generally been held that insurance does not create a right to sue where one otherwise would not exist.9

Nevertheless, in view of the theory underlying the Colorado rule with respect to charities, the decision in the principal case is tenable. Colorado and a minority of other jurisdictions have adopted the theory that a charity is liable when its representatives have committed a tort, but judgment will be entered against it only when it appears that the judgment can be satisfied without depleting the trust funds.10 As a matter of technical reasoning, then, the holding in the instant case can be said to be strictly in accord with the rationale of the rule of immunity since on the one hand, the charity was liable, hence the prerequisite to liability by the insurer is fulfilled, and on the other hand, payment by the insurer will prevent depletion of the fund. The insurer should hardly be able to assert as a defense to liability of the insured that the latter has no funds with which to pay the judgment. In answer it may be urged that in the absence of assets not devoted to charitable purposes, there is no cause of action, under the Colorado theory; hence, predicating liability on an insurance policy is unwarranted.

Irrespective of the validity of the technical justification of the decision, the result reached appears desirable in view of the general disapproval of the rule of immunity.11 In any event, making an exception to the rule of immunity in cases where there is insurance preserves whatever policy the rule represents and accords justice to the injured party. Furthermore, the insurance company should not be able to assert against the insured or against third parties whom the insured may have desired to protect that the premium was paid for a non-existent risk.12 Sanction for this view is found in two recent Tennessee cases13 and in cases allowing actions by minor children against parents, when the parent is covered by a liability insurance policy.14

Workmen's Compensation—Subrogation of Insurer—Effect of Settlement by Third Party with Injured Employee—[Georgia].—On April 13, 1937, a motorcycle policeman was injured by a manufacturer's payroll car, which he was escorting. On May 20,
1937, the manufacturer settled with the injured officer for $700, without notice to the insurer on a compensation-insurance policy issued to the City of Augusta. Subsequently, on October 19, 1937, the policeman recovered from the insurer, with the approval of the Industrial Board of Georgia, $100 as workmen’s compensation and medical expenses. Under a Georgia statute subrogating an insurer to an injured employee’s claim against a third-party tortfeasor who pays damages, the insurer brought suit to be reimbursed from the defendant manufacturer for the $100 paid the policeman. Held, despite its prior settlement with the officer, defendant was liable to the insurer for the compensation paid. It was apparently deemed immaterial: (1) that the claim, if any, to which the insurance company was subrogated had ceased to exist at the date when the insurance company made payment to the officer; (2) that double recovery was permitted against the tortfeasor; and (3) that the plaintiff had not established liability of the defendant to the injured officer. General Accident, Fire and Life Assurance Co. v. John P. King Mfg. Co.

It is generally said that an employer or insurer who pays compensation to the injured employee steps into the employee’s shoes with respect to his claim against the third-party tortfeasor. This is in accord with the general theory of subrogation. In the present case the employee claimed and received compensation before he settled with the third party and released his claim. Since an insurer is generally held not to be subrogated until it has made payment, it would seem that at the time the employee received compensation there no longer remained any claim against the third party to which the insurer could be subrogated. In absence of statutory dictate to the contrary this view seems logical. A subrogation theory indicating that the insurer was subrogated before payment, possibly at the time the employee was injured, cannot be

Additional information from briefs of counsel allow a statement of facts more detailed than that found in the court’s opinion.


RECENT CASES

6 See Right of Compensated Employee to Sue Third Party Tortfeasor, 40 Yale L. J. 1108 (1931). But see Everard v. Woman's Home Companion Reading Club, 122 S.W. (2d) 51, 58 (Mo. App. 1938): “We think it is clear that, under the statute, the moment the accident happened the employer became liable to the employee for compensation to be paid according to the provisions of the compensation law; and that the employer was from that moment subrogated to the right to recover from the negligent third party any amount which the employee would have been entitled to recover, subject, of course, to the rights and liabilities of all the parties being so determined in subsequent proper procedure for that purpose.”

