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Workmen's Compensation - Subrogation - Concurrently Negligent Employer's Rights against His Joint Tortfeasor

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NOTE

WORKMEN'S COMPENSATION — SUBROGATION — CONCURRENTLY NEGLIGENT EMPLOYER'S RIGHTS AGAINST HIS JOINT TORTFEASOR.— John Doe is injured by the concurring negligent acts of his employer and a third party. Doe collects his award for the injury from the employer under the Workmen's Compensation Act of the state; the employer then wishes to exercise his statutory authority by subrogating himself to Doe's cause of action against the third party. Thus the question is posed: Does the employer's concurrent negligence bar his recovery (via subrogation) from the joint tortfeasor?

The general rule in the United States is that there may be no contribution or indemnity between joint tortfeasors,[1] courts having been loath to adjust the burdens of misconduct,[2] waste time with lawbreakers,[3] and adopt what would amount to a doctrine of comparative negligence.[4] There are, however, certain exceptions to the general rule,[5] and many states have, through judicial decisions or enactment of statutes, allowed some degree of contribution between joint tortfeasors.[6] At any rate the principal question of a concurrently negligent employer's right to contribution or indemnity of some sort under the Workmen's Compensation Acts should be considered in the light of the above-mentioned rule.

The employer seeking contribution comes into court under rights granted him by subrogation provisions of his state's Workmen's Compensation Act,[7] hoping for a favorable statutory construction, since no state's statutes expressly provide for a situation like the

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1. Byron Jackson Co. v. Woods, 41 Cal. App.2d 777, 107 P.2d 639, 643 (1940); Rode v. Adley Express Co., 130 Conn. 274, 33 A.2d 329, 332 (1943); University Indemnity Ins. Co. v. Caltagirone, 119 N.J. Eq. 491, 182 Atl. 862, 863 (1936); Cooley, Torts §83 (4th ed. 1932); 19 Va. L. Rev. 881, 883 (1933).

2. Newman v. Fowler, 37 N. J. L. (8 Vroom) 89, 90 (1874).

3. Avery v. Central Bank of Kansas City, 221 Mo. 71, 119 S.W. 1106, 1110 (1909).

4. Fidelity and Casualty Co. of N. Y. v. Chapman, 167 Ore. 661, 120 P.2d 223 (1941).

5. Prosser, *Joint Torts and Several Liability*, 25 Cal. Law Rev. 413, 428 (1937) mentions the following exceptions: (1) Partners; (2) He under a secondary duty may sue him under a primary duty; (3) Respondeat superior (master or principal may seek indemnity from servant or agent); and (4) The passively negligent party may recover from the active wrongdoer.

6. *Id.* at 427; 43 Col. Law Rev. 395, 396, n. 2 & 3 (1943). (Judicial decisions: Minnesota, Pennsylvania, Wisconsin. Statutes: Arkansas, Georgia, Kansas, Kentucky, Maryland, Michigan, Missouri, New Mexico, New York, North Carolina, Rhode Island, Texas, Virginia, West Virginia). See also 9 Uniform Laws 161 (adopted by four states and Hawaii); Handbook of the National Conference of Commissioners on Uniform State Laws, 243 (1939).

7. Del. Rev. Code, §6108 (1935), a typical subrogation statute, provides: ". . . If compensation is awarded under this chapter, the employer having paid the compensation or having become liable therefor, shall be subrogated to the rights of the injured employee, or of his dependents to recover damages against such third person, and may recover . . . the indemnity paid or payable to the injured employee."

one under discussion.[8] Generally he is successful, for the majority of cases has been been decided in favor of the jointly negligent employer who looks to the other tortfeasor for recovery.[9] The minority view allows the third party tortfeasor to set up the employer's concurring or contributory negligence as a defense.[10]

Some of the reasons advanced to support the majority decisions are: (1) The statute made no exception to the subrogated right of an employer to recover against a third person (even though his negligence only concurred with that of the employer to produce the injury)[11] (2) The beneficiaries of the compensation award, will, by virtue of the employer's suit, have some protection for their interest in the proceeds of the judgment entered against the third party.[12] (3) An employer should receive some benefit in return for his absolute liability under the Workmen's

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8. Schneider, Workmen's Compensation Law §§44 & 45 (2d ed. 1932).

