

Louisiana Law Review

Volume 23 | Number 3

April 1963

Workmen's Compensation - Borrowed Employees - Liability of Employers

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Repository Citation

William Shelby McKenzie, *Workmen's Compensation - Borrowed Employees - Liability of Employers*, 23 La. L. Rev. (1963)

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stant case would be premature and prejudicial to the rights of the covenant holders.²⁰

Since the real basis of the serious litigation rule appears to be error, the primary consideration should be whether the vendee knew of the outstanding restrictions at the time of the contract. If so, there is no error and the vendee should not be heard to complain. As the opinion in the instant case makes no mention of the knowledge *vel non* of the defendant, it might appear that a lack of knowledge is not required to invoke the rule. It is submitted that the courts should consider application of the doctrine of serious future litigation only after the vendee has shown affirmatively that he had no knowledge of the restrictive covenants.

Anthony James Correro III

WORKMEN'S COMPENSATION — BORROWED EMPLOYEES —
LIABILITY OF EMPLOYERS

While engaged in the business of hiring out welders, plaintiff's insured furnished defendant an employee who was subsequently injured while welding under defendant's supervision. Following a compensation settlement with the injured borrowed employee, plaintiff instituted suit seeking contribution from defendant or his insurer. The district court sustained defendant's exception of no cause of action. The Third Circuit Court of Appeal affirmed. *Held*, though borrowing and lending employers are liable in solido for workmen's compensation to the injured borrowed employee, the lending employer, as between the two employers, is ultimately liable for the whole compensation when he is engaged in the business of hiring out his employees. Therefore, the lending employer is not entitled to contribution from the borrower. *Casualty Reciprocal Exchange v. Richey Drilling & Well Service*, 137 So. 2d 127 (La. App. 3d Cir. 1962).

In determining the locus of workmen's compensation respon-

20. Since the adjacent landowners in whose favor the covenants ran were not parties to the suit, the issue would not be *res adjudicata* as to them. However, a decision on the question would have precedential value in a subsequent suit between the covenant holders and the school board. If the court had decided adversely to the covenant holders in the instant case—school board not bound by restrictions—they would be prone to follow that decision in a subsequent suit between the covenant holders and the school board,

sibility in borrowed employee situations,¹ the majority of jurisdictions apply the well-recognized "whose business" or "control" tests drawn from the realm of *respondeat superior* tort liability; the burden generally falls on the borrowing employer alone.² Louisiana was included in this category until 1958,³ when the Supreme Court in *Humphreys v. Marquette Casualty Co.*⁴ rejected these tests in favor of a more liberal interpretation of the compensation act by holding borrowing and lending employers solidarily liable to the injured employee. Although the liability *inter se* of the employers was not in issue, the court intimated in dictum that the lending employer, after paying compensation, could seek contribution from the borrowing employer.⁵

Plaintiff's suit for contribution in the instant case directly posed for the first time the issue of ultimate liability between the employers for compensation previously paid by one to the injured employee. Aside from the possibility of no adjustment between the employers,⁶ the court perceived three rational resolutions of the liability problem: the borrowing employer alone could be ultimately responsible;⁷ both employers could share the liability equally; or the lending employer could be solely respon-

1. Borrowed employee situations can be divided effectively into gratuitous loans, mutual accommodations, and vocational loans. A loan is gratuitous when one allows his employee to assist another employer without anticipating any return benefit or remuneration. A mutual accommodation is illustrated by the factual situation in *Humphreys v. Marquette Casualty Co.*, 235 La. 355, 103 So.2d 895 (1958). A rice farm and a ranch having peak seasons occurring at different times supplied each other with additional employees during their respective peak seasons. The instant case is a good example of a vocational loan.

2. *E.g.*, *Sadler v. May Bros.*, 185 So. 81 (La. App. 1st Cir. 1938). See discussion of borrowed-servant doctrine as applied to workmen's compensation in *Benoit v. Hunt Tool Co.*, 219 La. 380, 53 So.2d 137 (1951). See generally MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 57 (1951); Note, 19 LA. L. REV. 923 (1959).

