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Exclusive Remedy Under Workers' Compensation: An Update on Exceptions to the General Rule

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by Stephen A. Markey, III

Introduction

The enactment of the first workers' compensation legislation in 1911 was a reaction to modern industrial development of the early 20th century and the unjust results under the common law tort system.[1] Workers' compensation laws are designed to provide injured employees with a remedy for accidental injuries "arising out of and in the course of their employment."[2] Under workers' compensation legislation an employee loses his common law tort remedies in exchange for a measure of guaranteed compensation without proof of fault against the employer. The employer in turn is able to avoid the possibility of extremely high damage awards in exchange for a limited type of strict liability.[3] Recently, however, employers have been subject to increased exposure to liability in industrial accidents. The once preclusive workers' compensation remedy is in danger of being eroded through exceptions to the exclusive remedy rule. This erosion has caused increased debate within the legal community concerning the future of workers' compensation.

Historical Background

Prior to the development of the concept of workers' compensation, an employee who was injured in the course of employment had to rely on common law tort actions against his employer. The injured employee had to prove that his injury was due solely to the negligence of his employer. On the other hand, the employer was able to utilize the defenses of contributory negligence, fellow servant rule and assumption of risk.[4] This difficult burden of proof coupled with the defenses available to the employer resulted in very few judgments in favor of the injured employee or his dependents.[5]

At this point in history the prevailing economic philosophy, as evidenced by common law decisions, was based on the "economic theory that there was complete mobility in labor, that the supply of work was unlimited, and that the worker was an entirely free agent, under no compulsion to enter into the employment."[6] The parties were allegedly free to contract. Also, an employer was generally not held liable for injuries caused solely by the negligence of fellow employees. This fellow servant rule, as it is commonly called, first appeared in the English case of *Priestly v. Fowler.*[7] In *Priestly* the court held that an employee assumes the risk of the negligence of his fellow servants when he accepts employment.

The almost total lack of recovery under the common law rules, together with modern industrial conditions, helped to make the inequities under the common law system more evident. This awareness helped to bring about statutory change in employers' liability for injuries to employees.

During the first ten years of the twentieth century, several states adopted employers' liability statutes.[8] These laws put strict limits on the common law defenses previously available to the employer, but still required the employee to prove the employer's negligence. Although these laws did little to improve the workers' plight, they paved the way for modern day workers' compensation laws.

In 1908 the first general workers' compensation statute was enacted in the United States for the benefit of government employees.[9] This was soon followed in 1910 by the first state workers' compensation legislation which was enacted in New York.[10] Today, every state and the District of Columbia, as well as American Samoa, Guam, Puerto Rico and the United States Virgin Islands, have enacted workers' compensation legislation.[11] Under these statutes an injured employee and his dependents in the case of his death are able to recover compensation for the employee's disability or death, together with medical and certain other incidental expenses from the employer, regardless of fault and with few exceptions. However, this right to compensation is the employee's exclusive remedy, and in the absence of a showing that the employer intentionally caused the injury, the employee has no right to sue his employer. Generally, workers' compensation statutes, including the exclusive remedy provisions, have been held constitutional.[12]

Most workers' compensation statutes provide for an exception to the exclusivity rule in the case of intentional torts on the part of the employer, and when the employer fails to secure workers' compensation insurance. Even so, the basic exclusiveness rule, which becomes applicable either by compulsion or by the employer's election, authorizes as the exclusive remedy of the employee or his dependents the right to receive a measure of guaranteed compensation from his employer and the employer's insurer.[13] The exclusive remedy rule is "part of the *quid pro quo*" or balancing of sacrifices between employers and employees.[14] The employer assumes liability regardless of fault, but he is no longer subject to large damage verdicts. Therefore, an employee injured in the course of his employment, even if he has not applied for workers' compensation, will generally be barred from holding his employer liable in tort.[15]

The exclusiveness provision also precludes the employer from statutory tort liability under state and federal statutes, whenever the injury falls within the compensation act.[16] In the absence of an exception to the general rule an employer will not be held liable under a statute such as a

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survivorship statute, for injuries covered by workers' compensation.[17] Even in the case of gross negligence on the part of the employer, the exclusiveness provision generally applies.[18]

At the inception of workers' compensation legislation, the exclusive remedy trade off was not much of a sacrifice for workers.[19] However, as the common law tort remedies have expanded, so has the sacrifice.[20] This widening of the trade-off gap has caused a great deal of questioning of workers' compensation laws.[21] It has also caused legislators and many of the courts to carve out exceptions to the exclusivity rule.

