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NOTES

THE THIRD PARTY'S RIGHT TO CONTRIBUTION FROM AN EMPLOYER COVERED BY WORKMEN'S COMPENSATION

I. INTRODUCTION

Arthur Larson, a leading commentator in the area of workmen's compensation law, has said, "Perhaps the most evenly balanced controversy in all of compensation law is the question whether a third party in an action by the employee can get contribution or indemnity from the employer, when the employer's negligence has caused or contributed to the injury."[1] The debate finds its roots in the rapid acceptance of the comparative negligence theory of fault recovery[2] and the resulting conflict with the no-fault recovery theory adopted by workmen's compensation acts.[3] The substance of the controversy is two-fold: (1) should a third party be allowed to seek contribution from a negligent employer, and (2) in the event that employer contribution is allowed, should the em-

1. 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 76.10, at 14-287 (1976) [hereinafter cited as LARSON]. The United States District Court for the District of North Dakota has recently held that a third party is not entitled to contribution from the employer. Paur v. Crookston Marine, Inc., 83 F.R.D. 466, 473 (D.N.D. 1979). In *Paur,* an action for contribution against an employer covered by the North Dakota Workmen's Compensation Act was denied to the manufacturer of a boat motor and the retail seller of the boat from which plaintiff's decedent was thrown and killed. *Id.* The court, relying upon White v. McKenzie Elec. Coop., Inc., 225 F. Supp. 940 (D.N.D. 1964), held that an employer who complies with section 65-01-08 of the North Dakota Century Code has no further liability to the injured employee, and therefore a third-party joint tortfeasor could not base an action for contribution on "common liability." 83 F.R.D. at 473. *See* N.D. CENT. CODE § 65-01-08 (1960).

2. *See* C. HEFT & C. HEFT, COMPARATIVE NEGLIGENCE MANUAL §§ 3.70-.580 (1978 & Supp. 1980). Currently thirty-eight states, including North Dakota, have adopted various types of comparative negligence statutes. A pure comparative negligence approach, in which the injured party can recover even if his negligence is greater than the negligence of the adverse tortfeasor, has been adopted in Minnesota. North Dakota has adopted a modified comparative negligence approach, allowing the injured party to recover if his negligence was less than one half of the total (the 49% rule). A similar approach allows recovery by the injured party if his negligence was no greater than the causal negligence of the defendant (the 50% rule). A slight/gross approach, in which the jury decides whether the plaintiff's negligence was "slight" in comparison with defendant's negligence, has been adopted statutorily in Nebraska and South Dakota.

For further discussion of comparative negligence theories, *see id.* at §§ 1.20-.60.

3. 2A LARSON, *supra* note 1, § 76.20, at 14-295. The vast majority of jurisdictions have held that a contributorily negligent employer who is in compliance with the state's workmen's compensation law cannot be sued or joined by the third party as a joint tortfeasor. *Id.*

ployer ever be required to pay the injured employee an amount greater than the statutory workmen's compensation liability.[4]

When third-party contribution from the negligent employer is barred, as under the majority view,[5] the third-party tortfeasor — a stranger to the workmen's compensation system — is made to bear the full burden of a common-law judgment, despite the possibility that greater fault exists on the part of the employer.[6] The prohibition against third-party contribution acts to effectively thwart the underlying function of comparative negligence schemes, *i.e.*, the equitable placement of the burden of loss for which two or more parties are responsible.[7]

This seemingly inequitable treatment of the third party is further underscored by the employer's right to recover directly or indirectly from the third-party tortfeasor the amount he has paid in workmen's compensation benefits.[8] The employer's right to share in the recovery against the third-party tortfeasor, however, never exceeds reimbursement for the amount paid to the injured employee under the compensation statute.[9] The employer's relative degree of fault generally does not limit his recovery from the third party.[10] Thus, the remedy of contribution has become a one-way street, and the third-party tortfeasor is statutorily compelled to underwrite the workmen's compensation system without regard to his relative degree of fault.

Pure contribution has the effect of undercutting the central concept behind workmen's compensation, that the employer and employee receive the benefits of a guaranteed, fixed-schedule, no-fault system. That schedule was intended to constitute the

4. *See, e.g.*, Lambertson v. Cincinnati Corp., 312 Minn. 114, 120, 257 N.W.2d 679, 684 (1977).

5. *See supra* notes 1 and 3.

6. 312 Minn. at 126, 257 N.W.2d at 689.

