Once Is Enough: A Proposed Bar of the Injured Employee’s Cause of Action Against a Third Party

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Cover Page Footnote
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ONCE IS ENOUGH: A PROPOSED BAR OF THE INJURED EMPLOYEE’S CAUSE OF ACTION AGAINST A THIRD PARTY

PHILIP D. OLIVER*

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INTRODUCTION

Under current law, an employee injured on the job normally cannot sue his employer, provided the employee is entitled to receive workers' compensation. Workers' compensation statutes typically require that the injury be one "arising out of and in the course of employment." Such language has been found in American statutes from the beginning of workers' compensation legislation in this country. An early New York statute, for example, stated: "'Injury' and 'personal injury' mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom." 1913 N.Y. Laws, ch. 816, art. 1, § 3(7) (codified at N.Y. Work. Comp. Law § 2(7) (McKinney 1965)).

Not surprisingly, this requirement has prompted an enormous amount of litigation. For example, considerable litigation has arisen concerning whether the requirement is satisfied in the case of an injury that occurs while the employee is engaged in a personal matter such as eating lunch. See 1A A. Larson, The Law of Workmen's Compensation §§ 21.20-21.24 (1989). Such vexing problems are beyond the scope of this Article.

2. The major exception to the rule prohibiting a worker covered by workers' compensation from suing his employer arises in the unusual case in which the employer intentionally injures the employee. The "intentional act" exception is universally recognized, but most courts have construed it very narrowly. Professor Larson observes that "[t]he most remarkable feature of the doctrine that 'intent means intent' is the way in which it has survived virtually intact in spite of the most determined onslaughts in dozens of jurisdictions." 2A A. Larson, supra note 1, § 68.15, at 13-47. See also Perlin, The German and British Roots of American Workers' Compensation Systems: When Is an "Intentional Act" "Intentional"?, 15 Seton Hall L. Rev. 849, 852-77 (1985) (urging a broad reading of the intentional act exception). Other recent advocates of expanding employer tort liability, who cite some judicial acceptance of the trend, include Amchan, "Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy against Employers, 34 Lab. L.J. 683, 691-95 (1983); Note, Workers' Compensation: Expanding the Intentional Tort Exception to Include Willful, Wanton, and Reckless Employer Misconduct, 58 Notre Dame L. 890, 896-910 (1983); Comment, Exception to the Exclusive Remedy Requirements of Workers' Compensation Statutes, 96 Harv. L. Rev. 1641, 1648-61 (1983).

A recent controversy concerning the scope of the intentional act exception is whether courts should recognize the "dual capacity" doctrine. Under this doctrine, an employee injured on the job by the employer is entitled to sue the employer if the employer was not acting in that capacity at the time of the tort. For example, if a physician's nurse were injured on the job and the physician negligently treated the injury, some courts would hold that because the physician was not acting in his capacity as the nurse's employer at the time of the negligent treatment, he should be open to suit. Compare Duprey v. Shane, 39 Cal. 2d 781, 249 P.2d 8 (1952) (allowing suit) with McAlister v. Methodist Hosp. of Memphis, 550 S.W.2d 240 (Tenn. 1977) (not allowing suit). The result in Duprey was reversed by statute. See California Laws, ch. 922 (1982) (codified at Cal. Lab. Code § 3602(a) (West Supp. 1989)).

3. Owing to the inadequacies of the English language and to the awkwardness of the "he or she" formulation, the masculine gender is used throughout this Article to include individuals of indefinite gender. See 1 U.S.C. § 1 (1982), which employs this approach.
compensation benefits from the employer or the employer's insurer. At the same time, the employee is not barred from suing a third party who causes or contributes to the injury. Workers' compensation protection does not affect the action against the third party, but the employer usually is subrogated to the extent of benefits paid.

This Article examines the situation in which the injured employee is entitled to recover tort damages from a third party in addition to recovery under workers' compensation. This Article proposes a significant statutory modification of present law. Under this proposal, workers' compensation benefits would remain the employee's exclusive remedy against the employer. However, the proposal would bar the employee's suit against a third party, except in those rare cases when the third party's actions, if committed by the employer, would allow the employee to sue the employer under present law. Exceptions aside, the third party's only liability would arise in a direct suit brought by the employer for recovery of workers' compensation benefits paid to the employee. In that suit, general tort law rules would apply, except that the employer

For clarity of presentation, the pronoun "it" is usually used in the case of employers, third parties and tortfeasors of indefinite gender. These may be individuals, but more often are corporations or other entities.


Ironically, the prototypical heavy industry of the nineteenth century, the railroad industry, is not covered by workers' compensation. Instead, Congress has chosen to retain the fault system with certain pro-plaintiff modifications, such as abolition of assumption of the risk and the fellow servant doctrine, and application of principles of "pure" comparative negligence. See Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1982) [hereinafter FELA]. Railroad employment was not covered by the no-fault system of workers' compensation because Congress had moved to modify the fault system in that industry as early as 1906, before enactment of the first state workers' compensation act. FELA has been defended as more advantageous to railroad employees than an act patterned on workers' compensation statutes. See Richter & Forer, Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers, 36 Cornell L.Q. 203, 214-35 (1951).

5. Because a third party can be sued by the employee while the employer cannot, it is a matter of considerable importance whether certain persons associated with the employer—co-employees, for example—enjoy immunity or are amenable to suit. Most jurisdictions extend immunity to some persons other than the employer. See 2A A. Larson, supra note 1, § 72.00-72.99 (defining third persons). This issue is beyond the scope of this Article.


7. References to injured employees include the survivors of fatally injured employees.

8. Generally, the only exception would be when the third party intentionally injures the employee. See supra note 2. The scope of the intentional act exception and other, less generally recognized exceptions to the exclusive remedy rule should be the same for third parties as for employers. These exceptions vary somewhat from state to state. See id.

Unless otherwise indicated, "injured employee" means an employee injured under circumstances that would entitle him to workers' compensation under present law.

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would be charged with the employee's fault in addition to its own.\textsuperscript{9}

This Article is not the first to propose limitations on the injured employee's suit against third parties.\textsuperscript{10} Most proposals have been advanced


Advocates of similar proposals point to at least two additional benefits of federal legislation. First, a major benefit would be to clarify the exposure of firms such as manufacturers of equipment used by other businesses. Such firms, and their insurers, could act more efficiently absent the uncertainty of exposure to products liability actions by another firm's employee. The value of certainty in matters such as setting liability insurance rates would be reduced if a manufacturer who sold nationwide were insulated from suit in some states, but not in others. See Bernstein, \textit{supra}, at 559-60 (discussing benefits of national policy); O'Connell, \textit{An Immediate Solution to Some Products Liability Problems: Workers' Compensation as a Sole Remedy for Employees, with an Employer's Remedy Against Third Parties}, 1976 Ins. L.J. 683, 687 [hereinafter O'Connell, \textit{Immediate Solution}] (suggesting that federal bill would avoid problems in interstate shipment of goods). Professor O'Connell also argues that "a federal bill would probably face fewer constitutional hurdles, given the more realistic attitude of the federal judiciary—including the U.S. Supreme Court—toward legislative power to curb common law tort rights." \textit{Id.}

On the other hand, without denying the benefits of a uniform approach, it might be argued that too great a willingness to rush to a nationwide solution tends to denigrate the status of the states. Respect for federalism requires a recognition that policy solutions will vary somewhat from state to state. Any business operating across state or international boundaries must be prepared to deal with legal systems that differ in many important respects. Most law governing personal injury traditionally has been implemented at the state level and nothing in the present proposal requires abandonment of that approach.

Because the proposal can be enacted effectively either at the national or state level, the balance of this Article does not address the federal/state implementation question. For a discussion of federal and state constitutional issues, see \textit{infra} notes 115-120 and accompanying text.

notwithstanding their authors' apparent belief that workers' compensation inadequately compensates injured employees. Some writers have suggested limits on the amount of recovery to protect industry from excessive injury costs or to free resources and thereby increase workers' compensation as sole remedy for industrial accident victims); O'Connell, *Bargaining for Waivers of Third-Party Tort Claims: An Answer to Product Liability Woes for Employers and their Employees and Suppliers*, 1976 U. Ill. L.F. 435, 441-44 [hereinafter O'Connell, *Bargaining for Waivers*] (proposing a bargained waiver of the employee's tort suit against specific third parties); Weisgall, *Product Liability in the Workplace: The Effect of Workers' Compensation on the Rights and Liabilities of Third Parties*, 1977 Wis. L. Rev. 1035, 1071-80 (recommending workers' compensation as sole recovery); Comment, *The Exclusive Remedy Controversy: Can Third Party Inequity Be Alleviated Without Disturbing the Principles of Workers' Compensation?*, 29 St. Louis U.L.J. 489, 504-08 (1985) [hereinafter Comment, *Exclusive Remedy*] (proposing limitation of recovery against third party to its proportion of fault; liability of employer not to exceed worker's compensation benefits); Comment, *A Critique of the Justifications for Employee Suits in Strict Products Liability Against Third Party Manufacturers*, 25 UCLA L. Rev. 125, 157-65 (1977) [hereinafter Comment, *A Critique*] (advocating reimbursement under workers' compensation for product injuries typical of the employment situation). Significant differences exist between each of these proposals and that of the present Article. See also *infra* notes 75-96 and accompanying text (discussing various judicial efforts to limit employee's action against third party).


11. Such proposals frequently suggest that any recovery less than that awarded under the tort system is inadequate. See, e.g., Comment, *Exclusive Remedy*, supra note 10, at 506 ("While this proposed solution lessens the amount recoverable by an injured employee [under present law], it does have several advantages.").

Several proposals meet the perceived shortcomings of the workers' compensation recovery by proposing some method of increasing it. See *infra* notes 13 & 203 and accompanying text.

The position advanced in Lynch, *supra* note 10, is rather different. The gravamen of Ms. Lynch's opposition to the present system is that workers' compensation benefits are inadequate in amount. She proposes allowing the employee a strict liability recovery against the employer, as under the workers' compensation system, but to assessing damages in a tort suit. Such a proposal rests on the faulty assumption that the tort measure of damages is more accurate than the workers' compensation measure. It is thus difficult to justify the additional expense and unpredictability a tort suit against the employer would entail. See *infra* notes 159-203 and accompanying text.

12. See O'Connell, *Immediate Solution*, supra note 9, at 685-87 (suggesting that industrial accident victims be compelled to rely on workers' compensation while the employer be allowed to recover from third party); O'Connell, *Bargaining for Waivers*, supra note 10, at 441-44 (advocating mutually advantageous cooperation by manufacturers,
compensation payments for all injured employees.\textsuperscript{13} Other writers have responded to the inefficiency and unfairness of allowing the suit against a

employers and unions). As the titles of his articles suggest, protection of industry seems to be Professor O'Connell's primary, though not exclusive, focus.

Interestingly, many of the proponents of reform apparently restrict their proposals to situations in which the third party is the manufacturer or supplier of a defective product. \textit{See}, e.g., Task Force Final Report, supra note 10, at VII-103 to VII-112; Lynch, supra note 10, at 35-38, 65-66; Weisgall, supra note 10, at 1072; Comment, \textit{A Critique}, supra note 10, at 161-65. The author is not persuaded that any distinction should be made among third parties based on the theory under which present law subjects them to liability.

13. The principal justification offered by Professor Bernstein in support of his proposal is that its adoption would lead to increased workers' compensation benefits. "Under this proposal, third party liability would be extinguished in return for which third parties engaged in activities which usually produce compensable injury would contribute to a supplementary workers' compensation fund at rates related to their injury-causing history." Bernstein, \textit{supra} note 9, at 544.

Other proponents of limitations on employee suits against third parties condition their support on the supposition that justice would require that the economic savings should find their way into increased workers' compensation benefits. Mr. Weisgall contends that if workers' compensation should become the employee's exclusive remedy, there should be "a substantial increase in workers' compensation benefit levels." Weisgall, \textit{supra} note 10, at 1072. Without such an increase, his proposal "would frequently leave the injured employee with inadequate workers' compensation benefits." \textit{Id.}; see also Comment, \textit{A Critique}, supra note 10, at 163 n.161 (discussing consequences of curtailing product liability suits on compensation for injured workers).

Although the author's view is that the level of workers' compensation benefits is generally too low, the present proposal is not conditioned on an increase in benefits. The level of societal resources that should be diverted to injured workers is a fundamental policy question best left for legislative determination.

Professor O'Connell has recommended that through free bargaining between employers and employees, employees would give up their rights to sue third parties and employers would provide increased workers' compensation benefits. The benefit to the employer from protecting the third party would be that the employer would be able to purchase capital equipment more cheaply, thereby shifting some of the workers' compensation burden to the capital equipment supplier by contract. \textit{See} O'Connell, \textit{Bargaining for Waivers}, supra note 10, at 443.

Professor O'Connell's proposal is not acceptable, in the author's view, because the greatly disparate bargaining positions of employers and employees frequently would leave in doubt the enforceability of such terms as contracts of adhesion. Moreover, society should determine that all workers receive appropriate accident benefits regardless of their other contractual arrangements with their employers. This is the purpose of workers' compensation statutes. If this proposition is accepted, then Professor O'Connell's reliance on private bargaining is not only unnecessary but harmful.

The subsequent evolution of Professor O'Connell's thinking in this area is interesting. At first, he concluded that difficulties with the bargaining approach called for a statutory removal of the employee's suit against the third party. \textit{See} O'Connell, \textit{Supplementing Workers' Compensation}, \textit{supra} note 10, at 541-42; O'Connell, \textit{Immediate Solution}, \textit{supra} note 9, at 685-86. He later offered another form of bargained-for waiver of the employee's right to sue the third party, in which, pursuant to a collective bargaining agreement, the employer would provide increased workers' compensation benefits to the employee in exchange for an anticipatory assignment of the employee's tort claim against the third party. \textit{See} O'Connell, \textit{Supplementing Workers' Compensation}, \textit{supra} note 10, at 545. Difficulties with any approach dependent on voluntary bargaining between employer and employee have been noted. The author's principal objection to Professor O'Connell's statutory approach lies in the failure to justify removal of the employee's rights against the third party. \textit{See infra} notes 93-94 and accompanying text.
third party. These proposals, while persuasive, have understated the case for barring the employee's suit.

This Article argues that the victim's suit against the third party should be barred for two additional reasons, either of which is sufficient standing alone. First, industrial accidents ought to be compensated solely under the workers' compensation scheme, and barring the employee's suit against the third party is more consistent with the theory underlying that regime. Second, the obvious costs of allowing the suit against the third party should not be incurred because consigning the injured employee to an exclusive remedy of workers' compensation benefits would not deny the employee an appropriate recovery.

Section I of the Article reviews the development of workers' compensation. This section considers the principles underlying workers' compensation and comparative fault, both of which are accepted as valid for purposes of this proposal. These two sets of principles do not mesh well under present law; consequently, the reasonable expectations of the employee, the employer and the third party cannot all be met. Section I also discusses the costs, complexities and anomalies of the present law. Section II explains how this proposal would remedy the problems of the present system and discusses several less sweeping proposals advanced by courts and commentators. These proposals address many problems of present law, but would not entirely deprive the employee of his tort action against the third party. Section III argues that workers' compensation should be the injured employee's sole remedy. The principles underlying worker's compensation demand adequate compensation for all injured workers without reliance on additional tort recovery. If present benefits are too low they should be increased, but adequate compensation should not depend upon the chance existence of a legally culpable third party who is able to respond in damages. Section III also responds to anticipated objections based upon constitutional grounds and such policy considerations as fairness, moral responsibility and concern for safety. Section IV presents the most controversial ar-

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14. Virtually no one who has examined the problem is wholly unmoved by the unfairness of the present system's treatment of either the employer or the third party, see infra notes 54-68 and accompanying text, or by the expense and inefficiency of tort litigation, see infra notes 159-203 and accompanying text. Most reform proposals, including all those listed in note 10, supra, would make some beneficial change in the unfair and inefficient status quo.

15. See infra notes 20-68 and accompanying text.

16. See infra notes 69-96 and accompanying text.

17. See infra notes 97-158 and accompanying text.

18. In this Article, the terms "culpability" and "fault" are frequently used to indicate a potential defendant's legal relationship to an injury such that application of the principles of general tort law would lead to an imposition of liability. For example, if a third party injures an employee in such a way that present law will allow a recovery (although a recovery would be barred by the proposal), the third party may be referred to as "culpable," even in the absence of that degree of moral failing associated with negligence.

19. See infra notes 159-203 and accompanying text.
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argument of the Article, positing that this proposal will not leave the injured employee with less than appropriate compensation. Workers' compensation benefits are the most appropriate measure of compensation for personal injury that society can provide and are superior to the tort system's assessment of damages. Any monetary quantification of personal injury damages is largely arbitrary. What constitutes appropriate compensation is a question of policy, and the most appropriate institution for addressing this sort of policy issue is the legislature. Finally, Section IV argues that this proposal enables society to compensate employee injuries more efficiently and consistently than the present system.

I. THE BIZARRE STATUS QUO

It is difficult to imagine that, if society were starting anew, any disinterested observer would recommend the present system for compensating injured employees. Nevertheless, each piece of the puzzle, considered alone, is understandable and perhaps laudable. To appreciate how legislators and judges devoted to the public good have brought the law to its present state, it is necessary to consider briefly the historical development of workers' compensation law.

A. Adoption of Workers' Compensation Statutes and the Exclusive Remedy Provision

By the late nineteenth century, substantial obstacles hampered the injured employee's common-law recovery against his employer. The employee had to establish the employer's negligence, a difficult task in most industrial accidents. Moreover, the law allowed even the negligence head of tort liability, strict liability, largely dominated tort law before the nineteenth century and has enjoyed a renaissance in the twentieth. See W. Prosser & P. Keeton, The Law of Torts § 75, at 536 (5th ed. 1984). In the typical employment-accident case of the late nineteenth or early twentieth century, however, the injured worker suing his employer almost certainly was left without a remedy unless he established negligence on the part of the employer.

