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WORKMEN'S COMPENSATION AND EMPLOYER SUABILITY: THE DUAL-CAPACITY DOCTRINE

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Traditionally, courts have been reluctant to uphold statutes in derogation of an individual's common law rights. Yet there are many areas of law wherein such limitation is desirable in order that benefits to the community as a whole can be realized. Zoning laws, for example, restrict a citizen's right to use his property, yet are upheld because they contribute to public health, safety, and welfare.[1] In other instances, the individual may exchange his common law right for some other guarantee of protection. An example of such a mutual compromise is workmen's compensation, in which the employee relinquishes his right to sue at law for damages sustained in job-related injuries in exchange for the employer's liability for a statutorily prescribed measure of damages regardless of fault. The basic scheme is both reasonable and workable. Nevertheless, because both employees and employers sacrifice important common law rights, workmen's compensation requires continued critical examination and clarification.

One aspect of the workmen's compensation scheme which should be clarified is the suability of the employer for causing injury to a workman in a context or situation outside of the employment relationship. Although the courts have been hestitant to recognize this suability and have continued to rely on the exclusive remedy provisions of the compensation statutes, there are situations where an employee ought to retain his common law right to sue his employer in tort. The employer in those instances may be said to have a dual capacity.

The no-fault liability theory of workmen's compensation was stated in a 1923 Supreme Court opinion as essentially one of *status*:

> Workmen's Compensation legislation rests upon the idea of status, not upon that of implied contract; that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes his capital—the one for the sake of the wages and the other for the sake of the profits. The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured.[2]

1. The leading case is Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 377 (1926).
2. Cudahy Packing Co. v. Parramore, 263 U.S. 418, 423 (1923).

Thus the controlling determinant of an injured employee's right to recover under the compensation statute is his status at the time of injury. If his status is an aspect of his employment relationship, then he is covered. In addition to the statutory limitation on the amount of compensation which the injured worker can receive, the workmen's compensation scheme imposes a further limitation on the employee: compensation under the statute shall be his exclusive remedy against his employer.[3] The right to sue at common law, except for willful misconduct, is barred.[4] In the context of the typical employee-employer relationship, this provision is reasonable; if the employer must pay compensation when he is not at fault—even when the claimant clearly is—then, to balance the equities, the employer should not be liable for any greater compensation when he does happen to be at fault. In the context of some atypical employee-employer relationships, however, the exclusive-remedy provision may be neither reasonable nor equitable. Among the complex interrelationships that characterize some contemporary employment situations, the employer often assumes, in a second capacity, the position of a third party in respect to his employee's injury. The same reasoning that supports the employee's right to bring third-party actions generally would thus apply.[5]

THIRD-PARTY ACTIONS

Formerly, most compensation statutes limited the employee's right against third parties whose negligence caused the injury by necessitating an absolute

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3. The exclusive remedy provision applies whenever coverage under the act becomes applicable. 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 65.10, at 135 (1970); *see, e.g.*, TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (1967).

Exclusive remedy provisions have been held constitutional. *See, e.g.*, Noga v. United States, 411 F.2d 943 (9th Cir. 1969), upholding the constitutionality of the exclusive remedy provision of the Federal Employees' Compensation Act, 5 U.S.C. § 8116(c) (1970) which states:

> The liability of the United States or any instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is *exclusive and instead of all other liability* of the United States or instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death . . . . (Emphasis added).

4. Most jurisdictions require that the employee must prove actual intent to injure before the employer will be held liable in a common law tort action. *See, e.g.*, Evans v. Allentown Portland Cement Co., 252 A.2d 646, 648 (Pa. 1969) (employer not liable for violation of statutory safety provision); Castleberry v. Frost-Johnson Lumber Co., 283 S.W. 141, 143 (Tex. Comm'n App. 1926, opinion adopted) (employer not liable for gross negligence). *But see* Heskett v. Fisher Laundry & Cleaners Co., 230 S.W.2d 28 (Ark. 1950) (corporation employer held liable for assault by general manager). *See generally* 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 68.10 to 68.23, at 153-164 (1970).

5. All American compensation systems preserve the employee's common law right to bring suit against parties whose liability is not determined by the statute. McCoid, *The Third Person in the Compensation Picture: A Study of the Liabilities and Rights of Non-Employers*, 37 TEXAS L. REV. 389, 395 (1959).

election of remedies.[6] If the employee thus injured elected to take his compensation benefits, his right of action against the third party was assigned to his employer or insurer who rarely chose to exercise the assignment right.[7] Under those circumstances, the third party received a benefit at the expense both of the worker, who gave up his right to a full recovery, and of the employer, who was liable regardless of fault. The third party compromised nothing under the compensation statutes, and thus did not warrant its protection. Furthermore, the absolute election provision required that if the employee chose to bring an action in tort against the third party, he waived his compensation benefit whether his suit was successful or not.[8] Election provisions were gradually modified to allow the employee to sue third parties while retaining his right to compensation under the statute and to further provide for the employer's or insurer's right to subrogation of the employee's rights in suits against third parties.[9] Most states also allow for reimbursement of the insurer to the extent of the benefits paid if the suit results in a recovery; any excess goes to the claimant.[10] Even in jurisdictions where there is no subrogation provision, however, the worker does have his common law right to sue third parties.[11]

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6. Until September 1973, Texas was the only state continuing to force the employee to elect the proper remedy and thus risk his substantive rights. NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, COMPENDIUM ON WORKMEN'S COMPENSATION 197 (1973). The Texas election provision, however, worked only one way: a prior suit against the third party barred a compensation claim, but not vice versa.