9. Otis Elevator Co. v. Miller and Paine, 240 Fed. 376 (8th Cir. 1917); Finnegan v. Royal Realty Co., 35 Cal.2d 409, 218 P.2d 17, 33 (1950); Pacific Indemnity Co. v. California Electric Works, 29 Cal. App.2d 260, 84 P.2d 313 (1938); Milosevick v. Pacific Electric Ry. Co., 68 Cal. App. 662, 230 Pac. 15 (1924); Williams Brothers Lumber Co. v. Meisel, 85 Ga. App. 72, 68 S.E.2d 384 (1951); Fidelity and Casualty Co. v. Cedar Valley Electric Co., 187 Iowa 1014, 174 N.W. 709 (1919); City of Shreveport v. Southwestern Gas and Electric Co., 145 La. 680, 82 So. 785 (1919); Utley v. Taylor and Gaskin Inc., 305 Mich. 561, 9 N.W.2d 842 (1943); Nyquist v. Batcher, 235 Minn. 491, 51 N.W.2d 566 (1952); General Box Co. v. Missouri Utilities Co., 331 Mo. 845, 55 S.W.2d 442 (1932); Graham v. City of Lincoln, 106 Neb. 305, 183 N.W. 569 (1921); American Mutual Liability Ins. Co. v. Alcoa Steamship Company, 266 App. Div. 992, 45 N.Y.S.2d 121 (1943); Western Casualty and Surety Co. v. Shafton, 231 Wis. 1, 283 N.W. 806 (1939); Clark v. Chicago M., St. P. and P. R. Co., 214 Wis. 293, 252 N.W. 685 (1934).

10. Hekman Biscuit Co. v. Commercial Credit Co., 291 Mich. 156, 289 N.W. 113 (1939); Thornton Bros. Co. v. Reese, 188 Minn. 5, 246 N.W. 527 (1933); United States Trucking Corporation v. New York and Pennsylvania Motor Express, 177 Misc. 377, 32 N.Y.S.2d 251 (1941); Essick v. City of Lexington, 233 N.C. 600, 65 S.E.2d 220 (1951); Eledge v. Carolina Power and Light Co., 230 N.C. 584, 55 S.E.2d 179 (1949) (Here the employer's negligence bars his recovery of that part of the judgment which would otherwise inure to his benefit); Brown v. Southern Ry. Co., 202 N.C. 256, 169 S.E. 419 (1933); Corey and Son, Limited v. France, Fenwick & Co., Limited, 1 K. B 114 (1911).

11. Fidelity and Casualty Co. v. Cedar Valley Electric Co., 187 Iowa 1014, 174 N.W. 709, 711 (1919) "There is nothing express or implied in section 2477m6 from which the conclusion can be drawn that the payment of compensation by the employer whose act, jointly with that of another, produced the injuries, shall operate as a bar against the right of an employee or the party paying the compensation and entitled to be subrogated to his rights to maintain an action against the person other than the employer although a joint tortfeasor for damages." See also Utley v. Taylor and Gaskin Inc., 305 Mich. 561, 9 N.W.2d 842, 847 (1943); General Box Co. v. Missouri Utilities Co. 331 Mo. 845, 55 S.W.2d 442, 448 (1932).

12. City of Shreveport v. Southwestern Gas and Electric Co. 145 La. 680, 82 So. 785 (1919); Nyquist v. Batcher 235 Minn. 491, 51 N.W.2d 566 (1952); see also statutes cited note 29 *infra*.

Compensation Acts.[13] (4) To hold otherwise would defeat the intent of the legislature.[14]

The courts in the majority, avoiding for the most part any statutory construction, nevertheless have relied on what seems to be undeniable logic in reasoning: (1) Joint tortfeasors should not be allowed contribution or indemnity.[15] (2) One should not be allowed to profit by his own wrong.[16] (3) An employer should have no more rights than his employee whose injury is the basis for the action.[17] At least one[18] of the minority cases, however, can be distinguished on the ground that a co-employee's negligence was imputed to the employer.[19]