20. Throughout the history of English and American tort law, damages sometimes have been awarded in the absence of negligence. Damages are awarded when there is intent to injure and such harms are compensable in the tort system notwithstanding the exclusive remedy of workers' compensation. See supra note 2. The other major non-negligence head of tort liability, strict liability, largely dominated tort law before the nineteenth century and has enjoyed a renaissance in the twentieth. See W. Prosser & P. Keeton, The Law of Torts § 75, at 536 (5th ed. 1984). In the typical employment-accident case of the late nineteenth or early twentieth century, however, the injured worker suing his employer almost certainly was left without a remedy unless he established negligence on the part of the employer.

21. The employer almost certainly could avoid a determination of negligence upon a showing that it had not deviated from the standards of the industry. In Titus v. Bradford, B. & K. R.R., 136 Pa. 618, 20 A. 517 (1890), the court observed:

[Even if the practice had been shown to be dangerous, that would not show it to be negligent... All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to the style of implement or nature of the mode of performance of any work, "reasonably safe" means safe according to the usages, habits, and ordinary risks of the business.

Id. at 626, 20 A. at 518 (emphasis added, citation omitted). Titus no doubt constituted a slight overstatement of the respect due the custom of an industry even when the case was decided; the equation of reasonable conduct with custom seems almost unquestionably
gent employer to avoid liability through the defenses of contributory negligence, assumption of the risk, or the fellow servant doctrine—Dean Prosser's "three wicked sisters of the common law."\textsuperscript{22} In that setting, almost any change that allowed recovery from the employer would have been an improvement from the worker's viewpoint.\textsuperscript{23}

Early in the twentieth century, workers' compensation statutes similar in form to those currently in effect began to sweep the country.\textsuperscript{24} Today, wrong as a theoretical matter. Nevertheless, a defendant's adherence to the custom of its industry was close to a complete defense at the turn of the twentieth century.


23. Professor Schwartz recently took issue with the traditional view that nineteenth-century courts aggressively utilized contributory negligence in order to protect industry. His detailed consideration of the actions of the Supreme Courts of New Hampshire and California led him to conclude that nineteenth-century courts were more supportive of plaintiffs than has been recognized generally. \textit{See} Schwartz, \textit{Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation}, 90 Yale L.J. 1717, 1720, 1731-34, 1772-75 (1981).

these statutes generally provide for recovery of determinate amounts from the employer upon proof that the injury was one "arising out of and in the course of employment." The negligence of the employer or its agents, or of the injured employee, is irrelevant. At the same time, all workers' compensation statutes bar the injured employee from suing his employer in most cases, even when the employer would otherwise be liable. This exclusive remedy provision constitutes an obvious political trade-off, and legislators remain reluctant to impose strict liability on employers without affording them this protection. The mandatory

25. Workers' compensation statutes vary from state to state. Perhaps the most significant variation lies in the dollar amount allowed for a given injury or disability. For example, an employee who loses a hand in Kansas receives benefits computed at 150 weeks, see Kan. Stat. Ann. § 44-510d(11) (1986), while in Wisconsin, the loss of a hand is computed at 400 weeks, see Wis. Stat. Ann. § 102.52(3) (West 1988). An employee in Tennessee who loses an eye receives compensation computed at 100 weeks, see Tenn. Code Ann. § 50-6-207(3)(A)(ii)(q) (Supp. 1988), but in Maryland, he receives 250 weeks, see Md. Code Ann. art. 101, § 36(3)(b) (1957). See also infra note 26 (use of "week" as a measure of compensation).

26. While compensation for wages lost during recuperation is typically a percentage of the worker's present salary, see, e.g., N.Y. Work. Comp. Law § 15(2) (McKinney Supp. 1989) (66 2/3% of average weekly salary), recovery for permanent injury depends upon the specific type of injury. Death or the loss of a hand or eye entitles the claimant to different amounts, usually expressed as "weeks" of lost earnings. See supra note 25. A "week" is defined by statute and does not necessarily reflect the employee's exact salary. See 2 A. Larson, supra note 1, § 60.11. The employee's recovery is determinate in that once the employee's injury has been classified, neither the employer nor the employee may assert that the award should be larger or smaller. See id. § 58.11.

27. Workers' compensation benefits are paid by the employer or an insurance carrier. See Butler & Worrall, The Costs of Workers' Compensation Insurance: Private Versus Public, 29 J.L. Econ. 329, 330-31 n.4 (1986).


29. See id.


A workers' compensation system could operate logically without the exclusive remedy provision. The law could provide that all employers would be required to provide some minimal compensation without consideration of the way in which the injury occurred, yet still provide that an employer who failed to exercise "reasonable" concern for its employee should be required to make a larger payment to the victim. See Richter & Forer, supra note 4, at 234 & n.121 (advocating such a system as an extension of FELA). Indeed, the law has crept in this direction in recent years, although no state allows suit against the employer for simple negligence. See generally Comment, supra note 2, at 1641 (discussing present exceptions to exclusive remedy rule).

The appeal of the exclusive remedy provision, however, is not wholly political. If one shares the writer's view that all injured employees should receive adequate compensation regardless of the fault of either the employer or the employee, the exclusive remedy provision has considerable logical force. The same line of reasoning, of course, leads to the conclusion that the employee should not be entitled to sue the third party either. See infra notes 97-100 and accompanying text.

32. The legislative history of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. 92-576, 86 Stat. 1251, for example, states:
trade-off thus remains a central part of the law governing employee injuries.

Defendants other than the employer were not included in the trade-off barring the injured employee's common-law suit. As courts adjudicating tort cases moved much more rapidly to increase the dollar amounts awarded than did legislatures and administrative boards in control of the workers' compensation system, injured workers and their lawyers found an increasing incentive to avoid the exclusive remedy provision and the accompanying damage limitation. While workers have enjoyed limited success in expanding the areas in which employers will be held liable in the tort system, successful suits against the employer are still rare. Accordingly, injured employees and their attorneys attempt to find some third party who does not enjoy the employer's immunity and who might be found liable in a tort action.

B. Modern Developments in General Tort Law

1. Pro-Plaintiff Developments

During the twentieth century, the third party has become increasingly vulnerable to tort suits brought by the injured employee. The negligence plaintiff now faces fewer obstacles in establishing the defendant's liability than in the past. Moreover, today's defendant is far more vulnerable in

While everyone has agreed since at least the mid-1960's that the benefits under this Act should be raised, there has been some dispute over the years as to whether such benefits should be raised so long as this compensation law was not the exclusive remedy for an injured worker. It has been the feeling of most employers that while they were willing to guarantee payment to an injured worker regardless of fault, they would only do so if the right to such payment was the exclusive remedy and they would not be subject to additional law suits because of that injury.

While subrogation avoids double recovery by the employee, the result can be unfair to the third party. Obviously, the employee should not receive compensation benefits in addition to full tort damages. See infra note 76. However, the third party should not have to pay full tort damages while the employer pays nothing, especially when the employer is partially at fault. One approach has been to hold the employer liable to the extent of workers' compensation benefits and to reduce the third party's liability by the amount of those benefits. See Maio v. Fahs, 339 Pa. 180, 192, 14 A.2d 105, 111 (1940); infra note 75.

34. See supra notes 2, 30-31 and accompanying text.

35. For example, at the turn of the century, a defendant's adherence to the custom of
products liability actions, which constitute a major portion of injured employee actions against third parties.\(^6\) Strict liability\(^3\) and the implied warranty of product fitness\(^8\) have replaced negligence as the basis for recovery, and the defendant has lost the all-important defense of the absence of privity.\(^39\) In addition, the affirmative defenses of contributory

its industry constituted almost a complete defense against a charge of negligence. \textit{See supra} note 21. A generation later, Judge Learned Hand relegated custom to the diminished role of mere evidence of reasonable care:

Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required . . . .

The T.J. Hooper, 60 F.2d 737, 740 (2d Cir.), \textit{cert. denied}, 287 U.S. 662 (1932). Similarly, Restatement (Second) of Torts, § 295A (1965) provides that customs "are factors to be taken into account, but are not controlling where a reasonable man would not follow them." \textit{See also infra} notes 139-145 and accompanying text (discussing more extreme pro-plaintiff developments in negligence law).

36. Writing in 1976, Professor O'Connell cited various figures indicating that 37 to 85 percent of all products liability cases involved plaintiffs covered by workers' compensation. \textit{See O'Connell, supra} note 9, at 684-85.

37. \textit{See} Restatement (Second) of Torts, § 402A (1965). Although strict liability for certain products, notably food, was the rule in the nineteenth century, it should be remembered that as late as 1944, in the landmark case of Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944), Justice Traynor wrote not for the California Supreme Court but for himself alone in advocating a rule of strict products liability. \textit{See id.} at 461-68, 150 P.2d at 440-44 (Traynor, J. concurring). \textit{See generally Owen, Rethinking the Policies of Strict Products Liability, 33 Vand. L. Rev. 681 (1980) (tracing the development of products liability law during the 1960s and 1970s and critiquing the present law).}

Products liability is generally characterized, at least formally, as a system of strict liability, although it remains true that "its doctrinal basis cannot as yet be unambiguously characterized as either fault or strict liability." Davis, \textit{supra} note 6, at 572 n.5. In the area of unintended manufacturing defects, the law is very close to true strict liability, but cases based on design defects or inadequate warnings are usually dealt with following an inquiry not easily distinguished from an evaluation of the defendant's negligence. \textit{See, e.g.,} Restatement (Second) of Torts, § 402A, comments j & k. Some jurisdictions, notably California, have moved close to a position of true strict liability even with respect to design defects. \textit{Compare} Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 432, 573 P.2d 443, 456, 143 Cal. Rptr. 225, 238 (1978) (a product is deemed defective if its design proximately caused injury and the defendant fails to prove that the benefits of the challenged design outweigh its dangers) \textit{with} Wilson v. Piper Aircraft Corp., 282 Or. 61, 66, 577 P.2d 1322, 1325 (1978) (en banc) (a product is deemed defective only if plaintiff establishes that a reasonably prudent manufacturer would not have designed the product as it did).


39. A requirement of privity would provide the third party complete protection in most work-related products liability cases because the third party normally sells to the employer rather than to the employee. This was the situation in the classic case upholding the requirement of privity of contract, Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842). The privity requirement was undermined in such leading cases
negligence and assumption of the risk, while not abolished as they have been under workers' compensation, have been restricted considerably by judicial interpretation. Finally, and perhaps most importantly, once the employee establishes negligence, the third party typically must pay a damage award far exceeding those of a few decades ago.

These developments, coupled with the employer's continued immunity from suit, have made the injured employee's suit against a third party considerably more productive today than in the early days of workers' compensation. It is now much easier to establish third party liability; once liability is established, the employee is more likely to receive a tort recovery far greater than workers' compensation benefits. The net benefit to a successful employee is significant, even after paying attorney's fees and satisfying the employer's right of subrogation for benefits paid.

2. Contribution and Comparative Fault

Unlike modern developments favoring tort plaintiffs in general, contribution and comparative fault may work a special hardship on third par-

as MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), and is generally regarded as having been finally rejected in Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). See Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791, 791 (1966) (fixing the "fall of the citadel of privity" at May 9, 1960, the date of the New Jersey Supreme Court's decision in Henningsen v. Bloomfield Motors, Inc.).

40. A generation ago, Professor Leflar observed that the doctrine of contributory negligence had "visibly shrunken and [was] still diminishing." Leflar, The Declining Defense of Contributory Negligence, 1 Ark. L. Rev. 1, 1 (1946-47). See generally Malone, Some Ruminations on Contributory Negligence, 1981 Utah L. Rev. 91, 113 (observing that contributory negligence has been put to an indiscriminate range of uses and urging that its use be curtailed).

Considerable movement has been made toward outright abolition of the defense of assumption of the risk. Professor Simons, in a recent defense of the doctrine (albeit in restricted form), opens his article with this observation: "According to most commentators and a growing number of courts, the tort doctrine of assumption of risk should be abolished." Simons, Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference, 67 B.U.L. Rev. 213, 213 (1987). The leading case for abolition of the defense is Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90 (1959). The New Jersey Supreme Court soon thereafter stated that experience "indicates the term 'assumption of risk' is so apt to create mist that it is better banished from the scene. We hope we have heard the last of it." McGrath v. American Cyanamid Co., 41 N.J. 272, 276, 196 A.2d 238, 240-41 (1963).

Some courts, while paying lip service to assumption of the risk, diminish protection by holding that the plaintiff must have contemplated in advance the exact manner in which the injury actually occurred. See, e.g., Russo v. Range, Inc., 76 Ill. App. 3d 236, 239, 395 N.E.2d 10, 13 (1979) (assumption of risk doctrine inapplicable to patron of "giant slide" in amusement park who "had no knowledge that the slide would cause his body to fly in the air as he rode it"); Carr v. Pacific Telephone, 26 Cal. App. 3d 537, 543, 103 Cal. Rptr. 120, 125 (1972) (decedent who knowingly exposed himself to "obvious dangers" while working to remove tree from telephone line did not assume the risk of a portion of the tree being thrown into the air by the tension of the telephone line).

Whatever remains of assumption of the risk has sometimes been made inapplicable to the injured employee, as under FELA. See supra note 4.

41. See infra notes 182-186 and accompanying text.
ties sued by injured workers. At common law, a suit to compel contribution among joint tortfeasors generally was not allowed.42 The contributory negligence doctrine, which denied any recovery to a plaintiff whose own negligence contributed to his injury, was a variation of the more general rule denying the law’s aid to one wrongdoer who sought redress from another.43 The contributory negligence rule also owed much to the earlier tort law’s search for a single proximate cause of an injury.44 Even if two proximate causes were recognized, as in the case of the plaintiff’s contributory negligence joining with the defendant’s negligence to cause injury, each actor’s negligence was deemed to have caused the entire injury. Having caused the entire harm, a negligent party could not be heard to complain that forcing him to bear all of the damages was unfair.45

The common-law rules that applied when two parties combined to cause an injury may seem unjust,46 but unquestionably those were the rules when the workers’ compensation system was established. Those rules, however, have changed drastically since the advent of workers’


43. See, e.g., C. Beach, Contributory Negligence § 12, at 11 (3d ed. 1899); Bohlen, supra note 42, at 554; Leflar, supra note 42, at 131-32.

44. See Wade, Comparative Negligence—Its Development in the United States and its Present Status in Louisiana, 40 La. L. Rev. 299, 299-300 (1980); Wright, Contributory Negligence, 13 Mod. L. Rev. 2, 2 (1950).

45. The common law did allow indemnity when one tortfeasor’s fault was wholly different in kind from that of a joint tortfeasor. For example, an innocent partner was entitled to indemnity from a negligent partner, and an employer liable under respondeat superior could recover from a negligent employee. See Jolowicz, The Right to Indemnity Between Master and Servant, 1956 Cambridge L.J. 101, 110. In a more difficult application, a “passive” wrongdoer has been granted indemnity from an “active” wrongdoer. See Note, Recent Cases: Civil Procedure—The Active-Passive Negligence Indemnity Theory (Listerman v. Day and Night Plumbing & Heating Serv.), 30 Mo. L. Rev. 624, 624 (1965). See generally Restatement of Restitution § 96 (1937) (person subject to tort liability without personal fault entitled to indemnity); Hodges, Contribution and Indemnity Among Tortfeasors, 26 Tex. L. Rev. 150, 153-57 (1948) (discussing various factual situations where courts have allowed indemnity between active and passive actors); Leflar, supra note 42, at 147 (actor must indemnify one held liable without fault); Meriam & Thornton, Indemnity Between Tort-Feasors: An Evolving Doctrine in the New York Court of Appeals, 25 N.Y.U. L. Rev. 845, 858 (1950) (where factual disparity exists between delinquency of joint tortfeasors, courts may be persuaded to call one tortfeasor’s wrongdoing passive and the other’s active); Note, Contribution and Indemnity Among Joint Wrongdoers, 32 Colum. L. Rev. 94, 95 (1932) (vicariously liable defendant may recover entire amount of damages from actual tortfeasor in separate action).

46. To put it mildly, the common-law rules have not lacked critics in this century. See, e.g., Bohlen, supra note 42, at 553 (it appears unjust that an injured person can choose to effect his remedy by suit against one of two persons whose tortious conduct concurred in bringing about his injury); Leflar, supra note 42, at 136 (it appears just to allow a joint tortfeasor, who by payment has relieved his co-tortfeasor of a common burden, to collect payment for the co-tortfeasor’s share of the loss). For one influential discussion of contribution, whose author “assume[s] the desirability of contribution
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compensation. Recently, the dominant trend has been toward a system of comparative fault.\(^47\) Under the modern approach,\(^48\) a person who partly causes an injury is responsible only for the part of the injury that he causes,\(^49\) at least vis-a-vis other wrongdoers. Thus, in an overwhelming majority of states, comparative negligence has replaced contributory negligence with respect to the plaintiff's negligence,\(^50\) and contribution among tortfeasors, see Gregory, *Contribution Among Tortfeasors: A Uniform Practice*, 1938 Wisc. L. Rev. 365, 365 [hereinafter Gregory, *Uniform Practice*].


The theory of comparative negligence is not without its critics, however. Former California Supreme Court Justice Clark, for example, argued that the theory is generally unworkable, producing unpredictable and inconsistent results. Implementation of the principle requires judgment beyond the ability of human judges and juries. The point is easily illustrated. If the first party to an accident drove 10 miles in excess of the speed limit, the second 50 miles in excess, it is clear that the second should suffer the lion's share of the loss. But should he pay 55% of the loss, 95%, or something in between? That question cannot be answered with any precision, and human beings will not answer it consistently. Yet that is the easiest question presented in comparing fault because we are dealing only with apples. When we add oranges to the comparison, there are no guidelines. If the first driver also was driving under the influence of Jack Daniels, reasonable judges and juries will disagree as to who shall bear the lion's share of the loss, much less the percentages. Finally, when the case is pure apples and oranges—one party speeds, the other runs a stop signal—there is no guide post, much less guidelines, and acting in furtherance of [comparative negligence], reasonable judges and juries can be expected to come up with radically different evaluations.


