

tion of a subsidiary policy to make variations in a fine depend on the nature of the violation. If fines could be deducted the loss occasioned by the fine would vary according to the tax bracket of the violator, whether he had net income for the year, and his loss carryover and carryback position—purely fortuitous circumstances from the state's point of view. Of course, the state could make its system of fines dependent on the federal income tax law; but this might be too complicated, if only because federal tax laws change so rapidly. Disallowance of deductions for fines seems preferable,⁴⁹ if the lack of statutory justification for such a course is to be disregarded.

In accordance with the language of Mr. Justice Douglas in the *Sullivan* case, another line of distinction might be suggested. One criticism of cases disallowing deduction on the grounds of illegality has been that it is not the function of the federal government to enforce state criminal law.⁵⁰ It may be that the distinction between fines and other expenses implicit in the *Tank Truck* and *Sullivan* cases reflects this concern for federal-state relations. Thus disallowance of deduction for fines merely aids an enforcement which has already taken place, rather than constituting independent enforcement of state law. However, problems of federalism would not be raised by disallowance of deduction for expenses incurred in connection with violation of federal law. Thus a double line of distinction may emerge from the *Sullivan*, *Tank Truck*, and *Hoover* cases: where violation of state law is involved, only deduction of fines will be disallowed; where federal law is violated, the prior case law will be followed.

⁴⁹ The cost of an unsuccessful defense of a criminal prosecution is an exception to the suggested rule of allowing deduction of all expenditures other than penalties. Litigation costs are likely to be closer to the magnitude of fines than of wage and rent expenditures. Thus, although it may be difficult to conceal a large portion of the litigation expenses, disallowance of such expenses would probably not discourage filing of returns. Moreover, no substantial administrative problems are involved in determining when litigation expenses have been incurred, and a policy of disallowance would not give the Commissioner the broad discretion to which the Court in the *Lilly* case seemed to object. However, although the disallowance of fines frustrates state policy to make the violator poorer by the amount of the fine, there is no comparable policy regarding litigation expenses.

⁵⁰ See Paul, *op. cit. supra* note 21.

THE EXCLUSIVE REMEDY PROVISION OF WORKMEN'S COMPENSATION ACTS—DISTRIBUTION OF RISK BE- TWEEN A CONCURRENTLY NEGLIGENT EM- PLOYER AND THIRD PARTY

Where the concurrent negligence of an employer and a third party cause injury to an employee, the majority of courts have made the third party bear the whole of the liability.¹ Thus, in suits against third parties by subrogated

¹ (a) *Subrogee-employer v. Third Party Cases*: *Aetna Casualty & S. Co. v. Manufacturers Cas. Ins. Co.*, 140 F.Supp. 579 (W.D. La., 1956); *Cyr v. F. S. Payne Co.*, 112 F.Supp. 526 (D. Conn., 1953); *Nyquist v. Batcher*, 235 Minn. 491, 51 N.W.2d 566 (1952); *Milosevich v. Pacific*

Electric Ry. Co., 68 Cal.App. 662, 230 Pac. 15 (1924). See also cases listed in 2 Larson, *The Law of Workmen's Compensation* §75.23 n. 80 (1952). Contra: *American Casualty Co. v. South Carolina Gas Co.*, 124 F.Supp. 30 (W.D.S.C., 1954); *Liddle v. Collins Construction Co.*, 283 S.W.2d 474 (Mo., 1955); *Pacific Indemnity Co. v. Cal. Electric Works*, 29 Cal.App.2d 260, 84 P.2d 313 (1938). See also cases listed in 2 Larson, *The Law of Workmen's Compensation* §75.23 n. 81 (1952).

