

1976

Third-Party Tortfeasors' Rights Where Compensation-Covered Employers are Negligent-Where Do Dole and Sunspan Lead?

Clifford Davis

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/hlr>

Recommended Citation

Davis, Clifford (1976) "Third-Party Tortfeasors' Rights Where Compensation-Covered Employers are Negligent-Where Do Dole and Sunspan Lead?," *Hofstra Law Review*: Vol. 4: Iss. 3, Article 1.
Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol4/iss3/1>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

Hofstra Law Review

Volume 4, No. 3

Spring 1976

THIRD-PARTY TORTFEASORS' RIGHTS WHERE COMPENSATION-COVERED EMPLOYERS ARE NEGLIGENT—WHERE DO DOLE AND SUNSPAN LEAD?

By Clifford Davis*

Yet another piece about *Dole v. Dow Chemical Co.*¹ seems necessary. Questions still remain about where *Dole* and its underlying principle, that distribution of costs among multiple tortfeasors should be in proportion to fault,² can take us. The following discussion, like pre-*Dole* ones,³ will focus on the three-cornered suit where the compensation system and the tort system interact. In the corners are: (1) an injured, compensation-covered employee, who sues (2) a defendant outside the compensation system (a negligent third-party tortfeasor⁴ such as a product liability defendant⁵ who sold the employer a product which allegedly

* Professor of Law, University of Connecticut; S.B., 1949, University of Chicago; LL.B., 1952, Harvard University.

1. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). A glance at Shepard's will lead to many articles which discuss this case. It seems unnecessary to collect them here.

2. 30 N.Y.2d 143, 148-49, 282 N.E.2d 288, 292, 331 N.Y.S.2d 382, 387 (1972). See the court's quotation of Werner, *Contribution and Indemnity*, 57 CALIF. L. REV. 490, 516 (1969), where the author states that in cases involving multiple-party liability, "tort policy goals" include an "equitable loss sharing by all the wrongdoers." 30 N.Y.2d at 150, 282 N.E.2d at 293, 331 N.Y.S.2d at 389. See also note 24 *infra* for another court's statement that the principle of distribution of costs in proportion to degree of negligence is the basic policy goal in multiple-party suits.

3. See, e.g., Bonin, *Action Over Against the Negligent Employer*, 22 NACCA L.J. 235 (1958); Larson, *Workmen's Compensation: Third Party's Action Over Against Employer*, 65 NW. U.L. REV. 351 (1970); McCoid, *The Third Person in the Compensation Picture: A Study of the Liabilities and Rights of Non-Employers*, 37 TEXAS L. REV. 389 (1959); Comment, *The Exclusive Remedy Provision of Workmen's Compensation Acts—Distribution of Risk Between a Concurrently Negligent Employer and Third Party*, 25 U. CHI. L. REV. 522 (1958); Annot., *Effect of Workmen's Compensation Act on Right of Third-Person Tortfeasor to Recover Contribution from Employer of Injured or Killed Workman*, 53 A.L.R.2d 977 (1957).

4. See Davis, *Workmen's Compensation—Using an Enterprise Theory of Employment to Determine Who is a Third Party Tort-Feasor*, 32 U. PRIT. L. REV. 289 (1971).

5. Although the products liability system will be treated as a fault system for pur-

caused the employee's injury), who in turn seeks contribution or indemnity from (3) the employer who is allegedly negligent, but immune from direct suit by the employee because in the compensation legislation "trade-off" between employers and employees,⁶ employers assumed a no-fault liability to injured employees in exchange for immunity from employees' common law actions.

Setting aside those instances where there are contractual indemnity rights⁷ which can be enforced,⁸ the three discordant resolutions of this type of three-cornered suit are exemplified by *Dole*,⁹ *Santisteven v. Dow Chemical Co.*,¹⁰ and *Iowa Power &*

poses of this article, its doctrinal basis cannot as yet be unambiguously characterized as either fault or strict liability, unencumbered by vestiges of ordinary tort or implied warranty theory. For example, a plaintiff suing for a product-related injury in New York might be denied recovery for failure to overcome such fault-oriented obstacles as: (1) freedom from contributory negligence; (2) the "patent-danger" rule; or (3) a valid disclaimer of liability. For a discussion of the impact of the latest New York Court of Appeals' decisions on products liability see Professor Twerski's enlightening article: *From Codling, to Bolm, to Velez: Triptych of Confusion*, 2 HOFSTRA L. REV. 489 (1974).

