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Expanding Employees' Remedies and Third Party Actions

Robert L. Millender*

I. Introduction

THE TITLE OF THIS ARTICLE is perhaps somewhat misleading. Do third party actions expand employees' remedies? Such actions arise out of provisions of our state and federal workmen's compensation laws granting an employer or his insurer the right to sue any person or persons who cause the injury to his employee. Also, third party actions arise under statutes granting the injured employee the right to sue the tort-feasor without loss of recourse against the employer. Third party actions do constitute an expanding remedy for the employer and his insurer; it is generally conceded that without a statutory provision the right to sue would not exist.¹ A review of the history of employees' remedies, on the other hand, does disclose that third party actions constitute an expanding employee remedy.

Prior to state and federal workmen's compensation laws, the right of an injured employee to sue a tort-feasor existed under the common law. The employee's action was supported by two social interests: (a) a party injured should be made whole, and (b) a wrongdoer should be responsible for his wrongdoing.

Before the turn of the century, the general notion of tort liability came under scrutiny where injury arose out of the employment situation.² There was an increasing number of industrial injuries, and the rich employer was privileged to have the friendship of the "three wicked sisters": fellow servant doctrine, assumption of risk and contributory negligence.

State and federal laws covering work-connected injury were thus passed. Compensation laws did not initially attempt to fulfill the two-fold purpose existing under common law tort liability of the restoration of the injured party and fixing the responsibility upon the wrongdoer. The purpose of the compensation laws was to provide relief to the injured party without a determination of fault.³ In carrying out this purpose, these statutes did not attempt to restore the injured employee to his

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¹ 2 Larson, *The Law of Workmen's Compensation*, § 74.11, at 206, holding that this is the rule in Ohio and West Virginia.

² *Id.* at Chapter II.

³ *Ibid.*

status quo. They limited his right of recovery to a percentage of his lost wages, thereby depriving him of his common law compensation rights.⁴

The early laws limited the employee's recovery by providing compensation under the statutes as the exclusive remedy against the employer. The employee was further restricted by having to forfeit his common law remedies as against third party tort-feasors should he elect to take under workmen's compensation.⁵ These elective provisions assigned the employee's right of action against the third party to the employer or his insurer if the employee elected to take benefits under the Act and the employer paid for these benefits.⁶ Since the employer was liable regardless of fault, arguably there was some justification for abrogating the employee's common law rights against that employer. Third persons gave up nothing, however, under the compensation law and therefore did not deserve protection from it.⁷

Soon after the enactment of these compensation laws, it became clear that the elective provisions were illogical, unnecessary and manifestly unfair and harsh. They afforded the third party wrongdoer an immunity which in no way assisted in carrying out the objectives of the law. Further, these elective provisions contravened the principle that the loss should fall upon the wrongdoer. These conclusions are readily apparent; most employees faced with the election chose the compensation benefit, and few employers exercised their assignment right under the provision. The third party tort-feasor got a windfall. These elective provisions were used to deprive the injured employee of either his compensation benefit, his third party right of action or both upon the grounds that he had elected to take the other remedy.⁸ When the leg-

⁴ Compensation varies between the states as to rate of compensation payable and the duration of the payment. None of the acts provides for payment for pain and suffering, loss of consortium or other similar benefits cognizable at common law.

⁵ Mich. Workmen's Comp. Act, M.C.L.A., § 411.4, M.S.A. 17.144, "Where the condition for liability under this act exists, the right to the recovery of compensation benefits, as herein provided, shall be the exclusive remedy against the employer." Most other states have similar statutory provisions.

⁶ The Mich. Workmen's Comp. Act, M.C.L.A. 413.15, contained the following elective provision: "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, the employee may at his option proceed either at law against that person to recover damages or against the employer for compensation under this act, but not against both, and if compensation be paid under this act the employer may enforce for his benefit or for that of the insurance company carrying such risk, or the commission of insurance, as the case may be, the liability of such other person." This, or a similar provision, was found in many of the state statutes and in the Federal Compensation Act.

⁷ Larson, *op. cit. supra* note 1, § 73.30, at 204.