(b) *Third Party v. Employer Cases*: *Hill Lines, Inc. v. Pittsburg Plate Glass Co.*, 222 F.2d 854 (C.A. 10th, 1955); *Peak Drilling Co. v. Halliburton Oil Well Cementing Co.*, 215 F.2d 368 (C.A. 10th, 1954); *United Gas Corp. v. Guillory*, 206 F.2d 49 (C.A. 5th, 1953); *Slattery v. Marra Bros., Inc.*, 186 F.2d 134 (C.A. 2d, 1951); *Mikkelsen v. The Grandville*, 101 F.Supp. 566 (E.D.N.Y., 1951), aff'd 191 F.2d 858 (C.A. 2d, 1952); *Sientki v. Haffner*, 145 F.Supp. 435 (S.D.N.Y., 1956); *McCormick v. United States*, 134 F.Supp. 243 (S.D. Tex., 1955); *Ward v. Denver & R.G.W.R. Co.*, 119 F.Supp. 112 (D. Colo., 1954); *Christie v. Powder Power Tool Co.*, 124 F.Supp. 693 (D.D.C., 1954); *Miranda v. Galveston*, 98 F.Supp. 245 (D. Tex., 1951); *Portel v. U.S.*, 85 F.Supp. 458 (S.D.N.Y., 1949); *Johnson v. United States*, 79 F.Supp. 449 (D. Ore., 1948); *Wisconsin Power & Light Co. v. Dean*, 275 Wis. 236, 81 N.W.2d 486 (1957); *Beal v. Southern Union Gas Co.*, 62 N.M. 38, 304 P.2d 566 (1956); *Lovette v. Lloyd*, 236 N.C. 663, 73 S.E.2d 886 (1953); *Hunsucker v. High Point Bending & Chair Co.*, 237 N.C. 559, 75 S.E.2d 768 (1953); *Hill v. Galveston*, 241 S.W.2d 229 (Tex. Civ. App., 1952); *Fidelity & Casualty Co. of New York v. Christenson*, 183 Minn. 182, 236 N.W. 618 (1931); *Groth v. Masnakoff*, 122 N.Y.S.2d 110 (S.Ct., 1953); *Edwards v. Sophkirsh Holding Corp.*, 280 App.Div. 168, 112 N.Y.S.2d 219 (S.Ct., 1952). See also cases listed in 2 Larson, *The Law of Workmen's Compensation* §76.21 n. 6 (1952). However, a few federal courts have allowed contribution in admiralty cases. *Coal Operators Cas. Co. v. United States*, 76 F.Supp. 681 (E.D. Pa., 1948); *The S.S. Samovar*, 72 F.Supp. 574 (N.D. Cal., 1947); *Rederii v. Jarka Corporation*, 26 F.Supp. 305 (S.D. Me., 1939) [The authority of the *Coal Operators, Samovar*, and *Rederii* cases has undoubtedly been weakened by *Baccile v. Halcyon Lines*, 187 F.2d 403 (C.A. 3d, 1951). See *Barber S.S. Lines v. Quinn Bros.*, 104 F.Supp. 78 (D. Mass., 1952).] See also *Portal v. United States*, 85 F.Supp. 458 (S.D.N.Y., 1949) and *The Tampico*, 45 F.Supp. 174 (W.D.N.Y., 1942). Cf. *Congressional Country Club v. Baltimore & O.R. Co.*, 194 Md. 533, 71 A.2d 696 (1950) (contribution allowed since injured employees were not deemed to be within the coverage of the Workmen's Compensation Act). Three courts have allowed contribution to the extent of the compensation award. *Baccile v. Halcyon Lines*, 187 F.2d 403 (C.A. 3d, 1951), reversed on other grounds sub nom. *Halcyon Lines v. Haenn Ship C. & R. Corp.*, 342 U.S. 282 (1952); *Eledge v. Carolina Power & Light Co.*, 230 N.C. 584, 55 S.E.2d 179 (1949); *Maio v. Fahs*, 339 Pa. 180, 14 A.2d 105 (1940). Indemnity has been allowed only under special circumstances: (1) where the employer was "actively" negligent and the third party was "passively" negligent, *United States v. Rothschild Int. Stevedoring Co.*, 183 F.2d 181 (C.A. 9th, 1950); *American Dist. Tel. Co. v. Kittleson*, 179 F.2d 946 (C.A. 8th, 1950). But cf. *Slattery v. Marra Bros., Inc.*, 186 F.2d 134 (C.A. 2d, 1951), cert. denied, 341 U.S. 915 (1951); *Sientki v. Haffner*, 145 F.Supp. 435 (S.D.N.Y., 1956); *Hunsucker v. High Point Bending & Chair Co.*, 237 N.C. 559, 75 S.E.2d 768 (1953); (2) where there is an express contract of indemnity, *Brown v. American-Hawaiian S.S. Co.*, 211 F.2d 16 (C.A. 3d, 1954); *Porello v. United States*, 153 F.2d 605 (C.A. 2d, 1946); *Johnson v. United States*, 133 F.Supp. 613 (E.D.N.C., 1955); *Severn v. United States*, 69 F.Supp. 21 (S.D.N.Y., 1946); *Green v. War Shipping Administration*, 66 F.Supp. 393 (E.D.N.Y., 1946); *Clements v. Rockefeller*, 189 Misc. 885, 70 N.Y.S.2d 149 (S.Ct., 1947); (3) where there is a separate duty based on the special legal relationship of the employer and third party, *Rich v. United States*, 177 F.2d 668 (C.A.2d, 1949); *Burriss v. American Chicle Co.*, 120 F.2d 218 (C.A. 2d, 1941); *Farm Bureau Mut. Auto I. Co. v. Kohn Bros. Tobacco Co.*, 141 Conn. 539, 107 A.2d 406 (1955); *Baugh v. Rogers*, 24 Cal. 2d. 200, 148 P.2d 633 (1944); (4) where there is a separate implied promise to use due care, *Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc.*, 355 U.S. 563 (1958); *Ryan Co. v. Pan-Atlantic Corp.*, 350 U.S. 124 (1956); *Barber S. S. Lines v. Quinn Bros.*, 104 F.Supp. 78 (D. Mass., 1952); *Westchester Light Co. v. Westchester County Small Estates Corp.*, 278 N.Y. 175, 15 N.E.2d 567 (1938); cf. *Crawford v. Pope & Talbot, Inc.*, 206 F.2d 784 (C.A. 3d, 1953).