The 63d Texas Legislature abolished the required election and article 8307, section 6a, now reads in part:

> Where the injury for which compensation is payable under this law was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employee may proceed either at law against that person to recover damages or against the association for compensation under this law, and if he proceeds at law against the person other than the subscriber, then he shall not be held to have waived his rights to compensation under this law.

TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Supp. 1974).

7. Millender, *Expanding Employees' Remedies and Third Party Actions*, 17 CLEV.-MAR. L. REV. 32, 33 (1968).

8. The Texas statute so provided until the 1973 revision. Tex. Laws 1917, ch. 103, pt. II, § 6a, at 285; *see* Texas Employers Ins. Ass'n v. Brandon, 126 Tex. 636, 89 S.W.2d 982 (1936); Employers' Liability Assur. Corp. v. Miller, 497 S.W.2d 122, 124 (Tex. Civ. App.—Houston [1st Dist.] 1973).

9. NATIONAL COMMISSION ON WORKMEN'S COMPENSATION, COMPENDIUM ON WORKMEN'S COMPENSATION 197 (1973). *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Supp. 1974).

10. *See, e.g.*, CAL. LABOR CODE § 3856 (Deering 1964); TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Supp. 1974). Some states allow an employer who brings an action on behalf of his employee to keep an additional portion of the excess as an incentive. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 152, § 15 (1965); N.Y. WORKMEN'S COMP. LAW § 29 (McKinney 1965).

11. Ohio and West Virginia recognize the employee's right to sue third parties at common law without a statutory provision. *See* Trumbull Cliffs Furnace Co. v. Shachovsky, 146 N.E. 306, 308 (Ohio 1924); Jones v. Appalachian Elec. Power Co., 115 S.E.2d 129, 133 (W. Va. 1960).

Because it is outside the scheme of mutual compromise between employer and employee, the third-party tortfeasor's relationship to an injured worker is the same as that between any two persons who stand as tortfeasor and victim. The third party is liable under traditional two-pronged tort theory: the tortfeasor should be responsible for the injury he causes and the injured person should be compensated.[12] If the plaintiff employee can sustain his burden and prove negligence in the third party, then the third party is liable for whatever the court will award. The result is the same as if he were being sued in a context unrelated to employment.[13]

THE EMPLOYER AS A THIRD PARTY—DUAL CAPACITY

It is logical, then, that when the employee is injured because of the negligence of another who simultaneously occupies both the positions of employer and third party, the right to bring a common law action ought not be denied without closely examining the facts. A physician-employer, for example, may negligently set the broken arm of his receptionist who sustained the break during the course of employment. Should the receptionist be limited to the workmen's compensation remedy or should he be able to bring a malpractice action? Should any injured employee be denied his common law tort action when he is injured because of the negligence of his employer when the employer occupies another capacity? Some court decisions have subscribed to this reasoning, holding that such an employer should be liable in tort and that under those conditions the exclusive-remedy provision in workmen's compensation statutes should not be controlling.[14]

One authority on workmen's compensation has noted in these cases a principle which he calls the dual-capacity doctrine.[15] According to this theory, "an employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent of those imposed on him as employer."[16] The

12. W. PROSSER, THE HANDBOOK OF THE LAW OF TORTS § 1, at 3 (4th ed. 1971).

13. Determining suability in alleged third-party tortfeasors nevertheless poses difficulties for courts, as cases involving employees of subcontractors illustrate. Courts have tended to apply the control rule in ascertaining whether the principal employer can be sued as a third party. *Compare* Hickman v. Fairleigh, 459 F.2d 790, 793 (10th Cir. 1972) (plaintiff injured doing work under plan mutually developed by defendant principal contractor and plaintiff's direct employer; defendant held not suable), *with* Ray v. Monsanto Co., 473 F.2d 219, 220 (9th Cir. 1973) (plaintiff injured while employed by construction company to build furnace for defendant phosphate producer; producer held suable).

14. *See, e.g.*, Duprey v. Shane, 241 P.2d 78 (Cal. Dist. Ct. App.), *aff'd*, 249 P.2d 8 (Cal. 1952); Bright v. Reynolds Metal Co., 490 S.W.2d 474 (Ky. 1973). *Compare* Costanzo v. Mackler, 227 N.Y.S.2d 750 (Sup. Ct.), *aff'd*, 233 N.Y.S.2d 1016 (1962).

15. *See* 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 72.80, at 226.20 (1970).

16. *Id.* § 72.80.

employer's tort liability, then, springs from that second capacity. As in all tort liability, some type of duty in the tortfeasor must be shown; under the dual-capacity doctrine, this duty in the employer is wholly independent of the duties he has toward his employees through the employment relationship. The fact that the tortfeasor is the injured person's employer is coincidental *in the context of the occurrence of the injury.* Thus a new status controls.