Though it seems well-recognized that the problems in adjusting all parties' rights in these cases are manifold,[20] there has been much dissatisfaction with the results our courts have reached.[21] Supposedly an employer who operates under the Workmen's Compensation Act will add its costs to his product's price, thus transferring the burden to the consumer. He is aided, in many instances, by a compulsory liability insurance plan, which tends to equalize the costs over an entire industry.[22] Yet, according to the majority

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13. Williams Brothers Lumber Co. v. Meisel 85 Ga. App. 72, 68 S.E.2d 384, 388, (1951) "It is true that by virtue of Code, §114-403 an employer may escape liability for its negligence where such negligence combines with that of another to produce an injury upon an employee of the employer, and would force the third party to pay damages for injuries which were caused not by his negligence alone, but this is one of the benefits that is granted to an employer coming under the Act and compensates for the many instances where the employer must pay compensation for an injury for which he would not have been liable at common law."

14. Otis Elevator Co. v. Miller & Paine, 153 C.C.A. 302, 240 Fed. 376, 379 (8th Cir. 1917).

15. Thornton Brothers Co. v. Reese, 188 Minn. 5, 246 N.W. 527 (1933). See also dissent 188 Minn. 5, 11, 246 N.W. 527, 530 in which it is mentioned that pleading the contributory negligence of the employer as a defense seems anomalous, for the non-negligent employee's cause of action is the basis for the suit.

16. Essick v. City of Lexington, 233 N.C. 600, 65 S.E.2d 220 (1951).

17. Brown v. Southern Ry. Co., 202 N.C. 256, 169 S.E. 419, 420 (1933) "When the injured workman sues a third party to recover for his injuries, the contributory negligence of the workman is an available defense, and therefore it would seem equally reasonable that when the employer prosecutes the suit for his own benefit, the same defense should not be denied. Certainly an employer is entitled to no greater immunity than his injured employee."

18. Hekman Biscuit Co. v. Commercial Credit Co., 291 Mich. 156, 289 N.W. 113 (1939).

19. 2 Larson, The Law of Workmen's Compensation §75.23 (1952) (expresses the view that an employer should not be barred by a defense of concurring negligence when the negligence is only that of a co-employee).

20. Riesenfeld and Maxwell, Modern Social Legislation, 416 (1950) "Perhaps the most difficult legal problem in the matter of third party tort liability is the adjustment of the relative rights between the injured workman, the employer, the insurance carrier and the third party tortfeasor. While the protection of the workman and his dependents is the main object of this type of remedial legislation, it should not inflict any undue or unnecessary hardship on the other parties involved."

21. 36 Minn. L. Rev. 549, 551 (1952) ". . . None of the decisions, irrespective of whether they allow or deny the defense, provide a satisfactory answer to the objection that they do not fairly apportion the damages between the wrongdoers."

22. Prosser, Torts §69 (1941).

of decisions, the employer is not only allowed contribution from a joint tortfeasor (in itself a contravention of the general rule), but he is often conceded an absolute shift of liability![23] Anything he collects, then, would seem to be pure profit, at least under the above-mentioned theory that the ultimate consumer; not the employer, pays the Workmen's Compensation costs.

The apparent inequity of the situation at hand might logically inspire the question: can the joint tortfeasor hope to recover over against the negligent employer? The majority of jurisdictions would respond negatively,[24] probably on the ground that the employer is not jointly liable to his employee in tort, and so cannot be a joint tortfeasor; the liability which rests on the employer is an absolute one, regardless of negligence, and such is the only kind of liability which can fall on him whether he is negligent or not.[25] Another ground would be that the negligent third person has no greater burden than borne by him before the passage of the act.[26] Only where the employer has breached an independent duty to the third party will the courts allow recovery over.[27]

The employee who elects[28] to take the Workmen's Compensation award fares very well in most states through the employer's subrogated action against the third party. In Massachusetts, for instance, he receives four-fifths of any excess the employer recovers above what will indemnify him for the award he paid to the employee.[29] The employer, as we have seen, does well in his own right, through the right of subrogation. Only three states[30] have

23. Cases cited note 9 *supra.*

24. Liberty Mutual Ins. Co. v. Vallendingham, 94 F. Supp. 17 (D. D. C. 1950); Lo Bue v. United States, 91 F. Supp. 298 (E.D.N.Y. 1950); Baltimore Transit Co. v. State, 183 Md. 674, 39 A.2d 858 (1944); Britt v. Buggs, 201 Wis. 533, 230 N.W. 621 (1930). *Contra*: Rappa v. Pittston Stevedoring Corporation, 48 F. Supp. 911 (E.D.N.Y. 1943).

