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Worker's Compensation - Executive Officer Liability

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COMMENT

WORKMEN'S COMPENSATION— EXECUTIVE OFFICER LIABILITY

It is fundamental in workmen's compensation law that by assuming no-fault liability for industrial accidents, the employer is afforded immunity from proceedings in tort.[1] It is equally fundamental, however, that the compensation remedy is exclusive only between employer and employee; claims against third parties remain unaffected.[2] Most jurisdictions,[3] including Louisiana,[4] have held that coemployees, *including* those in the highest levels of management, are "third parties" and hence subject to suit in tort.

During the last decade in Louisiana, there have been numerous "third party actions" against corporate executive officers, most often predicated on alleged negligent omissions.[5] The popularity of these actions can be attributed to liability insurance coverage provided by the corporation. It has been suggested that, as a result of executive officer liability, the policy of the Workmen's Compensation Act has been undermined.[6] It is indeed difficult to deny that when the third party executive

1. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 1.10 (1972).
2. 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 71.10 (1972).
3. *Id.* § 72.10.
4. *See, e.g.*, Chaney v. Brupbacher, 242 So.2d 627 (La. App. 4th Cir. 1970); Berry v. Aetna Cas. & Sur. Co., 240 So.2d 243 (La. App. 2d Cir. 1970); Boudreaux v. Falco, 215 So.2d 538 (La. App. 1st Cir. 1968); Daigle v. Cobb, 175 So.2d 392 (La. App. 4th Cir. 1965); Adams v. Fidelity & Cas. Co., 107 So.2d 496 (La. App. 1st Cir. 1958); Vidrine v. Soileau, 38 So.2d 77 (La. App. 1st Cir. 1948); Kimbro v. Holladay, 154 So. 369 (La. App. 2d Cir. 1934).

A working partner is considered an "employee" in Louisiana and hence eligible for workmen's compensation benefits. *See* Trappery v. Lumbermen's Mut. Cas. Co., 229 La. 632, 86 So.2d 515 (1956). Therefore, it would seem that working partners are also "third persons" within the meaning of the Louisiana Workmen's Compensation Act. *But see* Sonberg v. Bergere, 220 Cal. App. 2d 681, 34 Cal. Rptr. 59 (1963). It has been held, however, that nonworking partners are not considered "employees" of the partnership and therefore cannot be liable in tort as coemployee third persons. *See* Leger v. Townsend, 257 So.2d 761 (La. App. 3d Cir. 1972).

5. *See, e.g.*, LeJeune v. Liberty Mut. Ins. Co., 261 So.2d 280 (La. App. 3d Cir. 1972); Maxey v. Aetna Cas. & Sur. Co., 255 So.2d 120 (La. App. 3d Cir. 1971); Spillers v. Northern Assurance Co. of America, 254 So.2d 125 (La. App. 3d Cir. 1971); Berry v. Aetna Cas. & Sur. Co., 240 So.2d 243 (La. App. 2d Cir. 1970); Johnson v. Continental Ins. Co., 216 So.2d 336 (La. App. 4th Cir. 1968); Jolly v. Travelers Ins. Co., 161 So.2d 354 (La. App. 4th Cir. 1964); Adams v. Fidelity & Cas. Co., 107 So.2d 496 (La. App. 1st Cir. 1958).
6. Berry v. Aetna Cas. & Sur. Co., 240 So.2d 243, 249 (La. App. 2d Cir. 1970). *See also* Adams v. Fidelity & Cas. Co., 107 So.2d 496, 500 (La. App. 1st Cir. 1958).

is found liable by the court, the injured employee receives both the benefit of the Workmen's Compensation Act and a recovery in damages that the act forbids him to exact from his "employer."[7] Perhaps for this reason the courts have been reluctant to find executive officer liability, and have employed various fictions in an effort to restrict it. As a result, there is presently no clear definition of the legal duty, a breach of which gives rise to executive officer liability. The purpose of this Comment is to survey generally the sources of confusion in Louisiana law and to suggest what is hopefully a more realistic approach to executive officer liability in tort.

