1978

Coordination of Workers' Compensation Benefits with Tort Damage Awards

Richard A. Epstein

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i. introduction

One of the most important issues in modern accident law concerns the selection of a method to coordinate the benefits under workers' compensation law with damage recoveries under the tort law.[1] On this question, it is universally agreed that a worker who suffers injuries in the course of employment may be entitled to both workers' compensation benefits from the employer and to a valid tort action against a third-party defendant. It is also accepted that the worker is not entitled to keep *in toto* both the workers' compensation benefits and the full tort recovery. The question then arises how adjustments can be made in order to prevent double recovery. This article examines that tripartite relationship and proposes a modification of the current law that should better respond to the needs of all interested parties to the system. The emphasis is upon product-related injuries, although most of what is said applies to injuries from all sources. In order to understand the import of what is proposed, it is necessary to set out first the current system, then the proposed improvement, and last the rejected alternatives.

ii. the current system

Under the current law, the integration of the common law of tort with the workers' compensation system takes place as follows:

1. The benefits payable pursuant to workers' compensation law are the exclusive remedy available to an injured worker (or his representative) against his employer; these are paid for injuries

1. For a detailed discussion, *see generally, A. Larson, Workmen's Compensation Law*, § 71, § 75 (1976).

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arising out of and in the course of employment, without regard to negligence.

2. The exclusive remedy provisions of the workers' compensation statutes do not protect most third parties, including the manufacturers and suppliers of various products, from tort actions by the injured party. Thus, the injured worker may maintain a common law tort action against such third parties, recovering damages in excess of the benefits paid or payable under workers' compensation.

3. The employer can recoup from the worker's tort damage award any compensation benefits paid or payable. That recovery may be made by asserting a compensation lien against the worker's recovery, by joining with the worker in his tort action, or by subrogating to the injured worker's tort claim if the worker elects not to sue.

4. In some states, notably New York,[2] the third-party tort defendant may maintain an action for contribution or indemnity against the employer of the injured worker. The recovery in that cross-claim is in some jurisdictions limited to the amount of the worker's compensation lien,[3] and in others, like New York, it may exceed it, and perhaps equal the judgment entered for the injured worker against the third-party defendant.

iii. the proposed change

a. the system

The proposed reform[4] outlined here in no way undermines the central feature of the workers' compensation law that workers' compensation is the only remedy of the injured worker against his

2. *See,* Dole v. Dow Chemical Company, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).
3. *See, e.g.,* Brown v. Dickey, 397 Pa. 454, 155 A.2d 836 (1959).
4. See Appendix for outline of the proposal.

employer. Instead, it seeks to reorder the tripartite arrangement among worker, employer, and third party as follows:

1. Whenever a tort action is successful, the tort defendant (manufacturer, etc.) is entitled to a deduction from the judgment equal to the workers' compensation benefits paid or payable, whether or not employer was negligent.

2. In all cases, the workers' compensation lien of the employer is abolished; again, regardless of the employer's negligence.

3. No action of indemnity or contribution is allowed against the employer, and

4. The solution may, but need not, be restricted to product liability cases.

b. illustration

A brief illustration might be helpful to compare the current law with the proposed alternative. Suppose that an injured worker is entitled to $40,000 in compensation benefits; suppose too that tort damages are worth $100,000. Under the current law, the third party pays the full $100,000 to the worker. The worker must reimburse the employer $40,000 out of the tort recovery.[5]

Under the proposed statutory scheme, the employer pays the $40,000 in benefits; the third party pays $60,000 in tort damages. The employer's lien is abolished. No action for indemnity or contribution is allowed.

c. strengths and weaknesses of the proposed statute

To speak first of the drawbacks of the proposed statute, it is clear that it sanctions at least one inequity. The statute requires the employer who is in no way responsible for the injury of the worker to forego any relief against a third party who was fully responsible for that harm. The magnitude of this disadvantage is, however, open to some question. The equities in favor of the employer's lien are quite powerful in the typical automobile case when an employee is struck by a speeding motorist, for then it is usually quite clear the employer had nothing whatsoever to do with causing the accident. Yet the employer's role with respect to a worker's injury is quite different in the products liability context. Here the employer usually retains possession and control over the instrumentality immediately before the accident takes place. Often (and there is abundant testimony from manufacturers upon the point) the key cause of the injury has been the failure of the employer