⁸ *City of Grand Rapids v. Crocker*, 219 Mich. 178, 189 N.W. 221 (1922), holding that a dependent of a deceased employee is subject to the election provisions of the act; *Overbeck v. Nex*, 261 Mich. 156, 246 N.W. 196 (1933), acceptance of compensation bars suit for malpractice against doctors selected by company; *Teus v. C. F. Hanks Coal Co.*, 267 Mich. 466, 255 N.W. 227 (1934), settlement from third party constituted an election under the act; *Graham v. Mich. Motor Freight Lines, Inc.*, 304 Mich. 136, 7 N.W. 2d 246 (1943), starting an action at law for death of an employee constituted an election of remedies so as to bar a proceeding for compensation.

islature failed to act to correct this intolerable situation some enlightened court sought to lessen the effect of the harsh elective rule by finding exceptions thereto.⁹ Largely as a result of judicial criticism, most states have gradually eliminated these "elective" provisions in the compensation law.¹⁰ The elimination of the elective provision restored to an injured employee a right he had at common law.

II. Third Party Action Under Present Day Compensation Statutes

The elective provisions of old statutes are different from subrogation provisions in the same statutes. The elective provision gave the employee a right to select either compensation benefits or the right to sue the third party. Many of these statutes provided that if the employee elected to take benefits under the act, the employer was subrogated to the rights of the employee. Most present day statutes retain the subrogation provision but have eliminated the elective provision. These subrogation provisions are important because they permit third party actions by the employer and are determinative of priorities regarding who may bring the third party action. Larson, in his *Law of Workmen's Compensation*, grouped the subrogation procedure into five categories.¹¹ One of his categories provides for absolute subrogation arising out of the elective provision rule; thus, this exists today only in states still requiring election. The other four categories, however, are still applicable and provide as follows: (a) "no subrogation"—if a state does not have a subrogation statute, the employer has no right of action against the third party;¹² (b) the statute allows either the employer or employee to sue the third party and provides for a joinder of one in the suit begun by the other;¹³ or it provides for the subrogation by the employer without expressly depriving the employee of his right of action against third parties; (c) some state statutes allow the employees a period of time

⁹ *Fox v. Detroit United Ry.*, 218 Mich. 5, 187 N.W. 321 (1922), holding that payment of hospital and doctor's bills where employee made no claim for compensation under the act did not constitute an election; *Brabon v. Gladwin Light & Power Co.*, 201 Mich. 697, 167 N.W. 1024 (1918), holding that an acceptance by a widow of a voluntary payment of some compensation under an agreement which was not filed with and approved by the Workmen's Compensation Board did not constitute a proceeding under the Statute which would bar an action against third persons whose negligence caused the death.

¹⁰ M.C.L.A. § 413.15, M.S.A. 17.189, Michigan's elective provision was eliminated on Sept. 18, 1952. See also The Longshoremen's and Harbor Workers Comp. Act, 33 U.S.C. § 905 concerning exclusiveness of liability.

¹¹ Larson, *op. cit. supra* note 1, § 74, at 205.

¹² *Ibid.* It is stated that only Ohio, N.H. and W.Va. are in this category. These states are "state fund" states whose laws do not contain these "elective" provisions. Here the employee was not deprived of his common law right of action against a third party by the enactment of the Comp. Act.

¹³ California and Wisconsin have this type of statute.

within which to sue a third party before the subrogation rights of the employer come into existence; and (d) some acts give the employer the absolute right to sue within a limited period before the employee may sue.¹⁴ Under most statutes the operative act affecting the assignment of the employee's cause of action to the employer or its carrier is the payment of compensation.

In most states the elective provision is eliminated by express language. It is stated that where the injury is caused by a third party, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies. The injured employee or his dependents are also allowed to proceed against a third party.¹⁵

The new statutes also expressly provide for distribution of the proceeds of the third party action to the employee and the employer.

The following section will identify some classes which fall within the designation of third parties. These classes are not, however, exclusive, the only real limitation being the statutes themselves and the imagination of the attorney.

Although general principles of common law are important in these cases, some steps must be taken in accordance with the rules of the workmen's compensation statutes. Since the statutes of no two states' laws are exactly alike, the attorney must be careful to investigate the effect of the statute on his case with respect to the following areas:

- whether or not an election is called for;
- who has priority of action in regard to the starting of the suit;
- whether consent of the employer or state agency is necessary to start the action;
- if notice to the state agency is required;
- if approval of a settlement by the state agency or consent by the employer is a prerequisite; and
- what, if any, laws are involved regarding division of the proceeds of the recovery.

