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Wex S. Malone

WORKMEN'S COMPENSATION

*Wex S. Malone**

BUYER-SELLER, PRINCIPAL-CONTRACTOR RELATIONSHIP

It is familiar law that the employee of a contractor or subcontractor is entitled to maintain a claim for workmen's compensation against the principal or principal-contractor who had delegated the performance of his own undertaking to the claimant's immediate employer.[1] This liability, however, depends upon the existence of a principal-contractor relationship, which must be distinguished from other similar relationships which may obtain between the defendant and the claimant's direct employer. Conspicuous among these is that of buyer and seller. The necessity of distinguishing the purchaser (who is *not* liable for compensation to the seller's employees) and the employer of a contractor (who *is* liable for compensation to the latter's workers) has arisen most frequently in connection with lumbering and pulpwood procurement operations. The early course of litigation between the worker who gathers and hauls these commodities (usually under a direct employer who is insolvent) and the ultimate procurer of the lumber of pulpwood has been discussed many times in these pages and need not be reviewed here.[2] In the earlier decisions, particularly those by the courts of appeal, the transaction was seldom regarded as anything more than a sale of wood by the intermediary to the ultimate procurer. Hence compensation was denied the injured employee of the former against the latter. However, beginning about fifteen years ago it became obvious that these transactions were passing under a more critical scrutiny by the courts. Obvious examples were *Jones v. Hennessy*[3] and *Stephens v. Mitchell.*[4] In both cases ambiguous relations of the kind under discussion were regarded as principal-contractor arrangements. However, a reader following the course of decisions in general could hardly escape the impression that in each instance the trier regarded himself as under constraint to make a choice between principal-contractor, on the one hand, and buyer-seller, on the other. This would suggest that a contractual arrangement could not be regarded as incorporating the elements of

* Boyd Professor of Law, Louisiana State University.

1. W. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW & PRACTICE § 121 (1951).

2. *See, e.g., The Work of the Louisiana Appellate Courts of the 1956-1957 Term—Workmen's Compensation,* 18 LA. L. REV. 71 (1957).

3. 232 La. 786, 95 So. 2d 312 (1957).

4. 234 La. 977, 102 So. 2d 237 (1958).

both relationships and hence serve to entitle the worker to compensation even though the defendant was concededly a purchaser as well as principal. It is gratifying to note that a clarification of this misapprehension was made during the last term. In *Hart v. Richardson,*[5] a case involving a typical lumbering situation of the kind under discussion, Justice Dixon observed:

> There is no reference in the act to an exclusion from coverage because there exist elements of a vendor-vendee relationship between the injured workman and the one sought to be held as an employer. If all the other elements are present required by the act before there is coverage . . . and the injured workman is performing a necessary and indispensable activity which is part of the business operation of the one sought to be held as 'employer', the mere fact that elements of sale are present in the relationship will not defeat recovery. Of course, if the only relationship between the injured workman and the 'employer' is that of vendor and vendee, the act does not afford coverage.[6]

In Hart's case, the claimant's employer was regarded as a contractor hired to cut and deliver pulpwood for the defendant. The circumstances could hardly admit of any other interpretation. In addition to the usual deduction from the purchase price of the stumpage which was to be remitted to the owner, there was deducted a charge for social security and unemployment taxes. More important is the fact that the employer had hauled and sold wood for the defendant exclusively for two years prior to the accident.

An interesting contrast to the *Hart* case is *Broussard v. Heebe's Bakery, Inc.,*[7] decided during the same term. Heebe's Bakery entered into a sustained arrangement with Wolf's Bakery whereby Wolf would prepare certain designated bakery products which would be labeled with Heebe's tradename and delivered directly to Heebe's establishment by Wolf's delivery men. One of these latter was injured through the claimed negligence of Heebe or his workers. In resisting a tort claim for damages Heebe interposed the contention that Wolf was an independent contractor carrying out a regular part of Heebe's Bakery business. Hence the exclusive remedy provision would serve to preclude a tort recovery.[8] Certainly many of the elements of a principal contractor arrangement were present. Services, including the use of Wolf's specialized equipment and mass production tech-