An analysis of some of the cases relying on the dual-capacity doctrine, either explicitly or implicitly, aids in clarifying the concept. One of the first cases to use dual-capacity language is *Duprey v. Shane*,[17] in which a chiropractor was found liable for malpractice in the negligent aggravation of his employee's injury which occurred during the course of her employment. The court reasoned that the capacity in which the chiropractor treated the plaintiff was distinct from their employment relationship, and as a result he was vulnerable to a third-party action.[18] The court maintained that the holding of the case was justified by the unusual facts:

> It is true that the law is opposed to the creation of a dual personality, where to do so is unrealistic and purely legalistic. But where, as here, it is perfectly apparent that the person involved—Dr. Shane—bore toward his employee two relationships—that of employer and that of a doctor—there should be no hesitancy in recognizing this fact as a fact. Such a conclusion, in this case, is in precise accord with the facts and is realistic and not legalistic.[19]

Though the reasoning in *Duprey* is logical and the results apparently are fair, the case is not without its difficulties. Like any practitioner, the chiropractor owed his patients the duty to give good medical care and would have been liable for negligent care. But in his role as employer he also had the duty to provide medical services for employees injured during the course of their employment.[20] Since he had this duty toward his employees, then might his providing the services personally have been the coincidental (and under compensation theory, irrelevant) factor, because the aggravation caused by the negligent medical care was still a result of his fulfilling his duty as an employer? The answer lies in the difference between the employer's providing services by paying for them and providing services by performing them himself.[21] In the latter capacity, the employer-physician undertakes the legal obligation inherent in the doctor-patient relationship and is thus subject to suit for malpractice. Liability in this second capacity is the crux of the *Duprey* decision.

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17. 249 P.2d 8, 17 (Cal. 1952).
18. *Id.* at 15.
19. *Id.* at 15.
20. CAL. LABOR CODE § 4600 (Deering Supp. 1973).
21. 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 72.80, at 226.24 (1970).

Another type of dual-capacity case involves the employer's second capacity as owner of the premises. Under certain circumstances the employer-as-owner has been found to have duties toward the employee distinct from his duties as an employer. In a Florida case, *State v. Luckie*,[22] a general contractor who was also the owner of the construction site on which the injury occurred was found suable by an employee of an independent contractor.[23] The court in a recent Kentucky case likewise held the owner liable in a common law suit, finding his position distinguishable from the position of a principal contractor, against whom workmen's compensation would be the worker's sole remedy.[24] Courts in other jurisdictions, however, have reached opposite conclusions on similar facts. In New York, for example, while one decision held contra to *Luckie* in a real property case,[25] another held that the capacity of a truck owner, in which capacity the defendant was found suable, may be separate from the capacity of co-employee.[26] The court in the latter case reasoned that the workmen's compensation statute was inapplicable because "[t]he alleged tort of the defendant is independent of and not related to the common employment of both [the plaintiff and the defendant]."[27]

In several recent decisions the courts have explored the concept of dual capacity as it applies when the employer is operating another business responsible for the injury, and have concluded the employer was not immune from a third-party action. The most significant of these cases is *Reed v. The Yaka*,[28] a 1963 United States Supreme Court decision. In that case the plaintiff's employer, a stevedoring company, leased a ship under a bareboat charter; the plaintiff, a longshoreman, was injured while loading the vessel. Although the plaintiff was entitled to his compensation benefits, he brought an action against his employer as charterer alleging unseaworthiness of the vessel. Without using the dual-capacity terminology, the Court's holding was consistent with the reasoning behind the dual-capacity theory. The defendant had the duty as the bareboat charterer to provide the employee a seaworthy vessel. That duty was "traditional, absolute and nondelegable" and could not be avoided by the exclusive remedy provision of the Longshoreman's Act.[29] The Court looked to the purpose of the compensation act to support its conclusion:

22. 145 So. 2d 239 (Fla. Dist. Ct. App. 1962).
23. *Id.* at 245.
24. Bright v. Reynolds Metal Co., 490 S.W.2d 474, 477 (Ky. 1973).
25. Minsky v. Baitelman, 120 N.Y.S.2d 86 (1953).
26. Costanzo v. Mackler, 227 N.Y.S.2d 750 (Sup. Ct.), *aff'd*, 233 N.Y.S.2d 1016 (1962); *accord*, Collins v. Federated Mut. Implement & Hardware Ins. Co., 247 So. 2d 461 (Fla. Dist. Ct. App. 1971).
27. Costanzo v. Mackler, 227 N.Y.S.2d 750, 751 (Sup. Ct. 1962) (citations omitted).
28. 373 U.S. 410 (1963).
29. *Id.* at 415.