Only until these matters are firmly resolved should the attorney proceed. To overlook any of these requisites may prove fatal to the case.

¹⁴ In New York, Illinois and Michigan the employee has the priority of suit while in Massachusetts the employer has the priority. The time in which suit is to be brought by the class giving the first choice varies from state to state.

¹⁵ Certain classes of persons are not considered to be third parties. The Michigan Workmen's Comp. Act, M.C.L.A. § 413.15, M.S.A. 17.189, provides in part: "Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies, but such injured employee or his dependents or their personal representative may also proceed to enforce the liability of such third party for damages in accordance with the provisions of this section."

III. Who Are Third Parties?

A. *The Employer as Third Party.*

In all jurisdictions the immediate employer is expressly excluded from the category of third parties either by means of the exclusive remedy provision and/or the subrogation provision.¹⁶ This exclusion is supported by the rationale of workmen's compensation laws, i.e., the employer gave up his common law defense in return for a fixed liability. It should be emphasized that the exclusion is operative only where the injuries arise out of an employee-employer relationship. If this relationship does not exist, then the exclusion would not exist.¹⁷

This exclusion in respect to the employer has generally been upheld in actions against a municipality by an employee of one department whose injury was caused by the negligence of an employee of another department. As to the employee, the universal rule seems to be that the city is not a third party even if the city activity in one or both of the departments is of a proprietary nature.¹⁸

With respect to private enterprises, however, this immunity does not seem to apply where an employer is conducting another separate business which is responsible for the injury.¹⁹

One area that bears watching with respect to employer's immunity is that of the loaned servant doctrine. One employer, called the general employer, hires employees for the sole purpose of renting their services to another employer, called the special employer. These employees are usually rented for a specific task and time. The general employer usually retains the right to send any employee he wishes to the special employer. He also retains the right to hire and fire, with the special employer having only the right to return the employee to the control of the general employer if not satisfied with the work of the employee. The special employer necessarily controls the work of the employee while working for him. Wages are always paid by the general employer.

Under the usual agreement if the employee suffers a compensable injury while working for the special employer, the obligation to pay the statutory compensation benefit remains with the general employer.

¹⁶ Larson, *op. cit. supra* note 1, 1.204 § 73.30; Reynolds v. Harbert, 232 Ore. 586, 375 P. 2d 245 (1962).

¹⁷ Reynolds v. Harbert, *supra* note 16 held that a truck driver who was an independent subcontractor, was not a "workman" and therefore not subject to the exclusive remedy provision of the act.

¹⁸ Bross v. City of Detroit, 262 Mich. 447, 247 N.W. 714 (1933), here a fireman, was injured in a collision with a streetcar owned and operated by the City; Osborne v. Commonwealth, 353 S.W. 2d 373 (Ky. App. 1962).

¹⁹ Thomas v. Hycon, Inc., 244 F. Supp. 151 (D.D.C. 1965), wherein plaintiff, an employee of Edmonds Co., was injured while operating a train owned by Hycon, a wholly owned subsidiary of Edmonds, and as such was a separate business amenable to a tort action by plaintiff; Reed v. The Yaka, 373 U.S. 410 (1963). Here plaintiff's employer, a stevedoring company, leased a vessel under a bareboat charter. The plaintiff sustained injuries because of unseaworthiness of the vessel.

Many plaintiff's lawyers argue that if the injury was caused by the negligence of the special employer, the special employer is a third party and therefore subject to the common law action brought by the injured employee.²⁰

The special employer's usual defenses to this action are based upon the fact that at the time of the injury he had the right of control, and therefore he is entitled to the benefit of the exclusion privileges of the general employer, or that the employee's damages are limited to the provisions of the workmen's compensation act.