Failure to Insure

Today, every United States jurisdiction[22] requires employers to secure insurance, or to establish that they are able to provide self-insurance, for injured employees.[23] The vast majority of these jurisdictions provide that an employer who has failed to secure insurance and is not properly self-insured may be held liable to suit with his "common law defenses abrogated."[24] In fact, the workers' compensation statutes in two jurisdictions, Alaska[25] and Iowa[26], provide that there is a presumption of negligence on the part of the employer whenever the employer fails to insure. Those jurisdictions which do not establish an exception to the exclusivity rule for failure to insure, provide injured employees with compensation benefits from other sources or hold the employer liable for compensation benefits even without insurance.[27]

Intentional Torts

Most workers' compensation statutes provide for an exception to the exclusivity rule when the employer intentionally inflicts the injury on the employee.[28] Those jurisdictions not providing an exception for intentional torts generally allow for extra compensation when the employer's act is willful. The majority view is that the employer's conduct must be more than negligent for this exception to apply.[29] The intentional tort exception is premised on the theory that the injury suffered cannot be considered accidental.[30] Since most workers' compensation laws cover only accidental injuries, intentional torts are not within these statutes. In order for an employee to sue his employer for an intentional tort, the employer's conduct must be "willful and deliberate."[31]

"Deliberate intention" requires that the employer "have formed a specific intent to injure an employee (or at least to injure someone)."[32] The majority rule is that "injuries caused by the gross, wanton, willful, deliberate, intentional, reckless, culpable or malicious negligence, breach of statute, or other misconduct" on the part of the employer not amounting to "genuine intentional injury", are still considered "accidental".[33] Even a deliberate violation of a statute by an employer falls short of intentional injury" are still considered "accidental."[33] Even a deliberate violation of the employer must actually desire to injure an employee in order for this exception to apply. This rule is followed by the majority of jurisdictions regardless of the occasional outrageous results, such as in the decision of the Supreme Court of Georgia in *Fowler v. Southern Wire & Iron, Inc.*[35]

In *Fowler* the president of Southern Wire & Iron, Inc. was sued by an employee on the theory that he willfully and intentionally caused the employee's injury. The Georgia Court of Appeals found that the employer had willfully injured the employee because the employee had refused to turn in the names of fellow employees who had attended a union meeting.[36] The employer allegedly ordered the employee to work bare handed in a vat of acid. The Georgia Supreme Court reversed, holding that the willful failure to keep a workplace safe did not amount to a deliberate intention to injure and thus no actual assault was made on the employee.[37]

A different result was reached in *Doney v. Tambouratgis*[38] where the California Supreme Court found that an employee who had been assaulted by her employer could sue her employer outside of the workers' compensation statute.[39] In *Doney* the injured employee was a nude dancer and cocktail waitress at the defendant's bar. One night after the bar closed for the evening, her employer requested that she "accompany him upstairs to his office to discuss a customer complaint."[40] Once upstairs the employer attempted to rape her. The court permitted the employee to sue her employer for assault and battery, finding that the exclusive remedy section of California's workers' compensation act did not apply.

In *Johnson v. Mountaire Farms of Delmarva, Inc.*,[41] the Maryland Court of Appeals held that "deliberate intention" to cause an employee's injury implies that there must be a "formation by the employer of a specific intention to cause injury or death combined with some action aimed at accomplishing such result, as opposed to mere employer negligence or gross negligence."[42] In *Johnson* a sixteen year old employee was electrocuted while using a sump pump. Approximately, two months prior to this accident, the employer had been cited by the Maryland Occupational Safety and Health Administration (MOSHA) for the dangerous condition of the sump pump. Soon after the employer deliberately misinformed MOSHA that they had corrected this violation, Johnson was electrocuted. The Maryland Court of Appeals concluded that Maryland followed the majority view that "reckless, wanton or willful misconduct differs from intentional wrongdoing."[43] In so holding the court noted that to date only two states, Ohio and West Virginia, have permitted something less than an actual "deliberate intention" to injure to fulfill the intentional tort exception.[44]

In *Blankenship v. Cincinnati Milacron Chems., Inc.*,[45] the Ohio Supreme Court held that an employer could be held liable to an injured employee, outside of the workers' compensation act, if the employer knew or should have known that unsafe work conditions existed which may injure an employee. In *Mandolidis v. Elkins Indus., Inc.*,[46] the West Virginia Supreme Court of Appeals held that an employee could sue his employer for damages when the employer's conduct, which caused injury or death, was willful wanton and reckless. These expanded views, however,

are clearly the minority view.[47] Because the intentional tort exception is difficult to prove, injured employees often try to show that their injuries fall outside of workers' compensation statutes altogether.

Dual Capacity

A. Generally

The dual capacity doctrine is possibly the most widely debated judicially created exception to the exclusivity rule. The dual capacity doctrine is an attempt "to eliminate the discrepancy between the full tort remedy available to workers injured by third parties and the limited benefits available to workers injured in identical ways by employers."[48] Under this exception an employee injured during the course of employment by a piece of equipment which was manufactured by the employer, would be in the same position as an employee injured by that same equipment if manufactured by a third party. Both parties could sue the manufacturer in tort. In essence, the dual capacity doctrine allows an employee to sue his employer, outside of the workers' compensation statute, whenever the employer stands in a capacity other than just an "employer" at the time of the injury of the employee.[49] The employer is therefore considered a third party and thus outside of the workers' compensation statute.[50]

The dual capacity exception was first recognized in *Duprey v. Shane.*[51] In *Duprey*, a practical nurse working for a chiropractor was injured when she attempted to catch a patient who had fallen off the treatment table. Her employer, in the course of attempting to treat her injuries, caused further injuries. The nurse sued her employer for medical malpractice. She alleged that the exclusive remedy provision of California's Workers' Compensation Act was inapplicable when the employer was acting as a "person other than the employer."[52] The California court agreed with the employee, and held "that an employee injured in an industrial accident may sue the attending physician for malpractice if the original injury is aggravated as a result of the doctor's negligence, and that such right exists whether the attending doctor is the insurance doctor or the employer."[53] *Duprey* was later cited with approval in *Hoffman v. Rogers*[54] which extended *Duprey* to include physicians who were also co-employees of the injured employee. The California Court of Appeals found *Duprey* to be controlling, even though after *Duprey* was decided, the California legislature amended the Labor Code so that injuries caused by co-employees fell within the Workers' Compensation Act.[55] The court held that:

> Following the decision in *Duprey v. Shane* . . . section 3601 of the Labor Code was amended to include a provision that when conditions for compensation exist an employee who injures a fellow employee while acting in the scope of his employment shall not be liable unless he acted willfully or recklessly or was intoxicated. That amendment cannot be interpreted as overturning the rules established by the *Duprey* case.[56]

The reasoning in both *Duprey* and *Hoffman* have been criticized as irrational, in those states such as California,[57] which have enacted workers' compensation statutes containing sections designed to exclude "coemployees from the range of usable parties."[58] Professor Larson in *The Law of Workmen's Compensation* stated that *Hoffman*, was the result of the *Duprey* court's "thoughtless extrapolation" of the dual capacity doctrine.[59] Evidently, the California legislature agreed that the *Hoffman* and *Duprey* decisions were incorrect, because in 1982 the California legislature rejected *Duprey* and the dual capacity doctrine.[60]

While Professor Larson is critical of California's interpretation of the dual capacity doctrine, he does not reject the doctrine completely. Instead, he states that "[s]ince the term 'dual capacity' has proven to be subject to such misapplication and abuse, the only effective remedy is to jettison it altogether, and substitute the term 'dual persona doctrine.'"[61] Professor Larson's dual persona theory, which has been accepted in a few jurisdictions, allows an employer to be sued outside of workers' compensation "if—and only if—he possesses a second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal person."[62]

The reasoning Professor Larson gives for his position is his belief that courts have overexpanded the dual capacity doctrine. This overexpansion could ultimately destroy the exclusiveness of workers' compensation because employers may have many capacities during "the course of a day's work—as landowner, land occupier, products manufacturer, installer, modifier, vendor, bailor, repairman, vehicle owner, shipowner, doctor, hospital, health services provider, self-insurer, safety inspector. . . ."[63]

B. Medical Malpractice

Despite Professor Larson's criticisms of the dual capacity doctrine, this exception to the exclusive remedy rule has received favorable reception in a number of courts.[64] One of the more common areas of litigation wherein the doctrine is used is the area of medical malpractice. This doctrine has been applied where an employee is first injured in the course of employment and is subsequently negligently treated by the employing hospital or doctor.[65] In *Guy v. Arthur H. Thomas Co.*,[66] the Ohio Supreme Court allowed an employee to sue her employer for medical malpractice. In that case, the employee worked in a lab at Christ Hospital. She contracted mercury poisoning during her employment and sued the hospital for malpractice alleging that the hospital's failure to diagnose her injury led to an aggravation of that injury. The court found the hospital had acted in a dual capacity and at the time of the treatment was acting as a hospital.[67]

In the malpractice area, many courts have accepted the dual capacity doctrine on the theory that the medical treatment by the employer or co-worker is separate from the employment relationship.[68] Therefore, it is not uncommon in these situations for an injured worker to receive workers' compensation benefits for the original injury, as well as recover in tort for the subsequent aggravation of the injury.[69] In other cases an employer or co-employee may be liable for the tort claim but not under workers' compensation.[70] However, the majority of jurisdictions reject the dual capacity rule altogether in the area of medical treatment.[71]

In *McCormick v. Caterpiller Tractor Co.*,[72] it was held that an employee could not sue his employer for the negligent diagnosis and treatment of a work related foot injury. The Illinois court held that the dual capacity test is whether the employer's conduct in his second capacity, generates additional unrelated obligations from his ordinary obligations as employer.[73] The court concluded by holding that the Illinois Workers' Compensation Act requires the furnishing of medical treatment to employees, and thus there was not an unrelated obligation. The fact that the employer provided these medical services himself did not change the employee's exclusive remedy under the Act. The same conclusions reached in *McCormick* have also been reached in many other jurisdictions.[74]

C. Products Liability

Another area where the dual capacity exception has received some favorable reception is that of products liability. When an employee's injury is alleged to have been caused by a product which was manufac-

tured or modified by the employer, some courts have permitted employees to sue outside of workers' compensation. Within this area of the dual capacity exception, courts have distinguished between products manufactured or modified solely for the employer's use, and products manufactured for sale to the general public.[75]

When an employer manufactures or modifies machinery or equipment solely for the use in its own business, it has unanimously been held by those jurisdictions which have addressed the issue, that the dual capacity doctrine is inapplicable.[76] An employee under these circumstances is not considered to have separate and distinct capacities as manufacturer and employer.[77]

In *Stone v. United States Steel Corp.*,[78] an employee was injured when a steel plate, manufactured by the parent company of his employer, collapsed. The employee alleged that the exclusive remedy rule did not apply because his employer was acting in the capacity of manufacturer. The court ruled that the dual capacity rule did not apply because the employer's conduct in producing the steel plate did not create obligations apart from the ordinary employer-employee relationship. The court found that the injuries arose out of "the very nature of the work" and thus came within the workers' compensation scheme.[79]