employers² the courts have generally refused to admit the defense of contributory negligence.³ They have reasoned that since the employer is not suing in his own right, but rather as the subrogee of the non-negligent employee, the employer's negligence should not be in issue.⁴ And, where the third party has attempted to implead or bring an action over against the employer, the courts have usually interpreted the "exclusive remedy" clause⁵ of the compensation act as granting immunity to the employer.⁶ A few courts have reached the same result on the ground that there can be no contribution between joint tortfeasors.⁷ Most writers, however, have objected to holding the third party solely liable, suggesting instead a more "equitable" distribution of the risk.⁸

The desire for a sharing of the liability between the employer and the third party seems to stem from the general desire for contribution among joint tortfeasors. However, a unique problem is raised when the liability of one of the concurrent wrongdoers to the injured party is limited by the exclusive remedy

² Three states (Ohio, New Hampshire and West Virginia) have no subrogation provisions in their compensation acts. For the different types of subrogation statutes see notes 23, 24, 25, 28 and 29 *infra*.

³ See note 1(a) *supra*.

⁴ If the injured employee had been contributorily negligent, the third party could raise this negligence as a defense to an action by the subrogated employer, e.g., *Globe Indemnity Co. v. Hook*, 46 Cal.App. 700, 189 Pac. 797 (1920); *Metropolitan Milk Co. v. Minneapolis St. Ry. Co.*, 149 Minn. 181, 183 N.W. 830 (1921); *Brown v. Southern Ry. Co.*, 204 N.C. 668, 169 S.E. 419 (1933).

⁵ A typical "exclusive remedy" clause provides: "The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death. . . ." N.Y. Workmen's Compensation Law (McKinney, 1946) §11.

⁶ See note 1(b) *supra*. It has been argued that since the exclusive remedy provision was incorporated in the act to compensate the employer for his absolute liability to the employee, and since the employer has not relinquished his common law rights and defenses against the third party tortfeasor, the employer's immunity from suit should not be extended to third party actions. 2 Larson, *The Law of Workmen's Compensation* §76.52 (1952). See *Westchester Lighting Co. v. Westchester County Small Estates Corp.*, 278 N.Y. 175, 15 N.E. 567 (1938). It would appear, however, that this argument presupposes the conclusion. The employer might well be deemed to have assumed absolute liability in exchange for immunity from third party suits as well as from employee suits.

⁷ E.g., *Peak Drilling Co. v. Halliburton Oil Cement*, 215 F.2d 368 (C.A. 10th, 1954); cf. *Portal v. United States*, 85 F.Supp. 458 (S.D.N.Y., 1949); *Coal Operators Cas. Co. v. United States*, 76 F.Supp. 681 (E.D. Pa., 1947). However, it is generally held that the parties are not "joint tortfeasors" since "joint torfeasors" must all be liable to the injured person. See *Hunsucker v. High Point Bending & Chair Co.*, 237 N.C. 559, 75 S.E.2d 768 (1953); *Lovette v. Lloyd*, 236 N.C. 663, 73 S.E.2d 886 (1952).