Hal. M. Stanley, Chairman, Georgia Industrial Board, in a letter to the writer, dated Feb. 16, 1940, said: “It is my opinion that the words ‘subrogation’ and ‘reimbursement’ do not set forth alternative methods of recovering from a third-party tortfeasor.”


New York Workmen's Compensation Law § 15 (8), (9), § 29 (5). Section 29 (5) reads in part: “... such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment. ...”

The court said: “the constitutional issue narrows down to the question as to whether the Legislature had the power to give to the employer or insurance carrier a cause of action over against the wrongdoer. It is well settled that the Legislature may create a liability unknown at common law, provided that in so doing it does not violate legal fundamentals. ... The fact that the wrongdoer may have compromised with the decedent’s dependents, so that
The Illinois Workmen's Compensation Act, safeguarding against this situation by providing that where the employee is injured by a third-party tortfeasor not under the act, no release or settlement of a claim or satisfaction of judgment in a proceeding for damages is valid without the written consent of both employer and employee or his personal representative. Although no cases on this point have been found it would not release the wrongdoer from this other cause of action given by the statute.

In Foster & Glassell Co., Ltd. v. Knight Bros., 152 La. 596, 93 So. 913 (1922), the third party under "article 2315 [sic] of the Civil Code" filed a plea of prescription to an action brought by the employer, who claimed to be subrogated to the rights of his injured employee. The court upheld the plea, saying that the action was one ex delicto and that the employer could have no right against the third party greater than that of the employee. However, the third person was held liable to the employer on the theory that an employer upon paying compensation for injuries to an employee sustained through the fault and negligence of a third person has two causes of action: one by way of subrogation and on behalf of the employee under the Louisiana Workmen's Compensation Law § 7, La. Gen. Stat. Ann. (Dart. 1939) § 439, and the other for indemnification as on implied or quasi-contract for reimbursement for the money it was compelled to pay on account of the third person's fault. Against this second cause of action, the plea of prescription was not valid.

In Illinois, where the employee, employer, and third person are all under the act, the common-law right of action of the employee against the third person has been held to have been abolished by the act, Ill. Rev. Stat. (1939) c. 48, § 143 [Section 6 of the Compensation Act]; O'Brien v. Chicago City R. Co., 305 Ill. 244, 137 N.E. 214, (1922) (decided under the Workmen's Compensation Act of 1913, Ill. L. 1913, p. 335). Under these circumstances, "... the right of employee or personal representative to recover against such other person shall be transferred to his employer, and such employer may bring legal proceedings against such other person to recover the damages sustained, in an amount not exceeding the aggregate amount of compensation payable under this Act, by reason of the injury or death of such employee," Ill. Rev. Stat. (1939) c. 48, § 166 [Section 29 of the Compensation Act].