5. 272 So. 2d 316 (La. 1973).
6. *Id.* at 319.
7. 263 La. 561, 268 So. 2d 656 (1972).
8. LA. R.S. 23:1032 (1950).

niques, were indeed prominent features of the contract. It was also claimed by Heebe that the transaction was an exclusive arrangement which later was terminated when Wolf supplied identical products to others to be labeled with the latter's names. Features, such as these, had prompted the court of appeal to characterize the arrangement as that of principal and contractor,[9] and on appeal Justice Summers dissented from the judgment of the supreme court reversing this action.[10] On the other hand it is frequent that a seller will supply goods to other merchants for the ultimate purpose of what is commonly regarded as a "resale" under the name and mark of the purchaser "reseller." It appears that all the elements present here were entirely consistent with that of a sale. Moreover, there was no evidence of any exercise by Heebe of control over the processes adopted by Wolf, Heebe's only apparent interest was that the product should be of the description and quality specified in the contract and should bear his name. Equally important from the standpoint of policy is the fact that Wolf was also a major producer of bakery products which it sold directly to the public under its own name. It was an established operator who was in a position to protect its own employees through workmen's compensation. It appears to this writer that the series of transactions involved in this case in no way afforded an invitation to circumvent the employee's compensation liability — the only evil at which R.S. 23:1061 is appropriately directed.

PRINCIPAL'S IMMUNITY TO TORT LIABILITY

The *Heebe* decision is important for another reason. The majority opinion ventured to make clear that a principal who is subject to liability to pay workmen's compensation to his contractor's employee under R.S. 23:1061 enjoys the same immunity from a tort claim by the employee that would be enjoyed by a direct employer. These observations were entirely dicta for the reason that the defendant Heebe, as we observed earlier, was found to be a purchaser from the plaintiff's employer, Wolf. Nevertheless, the relationship between Heebe and Wolf had been regarded in the court of appeal as that of principal and contractor, and that court, following the prevailing Louisiana rule,[11] concluded that Heebe, as a principal, could not be successfully sued in tort. In this connection it is significant that the

9. 254 So. 2d 284 (La. App. 4th Cir. 1971).

10. 263 La. 561, 574, 268 So. 2d 656, 661 (1972).

11. *See* LA. R.S. 23:1032 (1950); Thibodeaux v. Sun Oil Co., 218 La. 453, 49 So. 2d 852 (1950); Meche v. Farmers Drier & Stor. Co., 193 So. 2d 807 (La. App. 3d Cir.), *writ refused*, 250 La. 369, 195 So. 2d 644 (1967).

opinion by Judge Lemmon, in the court of appeal, although acknowledging that the existing jurisprudence supports such an immunity, nevertheless ventured to anticipate that the supreme court might be induced to reconsider the question.[12] Of particular interest is the following statement:

> The underlying theory of the Workmen's Compensation Act is that an employer trades *absolute* compensation liability for *absolute* tort immunity. I do not believe that a *statutory* employer should also be awarded tort immunity, since he can ultimately recover compensation benefits through indemnity against the *actual* employer, whose solvency or insured status is within his power to control.[13]

The matter was regarded by the Louisiana Trial Lawyers Association as sufficiently important to call for an amicus curiae brief supporting Judge Lemmon's observations. The disposition of the matter by the supreme court in advance of necessity revealed a significant difference of opinion among the members of the court on the problem of the principal's immunity. Both Justices Tate[14] and Barham,[15] felt obliged to resort to special concurrences in order to express their concern over the premature commitment by the majority of the court on the tort immunity problem. Many observers may share this same concern. One is tempted to doubt the advisability of an advance judicial commitment on a serious question whose answer was not called for and which obviously could not be fully explored at a time when its resolution would not affect the outcome of the controversy at hand.

