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The Malpractice Liability of Company Physicians

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INTRODUCTION

Litigation involving the problem of the possible malpractice liability of company physicians has always been characterized by the tension between statutory interpretation on the one hand, and the policy considerations which suffuse the law of workmen's compensation on the other. Yet, constrained always by statutory provision, the courts have, over time, developed a series of tests which provide a framework for the analysis of the physician's relation with his employer and, concomitantly, for a determination of the physician's immunity or liability. The purposes of this Note are to present the tests which the courts have developed to determine the existence of the employment relationship with regard to company physicians, to examine the utility of these tests in light of the policy considerations governing workmen's compensation law, and finally to suggest a viable solution to the dilemma which increasingly confronts the courts in their attempts to resolve the problem. Before any consideration of these court-made tests can be presented, however, it is first necessary to examine the statutory context in which the problem of company physician liability arises.

EXCLUSIVE REMEDY PROVISIONS AND THE CO-EMPLOYEE EXEMPTION

It is a fundamental premise of the law of workmen's compensation that benefits for industrial injury will only be awarded when it can clearly be shown that the injury occurred within the context of the employer-employee relation. In view of this requirement, it is perhaps not surprising that one of the most vexing problems long confronting workmen's compensation law has been that of determining which of the myriad working arrangements are encompassed by the employer-employee relation.

The scope of the employment relationship is, in the first instance, determined by the state legislature in the drafting of the workmen's compensation statute. While the definitional sections of such statutes indicate which persons

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3It has been observed that "litigation aimed at delineating the scope of the employment relationship in particular cases has produced more reported cases than any other status definition in the history of modern law."
are to be considered employers and which employees, the exclusive remedy provisions, in turn, inform the potential employee-litigant that workmen's compensation benefits will represent his sole remedy against his employer. Nevertheless, the exclusive remedy provisions of all statutes are careful to protect the injured employee's common law rights against "third parties." In this connection, the employee-litigant will want to identify the third parties against whom he may bring a common law action in the hope of recovering a damage award greater than that provided by the workmen's compensation statute.5

The California Code provides an example of the limitations placed upon the employee-litigant, "[w]here the conditions of compensation exist, the right to recover such compensation . . . is, . . . the exclusive remedy for injury or death of an employee against the employer or against any other employee of the employer acting within the scope of his employment." The New York Code similarly protects both employer and co-employee from a suit by the injured employee; "[t]he right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee, . . . when such employee is injured or killed by the negligence or wrong of another in the same employ."7 In fact, most states now contain exclusive remedy provisions similar to those in the California and New York statutes which bar suits against co-employees.9

4A Id. § 71.00 (1976).
9Some typical examples of statutory co-employee exemption language include: "other than a person in the same employ" (Delaware, Kansas, Michigan); "no employee of any employer"
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In light of the co-employee exemption aspects of most exclusive remedy provisions, a considerable volume of recent workmen's compensation litigation has been concerned with the questions of whether one causing an industrial injury is an independent contractor or a co-employee of the injured worker and whether the injured worker may maintain a common law tort action against the person causing his injury. These issues are perhaps most strikingly presented in the context of suits brought by an employee whose injury has been exacerbated by the treatment of a company physician.

The initial issue in an action involving the malpractice liability of a full-time, salaried company physician for the aggravation of an employee's compensable injury is one of statutory construction, the question being whether the physician is or is not a co-employee within the meaning of the exclusive remedy provision of the statute. A company physician has been held an exempt co-employee under the New York statute, while a similarly situated physician in California was adjudged and independent contractor, and therefore susceptible to a malpractice action. Since the relevant statutes are not markedly dissimilar, it is apparent that the resolution of the problem of company physician liability seems to involve considerations in addition to those of statutory construction. The problem is further obfuscated by the often informal, quasi-employment status which some physicians enjoy with the company for whom they provide medical services.

In initially responding to this multi-faceted problem of company physician

(Ohio); "those conducting his [the employer's] business" (North Carolina); "acting in furtherance of the employer's business" (West Virginia); "performing the duties of employment" (Montana). See relevant statutory citations, supra note 8.


