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Workmen's compensation: Should a Contributorily Negligent Employer be Subrogated?

WORKMEN'S COMPENSATION: SHOULD A CONTRIBUTORILY NEGLIGENT EMPLOYER BE SUBROGATED?

Nearly all workmen's compensation statutes provide a method whereby an employer who has paid, or become liable to pay, compensation to an employee injured in the course of his employment can recoup these payments from a third party tortfeasor who caused the injury.[1] The usual method is to subrogate the employer to the employee's right of action against the tortfeasor. The employer, in effect, is reimbursed for the compensation payments he has made to the employee, and the employee receives the excess of any recovery from the third party.[2]

A basic issue arises when the employer's negligence[3] has combined with that of the third party to cause the employee's injuries. The statutes subrogating employers do not except negligent employers.[4] The action against the third party tortfeasor, however, is a common law tort action, divorced from the compensation act, and carries with it the defense of contributory negligence. Thus, the issue arises whether a negligent employer, not expressly excluded by the subrogation provision, is precluded by his contributory negligence from obtaining reimbursement from the third party tortfeasor.

The majority[5] hold that the employer's contributory negligence is no

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1. Only Ohio and West Virginia have no statutory provision enabling the employer or his insurance carrier to recoup the statutory compensation payments to the employee. The reimbursement procedure takes several forms. The employer may be subrogated to the rights of the employee against the third part; *e.g.*, MINN. STAT. ANN. § 176.061, subd. 5 (1966); CAL. CIV. CODE § 3852 (1955). The employee's rights may be assigned to the employer: *e.g.*, Longshoreman's & Harbor Worker's Compensation Act, 33 U.S.C. § 933 (1964); COLO. REV. STAT. § 81-13-8 (1963). The employer may have a lien on any recovery by the employee: *e.g.*, IND. STAT. ANN. § 40-1213 (Burns 1965 Repl.); IOWA CODE ANN. § 85.22 (Supp. 1965).

2. For a general discussion of the third party action in the workmen's compensation situation see 2 LARSON, WORKMEN'S COMPENSATION LAW ch. XIV (1961, Supp. 1966); 3 SCHNEIDER, WORKMEN'S COMPENSATION TEXT ch. 15 (Perm. ed. 1943, Supp. 1965). For a more detailed study see McCoid, *The Third Person in the Compensation Picture: A Study of the Liabilities and rights of Non-Employers*, 37 TEXAS L. REV. 389 (1959).

3. This includes negligence for which the employer is vicariously liable, but does not include the injured employee's negligence, since this is a defense to the action against the third party. Globe Indem. Co. v. Hook, 46 Cal. App. 700, 189 Pac. 797 (Dist. Ct. App. 1920).

4. A common provision is that of Minnesota: "If the employee or his dependents elect to receive compensation from the employer, such employer is subrogated to the right of the employee or his dependents to recover damages against the other party. . . ." MINN. STAT. ANN. § 176.061, subd. 3 (1966).

5. For purposes of this discussion, the "majority" includes those courts which have held that the contributory negligence of the employer does not defeat the action against the third party nor does it require any reduction of damages. Where the employee brought the action: Cyr v. F. S. Payne Co., 112 F. Supp. 526 (D. Conn. 1953); Milo-

defense in the action against the third party, while the minority[6] regard it as a *pro tanto* defense in that the recovery from the third party is reduced by the amount which otherwise would be recouped by the employer for compensation payments made.

Arguably, an express statutory exception is not necessary to preclude the negligent employer's recovery, since subrogation is an equitable remedy in which the subrogee's negligence is usually a defense.[7] The majority, however, view the employer's right against the third party tortfeasor as having no resemblance to that equitable remedy; instead, it is considered as nothing more than "a grant to an employer . . . of the employee's right to proceed against a negligent third party."[8] The employer, in effect, is assigned a "single cause of action" arising from the third party's negligence.[9] Since the employer is deemed to stand in the shoes of the employee, the sole question of the third party tortfeasor's liability is whether he is liable to the employee.[10] It is held to follow that