Third Party Tortfeasors—Negligent Employer's Reimbursement

Early in the history of Louisiana compensation litigation, our court adopted the majority position that an employer who has paid compensation to his injured worker is entitled to full reimbursement from a third party defendant whose negligence caused the injury,[16] and this is true even though the employer himself was guilty of negligence that contributed to the mishap.[17] This proposition, although

12. 254 So. 2d 284, 288 (La. App. 4th Cir. 1972).
13. *Id.* (Concurring in denial of rehearing).
14. 263 La. 561, 574, 268 So. 2d 656, 661 (1972).
15. *Id.* at 575, 268 So. 2d at 661.
16. *See* LA. R.S. 23:1101-03 (1950).
17. City of Shreveport v. Southwestern Gas & Elec. Co., 145 La. 680, 82 So. 785 (1919). *See also* 140 La. 1078, 74 So. 559 (1917) (earlier decision).

not without merit, can bring about what is not infrequently a shocking result: Suppose, for example, that Employer has maintained his work premises in a negligent condition rendering them deplorably susceptible to fire. As a result Employee is trapped in flames on an upper floor. Third Party, a Fireman, with a ladder, attempts to rescue Employee, but due to panic or well intended clumsiness, he allows Employee to fall. Employee, who is now totally and permanently disabled, can compel Employer to pay as compensation $65 weekly for 500 weeks, together with medical expenses. Employer is completely free of any further liability, despite his inexcusable conduct. On the other hand, Fireman, because of awkwardness, is subject to liability to Employee for an almost unlimited range of economic losses, together with heavy damage for a lifetime of pain and suffering. Not unlikely, liability will also be imposed on City, Fireman's employer. Neither Fireman nor City (who is personally blameless) are entitled to contribution from Employer, who is the beneficiary of the exclusive remedy provision of the compensation statute.[18] Perhaps this is fair enough. Employer's tort immunity can be regarded as a benefit that he should enjoy in return for his assuming a continuous obligation to pay workmen's compensation to Employee for any injuries sustained, even in those instances in which Employer was in no way to blame. But the story does not end here, for under the majority position Employer can now proceed affirmatively against Fireman and City and he can recover back from these third party defendants every penny that he has paid Employee as compensation. The unhappy result is that even the price of the compensation (which furnished the only justification for Employer's tort immunity) is returned to Employer, and he ends up paying nothing whatsoever for a tragedy in which he was the principal villain.

During the last term the Louisiana supreme court reconsidered this matter and evinced a disapproval of this commonly accepted position.[19] On the initial hearing it joined the courts of California,[20] North Carolina[21] and Pennsylvania[22] in denying the negligent employer's claim to reimbursement from a third party whose negligence had merely concurred with his own. There were two dissents, however, and a rehearing was granted.[23] Upon the second hearing the

18. LA. R.S. 23:1032 (1950).

19. Vidrine v. Michigan Millers Mut. Ins. Co., 263 La. 300, 268 So. 2d 233 (1972).

20. Witt v. Jackson, 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961).

21. Hunsucker v. High Point Binding & Chain Co., 237 N.C. 559, 75 S.E.2d 768 (1953).

22. Stark v. Posh Const. Co., 192 Pa. Super. 409, 162 A.2d 9 (1960); Brown v. Dickey, 397 Pa. 454, 155 A.2d 836 (1959).

23. McCaleb, C.J. and Barham, J. dissented on original hearing.

court reversed itself and affirmed its continued allegiance to the majority position which it had adopted earlier in 1919.[24] Again, however, the rehearing betrayed a division of opinion among the justices and there were dissents by Justices Tate, Dixon, and Hamlin, resulting in a four-three majority.[25] Under the precarious balance that now prevails, the issue may again be urged upon the supreme court.

Any effort to estimate the prospect for a further reshifting in the court's alignment on the matter must take into full account the questions raised by Justice Barham in his dissent from the initial opinion.[26] It will be recalled that in that earlier opinion, the majority had espoused the position denying reimbursement to the negligent employer. Barham's dissent was not a broad disavowal of the majority position. It was directed, rather, to a circumstance — conceded to exist in the case at hand — that the employer who was seeking reimbursement from the third party tortfeasor was not chargeable with any personal negligence. The worker, Vidrine, was injured in a collision while he was a rider in his employer's truck driven by a co-employee. The accident was occasioned by the combined negligence of this co-employee driver and the carelessness of the third party driver of the other car. Hence the only fault chargeable to the employer was the blame that would be imputed to him by law under respondeat superior. It is noteworthy that Justice Barham avoided any commitment as to how he would have ruled if in fact the employer had himself been driving the truck. Hence there is brought into inescapable focus the question: Are personal negligence and imputed negligence to be accorded the same treatment whenever the employer's claim to reimbursement is challenged by the third party? In order to undertake an answer here we must first inquire as to what is the underlying basis that lends support to the employer's claim to reimbursement. Here at the very outset we are in muddy water; for the claim has been variously characterized as resting on subrogation,[27] on principles of indemnity[28] or on tort.[29] Not long ago the United States Supreme Court announced that the employer under the Longshoremen's Act has a right to reimbursement that is quite