The case law in this area varies from state to state, but a few general rules can be stated. The old doctrine of control is generally rejected. The courts want to know whether or not there is any consent, implied or express, by the employee to make the special employer his employer.²¹

The court also wants to know if any special circumstances exist which are determinative of the employment relationship. If, for example, the special employer or the employee had previously taken an inconsistent position, he might be estopped.²²

Similar disputes arise where two employers are jointly engaged in performing a task, and the employee of one of them is injured as the result of the negligence of the other employer. The defense is usually that of joint venture. One case suggests that this defense will bar recovery because each employer enjoys the exclusion rights of the other.²³

B. Co-Employees as Third Parties.

In the absence of a statutory exclusion a co-employee is generally held to be a third party under the compensation act. One jurisdiction, however, in the apparent absence of a statute, extended the immunity of the employer to the co-employee on the theory that the co-employee "was the alter ego of the employer in the operation of the employer's machinery."²⁴

This statutory exclusion has been upheld even in those instances wherein the co-employee was an officer, director and majority stockholder and even when the accident complained of allegedly constituted

²⁰ *Wisecarver v. Riese Tool & Mfg. Co.*, No. 25,255, D.E.D. Mich., S.D. 1967.

²¹ *Quick v. Allegheny Const. Equipment Co.*, 361 Pa. 377, 65 A.2d 238 (1949); 1 *Larson, op. cit. supra* note 1, § 48.10.

²² *Wisecarver v. Riese Tool and Mfg. Co.*, *supra* note 20; see also *Davis v. Wakelee*, 156 U.S. 680 (1895). The latter case held that where an employer before the Workmen's Comp. Board was successful in his assertion that he was not the employer in fact, he could not thereafter deny that status where he is subsequently sued as a third party.

²³ *Cook v. Peter Kiewit Sons Co.*, 15 Utah 2d 20, 386 P. 2d 616 (1963), held joint venture existed and the action was dismissed because two companies agreed to perform the work contracted for by one.

²⁴ *Landrum v. Middaugh*, 117 Ohio St. 608, 160 N.E. 691 (1927); but see *Morrow v. Hume*, 131 Ohio St. 319, 3 N.E. 2d 39 (1936) where the court permitted a suit against a corporate officer.

a violation of a state safety statute amounting to gross negligence and/or willful misconduct.²⁵

Some of the cases as to the applicability of the immunity provision seem to depend on whether the co-employee was acting in the scope of his employment²⁶ or whether the plaintiff was entitled to workmen's compensation as a result of the injury.²⁷ It would appear, however, that a definite rule is enunciated that can be used as a standard in all cases of this nature. This rule is that co-employee immunity applies only if both employers are acting in the scope of their employment when the plaintiff employee was injured.²⁸

Questions of a co-employee's immunity frequently arise out of automobile accidents, especially on company owned parking lots.²⁹ In such cases the courts apply the general principles set out above to determine if the immunity is applicable. In such a situation, however, one jurisdiction held that while a tort action against the driver co-employee was barred, an action could be brought against the co-employee's husband as owner of the automobile.³⁰

Third party actions against a working partner of a co-partnership are barred under the co-employee immunity doctrine as well as by the immunity of the immediate employer,³¹ but a wholly-owned subsidiary of the employer is generally found not to be a fellow employee of an injured employee of the parent corporation.³²

It necessarily follows that the scope of the co-employee immunity is co-extensive with the policy of the individual state with respect to which activities of an employee are considered within the scope of his employment. The more liberal that policy, the broader will be the scope of the immunity.

²⁵ *Pettaway v. McConaghy*, 367 Mich. 651, 116 N.W. 2d 789 (1962); *Evans v. Rohrbach*, 35 N.J. Supp. 260, 113 A. 2d 838 (1955), here the court held that an employee's suit against a director was not barred by the Compensation Act.

²⁶ *McIvor v. Savage*, 220 Cal. App. 2d 127, 240 P. 2d 881 (1963), the fact that an employee suffered a compensable injury did not establish per se that the co-employee was also acting within the scope of his employment.

²⁷ *McNaughton v. Sims*, 247 So.C. 382, 147 S.E. 2d 631 (1966).

²⁸ *Helmick v. Paine*, 369 Mich. 114, 119 N.W. 2d 574 (1963).

²⁹ *Larson*, *op. cit. supra* note 1, 1967 supp. vol. II, 174.

³⁰ *Ladner v. VanderBand*, 376 Mich. 321, 136 N.W. 2d 916 (1965); *Bowman v. Atlanta Baggage & Cab Co.*, 173 F.Supp. 282 (1959). In this case the plaintiff was driving a truck owned by his employer and was injured in an accident with another truck leased by his employer, but driven by a fellow employee. Held, that action could be maintained against the defendant, the owner of the leased truck.