7. W. PROSSER, LAW OF TORTS § 50, at 307 (4th ed. 1971).

8. 2A LARSON, *supra* note 1, § 71.00, at 14-1. "To avoid a double recovery by the employee the statutes provide varying systems with the general effect of reimbursing the employer for his compensation outlay and giving the employee the excess of the damage recovery over the amount of compensation." *Id.*

The employer's right of recovery is provided by various methods. 2A LARSON, *supra* note 1, § 71.30, at 14-25 & 14-26 n.11; *see, e.g.*, Breitwieser v. State, 62 N.W.2d 900 (N.D. 1954) (subrogation); ILL. REV. STAT. ch. 48, § 138.5 (1975) (employer lien on employee's recovery); MINN. STAT. ANN. § 176.061 (West 1966 & Supp. 1979) (subrogation); N.D. CENT. CODE § 65-01-09 (Supp. 1979) (subrogation). In two states without statutory provisions, Ohio and West Virginia, courts have usually denied an employer the right to recover compensation payment from a negligent third party, on the theory that the right to subrogation is purely statutory, and on a finding that the doctrine of equitable subrogation does not apply. *See* 2A LARSON, *supra* note 1, § 71.30, at 14-25 to -28.

9. 2A LARSON, *supra* note 1, § 71.20, at 14-2 to -4. There are a limited number of narrow exceptions. *Id.* at 14-5 to -7. *See also* Weisgall, *Product Liability in the Workplace: The Effect of Worker's Compensation on the Rights and Liabilities of Third Parties*, 1977 WIS. L. REV. 1035, Appendix A.

10. *See, e.g.*, Randall v. United States, 282 F.2d 287 (D.C. Cir. 1960); Froysland v. Leef Bros. Inc., 293 Minn. 201, 197 N.W.2d 656 (1972).

maximum liability of the employer to his employee.[11]

The purpose of this Note is to trace the development of this controversy. The interests of the parties involved will be identified, and proposed solutions to the problem will be examined. Finally, a short-term remedy will be proposed and evaluated.

II. HISTORY AND DEVELOPMENT OF WORKMEN'S COMPENSATION LAWS

At common law, an employee injured in the course of his employment was allowed to maintain an action against the party responsible for the injury. Although the injured employee had a cause of action against his employer in such a case, the employer had the benefit of three onerous defenses.[12] The assumption of risk doctrine was applied to bar recovery against the employer when it could be shown that the employee had notice of the hazards existing in the work place and voluntarily subjected himself to the danger posed by those hazards.[13] An employer was also protected by the fellow-servant rule, which generally prevented recovery against the employer when one of his employees negligently injured another employee.[14] Finally, recovery could be barred by a showing of contributory negligence by the injured employee, even when lesser in degree than that of the employer.[15] Even in situations in which these defenses would not apply, the injured worker was plagued by the cost, delay, and uncertainty of litigation.

In response to the plight of the growing number of victims of industrial workplace accidents,[16] state legislatures in the early part of this century enacted workmen's compensation statutes.[17] These statutes have significantly altered the respective rights of both the employer and the employee. Under workmen's compensation acts, the employer is held responsible for all injuries to the employee that occur in the course of his employment, regardless of fault.[18] The employer is not allowed to raise the defenses of assumption of risk, contributory negligence, or the fellow-servant rule.[19] The benefit to

11. N.D. CENT. CODE § 65-01-08 (1960). *See* Schlenk v. Aerial Contractors, Inc., 268 N.W.2d 466 (N.D. 1978).

12. *See generally* 56 C.J.S. *Master and Servant* § 321 (1955); W. PROSSER, LAW OF TORTS § 80, at 526-30 (4th ed. 1971).

13. 1 LARSON, *supra* note 1, § 4.30, at 26-27.

14. *Id.* at 25-26.

15. *Id.* at 27-28.

16. *Id.*, § 4.50, at 32.

17. *Id.*, §§ 5.20-.30, at 37-40.

18. *Id.*, § 1.10, at 1-2; *see, e.g.*, MINN. STAT. ANN. § 176.021 (1) (West 1966); N.D. CENT CODE § 65-01-01 (1960).

19. 1 LARSON, *supra* note 1, § 1.10, at 1-2; *see also* McGough v. McCarthy Imp. Co., 206 Minn.

the employer under such acts is relief from personal injury liability and the concomitant likelihood of a large jury award. The injured worker, on the other hand, is granted a guaranteed recovery for his injury without the expense, uncertainty, or delay of a personal injury lawsuit.[20]

The dilemma addressed in this discussion arose with the adoption of comparative negligence, which, in contrast to the no-fault basis of worker's compensation acts, predicates liability on the relative degree of fault of each party.