24. 263 La. 299, 330, 268 So. 2d 233, 244 (1972).

25. *Id.* at 337, 268 So. 2d at 246.

26. *Id.* at 316, 268 So. 2d at 238.

27. City of Shreveport v. Southwestern Gas & Elec. Co., 140 La. 1078, 74 So. 559 (1917).

28. Foster & Glassell Co., v. Knight Bros., 152 La. 596, 93 So. 913 (1922) (relying on the famous case of Appalachian Corp., Inc. v. Brooklyn Coop. Co., 151 La. 41, 91 So. 539 (1922)).

29. Marquette Cas. Co. v. Brown, 235 La. 245, 103 So. 2d 269 (1958).

independent of the employee's claim for damages.[30] This right, the Court further observed, does not depend upon any express authorization conferred by the workmen's compensation statute. But whatever may be the technical designation of the procedure under which the employer secures a reimbursement of his compensation, there can be little doubt that the claim rests ultimately upon a foundation of preventing unjust enrichment. The blameless employer has been obliged by some arbitrary rule to compensate for a harm brought about by the wrongdoing of another. Hence, once he has satisfied the claim of the victim, he is entitled to insist that as between himself and the actual wrongdoer it is the latter who should ultimately be the loser. Once the restitutionary character of the claim has been appreciated, it seems fair to conclude that the usual recognized attributes of restitution should attach to the employer's claim to reimbursement. Appropriate here is the generally accepted principle that where an agent commits a tort for which, because of the agency relation, his principal is liable, the principal's rights and liabilities with respect to restitution because of a payment in discharge of the liability are the same as if he had acted personally.[31] Apart from two exceptions[32] which are immaterial for present purposes this identity between personal fault and vicarious fault for purposes of restitution has been recognized in a variety of situations. For example, in those jurisdictions that recognize a right of contribution between joint tortfeasors, the tortfeasor whose liability rests solely on a vicarious basis is both entitled to contribution from and subject to contribution toward another tortfeasor under precisely the same circumstances as though he had been personally at fault.[33] Again, in jurisdictions where the right to contribution between joint tortfeasors is denied recognition, the identity between personal liability and vicarious liability persists.[34]

30. Federal Marine Term., Inc. v. Burnside Ship Co., 394 U.S. 404 (1969) (Longshoremen's and Harbor Worker's Compensation Act § 33 is not the exclusive source of the stevedoring contractor's remedies against the shipowner, the former may have a course of action in tort for the compensation payments caused by the shipowner's negligence.).

31. RESTATEMENT OF RESTITUTION § 87 (1937): "Vicarious Liability. Where an agent has committed a tort for which because of the agency relation, his principal is liable, the principal's rights *and liabilities* with respect to restitution because of a payment in discharge of the liability are the same as if he had acted personally, except

(a) in an action between himself and the agent, and

(b) in an action between himself and a person also vicariously liable for the agent's tort or a person colluding with the agent in the commission of the tort." (Emphasis added.)

32. *Id.*

33. *See, e.g.*, Bedell v. Reagan, 159 Me. 292, 192 A.2d 24 (1963).

34. *See, e.g.*, Denneler v. Aubel Ditch. Serv., 203 Kan. 117, 453 P.2d 88 (1969).