³¹ *Ayers v. Genter*, 367 Mich. 675, 117 N.W. 2d 38 (1962); *Minsky v. Baitelman*, 281 App. Div. 910, 120 N.Y.S. 2d 86 (1953).

³² *Daisernia v. Co-Operative G.L.F. Holding Corp.*, 26 App. Div. 2d 594, 270 N.Y.S. 2d 542 (1966).

C. Statutory Employers as Third Parties.

A majority of jurisdictions have statutes which provide that if "A" (the principal) contracts with "B" (the contractor) and "B" is not subject to the compensation law, or is subject but fails to secure the necessary compensation insurance, then "A" shall be required to pay compensation to an employee of "B" if "B's" employee is injured on the job. This rule would also include any employees of "C," a subcontractor of "B," if "A" has given permission that any part of the work shall be performed under subcontract. In many of these jurisdictions the proceeding for compensation can be taken directly against the principal. In effect, these statutes make "A," the principal, an employer for the purpose of compensation.³³

Query: Under such a statute, can a statutory employer (principal) be subject to a third party claim by an employee of the contractor or subcontractor injured by the negligence of the principal or his employees? First, if the principal pays, or could be made to pay the compensation, the great majority of the cases hold that he enjoys the immunity of the immediate employer from all third party suits.³⁴

If the contractor or subcontractor is insured, however, most courts hold that the principal remains a third party subject to common law liability.³⁵

Some state statutes restrict the application of the statutory employer provision to those instances wherein the subcontractor is doing work which is a part of the business trade or occupation of the principal contractor. Therefore, a finding that the work of the subcontractor did not fall within the above statutory provision might form a basis for a third party action against the principal even in those states that grant general immunity to the principal under its compensation act.³⁶

D. Subcontractors and/or Their Employees on Same Job Site as Third Parties.

A majority of the jurisdictions, both state and federal, has held that subcontractors are third parties amenable to suits in an action by the principal contractor, his employees, co-subcontractors and their employees where the injury complained of occurred on the same job site.³⁷ The rationale for the decision in respect to the general contractor is that while the general contractor may, under statute, be ultimately liable for

³³ Mich. Workmen's Comp. Act, M.C.L.A. § 411.10(1) (10), M.S.A. 17.150.

³⁴ 2 Larson *op. cit. supra* note 1, 1967 supp. vol. II, 175-76.

³⁵ Ayers v. Genter, *supra* note 31; Minsky v. Baitelman *supra* note 31; Schulte v. Am. Box Board Co., 358 Mich. 21, 99 N.W. 2d 367 (1959).

³⁶ Sears, Roebuck & Co. v. Wallace, 172 F. 2d 802 (4th Cir. 1949).

³⁷ 2 Larson, *op. cit. supra* note 1, 1967 supp. vol. II, 177.

compensation to employees of the subcontractor, the subcontractor can never be liable for compensation to employees of the general contractor. A few jurisdictions, however, exclude by statutory language any and all such suits arising out of injuries occurring on the same job site or by judicially interpreting the compensation act to be the exclusive remedy for all injuries arising out of a common employment or in furtherance of a common enterprise or accomplishment of a related purpose.³⁸

Some states permit third party actions in construction cases involving injuries on the same job site. An excellent law review article on this subject may be found in 29 NACCA Law Journal.³⁹ Some points in the article deserve special note, regarding the sections dealing with the liability of an owner-contractee to the employees of the contractor and/or employees of a subcontractor. As the article states, owner-contractees are clearly "third persons" and as such are not covered by the exclusive provisions of the compensation statute. This conclusion creates innumerable possibilities for expanding the concept of employees' remedies.

Since construction work is clearly "inherently hazardous" the owner-contractee is liable in the following situations:

- where the owner personally interferes with the work and his act occasions the injury;

- where the act for which the contract is made is unlawful;

- where the acts performed create a public nuisance;

- where the owner-contractee is bound to do a thing efficiently by a statute and an injury results from inefficiency;

- where the owner-contractee knowingly hires an incompetent general contractor;

- where the owner-contractee exercises any supervision over the work or over the employees of the general contractor or subcontractors.

