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Third Party Actions Against Co-Employees

John E. Martindale*

Because many attorneys view the awards under workmen's compensation statutes as inadequate, the "third party action" is a popular means of escaping the restrictions such statutes place on common law tort actions. In the past, the practicality of third party actions has depended heavily on either the unusual circumstance of a wealthy tort-feasor, or on a finding of vicarious liability on the part of some person or organization more collectible than the ordinary tort-feasor in industrial accident situations. However, the widespread prosperity which the United States has experienced since the Second World War and the increasing private ownership of property in this country have changed the average workingman's economic status considerably. To some extent, he no longer enjoys his former "judgment proof" status. Collectibility has combined with a certain amount of confusion over the exclusiveness of workmen's compensation law to make actions against co-employee tort-feasors relatively rare. Since the workman's collectibility has considerably improved, it is worthwhile to give some consideration to the extent to which the workmen's compensation statutes allow common law negligence actions against the injured party's fellow servant.

Industrial injuries involving intentional torts or situations where the workmen's compensation statute has not been complied with by the employer may, in many cases, relieve the plaintiff of the restrictions placed on his common law rights. It is not our purpose here to explore these exceptions, but to define the extent to which a right of action exists against the co-employee tort-feasor who is clearly within the course and scope of his employment when he inflicts the injury on his fellow worker.

The workmen's compensation laws in every state permit common law actions against third parties. The question of who is, and who is not a third party is by no means as uniformly decided. As far as the fellow servant is concerned, only seventeen of the fifty state statutes clearly grant immunity from tort actions. These acts state that they shall be the exclusive remedy against the employer and "those conducting his business" or against "every officer, manager, agent, representative, or employee" of the employer, or else specifically grant common law rights


2 2 Larson § 71.00, 71.30.

against "any person not in the same employ." 4 The compensation statutes of the remaining thirty-three states grant common law rights against "third persons," or "persons other than the employer." 5 Ohio may be considered with this group although the Ohio statute actually makes no mention of any rights against third parties. The third party action in Ohio is entirely a matter of judicial construction. The question of whether a fellow employee is a "third person" amenable to suit has not been decided in all of the states in the last mentioned group. Fourteen of these states appear to have no reported cases on point. 6 However, out of the remaining nineteen, only four states have interpreted their workmen's compensation acts to grant immunity to fellow employees. 7 In the remaining fifteen, it is well settled that the compensation acts do not bar common law negligence actions against co-employees. 8 This ratio—four denying the action to fifteen all


7 Idaho: White v. Ponozzo, 77 Idaho 276, 291 P. 2d 843 (1955); Mass.: Caira v. Caira, 296 Mass. 448, 6 N. E. 2d 431 (1937); Tenn.: Majors v. Moneymaker, 196 Tenn. 698, 270 S. W. 2d 328 (1954); Ky.: Mahan v. Litton, 321 S. W. 2d 243 (1959). However, the last cited case is a weak one. In the opinion the court says, "We regret the appellee's confidence in the strength of his case is such that he has declined to file a brief. This conclusion is not so obvious to us." Actually, the question of the defendant fellow servant qualifying as a third party is considered nowhere in the opinion.

lowing it—indicates that eventually a sound majority of those states which have not specifically barred the action by statute will allow co-employees to be treated as third parties in industrial negligence cases.

The correctness of the decisions of the various courts in allowing or not allowing tort immunity for fellow servants has been argued at length elsewhere. Generally speaking it involves nothing more than the ordinary rules of statutory interpretation. If any of the interpretations already on the books are to be changed, it will probably be through change in the statutes themselves.

Bearing in mind the common law doctrine of the "vice-principal," one might consider certain employees in supervisory categories to be the alter ego of the employer and therefore share the employer's immunity from suit. Apparently the only court which has seriously approached this idea is the Supreme Court of Ohio. In a 1927 case involving an employee injured by his foreman's negligent operation of industrial machinery, the Ohio court held the foreman to be immune from suit. But the reasoning of the court indicates that the defendant's supervisory capacity was not the deciding factor, but rather the court's construction of the compensation statute as an exclusive remedy. In 1936, in *Morrow v. Hume,* a similar situation came before the Ohio Court when a salesman was injured while in a car negligently driven by his company's vice-president in charge of sales. Here, however, the court allowed the plaintiff to recover, and distinguished its earlier ruling on the unusual bases that a foreman operating machinery was the alter ego of the employer, but that a vice-president driving his own car was not. Although the auto trip was admitted to be clearly within the course and scope of the employment of both parties, the court stated that no facts had been alleged to show the employer had any power or right to direct the operation and control of the automobile.

In *Ellis v. Garwood,* in 1957, the Ohio court held that be-

(Continued from preceding page)


12 131 Ohio St. 319, 3 N. E. 2d 39 (1936).