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sevich v. Pacific Elec. Ry. Co., 68 Cal. App. 662, 230 Pac. 15 (Dist. Ct. App. 1924); Williams Bros. Lumber Co. v. Meisel, 85 Ga. App. 72, 68 S.E.2d 384 (1951); Andrus v. Security Ins. Co., 161 So. 2d 113 (La. 1964); Nyquist v. Batcher, 235 Minn. 491, 51 N.W.2d 566 (1952); Royal Indem. Co. v. Southern Calif. Petroleum Corp., 67 N.M. 137, 353 P.2d 358 (1960); Indemnity Ins. Co. of No. America v. Odom, 237 S.C. 167, 116 S.E.2d 22 (1960); Clark v. Chicago, M. St.P. & P. R. Co., 214 Wis. 295, 252 N.W. 685 (1934). Where the employer brought the action: Otis v. Miller & Paine, 240 Fed. 376 (8th Cir. 1917); Marciniak v. Pennsylvania R.R., 152 F. Supp. 89 (D. Del. 1957); Pacific Indem. Co. v. California Elec. Works, 29 Cal. App. 2d 260, 84 P.2d 313 (Dist. Ct. App. 1938); Fidelity & Cas. Co. v. Cedar Valley Elec. Co., 187 Iowa 1014, 174 N.W. 709 (1919); Utley v. Taylor & Gaskin, Inc., 305 Mich. 561, 9 N.W.2d 842 (1943).

6. Some decisions have recognized the employer's contributory negligence to be a complete defense: Fireman's Fund Indem. Co. v. United States Rosasco, 110 F. Supp. 937 (D.N.D. 1953); American Cas. Co. v. South Carolina Gas Co., 124 F. Supp. 30 (W.D.S.C. 1954); Brown v. Southern Ry., 204 N.C. 668, 169 S.E. 419 (1933). Generally, however, the employer's contributory negligence is a defense for the third party to the extent of the compensation payments made to the employee: 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 (Dist. Ct. App. 1963); Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953); Essick v. City of Lexington, 233 N.C. 600, 65 S.E.2d 220 (1951). Illinois has reached a similar result because of a statutory requirement that the employer must be free from negligence to enforce his right of subrogation. Alaimo v. DuPont, 11 Ill. App. 2d 238, 136 N.E.2d 542 (1956). In Hulke v. International Mfg. Co., 13 Ill. App. 2d 571, 142 N.E.2d 717 (1957), the third party's right to the *pro tanto* defense was recognized, but the court refused this defense in the employee's suit. In Blanski v. Aetna Cas. & Sur. Co., 287 F.2d 113 (7th Cir. 1961), the federal court followed the *Alaimo* case, *supra,* but noted that a 1959 amendment to the Illinois statute eliminated the requirement that the employer's subrogation rights depend upon his freedom from negligence (ILL. REV. STAT. ch. 48, § 172.40 (1966)).

7. See note 21 *infra.*

8. Marciniak v. Pennsylvania R.R., 152 F. Supp. 89, 91 (D. Del. 1957).

9. "Whether this was an intentional omission or an oversight on the part of the legislature, we do not know, nor can we speculate. The fact remains that there is but one cause of action, and the employer, or his insurer, is specifically granted reimbursement in this single cause of action." Royal Indem. Co. v. Southern Calif. Petroleum Corp., 67 N.M. 137, 144, 353 P.2d 358, 363 (1960).

10. "The sole test of liability of the third party to the subrogated employer is the

to permit the third party to plead the employer's contributory negligence would be to permit "one wrongdoer to plead the fault of a joint wrongdoer in defense. . . ."[11] Thus the effect of the majority's interpretation of the subrogation provisions is to allow the employer to escape all liability despite his contributory negligence.

The conflict presented by the application of the contributory negligence principle to this "single cause of action" theory is clearly illustrated by the position of the Minnesota court. In *Thornton Bros. Co. v. Reese,*[12] the third party tortfeasor was a fellow employee of the injured workman, and under the applicable statutory provision[13] recovery from the negligent third party-fellow servant was limited to the amount of compensation payable under the workmen's compensation act to the injured employee. Since the action in that case was merely one for reimbursement of the negligent employer, with the employee having no interest in the recovery, the court denied relief holding that "although the employer is subrogated to the rights of . . . the employee . . ., he is not thereby freed from the legal responsibility which attaches to his negligence. . . ."[14] When the third party is outside the enterprise of the employer, however, the Minnesota statute applies the standard subrogation provision and provides for full tort recovery from the third party tortfeasor.[15] Since the employee has an interest in any recovery over the amount necessary to reimburse the employer, and since the employer's negligence should not defeat recovery by the employee, the Minnesota court has refused to recognize the defense and has granted full tort recovery from the third party tortfeasor.[16]

Although the Minnesota court is apparently committed to the principle that a negligent employer should not be reimbursed, it and other majority courts, in cases where the action is for full tort recovery, usually have failed to consider the possibility of splitting the theoretical "single cause of action" and treating the employer's negligence as a defense only to his reimbursement. The "single cause of action" theory and its inequitable substantive result are sustained, apparently, only because of traditional acceptance of the theory.