6. New York Cent. R.R. v. White, 243 U.S. 188 (1917) is the leading case. As will be seen in the cases collected in note 11 *infra*, the legislative grant of immunity in the compensation act is often cited as the basis for the denial of third party's rights over against the employer, yet the third party was not in the legislative trade-off endorsed by *White* as constitutional. In other words, the compromise between the employer and employee is deemed by many courts as a ground to cut off the rights of the third party. While this seems strange, it is a frequent conclusion.

One of the few cases to question this conclusion is *Carlson v. Smogard*, 298 Minn. 362, 215 N.W.2d 615 (1974). *Smogard* is discussed at note 20 *infra*.

7. Contractual indemnity rights may be either express, see *Young v. Anaconda Am. Brass Co.*, 43 Wis. 2d 36, 168 N.W.2d 112 (1969); *O'Steen v. Lockheed Aircraft Corp.*, 294 F. Supp. 409 (N.D. Ga. 1968), or implied, see *Oaklawn Jockey Club, Inc. v. Pickens-Bond Constr. Co.*, 251 Ark. 1100, 477 S.W.2d 477 (1972); *Wentworth Hotel, Inc. v. F.A. Gray, Inc.*, 110 N.H. 458, 272 A.2d 583 (1970).

8. *Contra Gulf Oil Corp. v. Rota-Cone Field Operating Co.*, 84 N.M. 483, 505 P.2d 78, 79 (1972), where an employer's express agreement to indemnify the third party was held "illegal, void and unenforceable" by reasoning from the compensation statute which gave the employer statutory immunity!

9. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). Perhaps the most important cases to adopt a *Dole*-type result are *Trail Builders Supply Co. v. Reagan*, 235 So. 2d 482 (Fla. 1970) (see text accompanying note 18 *infra* for the impact of *Reagan* on a subsequently adopted employer immunity statute in Florida) and *Hendrickson v. Minnesota Power & Light Co.*, 258 Minn. 368, 104 N.W.2d 843 (1960) (see text accompanying note 20 *infra* for the impact of *Hendrickson* on a subsequently adopted employer immunity statute in Minnesota). See also *United States Fidelity & Guar. Co. v. Kaiser Gypsum Co.*, 539 P.2d 1065 (Ore. 1975).

10. 506 F.2d 1216 (9th Cir. 1974). For a discussion of California, District of Columbia, North Carolina, and Pennsylvania cases which effect a "load-sharing" see *Larson*, *supra* note 3, at 364-67. The most recent applications of the so-called *Murray* rule in the District of Columbia are discussed at notes 35-38 *infra* and accompanying text.

*Light Co. v. Abild Construction Co.*¹¹ (hereinafter referred to as *IPALCO*).

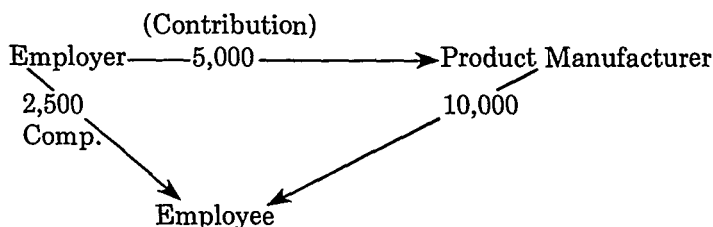
1. *Dole*: The New York Court of Appeals allowed Dow Chemical—a product liability defendant sued on a defective warning theory by the widow of a deceased employee of the Urban Manufacturing Company—to sue Urban for contribution despite the argument that the compensation act gave the employer immunity.

