Risk Administration in the Marketplace: A Reappraisal of the Independent Contractor Rule

Under the rule of *respondere superior*, a master is liable for torts that his servants commit within the scope of their employment.¹ When the servant can be characterized as an independent contractor, however, the employer is not liable.² Yet the servant and independent contractor are nearly indistinguishable in an economic sense; in both cases the superior commands, finances, and profits from the work done. Because of this similarity of function, courts have never been able to define clearly which employees are servants and which are contractors,³ and both courts and commentators have found it difficult to develop a convincing, manageable justification for the two different rules of liability.⁴

¹ 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 26.6 (1956); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 70 (4th ed. 1971); *RESTATEMENT (SECOND) OF AGENCY* § 219 (1958).

² *Robbins v. Chicago*, 71 U.S. (4 Wall.) 667 (1867); 2 F. HARPER & F. JAMES, *supra* note 1, § 26.11, at 1395; W. PROSSER, *supra* note 1, § 71, at 468; *RESTATEMENT (SECOND) OF TORTS* § 409 (1965).

³ *Crowell v. Benson*, 285 U.S. 22, 82 (1932) (Brandeis, J., dissenting): "Whether an individual is an employee or an independent contractor depends upon criteria often subtle and uncertain of application . . ." See also text and notes at notes 51-55 *infra*. The task of the courts is made more difficult by the common commercial practice of attempting to disguise a master/servant relationship as that of employer/independent contractor. 2 F. HARPER & F. JAMES, *supra* note 1, § 26.11, at 1396. The difficulty of the distinction has led to the unsurprising result that courts often differ about the status of an employee in essentially similar fact situations. Compare *Mirto v. News-Journal Co.*, 50 Del. 103, 123 A.2d 863 (1956) with *Bigger v. Consolidated Underwriters*, 315 S.W.2d 681 (Tex. Civ. App. 1958) (reaching contrary results on the status of a newsboy). The courts have not been above using the ambiguity in the definitions of servants and contractors to expand the category of servants. Cf. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 546 (1961); James, *Vicarious Liability*, 28 TUL. L. REV. 161, 201-02 (1954); Steffen, *Independent Contractor and the Good Life*, 2 U. CHI. L. REV. 501, 508-09 (1935). Another method of accomplishing the same objective has been to rest the burden of proving the independent status of the contractor on the party who asserts it. This procedure has been used where the various tests the courts use do not provide a clear distinction between servants and contractors. E.g., *F.H. Vahlsing v. Adames*, 360 S.W.2d 911 (Tex. Civ. App. 1962); *F. Perlman & Co. v. Gillian*, 355 S.W.2d 638, 647 (Tenn. 1961). In expanding employer liability, the courts have received the assistance of the legislatures, which have, through workmen's compensation laws, provided a broader definition of the master/servant relationship. Cf. A. LARSON, 1A *WORKMEN'S COMPENSATION LAW* § 43.00 (1967).

⁴ Virtually all the leading literature on the subject was written over thirty years ago. N.Y. LAW REVISION COMM. REPORT OF THE LAW REVISION COMMISSION OF 1939, at 409 (1939);

These difficulties have generated a complex body of law. The general rule that an employer is not liable for the torts of an independent contractor has been weakened during the last century by numerous exceptions.⁵ Commentators agree that the law is now unpredictable and inconsistent,⁶ and several question whether the exceptions have swallowed the rule.⁷ The complexity of the law imposes administrative costs on the tort system, and its unpredictability poses problems for both employers and employees in insuring against liability.

This comment briefly notes the development of the present independent contractor rule and discusses the lack of a consistent judicial approach in applying the rule's exceptions. It then reexamines the servant/independent contractor distinction that has led to the present confusion and argues that the traditional justifications for this distinction are unpersuasive and unmanageable. The comment concludes that the basic purposes of tort law—compensation of victims, distribution of the cost of compensation, and reduction of the amount of injuries⁸—are hindered by the present independent contractor doctrine. It proposes a new rule, joint liability supplemented with private indemnification agreements, which would simplify the law and better achieve the goals of the tort system.

I. DEVELOPMENT OF THE PRESENT RULE

Respondeat superior, announced in modern form by Lord Holt in the seventeenth century,⁹ developed long before the independent contractor doctrine, and the first case that clearly raised the contractor issue proceeded from the assumption that *respondeat superior* was the

Douglas, *Vicarious Liability and the Administration of Risk*, 38 YALE L.J. 584 (1929); Harper, *The Basis of the Immunity of an Employer of an Independent Contractor*, 10 IND. L.J. 494 (1935); Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339 (1934); Steffen, *supra* note 3. More recent critiques of the rule include James, *supra* note 3, and Williams, *Liability for Independent Contractors*, 14 CAMB. L. REV. 180 (1956).

⁵ The Restatement has at least twenty sections devoted to exceptions to the independent contractor rule. RESTATEMENT (SECOND) OF TORTS §§ 410-29 (1965). For reviews of the approach of state courts in handling the exceptions, see Brown, *Liability for Torts of Independent Contractors in West Virginia*, 55 W. VA. L. REV. 216 (1953), and Comment, *Liability for the Torts of Independent Contractors in California*, 44 CAL. L. REV. 762 (1956).

⁶ Comment, *Responsibility for the Torts of an Independent Contractor*, 39 YALE L.J. 861, 862 (1930); 28 ROCKY MT. L. REV. 128, 131 (1955).

⁷ *Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co.*, 201 Minn. 500, 503, 277 N.W. 226 (1937); W. PROSSER, *supra* note 1, § 71, at 468; RESTATEMENT (SECOND) OF TORTS § 409, comment b (1965).

⁸ Cf. Posner, *A Theory of Negligence*, 1 J. LEGAL STUDIES 29, 30-31 (1972).