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liability of the third party to the injured servant or his dependents, and it clearly is no defense to the third party's liability for his own negligence to show that another party, his employer, was also negligent and contributing thereto." General Box Co. v. Missouri Util. Co., 331 Mo. 845, 853, 55 S.W.2d 442, 445 (1932).

11. Otis Elevator Co. v. Miller & Paine, 240 Fed. 376, 380 (8th Cir. 1917).
12. 188 Minn. 5, 246 N.W. 527 (1933).
13. MINN. STAT. ANN. § 176.061, subds. 1-4 (1966).
14. Thornton Bros. v. Reese, 188 Minn. 5, 9, 246 N.W. 527, 529 (1933).
15. MINN. STAT. ANN. § 176.061, subd. 5 (1966).
16. Nyquist v. Batcher, 235 Minn. 491, 51 N.W.2d 566 (1952).

The majority's literal interpretation of the subrogation provisions of workmen's compensation statutes may be attributable to the fact that some of the early courts, being reluctant to impose absolute liability upon employers,[17] might have been predisposed to provide absolute reimbursement to the employer whenever a negligent third party could be found to bear the loss. Such a predisposition would explain why the majority view courts, supposedly committed to the fault principle of liability, are willing to literally interpret subrogation provisions, allowing employers to escape all liability for injuries caused by their concurring negligence.

The majority position has also been explained on the ground that even though the workmen's compensation statutes limit the employer's liability to the employee to fixed compensation benefits perhaps the legislatures intended to give the employer the added benefit of absolute subrogation regardless of fault in order to offset his strict liability.[18] As stated by one of the majority courts, "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."[19]

The majority view, although it is a literal reading of the subrogation provision, appears inconsistent with the principles of subrogation as well as the common law of negligence.

In the absence of an express statutory right of subrogation the employer could have no reimbursement since there is no common law right of subrogation against the third party tortfeasor.[20] Moreover, it is a general principle of subrogation law that a person whose own negligence has contributed to his loss should not be granted this right of subroga-

17. Imposing liability upon employers without regard to the fault of either the employer or the employee is without question a departure from the common law fault principle and thus subject to a strict interpretation by the courts. In Ives v. South Buffalo Ry., 201 N.Y. 271, 94 N.E. 431 (1911), this country's first comprehensive workmen's compensation statute was held unconstitutional on the ground that imposing liability upon an employer without regard to fault was a deprivation of property without due process. "The statute," according to the court, "judged by our common law standards is plainly revolutionary" (*id.* at 285, 94 N.E. at 436) and "plainly antagonistic to its basic idea." (*id.* at 296, 94 N.E. at 440). This case offered early indication that workmen's compensation statutes would generally be subject to a strict interpretation by the courts. See Brodie, *The Adequacy of Workman's Compensation as Social Insurance: A Review of Developments and Proposals,* 1963 WIS. L. REV. 57.

18. See note 53 *infra.*

19. Williams Bros. Lumber Co. v. Meisel, 85 Ga. App. 72, 75, 68 S.E.2d 384, 388 (1951).

20. Crab Orchard Improvement Co. v. Chesapeake & O. Ry., 115 F.2d 277 (4th Cir. 1940); McCullough v. John B. Varick & Co., 90 N.H. 409, 10 A.2d 245 (1939). See Hardman, *The Common-Law Right of Subrogation Under Workmen's Compensation Acts,* 26 W. VA. L.Q. 183 (1920).

tion.[21] A reasonable interpretation of the subrogation provisions would be that the statute merely gives the employer the right to proceed as a subrogee against the third party, subject to the defense of contributory negligence. This interpretation seems plausible in view of the legislatures' use of the term "subrogation" rather than the term "assignment"; the latter would be more compatible with the interpretation that the employer acquires the employee's cause of action without limitation.