2. *Santisteven*: The Ninth Circuit Court of Appeals, applying Nevada law, denied Dow Chemical—again a product liability defendant sued on a defective warning theory by an injured employee—the right to sue the employer for contribution. The *Santisteven* court, however, recognized the inequity of casting the whole burden on Dow Chemical and noted that the recovery against Dow would be reduced by the amount of compensation benefits, thus effecting a “load-sharing.”¹²

3. *IPALCO*: The Supreme Court of Iowa denied the third-party tortfeasor (who had settled with the injured employee) any contribution from the negligent employer, rejecting an earlier Iowa case.¹³

To restate these approaches in graphic form, assume the compensation package to be \$2,500, the product liability recovery to be \$10,000, and the degrees of negligence of the employer and the product manufacturer to be 50 percent each:

1. (A) A *Dole* approach in a state which does not give the employer subrogation or reimbursement rights:¹⁴



11. 259 Iowa 314, 144 N.W.2d 303 (1966). For some recent cases indicating the states which seem to have adopted the result of *IPALCO* see Appendix I. For earlier cases see the cases collected in the articles cited in note 3 *supra*.

12. *Santisteven v. Dow Chem. Co.*, 506 F.2d 1216, 1220 (9th Cir. 1974).

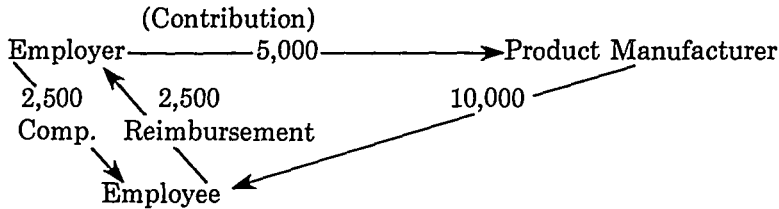
13. *Kittleson v. American Dist. Tel. Co.*, 81 F. Supp. 25 (N.D. Iowa 1948), *aff'd in part, rev'd in part*, 179 F.2d 946 (8th Cir. 1950), which had allowed indemnity on a “primary-secondary” negligence test, was rejected in *IPALCO*.

14. The states which do not allow reimbursement for the employer or carrier who pays compensation when the covered employee recovers from the third-party tortfeasor appear to be:

The result (disregarding the cost of shifting):

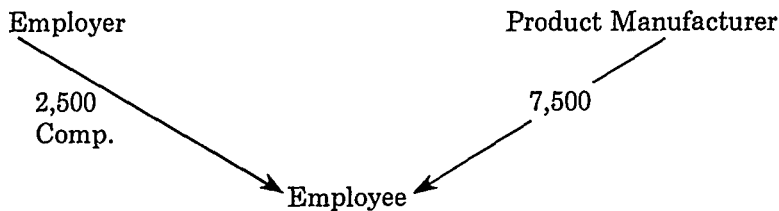
Employer Pays	7,500
Product Manufacturer Pays	<u>5,000</u>
Employee Gets	12,500

(B) A *Dole* approach where the employer has subrogation or reimbursement rights:¹⁵



Employer Pays	5,000
Product Manufacturer Pays	<u>5,000</u>
Employee Gets	10,000

2. *Santisteven*:



Employer Pays	2,500
Product Manufacturer Pays	<u>7,500</u>
Employee Gets	10,000

Georgia: GA. CODE ANN. § 114-103 (1973);

Ohio: OHIO REV. CODE ANN. § 4123.74 (1973);

Oklahoma: OKLA. STAT. ANN. tit. 85, § 44 (1961) (no reimbursement in death cases);

West Virginia: W. VA. CODE ANN. § 23-2-6 (1973).

Unfortunately, the cases seem to indicate that these states do not employ a *Dole* approach.