The Nonfeasance Rule

In early English cases the rule developed that an agent was liable to third persons for his malfeasance or misfeasance, but not for his nonfeasance.[8] This rule was based on the premise that tort liability for the breach of contractual obligations should be restricted to those with whom the obligor stood in privity. Thus, since no privity existed between the agent and the third person, a mere failure to perform a contractual duty owed to the principal, *i.e.*, a nonfeasance, would result in the agent's liability only to the principal.

This limitation was accepted in a minority of American jurisdictions. The peculiar result was that the primary wrongdoer escaped liability merely because his negligence was of a passive nature.[9] A majority of courts, however, ignored the rule and held the agent liable by recognizing a legal duty owed to

7. "The rights and remedies herein granted to an employee or his dependent on account of a personal injury for which he is entitled to compensation under this Chapter shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or relations." LA. R.S. 23:1032 (1950).

8. *See* Lane v. Cotton, 12 Mod. 472, 488, 88 Eng. Rep. 1458, 1467 (K.B. 1663); Marsh & Astreys Case, 1 Leonard 146, 74 Eng. Rep. 135 (K.B. 1609). "Nonfeasance" is defined as "the non-performance of some act which ought to be performed . . . ." BLACK'S LAW DICTIONARY 1208 (4th ed. rev. 1968). "Misfeasance" is defined as "[t]he improper performance of some act which a man may lawfully do." *Id.* at 1151. "Malfeasance" is defined as "the commission of some act which is positively unlawful . . . ." *Id.* at 1109.

9. Dean v. Brock, 11 Ind. App. 507, 38 N.E. 829 (1894); Williams v. Dean, 134 Iowa 216, 111 N.W. 931 (1907); Dudley v. Illinois C.R. Co., 127 Ky. 221, 96 S.W. 835 (1906); Delaney v. Rochereau, 34 La. Ann. 1123 (1882); Feltus v. Swan, 62 Miss. 415 (1884); Bissell v. Roden, 34 Mo. 63, 84 Am. Dec. 71 (1863); Potter v. Gilbert, 196 N.Y. 576, 90 N.E. 1165 (1909); Henshaw v. Noble, 7 Ohio St. 226 (1857); Drake v. Hagan, 108 Tenn. 265, 67 S.W. 470 (1902); Labadie v. Hawley, 61 Tex. 177, 48 Am. Rep. 278 (1884).

the plaintiff.[10] In accordance with this majority position, the nonfeasance rule was rejected by the *Restatement (Second) of Agency*.[11]

The Restatement Rule

The *Restatement (Second) of Agency* provides that when an agent undertakes to act for his principal[12] under circumstances where the agent should realize that some action is necessary for the protection of another, liability will result from the agent's subsequent failure to act.[13] The rationale of this rule is that by undertaking to perform a service involving the safety of others, the agent has induced the principal to "rest his oars" in reliance upon that undertaking.[14] Hence, by subsequently failing to act, the agent has deprived the third person of some protection which would have otherwise been provided by the principal.[15]

10. Mayer v. Thompson-Hutchinson Bldg. Co., 104 Ala. 611, 16 So. 620 (1894); Southern R. Co. v. Rowe, 2 Ga. App. 557, 59 S.E. 462 (1907); Baird v. Shipman, 132 Ill. 16, 23 N.E. 384 (1890); Wells v. Hansen, 97 Kan. 305, 154 P. 1033 (1916); Campbell v. Portland Sugar Co., 62 Me. 552, 16 Am. Rep. 503 (1873); Consolidated Gas Co. v. Connor, 114 Md. 140, 78 A. 725 (1910); Osborne v. Morgan, 130 Mass. 102, 39 Am. Rep. 437 (1881); Ellis v. McNaughton, 76 Mich. 237, 42 N.W. 1113 (1889); Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co., 71 N.H. 522, 53 A. 807 (1902); Van Winkle v. American Steam Boiler Co., 52 N.J.L. 240, 19 A. 472 (1890); New York & W. Printing Tel. Co. v. Dryburg, 35 Pa. 298, 78 Am. Dec. 338 (1860); Belvin v. French, 84 Va. 81, 3 S.E. 891 (1887); Lough v. John Davis & Co., 30 Wash. 204, 70 P. 491 (1902).