50. Comparative fault has been adopted in at least 44 states. See V. Schwartz, *Comparative Negligence § 1.1*, at 3 (2d ed. 1986). The states adopting comparative negligence, whether by judicial opinion or by statute, are divided into two groups. In "pure" comparative negligence jurisdictions, the plaintiff's negligence, no matter how great, les-
among joint tortfeasors has become the rule rather than the exception.\footnote{51} The rule of joint and several liability leaves open the possibility that a joint tortfeasor may bear more than its proportionate share of responsibility for an injury. However, joint and several liability is no more than a legal decision that a tortfeasor, and not the plaintiff, must bear the risk of a joint tortfeasor's insolvency.\footnote{52}

The tort law's changed practices concerning contribution and comparative fault pose new and severe problems of integrating the tort law system and the workers' compensation system. The common-law rules formed the backdrop against which the workers' compensation system was fashioned. Under the common-law system, if the third party was at fault, but the injured employee was not, tort rules would allow the entire loss to fall on the third party, regardless of the employer's fault. Similarly, applying the employer's immunity from suit under the workers' compensation statute, a third party could also bear all of a loss that the third party had combined with the employer to cause. Thus, the workers' compensation statutes were no more unfair than the common-law rules that allowed a plaintiff full recovery from only one of two culpable tortfeasors. In other words, the common-law rules of third party liability and contribution remained unchanged by adoption of the workers' compensation system, and the third party held liable for the entire loss had sens but does not bar recovery from a negligent defendant. See, e.g., N.Y. Civ. Prac. L. & R. § 1411 (McKinney 1976). Under modified or "drop-off" comparative negligence, a plaintiff's negligence does not bar recovery only if it remains below, or does not exceed, a specified proportion, usually 50% of the total fault. See, e.g., Ark. Code Ann. § 16-64-122(b) (1987).

51. At least 36 states have enacted statutes that allow a right of contribution; in at least five other states the right has been created judicially. See 3 F. Harper, F. James & O. Gray, The Law of Torts § 10.2, at 40-41 & nn. 6-8 (2d ed. 1986); Restatement (Second) of Torts § 886A (1979).


Generally, states that have retained joint and several liability while adopting comparative negligence grant the joint tortfeasor who has paid the judgment the right to contribution from other tortfeasors. This may take the form either of apportioning the damages equally among the tortfeasors, or of apportioning the damages based on comparative fault principles. The former approach is the more traditional; the latter represents the modern trend, especially in comparative negligence jurisdictions. See F. Harper, F. James & O. Gray, supra note 51, § 10.2, at 51-53.

A problem arises when one or more of the joint tortfeasors enjoys immunity. Compare Welter v. Curry, 260 Ark. 287, 298, 539 S.W.2d 264, 271 (1976) (child may not seek contribution from parent) with Shor v. Paoli, 353 So. 2d 825 (Fla. 1977) (spouse required to contribute despite interspousal immunity). A more common problem arises when culpable actions of the employer and a third party combine to cause the worker's injury, with the employer enjoying tort immunity under the "exclusive remedy" provision of the workers' compensation statute. See infra notes 54-68 and accompanying text.
no particular standing to challenge the fairness of the workers' compensation trade-off.

Once the tort system embraced the new theories regarding contribution and comparative fault, injured employee actions became troublesome. Imposing the entire loss on the third party forces that party to bear a larger share of the loss than it would have if it shared the legal blame for the accident with anyone other than an employer. Yet the principle of tort law immunity for the employer embodied in the exclusive remedy provision of workers' compensation statutes seems to require this result.\(^\text{53}\)

C. The Dole Problem: The Illegitimate Offspring of Workers' Compensation and Tort

The foregoing discussion leads to consideration of what might be called the "Dole problem," a matter over which considerable ink has spilled.\(^\text{54}\) In *Dole v. Dow Chemical Co.*,\(^\text{55}\) the New York Court of Appeals allowed a third party to sue an employer for contribution for an employee's death, notwithstanding the employer's immunity from direct suit by the employee's survivors.\(^\text{56}\) *Dole* illustrates a pattern that occurs

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\(^{53}\) The lack of fairness from the third party's viewpoint is exacerbated unnecessarily by the rule allowing a negligent employer to avoid any portion of the loss through subrogation. *See supra* note 33. But even if the third party were allowed credit for the amount of workers' compensation benefits received by the employee, the third party might be required to pay an amount far in excess of the liability suggested by principles of comparative fault. For example, if the third party and the employer were equally at fault in an accident for which workers' compensation benefits amounted to $50,000 and the tort recovery $1,000,000, such a credit would cut the third party's liability to $950,000, but principles of comparative fault would suggest that its liability should be limited to $500,000.

\(^{54}\) As of this printing, Shepard's Citations lists over 65 law review articles and three treatises that cite *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

\(^{55}\) *Id.*

\(^{56}\) Dow Chemical Company produced methyl bromide, a poisonous fumigant, and labeled the chemical as poisonous, dangerous and highly volatile. Employees of Urban Milling Company used the chemical to fumigate a grain storage bin, and shortly thereafter directed Dole, another employee, to enter the bin to clean it. "In doing this he was exposed to the poison which resulted in his death." *Id.* at 146, 282 N.E.2d at 290, 331 N.Y.S.2d at 385. Dole's widow brought suit against Dow and Dow sued over against Urban, the employer. *See id.*

Mrs. Dole contended that Dow negligently failed to provide a proper warning to users of its fumigant. She alleged that Dow failed to "warn and instruct users that entry without protection into an enclosed area where the poison had been employed would be dangerous [and] that use in an enclosed structure should be followed by effective dissipation of vapors or the lapse of time enough to allow dissipation." *Id.* Dow's response denied its negligence and alleged affirmative negligence by Mr. Dole. Further, Dow's third-party complaint against the employer alleged that the methyl bromide used was properly labeled and that Dow had furnished the employer printed instructions as to its proper use in fumigation. "If decedent's death was caused by negligence it was the result of the 'active and primary negligence' of Urban and the negligence of Dow 'if any' was 'merely passive and secondary.'" *Id.* According to Dow's pleading, Urban negligently used un-
regularly. An employee, injured by the combination of culpable actions committed by his employer and a third party, sues the third party. Faced with liability for the entire loss, the third party attempts to shift a portion of the loss to the employer by asserting that the burden should be allocated under the principles of comparative fault. The employer objects, arguing that to impose on it any liability outside of workers' compensation would violate the statutory exclusive remedy provision.\(^5\)

Present law cannot fulfill the reasonable expectations of the three parties. First, the employee argues that workers' compensation statutes were never intended to preclude the employee's action against a third party because the exclusive remedy provision bars only the suit against the employer. The innocent plaintiff should not be barred from suing a wrongdoer who, unlike the employer, is not bound to pay damages in the

trained personnel in fumigating and negligently failed to aerate and test the premises after fumigation. \textit{See id.}\(^7\)

If Mrs. Dole were to recover, Dow wanted the employer to indemnify it fully. The employer moved to dismiss the third-party complaint, which was denied by the trial court but approved unanimously on appeal to the Appellate Division. The dismissal was ordered by the Appellate Division “on the ground liability over would not be allowed if the plaintiff established that Dow's negligence in mislabeling and insufficient warning contributed to the accident.” \textit{Id.} In such case, the Appellate Division noted, Dow would be guilty of “‘active negligence of a character which would bar Dow from recovery against the user of the product’ even though the user was also negligent,” a view the Court of Appeals agreed was consistent with the common law of New York. \textit{Id.} at 146-47, 282 N.E.2d at 291, 331 N.Y.S.2d at 385. The Court of Appeals nevertheless reversed the Appellate Division and allowed the third-party complaint to go forward. The court fashioned a new rule, applicable when total indemnity is inappropriate due to the active negligence of the third party, which apportions responsibility for the injured party's damages between the negligent third party (Dow) and the negligent employer (Urban). The Court of Appeals thereby adopted a form of “equitable” or “comparative” indemnity, to use Dean Prosser's terminology. \textit{See W. Prosser & P. Keeton, supra} note 20, § 67, at 477.

The common-law bar of contribution among joint tortfeasors had been reversed by statute in New York, allowing one joint tortfeasor subject to judgment to compel equal contribution by another joint tortfeasor subject to the same judgment. \textit{See N.Y. Civ. Prac. L. & R.} 1401 (McKinney 1976). As the Court of Appeals observed, a major problem was that application of the statute depended on the willingness or ability of the injured party to sue all the joint tortfeasors, an impossibility if one of the wrongdoers were the employer, who enjoyed the protection of the exclusive remedy provision of the workers' compensation statute. \textit{See Dole}, 30 N.Y.2d at 148, 282 N.E.2d at 291, 331 N.Y.S.2d at 387.

In another break with traditional common law, New York courts had developed the “active negligence/passive negligence” doctrine, under which a tortfeasor deemed “passively” negligent was allowed full indemnity from the “actively” negligent tortfeasor, a doctrine explained by the Court of Appeals in \textit{Dole} as follows:

This process in practical application became a measure of degree of differential culpability, although the degree was a large one. The “passive” negligent act was treated by the court as less a wrong than the “active” negligent act. The result has been that there has in fact emerged from the statutory change and from the judicial decisions an actual apportionment among those who participate responsibly in actionable torts. \textit{Id.} at 148, 282 N.E.2d at 292, 331 N.Y.S.2d at 387.

57. Indeed, the employer typically will seek to recoup the workers' compensation benefits it has paid to the employee out of the employee's recovery from the third party. \textit{See supra} note 33.
absence of wrongdoing. Second, the third party, under modern comparative fault principles, simply argues for shifting a portion of the loss to another whose fault has contributed to the loss. A stranger to the workers' compensation trade-off who receives no benefit from it, the third party should not be forced to pay an extra amount in damages merely because the other wrongdoer is the plaintiff's employer. Finally, the employer argues that it should not be forced to contribute to a large damage award against the third party. The employer has already assumed the burden of compensating all its injured employees regardless of culpability, and as part of a recognized trade-off, is entitled to the exclusive remedy provision. It is anomalous that an employer whose fault is the sole proximate cause of an employee's harm is protected by the exclusive remedy provision of workers' compensation, but that such protection may be lost if the employer is only partly to blame.

Courts have adopted varying solutions to this problem. Some, including the New York Court of Appeals in Dole, have allowed the third party's suit over against the employer, reasoning that the third party "does not sue for damages 'on account of' [the employee's] death." Instead, the third party "asserts its own right of recovery for breach of an alleged independent duty or obligation owed to it by the [employer]." This sophisticated argument fails to address the employer's very real concern that it should be liable only for workers' compensation benefits. Under the Dole rule, the employer can protect itself only by purchasing insurance to cover third party liability in addition to workers' compensation insurance. To say that damages paid as a result of the third party's action against the employer are not paid on account of the employee's injury is to make a semantic argument devoid of substance.

59. See Davis, supra note 6, at 573-77 (discussing various judicial and statutory approaches to the Dole problem).
60. Dole, 30 N.Y.2d at 152, 282 N.E.2d at 294, 331 N.Y.S.2d at 390 (quoting Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N.Y. 175, 179, 15 N.E.2d 567, 568 (1938)).
61. Dole, 30 N.Y.2d at 152, 282 N.E.2d at 294, 331 N.Y.S.2d at 390 (quoting Westchester Light Co., 278 N.Y. at 175, 15 N.E.2d at 568).
62. This issue is reminiscent of the dispute concerning whether punitive damages are included in the coverage of an automobile liability insurance policy obligating the insurance company to pay the insured's liability arising "because of bodily injury." Courts can use policy language to justify either result. By emphasizing that punitive damages are awarded only to injured parties—no matter the degree of the defendant driver's misconduct, he will not be held liable for punitive damages unless he in fact harms someone—they can conclude that such damages are awarded "because of bodily injury." Alternatively, they can reason that punitive damages are awarded not to compensate the plaintiff for his losses, but to punish the wrongdoer. The majority and dissenting opin-
Such an approach allows a court to reach the result it desires without explaining the policies underlying its decision.

Notwithstanding the unfairness to the employer, it is difficult to criticize the result in *Dole* and similar cases when one considers the unfairness to the third party implicit in the major alternative approach. In cases such as *Iowa Power & Light Co. v. Abild Construction Co.*, 63 which represents the majority position on this issue, 64 the third party's claim against the employer is disallowed notwithstanding a general policy of allowing contribution among joint tortfeasors. 65 Professor Larson explained the rationale behind the majority position:

[T]he employer is not jointly liable to the employee in tort; therefore he cannot be a joint tortfeasor. . . . The claim of the employee against the employer is solely for statutory benefits; his claim against the third person is for damages. The two are different in kind and cannot result in a common liability. 66

As with the approach in *Dole*, this explanation allows courts to hide behind rules without justifying policy. The employer is hardly in the position of an insurance company, whose contractual obligation does not depend upon culpability. Absent statutory protection, the employer's liability would arise under the same common-law principles that apply to the third party. In such a setting, it is far from clear that one of two wrongdoers—the third party—should bear a disproportionate share of ultimate liability. 67 In any event, it seems inadequate for a court to claim that its hands are tied because the theoretical bases of the claims against

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63. 259 Iowa 314, 144 N.W.2d 303 (1966).
65. See *Davis, supra* note 6, app. I, at 592-93 (citing cases denying third party actions against employers); Comment, *Exclusive Remedy, supra* note 10, at 499 n.92 (same).
67. In jurisdictions following *Iowa Power*, the employer usually avoids any loss whatever, on account of its right of subrogation. See *supra* note 33. Professor Larson criticizes this outcome as "too absolute a victory for the employer." Larson, *supra* note 66, at 366.
the employer and the third party conflict. For a legislature, however, this theoretical justification is wholly inappropriate.

Both the approach in *Dole*, which opens the employer to a contribution suit in addition to the supposedly "exclusive remedy" of workers' compensation, and the majority approach, which saddles the third party with a share of the injury greater than that which it has caused, are flawed.

II. POSSIBLE SOLUTIONS TO THE "DOLE PROBLEM": PROTECTING THE EMPLOYER AND THE THIRD PARTY

A. The Effect of this Article’s Proposal

The proposal advanced in this Article would provide appropriate protection to both the employer and the third party. Unlike the result in *Dole*, employer liability would never exceed statutory workers' compensation benefits. In most jurisdictions, the employer would be slightly worse off under the proposal. At present, even a negligent employer usually is subrogated to the extent of workers' compensation benefits. Under the proposal, however, the employer would retain its subrogation right against the third party, but reduced proportionately to the fault attributable to the employer and the employee. Nevertheless, the proposal follows the logic of the workers' compensation system by providing the employer with the appropriate level of protection. The workers' compensation system holds the employer responsible, to the extent of workers' compensation benefits, for injuries caused either by its own fault or by that of the employee. If a loss has been caused partly by the employer or the employee and partly by a third party, it is logical to limit the employer's recovery from the third party to that portion of the loss not attributable to the employer or its employee.

This proposal would also protect the third party, notwithstanding its potential liability in a tort suit brought by the employer for recovery of the workers' compensation benefits paid by the employer to the employee. In that suit, the employer would be charged both with its own fault and that of the employee. If culpability were attributed ten percent to the employer, twenty percent to the employee and seventy percent to the third party, for example, the third party would be liable to the same extent as any negligent tort defendant where the plaintiff is thirty percent at fault. Under a "pure" comparative fault system, which would offer

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68. As is the case throughout the law of torts, one must be careful in asserting that a wrongdoer has or has not "caused" a particular loss. The third party's tortious action typically is but a single proximate cause of the employee's entire harm. Nonetheless, the common law tended to view each wrongdoer's conduct as the single cause of the entire injury. *See supra* notes 44-45 and accompanying text. The modern approach continues to accept this view to the extent that the rule of joint and several liability has survived. *See supra* note 52 and accompanying text.

69. *See supra* notes 54-62 and accompanying text.

70. *See supra* note 33.
the third party the least protection, the third party still would be liable for only the share of the loss that it had caused—seventy percent. Because this is the same percentage of the loss that all defendants would bear under a tort system with no workers' compensation system and no exclusive remedy provision, the proposal would avoid the unfairness to the third party engendered by cases such as Iowa Power.

The only loser under the proposal advanced in this Article would be the injured employee, or more properly stated, that rare employee who would have been able to recover from a third party under present law. Such a suit would be barred under the proposal. However, depriving the employee of an action against the third party is not necessarily inappropriate.

B. The Effect of Other Proposals

The present proposal is not justified simply as a solution to the Dole problem. Other proposals advanced by courts and commentators would protect the employer and the third party without restricting the employee's rights as drastically as the present proposal. Such proposals

71. If the jurisdiction followed the common-law rule of contributory negligence, the third party would have no liability if either the employer or the employee were at fault. If some form of "drop-off" comparative fault were in effect, the third party would be completely protected if the combined fault of employer and employee exceeded the percentage specified in the particular state. See supra note 50.