⁸ 2 Larson, *The Law of Workmen's Compensation* §76.53 (1952); 27 *Rocky Mountain L. Rev.* 106, 108 (1954), noting *Ward v. Denver & R.G.W.R.*, 119 F.Supp. 112 (D. Colo., 1954); *Workmen's Compensation—Contributory Negligence of Employer of Injured Employee as Bar to Action against Third-Party Tortfeasor*, 36 *Minn. L. Rev.* 549, 555 (1952); *Recent Developments in Iowa Workmen's Compensation Law Where Negligent Third Parties Are Concerned*, 37 *Iowa L. Rev.* 84, 95 (1951); *Risk of Contribution under the Longshoremen's and Harbor Workers' Compensation Act*, 51 *Col. L. Rev.* 789 (1951).

provision of the Workmen's Compensation Act. One writer has suggested that it is inequitable to make the third party bear the entire loss simply because his co-wrongdoer happened to be covered by a compensation act.⁹ On the other hand, it could be argued that it is unfair to deny the employer the benefits of the exclusive remedy provision simply because another person's negligence happened to contribute to the employee's injury. Since arguments on this level seem to reach an impasse, it would appear to be more profitable to consider the employee's interest, which, though formerly ignored in connection with this problem, does form a predominant concern of the compensation acts.

In a suit by the subrogee-employer against the third party, a change in the law would enable the latter to seek contribution¹⁰ through set-off,¹¹ counterclaim¹² or subsequent action. However, since under the present acts the employee is entitled to the excess from the employer's suit, usually the amount of the judgment minus the compensation award and expenses of the suit,¹³ the question arises as to whether the third party's claim should be considered in determining the excess.

If the claim is considered and the excess is thus computed after the claim has been deducted from the employer's judgment,¹⁴ whenever the judgment exceeds the amount of the compensation award and expenses of suit the employee will be bearing at least part of the cost of the employer's negligence.¹⁵

⁹ 2 Larson, *The Law of Workmen's Compensation* §76.53 (1952).

¹⁰ In making the computations in this comment (see notes 14-18 *infra*) it is assumed that contribution under the new law would be determined in the same manner as it is in contribution statutes. E.g., *Tex. Civ. Stat. Ann.* (Vernon, 1950) §2212. Thus where an employer and third party are concurrently negligent the "moiety rule" would apply.

¹¹ *Failure to Assert Claim by Set-off*, 8 *A.L.R.* 694 (1920) and cases cited therein.

¹² *Rest.*, *Judgments* §58 (1942). The third party's claim would probably be a compulsory counterclaim in a federal court. *Fed. Rules Civ. Proc.* 13(a).

¹³ E.g., *Delaware Ann. Stat.* (1953) c. 19, §2363 provides: "Any recovery against such third person in excess of the compensation theretofore paid and thereafter payable by the employer, less the cost of securing and collecting same, shall be paid forthwith when collected, to the employee or his dependents." Several states have variations of the "excess" rule. A Massachusetts statute provides that if the employer brings the action the employee gets four-fifths of the excess. *Mass. Laws Ann.* (1949) c. 152, §15. New York's statute provides that two-thirds of the excess goes to the employee. *N.Y. Workmen's Compensation Law* (McKinney, 1946) §29(2). Oregon's statute gives the employee a minimum of twenty-five per cent of the judgment. *Oregon Rev. Stat.* (1955) §656.322. Arkansas requires that the employee get at least one-third. *Ark. Stat. Ann.* (1947) §81-1340. Montana limits the employer's rights to one-half of the gross amount. *Mon. Rev. Code Ann.* (1947) §92-204. Arizona denies the employee any interest in the proceeds; however, the employer can only recover the amount of the compensation award and costs. *Ariz. Rev. Stat. Ann.* (1956) §23-1023.

¹⁴ E.g., if the award and expenses were 10, and the employer's judgment were for 30, the third party's claim would be 15, and the "excess" would be 5.

¹⁵ E.g., if the award and expenses were 10, and the employer's judgment were for 16, the third party's claim would be 8. The employee would receive no excess, whereas if the law had not been changed, 6 of the third party's claim of 8 would be deemed excess and inure to the employee.