⁹ For a full discussion of the development of both *respondeat superior* and the independent contractor rule, see James, *supra* note 3, at 164-65; Comment, *supra* note 6.

correct solution. In 1799, the Court of Common Pleas held in *Bush v. Steinman* that the owner of a house was liable for injuries caused by an obstruction placed in the road by a contractor indirectly in his employ.¹⁰ Subsequent cases modified the rule of liability, however, and by 1825 employers were held to be immune from liability.¹¹ Throughout this period, there was little discussion by the courts of the reason for the change.¹² Around 1850 courts decided, again without regard to any coherent rationale, that a pure rule eliminating master's liability would be unfortunate. They began moving in the opposite direction,¹³ producing numerous exceptions to the rule but without disavowing the general principle of employer nonliability. The current

10 1 Bos. & P. 404 (C.P. 1799). The obstruction was apparently placed in the road by a limeburner under a contract with a carpenter; the carpenter was under a contract with a surveyor who, in turn was under a contract with the owner. The court found a number of policy reasons to support imposing liability on the owner. Although Chief Justice Eyre "felt difficulty in stating the precise principle on which this action is founded," he nevertheless stated: "Where a civil injury of the kind now complained of has been sustained the remedy ought to be obvious, and the person injured should have only to discover the owner of the house which was the occasion of the mischief; not be compelled to enter into the concerns between that owner and other persons, the inconvenience of which would be more heavily felt than any which would arise from circuity of action." *Id.* at 408. Judge Rooke argued that an owner should have "control over all those persons who work on his premises, and he shall not be allowed to discharge himself from that intentment of the law by any act or contract of his own." *Id.* at 409. Both he and Judge Heath found additional grounds for the decision in the benefit that the owner derived from the work. *Id.* at 409-10.

11 In *Laughter v. Pointer*, 5 B. & C. 547 (K.B. 1826), where the owner of a carriage who hired a driver and horse from a livery stable was held not liable for the negligence of the driver, the court (dividing 2-2) reasoned: (1) the carriage owner had no contract with the driver since he was under no legal duty to pay him, *id.* at 579 (opinion of Abbot, C.J.); (2) the owner did not choose the driver and had no control over him, *id.* at 562 (opinion of Littledale, J.); and (3) there was a possibility of a multiplicity of suits, *id.* at 559, (opinion of Littledale, J.). The court reached this result despite clearly contradictory dicta in *Bush v. Steinman*: "As where a person hires a coach upon a job, and a job-coachman is sent with it, the person who hires the coach is liable for any mischief done by the coachman while in his employ, though he is not his servant." 4 Bos. & P. 404, 409 (C.P. 1799) (opinion of Heath, J.). Subsequent cases limited *Bush* to cases involving injury connected with real property ownership, e.g., *Quarman v. Burnett*, 6 M. & W. 499 (1840); it was finally overruled entirely in *Reedie v. London & N.W. Ry.*, 4 Ex. 244 (1849).

12 In *Milligan v. Wedge*, 12 A. & E. 737 (Q.B. 1840), Williams, J., remarked: "The difficulty always is, to say whose servant the person is that does the injury: when you decide that, the question is solved. . . . For, where the person who does the injury exercises an independent employment the party employing him is clearly not liable." *Id.* at 741-42. Coleridge, J. added: "Unless the relation of master and servant existed between them, the act of one creates no liability in the other." *Id.* at 742; accord, *Overton v. Freeman*, 3 Car. & K. 49 (C.P. 1851); *Knight v. Fox*, 5 Ex. 721 (1850); *Peahey v. Rowland*, 13 C.B. 182 (1853).

13 *Ellis v. Sheffield Gas Consumers Co.*, 2 E. & B. 767 (1853). The employer was held liable because the work was being done without a permit and was thus illegal. *Contra*, *Jourdenais v. Hayden*, 104 Vt. 215, 158 A. 664 (1932).

rule embraces twenty or more exceptions, each so vague that its application often seems to depend not on any policy but upon purely random factors, such as the court's attitude toward the parties.¹⁴ This inadequacy can be illustrated by a review of the three major exceptions to the independent contractor rule:¹⁵ the employer is liable for harms caused in the performance of inherently dangerous work¹⁶ and nondelegable duties,¹⁷ and for the torts of incompetent contractors.¹⁸

A. The Inherent Danger Exception

The "inherent danger" exception¹⁹ to the independent contractor rule relies on the notion that certain activities are dangerous absent precautions,²⁰ or that they are dangerous even if precautions are taken.²¹ Just as the concept of "inherent danger" and "ultrahazardous activities" proved unstable elsewhere in tort law, leading to strict liability and the abolition of the privity defense,²² the concept in the independent contractor context proved equally incapable of satisfactory definition.²³ When courts are forced to distinguish inherently dangerous activities from merely dangerous activities, apparently irrational categories develop, and courts often reach inconsistent results.²⁴

¹⁴ Cf. 38 ALI PROCEEDINGS 123-24 (1961).

¹⁵ RESTATEMENT (SECOND) OF TORTS § 409, comment b (1965).

¹⁶ E.g., *Miles v. Arena & Co.*, 23 Cal. App. 680, 73 P.2d 1260 (1937).

¹⁷ E.g., *Capitol Chevrolet Co. v. Lawrence Warehouse Co.*, 227 F.2d 169 (9th Cir. 1955).

¹⁸ E.g., *L.B. Foster Co. v. Hurnblad*, 418 F.2d 727 (9th Cir. 1969).

¹⁹ The exception was established in *Bower v. Peate*, [1876] 1 Q.B. 321.

²⁰ W. PROSSER, *supra* note 1, § 71, at 472; RESTATEMENT (SECOND) OF TORTS § 416 (1965) "[W]ork which the employer should recognize as likely to create during its progress a peculiar risk of physical harm unless special precautions are taken"

²¹ E.g., *Bologna v. Battisto*, 86 Misc. 2d 297, 235 N.Y.S.2d 819 (Albany County Ct. 1962); *Janice v. State*, 201 Misc. 915, 107 N.Y.S.2d 674 (Ct. Cl. 1951).

²² See Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

²³ See *Tropea v. Shell Oil Co.*, 307 F.2d 757, 771 (2d Cir. 1962); 2 F. HARPER & F. JAMES, *supra* note 1, § 26.11, at 1408-09.