72. In jurisdictions that do not apply principles of pure comparative fault in tort suits, the third party might escape liability that it would bear under the general tort system in the absence of workers' compensation. For example, suppose that the employee were blameless, the employer 60% at fault and the third party 40% at fault. If general tort principles were applied in the absence of workers' compensation, in all jurisdictions the third party could be held liable for at least 40% of the employee's damages. Under the proposal, the employer would sue the third party, and in jurisdictions barring recovery by a plaintiff who is 60% at fault, the third party would pay nothing. This outcome is not troubling. If the employee is properly compensated by workers' compensation—an essential requirement for any good system of dealing with workplace injuries, see infra notes 99-100 and accompanying text—the problem is simply a question of whether the employer or the third party should pay those benefits. Since the employer must pay in the first instance, it is in much the same position as any plaintiff seeking reimbursement for its loss from a defendant. The policy considerations that would lead a jurisdiction to use contributory negligence or "drop-off" comparative negligence—both of which allow negligent defendants to avoid liability—are almost the same in this case as in any other tort case.

73. See supra notes 63-68 and accompanying text.

74. See infra notes 97-100, 159-203 and accompanying text.

75. A limited move toward resolution of the Dole problem could be made without limiting the employee's rights. Under the approach taken in Maio v. Fahs, 339 Pa. 180, 14 A.2d 105 (1940), the employee receives the greater of a full tort recovery or workers' compensation benefits. Such a result leaves the employee in the same position as in most jurisdictions under present law, since generally the employer is subrogated to the extent of workers' compensation benefits. See supra note 33 and accompanying text. Under the approach of Maio, if the employer were free from fault, it would be entitled to usual subrogation rights. If, however, the employer were found to be at fault, the third party
would deny the employee a full tort recovery, but would not totally eliminate the right to sue the third party.

For example, in Murray v. United States, the Court of Appeals for the District of Columbia Circuit held that if both the employer and the third party were at fault, contribution from the employer would be denied. In what seems to be dicta, the court noted that any inequity to

would be allowed credit for the workers' compensation benefits paid by the employer to the employee, and the employer would not be entitled to recoup those benefits.

Such an approach allows the employee the equivalent of a full tort recovery. The employer avoids the result of Dole and can never be held liable for an amount in excess of workers' compensation benefits. It is true that under present law the employer would avoid all loss because of its right to subrogation, but the employer should have no complaint so long as its share of liability does not exceed the portion attributable to its own fault or to that of the injured employee. See supra notes 69-74 and accompanying text. Finally, the third party, while not obtaining the amount of contribution that principles of comparative fault would suggest, avoids the full harshness of Iowa Power because it can shift some portion of the loss to the employer.


Recently proposed federal statutory reform of products liability law would impose a rule similar to that of Maio v. Fahs. Under the proposals, the third party's liability would be reduced by the amount of workers' compensation benefits. Absent contract, the employer would have no right of subrogation unless it could establish that the injury occurred without fault of the employer or the injured employee's coworkers. See S. 1400, 101st Cong. 1st Sess. § 305, 135 Cong. Rec. S8725, S8728 (daily ed. July 25, 1989); H.R. 2700, 101st Cong., 1st Sess. § 9.

76. In some cases, the present system allows the employee more than a full recovery. If the employee is allowed a full tort recovery from the third party without having to account for workers' compensation benefits, the employee receives total compensation exceeding his injury. See 2A A. Larson, supra note 1, § 71. Professor Davis has suggested that the basis for this windfall may be a recognition that the excess recovery is offset by his attorneys' fees. However, "[a]lthough this may be a pragmatic answer, it is unprincipled . . . ." Davis, supra note 6, at 583.

Given the American system under which each party normally bears his own attorneys' fees in tort litigation, it is difficult to justify a departure from this general practice simply because the injured party is fortunate enough to have recourse to an alternate system of compensation. It is true that most jurisdictions permit workers' compensation claimants an allowance for attorneys' fees under some circumstances, typically when the employer denies liability. See 3 A. Larson, supra note 1, § 83.12(b)(1) (listing 34 jurisdictions). This means only that the two systems have different rules regarding attorneys' fees, but does not justify dual recovery for the same injury. By such reasoning, a plaintiff fortunate enough to be injured by two solvent tortfeasors should be allowed tort recoveries from both for the same injury, on the theory that a single tort recovery is inadequate because no recovery for attorneys' fees is allowed. The more usual rule is to allow the employer a right of subrogation to the extent of workers' compensation benefits paid. See supra note 33.

77. 405 F.2d 1361 (D.C. Cir. 1968).
78. See id. at 1364.
the third party would be "mitigated if not eliminated" because the victim could recover only fifty percent of his damages from the third party. In addition, the employee would retain his workers' compensation recovery undiminished by the employer's right of subrogation. Thus, the employee would recover workers' compensation benefits plus one half of the tort damages, a result obviously more favorable to the employee than the result under the present proposal. The Murray approach—now abandoned in the District of Columbia and apparently not adopted elsewhere—would protect the employer from paying more than the supposedly exclusive remedy of workers' compensation and limit the third party's portion of the loss to fifty percent of the employee's total damage award.

Slightly modified, the approach taken in Murray could protect the ex-

79. Professor Larson concluded that the formula outlined in Murray was "more than dictum, [but] not much more." Larson, Third-Party Action Over Against Workers' Compensation Employer, 1982 Duke L.J. 483, 495. Professor Larson noted that while the court's discussion of the employee's rights was not essential to the decision that the third party was not entitled to contribution from the employer, that discussion "in part justifies the harshness of its main decision." Id. The D.C. Court of Appeals, on the other hand, termed the Murray rule "palpable dictum." Ceco Corp. v. Coleman, 441 A.2d 940, 952 (D.C. 1982).

80. 405 F.2d at 1365.

81. The court did not state that the employee would retain the workers' compensation benefit. Professor Larson, United States District Judge Gesell, and the District of Columbia Court of Appeals all concluded that the employer would have a right of subrogation. See Turner v. Excavation Constr., Inc., 324 F. Supp. 704, 705 (D.D.C. 1971); Ceco Corp., 441 A.2d at 953-56; Larson, supra note 79, at 497.

On the other hand, it seems clear from the opinion in Murray that the court thought that the injured employee could retain the workers' compensation benefit in addition to one half of his tort recovery from the third party. Judge Gesell so read the D.C. Circuit's opinion in Murray. See Turner, 324 F. Supp. at 705. Moreover, the logic of the argument in Murray supports this view. The court's statement that the employee could recover only half his tort judgment from the third party relied on authority holding that a plaintiff who settled with one of two joint tortfeasors could recover only one half of the total tort judgment from the other. In such a case, it is clear that the settling tortfeasor would not have any claim to a portion of the plaintiff's recovery from the non-settling tortfeasor.

In any event, since Murray is now dead, see infra note 83, the case is of academic interest only.

82. Under the approach of Murray, whenever the workers' compensation recovery is more than 50% of the full recovery in a tort lawsuit, the injured employee's total receipts apparently would exceed the amount that he would have received in either the workers' compensation or the tort system alone. For example, an employee whose injury would produce for him $10,000 in a tort suit and $6,000 in workers' compensation would receive $11,000 under the Murray rule (50% of $10,000, or $5,000, plus $6,000).

83. Even if the Murray formula was good law when the case was decided, the District of Columbia Court of Appeals rejected that approach. See Ceco Corp., 441 A.2d at 953.

84. See 2B A. Larson, supra note 1, § 76.37, at 14-723.

85. The approximation would match the result under comparative fault principles only if the third party and the employer each were 50% at fault. When the third party's fault diverges greatly from 50%, the result under Murray differs considerably from the result under comparative fault. For example, suppose the third party were 90% at fault and the employer were only 10% at fault. The third party would shoulder 50% of the cost of the injury under the Murray rule, but 90% under comparative fault.
pectations of both the employer under workers' compensation and the third party under comparative fault principles. In a case arising under the Longshoremen's and Harbor Workers' Compensation Act, the Fourth Circuit attempted such a creative approach by limiting third party liability to its own portion of fault. The Supreme Court reversed, holding that Congress had intended to continue the traditional common-law approach. Professor Davis has proposed statutory modifications that would give a result similar to that proposed by the Fourth Circuit. Under Professor Davis' approach, the third party would be held responsible in damages to the employee to the extent of its fault, while the employer would pay only the benefits due under workers' compensation, perhaps reduced by partial subrogation. Similarly, Messrs. Cohen and Dougherty proposed that the employee, even if blameless, should be charged with the employer's share of the fault in his suit against the third party. Under this approach, "the third party actually responds to the employee only for that amount of the employee's damages as is equal to

87. See Edmonds v. Compagnie Generale Transatlantique, 577 F.2d 1153 (4th Cir. 1978), rev'd, 443 U.S. 256 (1979). In Edmonds, the employee was adjudged 10% at fault, the employer 70% and the third party 20%. The Fourth Circuit held that the third party should pay only 20% of the damages, rather than the 90% suggested by traditional analysis. See id. at 1154. Because the employer was not a party to the litigation, the court explicitly left open the question of the employer's right to any portion of the employee's recovery from the third party. See id. at 1156.

Similarly creative approaches were considered in Brkaric v. Star Iron & Steel Co., 409 F. Supp. 516 (E.D.N.Y. 1976). In that case, an employee's widow who had received compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (1982) [hereinafter LHWCA], sued a third party, which in turn brought a third party action against the employer. See Brkaric, 409 F. Supp. at 518. The court denied the employer's motion for dismissal. See id. at 526. Finding it unnecessary to decide whether New York law controlled, the court discussed both Dole and Murray as possible approaches for avoiding the exclusive remedy provision of the LHWCA. See id. at 520-25. The district court also suggested that the decision of the United States Supreme Court in United States v. Reliable Transfer Co., 421 U.S. 397 (1975), adopting the rule of comparative fault in maritime cases, could be blended with Murray. "[T]he Murray credit might be allowed in an amount proportionate to the respective negligence, and not the 50% figure which was mentioned in the Murray opinion, and which has been criticized." Brkaric, 409 F. Supp. at 525.

Writing in the same year Brkaric was decided, Professor Davis predicted that "a future effect of Reliable Transfer will be that the Murray rule will be modified to apportion damages to the relative degrees of fault." Davis, supra note 6, at 580 (footnote omitted).
88. See Edmons v. Compagnie Generale Transatlantique, 443 U.S. 256, 263-71 (1979). The Court held that the third party's liability was to be reduced only by the fault attributable to the employee. In effect, therefore, the third party was required to bear the burden of the employer's fault as well as its own.
89. See Davis, supra note 6, at 580. Under this approach, subrogation of the employer would be allowed only to the extent of fault not attributable to the employer. Thus, if the employer were 20% at fault, it would be entitled to recover 80% of workers' compensation benefits paid, apparently without regard to whether the remaining 80% of fault were attributable to the employee or to the third party. Professor Davis intended this result only for those jurisdictions that allow the employer subrogation rights under any circumstances. See id.
the third party's proportion of the fault." Although these approaches could reduce the employee's recovery from that allowed under present law, proponents argue that the employee would usually receive a larger total recovery than if he received workers' compensation benefits alone.

These proposals protect the employer and the third party by forcing the employee to give up a portion of the full tort recovery that he expects under principles of joint and several liability. If the employee deserves a full tort recovery, however, to say he is denied that recovery only in part falls far short of an ideal solution.

Other commentators have proposed, as is advocated here, that the employee be denied his suit against the third party entirely. But to the degree such proposals focus on the policy bases for protecting the employer or the third party, without justifying barring the employee's recovery, they, too, are not altogether satisfying. It is clear that society can protect the legitimate expectations of any two of the three parties; the difficulty is to achieve an outcome fair to all three.

90. Cohen & Dougherty, supra note 10, at 606.
91. See Davis, supra note 6, at 580; Comment, Exclusive Remedy, supra note 10, at 506.

On the other hand, the employee's recovery might be equal to or less than workers' compensation benefits. Suppose that full tort damages and full workers' compensation damages were both $10,000. If the employee were allowed to receive 50% of workers' compensation benefits plus 50% of tort damages ($5,000 plus $5,000), he would be no better off than with a full workers' compensation recovery.

If full tort damages were less than full workers' compensation benefits, application of the logic of some of these proposals could leave the employee with less than full workers' compensation benefits. For example, although Professor Davis asserted that under his proposal "[e]mployees or dependents never get less than the full compensation award," Davis, supra note 6, at 580, Ms. Lynch argued that "[u]nder the Davis approach, the employee would recover less . . . in those few cases in which the tort award is less than the workers' compensation award." Lynch, supra note 10, at 57. The significance of this threat is reduced because an employee faced with such a result would choose not to pursue his tort suit to final judgment.

92. Under general tort law, if a victim is injured by two culpable parties, he normally may obtain full recovery from either. The effort of the wrongdoer who has paid to shift a portion of the loss to the other wrongdoer is of no concern to the plaintiff. The injured employee can reasonably assert that this principle entitles him to a full recovery from the third party, regardless of whether he chooses to (or is entitled to) sue the employer.

93. See Bernstein, supra note 9, at 556; O'Connell, Supplementing Workers' Compensation, supra note 10, at 541; O'Connell, supra note 9, at 685; O'Connell, Bargaining for Waivers, supra note 10, at 468; Weisgall, supra note 10, at 1071; Comment, A Critique, supra note 10, at 161. Significant differences exist between each of these proposals and the proposal advocated in this Article.

94. It is at this point that the author parts company with Professor O'Connell's proposal for statutory abolition of the employee's cause of action, advanced in O'Connell, Immediate Solution, supra note 9. Professor O'Connell convincingly demonstrates that the proposal could benefit third parties and employers, but too lightly dismisses the employee's loss: "Although it is true employees thereby lose their tort rights, given the unlikelihood of payment in any given case and the delay and waste attendant on any such payment, employees as a group lose little." Id. at 686. While it is true that any given injury is unlikely to be compensated by the tort system, it is the compensation for precisely such injuries that is the point of contention. If some injured employees are entitled
As discussed earlier, any approach that assures the employee's right to full recovery measured by tort law would unfairly prejudice the employer, the third party, or both. However, protecting the legitimate expectations of the employer and third party by eliminating the employee's tort recovery presents an important question: Is it proper to limit the employee's right of recovery? Unless this question can be answered affirmatively, any proposal that limits the employee's right to recovery in order to benefit the other parties simply degenerates into a question of whose ox should be gored. Unquestionably, good reasons can be advanced for sparing the other parties, even at the cost of forcing the injured employee to forego all or part of his tort recovery. However, no approach is entirely satisfactory if the employee receives less than he is entitled to recover.

The balance of this Article advances the proposition that the employee's suit against the third party should be barred and that the employee should be consigned to the exclusive remedy of workers' compensation precisely because this approach would provide most appropriate recovery for the injured worker.

III. WORKERS' COMPENSATION: THE PROPER METHOD OF COMPENSATING INJURED WORKERS

A. Compatibility of the Proposal and the Workers' Compensation System

The theory underlying the workers' compensation system never has suggested a single, permanent answer to the question of how many dollars an injured person should receive in compensation for a loss. One enduring principle is present, however, and the validity of that principle is essential to the proposal advanced in this Article. That is, an injured employee's compensation, whatever the amount, ought not to depend on the fault of either the employer or the employee. The employee should recover the same amount from the employer regardless of the culpability of either. Similarly, the worker's entitlement to proper compensation to tort recoveries, society should not readily deprive them of such recoveries in order to benefit employers and third parties.

95. Obviously, the third party's liability to the employee could be limited to the amount of the employee's tort damages multiplied by the third party's share of the fault, a result that would not defeat the third party's expectations.

Many of the approaches envision reduction or elimination of the employer's traditional right of full subrogation against the third party. Although society may be sympathetic toward the employer who must bear the cost of workers' compensation benefits for an injury caused by a third party, this result does not necessarily defeat the employer's legitimate expectations. Under the workers' compensation scheme, the employer should expect to pay compensation benefits for job related injuries, regardless of fault. Thus, society need not concern itself with the employer's inability to reduce its expected financial loss when the injury results fortuitously from a third party's fault rather than the employee's fault. See supra note 74 and accompanying text.

96. See supra notes 12-14 and accompanying text.
should not depend on whether a third party happens to be legally culpable, any more than it should depend on the fault of employer or employee.

The workers' compensation system regards worker injuries as part of the cost of production, and "the cost of the product should bear the blood of the workman." If the business is to continue, this cost must be passed on to customers; if customers refuse to pay, society does not value the business' product at an amount sufficient to cover all production costs, including worker injuries. Alternatively, the employer could absorb the additional cost without increasing the price it charged customers for the product. The existence of profitable operations would indicate that society indeed values the product enough to enable the employer to cover all costs of production, including workers' compensation benefits, and still operate with an adequate profit margin. If, however, absorption of these additional costs would leave the employer with a loss, or with inadequate profit, it could not sustain production in the long run.

The basic justice and wisdom of this approach is self-evident. Employment injuries are too frequent an occurrence and such an inevitable part of business for compensation to depend upon the peculiarities of a particular accident. Moreover, the manner in which a particular injury occurs does not affect the social need for compensation when earning capacity is diminished or eliminated by an industrial accident. If customers did not bear the cost of compensation for accidents through higher prices, they might nevertheless do so as taxpayers through transfer payments, which would also stigmatize the victim. Finally, little justification exists for engaging the extraordinarily expensive mechanism of a law suit to allocate responsibility for individual accidents.

Assuming that all injured employees are entitled to adequate compensation, the amount of recovery should not vary with the presence or

97. See W. Prosser & P. Keeton, supra note 20, § 80, at 573 & n.49. Dean Prosser, who termed it an "old campaign slogan," wrote that he had heard the quotation attributed to British Prime Minister Lloyd George, but had been unable to trace its origin. See id. at 573 n.48.

98. Welfare is only one form of government transfer payments that might be available to the injured worker. Others include disability under social security and state welfare programs.

99. With regard to the important and basic requirement that the injury be employment-related, it is by no means self-evident that sound social policy should limit recovery from the employer to job-related injuries. Indeed, the victim has an equal need of compensation whether the injury occurs in the course of employment or not. Such an approach, however, would be revolutionary.