In *Goetz v. Avildsen Tool & Machs., Inc.*,[80] the court held that workers' compensation was the sole remedy of an employee who was injured during the course of employment by a drill hopper machine which was manufactured by the employer. In *Goetz* the employer had manufactured the defective machine for the use in its own plant and it was not offered for sale to the general public. The court recognized that in Illinois the dual capacity doctrine applies only when an employee is injured by "a breach of duty independent of the duty of an employer *qua* employer."[81] The court found that under the circumstances of this case the employee had not shown an independent duty outside of the duty as employer. The employer was not in the business of selling the allegedly defective machinery, and therefore the plaintiff could not sue outside of workers' compensation.[82] While jurisdictions which have decided the issue agree that the dual capacity doctrine should not be applied when the employer manufactures a machine solely for his own use, two jurisdictions, California and Ohio, have permitted an employee to sue his employer if he is injured by defects in products which were manufactured for the public.[83] The reasoning in these cases is that an employer is deemed to have a separate and distinct duty to produce safe products, and shielding employers from employee suits would reduce the deterrent value of strict liability for defective products.[84]

In *Mercer v. Uniroyal, Inc.*,[85] a truckdriver for Uniroyal was injured in an accident caused by a tire blowout. The defective tire was supplied and manufactured by Uniroyal, and the truckdriver brought a products liability suit against his employer. The trial court granted Uniroyal's motion for summary judgment holding workers' compensation was the employee's exclusive remedy. The appellate court reversed holding that the injuries did not arise out of the employment relationship and that Uniroyal was acting in the capacity of manufacturer as well as employer.[86] This holding has now been limited by *Bakonyi v. Ralston Purina Co.*,[87] where the Supreme Court of Ohio held that the dual capacity doctrine did not apply if an employment relationship predominated at the time of the injury.[88]

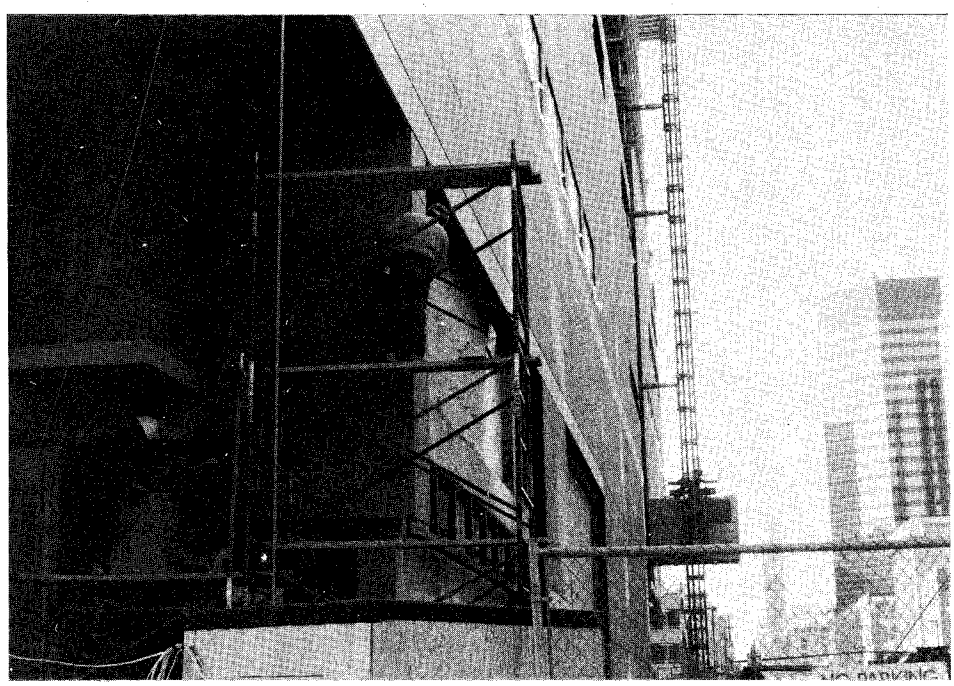
In *Douglas v. E. & J. Gallo Winery*,[89] employees brought an action against their employer when scaffolding on which they were working collapsed. The trial court granted the employer's demurrer without leave to amend on the grounds that the employee's exclusive remedy was under workers' compensation.[90] The court of appeals for the fifth district reversed, holding that under the dual capacity doctrine:

> a plaintiff may state a cause of action (or causes of action) based on manufacturer's liability even though the defendant is also the plaintiff's employer and the alleged injuries take place in the course of employment, provided that the product involved is manufactured by the employer for sale *to the public* rather than being manufactured for the sole use of the employee.[91]

The *Douglas* decision was later upheld in *Mareno v. Leslie's Pool Mart*[92] and again in *Bell v. Industrial Vangas, Inc.*[93] In 1982 the California legislature rejected the dual capacity doctrine, but made an exception for injuries caused by a defective product manufactured by the employer.[94] Outside of Ohio and California, all other "American jurisdictions hold an employer, who is also the manufacturer, modifier, installer, or distributor of a product used in the work, cannot be held liable in damages to his own employee on the theory of products liability."[95]

