Louisiana Law Review

Volume 4 | Number 1
November 1941

Workmen's Compensation - Damages - Effect of Refusal to Submit to Operation

O. P. S.

inherited from his aunts or uncles,[8] and since he was an adulterous illegitimate (a classification still further removed from legitimate) he was definitely prohibited from inheriting from them. Therefore it is a departure from a system of equality to permit his aunts and uncles to inherit from him and prevent a blood sister from inheriting her brother's estate.

In a case such as this, where both parties may be legally excluded from the estate, it would be more in accord with justice[9] as well as the modern legal trend[10] to award the decision to the nearest of blood, thereby erasing, to a small extent, the suffering caused by the social attitude toward such unfortunates who have no choice but to accept the position and class into which they are automatically cast.

R. O. R.

WORKMEN'S COMPENSATION—DAMAGES—EFFECT OF REFUSAL TO SUBMIT TO OPERATION—Plaintiff sues under the Workmen's Compensation Act[1] for total disability occasioned by a nose fracture. Medical proof disclosed that relief from sinusitis and other conditions resulting from the injury could not be obtained without a surgical operation on plaintiff's nose. Defendant maintained that plaintiff should submit to such an operation, the effect of which would relieve him of payments for *permanent total* disability under subsection 1(b) of Section 8 of the act. *Held,* an injured employee will not be compelled by the court to submit to a major operation, the purpose of which is to reduce the existing disability. *Delafield v. Maples,* 2 So. (2d) 704 (La. App. 1941).

It is well established that a wronged person owes to the individual wronging him a duty[2] to minimize the damage where it

---

8. "The law does not grant any right of inheritance to natural children to the estate of the legitimate relations of their father or mother." Art. 921, La. Civil Code of 1870.

9. The court in Succession of Haydel, 188 La. 646, 177 So. 695 (1937), gave an estate to an adulterous illegitimate under a broad interpretation of the word "alimony."

10. See Daggett, The Social Attitude of the Civil Law in the United States (1937) 15 Social Forces 558, 561.

1. La. Act 20 of 1914 [Dart's Stats. (1932) §§ 4391-4432].

2. This is not a duty in the strict legal sense, such as to create an enforceable legal right in the person to whom the duty is owed. It means rather a *disability* to recover for that part of the damage which the law deems the injured party could reasonably have prevented.

is reasonably possible to do so.[3] To what extent does this rule contemplate submission to a surgical operation by an injured employee? No rigid standard can be formulated. It can be broadly but certainly said, however, that courts will not compel submission to an operation, or, in the event of refusal, decree reduction or denial of compensation, if the operation be a *major* one.[4] All courts will require submission if the operation is considered *minor* and attended with little risk of loss of life.[5]

An operation is deemed major or minor at the discretion of each particular tribunal, the principal considerations being the nature and seriousness of the operation,[6] the physical[7] and psychological[8] condition of the patient, the possibility of post-operative complications, and other attending circumstances.[9]

---

3. McCormick, Handbook on the Law of Damages (1935) 127, § 33. See also Sedgwick, Damages (9 ed. 1912) 387, § 202.

4. Baltimore & Carolina S.S. Co. v. Norton, 40 F. (2d) 271 (E.D. Pa., 1929); American Mut. Liability Ins. Co. v. Broden, 40 Ga. App. 178, 149 S.E. 98 (1929); Simpson v. New Jersey Stone & Tile Co., 93 N.J. Law 250, 107 Atl. 36 (1919); Fred Cantrell Co. v. Goosie, 148 Tenn. 282, 255 S.W. 360 (1923).

5. Leday v. Lake Charles Pipe & Supply Co., 185 So. 655 (La. App. 1939); Myers v. Wadsworth Mfg. Co., 214 Mich. 636, 183 N.W. 913 (1921); Ritchie v. Rayville Coal Co., 224 Mo. App. 1128, 33 S.W. (2d) 154 (1930); Crane Enamelware Co. v. Dotson, 152 Tenn. 401, 277 S.W. 902 (1925).