III. THIRD PARTIES

Prior to discussing the problems and solutions of employer and third-party liability, it is necessary to first define who qualifies as a third party. While some third parties are total strangers to the employment situation, others have some direct relation to the employer, the employment situation, or the employee. The question of whether a party is subject to suit as a "third party" or is immune from suit is controlled by state statutes. Some states regard anyone other than the employer as a third party, and thus subject to suit.[21] Other states, including North Dakota,[22] grant immunity to the employer and co-employees in the same employment.[23] At least two jurisdictions have attempted to extend immunity to all contractors and employees engaged in a common employment.[24]

States granting immunity to co-employees allow the immunity to attach only when the employee is acting "in the course of his employment."[25] States differ, however, as to which test of "course of employment" is to be applied. In North Dakota, for example, the workmen's compensation standard is applied.[26] California, on the

1, 5, 287 N.W. 857, 863 (1939); Pace v. North Dakota Workmen's Compensation Bureau, 51 N.D. 815, 822, 201 N.W. 348, 350 (1924).

20. 1 LARSON, *supra* note 1, § 1.10, at 1-2.

21. States which allow suit by an injured employee against a co-employee include Arkansas, Florida, Georgia, Iowa, Louisiana (for intentional acts), Maryland, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, Rhode Island, South Dakota, Vermont, and Wisconsin. 2A LARSON, *supra* note 1, § 72.10, at 82 n.14 (Supp. 1980).

22. *See* N.D. CENT. CODE § 65-01-08 (1960).

23. 2A LARSON, *supra* note 1, § 72.20, at 90 n.23 (Supp. 1980).

24. In addition to Massachusetts, Florida moved in this direction for awhile. *See* 2A LARSON, *supra* note 1, §§ 72.32-.33, at 14-66 to -82.

25. 2A LARSON, *supra* note 1, § 72.20, at 14-39; *see also* N.D. CENT. CODE § 65-01-08 (1960) ("The employee shall have no right of action against such . . . other employee of such employer . . . but shall look solely to the fund for compensation.").

26. North Dakota's standard for determining whether an injury occurred "in the course of employment" is as follows: "Does the injury occur within the period of employment? Does it occur in a place where the employee may reasonably be? Does it occur while he is reasonably fulfilling the duties of his employment? All these must concur under the circumstances." Bjerke v. Heartso, 183 N.W.2d 496, 500 (N.D. 1971) (citing Kary v. North Dakota Workmen's Compensation Bureau, 67 N.D. 334, 339, 272 N.W. 340, 342 (1937)).

other hand, bars the suit against the co-employee only if the co-employee is actively engaged in some service for the employer at the time of the injury.[27] Thus, when a question arises whether the co-employee was acting within the course of his employment in a California case, an anomalous result may be reached whereby the co-employee is found to be within the course of employment for the purpose of compensation benefits but not for the purpose of tort immunity.[28]

A general contractor may also, under certain conditions, be considered a third party, and thus subject to suit by a subcontractor's employee. If a general contractor has not met the conditions for establishing himself as a statutory employer, he will remain liable as a third party. Forty-three states have adopted "statutory employer" or "contractor under" statutes, which provide that the general contractor shall be liable for compensation to the subcontractor's employees. Under such statutes the general contractor is required to provide workmen's compensation benefits for a subcontractor's employees who perform work that is a part of the business, trade, or occupation of the contractor. States have generally required the general contractor to provide such compensation only in cases in which the subcontractor is uninsured. Other states have imposed liability without reference to the subcontractor's insurance.[29] In these latter jurisdictions, courts have generally not allowed third-party tort actions to be brought by the subcontractor's employees against the general contractor. These courts have reasoned that, because the statute effectively makes the general contractor the employer for compensation purposes, he should be allowed to enjoy the immunity of an employer from third-party suit.[30] Ordinarily, in cases in which the statute merely subjects the general contractor to the secondary obligation of providing compensation, the courts have found the general contractor vulnerable to third-party liability. There is, however, a split of authority, with a marked trend toward allowing the general contractor immunity.[31] When the injured employee's actual employer

27. McIvor v. Savage, 220 Cal. App. 2d 128, 33 Cal. Rptr. 740 (1963).

28. Saala v. McFarland, 63 Cal. 2d 124, 403 P.2d 400, 45 Cal. Rptr. 144 (1965). In *Saala*, an employee was struck in her employer's parking lot after work by a vehicle driven by a co-employee. She was not barred from suing the co-employee, even though the co-employee would have been entitled to compensation benefits if injured in the accident. *Id.* at 128, 403 P.2d at 403, 45 Cal. Rptr. at 147.