Whenever the judgment is at least twice the compensation award and expenses, the employee would be bearing the full cost.¹⁶ It is only when the judgment exceeds twice the award and expenses that the employee would receive any excess.¹⁷

On first impression it might appear preferable to compute the employee's excess without regard to the third party's claim. However, this would be even worse from the point of view of the employee. Under this method it would be economically disadvantageous for the employer to recover a judgment for more or less than the amount of the award plus expenses,¹⁸ and since it is difficult to obtain a judgment for the precise sum desired, the employer will attempt to settle out of court for the amount of the award plus expenses.¹⁹ He would have little difficulty in doing so in view of the smallness of compensation awards as contrasted with common-law judgments for the same injury.²⁰ As a result, there would probably never be any excess for the employee.

Thus, where subrogation occurs the employee will probably suffer by a change in the law. And subrogation will occur whenever the employer can obtain it since it will always be economically advantageous for him. This is due to the fact that if the employee sues, the employer, under the recommended change of law, would be subject to an action over by the third party, and there is no theory by which the employee could be forced to pay any of the third party's claim. On the other hand, if the employer sues, the third party's claim would be at least partially satisfied out of what would have been

¹⁶ E.g., if the award and expenses were 10, and the employer's judgment were for 20, but for the change in the law the third party's claim of 10 would inure entirely to the employee.

¹⁷ The compensation award plus expenses is assumed to be 10.

Employer's Judgment	Third Party's Claim	Employer's Net	Excess to Employee
18	9	9	0
20	10	10	0
22	11	11	1

¹⁸ The compensation award plus expenses is assumed to be 10.

Employer's Judgment	Excess to Employee	Third Party's Claim	Employer's Reimbursement
8	0	4	4
10	0	5	5
12	2	6	4

¹⁹ It would appear that the employer's settlement will not be open to attack. For example, in *Sparks v. Huber Baking*, 48 Del. 9, 18, 96 A.2d 456, 461 (1952) the court stated that "the employee has no right to complain that settlement was made at an amount which would yield him nothing. . . . The primary purpose of the subrogation provisions . . . is to give a compensating employer a means of recouping his loss. . . ." Accord: *Johanson v. Cudahy Packing Co.*, 107 Utah 114, 152 P.2d 98 (1944); *Silvia v. Scotten*, 32 Del. 295, 122 Atl. 513 (1923). Contra: *Lovejoy Co. v. Ackis*, 153 Fla. 876, 16 So.2d 297 (1944) [Florida's subrogation statute requires court approval of settlements. Fla. Stat. Ann. (1943) §440.39(5)].

²⁰ The third party would prefer not to settle only if he could be sure of a common-law judgment for less than twice the sum of the compensation award plus expenses. This is unlikely to happen. See *Katz and Wirpel, Workmen's Compensation 1910-1952: Are Present Benefits Adequate?* 4 Labor L. J. 167 (1953) and the discussion of common-law judgments for personal injuries in *Belli, The Adequate Award*, 39 Cal. L. Rev. 1 (1951).

the employee's excess if that excess is computed after the third party's claim had been deducted;²¹ and if the excess is computed without regard to the third party's claim, that claim will be minimized.²²

It would seem that the employer will be able to obtain subrogation in a majority of jurisdictions. He will always be able to do so in the "employer priority"²³ and "absolute subrogation"²⁴ states, and in the "election theory"²⁵ states he quite likely will be able to since employees often cannot afford to wait for a common-law judgment.²⁶ Also, in the "election theory,"²⁷ "employee priority"²⁸ and "no priority"²⁹ states the employer will attempt to obtain a subrogation option through contract.³⁰

However, even in those jurisdictions where the employer is unable to force subrogation and the employee can exercise his right to sue the third party, a change in the law would harm the employee. He would then have no choice

²¹ See note 16 supra.

²² See note 18 supra.

²³ "Employer priority" statutes give the employer or his insurer the right to subrogate if they so desire, and if they do not bring suit within a certain time, the employee may then proceed. Mass. Laws Ann. (1957) c. 152, §15; Maine Rev. Stat. (1954) c. 31, §25; Utah Code Ann. (1953) §35-1-62.

²⁴ "Absolute subrogation" statutes provide that the employee's cause of action is unconditionally assigned to the employer. Mich. Stat. Ann. (1950) §17.189; Mo. Stat. Ann. (Vernon, Supp., 1957) §287.150; Neb. Rev. Stat. (1952) §48-118; N.C. Code Ann. (1950) §97-10; Penn. Stat. Ann. (Furdon, Supp., 1957) c. 77, §671; S.C. Code Ann. (1952) §72-134; Va. Code Ann. (1949) §65-38.