6. See Martin v. Wyatt Lumber Co., 4 La. App. 157, 160 (1926); Crawford v. Tampa Inter-Ocean S.S. Co., 155 So. 409, 411 (La. App. 1934). Courts have regarded the following operations as too serious: amputation of a leg [Bryant v. Texas Pipe Line Co., 1 La. App. 42 (1924)]; operation to remove a bone from a leg which had been broken twice [Perkins v. Long Bell Lumber Co., 8 La. App. 403 (1928)]; operation on fractured nose, similar to situation in the principal case [Dollar v. Southern States Co., 18 La. App. 178, 135 So. 758 (1931)]; operation on a dislocated shoulder and torn ligaments in the shoulder joint [Carl B. King Drilling Co. v. Mossenburg, 154 Okla. 236, 7 P. (2d) 454 (1932)].

7. In Bronson v. Harris Ice Cream Co., 90 So. 759 (1922), the plaintiff was 59 years old and the operation to remove broken parts of his knee required an anaesthetic. In Murphy v. B. Mutti, Inc., 184 So. 216 (La. App. 1938), the employee was an aged negro with a susceptibility to tuberculosis. The court refused to compel submission to an operation in both cases.

8. In American Smelting & Refining Co. v. Industrial Commission, 76 Utah 503, 290 Pac. 770 (1930), the court attributed little weight to the fact that the injured worker was timid and oversensitive to pain. The plaintiff in Gentry v. Williams Bros., 135 Kan. 408, 10 P. (2d) 856 (1932) was "deathly scared of hospitals"; compensation was refused, the employer being willing to bear the expense of an operation for hernia.

9. See Simmons v. Blair, 194 La. 672, 677, 194 So. 585, 586 (1940); Scott v. E. J. Deas Co., 3 La. App. 374, 376 (1926); Martin v. Wyatt Lumber Co., 4 La. App. 157, 160 (1926); Murphy v. B. Mutti, Inc., 184 So. 216, 218 (La. App. 1938); Grant v. State Industrial Accident Commission, 102 Ore. 26, 42, 201 Pac. 438, 444 (1921); American Smelting & Refining Co. v. Industrial Commission, 76 Utah 503, 506, 290 Pac. 770, 771 (1930).

Some courts are more hesitant[10] than others[11] in requiring a surgical operation. The Louisiana courts are among the former. For example, they have consistently held an injured employee justified in declining to undergo an operation for hernia,[12] while other courts have required submission to such an operation.[13]

Just how exacting different courts are can most clearly be illustrated by considering a random selection of cases where they have required the plaintiff to undergo the operation[14] and where they have refused to so require.[15]

---

10. Such courts hold the possibility of death a paramount consideration. Their attitude is typified in McNally v. Hudson & M. R.R., 87 N.J. Law 455, 457, 95 Atl. 122, 123 (1915): "Although the peril to life seems to be very slight, 48 chances in 23,000, nevertheless the idea is appalling to one's conscience that a human being should be compelled to take a risk of death, however slight that may be, in order that the pecuniary obligation created by the law in his favor against his employer may be minimized."

11. A prime factor influencing these courts is the feeling that society demands a speedy return to work. See O'Brien v. Albert A. Albrecht Co., 206 Mich. 101, 104, 172 N.W. 601, 602, 6 A.L.R. 1257, 1259 (1919). What effect would the demands of the present national emergency have on the courts' attitude toward injured workers?