D. Land Owners

The dual capacity doctrine has also been asserted in cases where personal injury suits are brought against employers who were also the owners of the property on which the employee was injured. This exception to the exclusive remedy rule has generally been rejected.[96] On the other hand, it has been held that injured longshoremen or harbor workers could maintain personal injury actions against vessel owners or operators outside of the Longshoremen's and Harbor Workers' Compensation Act.[97] The reasoning behind these decisions is that employers, as vessel owners or operators, owe a duty to employees separate than that as employer.[98]



E. Road Maintenance

One final area where the dual capacity exception has been used in attempting to circumvent the exclusive remedy rule is in suits against state governments for negligent maintenance of roads. Again the virtually unanimous view is that government employees cannot sue their employers for failure to properly maintain the highway.[99]

Bad Faith

One of the newest recognized exceptions to the exclusive remedy rule is an action holding the self-insured employer or an employer's insurance carrier liable for acting in bad faith. This cause of action is said to arise where an employer or carrier acts in bad faith in the payment, processing, investigation or settlement of a compensable injury.[100] However, in actuality the bad faith exception is an extension of the generally accepted intentional tort exception. In most cases, bad faith suits are brought under the tort of intentional infliction of emotional distress.[101]

The leading case adopting the bad faith exception is generally considered to be *Unruk v. Truck Ins. Exch.*[102] In *Unruk* the plaintiff had suffered an industrial back injury. The insurer had the plaintiff placed under surveillance and one of the investigators allegedly talked the plaintiff into going to Disneyland where she was persuaded to cross a rope bridge. In her complaint the plaintiff alleged that she suffered physical injuries from her activities at Disneyland and suffered a mental breakdown because her activities were photographed. The court held that it could not give its "approval to such misconduct which tramples upon the employee's rights," and therefore, the employee was permitted to hold the carrier liable in tort.[103]

Recently in *Gallagher v. Bituminous Fire & Marine Ins.*,[104] the Court of Appeals of Maryland recognized that an employer's insurer could be held liable for an intentional tort for the nonpayment of compensation awarded to an injured employee. In *Gallagher*, the plaintiff injured his back while working as a carpenter for an employer who was insured for workers' compensation by the defendant. Subsequent to his injury, the Maryland Workers' Compensation Commission issued an award ordering the defendant to start paying temporary total disability benefits and to provide prompt medical treatment. It was not until two and a half months later, when the Commission again ordered temporary total benefits and medical payments to be paid by the insurer, that the plaintiff began receiving benefits. In recognizing that the plaintiff may have a cause of action against the employer's insurer for emotional distress, the court stated that the original "back injury . . . is separate from the alleged cause of the claimed tortious injury (intentional failure to pay). The language of Section 15 [exclusive remedy provision] does not reach Gallagher's intentional tort claims."[105] In so holding, Maryland joined the fast growing number of states which recognize a bad faith exception to the exclusivity rule.[106]

Although the bad faith rule is considered to be a separate exception to the general exclusivity rule, as previously stated it is merely an extention of the intentional tort exception. When the insurer's conduct does not rise to an intentional level, most jurisdictions provide for statutory penalties only. These penalties are usually also applicable to the employer's conduct.[107]

Conclusion

The courts' willingness to make exceptions to the exclusivity rule has shown that the present workers' compensation laws are not considered adequate or equitable by many jurisdictions. Each of the carved out exceptions attempts to address a particular inequity by juxtaposing the workers' compensation system with the modern tort system. Despite the disparity between modern tort law recovery and workers' compensation recovery, and the injustice often caused by that disparity, most courts have abstained from creating exceptions to the exclusive remedy rule. As already noted, only a few jurisdictions have accepted the dual capacity doctrine. The bad faith exception has been adopted by a number of jurisdictions, but the bad faith exception is actually part of the intentional tort exception. While most jurisdictions do statutorily provide for an intentional tort exception, the reasoning for this exception is that the injury was not accidental. Therefore, intentional torts are not an exception, but rather never fell within workers' compensation.

In reality, workers' compensation is still the exclusive remedy for almost all work related injuries. "Judicial reluctance to adopt exceptions to the exclusive remedy rule has stemmed from an unwillingness to tamper with what courts see as the fixed terms of carefully designed legislative bargain underlying workers' compensation."[108] Originally, the exclusive remedy trade off was not much of a worker sacrifice when balanced against the unlikelihood of recovery under the old common law tort system. However, modern expanded tort remedies have tipped the scale in favor of the employer in many instances.

Just as the courts have been unwilling to accept the doctrinal exceptions to the exclusivity rule, so too have the majority of state legislatures. This failure to reform was attributed by the National Commission on State Workmen's Compensation Laws to the lack of understanding, of relatively complex workers' compensation laws, by state legislators.[109] Fortunately, although slow in coming, the movement by both the courts and state legislatures in recent years has been to modernize workers' compensation acts.[110]

Without substantial legislative modernization, the future of the exclusive remedy under Workers' Compensation laws is not bright. While the general rule is still a rule of exclusiveness, judicially created exceptions and piecemeal legislation have left too many uncertaintities and inconsistencies. The exclusive remedy provision is part of the backbone of workers' compensation laws and only time will tell just how far the courts will go in eroding this provision.

Notes

[1]U.S. Chamber of Commerce, *Analysis of Worker's Compensation Laws 1985*, at vii (1985 ed.).