²⁴ In addition to the difficulty in classification, the courts must attempt to distinguish between extrahazardous activities, which result in strict liability, and inherently dangerous activities, in which liability is contingent on proof of negligence. 2 F. HARPER & F. JAMES, *supra* note 1, § 26.11, at 1408. So long as some courts define inherent danger as anything that will probably cause injury if due care is not taken, the exception amounts to a virtual abrogation of the rule of nonliability. See 81 U. PA. L. REV. 232, 233 (1934). Further complicating the decisions is the rule, which originated in *Bower v. Peate*, [1876] 1 Q.B. 321, that the employer is not liable where the independent contractor or his servant was collaterally negligent. By collateral negligence, the courts apparently mean negligence merely in an operative detail of the work or so disassociated from the inherent or special danger of the work as not to create employer liability. 2 F. HARPER & F. JAMES, *supra* note 1, § 26.11, at 1410; W. PROSSER, *supra* note 1, § 71, at 474-75; RESTATEMENT (SECOND) OF TORTS § 426 (1965). Many commentators have professed difficulty in understanding precisely what is meant by collateral negligence. Morris, *supra* note 4, at 350; Smith, *Collateral*

For little apparent reason, fumigating is regarded as inherently dangerous,²⁵ for example, while disinfecting railroad cars with a creosote solution is not.²⁶ Similarly, steam sawmills have been held both to be²⁷ and not to be²⁸ inherently dangerous, while negligently piled beams²⁹ have revealed an insidious character unknown to negligently piled pipes.³⁰ The pattern of the cases has been described quite justifiably as "divided against itself without reason."³¹

In the common case, where the employer's personal fault is not at issue,³² liability for inherently dangerous activities is sometimes thought to be based on a policy of preventing the employer from contracting away work that involves a high risk of injury.³³ But there is no obvious reason why society should prefer to impose liability on employers rather than contractors only in these special cases. Neither group is necessarily a better risk preventer and neither group is more likely to be judgment-proof.³⁴ Another policy said to support the doctrine is that it gives the employer an incentive for hiring a competent contractor. If this were the policy, the employer should be immune if he could show he had exercised care to hire a competent contractor; under present law, however, such proof is unavailing.

Negligence, 25 MINN. L. REV. 399 (1941). This is hardly surprising: the principal concept of inherent danger is difficult to understand and the courts have again reached inconsistent results in similar fact situations. Compare *Hyman v. Barrett*, 224 N.Y. 436, 121 N.E. 271 (1918) (board falling from window is not collaterally negligent) with *Philadelphia, B. & W. R. Co. v. Mitchell*, 107 Md. 600, 69 A. 422 (1908) (hammer falling from bridge is collaterally negligent.).

²⁵ *Baker v. Knight*, 205 S.W.2d 65 (Tex. Civ. App. 1947).

²⁶ *Crow v. McAdoo*, 219 S.W. 241 (Tex. Civ. App. 1920). Compare *Trump v. Bluefield Waterworks & Imp. Co.*, 99 W. Va. 425, 129 S.E. 309 (1925) (constructing dam is inherently dangerous) with *Gadsen v. Craft & Co.*, 173 N.C. 418, 92 S.E. 174 (1917) (constructing bridge is not inherently dangerous); *Vinton Petroleum Co. v. L. Seiss Oil Syndicate*, 19 La. App. 179, 139 So. 543 (1932) (removing decayed structure is inherently dangerous) with *Smith v. Humphreyville*, 47 Tex. Civ. App. 140, 104 S.W. 495 (1907) (raising the roof of a building is not inherently dangerous); *Evans v. Elliot*, 220 N.C. 253, 17 S.E.2d 125 (1941) (excavating in or near highway is inherently dangerous) with *Dixon v. Robinson*, 276 S.W. 770 (Tex. 1925) (excavating is not inherently dangerous).

²⁷ *Royal v. Pope & Parish*, 177 N.C. 206, 98 S.E. 599 (1919).

²⁸ *Lovelace v. Ivey*, 41 Ga. App. 204, 152 S.E. 266 (1930).

²⁹ *Boylhart v. Di Marco & Reiman*, 270 N.Y. 217, 200 N.E. 793 (1936).

³⁰ *O'Hara v. Laclede Gaslight Co.*, 244 Mo. 395, 148 S.W. 884 (1912).

³¹ *Williams*, *supra* note 4, at 192.

³² In a limited number of cases, liability rests upon the employer's failure to order safeguards, e.g., *Ruehl v. Lingerwood Rural Tel. Co.*, 23 N.D. 6, 135 N.W. 793 (1912), or to correct improper procedures he knows the contractor is using, e.g., *Snow v. Marion Realty Co.*, 212 Cal. 622, 299 P. 720 (1931).

³³ See Comment, *Should the Financial Irresponsibility Theory Become a Reality*, 64 DICK. L. REV. 304, 308 (1960).

³⁴ See text and notes at notes 51-71 *infra*.

B. The Nondelegable Duty Exception

The theory behind the nondelegable duty exception is that certain responsibilities of the employer are so important that he should not be allowed to bargain away the risks of performance.³⁵ The list of nondelegable duties is prodigious and seemingly without pattern.³⁶ Commentators have criticized the exception as a "logical fraud," used when the court has already decided to extend the employer's liability.³⁷ The numerous sources from which nondelegable duties can spring³⁸ and the court's tendency to regard statutory duties as nondelegable unless the statute itself contains some inhibition against so holding³⁹ suggest that courts may impose employer liability in almost any situation. As with the inherent danger exception, it is difficult to understand the social interest in, for example, refusing to permit an automobile owner to delegate his "duty" to have brakes in good repair.⁴⁰ It is difficult to believe that public safety is maximized by having mechanical tyros fixing their own brakes. Moreover, if public safety were the goal, all activities should be regarded as nondelegable. In fact, the nondelegable duty exception does not prevent delegation but rather holds the party on whom the duty is imposed liable for negligent performance, regardless of delegation.⁴¹ If this approach is meant to promote victim compensation, it is, at best, a piecemeal means to that end.

³⁵ 2 F. HARPER & F. JAMES, *supra* note 1, § 26.11, at 1406; W. PROSSER, *supra* note 1, § 71, at 471.

³⁶ For eleven random examples, see W. PROSSER, *supra* note 1, § 71, at 470-71.

³⁷ Williams, *supra* note 4, at 193.

³⁸ Courts have found nondelegable duties arising from common law, *Wilson v. Thayer Co. Agricultural Socy.*, 115 Neb. 579, 213 N.W. 966 (1927); contract, *Coenen v. Buckman Bldg. Corp.*, 278 Minn. 193, 153 N.W.2d 329 (1967); license, *Hodges v. Johnson*, 52 F. Supp. 488 (W.D. Va. 1943); franchise, *Louis v. Youngren*, 12 Ill. App. 2d 198, 138 N.E.2d 696 (1956); corporate charter, *Orange v. Pitcairn*, 280 Ill. App. 566 (1935); municipal ordinance, *Merola v. Howard Sav. Inst.*, 109 N.J.L. 37, 160 A. 416 (1932); and statute, *Snyder v. Southern Cal. Edison Co.*, 44 Cal. 2d 793, 285 P.2d 912 (1955).

³⁹ Morris, *supra* note 4, at 353.