5. The plaintiff's attorney will in many states receive a fee on the entire judgment—part from the worker and part from the lienor.

to properly install, maintain, or repair the equipment that it has purchased from the third party. In many cases therefore a "no-fault" solution that disposes with any inquiry into the employer's conduct reaches the correct result without incurring the cost of a case-by-case determination of employer's negligence. In addition, even when there is arguably no employer negligence, the statute will have the beneficial effect of inducing greater investment in accident protection on the employer's part. The point here is quite crucial because one of the unfortunate effects of the workers' compensation law is that its relatively low benefit structure tends to encourage an underinvestment in safety by employers who are insulated from the full cost of work injury. Likewise, if the third party's products are already in place, incentives for safety are better placed upon the employer who is capable of responding to them, than upon the third party who is not.

There are other clear benefits to this proposal that work in favor of all interested parties. One such benefit is that the operation of the proposal in no way at all depends upon the actual substantive rules adopted in third-party products liability actions. The system works equally well no matter whether negligence or strict liability theories govern plaintiff's basic cause of action. Of equal importance, it works equally well no matter what rules are used to determine the role of plaintiff's conduct—say his contributory negligence—acts as a total bar upon recovery, then the proposal will operate only with respect to wholly innocent plaintiffs. If a pure comparative negligence system is adopted, then the amount of tort recovery is first determined without regard to the lien, which is then subtracted from the damages that would be otherwise awarded. Thus, consider a worker entitled to $25,000 in compensation benefits who suffers a $100,000 injury, for which the third-party supplier is 60 percent responsible, and the worker 40 percent. The tort recovery will be the $60,000 damages, reduced by the $25,000 compensation benefits, or $35,000. Note that the plaintiff recovers in total the same $60,000 that would be his from the tort action alone if he were not covered by workers' compensation.[6] Only the source of payment changes.

A third great advantage of this proposal is that it keeps the employer fully insulated from all actions of indemnity and contribution. It is true that the employer's conduct may be involved in the

6. For emphasis, note the tort recovery is *not* determined first by subtracting the amount of the lien from the total damages and then applying comparative principles to the residue. That is, the tort recovery is *not* in the example given $45,000, reached on the assumption that 60 percent is taken from the $75,000 left after the $25,000 is subtracted from the original law. The same procedures apply to all other forms of comparative negligence as well, as the lien is always subtracted from the damages that plaintiff would recover if workers' compensation law were inapplicable.

basic third-party action, particularly on the question of the causal connection between the product defect, if any, and the plaintiff's injury. Yet the involvement is very different from that in which the employer is brought into the case as a third-party defendant. Thus, when brought in as a *witness* on the question of causation, the employer has no financial stake in the outcome of the inquiry. No matter what the finding on that question of fact, the employer will not be able to recoup his lien from the third-party defendant. As that is the case, the presence of the employer does not result in the automatic creation of a second lawsuit. The elimination of the thorny questions of employer's liability from the third-party suit thus removes a major source of confusion, uncertainty and administrative difficulty in the current law. Whatever employers may lose by the sacrifice of their lien is more than offset by the administrative savings in which they share, and by the absolute guarantee that they will remain immune from all third-party suits for indemnity or contribution.

The proposed revised system also works well from the point of view of both the third party and the injured worker. The third party enjoys the obvious advantage of being insulated from products liability suits of small dollar figures. And in the larger cases, the third party enjoys what is in effect a deductible against liability equal to the amount of workers' compensation benefits paid or payable. As these third-party suits have less at stake, it should therefore take fewer resources to defend them—and, of course, fewer dollars to bring them.