11. RESTATEMENT (SECOND) OF AGENCY § 354, comment *b* (1957). The decision to reject the nonfeasance rule is supported by an abundance of well reasoned criticism: "It is clear that an engineer at the throttle is in control of a boiler . . . it is immaterial whether he ties down the safety valve or fails to untie it, whether he 'affirmatively' injures the boiler or continues to use a defective one. It would be absurd that a servant placed at the open door of a tiger's cage with instructions to close the door when there is any indication that the tiger will escape and who goes to sleep, is not liable to a member of the public injured through the escape of the tiger because he was guilty only of 'nonfeasance.'" *Seavey, Liability of an Agent in Tort*, 1 So. L.Q. 23 (1916). *See also* 3 W. FLETCHER, CORPORATIONS 1161 (1947); F. MECHEM, AGENCY 348 (4th ed. 1952); W. PROSSER, TORTS § 85 (2d ed. 1955); W. SEAVEY, LAW OF AGENCY § 133 (1964); Annot., 20 A.L.R. 97 (1922); Note, 21 LA. L. REV. 795, 798 (1961).

12. The terms "principal" and "agent" are used throughout this Comment to avoid confusion. It appears settled in Louisiana that, in determining the liability of the principal or master, the distinction between servants and non-servant agents is critical. Blanchard v. Ogima, 253 La. 34, 215 So.2d 902 (1968); Comment, 33 LA. L. REV. 110 (1972). It should be noted that this distinction is not determinative of the liability of servants and non-servant agents. *See* RESTATEMENT (SECOND) OF AGENCY § 361, comment *a* (1957).

13. *See* RESTATEMENT (SECOND) OF AGENCY § 354 (1957).

14. *See* RESTATEMENT (SECOND) OF AGENCY § 354, comment *a* (1957).

15. *Id.*

The Louisiana Jurisprudence

The nonfeasance rule emerged in Louisiana in *Delaney v. A. Rochereau & Co.*,[16] wherein the supreme court refused to find that agents of a nonresident building owner were liable for failing to properly maintain the premises. For nearly one-half century the classic nonfeasance rule observed in *Delaney* was applied in a variety of cases.[17] Finally, in *Washington v. T. Smith & Son, Inc.*,[18] the Orleans Court of Appeal held an agent liable for negligent omissions resulting in personal injury to a dockworker.

The nonfeasance rule was again rejected in *Adams v. Fidelity and Casualty Co.*,[19] a workmen's compensation "third party action" decided by the First Circuit Court of Appeal. The court observed that when the breach of a legal duty owed to the plaintiff occurs, "whether that breach is one of omission or commission,"[20] the defendant "director, officer, or agent"[21] will be liable. Unfortunately, the court did not further explain the circumstances under which such a duty would exist. The court in *Adams* did, however, observe that an agent would not be liable

"if he has been guilty of no act or omission causing or con-

16. 34 La. Ann. 1123 (1882).

17. Tyler v. Walt, 184 La. 659, 167 So. 182 (1936) (bank failure case in which *Delaney* was respectfully cited but "malfeasance" was found); Wirth v. Albert, 174 La. 373, 141 So. 1 (1932) (the court, noting "an entire lack of privity between plaintiff and defendants," denied recovery to plaintiff seeking price of certain bonds); Ellet v. Newland, 171 La. 1019, 132 So. 761 (1931) (bank failure case wherein "malfeasance" permitted recovery); Allen v. Cochran, 160 La. 425, 107 So. 292 (1926) (bank depositors charged defendants with omissions of duty and were denied recovery); McGuire v. Louisiana Baptist Encampment, Inc., 199 So. 192 (La. App. 1st Cir. 1940) (wrongful death action wherein the court, although finding the decedent contributorily negligent, apparently regarded *Delaney* as authoritative).