Cases supporting all of the fact situations noted above may be found in the cited article.

E. Employer's Insured, His Agents or Employees as Third Parties.

The question as to whether or not a carrier is a proper third party usually arises under two general fact situations:

- (1) The alleged negligence of the carrier contributed directly to the compensable injury, i.e., the carrier with a duty to inspect the hazard which caused the injury either failed to inspect or negligently conducted the inspection.

³⁸ *Pettiti v. Edward J. McHugh & Son, Inc.*, 341 Mass. 566, 171 N.E. 2d 169 (1960); *Fisher v. Rudie Wilhelm Warehouse Co.*, 224 Ore. 26, 355 P. 2d 242 (1960).

³⁹ 29 NACCA L. J. 74 (1963).

- (2) The alleged negligence of the carrier aggravated the compensable injury in that the carrier failed to provide necessary medical treatment or provided such treatment in a negligent manner.

The carrier's defense to both these forms of action is usually that of exclusiveness of the remedy or that it has the immunity of the employer.

Some jurisdictions have statutes in which the compensation carrier shares the immunity of the employer, while in other jurisdictions the courts have held that a carrier is not a third party and is therefore immune from a common law action.⁴⁰

Other jurisdictions have upheld a third party action against the carrier on the ground that a carrier is neither an employer nor a person in the same employ as the injured worker.⁴¹ Where there is an allegation of aggravation of compensable injury based upon a medical question, the courts generally deny the right. Since the alleged negligence did not cause the original injury the courts are more apt to extend the exclusive remedy provision to the alleged negligent act, especially where the carrier must bear the burden of paying compensation not only for the disability resulting from the original injury but also that resulting from the negligent act as well.

F. Physician Selected by Carrier or Employer as Third Parties.

In most jurisdictions third parties' actions against the alleged malpractice of doctors, as distinct from an action against the employer or carrier in the selection of doctors, are allowed.⁴² The general rule, however, may not apply if the doctor is a company doctor, and especially if the treatment complained of was given on the employer's premises.⁴³ Decisions in this latter instance are based upon the rule that the doctor is a fellow employee and as such is immune from the common law action. This same general rule would apply to hospitals selected by the employer or carrier.⁴⁴

In a case where the treating doctor was also the employer, a court held that an action could be maintained against the doctor-employer in his capacity as a doctor. In that capacity he was regarded as a person other than the employer and as such subject to the common law action.⁴⁵

⁴⁰ 2 Larson *op. cit. supra* note 1, 1967 supp. vol. II, 172 records that Indiana, New Hampshire, New Mexico, Texas and Wisconsin by statute grant immunity to carriers and by court decision immunity is granted in Idaho, Maryland, Missouri, and New Jersey.

⁴¹ Scaglione v. Liberty Mutual Ins. Co., Civil Action No. 45238, Wayne Cir. Ct.; Fabricius v. Montgomery Elevator Co., 254 Iowa 1319, 121 N.W. 2d, 361 (1963).

⁴² 2 Larson *op. cit. supra* note 1, Sec. 72.61, at 186.

⁴³ Hayes v. Marshall Field and Co., 351 Ill. App. 329, 115 N.E. 2d 99 (1953).

⁴⁴ Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W. 2d 167 (1960).

⁴⁵ Duprey v. Shane, 109 Cal. App. 586, 241 P. 2d 78 (1952).

*G. Makers, Sellers, Installers and Repairers of Instruments
Causing Injury as Third Parties.*

Thousands of workers are injured in industrial accidents each year because of negligence or breach of warranty on the part of manufacturers, retailers, installers and repairers of instruments used by the employee. Since these parties generally are not the employer or a person in the employ of the employer, they are considered to be third parties under the provisions of the compensation act.

In order to secure the proper perspective, however, plaintiffs' attorneys must first understand that if the products caused injury to their client, a cause of action might exist. The liability of the parties named above could exist because of any of the following reasons:

- (1) Breach of an express or implied warranty.
- (2) Misrepresentation.
- (3) Negligent designing, manufacturing or installing:
 - (a) Failure to install adequate safety devices;
 - (b) Employment of safety devices which failed in use;
 - (c) Failure to make a test or safety check after manufacture;
 - (d) Construction from unsafe or unsuitable material;
 - (e) Failure to plan for the foreseeable use which was intended by the manufacturer;
 - (f) Failure to foresee consequences of ordinary wear and tear and improper maintenance on the part of the user;
 - (g) The addition of an unnecessary part to the product;
 - (h) Failure to measure up to industrial standards;
 - (i) Failure to warn of the dangers arising from the defective design.
- (4) Violation of a state safety statute.