While workers' compensation provides recoveries without regard to fault, it is not entirely true that the employer has played no role in a job-related injury. It was the employer whose business created the circumstances in which the employee was injured. While the employee injured away from the job also needs compensation, there is considerably less reason to think that providing it should be the employer's responsibility. Perhaps compensation should be the responsibility of society as a whole.

The broadest no-fault system ever placed into effect is the New Zealand Accident Compensation Act. See Harris, Accident Compensation in New Zealand: A Comprehensive
absence of a legally responsible third party. Although all injured employees are entitled to appropriate compensation, none is entitled to a windfall in the form of overcompensation.\textsuperscript{100}

B. Objections to the Proposal

Several objections might be raised against the arguments advanced by this Article. The most fundamental objection is that workers' compensation benefits are inadequate.\textsuperscript{101} Critics also might suggest that allowing the third-party tortfeasor to pay less than full tort damages would allow it to avoid its moral obligation to compensate;\textsuperscript{102} that reduction of third-party liability would undermine industrial safety;\textsuperscript{103} and that it is unfair, irrational, and perhaps unconstitutional\textsuperscript{104} to bar employees' tort suits while maintaining them for the public at large.

1. The Tort System's Answer to the Asserted Inadequacy of Workers' Compensation Benefits

Accepting the premise that tort recoveries, when available, usually ex-
ceed workers' compensation benefits for the same injury, it by no means follows that the tort recovery is more appropriate. On the contrary, the tort system is, in fact, a less desirable method of compensation for all involved, except the lawyers.105

If, however, society decides that present workers' compensation benefits are inadequate,106 the obvious and proper solution is to increase workers' compensation benefits to an appropriate level. Allowing a few injured employees to obtain adequate redress through the tort system, while undercompensating the vast majority, does not correct society's failure to provide an adequate remedy.

Defenders of the present system may contend that for political reasons, workers' compensation benefits cannot be increased,107 but even if this were true,108 the present system is still inferior. The present system does not provide tort recoveries to a broad spectrum of injured workers,109 and the basis for allowing such recoveries frequently seems almost arbitrary when viewed from the plaintiff's perspective. Two workers may have identical injuries and identical needs, yet one may be able to sue a third party and the other not. The fault of the injured party may be almost irrelevant. One worker may be blameless yet unable to sue be-

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105. The interest of the plaintiffs' attorney in tort litigation is obvious. Without this interest and the occasional large recoveries it provides to some victims, the plaintiffs' attorney would be out of business. See generally Brimelow & Spencer, The Plaintiff Attorneys' Great Honey Rush, Forbes, Oct. 16, 1989, at 197, reprinted in 135 Cong. Rec. S16888 (daily ed. Nov. 21, 1989) (criticizing high earnings of plaintiffs' attorneys and their political efforts to block changes in tort law).

106. It may be less obvious that the defense attorney is also well served by a tort system that exposes defendants to large monetary damages. It is the magnitude of such damages and the possibility that an attorney's skill can determine whether such damages must be paid, that cause defendants to employ high-priced attorneys.

107. One commentator argues that proposals to limit employee suits enjoy "significant political clout" on account of "the alarming disparity in access to information, lobbying efforts, and financial influence between manufacturing enterprises as a whole and compensated employees as a group." Lynch, supra note 10, at 60.

108. During the last six months of 1988 and the first seven months of 1989, 24 states increased benefits, including 21 that did so through the use of automatic adjustments. See Bus. Ins., Oct. 16, 1989, at 54.

109. Professor Bernstein cited 1974 figures that indicated that some $1.5 billion was expended on third-party tort claims, as compared to an expenditure of only $5.5 billion to provide workers' compensation benefits "to fifty times as many claimants." Bernstein, supra note 9, at 543-44, 562-64. Since tort claims outlays have probably grown more rapidly than workers' compensation benefits in the intervening 15 years, it seems likely that the disparity has increased between the recoveries of injured workers who have access to the tort system and those who do not. See infra notes 182-186 and accompanying text.
cause there was no culpable third party, while another worker whose own negligence contributed to his injury may recover damages if he is fortunate enough to have been injured in part by a solvent third party. The random nature of the tort system extends even to workers entitled to a tort judgment, because a judgment will be worthless to the worker who was injured by an insolvent third party. In contrast, because employers usually are insured or solvent, almost all injured workers will receive workers' compensation benefits.

Defenders of the present system might answer that this varying ability of injured plaintiffs to recover is inherent in the tort system. All injured parties thrown to the tender mercies of the tort system can recover only if they have been injured in a legally culpable manner by a defendant who does not enjoy immunity and who is able to respond in damages. But that is the shame of the tort system, not its glory. It is the arbitrary nature of the tort system, which denies adequate benefits to many who need and deserve them, that led to the adoption of the workers' compensation system.110

Workers' compensation is the only relief most injured workers receive.111 Unless those benefits are adequate in amount, it is clear that the present system fails miserably. Society's basic goal is, or certainly ought to be, that all injured workers be entitled to adequate compensation. In terms of need and moral claim against society, injured workers should be grouped according to severity of injury, not according to the identity or the conduct of the injurer. Reliance upon workers' compensation benefits as the plaintiff's exclusive remedy—not just against the employer but against anyone—offers the significant advantage of treating like cases alike to a much greater degree than the present system.

2. Why Treat Injured Workers Differently from Other Accident Victims?

Another possible objection to the proposal is that it deprives injured workers of the right to bring tort actions against unrelated parties, while leaving others in society free to sue.

a. How Far Should No-Fault Principles Be Extended?

One might argue that this proposal is too timid. If all injured workers should receive equal treatment, with recovery based on the severity of injury, why not apply the same theory of recovery to all injured parties? The author tends to support adoption of a system of no-fault compensation for all accident victims along the lines of the New Zealand Compensation Act.112 Indeed, the present proposal might be viewed as a step in that direction.

111. See Bernstein, supra note 9, at 543-44.
112. See supra note 99.
The limited application of no-fault principles proposed here is appropriate for several reasons. This proposal could be implemented easily because the workers' compensation system already exists, while adopting a no-fault system for a broad range of accidental injuries would require many complex steps. In addition, society recognizes the special characteristics of the employment relationship, and legislatures already have limited compensation benefits and imposed liability on blameless employers. Outside the employment context, the mere relationship of injurer and victim may not warrant liability without fault.

Finally, it should be noted that a true no-fault system covering most or all injuries would simply lead us again to question the modesty of that proposal. Under such a system the nexus between payor, whether injurer or government, and injury may be so weak that society's true purpose is simply to compensate victims. In that case, why compensate only accident victims? Why not, for example, also compensate victims of disease?\(^{113}\)

None of this is to say that the concept of workers' compensation should apply only to employment related accidents—in at least some regards, especially measurement of damages, it should apply to all injuries. However, the complexities of the present tort system are far greater than this proposal addresses. Nonetheless, this proposal will greatly simplify the entanglement of workers' compensation and tort law. The victim will retain the recovery provided under the present law for all injured employees while avoiding complexities of an additional suit against a third party.\(^{114}\)

b. Constitutional Questions

Barring the employee's suit against the third party while maintaining the tort system for other injuries could be challenged based on the equal protection clause of state and federal constitutions.\(^{115}\) Opponents also might challenge the proposal under state constitutional provisions that

113. By this reasoning, perhaps even the New Zealand Accident Compensation Act, see supra note 99, is too modest. Having decided that social needs require that all accident victims should receive compensation, by what reasoning are those who suffer other types of misfortune held not entitled to such recovery?

114. Cf. Bernstein, supra note 9, at 554-55 (arguing for re-allocating third party funds to provide more compensation at lower cost). It is true that the present proposal allows a suit by the employer for the recovery of all or part of workers' compensation benefits paid. Nevertheless, considerable simplification would result. The possibility of a three-party suit, as in Dole, would be eliminated. In addition, settlement negotiations would be simplified because both the employer and the third party would know precisely the maximum amount of money at stake. In many cases, the employer and the third party would have an ongoing business relationship through which they might have access to some relatively efficient settlement mechanism, such as one operated by a trade association.

115. See U.S. Const. amend XIV, § 1. Equal protection challenges can also arise under state constitutions.

One writer has gone so far as to argue that retention of present workers' compensation arrangements may constitute an unconstitutional denial of equal protection. See Lynch, supra note 10, at 41-45. A proposal to foreclose the injured employee's present right to
guarantee access to the courts to seek redress for injuries. The validity of this proposal under the federal Constitution is of particular importance. Any statute, state or federal, would be subject to the federal Constitution, the amendment of which is difficult. The public benefit of this proposal, however, should suffice to overcome a federal constitutional challenge. As a practical matter, it is unlikely that this proposal would be enacted without an increase in the level of workers' compensation payments. If that were done, the proposal would stand on much the same ground as the original workers' compensation statutes. The original statutes benefitted workers who could not recover at common law but harmed employees who could have recovered. Coupled with increased workers' compensation benefits, the present proposal would amount to a new "trade off" of tort rights for assured compensation.

Even without an increase in benefits, the proposal would represent a modification of a system long regarded as constitutional. In sustaining bring a tort action against a third party, Ms. Lynch concludes, "is likely to fail a rigorous constitutional analysis." Id. at 60.

116. Some 37 state constitutions have such a provision. See Wagner, Courts Consider Caps' Constitutionality, Nat'l L.J., July 20, 1987, at 23, col. 3.

117. The Interagency Task Force on Product Liability, which examined the possibility of abolishing the employee's right of action against a third party in products liability cases, concluded that the addition of a *quid pro quo* in the form of increased workers' compensation benefits would provide considerable protection from constitutional challenge. See Interagency Task Force on Product Liability, U.S. Dep't of Commerce, Pub. No. ITFPL 77/02, Final Report of the Legal Study vol. VI, at 74-81 (1977).

118. If the workers' compensation statutes originally had been enacted with exclusive remedy provisions broad enough to protect the third party as well as the employer, it seems quite likely that such statutes would have been upheld in their entirety. It is true that some of the early Supreme Court cases sustaining state compensation statutes emphasized the *quid pro quo* aspect of those statutes, specifically, the employee's right to no-fault compensation benefits was coupled with the employer's protection granted by the exclusive remedy provision. In New York Central R.R. Co. v. White, 243 U.S. 188 (1917), the Court suggested in dicta that "it perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead." Id. at 201. But even in *White*, the Court observed that "[t]he act evidently is intended as a just settlement of a difficult problem, affecting one of the most important of social relations, and it is to be judged in its entirety." Id. at 202. The Court's statement that "[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit," id. at 198, offers little support to a constitutional challenge against the present proposal, nor does the fact that the Court ultimately analyzed the statute in terms of whether it was "arbitrary and unreasonable." Id. at 202.

Furthermore, the United States Supreme Court in similar settings has allowed states to end rights without providing anything in return. See, e.g., Silver v. Silver, 280 U.S. 117 (1929) (upholding automobile "guest statute" that left a non-paying guest wholly without remedy against the driver absent intent, heedlessness or reckless disregard); Arizona Employers' Liability Cases, 250 U.S. 400 (1919) (sustaining a compensation statute that gave workers the option of compensation benefits without granting employers the exclusive remedy provision).

Even if a *quid pro quo* were required, as the *White* dicta suggest, the workers' compensation scheme provides that to employees. Judging such a statute in its entirety, it seems unlikely that the Court would have insisted that the "*quid*" come from the third party, so long as it was received by the employee. If the proposal would have been sustained if
the original workers' compensation statutes, courts concluded that the public benefit of a rational policy of compensating injured workers overcame constitutional challenges. The present proposal would likely receive the same friendly reception.

The issue of constitutionality under state constitutions is necessarily enacted as part of the original statutes, it should not matter whether the system was established all at once or by a series of legislative acts spanning several decades.

As noted above, Ms. Lynch suggests that the present system is open to constitutional question. See supra note 115. She argues that constitutionality depends on whether workers' compensation statutes are advantageous to both employers and employees. Under recent developments in tort law, "[t]he workers' compensation 'bargain' is no longer mutually advantageous and can no longer justify the employer's immunity from suit." Lynch, supra note 10, at 42. Despite this asserted lack of mutual advantage, courts continue to enforce the exclusive remedy provisions of workers' compensation statutes.

Several commentators have concluded that similar proposals would be constitutional. Mr. Weisgall defends his proposal by citing several instances in which courts have sustained legislative abolition of common-law rights, and observes that "the Supreme Court has repeatedly held that no one has a property or vested interest in a rule of common law such as to protect the law itself from alteration." Weisgall, supra note 10, at 1078. Professor Davis argues that his proposed reduction of the employee's right to sue third parties "should be seen as an amendment to the compensation 'trade-off,' just as statutes giving immunity to fellow servants and compensation insurance carriers are part of that 'trade-off.'" Davis, supra note 6, at 581-82. Similarly, while conceding the existence of conflicting case law, Professor O'Connell has concluded that his proposal for voluntary waivers of tort claims against third parties "clearly should be upheld." O'Connell, Bargaining for Waivers, supra note 10, at 450.

The exclusive remedy provision common to workers' compensation statutes could itself be viewed as denying equal protection to employees who are injured by the employer, but, unlike non-employees so injured, are barred from suing. Obviously, this line of attack has been unsuccessful.

A recent decision of the United States Court of Appeals for the Tenth Circuit suggests that modern courts may continue to allow state legislatures considerable latitude in allocating economic losses arising from job-related injuries. In Veronie v. Garcia, 878 F.2d 347 (10th Cir. 1989), an injured employee received approximately $135,000 in compensation benefits from his employer, then sued a third party in tort. The employer's insurer intervened seeking subrogation against the third party. See id. at 348. After the third party settled with the employee for $12,000 without the insurer's consent, the insurer sought summary judgment against the third party under § 23:1102(c). That statute imposes liability on the third party for the full extent of compensation benefits paid by the employer if the third party settles with the employee with the approval of the employer or its insurer. See Veronie, 878 F.2d at 349; La. Rev. Stat. Ann. § 23:1102(c) (1983).

The third party argued that the statute was unconstitutional because it imposed liability without allowing a trial on the merits. See Veronie, 878 F.2d at 349. The court rejected that argument, reasoning that liability was imposed not for negligence in causing the injury, but for the third party's breach of "a statutory duty not to settle a claim brought by an injured employee... without first obtaining the consent of the workers' compensation insurer." Id. at 349-50.

The court also gave short shrift to the third party's argument that the statute violated the equal protection clause of the fourteenth amendment because the statute "gives employers and their insurers favored treatment under the law at the expense of employees and third party tortfeasors." Id. at 350. Despite the harsh result, the court found the statute "rationally related to a number of legitimate state interests," including the adjustment of "economic burdens within the workers' compensation arena" and the promotion of judicial economy. Id. Accordingly, the court upheld the statute. See id. Consequently, the third party's failure to comply with the statute resulted in liability to the
more complicated because each constitution requires separate analysis. The proposal would probably be inconsistent with some state constitutions. On the other hand, resolution of problems posed by state constitutions is simpler than in the case of the federal Constitution. If the proposal were enacted by a federal statute, the supremacy clause of the United States Constitution would obviate any issues of state law. If the proposal were enacted through state statute, the constitution could be amended if necessary, a process generally less burdensome than in the

employer of $147,000 rather than the $12,000 it settled for with the employee, without any adjudication of liability for the underlying injury.

The standard of review is crucial in the case of equal protection scrutiny. Some years ago, Professor Gunther commented on the all-important distinction between "the aggressive 'new' equal protection, with scrutiny that was 'strict' in theory and fatal in fact," and "the deferential 'old' equal protection ... with minimal scrutiny in theory and virtually none in fact." Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972). In Veronie, the court observed that the rational relationship test applied because no suspect class or fundamental interest was involved. See Veronie, 878 F.2d at 350. Evaluated under this standard, a statute based upon the proposal advanced in this Article would survive constitutional challenge.


The proposal of this Article, if enacted by state statute in Arizona, would apparently be unconstitutional. An election-out alternative would be meaningless because the proposal, unlike the workers' compensation system, offers the employee nothing in exchange for surrendering his tort suit. Perhaps the proposal could be enacted in Arizona without amending the constitution if the legislature included an increase in workers' compensation benefits, and made the increase conditional on the employee's not electing instead to retain his right to sue the third party.

122. U.S. Const. art. VI, para. 2.

123. It is well established that Congress can make radical changes in employment relationships historically governed by state law. In United States v. Darby, 312 U.S. 100 (1941), the Supreme Court upheld the Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-09 (1982 & Supp. V 1987)), which regulated wages and hours for employees producing goods to be introduced into interstate commerce. The Court rejected the argument that "while the prohibition is nominally a regulation of the commerce its motive or purpose is regulation of wages and hours of persons engaged in manufacture, the control of which has been reserved to the states." Darby, 312 U.S. at 113.


124. Constitutional provisions that stand in the way of beneficial change should be amended, and not the other way around. The original New York workers' compensation statute initially was held invalid under that state's constitution. See Ives v. South Buffalo Ry., 201 N.Y. 271, 94 N.E. 431 (1911). However, the decision was quickly reversed by constitutional amendment. See 4 N.Y. Laws app. at 2492 (1913) (amending New York state constitution by adding art. 1 § 19 (now § 18)); 1A. Larson, supra note 1, § 5.20, at 39; supra note 24.
case of the federal Constitution. Use of the amendment process was necessary in the early history of workers' compensation in order to overcome judicial barriers.

3. Third-Party Moral Responsibility

Another possible objection to the proposal is the idea that the third party, having caused an injury, should—in a moral sense—pay for that injury. The historical linkage of tort and crime is strong, and unquestionably many injured parties and other members of society feel a sense of satisfaction when a wrongdoer pays for his conduct, whether civilly or criminally. Although the present proposal allows for third-party liability to the employer to the extent of workers' compensation benefits, these benefits usually are substantially lower than damages awarded in tort. Moreover, the payment would go to the employer, who may share the fault, rather than to the injured worker.