29. 2A LARSON, *supra* note 1, § 72.31, at 14-47; *see, e.g.*, Moore v. Philadelphia Elec. Co., 189 F. Supp. 808 (E.D. Pa. 1960); Whitaker v. Douglas, 179 Kan. 64, 292 P.2d 688 (1956).

30. 2A LARSON, *supra* note 1, § 72.31, at 14-47.

31. *Id.* at 14-49 to -55. In Boettner v. Twin City Constr. Co., 214 N.W.2d 635 (N.D. 1974), the North Dakota Supreme Court interpreted section 65-01-02(5)(c) of the North Dakota Century Code

is not a true subcontractor, but an independent contractor over whom the general contractor has no control, the general contractor remains subject to third-party suit.[32]

A great majority of jurisdictions permit the injured employee of a general contractor to sue the subcontractor as a third party. The reason for this different result is that, although the general contractor has a statutory liability (whether primary or secondary) to the employees of the subcontractor, the subcontractor has no corresponding statutory liability to the general contractor's employees.[33] Recoveries by a general contractor's employees against subcontractors effectively dissipate the workmen's compensation limitation on the general contractor's liability. Because the recoveries act to increase the liability insurance premiums of the insured subcontractor, the subcontractor reflects this increase in his service prices to the contractor. The result appears neither rational nor desirable in light of the policies of the overall system.

Employers' managers and executives may also be subject to third-party actions. These "upper level" employees are often insured by the employer against work-related liability. An odd result may occur in such situations. The "upper level" employee at fault is not required to bear the cost of the injury, and the employer, in paying additional insurance costs, incurs additional liability in excess of the statutorily limited liability mandated under the compensation act.[34]

IV. THE PARTIES' INTERESTS, THE PROBLEMS, AND SOLUTIONS

A. THE EMPLOYER, EMPLOYEE, AND THIRD PARTY INTERESTS

The interests of the respective parties involved in the workmen's compensation scheme can be set out fairly simply. The employer has a primary interest in ensuring that his liability for compensation paid for employee injuries does not exceed that

(North Dakota's "contractor under" statute), and held that the general contractor is the employer of the subcontractor's or independent contractor's employees and is responsible for their workmen's compensation coverage only until the subcontractor or independent contractor obtains coverage. *Id.* at 638-40 (citing the district court's unpublished opinion). This relationship dissolves when the necessary coverage is secured and paid for. The general contractor is immune from suit by the subcontractor's employees only for the period covered by the premiums paid by the general contractor. Once the subcontractor begins to pay the necessary premiums, the general contractor becomes a third party subject to suit.

32. 2A LARSON, *supra* note 1, § 72.31, at 14-58.

33. *Id.*, § 72.32, at 14-67. Neither Massachusetts nor Florida, however, allows the employee of a general contractor to sue a subcontractor. Younger v. Giller Contracting Co., 143 Fla. 335, 196 So. 690 (1940); Catalano v. George F. Watts Corp., 225 Mass. 605, 152 N.E. 46 (1926).

34. *See generally* 2A LARSON, *supra* note 1, § 72.10, at 14-34 to -35.

established by the workmen's compensation schedule. He also maintains a secondary interest in retaining his right to receive reimbursement when a third party's action has caused him to incur obligations to his employee under the compensation act. The employee's primary interest is assuring his receipt of the full compensation benefit that he is statutorily entitled to. He is also concerned with maintaining his right to seek a common-law recovery against the third party to the extent that the actions of the third party have contributed to the harm he has suffered. The third party's interest is solely that of limiting his liability to the extent of his established fault.[35] The contrast of interests is apparent. While acting to secure both the primary and secondary interests of both employer and employee, workmen's compensation statutes in most instances effectively bar the interest of the third party.

The recent acceptance of the comparative negligence fault concept[36] in many jurisdictions[37] only serves to strengthen the interest of the third party in limiting his contribution to the employee's recovery to no more than his proportionate share.[38] The acceptance of comparative negligence by the majority of jurisdictions, when viewed in light of the workmen's compensation acts and the associated contribution statutes previously discussed, has resulted in a growing confusion within the judicial system.[39]

B. THE PROBLEMS

Courts, in confronting the problem of contribution in the area of workmen's compensation, have fashioned a general rule that a third-party tortfeasor who is liable to an employee in an action for damages may not receive contribution from a negligent employer.[40] Pennsylvania had been the only state to allow third-party actions for contribution against the employer. Contribution in Pennsylvania had been limited, however, to the amount of the employer's liability under the workmen's compensation act.[41].

35. Lambertson v. Cincinnati Corp., 312 Minn. 114, 122, 257 N.W.2d 679, 685 (1977).

36. In its pure form, comparative negligence would allow jury assignment of percentages of liability to employer, employee, and the third party, thereby facilitating mathematical precision in establishing liability. *See* C. HEFT & C. HEFT, *supra* note 2, at § 1.50.