⁴⁰ *E.g.*, *Maloney v. Rath*, 69 Cal. 2d 442, 71 Cal. Rptr. 897, 445 P.2d 513 (1968).

⁴¹ *E.g.*, *O'Connor v. Narragansett Elec. Co.*, 54 R.I. 317, 322, 172 A. 889, 891 (1934). A repair service was held liable for injuries caused by a repairman—allegedly an independent contractor—who negligently left oil on which plaintiff, who had no dealings with the service or the repairman, fell. The court said: "It is reasonable to hold that, in contracting for the performance of work . . . one should be permitted . . . to assume that he is dealing with the individual or corporation with whom he has contracted . . . to be assured of the responsibility of the other party to answer for any damages that may be sustained . . . by another person equally entitled to the protection usually arising from dealing with a substantial concern." The court fails to explain, however, why a complete stranger to the contract should be "equally entitled to protection" under the court's theory of entitlement by way of contract. At any rate, where the parties actually contract, they can also agree as to indemnification. See text and notes at notes 72-81 *infra*.

C. The Incompetent Contractor Exception

Liability based upon the employer's choice of an incompetent contractor stems from the belief that the employer "caused" the tort by failing to exercise reasonable care in the selection of the contractor. But the courts disagree as to what constitutes incompetence in the contractor and what the employer must do to discover the contractor's incompetence. Although mere lack of financial responsibility on the part of the contractor has traditionally been considered insufficient to make him incompetent,⁴² an employer who deliberately chooses a financially irresponsible contractor may be held liable.⁴³ Indeed, some courts now seem willing to define incompetency directly in terms of the contractor's financial irresponsibility.⁴⁴ Courts also differ over the amount of notice needed to charge an employer with having an incompetent contractor. Some demand actual knowledge of the contractor's incompetence;⁴⁵ others have held that the contractor's reputation may be so bad as to put the employer on constructive notice;⁴⁶ and still others hold that the employer has an affirmative duty to inquire into the contractor's competence when the work requires particular skills.⁴⁷ The range of responsibilities placed on the employer, coupled with the various judicial standards for what constitutes "incompetence," had led to a highly complex and unpredictable application of this exception by the courts.

The terms "inherent danger," "nondelegable duty," and "incompetence" often seem to be little more than slogans that the courts invoke to assign liability. The terms do not themselves suggest clear, easily administered rules of law and may be invoked or ignored at the will of the court.⁴⁸ A reexamination of the underlying goals of the tort system reveals the defects of such an ad hoc approach and, at the same time, suggests a preferable, alternative rule.

⁴² Steffen, *supra* note 3, at 505.

⁴³ *E.g.*, Nelson v. American Cement Plaster Co., 84 Kan. 797, 115 P. 578 (1911). See also Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 MICH. L. REV. 1222, 1245 (1940).

⁴⁴ In *Majestic Realty Associates, Inc., v. Toti Contracting Co.*, 30 N.J. 455, 153 A.2d 321 (1959), the court discusses at length, and with approval, just such a proposal but avoided the question by invoking the inherent danger exception. For analysis of the *Majestic* case, see Comment, *Should the Financial Irresponsibility Theory Become a Reality*, *supra* note 33, and 9 CATHOLIC U.L. REV. 106 (1960). The *Majestic* decision's financial irresponsibility theory was applied in *Bennet v. T. & F. Distrib. Co.*, 117 N.J. Super. 439, 444-45 (1971), a tort suit against the employer of a travelling salesman who criminally assaulted plaintiff's wife.

⁴⁵ *E.g.*, *McGregor v. Hertzman*, 98 Ohio App. 473, 129 N.E.2d 845 (1953).

⁴⁶ *E.g.*, *Skelton v. Fekete*, 120 Cal. App. 2d 401, 261 P.2d 339 (1953).

⁴⁷ *E.g.*, *Lewis v. Columbus Hosp.*, 1 App. Div. 2d 444, 151 N.Y.S.2d 391 (1956).

⁴⁸ *Cf.* Williams, *supra* note 4, at 181.

II. POLICY CHOICES AND THE PRESENT RULE

Each exception to the general rule of employer nonliability may reflect a judicial attempt to accommodate the law to the economic and legal problems of particular classes of cases, involving particular industries or employment situations. Courts may alter the rules to fit particular cases in order to achieve some basic purpose of tort law, such as the desire to prevent accidents, compensate victims or distribute the costs of compensation. In a famous article Mr. Justice (then Professor) Douglas argued that the rules of liability in contractor cases could be explained as a judicial balancing of the ability of the parties to prevent and distribute accident costs.⁴⁹ This "administration of risk" theory of the independent contractor cases involved four factors: avoidance, shifting, prevention and distribution.⁵⁰ Risk avoidance is the ability of the parties to refrain from a particular risk-engendering activity. Since this option is open to both the employer and independent contractor, their risk avoidance abilities are equal.⁵¹ Risk shifting is the ability to contract with another party, usually an insurance company, to assume the risk for a fee. Douglas argued that the employer and independent contractor have equal capacity to shift risk because each can foresee and provide for it.⁵²

The principal can prevent risk by hiring competent subordinates, training them well, and supervising them closely. The principal can also distribute the cost of assuming the risk⁵³ by raising prices to customers, by cutting production costs, and by reducing profits. Thus courts might attempt, in particular employment situations, to discover who is the better risk preventer or cost distributor and, by balancing such factors, create a rule of liability for that group of situations.

⁴⁹ Douglas, *supra* note 4, at 598-602.

⁵⁰ *Id.* at 587-602.

⁵¹ *Id.* at 598-99.

⁵² *Id.* at 599. Neither the employer nor the contractor will perfectly calculate a given risk because all the relevant information is never available and the cost of a perfect calculation may outweigh its benefit. Often both parties are in relatively equal positions to shift risks; for example, the probability of a traffic accident is known equally to a manufacturer and its delivery firm. Moreover, since the calculus of the quantum of risk is a highly complex proposition, it is doubtful that simple experience—without knowledge of actuarial techniques—could place a party in a superior position to evaluate a risk. See Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554, 560-67 (1961). To the extent that parties rely upon insurers, who are experts at calculating risk, any difference in their abilities disappears. Thus, if both parties have equal access to the insurance market, there is no *prima facie* method of deciding which of them is better able to shift the risk.

⁵³ The cost of assuming the risk is the cost of risk shifting—insurance premiums—or payouts in tort suits if the risk administrator self-insures. For simplicity, this analysis assumes that an insurance policy is procured.