There is last the position of the injured worker. Here the most obvious point is that little is changed, because all that is done is to change the *source* of the worker's recovery and *not* the overall amount. To the extent that the worker also benefits from the improved incentives imposed upon the employer and from the reduction of administrative costs, he too is better off under the proposed reform, because of the reduced probability that the accident will occur at all.

d. constitutional questions

A brief word should be said about possible constitutional objections to the proposed reform. Here the easiest way to examine the question is to note the possible objections that could be raised by any of the interested parties. As noted above, the statute does not work to the detriment of either the worker or the third party. To the extent that each is deprived of any right, he receives the "*quid pro quo*" so often mentioned in the cases. The worker loses part of the tort recovery from the third party but at the same time es-

capes the employer's lien. The third party loses any possible action for indemnity or contribution but gains the credit against the employee's judgment. Even a jurisdiction that adopts the view of the Florida Supreme Court in *Sunspan Engineering v. Springlock Scaffolding Company,*[7] should find the proposal acceptable, for the denial of the indemnity of contribution is offset by a reduction in initial tort exposure. And even if the credit created by the statute may be exceeded by the amount of recovery that the third party might possibly obtain from the employer, the requirement of the *quid pro quo* is still met. A smaller certain sum is an appropriate *quid pro quo* for a larger uncertain one.[8]

The only party who arguably does not get a *quid pro quo* in this situation is the employer; yet it cannot be supposed (we should hope) that he has for that reason any valid constitutional objection to the scheme. The original workers' compensation statute was only one of the many possible statutes that could have been imposed upon the employer. There is no question, for example, that the workers' compensation statute would have been constitutional if it had originally assumed the form that is proposed here. The exclusive remedy provision is a *quid pro quo* for all burdens assumed by the employer, including the loss of the lien. It hardly seems sensible, therefore, to say that once one form of workers' compensation is adopted, any subsequent variation that increases employer's burdens runs into fatal constitutional objections. There could surely be no constitutional objection against a 10 percent increase in scheduled benefits even if the employer receives no fresh *quid pro quo* when the increases are imposed. The result should be the same here. Little intellectual satisfaction can be derived from a ploy which contemplates first the total repeal of the workers' compensation law—thereby preserving the fact of a *quid pro quo*—and its subsequent reenactment in the form proposed here—again preserving the *quid pro quo.* To adopt a strict (indeed mindless) application of the *quid pro quo* doctrine in this area is to elevate to constitutional principle the dubious common law rules on consideration insofar as they apply to the statutory modification of the terms of any ongoing arrangement. The basic workers' compensation statute contains many strong no-fault elements in it, and the introduction of yet another such element could hardly be fatal to the scheme, especially since the employer had

7. 310 So. 2d 4 (Fla. 1975).
8. *See* New York Central R.R. v. White, 243 U.S. 188 (1916) where the constitutionality of the basic statute was upheld upon the grounds that the smaller certain sum received by all employees injured in the course of their employment was—if such were necessary—a sufficient quid pro quo for the possibility of a larger tort recovery under common law negligence principles.

little if any opportunity to realize upon the lien before third-party actions became frequent in products liability contexts. Given the widespread agreement of the need for broad legislative discretion with respect to the regulation of economic affairs, it seems most unlikely, and surely most unwise, to sustain any constitutional objection to this last proposal. The conclusion holds good no matter what doubts might apply, for example, to a statute which completely eliminates without any offset *any* third-party tort action that otherwise could be brought by an injured employee.

There is a second constitutional objection that should be briefly considered. As noted above, the proposal is in its present form directed to products liability actions, and not to cases of any other description, such as automobile or construction accidents. The selection of this one class of cases might be claimed to create an arbitrary classification in violation of the constitutional guarantees of equal protection.[9] It is believed, however, that this conclusion is mistaken. We have already noted the principled grounds for distinction between automobile cases and products liability cases. While the same hard-edged line may not exist between products cases and construction accidents, they are perhaps distinguishable in broad measure by virtue of the generally greater employer control in products cases. The precise degree of distinction is not decisive, for the essential principle is that in matters involving no possible infringement of "basic" or "fundamental" rights, the legislature should be free to respond to perceived problems, without reforming the entire law. The law of products liability has (whether rightly or wrongly) developed on its own doctrinal base, and has been perceived as a distinct subject matter. The courts should not (and most likely would not) say that its problems must be treated as part of a larger package of which products liability reform is but a single part.

iv. rejected alternatives

In considering the possible reform of third-party actions in the contexts of the workers' compensation law, several other possible reforms were rejected. Thus, one possible reform of little merit is simple expedient of abolishing all third-party actions by injured workers. Such a drastic remedy, in addition to the constitutional objections that it faces, is unwarranted because of the blanket protection that it gives to all manufacturers and suppliers of defective products which cause injury to innocent workers. Some more finely tailored proposal is both possible and desirable.