37. *See supra* note 2.

38. 312 Minn. at 124, 257 N.W.2d at 686.

39. The confusion is understandable when it is recognized that in ordinary proceedings the jury is allowed to determine the existence of fault and then apportion it among the involved parties. In workmen's compensation actions, however, the jury's conclusions are summarily disallowed, and only third-party liability is imposed, without regard to the respective fault of the parties.

40. The courts of forty-six jurisdictions generally deny recovery of contribution from the employer. *See* 2A LARSON, *supra* note 1, § 76.21, at 14-295. *See also* 53 A.L.R.2d 978 (1957).

41. 2A LARSON, *supra* note 1, § 76.22, at 14-307; *see* Socha v. Metz, 385 Pa. 632, 123 A.2d 837 (1956). Subsequent to the *Socha* decision, the Pennsylvania Legislature in 1974 amended the Pennsylvania workmen's compensation statute to read in part as follows:

Courts seem to base the rule barring contribution on one of two reasons. A number of jurisdictions have grounded the rule on a finding that the employer and the third party are not under a common liability to the injured employee.[42] The courts have reasoned that an employer is not jointly liable to the employee in tort because the employer's liability is absolute, based on the compensation acts; therefore, because negligence is not a factor for liability, the employer cannot be a joint tortfeasor.[43] The employee's claim against his employer is for statutory benefits, while his claim against the third party is for damages based on common-law negligence.[44] Common liability is held not to arise from claims that are different in kind.[45]

The second rationale used by courts to deny employer contribution has been the use of an exclusive remedy approach. Courts have construed particular statutes to not only limit the em-

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> In the event injury or death to an employee is caused by a third party, then such employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to receive damages by reason thereof, may bring their action at law against such third party, but the employer, his insurance carrier, their servants and agents, employees, representatives acting on their behalf or at their request shall not be liable to a third party for damages, contribution, or indemnity in any action at law, or otherwise, unless liability for such damages, contributions or indemnity shall be expressly provided for in a written contract entered into by the party alleged to be liable prior to the date of occurrence which gave rise to the action.

PA. STAT. ANN. tit. 77, § 481(b) (Purdon Supp. 1980). In Hefferin v. Stempkowski, 247 Pa. Super. Ct. 366, ____, 372 A.2d 869, 871 (1977), the court noted that the 1974 amendment to this section was not mere recitation of current law, but rather made the Workmen's Compensation Act a complete subsitute for, not supplemental to, common-law tort actions. The court held that the Act granted the employer immunity from suit and barred his joinder as an additional defendant in an action by the employee against a third party; the employer's right to subrogation was held unchanged. *Id.* at ____, 372 A.2d at 871; *cf.* Carlson v. Smogard, 298 Minn. 362, 215 N.W.2d 615 (1974). In *Carlson,* the Supreme Court of Minnesota struck down as violative of the due process clause of the fourteenth amendment a remarkably similar statute. *See also* Albrecht v. Pneuco Mach. Co., 448 F. Supp. 851 (E.D. Pa. 1978); Atkins v. Urban Redevelopment Auth., ____ Pa. ____, 414 A.2d 100 (1980); Tsarnas v. Jones & Laughlin Steel Corp., ____ Pa. ____, 412 A.2d 1094 (1980).

In Lambertson v. Cincinnati Corp., 312 Minn. 114, 257 N.W.2d 679 (1977), the Supreme Court of Minnesota allowed employer contribution in a third-party action, using the approach established by the Supreme Court of Pennsylvania. The court held that contribution among joint tortfeasors does not depend on joint liability. *Id.* at 130, 257 N.W.2d at 685.

Two states, California and North Carolina, have reached the same result as Pennsylvania, although by a somewhat different approach. Both California and North Carolina courts have held that an injured employee's recovery is reduced by the amount of workmen's compensation received. *See, e.g.,* Witt v. Jackson, 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961); Tate v. Superior Court, 213 Cal. App. 2d 238, 28 Cal. Rptr. 548 (1963); Hunsucker v. High Point Bending and Chair Co., 237 N.C. 559, 75 S.E.2d 768 (1953). *See also* Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). In *Dole,* the Court of Appeals of New York effectively abolished the distinction between indemnity and contribution for the purpose of allocation of damages among joint tortfeasors. The court found that, in some cases, damages resulting from employee injuries may be apportioned between the third party and the employer, in spite of workmen's compensation statutes. *Id.* at 154, 282 N.E.2d at 295, 331 N.Y.S.2d at 391.