13 168 Ohio St. 241; 143 N. E. 2d 715 (1957).
cause of the distinction made in *Morrow v. Hume*, ordinary fellow-employees were not immune from suit in automobile accidents within the course and scope of their employment. Two years later, in *Gee v. Horvath*, a case involving negligent injury of an employee by a fellow employee using industrial machinery, the court dropped the attempted distinction between automobiles and machinery and clearly stated that an employee under workmen's compensation was not precluded from maintaining an action against a fellow employee. Although this case involves an employee v. employee relation rather than an employee v. foreman relation, it makes fairly clear the court's intention to do away with any alter ego immunity for supervisors in the future.

In the other fourteen states, no distinction appears to have been made on the basis of supervisory employee sharing his employer's tort immunity. Common law actions have been allowed against foremen, general managers, and corporate officers. In Minnesota, a partnership is recognized as an entity, so that the partnership is immune from suit; but the individual partners may be sued as third persons under the compensation act. This last distinction has been rejected elsewhere, however, and generally the courts recognize a partnership as being no different from its individual members, and grant immunity to both.

In an individually owned business, clearly the owner is the employer and immune as such. Similarly, a trustee who runs a business for a proprietary owner is held to replace the owner and fall heir to his immunity and is not a mere agent of the owner.

Company physicians who treat employees are also third parties amenable to suit. One New Jersey court holds that a company doctor may not be sued for aggravation of an injury for

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14 *Supra* note 8.
16 Wells v. Lavitt, *supra* note 8; Wolford v. Chambersburg Oil & Gas Co. 86 D & C 496, 3 Lebanon 342 (1952).
17 Kimbro v. Holladay, *supra* note 8; Echols v. Chattanooga Mercantile Co., 74 Ga. App. 18, 38 S. E. 2d 675 (1946). (This case involves a willful assault, but the reasoning indicates the outcome would be the same for mere negligence.)
18 Morrow v. Hume, *supra* note 12; Borochoff v. Fowler, 98 Ga. App. 411, 105 S. E. 2d 764 (1958); Adams v. Fidelity & Casualty Co. of N. Y., 107 So. 2d 496 (1958); Leidy v. Taliaferro, 260 S. W. 2d 504 Mo. (1953); Webster v. Stewart, 210 Mich. 13, 177 N. W. 230 (1920) (Decided before the Michigan statute was changed.)
21 Wolford v. Chambersburg Oil & Gas Co., *supra* note 16.
which compensation has been paid on the grounds that there is no new injury.\(^{22}\) This would appear to be contrary to the usually accepted law on malpractice, and the decision has been criticized in another New Jersey appellate court.\(^{23}\) Elsewhere, medical malpractice is recognized as giving the employee a cause of action whether the original injury was compensable or not.\(^{24}\)

Ordinarily, if an injured employee attempts to sue an executive in tort he must show that the defendant was a direct participant in the wrong alleged.\(^{25}\) However, this is not always so. There are some jurisdictions which accept the Restatement of Agency rule that a servant may in a single act be the servant of two masters at the same time.\(^{20}\) An application of this rule can yield interesting results. *Leidy v. Taliaferro*\(^{27}\) involved a company president who had sent two employees in a company truck to pick up some of his personal property. This was acknowledged to be within his authority as corporation president, and the trip was within the course and scope of the employees' employment with the corporation. During the trip, one of the two men was injured as a result of the other's negligent driving. Stating the rule that a servant may serve two masters in a single act, the court held that even though the injury was compensable as employment connected, the injured party could maintain an action against the company president on the basis of vicarious liability. The negligent driver was the servant of both the corporation and its president as an individual at the same time.

In some jurisdictions, the liability imposed by statute on owners of motor vehicles may be used to reach a co-employee executive who was not an actual participant in the negligent act.\(^{28}\) This has been allowed even in a state where the co-employee driver was himself statutorily immune from suit.\(^{29}\)

Where they exist, statutory provisions for subrogation\(^{30}\) or election of remedies\(^{31}\) may have the same limiting effect on the value of co-employee third party actions which they have on any third party action. However, the present trend indicates that co-employee third party actions may be allowed in a majority of the fifty states in the near future, and as the value of a workmen's compensation award depreciates yearly and the collectibility of the co-employee improves, such actions can hardly avoid becoming more and more attractive.

\(^{22}\) Burns v. Vilardo, 60 A. 2d, 94 N. J. L. (1948).


\(^{26}\) Restatement, Second, Agency § 226, 236.

\(^{27}\) *Supra* note 18.

\(^{28}\) Gleason v. Sing, *supra* note 19.


\(^{30}\) 2 Larson § 74.

\(^{31}\) 2 Larson § 73.