18. 68 So.2d 337 (La. App. Orl. Cir. 1953).

19. 107 So.2d 496 (La. App. 1st Cir. 1958).

20. *Id.* at 508.

21. *Id.* Any notion that the nonfeasance rule had been abandoned by the Louisiana courts was put to rest when, in *Daigle v. Cobb*, 175 So.2d 392 (La. App. 4th Cir. 1965), it was employed to deny recovery. Later, the same court, affirming its position in *Daigle*, denied recovery in *Johnson v. Continental Insurance Co.*, 216 So.2d 336 (La. App. 4th Cir. 1968), noting "an absence of malfeasance." *Id.* at 338. On balance, however, the position adopted by the *Adams* court has been followed. *See* Dulaney v. Fruge, 257 So.2d 827 (La. App. 3d Cir. 1972); Spillers v. Northern Assurance Co. of America, 254 So.2d 125 (La. App. 3d Cir. 1971); Maxey v. Aetna Cas. & Sur. Co., 255 So.2d 120 (La. App. 3d Cir. 1971); Chaney v. Brupbacher, 242 So.2d 627 (La. App. 4th Cir. 1970); Sampson v. Schultz, 242 So.2d 363 (La. App. 2d Cir. 1970); Berry v. Aetna Cas. & Sur. Co., 240 So.2d 243 (La. App. 2d Cir. 1970); Cacibauda v. Gaienne, 222 So.2d 632 (La. App. 4th Cir. 1969); Boudreaux v. Falco, 215 So.2d 538 (La. App. 1st Cir. 1968); Jolly v. Travelers Ins. Co., 161 So.2d 354 (La. App. 4th Cir. 1964).

> tributing to such injury *or if he owes no duty to such third person to use care, such as where the breach of duty complained of is one owing only to the corporation.*"[22] (Emphasis added.)

The absence in the *Adams* decision of any clear refinement of an agent's legal duty to third persons for negligent omissions has resulted in varying attempts at definition of that duty[23] and concomitant confusion in the law. Two recent Third Circuit decisions[24] illustrate this confusion.

In *Spillers v. Northern Assurance Co. of America*,[25] one of the defendants, president of the general contractor, was charged with failing to supervise and failing to hire competent personnel. The court, in denying recovery, applied the *Restatement* rule[26] and concluded that since the duty to supervise had been delegated to the construction superintendent, the defendant could not be held liable.[27] The court further observed that the defendant had hired only two employees, the construction superintendent and the estimator, both of whom were well qualified. All other personnel had been hired and fired by the construction

22. Adams v. Fidelity & Cas. Co., 107 So.2d 496, 505 (La. App. 1st Cir. 1958).

23. "We think an officer or director of a corporation owes a duty to the corporation which is separate and independent of any duty which he may owe to an employee or to a third person. The duty which he owes to the corporation may include, among other things, a duty to provide safe working conditions for employees . . . ." Maxey v. Aetna Cas. & Sur. Co., 255 So.2d 120, 122 (La. App. 3d Cir. 1971).

"In our opinion the obligation of an employer and, within the limits of their authority, of its supervisory personnel towards workmen is to provide them with a working place and conditions which are reasonably safe considering the nature of the work." Chaney v. Brupbacher, 242 So.2d 627, 631 (La. App. 4th Cir. 1970).