3. See note 2 *supra*.

4. 235 La. 355, 103 So.2d 895 (1958). Note, 19 LA. L. REV. 923 (1959) deals extensively with *Humphreys'* acceptance of the minority position of mutual responsibility; hence, such coverage will be excluded from this Note.

5. 235 La. at 389, 103 So.2d at 907: "Indeed, it is the good fortune of the regular employer that the special employer is likewise liable and able to respond, thus contributing in part to his liability for the entire compensation due." The terms "regular (or general)" and "special" employers are often used interchangeably to mean "lending" and "borrowing" employers respectively.

6. Defendants urged they were not liable for contribution in absence of a judgment by the injured worker against both employers. The court rejected this tort concept drawn from the common law, finding it predicated upon fault which had no place in the social policy behind workmen's compensation.

Even joint tortfeasors are now entitled to contribution. LA. CIVIL CODE art. 2103 (1870), as amended, La. Acts 1960, No. 30, § 1. See generally Note, 22 LA. L. REV. 818 (1962).

7. Using *respondeat superior* criteria, most jurisdictions reach this result. See note 2 *supra*, and accompanying text.

sible. The court recognized that generally solidary obligors were entitled to contribution⁸ and acknowledged that dictum in *Humphreys* indicated this shared responsibility. When the employer lends employees as a business enterprise, however, the court chose to cast full liability upon the lending employer, finding this result demanded by two cogent considerations. First, the injured employee generally looks only to the lending employer for compensation since he originally contracted employment with him and has no control over who shall receive his borrowed services.⁹ Second, one in the business of lending employees is better situated to anticipate foreseeable compensation risks and provide for them by insurance.¹⁰ By providing compensation protection as part of the ordinary course of his business, the lending employer can easily pass the financial burden of the insurance premiums on to the recipient of his service as part of the cost.

In addition to the two sound factors found by the court in its acknowledged choice among divergent policy considerations, a third lends much support to the court's conclusion. If employers were entitled to contribution from each other or if the borrowing employer alone were liable, ultimate liability in borrower-lender situations would differ from that in otherwise closely similar principal-independent contractor relationships, necessitating the drawing of an often nebulous line to determine which relationship exists.¹¹ Under the apparent rule of the instant case, the borrowing employer is liable to the injured employee but is entitled to indemnity from the lending employer as the principal is from the independent contractor.¹²

Weighing against these supporting factors is the consideration that the borrowing employer, in whose service the employee is injured, is in a better position to alleviate the accident-producing risk. Hence exclusion of the borrower from all ultimate

8. LA. CIVIL CODE art. 2103 (1870), as amended, La. Acts 1960, No. 30, § 1. The court concluded, however, that contribution was not compelled by the Code, citing Article 2106 as authority. 137 So.2d at 129.

9. Theoretically the borrowed employee must consent to the lending — *McEachern v. Pine Wood Lbr. Co.*, 5 La. App. 665 (2d Cir. 1927) — but practically he has no choice in face of his employer's direction.

10. The relationship between the employee and the borrowing employer is by its nature transient and often the product of unforeseen necessity.

11. Compare *Sadler v. May Bros.*, 185 So. 81 (La. App. 1st Cir. 1938) (one furnishing drivers and trucks in lumber industry held lending employer) with *Lindsey v. White*, 22 So.2d 689 (La. App. 2d Cir. 1945) (same in oil industry held independent contractor). See generally MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 57 (1951).

12. LA. R.S. 23:1061-1063 (1950); MALONE, LOUISIANA WORKMEN'S COM-

liability may be unfair or, from the standpoint of encouraging safer working conditions, even undesirable social policy. The decision in the instant case was strictly limited to the situation in which the lending employer is engaged in the business of hiring out employees.¹³ When the lending is a mutual accommodation¹⁴ or a gratuity rather than a business venture, the consideration of unfairness is more striking; possibly this made the court reluctant to announce a broader rule imposing ultimate liability upon the lender in all cases. On the other hand, this unfairness is mitigated to the extent that even in a gratuitous loan the lending employer is not free of all responsibility for subjecting his employee to the hazard that caused his accident; the lending employer's consent and direction are prerequisites to the lending.