> We think it would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service. Petitioner's need for protection from unseaworthiness was neither more nor less than that of a longshoreman working for a stevedoring company.[30]

The Court in *Reed* thus argues for a liberal construction of the compensation statute so as not to deprive a worker of his common law right of recovery.[31]

THE TEST OF DUAL CAPACITY

Dual capacity nevertheless requires more than mere separateness in the divisions or departments of an employer's business functions or operations. Municipal governments, for example, which operate distinct departments will not be held liable in a common law action when an employee in one department is injured because of the negligence of an employee in another.[32] The attempts to hold the employer liable have been similarly unsuccessful at other levels of governmental activity.[33] In non-governmental situations, courts have likewise denied a third-party suit on the basis of injury resulting from a tortious activity by a separate division of the employer's business.[34]

The legal obligations of the municipality toward an employee of one department are the same as they are to an employee of another, those of employer to employee. The same can be said of the legal obligations of any employer whose employees work in separate departments or divisions. When an employee in one division is injured because of the negligence of an employee or condition in another division, he stands no differently in respect to his employer than he would had his injury been brought about while work ing in that other division. In order to allege dual capacity, then, there must be another factor present besides separateness. The following criterion has been suggested:

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30. *Id.* at 415.

31. *Accord,* Thomas v. Hycon, Inc., 244 F. Supp. 151 (D.D.C. 1965) (defendant employer was held not immune to a third-party suit brought by an employee injured while operating a train owned by the employer's subsidiary); Hertel v. American Export Lines, Inc., 225 F. Supp. 703 (S.D.N.Y. 1964) (employer, a bareboat charterer, was held personally liable to his employee on an unseaworthiness claim brought by a longshoreman).

32. Walker v. City & County of San Francisco, 219 P.2d 487 (Cal. Dist. Ct. App. 1950); *accord,* Bross v. City of Detroit, 247 N.W. 714 (Mich. 1933); De Giuseppe v. City of New York, 66 N.Y.S.2d 866 (Sup. Ct. 1946), *aff'd,* 79 N.Y.S.2d 163 (1948).

33. *See, e.g.,* Miller v. United States, 307 F. Supp. 932 (E.D. Va. 1969) (federal shipyard employees in installation division injured as a result of negligence of employees in design division); Osborne v. Commonwealth, 353 S.W.2d 373 (Ky. 1962) (state highway worker struck by car driven by state trooper).

34. *See, e.g.,* Potts v. Knox-Tenn Rental, Inc., 467 S.W.2d 796, 799 (Tenn. Ct. App. 1970).

> The decisive dual-capacity test is not concerned with how separate or different the second function of the employers is from the first but with whether the second function generates obligations unrelated to those flowing from the first, that of employer.[35]

When this test is met—when the duties generated by the second capacity are different from those inherent in the employer-employee relationship—the employer's status in that second capacity has become that of a third party. And as a third party, his duties and liabilities to an injured employee are different from those accruing to his status as employer. Despite the logic of this approach to employer liability, the dearth of dual-capacity cases demonstrates that courts have found the task of applying the doctrine difficult.

THE ANALOGIES OF PHYSICIAN AND INSURANCE CARRIER CASES

It must be pointed out, nevertheless, that the law has traditionally developed sophisticated means of scrutinizing relationships between persons. Where justice and public policy require, liability has been found in a person who might otherwise have been beyond the law because he retains some capacity bringing him within its reach. In the workmen's compensation field, for instance, courts have sometimes made fine distinctions in determining the suability of company physicians and insurance carriers as third parties. It is instructive to compare these cases to the employer's dual-capacity cases because they share the central issue of immunity via the exclusiveness provision.[36]

In *McKelvey v. Barber*,[37] a company physician was held to be a third party and not an agent of the employer. He was thus subject to an action at law for failing to diagnose the injured plaintiff's condition as tetanus. The court reasoned that though the physician would be considered the employer's agent for some purposes, he could not be so considered in this context because the employer had no right of control over the details of his performance.[38] The physician was not on retainer from the employer but was paid for services as they were rendered. The court pointed out that within the

35. 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 72.80, at 226.23 (1970).

36. Other examples from workmen's compensation are the cases dealing with the suability of a co-employee as a third party. Some cases turn on whether the common employer could be held liable under the doctrine of respondeat superior. *See, e.g.*, Ward v. Wright, 490 S.W.2d 223 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.) (co-employee suable for parking lot injury despite plaintiff's receipt of workmen's compensation). Others depend on whether the co-employee had the capacity of independent contractor at the time of the injury. *See, e.g.*, Collins v. Federated Mut. Implement & Hardware Ins. Co., 247 So. 2d 461 (Fla. Dist. Ct. App. 1971); Costanzo v. Mackler, 227 N.Y.S.2d 750 (Sup. Ct.), *aff'd*, 233 N.Y.S.2d 1016 (1962).

37. 381 S.W.2d 59 (Tex. Sup. 1964).

38. *Id.* at 63.

meaning of the compensation act, an agent, servant or employee is ordinarily one for whose conduct the employer would be responsible under the doctrine of respondeat superior, and that doctrine would not apply to the defendant's actions in treating the plaintiff.[39] There was, therefore, no justification for the assertion that the physician-defendant should be immune under the workmen's compensation statute.

Most of the insurance carrier cases deal with the alleged negligence of the carrier in providing medical care[40] or in carrying out safety inspections.[41] The logical discrepancy in finding immunity in the carrier performing these functions, as some courts have,[42] is that the activity may have been undertaken for the carrier's own benefit or protection.[43] Since the carrier has not assumed the same burdens as the employer,[44] it simply does not follow that it should receive the same immunity at the expense of an employee injured as a result of its negligence.