12. Hernia appears to be the injury of most frequent occurence in Employers' Liability cases. Addison v. Powell Lumber Co., 1 La. App. 210 (1924); Bossier v. Louisiana Oil Refining Corp., 3 La. App. 205 (1925); Martin v. Wyatt Lumber Co., 4 La. App. 157 (1926); Britt v. Texas Pipe Line Co., 5 La. App. 33 (1926); James v. Hillyer—Deutsch—Edwards, 14 La. App. 496, 130 So. 257 (1930); Plumlee v. Calcasieu Sulphate Paper Co., Inc., 16 La. App. 670, 132 So. 811 (1931); Flanagan v. Sewerage & Water Board, 19 La. App. 154, 140 So. 83 (1932); Huval v. Sexton Corporation, 19 La. App. 198, 139 So. 739 (1932); Durrett v. Unemployment Relief Committee, 152 So. 138 (La. App. 1934); Finley v. Texas Co., 162 So. 473 (La. App. 1935); Murphy v. B. Mutti, Inc., 184 So. 216 (La. App. 1938); Hall v. Mengel Co., 191 So. 759 (La. App. 1939).

13. Gentry v. Williams Bros., 135 Kan. 408, 10 P. (2d) 856 (1932); Hendler Creamery Co. v. Miller, 153 Md. 264, 138 Atl. 1 (1927) (negligence action); O'Brien v. Albert A. Albrecht Co., 206 Mich. 101, 172 N.W. 601, 6 A.L.R. 1257 (1919); Sun Coal Co. v. Wilson, 147 Tenn. 118, 245 S.W. 547 (1922).

14. One of the few Louisiana cases is Leday v. Lake Charles Pipe & Supply Co., 185 So. 655 (La. App. 1939), where the court required the employee to have the index finger of his right hand amputated; Joliet Motor Co. v. Industrial Board, 280 Ill. 148, 117 N.E. 423 (1917), operation for cataract; Mt. Olive Coal Co. v. Industrial Commission, 295 Ill. 429, 129 N.E. 103 (1920), refusal to take laughing gas and permit doctor to forcibly break up adhesions in the tendons of the wrist and hand; Kricinovich v. American Car & Foundry Co., 192 Mich. 687, 159 N.W. 362 (1916), operation to chisel callous thrown out from a healing leg bone, and to loosen the tissue; Myers v. Wadsworth Mfg. Co., 214 Mich. 636, 183 N.W. 913 (1921), operation on severe cut on arm and hand; Ritchie v. Rayville Coal Co., 224 Mo. App. 1128, 33 S.W. (2d) 154 (1931), operation to rectify a spine injury resulting in plaintiff's becoming a humpback; American Smelting and Refining Co. v. Industrial Commission, 76 Utah 503, 290 Pac. 770 (1930), probing lacerations and setting a fractured middle finger.

15. Reeves v. Dietz, 1 La. App. 501 (1925), removal of a skin scar on healed arm muscles and tendons; O'Donnell v. Fortuna Oil Co., 2 La. App. 462 (1925), amputation of middle finger (cf. Leday v. Lake Charles Pipe and Supply Co., 185 So. 655 (La. App. 1939); Hilliard v. Merkel Constr. Co., 4 La.

Despite the fact that some courts are less liberal than others toward the plaintiff, the cases in which submission was not required far outnumber those where such a requirement was imposed. This is especially true in Louisiana where "the cases in which an operation has been required . . . are so few as to lead to the conclusion that, while the academic principle is recognized, the practical application thereof is rare indeed."[16]

O. P. S.

App. 40 (1926), where physicians did not consider an injured party a "good risk"; Sybille v. Kelly Weber Co., 10 La. App. 374, 121 So. 640 (1928), serious operation involving grafting a bone to the arm; Kingsport Silk Mills v. Cox, 161 Tenn. 470, 33 S.W. (2d) 90 (1930), where there was a conflict of medical opinion.

In the following cases a first operation had been unsuccessful and the employer was demanding a second operation in which the outcome was problematical. Perkins v. Long Bell Lumber Co., 8 La. App. 403 (1928); Massotti v. Newburgh Shipyards, 210 App. Div. 538, 206 N.Y. Supp. 383 (1924); Indemnity Ins. Co. of N.A. v. Jones, 299 S.W. 674 (Tex. App. 1927).

16. Murphy v. B. Mutti, Inc., 188 So. 186 (La. App. 1939).