The employer may commence his action against the third person only after the amount of compensation payable to the employee has been fixed and determined, Friebel v. Chicago City R. Co., 280 Ill. 76, 117 N.E. 467 (1917); Gones v. Fisher, 286 Ill. 666, 122 N.E. 95 (1919). However, every action for personal injury must be commenced within two years after the cause of action has accrued, Ill. Rev. Stat. (1939) c. 83, § 16, and every action for wrongful death must be brought within one year after the death, Ill. Rev. Stat. (1939) c. 83, § 16. Often the employee or his representative and the employer cannot agree as to whether compensation should be paid, and if so, in what amount. In many of these cases compensation is not determined and fixed until more than two years after the injury or more than one year after the death, inasmuch as the decision of the industrial commission is reviewable by the circuit court with further review possible by the supreme court. In such cases the employer's right of action is barred even before he is in a position to commence suit for reimbursement, and the third party is relieved completely of any burden for the injury he caused. Not only is this true in the case of injury to the employee, Schlitz Brewing Co. v. Chicago R. Co., 307 Ill. 322, 138 N.E. 658 (1923), but also in the case where the employee has been killed, Havana Nat'l Bank for Use of Hartford Accident & Indemnity Co. v. Tazewell Club, 298 Ill. App. 393, 19 N.E. (2d) 228 (1939). In the former case it is said, and the words are quoted in the latter case: "We feel bound to hold that the right of the employer to sue is not a new cause of action created by section 29, but is the employee's right of action taken from him and transferred to the employer. We recognize this construction will in many cases defeat any recovery from a third
seem that a third-party tortfeasor who settled with an injured employee without complying with the statute would subject himself to the risk of an additional suit for the amount of workmen's compensation paid by the employer. At least one court, disapproving as a matter of policy a double penalty, has validated a settlement where the statutory requirement of consent was unfulfilled. In *State Compensation Ins. Fund v. Thackery*\(^4\) the controlling California statute,\(^5\) similar to the Illinois act, provided that no release or settlement of any kind for damages by reason of a third person's injuring an employee, should be valid without the written consent of both employer and employee, or one of them together with the commission. The employee settled with the tortfeasor, and neither the employer nor the commission was notified. The commission, as insurer, could not recover from the third party the compensation paid the employee. The court said, "It is not the intent of these enactments to allow a double recovery of the amount of damages which the employee has sustained under such circumstances as are shown in the record herein. To say that a release so obtained would be void is not equivalent to approval of a second demand for damages paid and satisfied, nor of the execution of a penalty not justified by the wording of the statute construed."\(^6\)

The purpose of the consent statutes is to implement the provisions of the compensation acts which provide for minimization of the burden on industry where the injury has been the fault of a third party outside of the industry. One of the general aims of workmen's compensation statutes is to make available to an employee injured within the scope of his employment, quickly and without proof of employer fault, a statutorily determined sum for medical expenses and temporary support.\(^7\) In most cases an employee's injury within the scope of his employment is considered a risk of the industry to be borne by the industry itself, but where the injury is the fault of a third party outside of the business the policy of the statutes is to shift the ultimate burden

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\(^6\) However, Daniel O. Carmell, Ass't Attorney General of Illinois, in a letter to the writer dated January 18, 1940, said with reference to the Illinois consent requirement: "The Legislative intention in making this amendment was to prevent third parties from making direct settlements with employees of employers who are liable to pay compensation and from closing out the employer's right of subrogation. If the third party settled with the employee without the written consent of the employer, he did so at his peril."

\(^7\) Dodd, Administration of Workmen's Compensation 611-16 (1936), sets forth four objectives of workmen's compensation acts: 1) to secure immediate medical or hospital service for an injured employee and prompt commencement of compensation payments; 2) to secure full payment of compensation in accordance with the terms of the act; 3) to standardize and define the liability of the employer; 4) to return the injured employee to work as soon as possible by discouraging litigation by him.
of the compensation payment to the tortfeasor by giving the compensating employer or his insurer a cause of action against the person upon whom society wishes to impose responsibility. In line with this policy, Georgia seeks to minimize the burden upon industry in these cases in two ways. First, a Georgia employer or insurer may subtract from the amount of compensation to which the employee is entitled the net damages he has recovered from the tortfeasor. Second, the employer or insurer who pays compensation is given by the technical legal device of subrogation a cause of action against the tortfeasor to recover the amount. Which of these two minimizing methods is utilized would seem to depend not on the employer's will but solely on whether the employee applies first to the tortfeasor for relief or first to his employer for compensation. This device preserves in the employee an initiative which he will assert in accordance with his judgment concerning the relative merits of his and the company's attorneys. ¹⁸ To prevent an employer's or insurer's right to indemnity¹⁹ from being cut off by a settlement which would extinguish the claim of the employee upon which the employer's or the insurer's right of subrogation rests, the consent statutes provide two safeguards. First, the employer will have notice of a settlement made prior to the compensation claim, so that the compensation payment will be reduced or eliminated. Second, the employer or insurer by withholding consent, if the proposed settlement is less than the statutory compensation rate,²⁰ may preclude the liability most courts would impose upon it for the difference between the amount of the employee's settlement and the statutory compensation.²¹