The usefulness of Douglas's analysis, like other analyses of the contractor rule,⁵⁴ is limited because he employed these factors only to rationalize what the courts actually do. It is necessary, however, to go further and ask what the courts should do. It is important to understand the relative abilities of the employer and contractor to prevent risks, to distribute risks, and to compensate victims. The assumption underlying the present rule—that prevention, distribution, and compensation can be maximized by imposing liability on only one of the two parties—is incorrect. The courts cannot easily identify a single party who is better able to accomplish these objectives. Even if the courts might theoretically be able to identify the proper party on whom to impose liability, the task imposes great difficulties in practice and creates an overly complex and unpredictable body of law. The economic marketplace is a more efficient decision-maker in these matters, and a rule of single party liability is defective precisely because it distorts the normal play of market forces.

A. Risk Prevention

In both the master/servant and employer/independent contractor relationships the superior employs the subordinate to accomplish a task and profits from the result.⁵⁵ Courts have distinguished servants from independent contractors on the basis of the "right of control": the superior retains control over the former but not the latter.⁵⁶ A

⁵⁴ See authorities cited note 4 *supra*.

⁵⁵ See authorities cited note 3 *supra*. Two of the reasons most often given for imposition of liability on the master under *respondere superior*—namely, profit and deep pocket—do not provide justifications for insulating the employer of the independent contractor. The profit justification—that since the superior stands to gain by the performance of the work, he should also absorb the losses—is equally applicable to both the servant's master and the contractor's employer. See generally Harper, *supra* note 4, at 496. The deep pocket justification does not serve to distinguish between the two since either may have the deeper pocket depending upon the circumstances. On the deep pocket theory, see T. BATY, VICARIOUS LIABILITY 154 (1916); G. CALABRESI, THE COSTS OF ACCIDENTS 40-42 (1970); Williams, *supra* note 4, at 195.

⁵⁶ RESTATEMENT (SECOND) OF AGENCY § 2(3), 220(1) (1958). This ground for the distinction has been relied upon since the earliest cases. *E.g.*, Boswell v. Laird, 8 Cal. 469, 68 Am. Dec. 345 (1857); Blake v. Ferris, 5 N.Y. (1 Seld.) 48, 55 Am. Dec. 304 (1851). See generally Stevens, *The Test of the Employment Relation*, 38 MICH. L. REV. 188 (1939). In attempting to discern whether this requisite right of control was present, courts asked such questions as: who decided the methods of work and the hours, who furnished tools and materials, what was the method of payment and duration of employment, was the person performing the task a skilled artisan, did he work exclusively for the employer, and did he exercise independent skill and judgment. ASSOCIATION OF SUPREME COURT JUSTICES, COMMITTEE ON PATTERN JURY INSTRUCTIONS, 12 N.Y. PATTERN JURY INSTRUCTIONS—CIVIL 255 (1965); RESTATEMENT (SECOND) OF AGENCY § 220(2). None of these factors were dispositive of the issue of control, however; in many instances some factors pointed to a master/servant relationship, while others were more typical of an employer/contractor

master was supposed to be able to discourage the torts of his servant by firing, demoting, withholding promotion or refusing to recommend him.⁵⁷ Douglas argued that the independent contractor, rather than his employer, is in this strategic position because he controls his immediate servants and more closely supervises their work.⁵⁸ An analysis of the control test as applied by the courts indicates, however, that neither employer nor contractor is more easily identifiable as better able to exercise the effective control that risk prevention requires.⁵⁹

In master/servant cases, the courts ignore how well or prudently the master exercised his right of control: the mere presence of the right leads to liability.⁶⁰ Furthermore, the "control" upon which the master's liability is predicated stems from his setting things in motion rather than on specifically ordering particular acts. And one court has commented:

[T]heoretically as well as practically, the master's responsibility for the negligence goes far beyond his actual or possible control over the conduct of the servant. It rests on the broader ground that every man who prefers to manage his affairs through others, remains bound to so manage them that third persons are not injured by any breach of legal duty on the part of such others while they are engaged upon his business and within the scope of their authority.⁶¹

Thus, control in the master/servant relationship is not prudent exercise of actual control in the economic sense that the master takes justifiable precautions to avert harms,⁶² but is rather possession of the

relationship. For a full discussion of the case law revealing the irregular application of the tests of control, see 2 F. HARPER & F. JAMES, *supra* note 1, § 26.10, at 1396-1400.

⁵⁷ Morris, *supra* note 4, at 341.

⁵⁸ Douglas, *supra* note 4, at 601.

⁵⁹ 2 F. HARPER & F. JAMES, *supra* note 1, § 26.3, at 1367-68; W. PROSSER *supra* note 1, § 70, at 461; Drake, *Wage-Slave or Entrepreneur?*, 31 MOD. L. REV. 408, 414-15 (1968).

⁶⁰ 2 F. HARPER & F. JAMES, *supra* note 1, § 26.3, at 1367, and cases cited therein. See, e.g., *LeBlanc v. Nye Motor Co.*, 102 Vt. 194, 199, 147 A. 265, 266 (1929), finding a car salesman to be a servant. The court stated: "While it appears that [the employer] exercised no control over [the salesman's] work in other particulars, it does not appear that it did not have the right to do so." (Emphasis in original).

⁶¹ *Wolf v. Sulik*, 93 Conn. 431, 436-37, 106 A. 443, 444 (1919).

⁶² Under the modern view of negligence as failure to take cost justified precautions, a person is liable for injuries to others if the cost of his preventing the injury is less than the accident cost. *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). See generally Posner, *supra* note 8. Thus, if the cost of repairing A's car brakes is \$20 and the accident cost of driving a car without brakes is \$100, A is liable for injuries that result if he fails to repair his car. But if A hires B as a servant, and B, acting in the scope of his employment, is negligent, A will be liable. The obvious and oft-repeated reason for this is that servants are said to be judgment-proof as a class and thus presumably not

right of control. In the employer/independent contractor relationship, however, the right to control is initially vested in the employer, who then contracts with the contractor concerning its exercise. From this perspective, therefore, the servant and independent contractor situations are indistinguishable. Although the contractor can control his employees and subcontractors, the employer can exercise control over the contractor both in right and in practice by placing in the employment contract conditions on performance.⁶³ The owner can retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the contract—including the right to inspect, the right to make suggestions or recommendations as to details of the work, the right to prescribe alterations and deviations in the work, and the right to cancel the contract for failure to observe conditions—all without changing the independent contractor relationship.⁶⁴