42. *See* White v. McKenzie Elec. Coop., Inc., 225 F. Supp. 940 (D.N.D. 1964); Hake v. Soo Line R.R. Co., 258 N.W.2d 576 (Minn. 1977) (applying Wisconsin law); United States Fidelity & Guar. Co. v. North Dakota Workmen's Compensation Bureau, 275 N.W.2d 618 (N.D. 1979).

43. *See* Sanderson v. Binnings Constr. Co., 172 So. 2d 721 (La. Ct. App. 1965); Farren v. New Jersey Turnpike Auth., 31 N.J. Super. 356, 106 A.2d 752 (1954).

44. *See* Great N. Ry. Co. v. Bartlett & Co., Grain, 298 F.2d 90 (8th Cir. 1962).

45. 2A LARSON, *supra* note 1, § 76.21, at 14-297 to -298.

ployer's liability, but also to preclude any liability to third parties for contribution.[46] This rationale totally disregards the loss allocation principles found in comparative negligence, because the denial of contribution effectively transfers the employer's entire burden to the third party, regardless of the employer's degree of fault.[47]

In comparative negligence jurisdictions, the claim against the third party is reduced in proportion to the injured employee's degree of negligence. A problem arises, however, in cases in which the employer seeks contribution from the third party. In such cases, because the employer's cause of action is derived solely from his employee's suit, the employer's negligence is generally irrelevant and does not reduce or bar the recovery against the third party.[48]

Under the present system of third-party contribution the following inequities are present: (1) the employer is entitled to contribution from the third party, whereas the third party is not entitled to contribution from the employer, and (2) in cases in which the employer seeks contribution from the third party, the recovery is not reduced by the employer's proportionate degree of fault.

C. SOLUTIONS

In light of the increasing adoption of comparative negligence and the problems presented by third-party involvement under workmen's compensation laws, courts and commentators have offered a number of solutions to contribution problems.[49]

The first proposal would result in a major departure from the majority rule. It would allow a third party to bring an action against the employer and shift all or part of the liability to the employer by apportioning damages according to relative fault. This solution would be in accord with the objective of comparative negligence, *i.e.*, an equitable allocation of costs in proportion to fault. The deterring effect the proposal would have is apparent. By allowing the employer to be held liable through contribution for the portion of damage directly attributable to him, the employer will be

46. *See, e.g.*, Santisteven v. Dow Chem. Co., 362 F. Supp. 646 (D. Nev. 1973), *aff'd*, 506 F. 2d 1216 (9th Cir. 1974); Jordan v. Solventol Chem. Prods., Inc., 74 Mich. App. 113, 253 N.W.2d 676 (1977).

47. W. PROSSER, LAW OF TORTS § 67, at 433 (4th ed. 1971).

48. *See, e.g.*, Randall v. United States, 282 F.2d 287 (D.C. Cir. 1960); Froysland v. Leef Bros., Inc., 293 Minn. 201, 197 N.W.2d 656 (1972). *See also* ILL. REV. STAT. ch. 48, § 172.40 (Supp. 1979).

49. *See* 2A LARSON, *supra* note 1, §§ 76.20-.44; Philips, *Contribution and Indemnity in Products Liability*, 42 TENN. L. REV. 85 (1974); Weisgall, *Product Liability in the Workplace: The Effect of Worker's Compensation on the Rights and Liabilities of Third Parties*, 1977 WIS. L. REV. 1035.

less likely to contribute (either directly by action or indirectly by inaction) to the cause of the injury. The employer will make efforts to require that, at the very least, non-stranger third parties minimize or eliminate any dangerous conditions.

In the event a contribution scheme is adopted, three possible methods of limiting the amount of contribution a third party would be allowed to recover have been suggested.[50] First, the amount of contribution allowed may be limited to the amount that the employer would be required to pay under workmen's compensation. As noted earlier, Pennsylvania judicially adopted this approach, although it was later legislatively rejected.[51] Minnesota, California, and North Carolina have, in essence, judicially adopted the Pennsylvania approach.[52]

A second method of limiting contribution from employers is that enunciated by the Court of Appeals of New York in *Dole v. Dow Chemical Co.*[53] In *Dole,* the court found that in some cases damages compensable under workmen's compensation can be apportioned between the third party and the employer, regardless of workmen's compensation statutes.[54] Again, the deterring effect of such a scheme is apparent. By establishing a greater loss potential to the employer, a greater incentive to minimize or eliminate accident-causing conditions will exist. Militating against the adoption of a *Dole* scheme of pure contribution, however, is the strong public

50. *See* Weisgall, *supra* note 49, at 1058-80.