That is to say, if the negligence of a servant unites with the negligence of one not a servant and the master of the former has discharged the common liability, he would be no more entitled to contribution in such a jurisdiction than would have been the case if his liability had rested upon personal fault. In indemnity situations the rule is the same.[35] If the servant of *A* negligently creates a dangerous condition at a place which *B* is legally obliged to maintain in a safe condition for the public, and thereafter a member of the public is injured by the condition and succeeds in recovering from *B*, the latter can successfully maintain a claim for indemnity against the master, *A*, on precisely the same basis as if the master were himself the wrongdoer.[36] Finally, this recognized identity between vicarious liability and personal liability for purposes of restitution is evidenced by the fact that the employer's statutory claim for reimbursement with which we are presently concerned is recognized consistently quite without regard to whether the third party defendant is a personal wrongdoer or is a blameless employer of a negligent servant. All this suggests to the writer that if it is true that the employer should be denied reimbursement of his compensation outlay whenever he is chargeable with personal negligence, his claim should similarly be denied where the fault is that of one of his servants.

This brings us back to the principal question of whether even the personal fault of the employer should preclude his right to reimbursement of the compensation paid by him to his worker. Here we must admit that we are faced with a three-way dilemma: If, adopting one possible alternative, the employer's own fault is to be ignored and his claim for reimbursement is recognized as not being subject to any moral qualifications, we would be obliged to tolerate a spectacle in which the guilty employer would be the actual beneficiary of an accident situation attributable in part to his own blameworthiness. He would gain this fortuitous advantage because a third person happened also to be partly at fault with reference to the same harm. This would clearly be contrary to the accepted principle that no person should be allowed to profit by a situation created through his own wrongdoing.[37]

35. RESTATEMENT OF RESTITUTION § 87, comment (a) (1937).

36. Appalachian Corp., v. Brooklyn Coop. Co., 151 La. 41, 91 So. 539 (1922).

37. This principle is not contradicted by the now familiar practice of allowing contribution between joint tortfeasors. It is true that in contribution one wrongdoer is permitted to benefit sheerly by reason of the presence of another wrongdoer. But this effort to bring about through contribution an even allocation of the cost burden between the tortfeasors is to prevent either of them from becoming unjustly enriched at the expense of the other where there would be no adverse effect upon the rights of any

We encounter equal difficulties, however, when we appraise a second possible alternative whereby the employer's fault operates as a defense available to the third party who enjoys a reduction of the damages claimed by the worker. If the third party tortfeasor were entitled to insist that the full measure of the damage normally chargeable to him by the victim is now to be reduced for the purely fortuitous reason that the victim of this wrongdoing happened also to be the employee of a careless employer, we would again unhappily permit a wrongdoer to profit by a windfall and to escape the full measure of his responsibility to the worker. Under either of these alternatives it is the hapless worker who would be the sole sufferer.

The final alternative is to hold the third party for the full extent of the damage sustained by the worker and at the same time to wholly deny the careless employer's claim to reimbursement. This would appear to produce the fairest result: neither wrongdoer would pay more or less than would be exacted of him in the absence of any participation by the other. Hence, there is no double liability in any sense of the word. In passing it should be noted that this solution in no way resembles an allowance of contribution between the employer and third party. It is properly to be regarded as a mere denial of a windfall that otherwise would drop fortuitously in the lap of the employer.

Despite these features which would appear to recommend the final alternative suggested above, it must be confessed that on occasions this solution has been expressly rejected by the courts.[38] The objection that is invariably advanced is that such a solution will result in "double recovery" by the employee, who will then receive both compensation and damages. This, apparently, is regarded as a result that must be avoided. Doubtless this argument has considerable merit whenever the prospect of an overlap of damage entitlements is viewed strictly within the context of joint or solidary tortfeasors. It is familiar law that the release of one such wrongdoer releases the others, to the end that the victim may be prevented from enjoying multiple recoveries for a single harm. Certainly a proliferation of lawsuits that would serve to impoverish several co-defendants in order to provide funds that would be beyond the claimant's need would be a useless squandering of the processes of litigation and

third person. Hence the familiar qualification that contribution can be allowed only after the claim of the tort victim has been fully satisfied. This is in sharp contrast with the situation we are now considering. The employer's reimbursement must be financed through a reduction in the amount of the damages to which the innocent worker would otherwise be entitled.