12Judicial consideration of the exemption of company physicians as co-employees has been delayed by the fact that many of the early workmen's compensation statutes did not contain co-employee exemption provisions, and because the courts have been concerned with such collateral issues as the possible bar to a malpractice action because of preliminary receipt of benefits under the act, and the related issue of the possibility of double recovery via the act and the malpracticing physician. For the leading cases involving these issues see Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966); Gay v. Greene, 91 Ga. App. 78, 84 S.E.2d 847 (1954); Fauver v. Bell, 192 Va. 518, 65 S.E.2d 575 (1951); Mitchell v. Peaslee, 143 Me. 372, 63 A.2d 302 (1951); Hancock v. Halliday, 65 Idaho 645, 150 P.2d 137 (1944). These issues rarely arise today because of the subrogation and election of remedy provisions of most compensation statutes. See, e.g., Jones v. Laird Foundation, Inc., 195 S.E.2d 821 (W. Va. 1973).


liability, courts have sometimes turned to the common law of master and servant and the resultant "right to control" test.

COMMON LAW ORIGINS: THE "RIGHT TO CONTROL" TEST

In the early part of this century, when the first workmen's compensation statutes were drafted in the United States, the legislators relied heavily on common law principles in delineating the parameters of the employment relation. Similarly, in their early interpretations of workmen's compensation statutes, the courts equated the employer-employee relation with the common law of master and servant. Indeed, some states, in defining "employer" and "employee," use these common law definitions. In supplying workable definitions of master and servant the common law also provided a comprehensive set of criteria for the purpose of determining whether one acting for another was a servant or an independent contractor. These criteria, in one form or another, have invariably been used in litigation where the employment relation is at issue.

It has generally been agreed that one's right to control the conduct of another in his labors is the dispositive criterion in establishing the master-servant relationship; indeed, the master's right to control has been regarded

16Restatement (Second) of Agency § 2(2)(3), Comment d (1957).
18Restatement (Second) of Agency § 220(2) provides:
In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
(a) the extent of control which, by agreement, the master may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct operation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the workman supplies the instrumentalities, tools, and the place for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by time or by the job;
(h) whether or not the work is part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business.
20The Restatement (Second) of Agency § 2(2)(3) (1957), defines "servant" and "independent contractor" in terms of the master's right to control. See also, 1A A. Larson supra § note
as the *sine qua non* of the doctrine of *respondeat superior*. Thus, when an injured employee has brought a "third party suit," against a person who is arguably a co-employee within the meaning of the exclusive remedy provision of the workmen's compensation statute, the courts have employed the control test for the purpose of determining whether the employment relation exists between the employer and the "co-employee." If the person causing the injury is found, through application of the control test, to be a co-employee of the injured worker, then he is immune from a common law action; if he is found to be an independent contractor, he is susceptible to such an action.

The right to control test has been similarly employed in suits wherein an employee's compensable injury has been aggravated by a physician who is arguably a co-employee. In *Hoffman v. Houston Clinic*, the plaintiff-employee's injury was exacerbated by a physician retained by the employer. Under the Texas workmen's compensation act the injured employee could not maintain a common law action against the employer or "any agent, servant or employee of said employer for damages for personal injury." The trial court held for the defendant, based on the contention that the defendant was an "agent, servant or employee" of the employer. The appellate court reversed, however, holding that "a doctor employed to make an examination of a third person is . . . distinctively free from control or direction of his employer and is not a mere servant."

Although the *Hoffman* court did not consider the details of the physician-employer relationship in applying the control test, the Texas Supreme Court

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22The volume of cases involving a determination of the employment relationship for co-employee exemption purposes is great. For such cases dealing specifically with a physician's possible immunity as a co-employee see note 20 *supra*.


25Id. at 138.

26Id. at 134.


