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# Compensated Employee's Right to Sue Physician for Aggravation

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necessity of retaining the rule against retroactive compensation in all its vigor as one of the needed bulwarks against the further decline in the supply of risk capital.

## WORKMEN'S COMPENSATION

### COMPENSATED EMPLOYEE'S RIGHT TO SUE PHYSICIAN FOR AGGRAVATION

Despite a general tendency to construe Workmen's Compensation statutes liberally for the benefit of employees, the majority of courts have reached the result that an injured workman who accepts compensation is precluded from suing a physician for negligent aggravation of the original injury.<sup>1</sup> This result has recently been adopted by the Supreme Court of Appeals of West Virginia.

Makarenko broke his arm in the course of his employment at a coal mine. Because of Dr. Scott's negligence in treating the injury, the bone had to be refractured in an effort to properly align the arm. The treatment failed and the arm was permanently deformed. Makarenko's employer was a subscriber to the West Virginia Workmen's Compensation Fund, and compensation was awarded for both the original injury and the aggravation. The payments were based upon a fifteen per cent permanent disability. In addition, medical expenses of nearly \$300 were paid from the fund. After accepting this award, Makarenko sought to recover \$20,000 from Dr. Scott for the deformity and accompanying pain resulting from the negligent treatment. The Supreme Court of Appeals of West Virginia held that Makarenko, having accepted compensation, was precluded from suing Dr. Scott. *Makarenko v. Scott et al.*, 55 S. E. 2d 88 (W. Va. 1949).

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of risk capital nourishing our economy." *The Forgotten Men*, 21 THE OUTLOOK (Standard and Poor's) 970 (1949).

High taxes are, of course, a major factor in this trend. Bachrach, *Advantageous Tax Positions In Security Transactions*, 25 TAXES 720 (1947); Wolder, *The Dividend*, 25 TAXES 911 (1947); *Compensation and Incentives for Industrial Executives*, INDIANA UNIVERSITY BUSINESS PLANNING PROJECT No. 11. There is evidence, however, that lack of control by the stockholders is also a factor. REPORT OF ANNUAL MEETING, STANDARD OIL CO. OF NEW JERSEY 28 (1949) (point was made that a contributing factor which accounted for lack of risk capital was unrestricted control by director-officers); see note 23 *supra*.

1. *Roman v. Smith*, 42 F.2d 931 (D. Idaho 1930); *Paine v. Wyatt*, 217 Iowa 1147, 251 N. W. 78 (1933); *McIntosh v. Atchison, etc.*, Ry. 109 Kan. 246, 198 Pac. 1084 (1921); *Vatalaro v. Thomas*, 262 Mass. 363, 160 N. E. 269 (1928); *Hanson v. Norton*, 340 Mo. 1012, 103 S. W.2d 1 (1937); *Burns v. Vilardo*, 26 N. J. Misc. 277, 60 A.2d 94 (1948); *Polucha v. Landes*, 60 N. D. 159, 233 N. W. 264 (1930); *Alexander v. Von Wedel*, 169 Okla. 341, 37 P.2d 252 (1934); *McDonough v. Nat'l Hosp. Ass'n.*, 134 Ore. 451, 294 Pac. 351 (1930); *Revell v. McGaughan*, 162 Tenn. 532, 39 S. W.2d 269 (1931); *Anderson v. Allison*, 12 Wash.2d 487, 122 P.2d 484 (1942); *Ross v. Erickson Const. Co.*, 89 Wash. 634, 155 Pac. 153 (1916); *Cf. McConnell v. Hames*, 45 Ga. App. 307, 164 S. E. 476 (1932); *Hoover v. Globe Indemnity Co.*, 202 N. C. 655, 163 S. E. 758 (1932).