Objections to the proposal based on the third party's moral obligations fail for a number of reasons. First, the proposal advanced here allows third-party liability to the extent of workers' compensation payments, and there is no reason to think that this is an inaccurate measurement of

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125. From 1946 to 1956, state constitutions were amended 1,172 times, or an average of more than two amendments per year for each state. See Graves, Use of the Amending Procedure Since World War II, in Major Problems in State Constitutional Revision 100, 102-03 (W. Graves ed. 1960). The process of amendment in the various states is discussed in Bartley, Methods of Constitutional Change, in Major Problems in State Constitutional Revision 21, 24-28 (W. Graves ed. 1960). For a more detailed but quite dated study, see W. Dodd, The Revision and Amendment of the State Constitutions 118-265 (1910).

126. See supra note 124.

127. Professor Larson states: "The concept underlying third party actions is the moral idea that the ultimate loss from wrongdoing should fall upon the wrongdoer." 2A A. Larson, supra note 1, § 71.10, at 14-1.

128. Oliver Wendell Holmes asserted that "the general principles of criminal and civil liability are the same." O. Holmes, The Common Law 44 (1881). See generally Epstein, Crime and Tort: Old Wine in Old Bottles, in Assessing the Criminal 231 (R. Barnett & J. Hagel eds. 1977) (discussing overlap and divergence of criminal and tort law); Hall, Interrelations of Criminal Law and Torts (pts. 1 & 2), 43 Colum. L. Rev. 753, 967 (1943) (same).

129. The third party would be liable for the full amount of workers' compensation benefits paid by the employer only if both the employer and the employee were blameless. Under the proposal, the employer would be entitled to sue the third party for recovery of the workers' compensation benefits paid to the employee, but in that suit the employer would be charged with the employee's fault as well as its own.

130. It is generally agreed that tort damages for a given injury typically exceed workers' compensation benefits for the same injury. However, while workers' compensation claimants represent the full spectrum of injured employees, only few bring tort actions. The tort action will make sense economically only if the injured employee expects a recovery substantially in excess of workers' compensation benefits. The victim may net nothing unless the tort recovery exceeds the workers' compensation benefit to some degree, because the employer usually is subrogated to the extent of workers' compensation benefits. See supra note 33. For these reasons, the difference between compensation levels under the two systems may be less for employee injuries as a whole than for employee injuries that result in tort suits.
the compensable harm.\textsuperscript{131} Payment to the employer rather than to the employee is objectionable, if at all, only on a visceral level. A blameless employer stands in the same position as a subrogated insurer. When the employer is culpable, allowing a partial recovery is wholly consistent with modern principles of comparative fault.\textsuperscript{132} Under the present law of most jurisdictions, even a negligent employer is subrogated to the extent of workers' compensation benefits paid.\textsuperscript{133}

Most importantly, the idea that society should use compensatory\textsuperscript{134} tort damages as a means of making a wrongdoer pay is inconsistent with the most basic principles of tort law, particularly as those principles have developed in the twentieth century. As Oliver Wendell Holmes pointed out a century ago, it is not wrongful actions alone that give rise to liability, but wrongful actions that happen to cause harm:

[Tort law] . . . cannot enable [an actor] to predict with certainty whether a given act under given circumstances will make him liable, because an act will rarely have that effect unless followed by damage, and for the most part, if not always, the consequences of an act are not known . . . . All the rules that the law can lay down beforehand are rules for determining the conduct which will be followed by liability if it is followed by harm,—that is, the conduct which a man pursues at his peril. . . . [I]f he escapes liability, it is simply because by good fortune no harm comes of his conduct in the particular event.\textsuperscript{135}

The primary purpose of tort law is to compensate the plaintiff for his loss.\textsuperscript{136} While the law will not do this without some basis for regarding

\textsuperscript{131} See infra notes 159-203 and accompanying text.

\textsuperscript{132} Under the proposal, a negligent employer's recovery from the third party would depend upon the jurisdiction's treatment of the plaintiff's fault. Nonetheless, under comparative negligence principles, a plaintiff who is partially at fault sometimes may recover, and most jurisdictions allow contribution among joint tortfeasors despite their individual culpability. See supra notes 46-51 and accompanying text. Thus, partial recovery by a culpable employer may be no more offensive than allowing a negligent plaintiff partial recovery.

\textsuperscript{133} See supra note 33.

\textsuperscript{134} Unlike compensatory damages, punitive damages are designed to punish rather than to compensate. Accordingly, the personal and moral considerations of criminal law are more relevant in assessing punitive damages than in determining compensatory damages.

The basic concept of punitive damages may be flawed. Not only are punitive damages suspect as a matter of policy, see supra note 100, but they may be unconstitutional as presently administered in most states. See generally Wheeler, The Constitutional Case For Reforming Punitive Damages Procedures, 60 Va. L. Rev. 269 (1983) (discussing constitutionality of procedural aspects of punitive damages).

\textsuperscript{135} O. Holmes, supra note 128, at 79.

\textsuperscript{136} It is a matter of considerable interest that tort law not only limits compensatory damages to instances in which harm occurs, but generally imposes the same limitation on punitive damages. As a punishment for defendant's wrongful conduct and as a deterrent against future wrongdoing by the defendant and others, punitive damages bear little theoretical relationship to the plaintiff's injury. See supra note 100.

Professor Ellis identified seven justifications for punitive damages, two of which—compensating the plaintiff's otherwise uncompensable losses and paying his attorneys' fees—relate to the plaintiff's loss rather than the defendant's culpability. See Ellis, supra note
the defendant as an appropriate person to bear the loss, harm suffered by
the plaintiff is always an indispensable element. Thus, once an injured
employee has received an appropriate recovery from his employer, soci-
ety need not concern itself with whether the wrongdoer has paid enough.
Most wrongful acts cause no harm, and thus subject the actors to no
liability at all; some wrongful acts cause limited harm and subject the
wrongdoer to limited liability; a few cause great harm and lead to great
liability. Yet society properly refuses to measure compensatory damages
according to the wrongfulness of the defendant's conduct; the very term
"compensatory" focuses instead on the plaintiff's suffering.

It is especially difficult to contend that today's compensatory tort dam-
ages fulfill any appropriate punishment function. Modern trends have
emphasized compensation for the plaintiff as a basis for recovery, even
in the absence of serious wrongdoing—or any wrongdoing at all—on the
part of the defendant. Even in areas where negligence remains the

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100, at 3. Termed "incomplete justifications," id. at 10, these two justifications merely
suggest that the measurement of compensatory damages is inaccurate. Indeed, punitive
damages respond only to the defendant's wrongdoing and absent the required degree of
culpability, the law otherwise does not allow recovery for uncompensable losses or attor-
neys' fees. See also id. at 10 (asserting that punitive damages reward the private attorney
general); Morris, Punitive Damages, supra note 100, at 1182 (same).

Many courts hold that there should be a direct relationship between compensatory and
punitive damages, so that the greater the amount of compensatory damages, the greater
the level of punitive damages. See, e.g., Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 928,
582 P.2d 980, 990, 148 Cal. Rptr. 389, 399 (1978). In the author's view, such a practice
turns the policy of the law backwards. Most wrongful conduct causes no harm, and the
wrongdoer avoids paying any tort damages at all for his affront to society. In the rela-
tively rare case in which wrongful conduct happens to cause injury, the wrongdoer al-
ready is forced to pay, through compensatory damages, far more than most who have
sinned as greatly as he. Why, then, does the law force the latter to pay even more
through punitive damages? Moreover, it seems that low compensatory damages would
require a greater deterrent in the form of punitive damages than necessary when compensa-
tory damages are high. Assuming some actual harm is required, the question remains:
If A and B engage in equally wrongful conduct, but A causes $100,000 in harm and B
$1,000,000, by what logic is it held that B, having paid ten times as much in compensa-
tory damages, now should be held liable for greater punitive damages than A?

In rare instances, courts have upheld a jury award of punitive damages without an
accompanying award of compensatory damages. For example, in Wells v. Smith, 297
S.E.2d 872 (W. Va. 1982), the plaintiffs had sought compensatory and punitive damages
from several defendants for conversion. The jury awarded compensatory and punitive
awards against some defendants, but awarded only punitive damages against one. The
trial court granted that defendant's motion to set aside the punitive damage award. The
Supreme Court of Appeals of West Virginia ordered the award of punitive damages reinstated, accepting the argument that "where a claim for actual damages is sufficiently
pleaded and proved, the failure of the jury to allow compensatory damages does not
require an award of exemplary or punitive damages to be set aside." Id. at 875.

137. Dean Calabresi asserts that the true goal in this regard is "reducing the societal
costs resulting from accidents" rather than compensating victims per se. See G. Cala-
bresi, The Costs of Accidents 27 (1970). "I shall attempt to show that the notion that one
of the principal functions of accident law is the compensation of victims is really a rather
misleading, though occasionally useful, way of stating this 'secondary' accident cost re-
duction goal." Id.

138. This shift in emphasis is apparent in the emergence of products liability—an ex-
nominal standard, \(^{139}\) courts have twisted the doctrine of *res ipsa loquitur* \(^{140}\) and expanded the concept of duty to new areas. \(^{141}\) Courts have also devised entirely new torts, \(^{142}\) and in many ways "creatively" interpreted issues relating to defendant's fault, \(^{143}\) plaintiff's fault \(^{144}\) and caus-

tremely important source of third party liability to injured employees—as a major area of strict liability. See Restatement (Second) of Torts § 402A (1965); R. Epstein, Modern Products Liability Law 25-35 (1980); Prosser, supra note 39, 791-800; Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1099-1103 (1960); *supra* notes 35-40 and accompanying text. Compensation without fault has found wide acceptance in recent decades:

In the first half of the twentieth century, the system for compensating worker injuries shifted from a basis in fault to a basis in strict accountability. In the years since 1950, a second major shift has occurred—an almost universal acceptance of strict products liability—and application of the fault principle to highway injuries has been eroded in some states by no-fault legislation. The time may be near, if it has not already arrived, in which more compensation is paid on the basis of strict accountability than on the basis of fault.

W. Prosser & P. Keeton, *supra* note 20, § 85, at 615.

139. In fact, significant areas of products liability are governed by a standard that has many features of negligence. See *supra* note 37.

140. See, e.g., Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944) (applying *res ipsa loquitur* to multiple defendants, although clearly not all contributed to plaintiff’s harm, thus imposing liability on defendants unable to establish non-culpability).

141. See, e.g., Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970) (apartment owner owed duty to protect tenant from foreseeable criminal acts notwithstanding tenant's knowledge of protection actually provided); Longstreth v. GenSel, 423 Mich. 675, 377 N.W.2d 804 (1985) (social host liable where 19-year-old guest left wedding reception intoxicated and was killed in auto accident).


143. For example, courts have shifted the burden of proof, forcing defendants to "prove their nonculpability, or else risk liability for the injuries suffered." Anderson v. Somberg, 67 N.J. 291, 298, 338 A.2d 1, 5, *cert. denied*, 423 U.S. 929 (1975). In Anderson, four defendants were sued on different theories; in such a setting, it might seem likely that each defendant could establish his nonculpability, even if he had the burden of proof. The New Jersey Supreme Court, however, ruled that the jury must find that at least one defendant had failed to discharge the newly-imposed burden of proof, for otherwise a "miscarriage of justice" would result. *Id.* at 297, 338 A.2d at 4. Such judicial contortions obviously go far beyond such important, but relatively noncontroversial, developments as the reduced deference given to a defendant's adherence to industry custom. See *supra* notes 21 & 35.

144. See, e.g., Peterson v. Campbell, 105 Ill. App. 3d 992, 434 N.E.2d 1169 (1982). In Peterson, the court acknowledged that "courts apply a more restrictive definition of negli-
consistently increasing the law’s protection of injured plaintiffs. Under the proposal, the third party still would remain liable to the employer for workers’ compensation benefits paid to the employee; surely morality as expressed through compensatory tort damages does not compel more. Through the criminal law, society continues to measure punishment by the moral failing of the offender. Conversely, once the tort victim has received an appropriate recovery, compensatory tort damages have served their function. As noted previously, if workers’ compensation benefits are inadequate in amount, the proper solution is to increase the amount of the benefits.

4. Third-Party Damages as Necessary to Further Safety Goals

Apart from the question of the third party’s moral obligation to compensate its victim for the full measure of tort damages, continued liability of third parties may be defended as necessary to ensure worker safety. If the third party were immune to employee suits and liable to the employee only for benefits paid by the employer, third parties would allocate fewer resources toward worker safety. The most obvious reduction in safety incentive would be for producers of capital equipment that would usually injure only compensation-covered employees. Assured that producing a defective product would result in limited liability and not include open-ended tort liability, the argument goes, the third party would be less concerned with safety, a long recognized policy goal of tort law.

That tort law furthers safety in fact as well as in theory is by no means

145. See, e.g., Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980). In Sindell, market share liability was imposed on drug manufacturers not acting in concert, notwithstanding plaintiff’s failure to identify the specific manufacturer that produced the drug that caused her injury. Liability was imposed according to each defendant’s share of the relevant drug market. See id. at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. The New York Court of Appeals recently has gone even further by imposing market share liability even though the defendant could have proved that it did not manufacture the drug that harmed the plaintiff. See Hymowitz v. Eli Lilly and Co., 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, cert. denied, 110 S. Ct. 350 (1989).

146. It is interesting that society differentiates among criminal offenders based on the consequences to the victim. For example, there may be little logic in punishing murder more harshly than attempted murder—the attempt includes all the moral depravity of the completed act, but merely coupled with ineptitude or intervening fortune. Nonetheless, most members of society probably consider this differentiation appropriate. See generally Ryu, Contemporary Problems of Criminal Attempts, 32 N.Y.U. L. Rev. 1170 (1957) (discussing impossibility, preparation, withdrawal and appropriate sanctions in the concept of attempt).

147. Under the proposal, a culpable third party might escape any liability, depending on the effect of plaintiff’s negligence in the particular jurisdiction. The employer seeking recovery from the third party would be charged with its own negligence and that of its employee. See supra notes 71-73 and accompanying text.

clear. An increasing body of literature suggests that tort law does not improve safety significantly. Indeed, in several ways tort law actually works against safety. Manufacturers may “overwarn” on product labels to the extent that only confuses users. Innovations that could further safety may be impeded rather than encouraged by tort law because acceptance of a new design suggests that the old design was defective. More generally, the threat of tort liability may encourage an injurer to conceal facts that could prevent a recurrence of the accident.

Nevertheless, let us accept for the purpose of present analysis the traditional claim of the tort system’s supporters, and thus concede arguendo that the threat of liability causes increased concern for safety on the part of the third party. Adoption of this proposal, therefore, could be expected to reduce the third party’s allocation of resources to safety and thus result in more accidents. Recognizing this possibility by no means concedes a drawback of the proposal, however. We long have realized that the highest level of safety attainable is a goal that we should not pursue. This is a fundamental teaching of the “Learned Hand test,” which has played a large role in the modern economic analysis of tort law.

149. See, e.g., Pierce, Encouraging Safety: The Limits of Tort Law and Government Regulation, 33 Vand. L. Rev. 1281, 1288-1308, 1330 (1980) (concluding that “[t]ort law has proven an abysmal failure at accomplishing its putative goals”); Sugarman, Doing Away with Tort Law, 73 Calif. L. Rev. 555, 559-91, 664 (1985) (concluding that “[t]ort law is failing . . . to promote better conduct”).

150. See, e.g., Sugarman, supra note 149, at 582-83. A different kind of overwarning may also occur among therapists in the wake of Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). See Givelber, Bowers & Blitch, Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action, 1984 Wis. L. Rev. 443, 469-70 (analyzing impact of potential liability of Tarasoff on therapists’ conduct in light of empirical evidence and concluding that in warning potential victims of patients, therapists are likely to violate their clinical judgment).

151. See Sugarman, supra note 149, at 583-84.


154. Judge Hand stated his classic test in United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947):

[The owner’s duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B [is less than] PL.

Id. at 173.

155. Judge Posner contends that Judge Hand produced “[t]he essential clue” to an understanding of negligence theory. Posner, A Theory of Negligence, 1 J. Legal Stud. 29, 32 (1972). The importance of Judge Hand’s analysis is not limited to negligence theory. For example, it has provided the starting point for the argument of Dean Calabresi and Professor Hirschoff that liability should be placed on the party in the best position to
the highest degree of safety attainable, but in the real world this is not the case. Accordingly, we pursue only relative safety, and the level of safety sought depends—and should depend—upon the resource costs of greater safety and upon the danger protected against.\textsuperscript{156} From this, it follows that it is possible to invest too much in safety just as it is possible to invest too little. It is wasteful for society to spend $10,000 to eliminate a one-percent danger of a worker suffering a broken leg, unless we think that a broken leg is "worth" a million dollars.\textsuperscript{157}

Therefore, even assuming that the present system provides workers with more safety than the proposal, it does not necessarily follow that the present system provides a more appropriate level of safety. Greater safety for workers, or for anyone else, is a worthwhile societal goal if we conclude that inadequate resources are devoted to safety; but less safety is an equally worthwhile goal if we conclude that excessive resources are devoted to safety. An assertion that the tort law generates not merely more safety but a more appropriate level of safety assumes that the tort system more accurately measures the monetary equivalent of personal injury than does the workers' compensation system. If the tort system, and not the workers' compensation system, determines the level of resources allocated to safety, the appropriateness of the allocation depends upon which system better measures damages, that is, converts to monetary terms decide whether an accident "should" be avoided, and to act on its decision. See Calabresi & Hirschoff, Toward a Test for Strict Liability in Torts, 81 Yale L.J. 1055, 1056 (1972).