[2]Annot., 9 A.L.R. 4th 873, 876. *See United States v. Demko*, 385 U.S. 149 (1966).

[3]M. PRESSMAN, *WORKMEN'S COMPENSATION IN MARYLAND* § 1-1 (2nd ed. 1982). *See also* 2A LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 65.11 at 12-1, 12-2, 12-6 (1983); W. PROSSER, *HANDBOOK ON THE LAW OF TORTS* § 80 at 568 (5th ed. 1984).

[4]*Analysis*, at vii; PRESSMAN, Section 1-1 at 1; *Johnson v. Mountaire Farms of Delmarva, Inc.*, 305 Md. 246, 249, 503 A.2d 708, 709 (1986); *McGarrah v. State Acc. Ins. Fund Corp.*, 651 P.2d 153, 157, n.6 (Ore. App. 1982).

[5]W. PROSSER, § 80 at 568 (5th ed. 1984).

[6]*Id.*

[7]3 M. & W. 1, 150 Eng. Rep. 1030 (1837).

[8]*Analysis*, at vii.

[9]PROSSER, *supra* note 5, at 573.

[10]*Id.*

[11]*Analysis*, at vii.

[12]*See, e.g., Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571 (1915); *Keller v. Dravco Corp.*, 441 F.2d 1239 (5th Cir. 1971); *Frazier & Son v. Leas*, 127 Md. 572, 96 A.2d 764 (1916). *See also* Note, *Important Constitutional Questions, New In Form, Raised by the Texas Workmen's Compensation Act*, 25 YALE L.J. 100 (1915-1916).

[13]2A LARSON, § 65.11 at 12-1 (1983).

[14]2A LARSON, *supra* note 13 at 12-1, 12-2; *Vineyard v. Southwest Engineering and Contracting*, 117 Ariz. 52, 570 P.2d 823 (1977).

[15]2A LARSON, *supra* note 13, at 12-9.

[16]2A LARSON, *supra* note 13 at 12-11.

[17]*See, e.g., Johnson v. Mountaire Farms of Delmarva, Inc.*, 305 Md. 246, 503 A.2d 708 (1986); *Walker v. Rowe*, 535 F. Supp. 55 (N.D. Ill. 1982); *Jackson v. Dravo Corp.*, 603 F.2d 156 (10th Cir. 1979).

[18]*See Johnson*, 503 A.2d at 708-09, 711-12.

[19]*See* Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641, 1641-44, (1983).

[20]*Id.*

[21]Policy Group of the Interdepartmental Workers' Compensation Task Force, *Workers' Compensation: Is There a Better Way?* (1977).

[22]United States jurisdictions include the District of

Columbia, American Samoa, Guam, Puerto Rico, The United States Virgin Islands, and the Federal Employees' Compensation Act (Federal appropriation) and the Longshoremen and Harbor Workers' Compensation Act.

[23]A number of jurisdictions provide for exceptions to the requirement of insurance or self-insurance in limited employment circumstances. *See Analysis*, at 3-8.

[24]*Analysis*, at 3-4; 2A LARSON, *supra* note 13, § 67.20 at 12-81. *See, e.g., Muffett v. Royster*, 147 Cal. App. 3d 289, 195 Cal. Rptr. 73 (1983); *Bancinsurance Corp. v. Daugherty*, 70 Ohio App. 2d 44, 434 N.E. 2d 282 (1980); *Williams v. Montano*, 89 N.M. 252, 550 P.2d 264 (1976); *McCoy v. Cornish*, 220 Miss. 577, 71 So. 2d 304 (1954).

[25]ALASKA ADMIN. CODE tit. 23, § 23.30.080 (October 1984).

[26]IOWA CODE ANN. § 87.21 (West 1984).

[27]*See Analysis*, at 3-4.

[28]Most statutes also provide an exception to the exclusivity rule when the intentional tort was committed by a co-employee so that the injured employee may sue his co-employee. However, most states hold the exclusive remedy rule shields an employer from actions resulting from co-employee caused injuries. *See, e.g., Athas v. Hill*, 300 Md. 133, 476 A.2d 710 (1984), and cases cited therein.

[29]81 Am. Jur. 2d, *Workmen's Compensation*, § 55 (1976).

[30]*See generally*, 2A LARSON, *supra* note 13, § 68.11.

[31]*Id.*

[32]Annotation, 96 A.L.R. 3d 1064. (1978). *See, e.g., Johnson*, 503 A.2d at 714.

[33]2A LARSON, *supra* note 13 § 68.13 at 13.9.

[34]*See, e.g., Johnson*, 503 A.2d at 712.

[35]217 Ga. 727, 124 S.E. 2d 738 (1961). *See also* 2A LARSON, *supra* note 13, § 68.13, n.11 at 13-8.

[36]104 Ga. App. 401, 122 S.E. 2d 157 (1961).

[37]*Fowler*, 124 S.E.2d at 739-40. *Fowler* was cited with approval in *Helton v. International Brands Corp.*, 155 Ga. App. 607, 271 S.E. 2d 739 (1980); and again most recently in *Reed Tool Co. v. Copelin*, 689 S.W. 2d 404 (Tex. 1985).

[38]151 Cal. Rptr. 347, 587 P.2d 1160 (1979).

[39]*Id.* at 347, 587 P.2d at 1162.