The existence of any of the above negligent acts, inter alia, creates a new field for the attorney of the injured employee. One has only to think of the vast numbers of injuries caused by presses, cranes, hoists, pneumatic tools and other machine injuries to realize the importance of this theory of liability.⁴⁶

In the field of occupational diseases there have been new determinations of liability that in the past were considered non-occupational in origin. Many of these diseases resulted from contact with chemicals, drugs, solvents, soaps and other toxic materials. Here again the makers

⁴⁶ Robb and Philo Lawyers Desk Reference, Chapter 10.

and sellers of these materials are third parties and may be liable for the reasons stated above with regard to industrial machines.

IV. Distribution of Third Party Proceeds

Most subrogation statutes provide a method for distribution of the proceeds arising out of a successful third party action.⁴⁷ In jurisdictions which do not have subrogation statutes, however, the injured employee can keep both his compensation payments and whatever he can get from the third party tort-feasor.⁴⁸

Under the subrogation statute in most jurisdictions the attorney fees and expenses are permissible deductions prior to any distribution of the recovery to either the employer or the employee. Some jurisdictions require the employer or carrier to bear his proportional share of the fees and expenses⁴⁹ while others do not.⁵⁰ In determining the amount for which the carrier is entitled to be reimbursed, most jurisdictions include medical and funeral expenses as part of the term "compensation," even if these items are not expressly stated as being those for which reimbursement will be made.

The fact that a verdict in a third party action designated a certain part of the proceeds for pain and suffering does not seem to affect the

⁴⁷ Mich. Workmen's Comp. Act, M.C.L.A. § 413.15, M.S.A. 17.189 *op. cit. supra* note 10. Prior to the entry of judgment, either the employer or his insurance carrier or the employee or his personal representative may settle their claims as their interest shall appear and may execute releases therefor.

Such settlement and release by the employee shall not be a bar to action by the employer or its compensation insurance carrier to proceed against said third party for any interest or claim it might have. In the event the injured employee or his dependents or personal representative shall settle their claim for injury or death, or commence proceeding thereon against the third party before the payment of workmen's compensation, such recovery or commencement of proceedings shall not act as an election of remedies and any moneys to be recovered shall be applied as herein provided.

In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or his dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workmen's compensation insurance carrier for any amount paid or payable under the workmen's compensation act to date of recovery, and the balance shall forthwith be paid to the employee or his dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits.

Expenses of recovery shall be the reasonable expenditures, including attorney fees, incurred in effecting such recovery. Attorney fees, unless otherwise agreed upon, shall be divided among the attorneys for the plaintiff as directed by the court. The expenses of recovery above mentioned shall be apportioned by the court between the parties as their interests appear at the time of said recovery.

Compensation benefits referred to in this section shall in each instance include but not be limited to all expenses incurred under sections 4 and 8 of part 2 of this act, being sections 412.4 and 412.8 of the Compiled Laws of 1948. As Amended P.A. 1952, No. 155, § 1, Eff. Sept. 18.

⁴⁸ Ohio and West Virginia appear to be the only two states where this is possible.

⁴⁹ Scaglione v. Liberty Mut. Ins. Co. *supra* note 41.

⁵⁰ 2 Larson *op. cit. supra* note 1, 1967 supp. vol. II, 209.

right of carriers to be reimbursed in full, even if some of the segregated proceeds must be used.⁵¹

Most jurisdictions treat the proceeds received from a settlement or judgment alike, insofar as the carrier's right of reimbursement is concerned. In Michigan, however, because of the wording of the statute, there are cases now pending before the Supreme Court of that State to determine the effects of a settlement prior to judgment on the carrier's right to reimbursement.⁵²

V. Future of Third Party Claims

There is a growing awareness by attorneys of the advantages that ensue from third party actions. The growth of new theories of liability as in the field of product liability, and the liberal verdicts possible with regard to the worth of the human body and life, force an awareness by attorneys of the advantages of these actions. The future of claims of this nature is bright indeed.