One solution to the confusing state of carrier-immunity law[45] is to distinguish between the carrier's function as payor for benefits and services, in which it shares the employer's immunity, and any function it voluntarily assumes in directly providing these services, in which it acts as a person other

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39. *Id.* at 62.

40. *See, e.g.*, McDonald v. Employers' Liab. Assurance Corp., 192 N.E. 608 (Mass. 1934); Mager v. United Hosps., 212 A.2d 664 (N.J. Super. Ct. 1965), *aff'd per curiam*, 217 A.2d 325 (N.J. 1966).

41. *See, e.g.*, Fabricius v. Montgomery Elevator Co., 121 N.W.2d 361 (Iowa 1963); Smith v. American Employers' Ins. Co., 163 A.2d 564 (N.H. 1960).

For a detailed study of carrier suability, see Larson, *Workmen's Compensation Insurer as Suable Third Party*, 1969 DUKE L.J. 1117. *See also* Comment, Workmen's *Compensation Insurance Carrier As a Third Party Tortfeasor*, 1 CONN. L. REV. 183 (1968).

42. *See, e.g.*, Mustapha v. Liberty Mut. Ins. Co., 387 F.2d 631, 632 (1st Cir. 1967), *aff'g*, 268 F. Supp. 890 (D.R.I.); Kotarski v. Aetna Cas. & Sur. Co., 244 F. Supp. 547, 560 (E.D. Mich. 1965), *aff'd*, 372 F.2d 95 (6th Cir. 1967); Flood v. Merchants Mut. Ins. Co., 187 A.2d 320, 323 (Md. 1963). The reasoning in *Flood* is that under Maryland law whenever a carrier assumes the duties of an employer it stands in the shoes of the employer and is therefore immune. *Id.* at 323; *accord*, Donahue v. Maryland Cas. Co., 248 F. Supp. 588, 592 (D.C. Md. 1965).

43. Ray v. Transamerica Ins. Co., 158 N.W.2d 786, 790 (Mich. Ct. App. 1968); *accord*, Mager v. United Hosps., 212 A.2d 664, 667 (N.J. Super. Ct. 1965), *aff'd per curiam*, 217 A.2d 325 (N.J. 1966).

44. One commentator makes the following distinction: "The employer assumes compensation burdens in exchange for tort immunity. The carrier assumes compensation burdens in exchange for payment of insurance premiums." Larson, *Workmen's Compensation Insurer as Suable Third Party*, 1969 DUKE L.J. 1117, 1133.

45. Further confusion results from the conflicting views whether carrier services are an integral part of the carrier's statutory duties. Some cases hold that providing safety inspection services is a part of those duties while providing medical services is not. *See, e.g.*, Burns v. State Compensation Ins. Fund, 71 Cal. Rptr. 326, 331 (Dist. Ct. App. 1968); State Comp. Ins. Fund v. Superior Ct., 46 Cal. Rptr. 891, 894 (Dist. Ct. App. 1965). Courts in other cases have held the opposite. *See, e.g.*, Matthews v. Liberty Mut. Ins. Co., 238 N.E.2d 348, 350 (Mass. 1968); Smith v. American Employers' Ins. Co., 163 A.2d 564, 568 (N.H. 1960).

than the employer and is therefore suable.[46] At least one case has succeeded in making that distinction. In *Mager v. United Hospitals*,[47] the decedent's compensable injuries had been aggravated by treatment at a clinic operated by the carrier. The court held the insurer not immune to a tort action brought by the administratrix of the decedent's estate, pointing out that while the New Jersey statute required the employer to furnish medical and hospital services, there was no requirement that either the employer or carrier maintain and operate a medical services clinic.[48] The court concluded that the "[d]efendant's operation of such a clinic was clearly in its own interest . . . [and] was obviously a means adopted to reduce costs and achieve possible economies."[49] Had the decedent gone elsewhere for medical attention, his representative's right to sue for malpractice would be unquestioned.[50] By directly providing for these services, and not merely paying for them in the carrier's normal role, the carrier assumed *control* of the event that caused or aggravated the injury. The same test of control applies when the carrier actually performs safety inspections, even though gratuitously.[51] In both kinds of situations, the carrier's assumption of control of the performance of a function other than that of underwriting risks results in the generation of new obligations to the employee for which the carrier logically ought not escape liability in tort through the exclusive-remedy provision.

Similar reasoning was used recently by the California Supreme Court in *Unruh v. Truck Insurance Co.*,[52] an insurance investigation case. The plaintiff contended that the defendant carrier's investigation of her industrial injury went beyond its permissible scope and that the carrier should be liable in tort for damages she sustained as a result of its failure to control the investigation. Finding the carrier's function of investigating claims "inextricably interwoven" with its function as insurer, the court rejected the plaintiff's argument that the carrier in effect became a third party, and thus re-

46. Larson, *Workmen's Compensation Insurer as Suable Third Party*, 1969 DUKE L.J. 1117, 1136.

47. 212 A.2d 664 (N.J. Super. Ct. 1965), *aff'd per curiam*, 217 A.2d 325 (N.J. 1966).

48. *Id.* at 667.