Georgia: *Coleman v. General Motors Corp.*, 386 F. Supp. 87 (N.D. Ga. 1974)

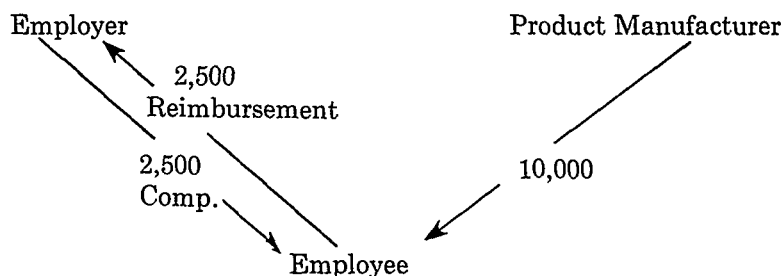
(motion for summary judgment by employer granted where third party sued seeking indemnity and contribution—third party's due process and equal protection arguments failed);

Ohio: *Madrin v. Wareham*, 344 F. Supp. 166 (W.D. Pa. 1972) (dicta); *Bankers Indem. Ins. Co. v. Cleveland Hardware & Forging Co.*, 77 Ohio App. 121, 62 N.E.2d 180 (1945), *aff'd*, 145 Ohio St. 615, 62 N.E.2d 251 (1945);

West Virginia: *Makarenko v. Scott*, 132 W. Va. 430, 55 S.E.2d 88 (1949) (dicta).

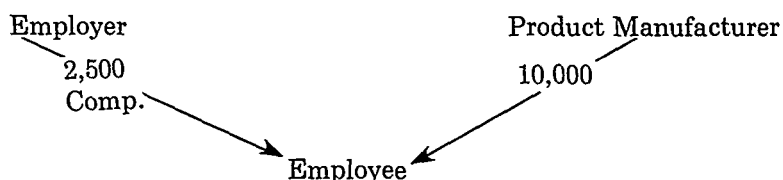
15. For state statutes codifying employee's rights against third-party tortfeasors and giving employers subrogation or reimbursement rights see Appendix II.

3. (A) An *IPALCO* approach in a state which gives the employer subrogation or reimbursement rights:



Employer Pays	-0-
Product Manufacturer Pays	<u>10,000</u>
Employee Gets	10,000

- (B) An *IPALCO* approach in a state which does not give the employer subrogation or reimbursement rights:



Employer Pays	2,500
Product Manufacturer Pays	<u>10,000</u>
Employee Gets	12,500

To these judicial approaches we can add legislative solutions which have failed—statutes adopting the *IPALCO* result in *Dole* states. Although the New York legislative proposal¹⁶ to give employers immunity on *Dole* facts was not enacted, such a statute was enacted in Florida¹⁷ following that state's judicial adoption of the *Dole* theory.¹⁸ In *Sunspan Engineering & Construction Co.*

16. See N.Y. A.9200, 197th Leg. (1974), reported in 171 N.Y.L.J. 59, Mar. 27, 1974, at 1, col. 5.

17. Fla. Laws. 1971, ch. 71-190, § 1, amending FLA. STAT. ANN. § 440.11 (1966), codified at FLA. STAT. ANN. § 440.11 (Supp. 1975). The statute provides:

The liability of an employer prescribed in sec. 440.10 shall be exclusive and in place of all other liability of such employer to any third party tort-feasor and to the employee . . . and anyone otherwise entitled to recover damages from such employer . . . on account of such injury or death . . .

18. *Trail Builders Supply Co. v. Reagan*, 235 So. 2d 482 (Fla. 1970).

v. Spring-Lock Scaffolding Co.,¹⁹ however, the Florida Supreme Court declared the statute providing immunity to the employer in suits brought on a *Dole* theory to be unconstitutional. Minnesota has also held it unconstitutional for the state legislature to adopt an *IPALCO* statute after the state court established a *Dole* rule.²⁰

It is curious that in the *IPALCO* cases (absolute immunity of the employer and a right for the negligent employer to pass all costs out of the compensation system) judicial construction does what the *Sunspan* court said the legislature could not do constitutionally. However, while officials at Dow might see this as a strange inconsistency, readers of Professor Larson might see it as a result of different answers in different states to one of the most "evenly balanced" issues in worker's compensation.²¹ I see it as the failure to analyze the problem as one in the interaction of two reparation systems, which would not be significant but for the different levels of liability and recovery in the systems.²² It is, therefore, a problem which should be approached by working with the benefit levels to adjust the interaction of the systems. Furthermore, it is a problem which will be increasingly affected by the wide adoption of comparative negligence in the two-party

19. 310 So. 2d 4 (Fla. 1975).