Furthermore, the majority's invocation of the tort principle that the fault of a joint wrongdoer is no defense is of questionable validity in this context, since if the third party tortfeasor is held liable for the full amount of the employee's damages, the jointly negligent employer will receive a share commensurate with his compensation payments to the employee. Therefore, while the fault of a joint wrongdoer is usually immaterial to the defendant, it may be quite material to the defendant in this situation where the joint wrongdoer stands to share in the recovery. Since partial satisfaction by a joint wrongdoer is usually credited *pro tanto* against recovery from a concurrent wrongdoer,[22] it might be argued that in this situation the employer who has paid compensation to the employee should be considered a joint wrongdoer who has made partial satisfaction for the employee's injuries.[23] Instead, the majority view treats the employer's negligence as that of a joint wrongdoer in holding that it is no defense to the wrongdoer being sued (the third party), but fails to take the next logical step of holding that the compensation payments made by the employer are to be considered partial satisfaction by him of the injured employee's cause of action against the third party tortfeasor.

The minority view has usually been characterized as designed to avoid the inequity of allowing the negligent employer to recoup his compensation payments for an injury he has partially caused.[24] This characterization may be attributable to the argument of counsel for the third party tortfeasors that subrogation has foundations in equity and that the subrogee is therefore required to have "clean hands" in order to recoup his compensation payments.[25] One of the earliest minority view cases

21. German Bank of Memphis v. United States, 148 U.S. 573 (1893); National Sur. Co. v. Massachusetts Bonding & Ins. Co., 19 F.2d 448 (2d Cir. 1927); W.A. Ellis, Inc. v. Ellis, 115 Colo. 12, 168 Pac. 549 (1949); Akers v. Lord, 67 Wash. 179, 121 Pac. 51 (1912). See also McCLINTOCK, EQUITY § 123 (1948).

22. Laurenzi v. Vranizan, 25 Cal. 2d 806, 155 P.2d 633 (1945). See PROSSER, TORTS 267 (3d ed. 1964).

23. See Note, 50 CALIF. L. REV. 571, 574 (1962).

24. See, *e.g.*, Marciniak v. Pennsylvania R.R., 152 F. Supp. 89, 91 (D. Del. 1957); Note, 33 NOTRE DAME LAW. 506 (1958); 2 LARSON, WORKMEN'S COMPENSATION LAW §§ 75.22-.23 (1961, Supp. 1966).

25. See, *e.g.*, Marciniak v. Pennsylvania R.R., 152 F. Supp. 89, 90 (D. Del. 1957).

illustrates the importance of "inequity" as a consideration.[26] It held that when the employer seeks to enforce his right of subrogation in an action against the third party tortfeasor "his hands ought not to have the blood of the dead or injured workman upon them. . . ."[27]

A more sophisticated, conceptual argument is developed in the later minority view cases. In *Lovette v. Lloyd*[28] the court pointed out that the statute provided that the action against the third party tortfeasor is a common law tort action and that any recovery from the third party be divided between the employer and the employee.[29] Therefore, according to the court, this is not merely the employee's cause of action, but is to be considered a cause of action in tort against the negligent third party "prosecuted in behalf of any person entitled to claim a share in the recovery. . . ."[30] Since the employee is denied recovery when his negligence contributes to his own injury, the employer should be denied recovery, according to the court, when he has an interest and is at fault.[31] Technically, in the action against the third party, the employer is enforcing his own independent claim for reimbursement as well as the employee's claim for damages. Consequently, for purposes of his right to reimbursement the employer does not stand in the shoes of his employee and his contributory negligence is a defense.[32] And in order to prevent a double recovery by the employee when the employer is found to be contributorily negligent, the liability of the third party tortfeasor is reduced by the amount that would otherwise be recovered directly or indirectly by the employer.