49. *Id.* at 667. It has been pointed out that one of the economies attempted was to operate a clinic "free of the normal cost of liability for negligence, which means free of the cost of premiums on malpractice liability insurance." Larson, *Workmen's Compensation Insurer as Suable Third Party*, 1969 DUKE L.J. 1117, 1137.

50. In most states this is true even if a compensation claim has been made, provided the statutory subrogation provisions were complied with. *See, e.g.*, Hancock v. Halliday, 171 P.2d 333, 342 (Idaho 1946); Wimer v. Miller, 383 P.2d 1005, 1009 (Ore. 1963); Goodnight v. Phillips, 418 S.W.2d 862, 868 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.). *See also* Annot., 28 A.L.R.3d 1066 (1969).

51. *See, e.g.*, Nelson v. Union Wire Rope Corp., 199 N.E.2d 769, 779 (Ill. 1964); Fabricius v. Montgomery Elevator Co., 121 N.W.2d 361, 364 (Iowa 1963).

52. 102 Cal. Rptr. 815 (1972).

fused to apply *Duprey* to the negligence issue of the case.[53] The court did hold, however, that the carrier did not enjoy the immunity from suits for intentional torts conferred by the compensation statute upon the employer. The plaintiff's complaint was thus found sufficient in its allegations of assault and battery and intentional infliction of emotional distress to support the action against the defendant carrier.[54] The court stated, "A deceitful investigation, in place of an honest one, frustrates the laudable objectives of the workmen's compensation law. Permitting the employee to maintain an action at common law for the insurer's intentional torts will subserve these objectives . . . ."[55] The defendant carrier was, the court concluded, a "person other than the employer" within the meaning of the compensation statute.[56]

The court's analysis in *Unruh* is much like that in *Mager*. The decision turns on the function or role of the carrier in respect to the occurrence of injury to the plaintiff. According to *Unruh*, the carrier is not subject to suit for negligently conducting its proper function but is suable when it steps outside its role and intentionally causes injury to the subject of an investigation. The same kind of analysis is called for in the employer dual-capacity cases: the function performed by the employer in relation to the employee's injury ought to determine the employer's potential suability. When the function is clearly outside the employment relationship, he ought to be suable. Such determinations are not easily made, however, and each allegation of third-party liability on the part of the employer requires careful scrutiny by the court to determine if true dual capacity is presented by the facts of the case.

REJECTION OF THE DUAL-CAPACITY DOCTRINE

A 1968 Michigan case, *Hudson v. Allen*,[57] rejected *Duprey* and dual capacity in a situation where its application seems to have been appropriate. The plaintiff in that case was an employee of the defendant's drug store, located near a laundromat also owned by the defendant. She was walking past the laundromat while delivering a sandwich to a customer when the door suddenly opened onto her, cutting her severely. Alleging the defendant was negligent in locating and maintaining the door, she sued for damages after claiming and accepting workmen's compensation. Relying on *Duprey*, the plaintiff claimed that the defendant in the operation of his laundromat was a legal personality separate and distinct from the legal personality operating the drugstore, and thus could be considered a person other

53. *Id.* at 824.
54. *Id.* at 825.
55. *Id.* at 825.
56. *Id.* at 825.
57. 161 N.W.2d 596 (Mich. Ct. App. 1968).

than the employer. The court refused to follow *Duprey* and reversed for the defendant, insisting that the crucial factor allowing recovery in *Duprey* was the existence of a *second* injury which aggravated the industrial injury, whereas in *Hudson* there was only one injury.[58]

In countering the plaintiff's argument of dual capacity, the court sought to show that the laundromat was merely another division of the defendant's business, citing the fact that the defendant kept one set of records for his drugstore and laundromat operations.[59] But such an arrangement was undertaken solely for the defendant's convenience, and ought not permit him to sidestep his legal obligation. The laundromat was a completely separate function that generated one set of obligations to those who worked in it and another set to others who came in contact with its equipment and appurtenances. The owner, therefore, ought to be liable to an employee of another business function who is injured by a negligently maintained door. The court further relied on the 1933 Michigan Supreme Court decision in *Bross v. City of Detroit,*[60] wherein a fireman had attempted to recover from the city for damages sustained when his ladder truck collided with a city-owned streetcar. The plaintiff had accepted a pension in lieu of his compensation benefits, and thereafter brought suit against the city as a third party. The court rejected the plaintiff's contention that his injury was caused by an agency of the city distinct from that in which he was employed.[61]

There are significant differences between the situations in *Bross* and *Hudson* and it is unfortunate that the court in *Hudson* relied on *Bross*. One difference is that the providing of various public services is the customary function of municipal governments, while the common ownership of a drugstore and nearby laundromat is merely coincidental. Secondly, the risk to which the plaintiff in *Bross* was exposed was predictable from the course and scope of his employment, while the risk of harm from a drugstore employee's duties would not normally include running into a faulty door on another building. Thirdly, while the court in *Bross* had no contrary authority with which to temper its decision, the court in *Hudson* was cited to *Duprey*.