51. *See supra* note 41 and accompanying text.

52. *Id. See also* Maio v. Fahs, 339 Pa. 180, 14 A.2d 105 (1940).

53. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

54. Dole v. Dow Chem. Co., 30 N.Y.2d 143, 154, 282 N.E.2d 288, 295, 331 N.Y.S.2d 382, 391 (1972). In *Dole,* an employee died from inhaled fumes while cleaning his employer's grain storage bin. The bin had been sprayed with a chemical manufactured by Dow. Dow, being sued by the employee's family for negligently labeling its product, brought suit against the employer for full recovery of any damages for which Dow might be found liable. Dow based its action on a theory that its alleged negligence was "passive," while the employer's negligence in failing to warn its employee and failing to use the product properly was "active."

The Court of Appeals of New York abolished the distinction between contribution and indemnity when allocating responsibility among joint tortfeasors, and concluded that damages should be apportioned between the third party and the employer according to their degrees of fault. *Id.* at 148-49, 282 N.E.2d at 292, 331 N.Y.S.2d at 387. An example of a *Dole*-type recovery is illustrated as follows: Suppose that an injured employee's total damages are $20,000 and that he has received $9,000 in workmen's compensation benefits. Assume that the third party was 40% responsible for the loss, with the employer 60% liable. The employee would recover his full $20,000 from the third party in the tort suit. The third party would eventually pay only $8,000 of this amount, which is proportionate to his degree of fault. The employer would pay $12,000, the amount proportionate to his degree of fault. The employer, having a right to reimbursement of his compensation outlay from the proceeds of the third-party suit, would get back $9,000 from the employee. The employee would not receive a double recovery, but would be left with the original $20,000 full recovery. 2A LARSON, *supra* note 1, § 76.22, at 14-320. To date, *Dole* has been followed by the New York courts. *See, e.g.,* Nelson v. Dykes Lumber Co., Inc., 52 A.D.2d 808, 382 N.Y.S.2d 335 (1976). *But see* Zapico v. Bucyrus-Erie Co., 579 F.2d 714, 725 (2d Cir.-1980) (commenting on the *Dole* apportionment method).

In 1974, section 1401 of the New York Civil Practice Law was amended to provide for an equitable division of reponsibility among all wrongdoers, thereby effectively codifying the *Dole* apportionment scheme. *See* N.Y. CIV. PRAC. LAW § 1401 (McKinney 1976).

policy toward maintaining an efficient, fixed scheme of recovery for the injured employee.[55]

A third contribution scheme, which is actually a compromise between the two previously mentioned plans, is to allow contribution not exceeding an arbitrary limit which is greater than the statutorily mandated workmen's compensation payment. An important aspect of the compensation bargain, the elimination of unlimited liability to the employer, is maintained, and a fixed ceiling is provided on the employer's liability, thereby allowing a reasonably precise framework within which to predict future compensation costs.

A noncontribution solution to the third-party problem would entail the abolition of third-party actions in cases involving workmen's compensation, thereby making the accident victim totally dependent on workmen's compensation for benefits. This would be a truly "exclusive remedy."[56] This scheme, standing alone, would limit the recovery available to an injured employee to the amount fixed by the workmen's compensation schedule, which is often found to be inadequate and frequently nowhere near the true costs of the injury.[57]

By eliminating third-party suits and establishing the workmen's compensation system as the employee's sole remedy, the non-fault concept underlying the system would be extended beyond the employer-employee relationship to include all parties to the workplace relation.[58] Injured employees would gain no advantage from such a system, while third parties would benefit immeasurably from the resultant immunity from both employee suits and employer subrogation actions. Although a noted commentator has suggested that such a change in the existing scheme would reasonably require that the injured employee receive a *quid pro quo* increase in benefits,[59] the bargain remains heavily weighted on the third party's side of the scale. Admittedly, the suggested increases probably will not be as large as the potential damage recovery now available to the employee. A three-party inclusive system would allow the employee to avoid the uncertainties of litigation. The injured employee, however, in part maintains that security within the present system.[60]

55. 1 LARSON, *supra* note 1, § 2.20.
56. *See* Weisgall, *supra* note 49, at 1071-80.
57. *Id.* at 1072 n.157.
58. *Id.* at 1071-72.
59. *Id.*
60. *See supra* note 20 and accompanying text.

The benefits arising out of the establishment of the compensation system as the exclusive remedy for injured employees weigh too heavily on the third-party's side. The injured employee is asked to give up his right to maintain a negligence action against a third-party tortfeasor, and the potential of making himself whole, in exchange for an admittedly inadequate, exclusive remedy scheme that furnishes him nothing more than the existing system provides.