In the absence of consent or notice provisions in a statute, it is unjustifiable to allow a double recovery from the wrongdoer. In the present case, inasmuch as the police officer's settlement was seven times greater than the compensation recoverable, he was not entitled to compensation and his claim should not have been allowed.²² However, after the claim was allowed and after the insurer learned of the prior settlement, it should have sought reimbursement from the officer on a theory of unjust enrichment or money had and received; it should not have been allowed to recover from the wrongdoer on the basis of the statute. In sanctioning a second recovery from the wrongdoer,

¹⁸ Dodd, op. cit. supra note 17, at 615, writes: "The argument in favor of the employee's control of the third-party claim is based in large part on the assumption that the employee should receive any excess that may be recovered in addition to the cost of compensation, and that he is in a position to avoid unsatisfactory compromises."

¹⁹ Dodd, op. cit. supra note 17, at 615.

²⁰ See Hugh Murphy Construction Co. v. Serck, 104 Neb. 398, 401, 177 N.W. 747, 748 (1920): "To allow the workman to settle with the street railway company for an unfair or an inadequate sum would compel the employer to be mulcted to an additional extent."


²² White v. New Mexico Highway Commission, 42 N.Mex. 626, 83 P. (2d) 457 (1938); Texas Employers Ins. Ass'n v. Brandon, 126 Tex. 636, 89 S.W. (2d) 982 (1936). See Hugh Murphy Construction Co. v. Serck, 104 Neb. 398, 177 N.W. 747 (1920) (where settlement with the third party, smaller than compensation, was credited to amount of compensation due); Rosenbaum v. Hartford News Co., 92 Conn. 398, 103 Atl. 120 (1918); Everard v. Woman's Home Companion Reading Club, 122 S.W. (2d) 51 (Mo. App. 1938) (but where settlement was for a smaller amount than compensation).
Division No. 2 of the Georgia Court of Appeals in the principal case disregarded a contrary opinion handed down four years previously by Division No. 1.23

From the wrongdoer's point of view, by his settlement he had made what ordinarily is socially accepted atonement for his unsocial conduct, and had borne the burden which otherwise would have fallen upon the city alone. There his responsibility should have ceased. But merely because the injured employee later received workmen's compensation for the same injury—compensation which in this case should not have been paid—the city by its insurer was allowed to mulct the wrongdoer of an additional amount. The result is all the more startling because the tortfeasor had violated no statutory duty to the insurer or to the city. Certainly the court has developed a most unusual criterion by which an employer's obligation is lightened and that of a tortfeasor correspondingly increased. A more desirable social policy is that probably contemplated by the legislature, imposing upon the tortfeasor no risk greater than that usually accompanying tortious conduct, but allocating any recovery from him so as to minimize the employer's burden. Another result of the decision in the principal case is that in the future no wrongdoer will succeed in relieving himself of liability by settlement with the employee unless he makes the employer or insurer a party to the settlement, or at least conveys to the employer or insurer concerned notice of a prospective settlement; thus without benefit of statute Georgia now has the notice requirement expressed in the Illinois and California acts.

The present case is unusual, too, in allowing the insurer to recover from the third party without proof of the original liability of the third party to the injured employee. A comparison of the Georgia statute before amendment in 1937 with its present form reveals a conscious intention of the legislature to reach this result by the amendment.24

By the Act of 1937 the words "under circumstances creating a legal liability in some person" were replaced by the words "under circumstances whereby payment is made

23 In Travelers Ins. Co. v. Georgia Power Co., 51 Ga. App. 579, 181 S.E. 111 (1935), (not cited in the principal case) it was held that even where a tortfeasor had promised to notify the compensation insurer of a settlement and failed to do so, his liability ended with payment of a consent judgment obtained by the employee, and the insurer was not authorized to recover from the wrongdoer the amount of compensation paid. Although the court intimated that had a private settlement been made, there might have been a jury issue, its language applies to the facts of the principal case: “The right of action for the entire amount still exists in the employee, subject to the right of the employer to be recompensed for the amount of compensation he may have paid, which amount may be recovered from the third party causing the injury, in the first place, or from the employee himself where the third party has already made full settlement with such injured employee.” Despite subsequent amendment of the statute, these statements would seem still valid.