Another recent case demonstrates even more compellingly the need for applying the doctrine of dual capacity. In *Lewis v. Gardner Engineering Corp.*[62] the plaintiff, Lewis, was employed as a foreman on a dam construction project by two joint venturers, Gardner Engineering Corporation (Gardner) and San Ore Construction Company (San Ore). The joint venture, S.O.G. of Arkansas, was entered into for the sole purpose of performing the work for the project. The joint venturers agreed to use newly

58. *Id.* at 597.
59. *Id.* at 599.
60. 247 N.W. 714 (Mich. 1933).
61. *Id.* at 715.
62. 491 S.W.2d 778 (Ark. 1973).

acquired equipment as well as equipment they owned separately. Lewis was injured when a hoisting clamp on a pile-driving machine malfunctioned, causing a steel piling to fall on him. The hoisting clamp, allegedly defective, was designed and manufactured by the defendant Gardner. After claiming and receiving workmen's compensation for his injuries from the joint venture, S.O.G., Lewis brought a products liability suit against Gardner separately as manufacturer of the hoisting clamp. Gardner asserted as its defense the exclusive-remedy provision of the compensation statute, while Lewis contended that since Gardner was both employer and manufacturer, the exclusiveness rule did not apply. The trial court entered summary judgment for Gardner, and the Arkansas Supreme Court affirmed.[63]

The majority's opinion is mainly concerned with the issue of the joint-venture-as-third-party. Rejecting the plaintiff's contentions that the joint venture, S.O.G., was an employing entity and had autonomous control of its employees as does a *de facto* corporation, the court instead found the general rule applicable: "a joint adventure is not a distinct legal entity separate and apart from the parties composing it . . . ."[64] Consequently, the court insisted, Gardner Engineering Corporation could not be cosidered a third party but was rather to be considered an employer within the contemplation of the workmen's compensation act. The court concluded, "It is nothing more than a coincidence that Gardner, one of the joint venturers, happens to have manufactured the hoist."[65]

In a vigorous dissent, Justice Fogleman asserted that the majority's finding of a "coincidence" allowed the court to avoid the real issue in the case—the employer as third party. Applying the dual-capacity doctrine, he emphasized:

> Appellants do not seek to recover for the furnishing of unsafe equipment by the joint venture or the joint venturer. They seek to recover from the appellee as a "third party" . . . on the basis of negligence or breach of warranty in the manufacture and distribution of a faulty device, a step that certainly was outside the purposes of the joint venture, i.e. the construction of a lock and dam.[66]

Justice Fogleman reasoned that this "outside purpose" rendered the defendant liable in tort. Had Lewis tried to sue S.O.G. or Gardner for furnishing unsafe equipment, such suit would have been barred, for the furnishing of tools or equipment is part of the employment relationship and thus clearly within the workmen's compensation act.[67] But the duty to manufacture safe

63. *Id.* at 780.
64. *Id.* at 779.
65. *Id.* at 780.
66. *Id.* at 781 (dissenting opinion).
67. ARK. STAT. ANN. § 81-1302(c) (1960); *see* Birchett v. Tuf-Nut Garment Mfg. Co., 169 S.W.2d 574, 577 (Ark. 1943).

equipment springs from the defendant's role as a *manufacturer*, and is extended to all who might use that product.[68]

Justice Fogleman persuasively argued that the dual-capacity doctrine is not at all inconsistent with the scheme of workmen's compensation. Citing *Reed v. The Yaka*[69] for the proposition that workmen's compensation statutes should be liberally construed to conform with the purpose of the act, he contended that "[i]t was never intended that our workmen's compensation statutes should immunize one who happens to be an employer from any and all liability to one who happens to be his employee."[70] The Arkansas constitutional amendment, while authorizing the legislature to enact laws prescribing the amount of compensation to be paid for various injuries, prohibits any other limitations on the amount to be recovered.[71] This prohibition, Justice Fogleman argued, means than any legislative effort to insulate the employer from a liability other that the one arising from the employment relationship would violate the constitution.[72] He concluded that the exclusive-remedy provisions in the Arkansas workmen's compensation statute "applies only to liabilities arising out of the employer-employee relationship. . . . [T]he purpose of the act is to compensate only for losses resulting from the risks to which the fact of engaging in the industry exposes the employee."[73]

THE DUAL-CAPACITY RATIONALE

Justice Fogleman's analysis supports not only the application of the dual-capacity doctrine in *Lewis* but also the general rationale for attempting to find employer liability outside of the workmen's compensation scheme. First of all, in the dual-capacity situations there is simply no justification for going beyond the intent of the statute by exonerating culpable negligence outside of the employer-employee relationship.[74] The plain intent of current compensation schemes is to protect the employee for injuries which occur in the course of his employment while also preserving his right to bring

68. The leading case is MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916). *See also* Carpini v. Pittsburgh & Weirton Bus Co., 216 F.2d 404 (3d Cir. 1954); Escola v. Coca Cola Bottling Co., 150 P.2d 436 (Cal. 1944); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

69. 373 U.S. 410 (1963).

70. Lewis v. Gardner Eng'r Corp., 491 S.W.2d 778, 783 (Ark. 1973) (dissenting opinion).

71. ARK. CONST. amend. 26.

72. Lewis v. Gardner Eng'r Corp., 491 S.W.2d 778, 783 (Ark. 1973) (dissenting opinion).

73. *Id.* at 784 (dissenting opinion).