2841 S.W.2d 134, 139.
closely examined this relationship over thirty years later\(^2\) in the case of *McKelvey v. Barber*.\(^3\) There, the defendant Barber was clearly the employer's company doctor.\(^4\) Yet the court found that only about fifteen or twenty percent of the doctor's work was of an industrial nature, that he was not on a retainer with the employer, but was paid for his services as they were rendered, and that he also engaged in the general practice of medicine.\(^5\) On the basis of these findings, the court concluded that as between the physician and the employer, the employer did not have the "right to control the physical details as to the manner of performance which is characteristic of the relationship of master and servant;"\(^6\) the physician was an independent contractor and therefore susceptible to individual liability.\(^7\) While the *McKelvey* court saw the common law relationship of master and servant as dispositive on the issue of the existence of the employment relation,\(^8\) it also indicated that in the "ordinary case" the physician and the employer do not contemplate that the relationship of master and servant will arise between them. "The doctor is generally expected to exercise and rely entirely upon his own professional knowledge and skill without interference from . . . the employer. . . ."\(^9\)

It must be stressed that the use of the law of master and servant and the right to control test by the Texas courts is not idiosyncratic; in two Pennsylvania cases these concepts were applied and results were achieved similar to those in *Hoffman* and *McKelvey*.\(^10\) In *Lemonovich v. Klimoski*,\(^11\) the federal district court noted that because of provisions in the Pennsylvania workmen's compensation act, where "employer" and "employee" are respectively equated with "master" and "servant,"\(^12\) the "particular criterion which distinguishes an

\(^{29}\)Between *Hoffman* and *McKelvey* the Fifth Circuit Court of Appeals ruled that an employee's malpractice suit against a physician retained by the employer's insurance carrier was barred by the exclusive remedy provision of the Texas compensation act. This case, however, is not instructive on the question of company physician liability, since plaintiff made the pleading mistake of alleging that the physician acted "under the direction and control of the company;" in suing both the physician and the insurance carrier he effectively foreclosed his suit against the physician. *Martin v. Consolidated Casualty Insurance Co.*, 138 F.2d 896 (5th Cir. 1945).

\(^{30}\)81 S.W.2d 59 (Tex. 1964).


\(^{32}\)81 S.W.2d 59, 63.

\(^{33}\)Id. at 62.

\(^{34}\)Id. The court stated in this connection that "an agent, servant or employee within the meaning of this statute is ordinarily one for whose conduct the employer would, aside from the Workmen's Compensation Act, be legally responsible under the doctrine of respondeat superior." *Id.* at 62.

\(^{35}\)Id. at 63.

\(^{36}\)Id.


employer-employee relationship from an independent contractor relationship is the right to control the means of accomplishing the result." In applying this law to the case at bar, where the injured employee had sued his employer's "surgical liaison officer" for aggravation of his industrial injury, the court found that the employer had no right of control over the means by which the physician did his work, and therefore that the physician was not an exempt co-employee within the meaning of the act. The emphasis of the Lemonovich court on the details of the physician-employer relationship is well-placed, for those details are undoubtedly the best manifestation of the master's right to control his servant's activities. The limited utility of the test, however, is apparent in the case where the physician-employer relationship is close.

In Lazar v. Falor, the physician was employed full time in the employer's medical department; his hours were fixed by the employer; he was paid a monthly salary; and, his office, facilities, and equipment were provided by the employer. Moreover, while it was clear that the physician could provide only such medical services as were authorized by the employer, he was neither allowed to engage in any private practice, nor was he permitted to receive any fees additional to his salary. Since it would be difficult to imagine a relationship between physician and employer closer than that presented by these facts, the Lazar court's holding that the physician was an independent contractor, and therefore susceptible to a malpractice action, might be regarded as a finding that company physicians are susceptible to such actions as a matter of law.

If the control test requires that the employer have the right to control the details or the manner of the physician's work, it is apparent that the physician can never be characterized as a servant, and, by extension, an exempt