The alternatives that have greater merit all seek to tie the rights

9. This possible objection would not apply at all if this proposal was extended to cover all types of tort actions.

and duties of the third-party defendant to the employer's responsibility for the harm to the injured worker. We consider several variations here.

a. unlimited damage reduction

The first type of proposal contemplates that the negligence of the employer might on a comparative basis serve as the source of an unlimited reduction in the tort damages paid by the third party.[10] The proposal has three distinct features. First, the exposure of the third-party defendant is reduced to the extent of the employer's relative responsibility for the injury: the reduction in question may be less than or greater than the amount of the workers' compensation benefits payable. Second, any reduction in the worker's third-party tort judgment triggers a dollar for dollar reduction in the employer's compensation lien. In no circumstances however does the worker get positive recovery from the employer. Third, all actions for indemnity and contribution are abolished.

Two examples illustrate the basic position. First assume that a worker suffers $100,000 in injuries for which the employer is adjudged 20 percent responsible. Workers' compensation benefits are $25,000. Under this proposal the worker receives $80,000 in tort damage, and the employer receives only a $5,000 lien upon the compensation award of $25,000. Second, assume the same facts as before, except that the employer is 40 percent responsible for the accident. Here the third party pays $60,000 in damages. The worker keeps the full $25,000 free of all employer's lien. In the first example the worker recovers the full $100,000. In the second example he recovers $85,000, and is left $15,000 short.

The great advantage of this rule lies in its second and third parts. Nonetheless it is subject to grave, if not fatal, objections. One consequence of this rule is that it becomes necessary to determine that exact extent of the employer's causal involvement in the injury. Yet the principles needed to determine the employer's degree of negligence and its causal effects are, at best, difficult to define and apply. Many products liability cases involve the use of strict liability theories, and it is difficult to know how the strict liability of the third party is to be "compared" with the negligence of the employer. Again, the case patterns in which these issues are apt to be raised resist the easy definition and

10. It is possible, in principle, to treat the employer's negligence as a complete bar to recovery. Where that is done, however, there is no need to worry about the coordination of workers' compensation and products liability law. For this obvious reason, the discussion here is restricted only to an analysis of the comparative rule. Where the reductions in question are limited to the amount of the compensation benefits, on next page, 472, it is possible to examine both rules which automatically reduce the recovery to the extent of the compensation benefits, and rules which use some comparative measure.

classification that might permit the cheap and effective disposition of claims. How do we compare the employer's failure to repair and maintain a product, with the manufacturer's responsibility for its defective design? Or how do we compare the manufacturer's failure to provide adequate warnings to the workers with the employer's modification of the product? There are no good, predictable answers, and the need for countless delicate comparative judgments has the unfortunate consequence of bringing the employer squarely back into the courtroom, even though one purpose of the workers' compensation law—and of any proposal to abolish actions for indemnity and contribution—is to keep him out of it.

Still a further objection against this pure comparative approach is that when all the calculations are complete, the total amount of recovery for the employee from all sources may be *reduced* by the rule. To revert back to the last two examples, it is clear that if the employer's responsibility is set at less than 25 percent, the effect of this proposal is only to shift the source of the worker's payment from the third party to the employer. Yet if the employer's responsibility is set above that figure, say at 40 percent, then total recovery of that worker is reduced, in the case given by $15,000 to $85,000.[11] What is more, the savings by cutting awards are likely in any event to be eaten up by the increased administrative costs of the system. It is doubtful that any novel coordination of workers' compensation and products liability law is acceptable if it reduces the total monetary payment to injured workers. And there is surely no reason to accept a system that dissipates the costs savings of such a reduction in the form of higher administrative costs.

b. damage reductions limited to the level of compensation benefits

There are yet another class of possible systems that seek in a more limited way to tie the negligence of the employer into the worker's recovery against the third party. All of these systems envision that the employer's negligence should, up to the level of