Some support for the minority view is found in a 1911 English decision[33] restricting the employer's right against the third party. The employer's right under the English statute[34] is one of indemnity rather than

26. Brown v. Southern Ry., 204 N.C. 668, 169 S.E. 419 (1933).
27. *Id.* at 671, 169 S.E. at 420.
28. 236 N.C. 663, 73 S.E.2d 886 (1953).
29. *Id.* at 668-69, 73 S.E.2d at 890-91.
30. *Id.* at 669, 73 S.E.2d at 891.
31. *Ibid.*
32. "[T]he right of redress against the tortfeasor has been extended by the [statutory] provisions to the injured workman's employer, who is accorded a preferential right to recover, out of the judgment for damages which may be assessed against the tortfeasor, the amount of compensation he has paid or become obligated to pay to the injured employee." Marquette Cas. Co. v. Brown, 235 La. 245, 249-50, 103 So. 2d 269, 271 (1958).
33. Cory & Son, Ltd. v. France, Fenwick & Co., [1911] 1 K.B. 114; *accord,* Canadian Pac. Ry. v. Alberta Clay Products Ltd., 8 B.W.C.C. 645 (Can. 1914).
34. Workmen's Compensation Act, 1906, 6 Edw. 7, c. 58, s. 6: "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof . . . (2) if the workman has recovered compensation under this Act, the person by whom the compensation was paid, . . . shall be entitled to be indemnified by the person so liable to pay damages as aforesaid. . . ."

one of subrogation. Thus the court was not faced with the need to split a "single cause of action" for the purpose of denying only the employer's recovery, since the action was his entirely. The English court, however, was concerned with whether this right was available to all employers regardless of their contributory negligence. It decided that

> The intention of the Legislature, in using these general words,[35] could not have been that an employer, who has been a party to . . . the negligence which has brought about the injury to the workman, should have a right of action for indemnity against the [third party tortfeasor]. . . .[36]

In determining whether the action lies against the third party, it should be immaterial whether the action is merely one for reimbursement or one for full tort damages. Taking this approach, the English and Canadian courts have construed the statute so as to exclude the employer's right where he and the third party have combined to injure the employee.

Recognition of the minority view that the employer's contributory negligence is a defense may present several procedural difficulties. The first problem is whether evidence of the employee's receipt of workmen's compensation benefits from the employer should be admissible in the employer's action against the third party. In *Milosevich v. Pacific Elec. Ry.*,[37] a California case where the defense of the employer's contributory negligence was ultimately denied, the court noted that the defense is available to the third party tortfeasor "unless there is some provision contained in the . . . workmen's compensation statute which either directly or indirectly deprived the defendant of the right to interpose the same."[38] Included in the California statute was a provision that specifically excluded from the trial of the action against the third party evidence of the amount of compensation paid by the employer. Therefore, according to the court, even if the contributory negligence of the employer constituted a *pro tanto* bar to recovery, "it would be impossible . . . to determine the amount of the damages which would be barred. . . ."[39] Since it was impossible to determine how much the damages should be reduced, the court refused to recognize the defense and permitted full recovery from the third party.

The policy basis for excluding such evidence is that it is irrelevant

35. See note 34 *supra* for the English statute which uses the same terminology as most United States statutes. See WRIGHT, SUBROGATION UNDER WORKMEN'S COMPENSATION ACTS (1948), for a compilation of all the states' third-party provisions.

36. Cory & Son, Ltd. v. France, Fenwick & Co., [1911] 1 K.B. 114, 125.

37. 68 Cal. App. 662, 230 Pac. 15 (Dist. Ct. App. 1924).

38. *Id.* at 667, 230 Pac. at 17.

39. *Id.* at 668, 230 Pac. at 18.

to the issue of the third party's liability.[40] However, in a minority view jurisdiction, where the substantive right of the third party to the contributory negligence defense is recognized, the fact that the employer has paid compensation and has an interest in any recovery from the third party is relevant and therefore should be admissible. The California court's application of the statutory provision for exclusion of evidence in the *Milosevich* case was therefore without a rational policy basis in light of the jurisdiction's apparent recognition of the contributory negligence defense.