There are some statutory and practical defects existing, however, which cannot be overlooked, for they materially affect this future. The first of these defects is that of the "elective" provision which still exists in some states. Only through an elimination of this type of provision can an injured employee secure the full benefits due him for his industrial injury.

Second, as a practical matter, increased benefit rates under compensation acts, because of the statutory provisions related to disbursement of third party proceeds, can and will have an effect upon the future of third party claims. In a state like Michigan, prior to September 1, 1965 an injured employee, other than a permanent and total case, was limited to 500 weeks of compensation or a total average maximum recovery of compensation of \$20,000. This amount approximated \$18,000 in a death case. Under this situation, a third party recovery in excess of \$50,000 was of benefit to the injured employee or his dependent.

As a result of the increase in benefits in September, 1965 and the elimination of the 500 week rule, a reasonable weekly average compensation rate of \$75.00 now exists in Michigan.⁵³

⁵¹ *United States v. Hayes*, 254 F. Supp. 849 (W.D. Ky. 1966); *Bumbarger v. Bumbarger*, 190 Pa. Super. 571, 155 A. 2d 216 (1959).

⁵² *Deanna K. Gamble, Adm. of the Estate of Myrtella Wheeler v. American Asbestos Products & Michigan State Accident Fund*, Case No. 51.496, Michigan Supreme Court, 1967.

⁵³ This \$75 average is a purely educated guess. It is based upon the fact that labor unions in Michigan estimated the average payment under the old rates for two dependents as approximately \$40. Under the new rates the benefit for two dependents is \$75 a week.

When one considers that with the elimination of the 500 week rule this \$75 could be paid for life, a third party recovery to be meaningful to the injured employee must now exceed \$100,000 in order to be meaningful. The need for this amount of a recovery will of necessity reduce the number of third party actions initiated in the future.

There are those who will say that this is true only in the cases of employee-initiated third party claims; that with these increased benefits if the employee does not sue, the employer, because of his increased cost, will avail himself of this remedy. While this should be true, it will probably not come to pass for some very practical reasons. For instance, in the area of third party malpractice suits against physicians and hospitals, can one reasonably expect employers or carriers to initiate suits against doctors or hospitals selected by the employer or the carrier? Can or should one expect an employer to sue his carrier for failure to inspect, will the the employer sue any of his suppliers under a theory of product liability? To ask the question is to answer it. In brief, the future of third party claims lies with employee-initiated claims and not with those initiated by the employer.

It necessarily follows that in order for this theory of liability to continue, some changes must be made in the statutory provisions requiring the reimbursement of the employer in full. For none should expect the employee to bear the burden and uncertainty involved in litigating his claim if he is not assured of some return therefrom. Here again, some might argue that since the employee is adequately or more equitably compensated under the new rates, why is it so necessary that right of action against the third party tort-feasor should continue. The answer to this is that the employee is not and cannot be adequately or equitably compensated under a system which pays a percentage of his lost wages and deprives him of the right to recover for pain and suffering. Further, requiring a wrongdoer to pay for his wrongdoing has an intrinsic value of its own over and above the monetary amount involved. It imposes an obligation upon all to be considerate of the health and welfare of others and underscores the safety theme in the industrial life of our country.

The future of third party claims and the future of the injured employee can be assured only if some means are devised, either by judicial decision or legislative changes, that will leave to the employee a specific percentage of the third party recovery, regardless of the amount of the recovery which is not subject to the compensation law. This is not a completely new concept. In one state the court, in the case of an employee-initiated suit, distributed the proceeds between the employee and the carrier upon an "equitable basis" under a provision to that effect.⁵⁴

It may also be supported on a philosophical-legal basis that this ex-

⁵⁴ *Hartford Acc. & Indem. Co. v. McNair*, 152 So. 2d 805 (Fla. 1963).

empt amount is intended to compensate the employee for that portion of his rights (one-third loss of wages and damages for pain and suffering) which are not covered under the compensation act. In other words, it did not form part of the original bargaining between the employer and the employee. Without some such innovation, the future of third party actions is in doubt.

Finally, one would hope that this discussion will stimulate some to take an interest in the field of third party actions on behalf of injured employees who need the assistance of attorneys.