11. There remains one additional coordination scheme, and it reduces still further the plaintiff's total recovery in all cases. Thus it is possible to fashion a system in which the third party pays tort damages only for that portion of the injury for which he is responsible, while the employer pays compensation benefits only for that portion of the injury for which he is responsible. Revert again to a case involving a $100,000 injury and $25,000 in compensation benefits. Where the employer is 20 percent responsible and the third party 80 percent responsible, the recovery from the third party is $80,000 and from the employer only $5,000. Likewise where the employer is 40 percent responsible and the third party 60 percent, the recoveries are $60,000 from the third party, and $10,000 from the employer. The shortfall is $15,000 in the first case, and $30,000 in the second. Under this system the worker will obtain full benefits only where the third party is fully responsible for the accident. If the proposal in the text is unacceptable because it shortchanges the worker, the system in this note is more so.

the workers' compensation benefits, reduce the plaintiff's recovery against third-party defendants. All agree that such negligence should reduce or eliminate the employer's compensation lien. And all agree that all actions for indemnity and contribution should be abolished.

The proposals with these three general features fall into three types. By the first, the negligence of the employer automatically reduces the tort judgment against the third party by the amount of the lien. By the second, proof only of the "primary" negligence of the employer has that effect. By the third, the employer's negligence on some comparative basis can reduce the worker's third party recovery, but only to the amount of the lien.

The major strength of all of these proposals are two. First, they undo the injustice of the current law whereby the negligent employer can recover the full compensation benefits paid to the worker by a third party, whose fault may have been less than the employer's. Second, they make it impossible (as was the case of the proposals just considered) for any distribution of responsibility between the employer and the third party to ever reduce the full tort damages to which the worker is otherwise entitled.

The disadvantages of the proposal appear, however, to be more weighty. All of these proposals require the adjudication of another issue, that of an employer's negligence, which must take time and money to decide. It becomes, therefore, ever more necessary to link the employer more firmly to the worker's third-party action. The survival of the employer's lien is tied to the destruction of the manufacturer's credit against third-party recovery, placing the employer and third party into a direct financial conflict in the injured worker's tort action. The employer therefore is an indispensable party to that litigation and must therefore be given some opportunity to intervene in it. Since his intervention bears only upon the duty of the third party to pay and not upon the right of the injured worker to collect, the court may well defer consideration of the dispute between employer and third party until after the third party's liability is established, thus necessitating a second costly trial.

That trial will be even more complex if either the "primary" or "comparative" forms of the proposal are used, as neither of these terms has much grip in connection with the complex factual patterns that arise routinely in products liability actions. Thus, whether the distinction between primary and secondary negligence is couched in terms of percentages (such that 51 percent negligence is primary) or in terms of "active" and "passive" negligence, borderline cases will often occur in which minute differ-

ences in facts can lead to huge differences in legal effect. Given the intrinsic uncertainty in the operative terms of the primary negligence system, it seems unwise to have the existence of a $50,000 lien turn on the difference between 51 and 49 percent, or upon the difference between active and passive negligence when both parties were, as is commonly the case in products liability situations partially active and partially passive. These problems, severe enough in three-party cases, are further complicated in cases involving multiple third-party actions against, say, a manufacturer, retailer, and components parts supplier.

The "comparative" negligence system avoids the borderline problems of the primary-secondary distinctions, only to create others in their stead. The sliding scale contemplated by the comparative approach requires a determination of relative percentages in each and every case, even where third-party and employer fault is not close to equal. Both sides will have, therefore, the incentive to argue about the percentages of the worker's recovery that will come from the employer or the third party, necessitating a costly second trial on issues of no importance to the injured worker.