"I find it difficult to extend liability to any of the other corporate officers. Certainly, the poorly managed, almost non-existent safety program constituted negligence on the part of the officer in charge of safety; but I think his inaction constitutes a breach of a general duty owed by him to the corporation rather than of an individual responsibility to the plaintiff-employee many echelons below him." Berry v. Aetna Cas. & Sur. Co., 240 So.2d 243, 250 (La. App. 2d Cir. 1970) (concurring opinion).

24. These cases were decided by different panels of judges.

25. 254 So.2d 125 (La. App. 3d Cir. 1971).

26. *Id.* at 129.

27. "In considering the Adams decision it should be borne in mind that the agent should not be held responsible to a third person for his mere failure to perform an affirmative duty toward his principal unless (a) the principal owed a duty of care toward the third person, and (b) this same duty was delegated to the agent, who undertook its performance." Spillers v. Northern Assurance Co. of America, 254 So.2d 125, 129 (La. App. 3d Cir. 1971). *See also* LeJeune v. Liberty Mut. Ins. Co., 261 So.2d 280, 286 (La. App. 3d Cir. 1972) (concurring opinion).

superintendent. In essence, the court held that the defendant president had not failed to properly discharge his particular job function.[28] The supreme court denied writs with the comment "[t]he result is correct."[29]

In *Maxey v. Aetna Casualty & Surety Co.*,[30] the court held that the failure of various executive defendants to instigate safety procedures was the breach of a duty owed only to the corporation;[31] hence, there could be no liability to the plaintiff. The above reasoning is at variance with the *Restatement* rule as applied in *Spillers*, under which a contractual duty to the corporation to perform services involving the safety of others would *necessarily* give rise to a legal duty owed to the plaintiff.[32] In contrast to the *Spillers* approach, the court in *Maxey* thus found it unnecessary to consider whether defendants had failed to properly discharge their particular job functions. The reasoning of *Maxey*, if given full effect, constitutes a return to the nonfeasance rule by eliminating an agent's liability to third persons for negligent omissions. The supreme court again denied writs with the comment "[t]he result is correct."[33]

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28. "Applying these [*Restatement*] rules to the present matter . . . plaintiff has no claim against Mr. Weill for failure to supervise the work or to hire competent personnel. Mr. Weill was not delegated the duty to supervise the construction . . . . Furthermore, Weill did not undertake to supervise construction." Spillers v. Northern Assurance Co. of America, 254 So.2d 125, 129 (La. App. 3d Cir. 1971).

29. 260 La. 288, 255 So.2d 772 (1972).

30. 255 So.2d 120 (La. App. 3d Cir. 1971).

31. "We think an officer or director of a corporation owes a duty to the corporation which is separate and independent of any duty which he may owe to an employee or to a third person. The duty which he owes to the corporation may include, among other things, a duty to provide safe working conditions for employees . . . ." *Id.* at 122.

32. "The writer of the present opinion concurred with the majority decision in the Maxey case, but differed from the statement of law in certain respects. The writer . . . could not agree that in every situation it is immaterial whether the agent has breached a [contractual] duty to his principal. A simple illustration of this is the situation where an agent is in charge of property, with the duty to cause all necessary repairs to be made. In order to find the agent liable for an injury sustained by a third person, due to the agent's neglect to keep the premises in repair, *the agent's obligation under the agency contract must be proved. Otherwise, the agent would have no* [legal] *duty to the third person.*" (Emphasis added.) Spillers v. Northern Assurance Co. of America, 254 So.2d 125, 128 (La. App. 3d Cir. 1971). *See also* RESTATEMENT (SECOND) OF AGENCY § 354 (1957).