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41 Id. at 1292.
42 The facts of the employment relation reveal that the physician was paid on a prevailing fee-for-service basis, that his duties included caring for all of the employer's injured employees who were hospitalized, referring some employee-patients to certain surgeons, keeping appropriate records and reporting to the employer on all medical treatment, and being available in the event of any emergency at any of the employer's mine portals. See id.
44 See note 41 supra.
47 Id. at 300. Compare the details of this physician-employer relationship with the Restatement's criteria, developed for the purpose of proving the existence of the master-servant relationship, quoted in note 18 supra.
48 The court defined "independent contractor" as "a person engaged in the work . . . [having] the exclusive control of the manner of performing it, being responsible only for the result." 118 Pitt. Legal J. 299, 303 (C.P. Allegheny Cty. May 11, 1970).
49 Id.
50 For a similar view of the physician's susceptibility to a common law tort action, despite a close relationship with the employer, see, Metzger v. Western Maryland Ry., 30 F.2d 50 (4th Cir. 1929).
co-employee. In this regard, one court has stressed that if employers are so presumptuous as to attempt to
direct . . . [their physicians] as to the method of treatment of . . . [an] injured man, and this method was regarded by . . . [the physicians] as unwise, they would . . . [be] bound to exercise their own superior skill and better judgment and to disobey their employers, if in their opinion the welfare of the patient required it.

In reacting to the strictures of the common law control test, some courts have so modified the test as to allow for the immunity of the physician as a co-employee. Rather than emphasize the employer's control over the manner or details of the physician's work, these courts have applied the control test in a much narrower fashion. Under this analysis, such questions as whether the physician has a private practice in addition to his work for the company; whether he is paid by salary or on a prevailing fee-for-service basis; whether he works full time for the employer; and whether he works in the same plant or establishment as the employer and employees are considered as evidence of the employer's right to "control" the physician.

Other attempts to circumvent the control test have come in the form of newly developed tests, designed either to augment or supplant the common law considerations of master and servant. The conclusion that the physician,

49In Jones v. Bouza, 7 Mich. App. 561, 152 N.W.2d 393, 395 (1967), aff'd, 381 Mich. 299, 160 N.W.2d 881 (1968), the court observed that the employer cannot possibly "directly control his [the physician's] every action in the performance of his professional expertise."

50Metzger v. Western Maryland Ry., 30 F.2d 50, 51 (4th Cir. 1929).

51The details of the physician-employer relationship in Jones v. Bouza were nearly identical to those in Lazar v. Falor, yet the Jones court found the physician immune. See also Mrachek v. Sunshine Biscuit, 308 N.Y. 116, 121-122 (1954).


56For criticisms of the right to control test, and the development of alternative theories see generally, 1A A. LARSON §§ 43.30, 43.40, 44.00, 45.10 (proposing use of the "relative nature of
in treating an injured employee, is not “engaged in the business pursuit of the employer,” has been used to characterize him as an independent contractor. Closely related is the argument that the physician’s aggravation of the employee’s injury was not an injury received in the course of the employee’s employment, so that the workmen’s compensation statute is inapplicable, and the plaintiff-employee may bring a tort action against the physician. It has also been suggested that the doctrine of proximate cause could be used to demonstrate either the company physician’s susceptibility to, or immunity from, a common law action. Finally, quite apart from analyses of the common law of master and servant, examinations have been made of legislative intent to determine whether or not company physicians should be held liable within the meaning of the co-employee exemption provision of the statute.

These various attempts to circumvent the common law restrictions reflect a judicial discomfort with the control test; the concept has been made so malleable by judicial interpretation that its utility has been severely impaired. This discomfort is most apparent in California, where emphasis on the physician as a professional has resulted in the development of the dual capacity doctrine.

THE COMPANY PHYSICIAN AS A PROFESSIONAL: THE DUAL CAPACITY DOCTRINE

Among the various exceptions, modifications and evasions of the right to


The argument is based on the fundamental workmen’s compensation requirement that only those injuries are compensable which arise out of, and in the course of, the employee’s employment. 1 A. Larson, supra note 2 § 6.10 (1972).


The use of the proximate cause doctrine for these purposes in a state without a co-employee exemption provision has been suggested in Wilson v. Hungate, 493 S.W.2d 580, 583 (Mo. 1968). See generally, Leidy, Malpractice Actions and Compensation Acts, 29 Mich. L. Rev. 568, 579 (1951); 14 Ark. L. Rev. 117 (1959-60); 17 Iowa L. Rev. 103 (1931).


See text accompanying notes 52-53 supra.

See note 54 supra.
control test, the dual capacity doctrine stands unique, for it acknowledges that a full-time, salaried company physician may logically be considered an exempt co-employee under the exclusive remedy provisions of most state workmen’s compensation statutes. Yet the doctrine regards the physician as having two working personalities; he acts not only as a co-employee of the injured laborer, but also as an independent, professional physician, susceptible to individual liability.