25. Cases cited note 24 *supra.*

26. Milosevich v. Pacific Electric Ry. Co., 68 Cal. App. 662, 230 Pac. 15, 18 (1924) "To hold that in such an action the defendant is liable for the full amount of damages sustained by the employee, irrespective of the contributory negligence of the employer, is casting no burden upon the negligent third person greater than that borne by him prior to the enactment of the statute. Before the passage of any workmen's compensation acts a negligent third person was responsible for all damages sustained through his negligence to one in the employ of another, and the fact that the employer was liable for such injury jointly with a third person was no defense to such an action in whole or in part, nor could it be made the basis of any proceedings against the employer for contribution toward payment of the judgment recovered by the employee against the third person."

27. American District Telephone Co. v. Kittleson, 179 F.2d 946 (8th Cir. 1950); Burris v. American Chicle Co., 120 F.2d 218 (2d Cir. 1941); Westchester Lightning Co. v. Westchester County Small Estates Corp., 278 N.Y. 175, 15 N.E. 2d 567 (1938).

28. See Mass. Gen. Laws, c. 152 §15 (1932) ". . . The employee may at his option proceed either at law against that person to recover damages or against the insurer for compensation under this chapter, but not against both."

29. Mass. Gen. Laws, c. 152 §15; (1932) See also N. Y. Consolidated Laws, Workmen's Compensation Law §29 (1952).

30. New Hampshire, Ohio and West Virginia. See Crab Orchard Improvement Co. v. Chesapeake and O. Ry., 33 F. Supp. 580 (S.D.W.Va. 1940).

no subrogation statute,[31] though North Dakota and Washington are the only states which allow only the state fund to be subrogated to the employee's action.[32] The rest of the jurisdictions provide for four types of subrogation: (1) Absolute (where the employee's cause of action is assigned unconditionally to the employer), as in Michigan.[33] (2) Subrogation and direct action co-existent (Wisconsin and California—either the employer or employee can sue).[34] (3) Employee priority (as in New York; the employee has six months after the awarding of compensation to bring a third party suit, and on failing to do so, has his right of action assigned to the employer (Illinois' statute is similar, the time being only three months, however)).[35] (4) Subrogee priority (as in Maine, where the situation described in illustration 3 *supra* is reversed).[36] With such statutes and strong precedent of construction in his favor, then, the employer, like his employee, stands to benefit at the expense of the third party.

Illinois is the only state which has managed to avoid the majority result by legislation; the Illinois statute denies subrogation to the employer who would have been liable to the employee at common law.[37] One writer, too, proposes that an employer's suit be barred in "subrogation jurisdictions", if his negligence was direct and personal, on the general equitable subrogation principle that the subrogee must not sue on a loss to which he contributed.[38] At any rate, it appears that without legislation more cognizant of the rights of all parties in actions like these, the negligent employer will continue to profit by his own wrongs.

Since North Dakota has no "employer-subrogation" statute,[39] it is difficult to imagine how such a case might arise here. Left to conjecture, one might venture that in the event an employer falls behind in his premium payments to the State Fund, is subsequently sued by an injured employee under the Act and forced to compensate him personally, then a right of subrogation might arise in the employer against the third party. But this, of course, is pure speculation.

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31. 2 Larson, The Law of Workmen's Compensation §74.11, n. 23 (1952).
32. N. D. Sess. Laws 1951, c. 343 "The fund shall be subrogated pro tanto to the rights of the injured employee or his dependents to the extent of the amount of compensation paid. . ." See also Wash. Rev. Code §51.24.010 (1951).
33. Mich. Comp. Laws (1948) §413.15.
34. Wis. Stats. §102.29 (1949).
35. N.Y. Consolidated Laws, Workmen's Compensation Law §29 (1952).
36. Maine Rev. Stats. c. 26 §25 (1944).
37. Ill Rev. Stats. c. 48, §138.5 (b) (1951).
38. 2 Larson, The Law of Workmen's Compensation §75.23 (1952).
39. See note 32 *supra*.