²⁵ "Election theory" statutes provide that if the employee chooses to take his compensation award his employer is subrogated to his rights against the third party. Ariz. Rev. Stat. (1956) §23-1023; Colo. Rev. Stat. (1953) §81-13-8; Del. Code Ann. (1953) c.19, §2363; Idaho Code (1948) §72-204; Ind. Stat. Ann. (Burns, Supp., 1957) §40-1213; Ky. Rev. Stat. (Baldwin, 1955) §342.055; Md. Code Ann. (1957) c. 101, §58; Minn. Stat. Ann. (1947) §176.06; N.M. Stat. Ann. (1953) §59-10-25; Nev. Rev. Stat. (1955) §656.322; N.D. Rev. Stat. (1943) §65-0109; Okla. Stat. Ann. (1951) c. 85, §44; S.D. Code (1939) §64.0301; Tex. Civil Stat. Ann. (Vernon, 1956) c. 8307, §6a; Vt. Rev. Stat. (1947) §8078; Wash. Rev. Code (1951) §51.24.010; Wyo. Stat. Ann. (1945) §72-108.

²⁶ The advancement of money to clients is disapproved by the American Bar Association. See Opinions of the Commission on Personal Grievances, ABA Opinion No. 288 (1954).

²⁷ See note 25 supra.

²⁸ "Employee priority" statutes give the employee the right to receive the compensation award and proceed against the third party. If he does not bring suit within a certain time the employer or his insurer may proceed with the action. Ala. Code (1955) c. 26, §312; Ark. Stat. Ann. (Supp., 1957) §81-1340; Ill. Rev. Stat. (1957) c. 48, §138.5; Iowa Code Ann. (1949) §85.22(2); Kan. Stat. Ann. (Supp., 1957) §44-504; Mont. Rev. Code (1947) §92-204; N.J. Stat. Ann. (Supp., 1957) §34:15-40(f); N.Y. Workmen's Compensation Law (McKinney, 1946) §29(2); R.I. Gen. Laws (1957) §28-35-58; Tenn. Code Ann. (1955) §50-914.

²⁹ "No priority" statutes provide that either the employer or the employee can sue. Cal. Code Ann. Lab. (Deering, 1953) §3852; Conn. Rev. Stat. (Supp., 1955) §3040(d); Fla. Stat. Ann. (1943) §440.39(2); Ga. Code Ann. (1948) §114-403; La. Rev. Stat. (West, 1950) §23:1101; Miss. Code Ann. (1952) §6998-36; Wis. Stat. Ann. (West, 1955) §102.29(1).

³⁰ Such a contract provision would probably be held valid in light of the interpretation given to subrogation statutes. See note 19 supra.

but to bring the suit himself whereas previously he could profitably have allowed the employer to subrogate. If the employer brings the action through house counsel or a retained lawyer the employee, in effect, secures an attorney at a lower cost. If the employee brings the action and hires counsel on a retained basis he takes the chance of paying fees in cases that are lost. If he attempts to avoid this by hiring a contingent fee lawyer he must pay a higher fee for the cases won as compensation for the lawyer's assumption of the risk of loss. The employer's retained lawyer receives less than a contingent fee lawyer for the cases he wins, because he also is assured a fee in the cases he loses. However, when the employer sues, the employee pays legal expenses only if the suit is won since expenses are paid only by a reduction of the excess of a judgment over the award.³¹

Some of the foregoing problems could be avoided if contribution were determined on the basis of the compensation award rather than on the basis of the employer's judgment. If the employee's excess were computed without regard to the third party's claim, there would no longer be any reason for the subrogee-employer to attempt to limit his judgment to the amount of the compensation award and expenses.³² Moreover, determining contribution on the basis of the compensation award would not be violative of the exclusive remedy clause. However, if the employee's excess were computed after the third party's claim had been deducted from the employer's judgment, the employee will still be bearing the cost of the employer's negligence whenever the judgment exceeds the amount of the compensation award and expenses of suit.³³ But, even if the excess is computed without regard to the third party's claim, it would appear that any such formula would make only a minor contribution towards a more "equitable" distribution of the risk since, at present, common-law judgments so far exceed compensation awards.³⁴ Furthermore, in

³¹ However, the employer must defray the costs of those suits which he or his insurer, as subrogee, bring but lose. At least a part of this cost will be defrayed by lowered salaries to the employees. This part is thereby distributed to all of the employees rather than being borne entirely by the injured employee who brings his own suit.