156. The American Bar Association's Special Committee on the Tort Liability System has observed that "many [tort] decisions clearly indicate that accident reduction is a worthy goal by itself, a goal at least semi-detached from economic optimization." Special Comm. on the Tort Liab. Sys., American Bar Ass'n, Towards A Jurisprudence of Injury: The Continuing Creation of a System of Substantive Justice in American Tort Law 4-7 (1984). While some opinions in tort cases can be read this way, it is likely that the opinions arise from the decisions of courts in individual cases before them. Such decisions do not reflect a widespread judicial view that costs are irrelevant in determining the appropriate degree of safety that society should pursue. If any judges actually think that costs are irrelevant, they are wrong.

157. In some instances, American society may be grossly overspending in an effort to attain an inefficient level of safety. An empirical study of the effects of the Occupational Safety and Health Act led to the conclusion that in 1977, OSHA inspections caused industry to increase its expenditures on safety capital by $461 million, but reduced worker accidents by only $6.4 million. See Bartel & Thomas, The Costs and Benefits of OSHA-Induced Investments in Employee Safety and Health, in Workers' Compensation Benefits: Adequacy, Equity, and Efficiency 41, 54 (1985). "Clearly, the costs of OSHA-induced investments overwhelmingly outweighed the benefits." Id. Any such analysis requires that a monetary value be placed on injuries. Focusing exclusively on the economic aspects of injuries, Bartel and Thomas assigned a 1977 value of $50 to each lost workday. See id. at 54 & n.12.

The present system of quantifying tort damages makes any valuation uncertain, of course, including the proposition suggested in the text that a broken leg is not worth a million dollars. In Kavanaugh v. Geze, 27 A.T.L.A. Rep. 327 (Sept. 1984), a California Superior Court jury awarded a 32-year-old dentist $3 million from a distributor of skiing equipment. The dentist's ski binding broke while he skied, causing him to break both the tibia and fibula in his lower leg. The dentist settled with the manufacturer before trial for $250,000. See id.
losses which do not lend themselves to quantification.158 If the workers' compensation system is more accurate in this most difficult undertaking, acceptance of the proposal, while reducing resources devoted to worker safety, would save those resources for other, more efficient, uses. The remainder of this Article will examine the question of which of the two competing systems should be regarded as the more reliable in the process of quantifying damages.

IV. PRESENT WORKERS' COMPENSATION BENEFITS ARE NOT INADEQUATE

The principal criticism of the workers' compensation system, and of any proposal that would limit injured workers to that system's benefits, is that workers' compensation benefits are inadequate in amount. As noted previously,159 this criticism, even if correct, is hardly fatal to the proposal. Society's goals are best served by the principles underlying the workers' compensation system—that every injured employee be entitled to compensation determined by the severity of his loss, and not by the manner in which the accident occurred. If the workers' compensation system allows recoveries that are too small, the recoveries should be increased, but the principles of workers' compensation still should apply.

However, the correctness of the underlying assertion—that workers' compensation benefits are too low—need not be regarded as received truth. Similarly, the theory that tort actions more accurately measure victims' losses than do workers' compensation schedules of damages is not necessarily true. These principles are only assumptions implicit both in present law and in most reform proposals, including some that advocate limiting the employee's cause of action against the third party.160 This Section argues that, contrary to conventional wisdom, workers' compensation provides the more accurate measurement of compensation. Accordingly, allowance of a tort action by the employee against a third party not only is unnecessary, but can result in a windfall to the victim and lead to an inappropriately high allocation of resources to safety.

A. The Impossibility of Measuring the Victim's Loss in Monetary Terms

Compensating for personal injuries, by whatever system, often requires

158. It might be argued that even the tort system results in too small an allocation of resources to safety. Under doctrines such as proximate causation, the defendant in a tort action rarely is held liable for all of the harm caused, as measured by a "but-for" test of causation. See infra notes 193-198 and accompanying text. To the degree that the threat of tort damages affects the quantity of resources allocated to safety, systematic underallocation is therefore possible.

On the other hand, an injurer may suffer many costs, such as the payment of attorneys' fees and adverse publicity, other than payment of damages to the plaintiff. These costs indicate an excessive allocation of resources to safety.

159. See supra notes 105-111 and accompanying text.

160. See supra notes 11, 13 & 91 and accompanying text.
translation into monetary equivalents elements of damage that are especially difficult to quantify. In the area of economic losses, items such as loss of future earning capacity are largely speculative. The decision maker must make such nonmonetary determinations as the permanency and severity of the victim's injuries, the probability that he will return to the labor force and, if so, what position he will hold. The decision maker also must compare the injured employee's expected future with what the future would have held without the injury. Would the victim have remained employed and if so, would he have been promoted? Would economic conditions result in layoffs or other barriers to continued employment? At best, even with expert assistance, the decision maker can make only informed guesses about these matters.

Even more speculative is the fact finder's determination of future trends in wages, interest rates and inflation. Simply stated, accurate computations cannot be made because the necessary figures cannot be known or estimated with any degree of certainty. Experienced investment professionals, who spend entire careers dealing with the course of future interest rates, cannot confidently predict interest rate movement six months in advance. Yet our present system requires the jury, a group of laymen "educated" on the spot by expert witnesses who claim to have clear crystal balls, to speculate not merely about the direction of interest rates, but the actual amount of interest rates for the next forty or fifty

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161. Even such relatively noncontroversial items as past medical expenses can raise troublesome issues. The collateral source rule, for example, has been the subject of both judicial and academic disagreement. Compare United States v. Harue Hayashi, 282 F.2d 599, 604 (9th Cir. 1960) (defendant United States not entitled to offset for Social Security survivors' benefits) with United States v. Gray, 199 F.2d 239, 244 (10th Cir. 1952) (defendant United States entitled to offset for veterans' benefits). The cases cited can be reconciled facially by arguing that Social Security benefits, unlike veterans' benefits, are not paid from general revenues, and thus are not paid by the defendant in the same sense. However, the policy basis for such a distinction is elusive. In both instances the plaintiff "paid" for the government benefit, either through payment of Social Security taxes or through rendering of military service; in both cases, payment was made to and benefits were received from the defendant.


162. Or, for example, would a drinking or drug problem have developed, or intensified, until he were no longer employable?


164. As Judge Newman observed, "[t]he average accident trial should not be converted into a graduate seminar on economic forecasting." Doca, 634 F.2d at 39.
Yet the computation of economic losses is child's play when compared to the quantification of noneconomic losses. In the case of economic losses, the decision maker lacks the facts to compute accurately the target quantum of damages, but at least the target can be stated, and could be computed if the facts were known. By contrast, in the case of noneconomic losses the decision maker is given no standard by which to operate. In matters such as pain and suffering, mental anguish, humiliation and loss of parental guidance and affection, there simply is no basis for quantification beyond the decision maker's wholly subjective conclusion.


Some economic studies suggest that the "real" rate of interest—the nominal interest rate reduced by the average inflation rate—may be relatively stable, perhaps in the range of 1.5% to 3%. See Doce, 634 F.2d at 39 n.10 (citing economists).

Even if we accepted those studies suggesting stability in real interest rates, we should not have confidence in the ability of juries to make calculations based on future interest rates with great accuracy. First, juries are usually free to accept whichever expert's opinion they choose, and that expert may have predicted future real interest rates not within the 1.5% to 3% range. Second, over a long period of time, even the difference between 1.5% and 3% can be considerable. One dollar today will be worth about $1.45 in 25 years if interest rates of 1.5% are assumed, but $2.09 with an assumed rate of 3%. Finally, it should be noted that most studies of real interest rates, necessarily based on past experience, deal with periods in which inflationary expectations are lower than at present. In periods of high expected inflation, we should expect a greater differential between nominal interest rates and inflation (i.e., higher real interest rates). If for no other reason, the income tax law should lead to this result, if we assume that lenders will (and can) demand acceptable rates of after-tax interest. For example, let us assume that expected income tax rates are 33-1/3%. If expected inflation were zero, a nominal interest rate of 3% would yield the lender 2% after payment of income taxes. On the other hand, if assumed inflation were 12%, a nominal interest rate of 15% (supposedly, a real interest rate of 3%) would leave the lender only 10% after payment of income taxes, for a negative after-tax real return. The lender would have to receive a nominal rate of 21% (a real interest rate of 9%) in order to net 14% after taxes, and thus attain a return, after taxes and inflation, of 2%.

It is no answer to take the route of some jurisdictions and simply end discounting. See, e.g., Beaulieu v. Elliott, 434 P.2d 665, 671 (Alaska 1967); Kaczkowski v. Bolubasz, 491 Pa. 561, 583, 421 A.2d 1027, 1039 (1980). The Alaska Supreme Court attempted to justify this result through the following language:

Since the plaintiff, through the defendant's fault and not his own, has been placed in the position of having no assurance that his award of future earnings, reduced to present value, can be utilized so that he will ultimately realize his full earnings, we believe that justice will best be served by permitting the trier of fact to compute loss of future earnings without reduction to present value.

Beaulieu, 434 P.2d at 671. This line of reasoning would lead us to resolve all doubts concerning damage issues—not just those relating to inflation and interest rates—in favor of the plaintiff. Little in the area of damages is certain in most personal injury cases, and possible damages might greatly exceed expected damages in many cases. Such an approach, therefore, would take us far from the goal of compensating the plaintiff for his loss without providing him a windfall.

166. The writer's personal favorite is the "more than normal grief" test of the Arkansas Supreme Court. In St. Louis S.W. Ry. Co. v. Pennington, 261 Ark. 650, 553 S.W.2d
How, then, does the tort system, which requires these impossible calculations in virtually every "garden-variety . . . personal injury suit," operate? The tort system simply pretends that the jury's determination is correct. On this theory, courts, at both the trial and appellate level, find it difficult to review personal injury damage awards. Because any jury's quantification of damages is speculative and uncertain, it is quite difficult for judges to conclude that a jury's figure is so erroneous as to constitute error as a matter of law. It is no solution at all to recite the standard phrase that the jury's determination of damages will be reversed if it indicates "passion and prejudice" on the part of the jury and thus "shocks the conscience" of the court. First, as with the problem of chancellors' consciences and chancellors' feet, while most judges have robust consciences that are not easily shocked, others have consciences that give way with relative ease. If courts are reluctant to intervene (the usual case), individual juries are likely to give widely differing recoveries to plaintiffs with similar injuries. But even if courts take an active role in reviewing the damage awards of juries, the unfettered discretion of the jury may be replaced by the unfettered discretion of the judge, a situation still far from satisfactory. The fact remains that regardless who at-

436 (1977), that court bravely attempted to bring order to Arkansas decisions allowing recovery for the mental anguish of adult survivors of wrongful death victims when the survivors suffer "more than normal grief occasioned by the loss of a loved one." Id. at 674, 553 S.W.2d at 448. The court's candor in dealing with the impossibility of quantifying these damages is refreshing: "We have not found any gauge by which we can measure a verdict for excessiveness. We have sustained, reversed or reduced verdicts upon attack for excessiveness without any real indication of the evidence which either supported or failed to support the verdict." Id. at 677, 553 S.W.2d at 449 (citations omitted).

Perhaps equally refreshing is the court's attempt to draw standards from its earlier decisions to control this item of damage: "It seems clear . . . that the next of kin who does not appear at the trial, does not testify that he suffered mental anguish, and does not attend the funeral of the deceased is not entitled to recover, at least in the absence of some explanation." Id. at 675, 553 S.W.2d at 448 (emphasis added).


169. A typical statement is that a jury award stands on appeal unless "the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury." Seffert v. Los Angeles Transit Lines, 56 Cal. 2d 498, 507, 364 P.2d 337, 342, 15 Cal. Rptr. 161, 166 (1961).

170. Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the standard for the measure we call a "foot" a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in the Chancellor's conscience.

171. There is significant improvement when judges take an active role in setting damages. While the quantification remains essentially arbitrary, at least victims and tortfeasors in a given jurisdiction are likely to receive more consistent treatment. Even if
tempts to quantify losses, the task is impossible.

B. Is an Individualized Determination Preferable?

It is not enough to curse the darkness without lighting a candle. Obviously, personal injuries do occur in circumstances that have led society to conclude that the victim should receive monetary compensation. Accordingly, some mechanism must be employed to quantify injuries that do not lend themselves to quantification. The question for present purposes is which of the two competing systems—the tort system or workers’ compensation—does the less poor job.

The immediate temptation is to prefer the individual determination offered by the tort system. The determination is made by a broad cross section of society embodied in the jury. The unique facts of the particular victim’s injury are placed before the jury, experts offer individualized predictions about the future medical and economic situation, attorneys debate which predictions should be accepted, and the jury can see and hear the plaintiff before assessing injuries such as pain and suffering. The workers’ compensation system, by contrast, merely places the victim into a relatively broad category for which damages already have been determined and does not attempt an individualized assessment of damages. Even if defenders of the tort system concede that no system is available through which society can quantify a personal injury accurately, they might assert that the individualized tort trial is simply the best that can be done.

On the contrary, the basic approach of the individualized tort system is inferior to the workers’ compensation approach. First, the tort system emphasizes factors that should play little or no role in the determination of damages. The most significant of these factors is the relative skill of the attorneys. The makeup of the jury, which may be influenced by the skill and knowledge of the attorneys during voir dire,
tant.\textsuperscript{173} Other factors that should be irrelevant include the sex and physical appearance\textsuperscript{174} of the parties and their witnesses and attorneys,\textsuperscript{175} the place where the case is tried,\textsuperscript{176} and the simple emotional attractiveness of the plaintiff’s case. An individualized determination, especially one made by a jury, brings a great deal of baggage with it. In addition, the jury trial is an exceedingly expensive method of assessing damages. Larger jury awards encourage attorneys to subject lay jurors to minicourses in medicine and economics.\textsuperscript{177} As Oliver Wendell Holmes observed over a century ago, the state’s “cumbrous and expensive machinery ought not to be set in motion unless some clear benefit is to be derived.”\textsuperscript{178}

While a jury trial may offer certain advantages,\textsuperscript{179} greater accuracy in

\begin{itemize}
\item \textsuperscript{173} Some contend that the importance of voir dire goes far beyond selecting the individuals who will decide the case:

Interviews conducted by my consulting firm show that 80 percent of jurors have reached a verdict by the end of voir dire. Apparently they piece together an impression of the merits of a case from the questions asked. Knowing this, lawyers can plan voir dire to ensure that jurors form an impression favorable to their cases.

Jones, \textit{Voir Dire and Jury Selection}, 22 Trial, September, 1986, at 60.


\item \textsuperscript{175} See Cash, Begley, McCown & Weise, \textit{When Counselors Are Heard But Not Seen: Initial Impact of Physical Attractiveness}, 22 J. Counseling Psychology 273 (1975). The importance of the attorney's dress and grooming also may be important:

To create an image of skill and precision, dress neatly in well tailored clothes and give some attention to cuticle care and polished shoes. It is hard for jurors to believe that a seedy, shabby looking lawyer has an orderly, precise mind. If you come into court looking like you were just rolled or mugged in the alley, jurors assume that you are careless and disorganized. On the other hand, it is easy to conclude that the attorney who is well groomed and fastidiously dressed is methodical and meticulous in his preparation.


\item \textsuperscript{176} This factor is not wholly irrelevant. If it may be assumed that a given injury will be more richly compensated by a jury in New York City than by one in Little Rock, Arkansas, some portion of the difference rationally might be attributed to the higher cost of living in New York and the corresponding perception that, even for noneconomic losses, more money is necessary in order to compensate a New York plaintiff than a Little Rock plaintiff for the same loss.

\item \textsuperscript{177} See generally 3-5 M. Belli, \textit{Modern Trials} chs. 53-67 (2d ed. 1982) (discussing various kinds of evidence presented in civil trials).

\item \textsuperscript{178} O. Holmes, \textit{supra} note 128, at 96. A recent study illustrates the excessive costs of tort litigation. Of an estimated $19.5 billion spent on nonauto tort cases in 1985, $11 billion, roughly 57\%, went to litigation costs, including attorney's fees, leaving $7.5 billion for compensation of plaintiffs. \textit{See Committee Report, supra} note 152, at 5, 51-54.

\item \textsuperscript{179} Tradition, never a factor to be discounted, supports the jury trial.

Jury trials are also said to give a measure of societal involvement in liability and damage evaluation that some claim to be lacking in a system such as workers' compensation. In the writer's view, liability in the case of injured workers should be determined without the fault or quasi-fault findings required by the tort system. \textit{See supra} notes 97-100 and accompanying text. The more appropriate setting for societal involvement in the setting
the assessment of damages is not one of them. The tort system only appears to award damages uniquely appropriate for each victim. A given injury might be worth $20,000 to one jury and $100,000 to another, but a fair and rational system would allow the two victims similar recoveries. The individualized tort system simply pretends that one victim has suffered five times as much harm as the other. However, there is no reason to think that that is actually the case when no solid basis supports either assessment of damages. In contrast, the decision maker in an individual workers' compensation case has the much simpler task of categorizing the injury without venturing into the never-never land of determining a monetary equivalent for the injury.

The author does not wish to overstate his argument. The workers' compensation system must quantify the injury, and, because the injuries cannot really be equated to a monetary sum, its quantification will not necessarily be more "accurate" than that of a given jury. But neither will it be less accurate. Moreover, benefits set by workers' compensation statutes ensure similar awards for similar injuries and allow a more appropriate societal consideration as to what the amount of that award should be.

The recent history of tort awards in this country should destroy any faith that the tort system in fact can measure accurately the monetary value of injuries. Within recent memory, the million dollar verdict was akin to the almost unbreakable four-minute mile. To carry the analogy a step further, even after adjustment for inflation, tort plaintiffs have not merely broken the barrier but are running their "miles" in ten or fifteen seconds. Seven-figure settlements are no longer uncommon.

of damages is in the legislative process that controls the workers' compensation system. See infra Section IV.D.