The two arguments advanced by the court in the instant case are not without weight in loans that are gratuitous or for mutual accommodation. However, if these arguments were the sole factors weighing against the considerations of unfairness and social policy in mutual accommodation and gratuity situations, perhaps contribution, as a departure from the rule in the instant case for the vocational lender, would be the most desirable solution. On the other hand, such a dichotomy of principles — between vocational and non-vocational lenders — within the borrower-lender regime often would call for difficult and litigious distinctions that do not seem justified by the competing policy considerations involved. Although not compulsory in Louisiana, workmen's compensation almost universally is provided for by insurance. As insurance companies would normally cover as many lenders as borrowers, it probably would be of no pecuniary interest to them where the ultimate compensation burden lay. It would be disadvantageous to them, however, to be forced to litigate whether each particular case was an in-

PENSATION LAW AND PRACTICE §§ 121-27 (1951).

13. In summary, the court stated: "The circumstances that we deem to be relevant to the result we have reached in the present case are: (1) the general employer is engaged in the business of hiring out his employees, and the borrowed employee was injured when loaned in the course of such business; (2) the general employer is engaged in a hazardous business within the meaning of the compensation act; and (3) the type of work which the borrowed employee is performing for the special employer at the time of the injury is generally the same type of work which the employee is engaged to perform for the general employer." 137 So. 2d at 131.

14. In *Humphreys v. Marquette Casualty Co.*, 235 La. 355, 103 So. 2d 895 (1958), the case in which the Supreme Court indicated by dictum that contribution could be obtained between the solidary debtors, the borrower-lender situation was a mutual accommodation. See note 1 *supra*.

demnity or contribution situation. To prevent this unnecessary litigation between insurance companies, it would seem that the desire for a consistent principle applicable in all lending cases would outweigh the countervailing considerations which call for such a bifurcation of principles.¹⁵

With the value of utilizable analogy to the principal-independent contractor situations superadded to the arguments of the court, the decision in the instant case is compelling. If a consistent and universally applicable principle is to govern borrowed employee situations, it is submitted that, in accordance with the rule of the instant case, the liability *inter se* of the two employers always should rest solely with the lending employer.¹⁶

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15. Furthermore, since the borrowed employee almost universally remains on the lending employer's payroll, the instant case's rule facilitates the final calculation of workmen's compensation premiums. Since estimated premiums are generally corrected from actual payroll data, administrative difficulties would be encountered if those records did not accurately reflect the actual risk exposure.

There would also be certain advantages from the standpoint of the insured employers. If contribution were required, both the borrowing and lending employers would have to undergo the expense of compensation insurance. On the other hand, if the lending employer alone is ultimately liable, the borrowing employer can avoid the cost of duplicate coverage by relying upon certificates of insurance furnished by the lending employer's insurer.

16. California has resolved the liability problem, at least between insurers, by legislation. CAL. INS. CODE § 11663 (1947): "As between insurers of general and special employers, one which insures the liability of the general employer is liable for the entire cost of the compensation payable on account of injury occurring in the course of and arising out of general and special employments unless the special employer had the employee on his payroll at the time of injury, in which case the insurer of the special employer is solely liable." *Agronaut Insurance Exchange v. Industrial Accident Comm'n*, 316 P.2d 759 (Cal. App. 1957) held that this statute had no effect on California's rule that the borrowing and lending employers are solidarily liable to the injured borrowed employee. Since the borrowed employee would almost always remain on the lending employer's payroll, the above statute appears to reach the same solution for borrower-lender situations as that recommended for Louisiana by this Note.

On the other hand, Illinois has reached the opposite conclusion. ILL. REV. STAT. ch. 48, § 138.1(4) (Supp. 1961): "[A]nd as to such [loaned] employee the liability of such loaning and borrowing employers shall be joint and several, provided that such loaning employer shall in the absence of agreement to the contrary be entitled to receive from such borrowing employer full reimbursement for all sums paid or incurred pursuant to this paragraph together with reasonable attorneys' fees and expenses in any hearing before the Industrial Commission or in any action to secure such reimbursement."