33. 260 La. 123, 255 So.2d 351 (1971). Applying the *Restatement* rule to the facts of *Maxey*, the result does indeed seem correct. "[N]either of plaintiff's petitions allege that the duty owed by the corporation to the decedent to furnish safe working conditions was delegated to these defendant executive officers nor that they undertook the performance of this duty." Maxey v. Aetna Cas. & Sur. Co., 255 So.2d 120, 124 (La. App. 3d Cir. 1971) (concurring opinion). However, if the law set forth in *Maxey* (*See* note 31 *supra*)

A Suggested Approach

It is submitted that the rule set forth in section 354 of the *Restatement (Second) of Agency* provides the most reasonable test of an agent's liability to third persons resulting from the agent's failure to perform duties owed to his principal. That section provides:

> "An agent who, by promise or otherwise, undertakes to act for his principal under such circumstances that some action is necessary for the protection of the person or tangible things of another, is subject to liability to the other for the physical harm to him or his things caused by the reliance of the principal or of the other upon his undertaking and his subsequent unexcused failure to act, if such failure creates an unreasonable risk of harm to him and the agent should so realize."[34]

The principle underlying this test is that the agent's failure to act deprives the third person of protection that he would otherwise receive from the principal.[35] The fundamental consideration in applying the *Restatement* rule should be the nature of the "undertaking," *i.e.*, the nature of the job that the agent has expressly or impliedly agreed to perform for his principal.[36] It seems that only when the agent has failed to perform his particular job function can he be said to have deprived the third person of protection which would have otherwise been provided by the principal. For instance, it is clear that an employer owes a duty to his employees to provide them with a working place reasonably safe under the circumstances.[37] Of practical necessity, this duty must be delegated down the chain of command. Certainly, when the duty has been properly delegated by an agent, he should not be liable for its breach.[38]

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was applied in a case where the defendant had in fact undertaken to perform a service involving the safety of others, the effect would be to relieve the primary wrongdoer of the consequences of his negligent behavior.

34. RESTATEMENT (SECOND) OF AGENCY § 354 (1957).

35. *Id.*, comment *a*. *See* text accompanying note 15 *supra*.

36. "Central to these [*Restatement*] principles is the consideration that the law does not impose, by a species of implication of law, as distinguished from reasonable implication in fact, a duty on the supervisory or executive corporate employee to assume *in invitum* functions or responsibilities respecting the safety of workmen not placed upon the former by the corporation itself." Miller v. Muscarelle, 67 N.J. Super. 305, 333, 170 A.2d 437, 452 (1961).

37. "Every employer shall furnish employment which shall be reasonably safe for the employees therein." LA. R.S. 23:13 (1964).

38. *See* note 27 *supra*.

The Actual Knowledge Test

The courts in the cases following *Adams* have adopted the requirement that the defendant have actual knowledge of the dangerous condition as well as the authority to remove it.[39] If blindly applied in every case, it seems that the "actual knowledge test" is incompatible with a realistic application of the *Restatement* rule. For example, assume that a safety engineer, whose job function relates solely to the safety of employees, simply does nothing toward discharging the duties which he has undertaken to perform. As a result of his inaction, a hazardous condition develops and an employee is injured. Further, assume that the safety engineer had no knowledge of the hazardous condition. Application of the "actual knowledge test" would result in no liability;[40] application of the *Restatement* rule would certainly result in liability.[41] Similarly, when the duty involving the safety of others has been negligently delegated to obviously incompetent subordinates,[42] liability should result irrespective of actual knowledge of the particular hazard which causes the injury.

Actual knowledge would be relevant in the usual case where the duty has been properly delegated. The agent delegating the duty should be entitled to assume that the duty so delegated is being properly discharged until he has notice to the contrary.[43] When the agent receives such notice, the duty should again attach until he has taken reasonable steps to remove the hazard.

Statutory Immunity

In an attempt to preserve the integrity of their respective

39. *See, e.g.*, Chaney v. Brupbacher, 242 So.2d 627 (La. App. 4th Cir. 1970); Johnson v. Continental Ins. Co., 216 So.2d 336 (La. App. 4th Cir. 1968); Note, 46 TUL. L. REV. 352, 355 (1971).

40. *See* Note, 46 TUL. L. REV. 352, 355 (1971).