³² The employer's reimbursement would not be decreased by an increase in the size of his judgment. For example, assuming the compensation award to be 10 and contribution to be 50 per cent of the compensation award.

Employer's Judgment	Excess to Employee	Third Party's Claim	Employer's Reimbursement
6	0	5	1
10	0	5	5
20	10	5	5
30	20	5	5

³³ E.g., assuming the compensation award to be 10 and contribution to be 50 per cent of the compensation award.

Employer's Judgment	Third Party's Claim	Employer's Net	Excess to Employee
20	5	15	5
30	5	25	15
40	5	35	25

³⁴ See note 20 *supra*.

a great many instances, regardless of the formula of contribution, a change in the law would have no practical consequences.

Concurrent negligence is most likely to occur when parties are working closely together for extended periods of time. And this occurs most often because of a contractual relationship between the parties or separate contracts with a third person. No doubt the most recurring examples involve co-employees. But in these situations suit is seldom brought,³⁵ since the co-employee is often substantially judgment proof and many states expressly exclude co-employees from the category of third persons.³⁶ A majority of the litigated cases,³⁷ however, involve contractual relationships³⁸ which enable the parties to shift costs. Over two-thirds of these cases³⁹ involve the construction⁴⁰ and maritime shipping⁴¹ businesses where an employee of a sub-contractor is injured by the concurrent negligence of his employer and the prime contractor⁴² (in the construction business) or the ship owner⁴³ (in the maritime cases) or the concurrent negligence of his employer and another subcontractor.⁴⁴ In the former instances the prime bears the full risk under the present law. If the law were changed part of this risk would be shifted to the sub-employer, but by increasing his bids to account for this increased insurance

³⁵ There are only two reported cases. *Groth v. Masnakoff*, 122 N.Y.S.2d 110 (S.Ct., 1953); *Thornton Bros. Co. v. Reese*, 188 Minn. 5, 246 N.W. 527 (1933). Where the co-employee was the sole tortfeasor, he has been sued a number of times. See cases cited in 2 Larson, *The Law of Workmen's Compensation* §72.20 nn. 16, 17, 18, 19 (1952).

³⁶ E.g., Ala. Code (Supp., 1955) c. 26, §312; Colo. Rev. Stat. (1953) §81-13-8; N.Y. Workmen's Compensation Law (McKinney, 1946) §29(2); Okla. Stat. Ann. (1951) c. 85, §44; Utah Code Ann. (1953) §35-1-62.

³⁷ Out of the 88 reported cases there was a contractual relationship in 60.

³⁸ (a) Construction Company Cases: (1) Employer-Sub-contractor and Third Party-Prime contractor, e.g., *Otis Elevator Co. v. Miller & Paine*, 240 Fed. 376 (C.A. 8th, 1917); *Aetna Casualty & S. Co. v. Manufacturers Cas. Ins. Co.*, 140 F.Supp. 579 (W.D. La., 1956); *General Box Co. v. Missouri Utilities Co.*, 331 Mo. 845, 55 S.W.2d 442 (1932); (2) Employer-Prime Contractor and Third Party Sub-contractor, e.g., *Cyr v. F.S. Payne Co.*, 112 F.Supp. 526 (D. Conn., 1953); *Utey v. Taylor & Gaskin*, 305 Mich. 561, 9 N.W.2d 842 (1943); (3) Employer-Sub-contractor and Third Party-Sub-contractor, e.g., *Sparks v. Huber Baking Co.*, 48 Del. 9, 96 A.2d 456 (1953); *Lovette v. Lloyd*, 236 N.C. 663, 73 S.E.2d 886 (1953). (b) Admiralty Cases: Longshoremen and Harbor Worker Employers and Third Party Ship-owners, e.g., *Crawford v. Pope & Talbot, Inc.*, 206 F.2d 784 (C.A. 3d, 1953); *Mikkelson v. The Granville*, 101 F.Supp. 566 (E.D.N.Y., 1951), aff'd 191 F.2d 858 (C.A. 2d, 1952). (c) Miscellaneous Employer-Independent Contractor cases: e.g., *Ward v. Denver & R.G.W.R. Co.*, 119 F.Supp. 112 (D. Colo., 1954); *Nyquist v. Batcher*, 235 Minn. 491, 51 N.W. 2d 566 (1952); *Employers Mut. L. Ins. Co. v. Refiner Syrups. S Corp.*, 184 Misc. 941, 53 N.Y.S.2d 835 (S.Ct., 1945), aff'd 269 App.Div. 930, 58 N.Y.S.2d 216 (1946). (d) Miscellaneous Contract Cases: e.g., *Graham v. Lincoln*, 106 Neb. 305, 183 N.W. 569 (1921); *Fidelity & Casualty v. Cedar Valley Electric Co.*, 187 Iowa 1014, 174 N.W. 709 (1919).