V. CONCLUSION

The problems involved in deciding whether comparative negligence and contribution concepts are preferable to the non-fault concept of workmen's compensation are complex and difficult.[61] At best, courts should be expected to provide a short-term compromise of the competing policies. Courts appear to have adopted such compromises with a limited degree of success. The long-term solution requires legislative action to equitably adjust the rights between the third party and the negligent employer. In the meantime, a question which remains to be answered is whether the compensation acts, in conferring immunity on the employer from common-law suit, were meant to do so only at the expense of the injured employee, or also at the expense of outsiders.[62]

Four alternative short-term solutions have been offered by the courts. One appears to meet the equitable principles required by the system. The *Dole* apportionment rule attempts to solve the problem and provide recovery on a purely equitable basis.[63] In adopting a *Dole*-type apportionment scheme, the interests of the employee will be maintained. There will not be any intrusion upon the employee's primary interest of assuring his receipt of full workmen's compensation benefits, or upon his secondary interest of maintaining his right to seek a common-law recovery against a negligent third party. The third-party's sole interest, that of limiting his liability to the extent of his established fault, is fully satisfied. The employer's primary interest, assuring that his liability does not exceed the established statutory limits, suffers a potential intrusion under the *Dole* scheme.[64] The potential intrusion

61. *See* Larson, *Workmen's Compensation: Third Party's Action Over Against Employer*, 65 Nw. U.L. Rev. 351, 420 (1970).

62. *Id.*

63. 2A Larson, *supra* note 1, § 76.22, at 14-320. In referring to the *Dole* apportionment scheme, Professor Larson stated: "[R]eserving the question of the compensation law exclusive-remedy issue, one may go on to observe that the end result may well be the most equitable yet achieved by any jurisdiction." *Id.*

64. *See supra* note 54. Had the employer's statutory maximum liability been the $9,000 in the

could possibly be eliminated by treating the statutory relationship between the employer and his employee as a form of settlement between the parties. By allowing settlement principles to control, the employer would purchase his peace at the expense of his statutory liability under the act, and would not be liable to anyone for contribution. The employer's interest in limiting his liability to the statutory maximum is therefore maintained at the cost of depriving the third party of the right to contribution.

The employer's secondary interest, that of maintaining his right to reimbursement from a negligent third party, is left intact under the *Dole* scheme. It might be suggested that when an employer is required by statute to pay his employee more than the sum found to be attributable to his percentage of fault, he should be allowed to seek reimbursement of that excess amount from the employee's common-law recovery from the third party.[65]

The *Dole* apportionment scheme reaches an equitable balance of interests between the two parties most directly involved in the controversy, while maintaining fully the interests of the secondary party, the employee. Short of legislative action, the apportionment approach taken under the *Dole* scheme appears to afford the most equitable short-term solution to the controversy.[66]

DAVID DUNLAVEY

hypothetical, his interest in having to pay out no more than that amount would not have been maintained.

65. An example may be helpful at this point. Suppose that an injured employee's total damages are $20,000 and the employer's statutory obligation to the employee is $1,200. Assume that the third party and the employer are each 50% responsible for the loss. The employee would receive his $10,000 from the third party in the tort suit. Because the workmen's compensation relationship between employer and employee would be viewed as a settlement, the employee would recover nothing from the employer beyond the $1,200 he is entitled to under the act. The employer's responsibility would be limited to the statutory requirement. The employer is precluded from receiving reimbursement for the compensation paid out in this case because his obligation under the act ($1,200) is less than the proportionate amount required by his degree of negligence ($10,000).

Changing the facts slightly, assume that total damages remain the same, the responsibility of the third party and the employer remain the same, and the employer's statutory obligation to the employee is $12,000. The employee will recover $10,000 from the third party in a tort suit. The employee's total recovery will therefore equal $22,000, which is $2,000 in excess of the total damage award. The employer's obligation is $2,000 in excess of his degree of responsibility, and he therefore should be allowed to seek reimbursement of that excess amount from the employee's recovery from the third party. The employee's full damage recovery is maintained, and the employer is not forced to pay an amount in excess of his statutory obligation upon his degree of responsibility.

66. North Dakota readers of this Note should be aware that as this issue was going to press the Supreme Court of North Dakota handed down a decision which may have an effect on the third-party contribution issue in North Dakota. In Gernand v. Ost Servs., Inc., 298 N.W.2d 500 (N.D. 1980), a third-party contribution action involving workmen's compensation, the North Dakota Supreme Court, without discussing the validity of a district court damages apportionment plan, upheld a summary judgment in favor of the employer. *Id.* at 505.