41. *See* RESTATEMENT (SECOND) OF AGENCY § 354 (1957). The safety engineer undertook to perform a duty involving the safety of employees. Further, this undertaking presumably induced the employer to believe that a safety program was in effect. By failing to act, the safety engineer deprived employees of protection which would have been provided by a competent safety engineer.

42. In *Spillers v. Northern Assurance Co. of America*, 254 So.2d 125, 129 (La. App. 3d Cir. 1971), the court seemed to implicitly recognize that executives could be liable for the negligent delegation of a duty involving the safety of third persons.

43. *See* Miller v. Muscarelle, 67 N.J. Super. 305, 331, 170 A.2d 437, 451 (1961).

workmen's compensation schemes, a growing minority of jurisdictions have enacted statutes immunizing coemployees from suit in tort.[44] The immunity only attaches when the coemployee is acting in the course of his employment,[45] and does not embrace intentional wrongs committed by the coemployee.[46]

The reality of liability insurance coverage demanded by executives in a competitive labor market indicates what is probably the most persuasive argument for statutory immunity in Louisiana. The increasing number of tort suits directed against executive officers[47] suggests that the exclusive remedy provision of our compensation act[48] is becoming less meaningful. The employer can take little comfort in the knowledge that he is legally immune from tort liability when, as a matter of practice, he is compelled to provide liability coverage for executive officers.[49]

Conclusion

The Louisiana courts, apparently recognizing the potential burden on employers of de facto tort liability in addition to compensation liability without fault, have displayed a restrictive attitude in the area of executive officer liability. Conflicting statements of law in recent appellate decisions suggest a need

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44. *See* ARIZ. REV. STAT. ANN. § 23-1022 (1956); CAL. LABOR CODE § 3601 (Deering 1964); COLO. REV. STAT. § 81-13-8 (1963); DEL. CODE ANN. tit. 19, § 2363 (Cum. Supp. 1968); HAWAII REV. STAT. § 386-8 (1968); ILL. REV. STAT. ch. 48, § 138.5 (1969); MICH. COMP. LAWS § 17.237(827) (1968); N.J. STAT. ANN. 34:15-8 (1972); N.Y. WORKMEN'S COMP. LAW § 29(6) (McKinney 1965); N.C. GEN. STAT. § 97-9 (1972); OKLA. STAT. ANN. tit. 85, § 44 (1970); ORE. REV. STAT. § 656.154 (1971); S.C. CODE ANN. § 72-401 (1962); TEX. CIV. STAT. art. 8306 (3) (Vernon 1967); UTAH CODE ANN. § 35-1-62 (1966); VA. CODE ANN. § 65-1-103 (1968); WASH. REV. CODE § 51.24.919 (1962); W. VA. CODE ANN. 23-2-6a (1970).

45. 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 72.20 (1972).

46. *See* note 44 *supra.*

47. *See* note 5 *supra.*

48. *See* note 7 *supra.*

49. House Bill No. 170, a recent attempt at immunity legislation, was referred to committee where it received unfavorable consideration. It provided in pertinent part:

"§ 1101. Employee and employer suits against third persons causing injury; effect on right to compensation.

"A. As used in this section, the term 'third person' shall mean only a person other than the employer of the injured employee, and other than the executive officers, owners, shareholders, agents, or other employees of the employer." LA. H.B. No. 170 (Regular Session, 1972).

for an expression by the supreme court in this area. It is respectfully urged that the *Restatement* rule as applied in *Spillers v. Northern Assurance Co. of America*[50] be adopted as the test of coemployee tort liability for negligent omissions. Complete elimination of the liability[51] is surely a matter for the legislature.

John R. Olds

50. 254 So.2d 125 (La. App. 3d Cir. 1971). *See* note 27 *supra*. *See also* Canter v. Koehring Co., 267 So.2d 270 (La. App. 3d Cir. 1972).

51. *See* text accompanying note 33 *supra*.