One party may exercise greater control in a given situation and therefore be better able to prevent accidents, but this would justify placing primary liability on him in that case alone, not wholly insulating the other in all cases. The uniform rule of liability has perverse effects on incentives to take precautions. If the employer is made solely liable, as he is when the duty is nondelegable, the contractor has no incentive to prevent accidents even when he is able to do so most efficiently. Assume that there is a type of accident the cost of which is \$100. The employer may be able to prevent it for \$80 by closer supervision, and the contractor for \$50 by use of a different type of tool. If the duty is "nondelegable" the employer will invest \$80 and the harm will be averted. But if the contractor were responsible instead, he would have an incentive to invest \$50 to avert the harm, a saving of \$30. The outcome is equally inefficient when the employer can prevent accidents at a lower cost but the contractor is held liable. As in the example above, the accident costs \$100; the employer can avert the harm for the same \$80, but the contractor would have to expend \$120. If only the contractor is liable, and he cannot contract with the employer concerning liability, he will allow the accident to occur, whereas

deterred by the prospect of financial liability for their torts. Liability is shifted to the master who is presumed responsive to such an economic threat. The effect of *respondeat superior* is, however, to make *A* strictly liable for *B*'s torts committed in his scope of employment. Posner, *supra* note 8, at 42-43. To approach this another way, the employer's liability is not based on his failure to take cost justified precautions in selecting, training and supervising his employee. If the employee is negligent, application of *respondeat superior* results in liability to the employer.

⁶³ See, e.g., the contract in *Sword v. Gulf Oil Corp.*, 251 F.2d 829, 831 (5th Cir. 1958).

⁶⁴ See *McDonald v. Shell Oil Co.*, 44 Cal. 2d 785, 790, 285 P.2d 902, 904 (1955).

the employer could have prevented the harm and saved \$20 in the process.⁶⁵

B. Risk Distribution

Savings may be generated if either party is able to "distribute" the cost of risk at lower cost. One party may, by engaging in fewer costly transactions than the other, be able to collect risk expenses from consumers, workers, or other factors of production, or shareholders.⁶⁶ Proponents of the risk distribution theory argue that a contractor is a businessman and, if he commits a tort in the course of his business, he, rather than his employer, should be held liable. But servants commit torts pursuant to their business of being a servant and, by the above reasoning, liability ought to be assignable to the servant rather than his master.

Nothing in economic theory or practical experience leads to the conclusion that either employers as a class or independent contractors as a class are in all cases better able to distribute the costs of risk. A rule that assigns risk distribution to the independent contractor is therefore inefficient in cases in which the employer is a better distributor. Even if it is assumed that "entrepreneurs" as a class are better risk distributors, the current rule does not follow. The superior, whether he is master, employer or contractor, may be an entrepreneur capable of distributing costs. But not all masters, employers, and contractors are entrepreneurs, and, therefore, the rule may sometimes place liability on a party who is not in the best position to distribute risks.

Neither the independent contractor nor his employer is the inherently superior risk distributor,⁶⁷ since either party usually can, with equal facility, contract with an insurance company, which is, of course, highly effective in distributing such risks. The employer can distribute the cost of insurance by raising prices, lowering production costs or decreasing profits. If the independent contractor must purchase the insurance, he will increase the price he charges the employer.

⁶⁵ In fact, a general liability rule might impose a disincentive to the employer's exercise of control, since he might fear that an extensive supervision of work procedures would lead to his being held liable under the "interference" exception to the contractor rule. *E.g.*, *Humble Oil & Ref. Co. v. Martin*, 148 Tex. 175, 222 S.W.2d 995 (1949).

⁶⁶ Since risk distribution focuses on the ability of the businessman to distribute costs through the operation of the market, it has also been called the "entrepreneur theory." Calabresi, *supra* note 3; Douglas, *supra* note 4, at 585-86; Morris, *supra* note 4, at 340-41; Smith, *Frolic and Detour*, 23 COLUM. L. REV. 716 (1923).

⁶⁷ Douglas suggested that the employer, as the ultimate consumer of the contractor's services, may be the better risk distributor since "there will be no distribution of these cost items except through [the employer]." Douglas, *supra* note 4, at 600. *But see* Calabresi, *supra* note 3, at 509-14.

The independent contractor sometimes has a higher exposure to the risk against which insurance is procured, since he engages regularly in the procedure generating the risk. He may, therefore, be able to procure insurance at lower costs, since he would have to negotiate with the company only once to cover a multitude of transactions. But neither employers nor contractors are as a class preferred insurers. A large employer may engage in a risk engendering activity more often than a small contractor whom he hires to perform part of the work. Thus, while the cheap insurer is the preferable party to bear liability, no single rule of liability can identify this party in every case.

C. Victim Compensation

The desire to provide an accident victim with recourse against a solvent defendant, and the fact that it is impossible to predict whether placing liability upon one class of actors will produce a solvent defendant in a particular case, is widely acknowledged as a major source of exceptions to the general rule of employer nonliability.⁶⁸ Courts are often faced with situations in which the independent contractor is insolvent, unreachable, or, through some oversight, has not been brought into court. Under such circumstances, the courts are confronted with a choice between letting the injured party go uncompensated or fixing liability on the employer who indirectly authorized the commission of the injury.

Restricting liability to a judgment-proof party defeats the purpose of compensation since it assigns all costs to the victim. Furthermore, it leads to a misallocation of resources.⁶⁹ Since the judgment-proof party does not include the cost of judgments in his decisions, he will not take cost-justifiable steps to prevent accidents. The judgment-proof party will not invest \$20 to prevent a \$100 harm since the investment would be a cost to him while an uncollectible judgment would not.⁷⁰

⁶⁸ See *Kuhn v. P.J. Carlin Constr. Co.*, 154 Misc. 892, 897-98, 278 N.Y.S. 635, 641 (1935); Comment, *supra* note 6, at 872. Indeed it is highly unlikely that a plaintiff would proceed against an employer unless the contractor were judgment-proof since, while the contractor is liable on proof of negligence, the employer must also be fit into one of the exceptions.

⁶⁹ "[T]he most desirable system of loss distribution under a strict resource-allocation theory is one in which the prices of goods accurately reflect their full cost to society. The theory therefore requires, first, that the cost of injuries should be borne by the activities which caused them Second, the theory requires that among the several parties engaged in the enterprise the loss should be placed on the party which is most likely to cause the burden to be reflected in the price of whatever the enterprise sells." Calabresi, *supra* note 3, at 505.