It is fairly obvious that the development of the dual capacity doctrine reflects the strong judicial sentiment that any employment relationship that the physician has with the employer is subordinate to the patient-physician relationship. The primacy of this relationship was emphasized in Gay v. Greene:

It is alleged that the defendant was “employed,” but as a physician he would be charged with exercising his own judgment in determining the manner and method of treating an injury. The National Lead Company (the employer) was not engaged in the practice of medicine; rather, the defendant physician was engaged in his own profession as an independent contractor. His liability arises from the doctor-patient relationship with the plaintiff, and not from the employer-employee relationship.

The dual capacity doctrine was first used in the context of company physician liability in the case of Duprey v. Shane. There, the employee, a practical nurse, was treated by her employer and a co-employee, both chiropractors, for an injury she received during the course of her employment. Although the California workmen’s compensation act did not at that time contain a co-employee exemption provision, employers were protected from common law actions. Nevertheless, the court regarded the chiropractor-
employer as "a person other than the employer" within the meaning of the compensation act: "In treating the injury Dr. Shane did not do so because of the employer-employee relationship, but did so as an attending doctor, and his relationship to . . . [the plaintiff] was that of doctor and patient." The Duprey court similarly held the co-employee-physician liable, as it did the employer, thus anticipating company physician liability under the amended act which later protected co-employees. The Duprey case received extensive consideration and was accepted in toto in Hoffman v. Rogers, where the issue of company physician liability was again adjudicated. In Hoffman, the defendant-physician was a full-time, salaried company doctor. The California court, in holding the physician susceptible to a common law tort action, observed that although Duprey was decided prior to the passage of the co-employee exemption provision in California, there was "nothing in the amendment to undermine the dual personality theory."

Although the Duprey and Hoffman cases clearly indicate that in California company physicians are susceptible to individual liability via the dual capacity doctrine regardless of the extent of the physician's affinity with the employer, the doctrine has been treated unevenly in other jurisdictions. In Pennsylvania, where there has been a tacit acceptance of the doctrine, emphasis has been placed on the inconsistency of holding liable an independent physician to whom industrial cases are referred, while immunizing a company physician who provides similar services; it seems incongruous to exempt the company physician merely because of the fortuity of the employment relationship. The anomaly of protecting company physicians, while holding liable independent physicians providing identical industrial services would appear to

\[^{11}\text{Id. at 790; 249 P.2d at 15.}\]
\[^{12}\text{Id. at 793, 249 P.2d at 15.}\]
\[^{13}\text{Id. at 794, 249 P.2d at 16.}\]
\[^{14}\text{22 Cal. App. 3d 655, 99 Cal. Rptr. 455 (1972).}\]
\[^{15}\text{The physician's relation with his employer is detailed at 22 Cal. App. 3d 658, 99 Cal. Rptr. at 457.}\]
\[^{16}\text{Id. at 662, Cal. Rptr. at 460.}\]
\[^{17}\text{For California cases defining the parameters of the dual capacity doctrine in other employment contexts see, e.g., Douglas v. E & J Gallo Winery, 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977); Unruh v. Truck Insurance Exchange, 7 Cal. 3d 616, 102 Cal. Rptr. 815, 498 P.2d 1063 (1972).}\]
\[^{20}\text{In Lazar, the court observed, \text{"We do not believe . . . that the Legislature intended that the rights of an employee vis-a-vis a physician who is a "full time employee" of the employer were to be any different from the rights of an employee treated by a physician "furnished" by the employer who conducts his practice on his own premises and by the use of his own equipment.\"}}\]
be present in all those states which both protect the company physician and allow the injured employee to elect to receive treatment from either company or private doctors.81

The general view of the doctor as independent professional and its theoretical concomitant, the dual capacity doctrine, manifests a judicial disinclination to limit the recovery of employees whose injuries have been exacerbated by medical malpractice. The doctrine also reveals, to some extent, the discomfort of the courts with the result of immunizing a negligent physician solely because of his employment status. Such attitudes suggest that the problem of company physician immunity or liability is pre-eminently one of policy. Indeed, the viability of the various approaches to this problem cannot be fully determined until an examination has been made of the central policy considerations which underlie the law of workmen's compensation.