The effort towards "perfect justice" is overwhelmed by the practical and theoretical problems of definition and application. Measured by its favorable incentive effects, its great simplicity, and its relative fairness, the statutory reform urged here ranks ahead over other possible reforms that might otherwise be advanced.

c. contracting out of third-party actions

There is at least one additional way to resolve the third-party problems in workers' compensation cases that merits close attention. In a recent article, Professor Jeffrey O'Connell argues for a system which would work as follows:

> Employers should contract with employees, pursuant to collective bargaining, to have employees waive their common law rights, not only against their employer, which worker's compensation law waive anyway, but against any suppliers to the employer whom the employer and the union designate.[12]

12. O'Connell, "Bargaining for Waivers of Third-Party Tort Claims. An Answer to Product Liability Woes for Employers and Their Employees and Suppliers," 1976 *Illinois L. Forum* 435, 441 (1976). From the appearance of a later article on the subject, it appears as if Professor O'Connell has retreated, perhaps for the reasons advanced here, for the proposal advanced in his article in the Illinois Law Forum. *See*, O'Connell, An Immediate Solution to Some Products Liability Problems: Workers' Compensation as a Sole Remedy for Employees, with an Employer's Remedy Against Third Parties, 1976 Insurance Law Journal 683. The proposal made in this last article envisions an abandonment of all third-party tort actions, coupled with the employer's rights to recoup a portion of the workers' compensation awards under comparative negligence type principles from any third-party products liability defendant. Given that the proposal reduces the compensation available to injured parties, and requires use of complicated comparative negligence principles, it is doubtful that it will win general acceptance. *See* supra at page 472 and note 11.

The scheme which Professor O'Connell proposes does not need any special statutory authorization to be put in place, although it is of course vulnerable to judicial attacks on the ground that any waiver exacted from individual workers is against public policy. There are strong arguments that these agreements should be upheld against such attacks as a matter of course[13] and particularly where they are made part and parcel of a collective bargaining agreement. The central concern is not about the validity of this scheme, but about some of the complications that are apt to emerge in any attempt to put it into operation. While Professor O'Connell notes that his proposal is at best a "partial" solution, I do not think that he has paid enough attention to the many problems that it leaves untouched.

As an initial point, it is difficult to see how this contractual scheme could have any application to equipment that is already in place. Since the agreement is between the employees and the employer, there is no obvious reason why the workers will want to give up their rights of action against the third parties when they receive nothing in return. Likewise it is difficult to see why employers want to protect third parties. With these completed transactions, there is no possibility of realizing savings on the purchase price, and hence no real inducement on the part of either side to surrender products liability actions, particularly if the employer himself retains the lien against the worker's recovery. The point, moreover, is of no small importance, as it turns out that many capital goods have very long useful lives. As that is the case, the agreements proposed by O'Connell will not promise any substantial immediate relief even if they are fully enforceable. Machines now in use must first be phased out.

Then too there are also problems with suits involving machinery not yet acquired. As the proposed system suggests, the contracts will not provide a universal bar against all third-party actions. Only those designated third parties (and possibly parties designed only for some purposes and not for others) will be able to claim the benefits of the collective bargaining agreements. The incompleteness of the designations are sure to mesh imperfectly with the tort system. Let the manufacturer of the finished product be covered by the contract, and there will be an incentive to sue the retailer, or the manufacturer of some component part. Let all these be covered, and the action may be brought against the standards organization that established the specifications for the goods. If any of these third-party actions are in principle main-

13. *See*, for my views, Epstein, "Unconscionability: A Critical Reappraisal," 18 *J. Law & Economics* 293 (1975). Others with less faith in markets may wish to dispute these sharp conclusions.

tainable, then there is surely much question about whether the original designated parties will obtain their full measure of protection, for there could well be suits for contribution and indemnity brought by one unprotested third-party product liability defendant against the other parties designated under the collective bargaining agreement. In effect, the situation would be similar to that which has emerged under the current workers' compensation laws whenever the third-party defendant seeks contribution from the employer covered by the exclusive remedy provisions. And, as the protection of the designated third parties is strictly arrived at by contract, it seems clear to me that such contracts will, unlike the workers' compensation statutes, not protect him from the exposure to suits for either contribution or indemnity.

There are yet further gaps in the proposed system. The agreements that O'Connell proposes may be reached with the workers in one union, but not with those in another. Or the agreement may apply to workers now in the plant, but not to those who accept employment at a later date. And if these limitations were not enough, there is the problem that the third party's contractual protection will not *run* with the product when resold, perhaps once, perhaps many times, to other employers for use by other workers in other plants.