³⁹ 42 out of the 60 cases involving a contractual relationship.

⁴⁰ See note 38(a)(1), (a)(2) and (a)(3) supra.

⁴¹ See note 38(b) supra.

⁴³ See note 38(b) supra.

⁴² See note 38(a)(1) supra.

⁴⁴ See note 38(a)(3) supra.

cost the shift would be negated.⁴⁵ In the latter instance under the present law, the entire risk is theoretically borne by the sub-third party. In actuality, however, this risk is shifted to the prime. If the law were changed, part of this risk would be shifted to the sub-employer. But, since the sub-employer would in turn shift this risk to the prime, the situation would be substantially the same as if the law had not been changed.

In many of the other cases where a change in the law would be reflected in a change in risk distribution, it would appear that this result is of questionable desirability. These cases involve a public utility in the role of the third party,⁴⁶ and due to the relatively inelastic demand curve of public utilities they are usually in a better position than non-utility employers to pass on the insurance cost to the general public.

It appears that not only would employees tend to be harmed by a significant change, but such a change would often fail to achieve the desired result of shifting the risk. Thus it would seem unwise to change the present law.

⁴⁵ In the construction business the prime contractor includes his insurance cost in the bid he submits to the owner. If the law were changed, the prime's insurance costs would be reduced in proportion to his reduced risk. On the other hand, the insurance costs of the sub-contractor will be raised proportionately. Since the increased insurance cost would affect all sub-contractors in the same field, e.g., plumbers, the sub-contractors would be able to increase their bids to the primes without affecting their competitive position. The prime will be willing to contract for the same quantity of business at the increased bids since the increase will merely offset the decrease in insurance premiums applicable to sub-contracts. And since the ultimate bid to the owner would not be affected by the change, the industry's demand curve would likewise not ultimately be affected. It is possible, however, that after the risk is shifted to the sub via the change in the law, and before the subs include the cost of the risk in their bids, the prime will lower his prices and thereby theoretically increase the demand for his services. To meet the increased demand, the prime's need for the services of the subs will be increased. This should cause the price of the sub's services to increase. Thus, even before the subs include the cost of the risk shifted to them via the change in the law in their bids to the primes, the risk in effect will be shifted back to the prime.

⁴⁶ E.g., *United Gas Corp. v. Guillory*, 206 F.2d 49 (C.A. 5th, 1953) (explosion of natural gas injured the plaintiff-construction worker); *Shreveport v. Southwestern Gas & Electric Co.*, 145 La. 680, 82 So. 785 (1919) (fireman killed by coming into contact with high tension wire); *Fidelity & Casualty v. Cedar Valley Electric Co.*, 187 Iowa 1014, 174 N.W. 709 (1919) (telephone employee came into contact with improperly installed high tension wire).

THE HEARSAY EXCEPTION FOR CO-CONSPIRATORS' DECLARATIONS

The conspiracy charge, long established¹ as an important weapon of prosecution,² has lately been subject to severe judicial and scholarly criticism.³

¹ See *The Conspiracy Dilemma: Prosecution of Group Crimes or Protection of Individual Defendants*, 62 Harv. L. Rev. 276, 277 n. 5 (1948).

² O'Dougherty, *Prosecution and Defense Under Conspiracy Indictments*, 9 Brooklyn L. Rev. 263 (1940).

³ See *Krulewitch v. United States*, 336 U.S. 440, 445-58 (1949) (Jackson, J., concurring); *Grunewald v. United States*, 353 U.S. 391, 404-5 (1957); Michael and Wechsler, *Criminal Law and Its Administration* 673-77, 686 (1940); *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 Harv. L. Rev. 276, 277 n. 8 (1948).