rule does not apply and the defendant, being solely responsible for the injury, must pay the entire judgment entered against him. Thus, the employee's recovery will be greater. The result of this rule is that the employee is penalized in cases where the government was negligent. In effect, the employee is made to suffer for the negligence of his employer, by taking a smaller recovery, nothwithstanding his guaranteed recovery under FECA.

[37]It is suggested that this would be a matter to be determined by the defendants themselves and should be of no concern to the plaintiff.