20. *Carlson v. Smogard*, 298 Minn. 362, 215 N.W.2d 615 (1974). Smogard bought a used car from Quality Mercury. The car had a defective hood latch, which Smogard "fixed" by putting in an extension wire to hold the hood. The car was returned to Quality to be repaired and an employee, Carlson, was injured when the hood flew open while he was driving the car. Carlson received compensation and sued Smogard. Smogard sued over against Quality Mercury. Quality moved for and was granted a summary judgment below on the basis of a statute providing that in a suit by a covered employee against a third-party tortfeasor, the employer shall not be liable to reimburse the third party or indemnify him unless there was a written indemnity agreement.

In a prior case Minnesota had adopted a *Dole* approach, *Hendrickson v. Minnesota Power & Light Co.*, 258 Minn. 368, 104 N.W.2d 843 (1960), and the *Smogard* case held the statutory limitation of the employer's liability unconstitutional. For an exhaustive discussion of the Minnesota law see Note, *The Third Party's Dilemma—The Exclusive Liability Doctrine, Comparative Negligence and the Minnesota Workmen's Compensation Act*, 1 WM. MITCHELL L. REV. 134 (1974).

21. The introductory paragraph of Larson, *Workmen's Compensation: Third Party's Action Over Against Employer*, 65 NW. U.L. REV. 351 (1970) states:

Perhaps the most evenly-balanced controversy in all of workmen's compensation law is the question whether a third party in an action by the employee can recover over against the employer, when the employer's fault has caused or contributed to the injury.

22. See Davis, *New Developments in Workmen's Compensation*, 2 WORKMEN'S COMP. L. REV. 638 (1975).

suit,²³ and the underlying principle—evident in *Dole*—that the costs of personal injury should be distributed in proportion to fault.²⁴

One need not be Jeremiah Smith²⁵ to see *IPALCO* as an unjust result. If one champions fault as the basis for distributing losses, it is not logical to construe a statute so that total responsibility falls on one of two concurrent tortfeasors. It is especially unfair if it is done in a state which has adopted comparative negligence in the two-party suit.²⁶

Dole can also be criticized. It defeats the expectation of the employer who, under the compensation act, has been told that in the compensation trade-off he or she will be immune from further liability. Contrary to this expectation, *Dole* takes money from the employer and gives it to the third party to offset what the third party has to pay because of a covered employee's injury.

The "load-sharing" approach of *Santisteven* is preferable. It meets the employer's expectation of liability limited by the compensation act and gives the product defendant some relief. Yet it is no more feasible than the divided damages rule in maritime law which was finally abandoned last year in *United States v. Reliable Transfer Co.*²⁷ under the pressure of the surge to comparative negligence.

23. See generally C.R. HEFT & C.J. HEFT, *COMPARATIVE NEGLIGENCE MANUAL* (Supp. 1975).

24. Perhaps the underlying principle is best stated in another *Dole*-like case, *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962) where, in establishing "pure" contribution between concurrent tortfeasors and bringing the "gross" negligence of the automobile guest case within the comparison of negligence approach, the court said, "we are stressing the basic goal of the law of negligence, the equitable distribution of the loss in relation to the respective contribution of the faults causing it." *Id.* at 113.

25. Smith's anxiety over the decline of the fault principle is engagingly discussed in Malone, *Damage Suits and The Contagious Principle of Workmen's Compensation*, 12 LA. L. REV. 231 (1952). See also Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235 (1914). An interesting challenge to the constitutionality of the discrimination of compensation acts in favor of workmen is Smith's question whether the no-fault principle should be applied to others as well. *Id.* at 236. The article also specifies how compensation and the common law fault principle are irreconcilable. *Id.* at 235.