[40]*Id.* at 347, 587 P.2d at 1163.

[41]*See* footnote number 4.

[42]*Johnson v. Montaire Farms of Delmarva, Inc.*, 305 Md. 246, 503 A.2d 708, 711 (1986).

[43]*Id.* at 249, 503 A.2d at 712.

[44]*Id.* at 249, 503 A.2d at 711.

[45]69 Ohio St. 2d 608, 433 N.E.2d 572 (1982).

[46]161 W.Va. 695, 246 S.E. 2d 907 (1978).

[47]*See* 2A LARSON, *supra* note 13, § 68.13.

[48]96 HARV. L. REV. at 1648-49.

[49]GHIARDI, *Dual Capacity–An Exception to the Exclusivity of Workers' Compensation*, (American Bar Association Annual Meeting, Chicago, Illinois 1984).

[50]*Id.*

[51]39 Cal. 2d 781, 249 P.2d 8 (1952). *See generally* GHIARDI, *supra*.

[52]*Duprey*, 249 P.2d at 13.

[53]*Id.* 249 P.2d at 15.

[54]22 Cal. App. 3d 655, 99 Cal. Rptr. 455 (1972).

[55]CAL. LAB. CODE, § 3601 (West 1982); 2A LARSON, *supra* note 13, § 72.61(b).

[56]*Hoffman*, 99 Cal. Rptr. at 459.

[57]CAL. LAB. CODE § 3601 (West 1982).

[58]2A LARSON, *supra* note 13, § 72.61(b) at 14-200.

[59]*Id.* at 14-203.

[60]CAL. LAB. CODE, § 3602 (West 1982), (With an exception when the injury is caused by a defective product manufactured by the employer, § 3602(b)(3)).

[61]2A LARSON, *supra* note 13, § 72.81 at 14-230.

[62]*Id.* at 14-229.

[63]*Id.* at 14-229, 14-230.

[64]Annotation, *Modern Status: "Dual Capacity Doctrine" as Basis for Employee's Recovery from Employer in Tort*, 23 A.L.R. 4th 1151, 1156 (1983) [hereinafter *Modern Status*].

[65]*See Duprey*, 249 P.2d 8.

[66]55 Ohio St. 2d 183, 378 N.E.2d 488 (1978).

[67]*Id.* at 185, 378 N.E.2d at 490.

[68]*Modern Status, supra* note 64, at 1156.

[69]*Id.* at 1171. *See, e.g., Duprey*, 249 P.2d 8; *Guy*, 378 N.E.2d 488.

[70]This result may occur when an employer or co-employee negligently treats an employee's non-work related injury. *See Wojik v. Aluminum Co. of America*, 18 Misc. 2d 740, 183 N.Y.S. 2d 351 (1959).

[71]*See Modern Status, supra* note 64 at 1172-77.

[72]85 Ill. 2d 352, 423 N.E.2d 876 (1981).

[73]*Id.* at 354, 423 N.E.2d at 878.

[74]*See Budzichowski v. Bell Tel. Co.*, 299 Pa. Super. 392, 445 A.2d 811 (1982); *Jenkins v. Sabourin*, 104 Wis. 2d 309, 311 N.W.2d 600 (1981); *Ross v. Schubert*, 388 N.E. 2d 623 (Ind. App. 1979); *Trotter v. Litton Systems, Inc.*, 370 So. 2d 244 (Miss. 1979); *McAlister v. Methodist Hospital of Memphis*, 550 S.W. 2d 240 (Tenn. 1977). *But see Wright v. District Court*, 661 P.2d 1167 (Colo. 1983). *See generally Modern Status, supra* at 1172-77.

[75]*Modern Status, supra* note 64, at 1156-57.

[76]*Id.* at 1179; Annotation, *Workmen's Compensation Act as Furnishing Exclusive Remedy for Employee Injured by Product Manufactured, Sold, or Distributed by Employer*, 9 A.L.R. 4th 873, 880-84 (1981) [hereinafter *Exclusive Remedy*].

[77]Annotation, 23 A.L.R. 4th at 1177; Annot. 9 A.L.R. 4th at 879-84. *See, e.g., Mapson v. Montgomery White Trucks, Inc.*, 357 So. 2d 971 (Ala. 1978); *Goetz v. Avildsen Tool & Machines, Inc.*, 82 Ill. App. 3d 1164, 403 N.E. 2d 555 (1980); *Longever v. Revere Copper and Brass, Inc.*, 408 N.E.2d 857 (Mass. 1980); *DePaolo v. Spaulding Fibre Company, Inc.*, 119 N.H. 89, 397 A.2d 1048 (1978); *Taylor v. Pfandler Sybron Corp.*, 150 N.J. Super. 48, 374 A.2d 1222 (1977); *Gerger v. Campbell*, 98 Wis. 2d 282, 297 N.W.2d 183 (1980).

[78]384 So. 2d 17 (Ala. 1980).

[79]*Id.* at 18.

[80]*See* footnote number 77.

[81]*Goetz*, 82 Ill. App. 3d at 1168, 403 N.E. 2d at 559. *See also Sago v. Amax Aluminum Mill Products, Inc.*, 67 Ill. App. 3d 271 Ill. 250, 385 N.E. 2d 17 (1978).