24 Section 2(d) (1) of the Georgia Workmen’s Compensation Act, Ga. Code (1933) § 114–403, reads as follows: “When an employee receives an injury for which compensation is payable under this Title, which injury was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereto, the employee or beneficiary may institute proceedings both against that person to recover damages and against the employer for compensation, but the amount of compensation to which he is entitled under this Title shall be reduced by the amount of damages recovered. If the employee or beneficiary of the employee in such case recovers compensation under this Title, the employer by whom the compensation was paid, or the party who was called upon to pay the compensation, shall be
by some person," and the words "so liable to pay damages" were replaced by the words "so paying damages." The purpose of the amendment was to relieve employers and insurers from the practical burdens imposed by the line of cases exemplified by Travelers Ins. Co. v. Luckey\(^8\) and American Mutual Liability Ins. Co. v. Wigley.\(^6\) These cases held that where the third person had voluntarily settled with the injured employee an insurance carrier or employer could not recover from the wrongdoer unless his liability be established by an adjudication.\(^7\)

The constitutionality of this amendment enabling the insurer to recover from the wrongdoer without proof of liability is open to serious challenge. In United States Fidelity & Guaranty Co. v. New York, N. H. & H. R. Co.,\(^2\) an employee after receiving compensation, settled with the railroad company responsible for his injury and released it from liability. When the employer sought to be reimbursed from the railroad for the compensation paid, he was met by the court's refusal to sustain the action without proof of the railroad's legal liability. The court said: "If an action could be sustained against the defendant as a tortfeasor under the circumstances of this case, it would be maintained without the defendant having had an opportunity to have had its legal liability for the injuries to the employee of the employer determined by a legal adjudication. The defendant would thus pay damages and lose its property without having had the right to be heard upon the question of its legal liability. This could not be done. 'The plaintiff's rights of property,' we say, 'were involved, and could not be injured or destroyed save by "due course of law" after hearing had and opportunity given to be heard.'"

It is even doubtful under the Georgia amendment whether an employer or insurer after paying compensation could secure reimbursement unless the employee himself later recovered damages from the tortfeasor, because under the statute reimbursement or subrogation for compensation depends solely upon whether the tortfeasor makes payment.\(^9\) Should an employee, content with the compensation award or merely whimsical, refuse to proceed against the third person, the employer or insurer might be completely unable to secure indemnity from the third person. While this contingency may be remote, it illustrates another inadequacy resulting from the Georgia amendment.

entitled to reimbursement from the person so liable to pay damages as aforesaid, and shall be subrogated to the right of the employee to recover from him to the extent of the compensation."


\(^6\) 179 Ga. 764, 177 S.E. 568 (1934).

\(^7\) Similar decisions are found in other states, Southern Surety Co. of New York v. Chicago, R.I. & P. R. Co., 215 Iowa 525, 243 N.W. 864 (1932); Western Maryland R. Co. v. Employers' Liability Assurance Corp., 163 Md. 97, 161 Atl. 5 (1932).

\(^8\) 101 Conn. 200, 125 Atl. 875 (1924).

\(^9\) The conditions set forth in the statute must control because in Georgia "there is no subrogation in favor of an employer or insurance carrier as against a tortfeasor unless such right is expressly conferred by statute," Travelers Ins. Co. v. Georgia Power Co., 51 Ga. App. 579, 582, 181 S.E. 111, 113 (1935).