There is I think an important lesson to be gained from the mention of these particular difficulties. Even in a regime which is favorably disposed to freedom of contract, massive transactions costs may blunt the ability of contracts to achieve their stated end. With products liability cases, there are simply too many parties for a set of private bilateral or even multilateral agreements to be effective. The case for some form of direct public control over the third party actions thus rests not upon the undesirability of contract in principle, but upon its ineffectiveness and incompleteness in practice. Professor O'Connell may be right (though I think his case is overstated) that third-party tort actions are simply not worth the candle, given that they generate uncertainty and expense on the one hand, and do not provide effective safety incentives or victim compensation upon the other. If that is the case, then the prohibition of the third-party action by direct statutory means seems to me to be the only workable solution. The contract proposal raises many complications, but over time gives very little protection.

conclusion

The coordination of workers' compensation law with tort liability systems demands the reconciliation of the dictates of two systems

which start with very different aims and which embody very different features. The question of how that coordination is best made will always raise questions of both relative fairness for the interested parties, and the administrative workability over time of the chosen system. Of the many possible arrangements which might be used to blend products liability (or other tort actions) and workers' compensation benefits, the best proposal is that which has these three features. The third party is always given a credit against any tort judgment entered against it for the amount of the workers' compensation benefits paid or payable by the employer. The employer's lien against the workers' recovery is always abolished. And all third-party actions for indemnity and contribution are abolished. The system is not perfect; but by that test there could be no law at all. The system is better than the others that have been adopted or proposed. And by that test it should be enacted into law.

appendix

statutory guideline to effectuate workers' compensation reform*

Sec. 1. Notwithstanding any other provision of this law, or any other law, to the contrary, in any products liability action[1] against a third party tortfeasor[2] this section shall govern the rights of the employee, or in the event of death his dependents or representative, the employer or insurance carrier and the third party tortfeasor.

Sec. 2. Products Liability Action: Definition: "Products liability action" shall include all actions brought for or on account of personal injury, disability, disease, death or property damage caused by or resulting from the manufacture, construction, design, formula, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, advertising, packaging or labeling of any product. It shall include, but not be limited to, all actions based upon the following theories: strict products liability; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether deliberate, negligent or innocent; misrepresentation, concealment, or non-disclosure, whether fraudulent, negligent, or innocent; or under any other substantive legal theory in tort or contract whatsoever. This act shall apply to all products liability actions, whether or not based upon the Restatement (Second) of Torts.

Sec. 3. Any judgment against a third party tortfeasor resulting from a products liability action shall be reduced by an amount equal to the amount paid as compensation and medical benefits[3] under the provisions of this workers' compensation law and the present value of all future compensation benefits payable under this workers' compensation law.

Sec. 4. No employer, or in the event the employer is insured against liability hereunder then the insurer, shall have any lien upon any judgment received in any products liability action, nor any right of subrogation as provided in Section _____ if the action against the third party tortfeasor is a products liability action.

Sec. 5. In any products liability action for personal injury (disease, disability)[4] or death arising out of and in the course of employment subject to the provisions of this law, brought against any third party tort-

*The specific terms and section numbers shall be tailored to the Workers' Compensation Law and Occupational Disease Law of the state in which this proposal is introduced.

1. The proposal in the Appendix is restricted to Product Liability Sections. In the event that it is thought desirable to extend the proposal to all situations the words "products liability action" can be replaced with the words "tort actions" or some such equivalent.
2. The term "third party tortfeasor" refers to product manufacturers, suppliers, etc.; other terminology which would be consistent with local statutory or judicial usage should be adopted.
3. The words disease or disability should be used in states where non-traumatic injury (*e.g.*, cancerous diseases) are not defined as compensable injuries.
4. It should be noted that the deduction provided for in Section 3 is intended to apply only to benefits paid or payable pursuant to provisions of the workers' compensation and occupational disease laws.

feasor, such third party tortfeasor may not maintain any action for indemnity or contribution against any person immune from liability under Section _____ of this law.

Sec. 6. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall affect each and every other provision or application of the act. To this end, the provisions of this act are declared unseverable.