[82]GHIARDI, at 18; *See also Modern Status, supra* note 64, § 8 at 1177-85; *Exclusive Remedy, supra* note 76, § 4 at 879-84.

[83]2A LARSON, *supra* note 13 § 72.83 at 14-239; Note: *Bell v. Industrial Vangas: The Employer-Manufacturer and the Dilemma of Dual Capacity*, 34 HASTINGS L.J. 461 (1982). *See also* GHIARDI, at 18; *Modern Status, supra* note 64, § 8 at 1177-85; *Exclusive Remedy, supra* note 76, § 4 at 879-84.

[84]GHIARDI, at 19.

[85]49 Ohio App. 2d 279, 361 N.E. 2d 492 (1976).

[86]*Id.* at 283, 361 N.E.2d at 496.

[87]17 Ohio St. 3d 154, 478 N.E. 2d 241 (1985).

[88]*Id.* at 157, 478 N.E. 2d at 244.

[89]69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977).

[90]*Id.* at 105, 137 Cal. Rptr. at 799.

[91]*Id.* at 799.

[92]110 Cal. App. 3d 179, 167 Cal. Rptr. 747 (1980).

[93]30 Cal. 3d 268, 179 Cal Rptr. 30 (1981).

[94]CAL. LAB. CODE, Section 3602(b)(3) (West 1982). *See Shields v. San Diego County*, 155 Cal. App. 3d 103, 202 Cal. Rptr. 30 (1984).

[95]2A LARSON, *supra* note 13 § 72.83 and cases cited therein.

[96]*Id.* Section 72.82 at 14-234; Annot., 23 A.L.R. 4th at 1163; *Holzworth v. Fuller*, 448 A.2d 394 (N.H. 1982); *Gore v. Amoco Production Co.*, 616 S.W. 2d 289 (Tex. Civ. App. 1981); *Billy v. Consolidated Machine Tool Corp.*, 51 N.Y. 2d 152, 432 N.Y.S. 2d 879, 412 N.E. 2d 934 (1980); *Doe v. St. Michael's Medical Center*, 184 N.J. Super. 1, 445 A.2d 40 (1982); *Jackson v. Gibson*, 409 N.E. 2d 1236 (Ind. App. 1980); *State v. Purdy*, 601 P. 2d 258 (Alaska 1979); *Dintelman v. Granite City Steel Co.*, 35 Ill. App. 3d 509, 341 N.E. 2d 425 (1976). *But see Sharp v. Gallagher*, 94 Ill. App. 3d 1128, 419 N.E. 2d 443 (1981).

[97]33 U.S.C.A. §§ 901-950 (West 1986).

[98]*See Reed v. S.S. Yaka*, 373 U.S. 410; *Jackson v. Lykes Bros. S.S. Co.*, 386 U.S. 731; *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342 (5th Cir. 1980). *But see Baker v. Pacific Far East Lines, Inc.*, 451 F. Supp. 84 (N.D. Cal. 1978); *Richardson v. Norfolk Shipbuilding & Drydock Corp.*, 621 F.2d 633 (4th Cir. 1980).

[99]*See State v. Purdy*, 601 P.2d 258 (Alaska 1979); *Ind. State Highway Dept. v. Robertson*, 482 N.E. 2d 495 (Ind. 1985); *Thompson v. Lewis County*, 92 Wash. 2d 204, 595 P.2d 541 (1979); *Wright v. Moore*, 380 So. 2d 172 (La. App. 1979). *But see Mazurek v. Skaar*, 60 Wis. 2d 420, 210 N.W. 2d 691 (1973).

[100]*See, e.g., Gallagher v. Bituminous Fire & Marine Ins. Co.*, 303 Md. 201, 492 A.2d 1280 (1985); *Traveler's Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985); *Sam Rogers Enterprises v. Williams*, 401 So. 2d 1388 (1981 Fla. App.); *Anderson v. Continental Insurance Co.*, 85 Wis. 2d 675, 271 N.W. 2d 368 (1978); *Unruk v. Truck Insurance Exchange*, 7 Cal. 3d 616, 102 Cal. Rptr. 815, 498 P.2d 1063 (1972).

[101]*See* Footnote 100.

[102]7 Cal. 3d 616, 102 Cal. Rptr. 815, 498 P.2d 1063 (1972).

[103]102 Cal. Rptr. at 825.

[104]303 Md. 201, 492 A.2d 1280 (1985).

[105]*Id.* 492 A.2d at 1283. *See also Young v. Hartford Accident & Indemnity*, 303 Md. 182, 492 A.2d 1270 (1985).

[106]*See* note 100. *But see Argonaut Ins. Co. v. Superior Court*, 164 Cal. App.3d 320, 210 Cal. Rptr. 417 (1985); *Cook v. Optimum/Ideal Manager Inc.*, 473 N.E.2d 334 (Ill. App. 1985); *Hajciar v. Crawford & Co.*, 369 N.W.2d 860 (Mich. 1985); *Young v. USF&G Co.*, 588 S.W.2d 40 (Mo. App. 1979).

[107]2A LARSON, *supra* note 13 § 69.30 at 13-130 to 132.

[108]96 HARV. L. REV. at 1654.

[109]The Report of the National Commission on State Workmen's Compensation Laws (July 1972); 96 HARV. L. REV. at 1657.

[110]96 HARV. L. REV. at 1658.

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