⁷⁰ Given an insurance premium of \$10 to cover the risk the judgment-proof independent contractor will be able to refuse to undertake this cost and will thus enjoy a competitive advantage over the non-judgment-proof contractor who must incur this cost (or self-insure, which results in approximately the same cost in the long run) and would

But it is impossible to construct a rule of single party liability that will always hold liable a solvent defendant. Neither independent contractors nor employers are as a class judgment-proof. The victim can be assured compensation only if the courts are willing to shift liability from the employer in one case to the independent contractor in the next, depending on which is the solvent defendant. But a rule that leaves the courts so free is no rule at all; it has no predictive value.

A rule that has no predictive value may in turn cause a misallocation of resources by encouraging both employer and contractor to purchase insurance or take preventive action to offset liability to a single defendant. Assume again that the accident cost is \$100, and that either party can prevent it by supervising the work more closely at a cost of \$40. If both parties are solvent and neither can predict which party will be held liable for the accident, each will assume that the cost of the potential judgment would be, say, \$50—the cost of the accident discounted by the improbability of a judgment being rendered against him. Each party will therefore invest \$40 to prevent the harm, producing a net loss to society of \$40—a loss that a definite rule of liability could have prevented.

Conversely, if both parties are partially judgment-proof and can pay only \$30 of a potential \$100 judgment, neither will take the \$40 precaution to avert the \$30 loss to him if the accident occurs.

A rule leaving the courts free to assign liability to any solvent defendant produces, therefore, an excessive number of accidents whenever both parties are either solvent or insolvent. This seems a high cost to pay for victim compensation in those few cases in which one party is solvent and the other not.

D. Summary

All traditional approaches to vicarious liability, including administration of risk, are grounded in generalizations about parties to the employment agreement. They assume that one class of defendants has deeper pockets, more control, or greater ability to distribute risk than some other class. Insofar as contractors and employers are concerned, these generalizations are of questionable validity. Douglas suggested that the alternative to general rules based on uncertain premises is for the courts to engage in a case by case inquiry into the differential

include at least part of the cost in his price. In that sense, the employer of the judgment-proof contractor can be viewed as benefiting from both the employer's general insulation from liability and the lower cost due to the contractor's refusal to insure. The employer can thus be regarded as a fitting party on whom to impose liability. This seems to be the unstated reasoning of those who would hold the employer of a financially irresponsible contractor liable. *See, e.g., Morris, supra* note 4, at 344.

abilities of contractors and employers to distribute and prevent risk. Yet the analysis this alternative necessitates may not be within the competence of any court to make and, in any event, involves high administrative costs.⁷¹

III. THE JOINT LIABILITY APPROACH

The most rational solution to the independent contractor problem is to expand the scope of legal liability to include both the contractor and the employer, and to allow private law distribution of risk between the two parties. Under this rule, if the independent contractor commits any tort, the victim would have a cause of action against the employer, the contractor, or both as joint tortfeasors.⁷² The employer and contractor could avoid the imposition of arbitrary liability by concluding an indemnification agreement. The party who can avoid the risk or insure against possible liability at the lowest cost would become the indemnitor and the other party the indemnitee. Since the relative abilities of the parties may differ according to the type of risk involved, the agreement could assign some liabilities to the employer while reserving others to the contractor.

This arrangement would conform the law of the independent contractor to that of master/servant, except for a difference in the nature of the indemnification. A master is permitted to recover over against the servant as a matter of right, and, therefore, any joint suit against master and servant is, in theory, one against the servant until his resources are exhausted, and against the master for the remainder.⁷³ In the case of indemnification agreements, however, the ultimate liability would be determined by contract. Because indemnification by private bargain would more regularly place liability on the better risk administrator than any indemnification imposed by rule of law, joint liability supplemented by private agreement is preferable to a rule comparable to *respondeat superior*.

The joint liability approach would also entail significant savings in transaction costs. All of the old "exceptions" to the independent contractor rule would be eliminated, as would costly litigation over the definition of "independent contractor," "inherently dangerous," "non-

⁷¹ Cf. Posner, *supra* note 8, at 43.

⁷² Liability may sometimes be imposed on both the independent contractor and his employer, but such cases are probably highly unusual. See, e.g., *Simmons v. Kelly*, No. 72-2608 (5th Cir. Apr. 12, 1973).

⁷³ Masters do not generally pursue their right of indemnification against servants. 2 F. HARPER & F. JAMES, *supra* note 1, § 13.4, at 771. But employers probably would act differently on their indemnification rights against contractors under a rule comparable to *respondeat superior*. *Id.* § 26.1, at 1363.

delegable duty," and so on. The sole question remaining for litigation would be whether a tort occurred; allocation of liability would have occurred beforehand pursuant to private agreement between the parties.

Indemnification agreements are incompatible with the present liability rules, and would be facilitated by the joint liability approach for two reasons. First, indemnification can be effective only when there is some certainty over who is liable at law; the ability to contract can yield efficiency only when property rights—the object of the contract—are settled. A complex assignment of liabilities produces either uncertainty⁷⁴ or a substantial investment in information needed to decide whether a contract concerning liability is warranted. This uncertainty, and the costs of resolving it, can be eliminated by introducing joint liability.⁷⁵

Second, any rule assigning liability initially to only one party creates incentives for that party to be judgment-proof. If, for example, liability is placed upon contractors, judgment-proof contractors will be able to offer their services at a competitive advantage over solvent contractors; since judgments cannot be collected from such contractors, they need not include the cost of their torts in the price of their work. They will gradually replace solvent contractors and safety precautions will not be taken. The employer will not conclude an indemnification agreement since he is not liable initially, and is not being charged by the contractor for the contractor's risk. For the employer to agree to pay the judgment would be an act of altruism. The identical situation obtains if the employer is liable. Judgment-proof employers will have a competitive advantage, less safe methods will be used, and victims will go uncompensated. The rule against incompetent and insolvent contractors⁷⁶ attempts to deal exactly with this problem, but that rule creates insuperable problems of definition and is quite costly to administer. These costs can be avoided by a system of joint liability.

The common law presents an additional bar to the use of indemnification agreements. Although the majority rule is that parties can validly contract that one shall be liable for any damage sustained by the other, regardless of fault,⁷⁷ other courts have struck down private

⁷⁴ See text at notes 68-70 *supra*.

⁷⁵ For the role of private indemnification agreement in joint liability, see text at notes 80-81 *infra*.