A second procedural issue is whether the employer must be joined in the action before the issue of his contributory negligence can be litigated. This was an issue in a California case brought against the third party by an injured employee.[41] It was argued that the partial defense of the employer's contributory negligence is not available to the third party tortfeasor unless the employer brings his own action or joins in the employee's action in order to recover the compensation benefits paid. The court, however, held that the employer's contributory negligence defeats his right to reimbursement whether he seeks to enforc it in the action against the third party tortfeasor or by imposing a lien on any recovery by the employee;[42] the fact that the employer is not a party to the action "is not a ground for denying to defendants the opportunity to plead an applicable defence"[43] since pleading the contributory negligence defense does not require the naming of the employer or his insurance carrier as necessary or indispensable parties. The court reasoned that since the California statute[44] requires the employee to give written notice to the employer or carrier when he brings his action against the third party tortfeasor and since they have the right to intervene, they are procedurally protected and there is no reason to deny the contributory negligence defense to the third party merely because the employer or carrier have not been joined as parties.[45]

Since workmen's compensation statutes typically require that the employer be given written notice of the employee's action against the third party and that he be permitted to intervene,[46] the employer seemingly

40. Myers v. Thomas, 143 Tex. 502, 186 S.W.2d 811 (1945); Pattison v. Highway Ins. Underwriters, 278 S.W.2d 207 (Tex. Civ. App. 1955).

41. Tate v. Superior Court, 213 Cal. App. 2d 238, 28 Cal. Rptr. 548 (Dist. Ct. App. 1963).

42. *Id.* at 246, 28 Cal. Rptr. at 552.

43. *Ibid.*

44. CAL. CIV. CODE § 3853 (1955).

45. Tate v. Superior Court, 213 Cal. App. 2d 238, 246, 28 Cal. Rptr. 548, 553 (Dist. Ct. App. 1963).

46. See, *e.g.*, N.Y. WORKMEN'S COMP. LAW § 29(1) (McKinney 1965); WISC. STAT. ANN. § 102.29(1) (1957); CONN. GEN. STAT. ANN. § 31-293 (1966 Cum. Supp.).

could have no due process objection to the adjudication of the issue of his contributory negligence in litigation to which he is not a party. Thus the employer could not defeat the *pro tanto* reduction of the judgment against the third party merely by remaining out of the action.[47]

A third and more difficult problem is presented by the possibility that the employer will evade the *pro tanto* defense by inducing the employee to proceed directly against the third party tortfeasor without first receiving compensation from the employer or his insurance carrier. Since receipt of compensation by the employee under the act is the basis of the employer's right of subrogation, the minority position would seemingly be undermined in that case because the defense of the employer's contributory negligence could not be raised if the employer had no recognizable interest in the recovery from the third party. As a practical matter, the employee would probably always claim compensation under the statute before bringing an action against the third party because of the delay and uncertainty involved in a lawsuit and because most states no longer require the employee to elect between compensation under the act and bringing a tort action for damages.

Conceivably, however, a "loan" by the employer to the employee in lieu of compensation benefits could be utilized to enable the employee to bring an action against the third party without filing a workmen's compensation claim. These so-called "loans" were devised for that purpose where the statutes required an employee to elect either his remedy against the employer under the act or that against the third party.[48] It has been held that such loans were not compensation so far as the election requirement is concerned.[49] To prevent its use to undermine a valid defense of the third party, however, the loan should be viewed as compensation from the employer so that the third party may raise the defense of his contributory negligence. Indiana's present statute specifically provides that if the employee agrees to accept compensation or "to accept

47. In the federal courts the issue of the employer's contributory negligence might be litigated by joining the employer as a party plaintiff. "Although the federal decisions are in conflict, the greater weight of authority holds that a workmen's compensation carrier, as a partial subrogee, is a real party in interest under Rule 17, whose joinder under these circumstances may be compelled upon timely motion, under Rules 19 and 21 of the Federal Rules of Civil Procedure." Carlson v. Consumers Power Co., 164 F. Supp. 692, 695 (W.D. Mich. 1957). The Indiana statute, IND. STAT. ANN. § 40-1213 (Burns 1965 Repl.), however, has been interpreted by the federal courts as not making the employer or carrier a "partial subrogee" until after recovery by the employee, when the employer's lien attaches, and thus it has been held that before judgment against the third part, the employer or carrier is not a real party in interest and cannot be compelled to join. Strate v. Niagara Mach. & Tool Works, 160 F. Supp. 296 (S.D. Ind. 1958); Race v. Hay, 28 F.R.D. 354 (N.D. Ind. 1961).

48. See Note, 48 GEO. L.J. 761 (1960).

49. Pentecost Const. Co. v. O'Donnell, 112 Ind. App. 47, 39 N.E.2d 812 (1942).

from the employer . . . by loan or otherwise, any payment on account of such compensation" the employer shall have a lien upon any recovery from the third party.[50] Thus, assuming that where the *pro tanto* defense is recognized it would be available whenever the employer had an interest in any recovery by the employee against the third party, it arguably would be available where the employer had made a loan to enable the employee to proced directly against the third party.