180. See infra Section IV.E.

181. See infra Section IV.D.


183. Kakalik and Pace have observed that:

The average annual growth rate in average compensation paid per liability claim [from 1981-85] has been about 12 percent for auto claims and 17 percent for other tort claims—considerably higher than the 7 percent average growth in the Consumer Price Index during the same years.

J. Kakalik & N. Pace, Costs and Compensation Paid in Tort Litigation xii (1986).

A recent American Medical Association study demonstrating that the average loss paid by physician-owned insurance companies rose from $20,396 in 1979 to $72,243 in 1983. See Kelley & Beyler, Large Damage Awards and the Insurance Crisis: Causes, Effects and Cures, 75 Ill. Bar J. 140, 147-48 (1986).

A Rand Corporation study showed that average jury awards in Cook County, Illinois and San Francisco doubled between 1960 and 1979 after inflation was factored out. See id. Interestingly, the median awards in Cook County and San Francisco did not rise greatly after adjustment for inflation. Professors Kelley and Beyler observed that the largest awards—which tended to be those in which the jury could sense a well-insured or otherwise deep-pocketed defendant—had risen much more than the median award. See id.

184. See, for example, Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal.
This is not to suggest that tort awards are inaccurate because they are large. As noted above, the tort system attempts to quantify that which cannot be quantified, and a large figure is no less accurate than a small one. What is submitted is that the accuracy of the awards cannot be defended on the basis that this is what the tort system came up with and the law can do no better. If today's tort awards are accurate measurements, then the tort system routinely arrived at inadequate awards twenty years ago. On the other hand, if past tort awards were accurate, then today's awards are too high. There is no reason to think that the individualized tort award is more accurate than the categorized approach of the workers' compensation system. The tort system gives greater variety in awards, but that is entirely different from the question of accuracy.

C. What Elements of Loss Should Be Compensated?

Defenders of the tort system might contend that the measurement of damages necessarily is more accurate under that system than under workers' compensation because the workers' compensation system ignores several items. Workers' compensation is designed primarily to compensate for certain economic losses and focuses on replacing the lost earnings of a worker who has been killed or injured. Items of damage that are important in the tort system, most notably pain and suffering, are ignored. It does not follow, however, that the tort system more accurately measures the loss for which society may deem compensation appropriate. Under any system, not all harm is, or can be, compensated.

It is impossible to quantify accurately noneconomic losses such as pain and suffering. Conceding that some loss has occurred, allowing compen-

Rptr. 348 (1981), where a jury awarded the plaintiff over $2.5 million in compensatory damages and $125 million in punitive damages. The trial judge reduced the punitive damages to $3.5 million and ordered a new trial in the alternative, and the appellate court affirmed.

186. See id. at 658-718. For discussion of a case in which the plaintiff received over $3 million in compensation for a broken leg, see supra note 143.
187. "[T]he underlying principle of compensation law [is] that benefits relate to loss of earning capacity and not to physical injury as such." 2 A. Larson, supra note 1, § 58.11, at 10-82.
188. "The only injuries compensated under Workers' Compensation are those which produce disability and, thereby, affect earning power. Damages for pain and suffering are not available under Workers' Compensation statutes." Note, Intentional Torts Under Workers' Compensation Statutes: A Blessing or a Burden?, 12 Hofstra L. Rev. 181, 185 (1983). "While the provisions of workers' compensation statutes vary widely, there are certain common features [including] employee benefits limited to medical expenses and a portion of lost wages . . . ." Comment, Exclusive Remedy, supra note 10, at 492.
189. The tort system normally allows no recovery for the attorneys' fees of the claimant, an item for which recovery frequently is allowed under workers' compensation. See 3 A. Larson, supra note 1, § 83.12(b)(1).
sation in an almost arbitrary amount set by juries does not necessarily result in appropriate compensation. Suppose, for example, that it were possible to determine that a given level of pain were "worth" $20,000. A jury valuation of $100,000 might seem further from justice, in monetary terms, than if no compensation at all were allowed for pain and suffering. However, without a reliable basis for valuing pain and suffering, there is no way to determine whether overvaluation has occurred. As suggested above, it is not entirely satisfactory to say that pain is "worth" whatever value it is given by the tort system, when that same system gave it a much lower value just a few years ago. While human pain has not changed in the past few years, the tort system has radically changed the value placed upon it.

The problem with ready acceptance of the tort system's superiority goes beyond the difficulty of measuring loss. No court has held that all losses occasioned by a defendant's wrongful conduct should be compensated. This is, of course, the concept that is embodied in the term "proximate cause." Generations of first-year law students have struggled toward the realization that the term has very little to do with causation. Instead, proximate cause is a statement of society's policy that certain harm in fact caused by the defendant should not be compensated because society does not deem such compensation expedient.

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190. See supra notes 182-186 and accompanying text.

191. Our scientific knowledge of pain continues to grow, however. Professor Peck concluded that a better understanding of the causes of human pain should "result in a limitation on damages awarded for pain." Peck, Compensation for Pain: A Reappraisal in Light of New Medical Evidence, 72 Mich. L. Rev. 1355, 1395 (1974).

192. Although recovery for pain and suffering is universally allowed by American courts, such noneconomic heads of recovery have not escaped academic criticism. Jaffe, Damages for Personal Injury: The Impact of Insurance, 18 Law & Contemp. Prosbs. 219 (1953), is of particular interest in the context of the present proposal. Professor Jaffe argued that

if our basis of compensating injury is shifted implicitly or explicitly from fault to insurability there must be a reconsideration of the kinds of interest which are compensated and the degree of compensation for the interests which are compensable. It seems likely that... protection must tend to shrink toward the minimum level of economic loss.

Id. at 235. Other important criticisms of the present approach to compensation for pain and suffering include Morris, Liability for Pain and Suffering, 59 Colum. L. Rev. 476 (1959), and Plant, Damages for Pain and Suffering, 19 Ohio St. L.J. 200 (1958).

193. The policy issue was well stated in the famous Wagon Mound (No. 1) case:

[I]t does not seem consonant with current ideas of justice or morality that, for an act of negligence, however slight or venial, which results in some trivial foreseeable damage, the actor should be liable for all consequences, however unforeseeable and however grave, so long as they can be said to be "direct". It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour.

Overseas Tankship (U.K.), Ltd. v. Morts Dock & Engineering Co., Ltd., [1961] App. Cas. 388, 422-23, 1 All E.R. 404, 413 (P.C. Aust.). Thus, for reasons of policy, the court
The concept that not all consequences of a tortfeasor's wrong give rise to legal compensation permeates the law of torts. At one time, the law allowed no wrongful death action; this result was reversed by statute in both England and this country. Yet the law has chosen not to allow all who suffer from a death to recover. Anyone who has suffered the loss of a close friend knows that the loss is a very real one indeed; like pain and suffering, it may cost no money, but the loss may be as real as physical pain. Yet even today, regardless of the believability of the friend's testimony regarding his loss, the law refuses to allow any compensation at all. Why does the law refuse to make the tortfeasor pay for the loss? Surely the explanation is not that the mental anguish of friends over the victim's death is unforeseeable, or that the anguish is not the direct result of the death. Perhaps part of the reason is that the loss cannot be measured reliably. Of even greater importance, probably, is society's determination that the burden on human activity would simply be too great if all the consequences of a tortfeasor's wrongdoing—even some that are the "direct" and "foreseeable" consequences of the tort—gave rise to an obligation to respond in damages.

No one seriously suggests that tortfeasors be made to pay for all the consequences of their torts. A line must be drawn somewhere. The fact that the present tort system allows compensation for several items of damage ignored by workers' compensation establishes only that the line has been drawn differently by the two systems. That does not establish allowed the negligent defendant to avoid compensating the innocent plaintiff for the destruction of its dock, which would not have been destroyed had the defendant exercised reasonable care. See id. at 415.


195. See Fatal Accidents Act of 1846, 9 & 10 Vict. ch. 93 (better known as Lord Campbell's Act).


197. See Aspinall v. McDonnell Douglas Corp., 625 F.2d 325 (9th Cir. 1980). In that case, the court held that California law did not allow any wrongful death recovery to the plaintiff under the following circumstances, which clearly show the existence of substantial economic loss:

[The decedent's] parents were deceased and he had no collateral heirs. But he and appellant had lived together in the roles of husband and wife for over four years and [the decedent] left his entire estate to appellant by will. He had been the sole support (except for a small pension) of appellant and her children during the four years, but he had never married appellant and he had never adopted her children.

Id. at 326.

198. In a leading nineteenth-century case decided on proximate cause grounds, the New York Court of Appeals contended that to hold a tortfeasor who negligently spread a fire liable for all resulting damages "would be to create a liability which would be the destruction of all civilized society." Ryan v. New York Cent. R.R., 35 N.Y. 210, 217 (1866). Although its view on the precise issue has not stood the test of time, Ryan correctly instructs us that some outer limit to liability, short of cause in fact, must be found.
the superiority of the policy choices inherent in the tort system over those of the workers' compensation system.

D. Who Should Decide Which Losses Merit Compensation and In What Amount?

Regardless of the system employed in compensating personal injuries, some losses will not be compensated at all, and in most instances losses that are compensated cannot be calculated accurately. In this state of affairs, the question is primarily one of power and legitimacy. Specifically, who in society is best suited to make the fundamental policy determinations involved in deciding which losses to compensate, and in what amount?

The two obvious candidates for this position are the judiciary and the legislature. Although each institution plays some role in both systems, tort law is primarily a product of the common law and workers' compensation is primarily a creature of statute.

In principle, society should not prefer judicial solution of policy questions that the legislature chooses to address. Under our political system the legislature is charged with the primary responsibility of resolving competing policy considerations. If the legislature has not acted, the judiciary must fill the gaps, but where the legislature does act, the judiciary must defer.

Allocating resources to compensate accident victims, a decision involving competing policy considerations, is best left to legislative determination. A wealthy society might choose to give generous awards to injured workers. Conversely, society, noting that such awards consume resources and cause other resources to be directed to accident prevention, might conclude that its long-term self interest requires relatively modest payments. This sort of conflict of goals and fundamental policy considerations can be undertaken by courts, but the judiciary is best suited to decide individual cases according to established rules. Legislative bodies, on the other hand, are not bound by the peculiarities of individual cases, and are therefore better suited to resolve competing policy claims.

Accordingly, whatever compensation scheme the legislature decides to establish under the workers' compensation system should be regarded as the most appropriate measure of compensable loss. Not all losses can be compensated, and the legislature may properly decide that society should compensate fewer losses than some might prefer. Quantifying personal injuries is an impossible task, and whatever value is assigned must be almost arbitrary. Those who disagree with values determined legislatively should recognize the legislature's authority to make those determinations, and seek modification or reversal through the political process.
E. Advantages of Using the Workers’ Compensation System’s Measurement of Damages

The benefits of a legislative resolution of the compensation problem aside, the workers’ compensation system is still preferable to the tort system. The question of which system more appropriately determines the amount of compensation cannot be resolved by arguing either that the workers’ compensation system gives inadequate benefits or that the tort system gives excessive awards. Either statement, or both, might be true, but the determination of truth would be almost wholly subjective.

The workers’ compensation system, however, does offer some significant advantages that can be demonstrated in a relatively objective manner. The system is simpler and less expensive to administer. The availability of legislatively prescribed damage schedules considerably simplifies the fact finder’s task. He need not speculate on the future course of interest rates, nor consult his soul to put a value on the victim’s pain and suffering. The fact finder need only decide the category of the victim’s injury, a relatively simple task. Obviously, dispensing with the jury would reduce cost and complexity.199 Workers’ compensation hearings typically are much shorter than jury trials. Since both liability and damage issues are more clear-cut, the amount of an injured worker’s recovery will depend less on the skill of his attorney in the worker’s compensation system than in the tort system.200

The relative simplicity of the proposal is subject to even less doubt. The present system does not utilize the tort system instead of the workers’ compensation system; it utilizes both. An employee injured by the culpable act of a third party normally will bring a tort action only after receiving workers’ compensation benefits. Thus, the true question does not call for a comparison of the relative complexity and expense of a workers’ compensation proceeding and a tort action, but asks merely whether using one of the two systems is not simpler and cheaper than utilizing a combination of the two.

In addition, the economy no longer would be burdened by multiple layers of insurance coverage in which employers maintain workers’ compensation insurance while third parties, particularly manufacturers and suppliers of capital equipment, maintain liability insurance to compen-

199. If juries were desired, the workers’ compensation system could employ them for fact-finding purposes. For example, a jury could be employed to determine any factual questions relating to whether an accident was compensable under workers’ compensation and the percentage of disability. After these facts have been determined, the legislatively prescribed level of damages for that level of disability could be applied.

200. Attorneys’ fees are generally lower in workers’ compensation proceedings than in tort suits. “Fees for representing a worker in workers’ [compensation cases] are often closely scrutinized by the courts or set at a low percentage—often 10 percent—by statute. Tort actions allow a standard 33 percent contingency fee.” Rust, New Tactics for Injured Workers, 73 A.B.A. J. 72, 73 (Oct. 1, 1987). Obviously, it might be argued that such limitations merely make good lawyers less available to workers’ compensation claimants, but not less important.
sate the same injury under the tort system.\textsuperscript{201} Indeed, in jurisdictions that allow the third party to seek contribution from the employer, the employer itself must maintain both types of insurance.\textsuperscript{202} The savings generated could be passed along to \textit{all} injured employees in the form of increased workers’ compensation benefits, as Professor Bernstein has proposed.\textsuperscript{203} Alternatively, the savings could stimulate wealth and productivity in society through increased wages to all workers, or as increased returns to investors and entrepreneurs who might be encouraged to further investment and job creation. Although each of us no doubt would have a preferred resolution, such a fundamental policy choice is most appropriately left to the legislature.

The proposal thus would offer significant advantages—including concrete dollars saved for society—both in administration and in the area of insurance. An even more compelling reason for preferring the workers’ compensation system’s measure of damages, however, is the greatly increased likelihood that similarly injured workers would receive similar compensation. Under present law, most injured workers receive only workers’ compensation benefits, while a few receive additional recoveries under the tort system. Moreover, because the tort system quantifies personal injury losses with the precision and fairness of a roulette wheel, even workers who do have access to the tort system do not necessarily receive comparable awards. If the victims’ needs are the same, and if sound industrial policy requires a system of work-related accident compensation divorced from such legal niceties as fault, contributory fault and assumption of the risk, all workers with similar losses \textit{should} receive similar recoveries. A major advantage of the workers’ compensation system is that it greatly increases the possibility that like cases will be treated alike.

\textsuperscript{201} See sources cited \textit{supra} note 12.
\textsuperscript{202} See \textit{supra} notes 60-62 and accompanying text.
\textsuperscript{203} Although Professor Bernstein’s proposal is similar in some respects to the one advanced in this Article, there are significant differences. Professor Bernstein assumes that workers’ compensation benefits are too low, noting, for example, that cost of living adjustments “generally do not occur but are sorely needed.” Bernstein, \textit{supra} note 9, at 559. As a matter of personal, subjective judgment, this author would agree that workers’ compensation benefits tend to be lower than he would prefer. Any assertion that benefits are too low, however, suggests that there is some correct valuation of personal injuries and that the legislature is not society’s best tool for setting appropriate levels of compensation. Both of these views are rejected here.

Professor Bernstein’s insistence that a bar on the employee’s suit against the third party be accompanied by increased workers’ compensation benefits, \textit{see id.} at 555-59, is subject to a more practical objection. Implementation of Professor Bernstein’s proposal would be much more complex than the simple abolition of the employee’s cause of action against the third party proposed in this Article. Assuming increased workers’ compensation benefits are desirable, Professor Bernstein’s approach would require a determination of the amount that third parties should contribute to fund increased workers’ compensation benefits. It would be much simpler to increase worker’s compensation benefits directly, without involving the third party, and to rely on market forces to allocate burdens between employers and third parties.
CONCLUSION

The present system for compensating employees who are injured on the job is clearly inadequate. In all states, the employee is entitled to workers' compensation benefits as his exclusive remedy from his employer. In addition, the employee may sue a third party. The present system cannot provide these rights to the employee and at the same time protect the legitimate expectations of the employer and the third party. The third party, when sued in tort, should have the right to shift a portion of its liability to another negligent party, including the employer, under principles of comparative fault. Yet the employer should be able to rely on the exclusive remedy provision of the workers' compensation statute and thus avoid any tort liability arising out of employee accidents.

The appropriate solution is to bar the employee's right of action against the third party. Under the proposal, all employees would receive workers' compensation benefits as the true exclusive remedy for their injuries. Such a limitation on the employee's rights would enable society to protect the legitimate expectations of the employer and the third party. Moreover, the limitation is appropriate in its own right. The basic principle underlying workers' compensation is that all injured employees should be entitled to appropriate compensation, regardless of the way in which they were injured. If workers' compensation benefits provide appropriate compensation, the employee has no valid claim for more of society's resources. If workers' compensation benefits are inadequate, they should be increased. In no event should the societal response be to provide injured workers less than appropriate compensation through the workers' compensation system, while allowing a few fortunate injured employees to sue a third party for additional money.

It should not be assumed that workers' compensation benefits are inadequate in amount simply because they generally are lower than tort awards. The contrary conclusion, that the workers' compensation system is more accurate than the tort system in determining appropriate compensation for employee injuries, is more supportable. No system can accurately quantify appropriate compensation for personal injury and no system has ever allowed compensation for all consequences of an accident. What constitutes appropriate compensation, therefore, is ultimately a question of policy. The legislature, and not the courts, properly serves as society's primary instrument for resolution of such policy questions. Adoption of the proposal advanced in this Article would enable society to undertake the extremely difficult task of settling on appropriate compensation for victims of industrial accidents in a consistent, fair and efficient manner.