POLICY CONSIDERATIONS AND THE MALPRACTICE OF COMPANY PHYSICIANS

Workmen's compensation is fundamentally a type of income insurance. On the basis of small, scheduled contributions made by the employer, employee, or both, the employee is entitled to receive a portion of his income, as well as medical expenses,82 when the flow of that income is interrupted by industrial injury.83 This arrangement is made possible by an employer-employee quid pro quo: The worker gives up his right to bring a common law action for damages and the employer acknowledges liability, while relinquishing his right to certain common law defenses.84 According to one authority,

[t]his reasoning can be extended to the tortfeasor co-employee; he, too, is involved in this compromise of rights. Perhaps, . . . one of the things he is entitled to expect in return for what he has given up is freedom from common law suits based on industrial accidents in which he is at fault.85

Others, however, have questioned the wisdom of the co-employee exemp-
tion provision; co-employee immunity has been seen as shifting the burden of the injury to the injured employee,44 and generally producing unfair results45 in the sense that the employee is both deprived of the opportunity to sue the co-worker tortfeasor and is compelled to rely on a statutory schedule of benefits which is often regarded as inadequate. Immunity provisions have also been thought to encourage careless conduct46 in that the industrial worker, safe in the knowledge that a negligence suit may not be brought against him, will be less assiduous in his adherence to safety standards. Yet, co-employee immunity does undoubtedly minimize industrial discord and ensure recovery for the injured employee, since it seems likely that few common law tort judgments against co-employees would be satisfied.47

It is significant that these justifications for co-employee immunity are not clearly applicable to company physicians. As a "non-laborer" the company physician does not participate in the employer-employee quid pro quo; since it is extremely unlikely that a physician would ever be injured by a fellow employee, he realistically gives up no right to bring suit in return for his own immunity from suit. Similarly, as a non-laborer, the company physician does not readily figure in problems of industrial discord. Finally, although judgments against negligent co-employee laborers would no doubt rarely be satisfied, the physician, as a highly salaried individual, or as an insured professional, would more likely be able to pay the price of his negligence.

Moreover, while it is true that the general arguments concerning the co-employee exemption are inapplicable to the company physician, any analysis of physician immunity must include a consideration of other factors. The "public policy disapproving malpractice" must be balanced against the need for ready, efficient treatment of industrial injury,48 and the desirability of economical risk distribution.49 In addition, there has long been a fear that protection of company physicians would encourage careless treatment.50 Also,
the general judicial reluctance to replace common law rights with statutory remedies has invariably entered into analyses of company physician liability.\textsuperscript{93}

While the merits of co-employee immunity are at least arguable, there can be little doubt about the rationale behind holding independent contractors susceptible to common law tort actions—as separate economic entities they have a presumed capacity to distribute and provide for their own risks.\textsuperscript{94}

This suggests that the company physician who treats non-industrial patients may be characterized as an independent contractor, for he must obviously possess some means of personal risk distribution as to those patients.

Co-employee immunity would not be a problem—indeed, it would not be a topic of serious discussion—were it not true that workmen's compensation benefits are usually inadequate:

[B]ecause of fixed dollar ceilings on benefits, compensation awards are generally inadequate, both in relation to meeting the needs of the victims of industrial injury under current cost of living levels, and conspicuously in relation to standards that have grown up of what constitutes adequate damages in a personal injury action.\textsuperscript{95}

As a form of income insurance, workmen's compensation is primarily designed to ensure against loss of earnings; it does not compensate for pain and suffering, disfigurement,\textsuperscript{96} or for physical losses that are unaccompanied by loss of earnings.\textsuperscript{97}

If workmen's compensation benefits are inadequate in the typical industrial accident case, this inadequacy is even more apparent in those cases where the injury has been aggravated by medical malpractice.\textsuperscript{98} Even though workmen's compensation benefits cover aggravation of the injury by malpracticing physicians,\textsuperscript{99} the chances of collateral damages occurring in this situa-

\textsuperscript{93}A. Larson, supra note 2 § 72.50 (1976): "If there is no strong reason of compensation policy for destroying common-law rights as to various classes of third parties, then, every presumption should be on the side of preserving those rights, once basic protection has been assured." Id.