38. *See* decisions cited in notes 20, 21, and 22 *supra*.

would be a harsh and unnecesssary imposition on the defendants. But where, as in the situation under consideration, there is no one obliged to shoulder a charge that is in any way an unjust burden upon him and where there is no prospect of extravagant duplicate claims to burden the processes of litigation, it is difficult to discover any reason why the prospect of a partial overlap of funds made available to repair the same harm should be regarded askance. The law's indulgence toward multiple benefits for a single hurt is abundantly evidenced by the collateral benefits rule: Insurance benefits, whether privately procured by the victim or whether the product of an employment relationship, or even the receipt of a gift or the benefits of charity — none of these are regarded by the law as matters of any concern to the tortfeasor whose blameworthy conduct brought about the occasion from which such benefits arose.

It appears to the writer that compensation payments are more readily related to insurance benefits than to tort damages. The insurance character of workmen's compensation is apparent in England and on the Continent where the benefit funds are made available by direct assessment against both employer and employee, and in some instances against public funds.[39] In this country it is hardly less obvious that workmen's compensation is indeed insurance with premiums financed by funds that have been taken into full consideration in the bargaining processes between employers and employees and in the fixing of labor costs everywhere. Any notion that compensation benefits are in reality "damages" paid by the employer is difficult to appreciate.[40] They are entirely consonant with other collateral benefits.

It is noteworthy that in the two states that have no third party provision in their compensation statutes, but which nevertheless recognize the employee's full rights against all tortfeasors other than the employer, the employer is denied any reimbursement.[41] The result is that in these states the employee receives both damages and compensation — the latter benefit being regarded as insurance.

As indicated above, the leading California decision, *Witt v. Jackson*[42], in which the negligent employer was denied reimbursement of his compensation contains the observation that the employee must not receive both compensation and damages. The result in that

39. National Insurance (Industrial Injuries) Act, 1965 (c. 52) [England].

40. *But see* the contrary argument in 2 LARSON, WORKMEN'S COMPENSATION LAW § 71.30 (1970).

41. Trunbull Cliffs Furn. Co. v. Shakousky, 111 Ohio St. 791, 146 N.E. 306 (1924); Jones v. Appalachian Elec. Power Co., 145 W. Va. 478, 115 S.E.2d 129 (1960).

42. 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961).

case was a windfall for the wrongdoing third party when he was sued by both employer and employee in a single suit. Nevertheless a reading of the later California decisions following *Witt* reveals sharp differences of opinion among the courts of appeal on the matter of the employee's right to enjoy both compensation and full damages. In one series of cases[43] the employer, who had intervened in the employee's third party suit and had been denied reimbursement for compensation paid up to that time because of his own negligence, later sought to resist the payment of further benefits on the ground that such an award would bring about double recovery. This argument was rejected and both compensation and torts damages were accordingly enjoyed by the worker. On the other hand, a contrary conclusion, favorable to the employer, was reached in another court of appeal decision, *Corley v. Workmen's Compensation Appeals Board.*[44] The California position, hence, appears highly uncertain. Of particular interest at this point are the concluding words in the dissenting opinion of Judge Kerrigan in the *Corley* case:

> Even assuming that the majority's passionate concern with the possibility of a double recovery is somehow tenable, the simple fact of the matter is that 'double recovery' is a misnomer in terminology as well as a rarity in actuality, if it exists at all. Anyone experienced in workmen's compensation law knows that the benefits awarded an injured workman are nominal, not compensatory. Similarly, personal injury lawyers recognize that damage awards seldom, if ever, fully compensate an injured employee for all detriment sustained by him.[45]

43. Nelsen and Others v. Workmen's Comp. App. Bd. (1970) 11 Cal. App. 3d 472, 89 Cal. Rptr. 638. The same position was later adopted in *Serrano v. Workmen's Compensation Appeals Board* (1971) 16 Cal. App. 3d 787, 94 Cal. Rptr. 511.

44. 22 Cal. App. 3d 447, 99 Cal. Rptr. 242 (1971).

45. 22 Cal. App. 3d 447, 463, 99 Cal. Rptr. 242, 253 (1971).