The possibility, however remote, that the employee and employer might subvert the *pro tanto* defense of the employer's contributory negligence by having the employee proceed directly against the third party without first receiving compensation payments could be met by allowing the third party some form of contribution which would be available regardless of whether the employee had received compensation under the statute.[51]

A majority of jurisdictions have held that the third party has no right to contribution from an employer who is covered by workmen's compensation.[52] Their reasoning is that contribution is unavailable because of the exclusive remedy provisions[53] of the workmen's compensation statutes which deny the employee any common law right of action against the employer and thus limit the employer's liability to the amount of compensation payments prescribed. Since the employer and the third party are not under a common liability to the injured employee,[54] it is held

50. IND. STAT. ANN. § 40-1213 (Burns 1965 Repl.).

51. In several early California cases where the third party sought to raise the employer's contributory negligence as a defense in the subrogation action, the courts held that to deny the employer recovery would be forcing him to bear part of the burden of the employee's compensation and thus equivalent to the third party securing contribution from the employer. Finnegan v. Royal Realty Co., 35 Cal. 2d 409, 218 P.2d 17 (1950); Pacific Indem. Co. v. California Elec. Works, Ltd., 29 Cal. App. 2d 260, 84 P.2d 313 (Dist. Ct. App. 1938); Milosevich v. Pacific Elec. Ry., 68 Cal. App. 662, 230 Pac. 15 (Dist. Ct. App. 1924). Prior to California's adoption of the Contribution Among Joint Tortfeasors' Act (CAL. CODE CIV. PROC. §§ 875-80 (Cum. Supp. 1966)) in 1957 there could be no contribution.

52. Employers Mut. Liab. Ins. Co. v. Griffin Constr. Co., 280 S.W.2d 179 (Ky. App. 1955). See Annot., 53 A.L.R.2d 977 (1957), for a collection of cases.

53. Two common provisions are: "No common law or statutory right to recover damages for injury or death sustained by any employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or anyone otherwise entitled to recover damages for such injury." ILL. REV. STAT. ch. 48, § 138.5(a) (1966 Cum. Supp.). "The liability of an employer prescribed by this chapter is exclusive and in place of any other liability to such employee, his personal representative, surviving spouse, parent, any child, dependent, next of kin, or other person entitled to recover damages on account of such injury or death." MINN. STAT. ANN. § 176.031 (1966).

54. American Mut. Liab. Ins. Co. v. Matthews, 182 F.2d 322 (2d Cir. 1950); Porello v. United States, 153 F.2d 605 (2d Cir. 1946). *Contra,* American Dist. Tel. Co. v. Kittleson, 179 F.2d 946 (8th Cir. 1950).

that the employer cannot be a "common law tortfeasor as to the employee" so as to give the third party a right of contribution.[55]

The counter argument has been that the compensation statutes regulate the relations between the employer and the employee and have no effect upon the third party's liability or remedies.[56] Professor Larson argues that the exclusive remedy provision should be interpreted as precluding only other remedies of the employee or his dependents and not as precluding the remedy of the third party who is not limited by the workmen's compensation statute.[57] This is the proper interpretation, according to Larson, because the purpose of the provision limiting the employer's liability is to compensate for imposing absolute liability on him, and since no similar limit has been placed on the liability of the third party, his action for contribution should not be deemed to violate this immunity of the employer.[58]

This position is reflected in a Pennsylvania decision which held that the third party is entitled to recover contribution from the negligent employer.[59] The exclusive remedy provision of the subrogation statute retains its effect, however, since the employer's liability for contribution is limited to the extent of his liability to the employee under the compensation statute,[60] which limitation seems to be the only real reason for the exclusive remedy provision.