\textsuperscript{95}A. Larson, supra note 2, § 72.50 (1976).

\textsuperscript{96}Note, Malpractice Actions and Workmen's Compensation, 36 Va. L. Rev. 781, 786 (1950); 4 Fordham L. Rev. 358, 360 (1955).


\textsuperscript{98}In Hancock v. Halliday, 65 Idaho 45, 650, 150 P.2d 137, 140 (1944), the court observed that the immunity of the physician would "permit the wrongdoer to go practically unscathed for grievous damage to another, and would likewise sentence the workman to a lifetime of drear and hopeless existence through inability to work . . . with his only compensation limited to a sum totally inadequate to cover his substantial losses."

\textsuperscript{99}A. Larson, supra note 2 § 13.21 (1972), 2A Id. § 72.61 (1976).
tion are greater, and therefore the likelihood that the benefits will prove inadequate is correspondingly higher. This deficiency is particularly apparent in the context of damages for pain and suffering and disfigurement; the injured employee whose uncompensated pain and suffering is compounded by the negligent treatment of a physician is clearly deserving of an opportunity for recovery additional to that provided by the act.

These manifold policy considerations which govern the triangular relationship between physician, employer, and employee may be distilled into three general categories: the desirability of rapid and expert treatment of industrial injury; the need for the injured worker to be made whole; and the relative abilities of the three to serve as efficient conduits for risk distribution. Although the common law tests have been made so flexible by the courts as to produce any result desired, the master's right to control his servant, the control test, is in no way directly responsive to the above considerations. Alternatively, a judicial application of the dual capacity doctrine is tantamount to a decision that company physicians are susceptible to individual liability as a matter of law, regardless of the scope of the statutory co-employee exemption provision.

The dual capacity doctrine does, however, afford the injured laborer an opportunity for full recovery. In this regard that application of the doctrine does not influence the merits of the employee's action; it is merely a mechanism which provides the injured employee the opportunity to prove that his injury has been exacerbated by the physician's negligence and that benefits awarded pursuant to the workmen's compensation act are inadequate. As for risk distribution, the doctrine leaves this determination not to the courts, but to the physician and the employer; if the physician has non-industrial patients he must obviously contrive some method of personal risk distribution as to those patients. If, however, the physician treats only industrial patients, the employer will probably either undertake to pay the physician's malpractice insurance premiums, or agree himself to compensate workers whose injuries have been aggravated by the physician's malpractice. Either way, the employer serves as risk distributor. In fact, this is the most desirable arrangement since most employers who can afford to retain a physician can also absorb the cost of malpractice much more easily than the individual physician.

100A quadrangular relationship might be created by adding the insurer. For an analysis of the complex issues surrounding the insurer's role in the problem of co-employee liability see, Marks, Klein & Long, Co-Employee Suits Under Workmen's Compensation, 26 FEDN OF INS. COUNCIL. Q. 327 (1976).
101See text accompanying note 95 supra.
103See text accompanying notes 76, 80 supra.
In confronting the problem of company physician liability, the California lead in adopting the dual capacity doctrine should be followed. Since the doctrine states that physicians are vulnerable to a malpractice action as a matter of law, regardless of the statutory co-employee exemption provision, it may be more effective if state legislatures would incorporate the doctrine into their workmen's compensation acts, rather than allow for its eventual adoption by the courts. Inclusion of a statement in the act that physicians are not to be considered co-employees or fellow employees would undoubtedly prevent much litigation on the issue of whether company physicians are susceptible to individual liability. As adopted by either the legislatures or the courts the doctrine will allow the physician and the employer to decide who may best serve as risk distributor, a decision which will, perhaps, turn largely on whether, and the extent to which, the company physician treats non-industrial patients. Moreover, the doctrine will afford the injured worker at least an opportunity for full recovery. More importantly, in creating this opportunity for the worker, the dual capacity doctrine will highlight the fundamental recognition that company physician immunity is inconsistent with the policy considerations upon which the law of workmen's compensation is founded.

TIMOTHY J. PARIS