74. *Id.* at 783 (dissenting opinion). *See* Duprey v. Shane, 241 P.2d 78, 81 (Cal. Dist. Ct. App. 1951), *aff'd*, 249 P.2d 8 (1952); *cf.* Reed v. The Yaka, 373 U.S. 410, 415 (1963).

third-party actions. A third-party action should be no less viable because the duty owed by the tortfeasor springs from an extra-relational capacity of the employer rather than arising from another third party. All the reasons supporting the justness of recovering from third parties generally can be assembled to support dual-capacity liability. The employee, in accepting employment, can be presumed to have accepted all the conditions of his employment obvious to him and to have implicitly or explicitly agreed to the workmen's compensation compromise. But he cannot be presumed to have waived his right to bring common law actions against negligent third parties who coincidentally share the role of employer.[75]

A second reason for allowing such suits is the deterrent value of tort liability. If the tortfeasor is shielded from the consequences of his negligence in one capacity because he happens to occupy the separate capacity of employer in a second relationship with the injured person, he has little incentive to correct the condition which caused the injury.[76] When the exclusive-remedy provision is unconditionally applied, the employer-third-party-tortfeasor can be comfortably aware that should injury occur because of his negligence, he or his carrier will be liable not to the full extent allowable in a common law recovery but only to the limited extent of the compensation benefit.[77] Sloppy procedure in manufacturing, inept practice of medicine, and careless upkeep of premises may thus go unpunished. While the employer's compensation insurance premiums will increase with additional payments of benefits, such an increase is a small penalty for what may be a conscious disregard of the rights of others. As Justice Fogleman queries in his dissent in *Lewis*, "Why should Gardner Engineering Corporation be relieved of its liability as a designer and manufacturer by the fortuitous circumstance that it happened to be the employer of the injured party in an unrelated undertaking?"[78] The implied answer, of course, is that assuming proper proof, there is no just reason to relieve that defendant or any other

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75. Part of the Supreme Court's discussion in *Reed* concerned the attempt by the bareboat charterer to defeat the possibility of third-party recovery by hiring longshoremen directly instead of through a stevedoring company. Reed v. The Yaka, 373 U.S. 410, 415 (1963).

76. The deterrent aspect is especially important in cases like *Lewis* involving alleged products liability. The manufacturer is held strictly liable because he "is in a peculiarly strategic position to promote the safety of his products, so that the pressure of strict liability could scarcely be exerted at a better point if accident prevention is to be furthered by tort law." James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957). *See also* Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

77. *See, e.g.*, Hickman v. Fairleigh, 459 F.2d 790, 792 (10th Cir. 1972); Sirianni v. General Motors Corp., 313 F. Supp. 1176, 1177 (W.D. Pa. 1970); Lewis v. Gardner Eng'r Corp., 491 S.W.2d 778, 780 (Ark. 1973).

78. Lewis v. Gardner Eng'r Corp., 491 S.W.2d 778, 784 (Ark. 1973).

who has been negligent in performing a duty owed an injured employee outside the employment relationship.

Despite the fact that there are compelling reasons for applying the dual-capacity doctrine in certain employment situations, most courts side with the majority opinion in *Lewis* and either overlook or reject its application.[79] The usual reason for finding no third-party suability in the employer is that the statutory exclusive-remedy provision precludes any recovery, under any theory whatever.[80] This is a disappointingly simplistic response to the complexities sometimes presented by the relationship between the injured employee and the person responsible for his injury.

CONCLUSION

As this analysis has attempted to show, the arguments against recognizing dual capacity falter under close scrutiny, while those supporting it are buttressed whenever a case like *Lewis* arrives. Admittedly, the doctrine's applications are limited—there will not be many situations where the employer occupies a separate capacity giving rise to distinct duties,[81] and admittedly, courts will have to make searching examinations of the facts peculiar to each alleged dual-capacity case. But infrequency of occurrence and difficulty of application should not deny the doctrine the life-blood it deserves. The courts' refusal to admit the reasons for its viability by blindly insisting on "exclusive remedy" will produce what the Supreme Court in *Reed* called a "harsh and incongruous result" for members of the working class who may already have only inadequate compensation for their injuries. These individuals deserve to retain their common law right to recover for damages from tortfeasors outside of the employment relationship.

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79. *See, e.g.*, Frey v. Brown, 254 So. 2d 491, 493 (La. Ct. App. 1971); Gulf Am. Fire & Cas. Co. v. Singleton, 265 So. 2d 720, 721 (Fla. Dist. Ct. App. 1972).

80. *See, e.g.*, Denenberg v. United States, 305 F.2d 378, 380 (Ct. Cl. 1962); Billings v. Dugger, 362 S.W.2d 49, 53 (Tenn. 1962); Minsky v. Baitelman, 120 N.Y.S.2d 86, 87 (1953).

81. It is probable, however, that cases involving situations like that in *Lewis*, where products liability can be plead, will become more frequent. Manufacturers or suppliers of defective equipment are held strictly liable for failure to protect the user from an unsafe design. *See, e.g.*, Yale & Towne Mfg. Co. v. Ray McDermott Co., 347 F.2d 371 (5th Cir. 1965) (defective hoist); Swaney v. Peden Steel Co., 131 S.E.2d 601 (N.C. 1963) (defective steel truss).