Limited contribution seems to be an appropriate means of preventing circumvention of the *pro tanto* defense. The exclusive remedy provisions expressly provide that the employer shall be liable only for the compensation prescribed by the statute. It can be argued that to allow a third party who has been held liable for the full amount of the employee's damages to recover from the employer (who in effect has paid nothing)[61] to the extent of the statutorily prescribed compensation payments due the employee does not violate the exclusive remedy provision since the employer's liability remains limited to that amount provided by the statute. Limited contribution, in effect, produces the same result as recognition of the employer's contributory negligence as a partial defense. In each

55. Williams Bros. Lumber Co. v. Meisel, 85 Ga. App. 72, 75, 68 S.E.2d 384, 388 (1951).

56. 2 LARSON, WORKMEN'S COMPENSATION LAW § 76.52 (1961, Supp. 1966).

57. *Ibid.*

58. *Ibid.*

59. Maio v. Fahs, 339 Pa. 180, 14 A.2d 105 (1940).

60. *Ibid.* See McCoid, *The Third Person in the Compensation Picture: A Study of the Liabilities and Rights of Non-Employers,* 37 TEXAS L. REV. 389, 438 (1959).

61. Assuming the employee brought the action against the third party after receiving compensation under the act, the employer has been reimbursed if the *pro tanto* defense has not operated to reduce the employee's recovery from the third party; if it has, then it is presumed that the third party would be denied contribution.

instance the employer pays the statutory compensation due the employee, and the third party accounts for the difference between this amount and the amount of the common law tort damages found against him. In either case the result is consistent with the purpose of workmen's compensation acts, which is to provide the employee with immediate and certain relief and to limit the employer's liability to the extent prescribed by the statute.

The minority's emphasis of the inequity of permitting the employer to profit from his own wrong can be criticized to the extent that it emphasizes moral fault where fault may not be relevant to the issue at hand, *i.e.,* how to allocate the burden of work-connected injuries. Furthermore, the employer may not be profiting from his "own" wrong since the actual fault may rest with a co-worker of the injured workman and the employer may be considered negligent only because of the principle of *respondeat superior.* Thus there may be some justification for the majority's view that the fault of the employer is immaterial, although the reason they advance for that position (that the negligence of a joint wrongdoer is immaterial to the wrongdoing defendant)[62] is inapplicable when the joint wrongdoer would otherwise share in the recovery.

One argument against contribution, which the majority courts have not made, is that the issue of the employer's negligence should not be raised in the action against the third party since there was no issue of fault in the first instance when the employer was required to compensate the injured employee. However, the third party tortfeasor's liability is predicated upon fault, and it may be questioned whether he should be deprived of a defense that would otherwise be available to him. It is arguable that although the employer is not to be considered a tortfeasor in relation to the employee, he should be considered a joint tortfeasor who has made partial satisfaction to the injured workman as far as the third party is concerned. Therefore, any common law recovery from the third party tortfeasor should be reduced by the amount of compensation paid or payable by the employer. Similarly, if the employee entitled to statutory compensation from the employer chose to proceed only against the third party, the latter should be entitled to contribution from the employer to the extent of the employer's statutory liability to the employee.

The suggestion that the fault principle has relevance in workmen's compensation may seem contradictory in light of the earlier observation that the employer may not really be at fault in these situations. However, as Larson has pointed out, every loss-adjusting system must have two aims: (1) to compensate the injured, and (2) to seek out the true

62. See notes 22 & 23 *supra* and accompanying text.

wrongdoer whenever possible.[63] After the employee has been compensated by the employer the courts must return to the fault principle in order to place the burden where it should be.[64] This then is the reason for the subrogation provision—the employer who has been required to pay compensation because of the negligence of another person should be entitled to reimbursement from that third person. But an employer who has been negligent himself should not be permitted to shift the entire burden to the third party tortfeasor. Although the employer may not be personally at fault, it is sufficient that he be chargeable with negligence: *respondeat superior* is part of the fault principle to which the legislatures have subjected both the third party and the employer when the latter seeks reimbursement.

When the employer is chargeable with negligence there seems to be no sound reason why he or his insurance carrier should be relieved of all liability for the employee's injuries and allowed to place the entire burden upon the third party tortfeasor. Until legislatures provide a more rational scheme for distributing the loss where the employer and a third party combine to injure the employee, recognition of the partial defense of the employer's contributory negligence or recognition of limited contribution by the employer would not only observe the purpose of workmen's compensation, but would also preserve the common law fault principle of the third party tort action.

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63. See 2 LARSON, WORKMEN'S COMPENSATION LAW § 71.10 (1961, Supp. 1966).
64. *Ibid.*