⁷⁶ See text at notes 42-48 *supra*.

⁷⁷ *E.g.*, *Thompson-Starrett Co. v. Otis Elevator Co.*, 271 N.Y. 36, 2 N.E.2d 35 (1936); *Barrus v. Wilkinson*, 16 Utah 2d 204, 398 P.2d 207 (1965); *Griffiths v. Henry Broderick, Inc.*, 27 Wash. 2d 901, 182 P.2d 18 (1947); see *Curtis, Third Party Indemnity Among Owners, Contractors and Subcontractors*, 14 FEDERATION OF INS. COUNSEL 70, 71 (1964).

indemnification agreements on public policy grounds.⁷⁸ For example, where an employer attempts to recover over from the contractor for a judgment paid out to a workman or third party, the courts have held the indemnification agreement ineffective if they perceived a great disparity in bargaining power. Such a result has usually been possible if the agreement is subject to an interpretation favorable to the weaker party.⁷⁹ The proposed change to joint liability would remove this impediment to achievement of the goals of the tort law. Even if courts continued to rely on "inequality of bargaining power," the "stronger" party could purchase insurance himself and use his superior bargaining position to deduct the amount of the premium from the compensation he would have paid, or add it to the price he would have charged, the indemnitor. The indemnitor would thus become the conduit through which the indemnitee obtains insurance.

The joint liability plan would fulfill all the goals of the tort law. Victim compensation would be assured if either party is solvent, whereas under the rule of employer nonliability the victim is compensated only if the contractor is solvent. Furthermore, while the current rule gives some advantage to judgment-proof contractors, the joint liability approach would increase the likelihood that, in case an accident occurred, at least one of the parties would be solvent. Both parties know that, even if they are judgment-proof when the contract is entered, they may have accumulated assets by the time a tort occurs. In order to avoid the possible loss of those assets, each party would either insure, take steps to reduce the loss from torts, or pay the other party to do so. In order to assure the indemnitor's compliance with the agreement, the indemnitee would demand assurance of solvency—usually in the form of a bond or insurance. These precautions would serve to compensate victims at the same time as they produce investment in safety. If liability is assigned solely to one party, however, the

⁷⁸ *E.g.*, *Northwest Airlines, Inc. v. Alaska Airlines, Inc.*, 351 F.2d 253 (9th Cir. 1965); *Basin Oil Co. v. Baash-Ross Tool Co.*, 125 Cal. App. 2d 578, 271 P.2d 122 (1954); *Otis Elevator Co., v. Maryland Cas. Co.*, 95 Colo. 99, 83 P.2d 974 (1934).

⁷⁹ But the courts have gone far to find such interpretations. *E.g.*, *Pacific Indem. Co. v. California Elec. Works*, 29 Cal. App. 2d 260, 262, 84 P.2d 313, 314 (1938), in which the court professed to find ambiguity in the following agreement and thus held that the employer could not recover on its basis: "You will indemnify and save Company harmless from and against any and all loss, damage, injury, liability, and claims, therefore, including claims for injury and death to Company's employees and damage to Company's property and claims and liens of workmen and materialmen, howsoever caused, resulting directly or indirectly from the performance of this agreement, and will obtain and maintain in effect insurance including workmen's compensation insurance, to protect Company from the above in amount satisfactory to Company."

solvent nonliable party will not demand these precautions of the judgment-proof liable party.

Private indemnification agreements play an essential role in assuring an optimal allocation of resources to risk prevention and compensation under joint liability rules. Barring such agreements, the parties would insure against risk and take precautions to prevent accidents only to the extent that they fear individual liability. If the employer and the contractor mutually underestimate their chances of being sued, there would be a failure to insure properly and to take cost justified precautions.⁸⁰ If they overestimate their probable liability, there would be a net loss in economic efficiency since insurance would be procured and precautions would be taken that are, in the aggregate, more than cost justified, thus resulting in a misallocation of resources. By fixing liability with certainty, private indemnification agreements prevent the indemnitee from overinvesting in precautions or insurance, since he can leave those matters to the indemnitor, who will be financially responsible for all torts.⁸¹

In addition, joint liability would lead to the optimum amount of safety. If an accident that would cost \$100 can be prevented by the employer for \$60 and by the contractor for \$40, the employer would, under the joint liability rule, pay the contractor some sum greater than \$40 but less than \$60 to assume the liability. The contractor would then invest \$40 in order to avoid the \$100 liability. The same result would follow if the positions of the employer and the contractor with respect to accident prevention costs were reversed. If the loss is not preventable by an expenditure of less than \$100, but one party can obtain insurance more economically, the other party would pay him to do so and to assume the liability.

If both parties are solvent, the optimal investment in safety, described above, would follow directly. If neither party is solvent, no investment in safety will be made under either the proposed or current rule. Unlike the present rule, however, the joint liability rule would lead to the optimal amount of safety even if only one of the parties is solvent. The solvent party would invest to avert the harm if he can do so less expensively, and he would pay the insolvent party to do so if that party can do so at a lower cost. Finally, if both parties are partially solvent, the joint liability rule would still encourage the

⁸⁰ See Comment, *Borrowed Servants and the Theory of Enterprise Liability*, 76 YALE L.J. 807, 819 (1967).

⁸¹ The parties could also stipulate that the indemnitor, as the real party in interest, would have control over the conduct of any tort action, thus avoiding the problem of multiplicity of suits.

investment in safety if the sum of the judgments obtainable against the parties exceeds the cost of accident prevention. Assume that the employer can prevent \$100 in harm by investing \$60, that the contractor can prevent the harm by investing \$40, and that both contractor and employer can each pay a judgment not exceeding \$25. Under the present liability rules neither party will invest in safety, since he would have to expend at least \$40 to avert a \$25 loss to him. If, however, liability was joint and indemnity was permitted the employer would offer up to \$25 to the contractor to assume the liability; the contractor would accept liability for any sum greater than \$15; the transaction would occur and the efficient investment in safety would be made.

CONCLUSION

The independent contractor rule has proved difficult both to administer and to explain, because no one rule or series of rules of liability can identify the proper risk bearer as efficiently as the marketplace. A better approach would be to make the employer and independent contractor jointly liable for torts committed in the course of their contract. By the use of private indemnification agreements, problems of multiplicity of suits, overinsurance, and improper resource allocation could be avoided. Moreover, the joint liability approach would lead to a more reasonable, consistent rule of law, better risk distribution and victim compensation, and the employment of contractors who are financially more responsible.

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