26. It is interesting to note that the argument used by Professor Keeton in *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 508-09 (1962) and in the Illinois case where comparative negligence was adopted by a lower court as a matter of judicial reform, *Maki v. Frelek*, 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967), *rev'd*, 40 Ill. 2d 193, 39 N.E.2d 445 (1968), was that if there is contribution among concurrent tortfeasors there should be comparison of negligence in the two-party suit. Now that comparative negligence exists in the two-party suit, the reciprocal of that argument is that it is only fair and equitable to have contribution among concurrent tortfeasors when there is a comparison of negligence in the two-party suit. See *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962) (contribution among joint tortfeasors apparently derived from comparative negligence in two-party suit); Note, *Comparative Negligence as Applied to Contribution: The New Doctrine of "Comparative Contribution"*, 17 SW. L.J. 155 (1963).

27. 421 U.S. 397 (1975). For over 100 years damages in maritime law had been divided

It is easy to criticize existing resolutions, and even to express a preference. The difficult problem is resolving these differences in the interaction of the reparation systems. Several solutions are possible. The courts may see a constitutional issue. For example, the United States Supreme Court might say that when a state adopts comparative negligence in the two-party suit, equal protection requires a comparison of negligence in the multiple-party suit.²⁸ Or Congress may be prevailed upon to include a solution in a package of worker's compensation reform, perhaps something analogous to what it did with third-party actions in the 1972 amendments to the Longshoreman and Harbor Workers Compensation Act.²⁹

Another possibility is that state legislatures or courts could create benefit equality in the two systems.³⁰ This is a fine solution, although probably politically impossible. Direct efforts to bring compensation benefits up to common law ones under a due process/equal protection theory have failed.³¹ And the statutory schemes which tried to give all compensation-covered employers immunity for injuries to all compensation-covered employees have been either abandoned or struck down to permit employees to sue employers other than their own as third parties.³²

evenly. *Reliable Transfer* held:

[W]hen two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault.

Id. at 411.

28. *Coleman v. General Motors Corp.*, 386 F. Supp. 87 (N.D. Ga. 1974) held it no denial of equal protection to insulate the employer from third-party suits for contribution under the compensation act when employers who are not required to be covered would be liable to the third party. However, equal protection may reach from the comparison of negligence in the two-party suit to *IPALCO* situations. *Id.* at 90-91; see note 25 *supra*.

29. Pub. L. No. 92-576, 86 Stat. 1263 (1972), amending 33 U.S.C. § 905 (1971), codified at 33 U.S.C. § 905 (Supp. III, 1973). The effect of these amendments is discussed in Vickery, *Some Impacts of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act*, 41 INS. COUNSEL J. 63 (1974). See also *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669 (9th Cir. 1975); *Shellman v. United States Lines*, 528 F.2d 675 (9th Cir. 1975).

30. Lowering the benefits third-party tortfeasors must pay might be accomplished if states, or even individuals who can do so by contract, adopt the suggestion of O'Connell, *An Elective No-Fault Liability Statute*, 1975 INS. L.J. 261 or O'Connell, *No-Fault Liability by Contract for Doctors, Manufacturers, Retailers and Others*, 1975 INS. L.J. 531.

31. See, e.g., *Kaznoski v. Consolidated Coal Co.*, 68 F. Supp. 1022 (W.D. Pa. 1974).

32. See 2 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 72.40 (1975). For the difficulties in the application of the Washington statute see McGough, *Personal Injury*

Finally, the courts, or the legislature, may be able to adopt a comparative negligence theory and apply it between systems. If the cost of employee injuries and death could be apportioned between the two systems by applying the degree of fault in each system to the benefit levels of each system, *Dole*, *Santisteven*, and *IPALCO* could be abandoned.

Comparative negligence is the rule in two-party suits in over 30 states.³³ This may be primarily a result of the pressure of the plaintiffs' bar to avoid defense issues (a process similar to the abolition of the doctrines of contributory negligence and assumption of the risk in compensation legislation). It is also based on a principle which distributes costs in proportion to fault. The wide adoption of comparative negligence offers a model for courts or legislatures which want to apportion the costs of employee injury between the product liability system and the compensation system.³⁴ Another model is the so-called *Murray* rule in the District of Columbia.³⁵ This rule divides the damages and allows an in-

Actions and Immunities Under The Workmen's Compensation Act, 29 WASH. L. REV. 42 (1954). The Illinois statute was held to be unconstitutional in *Grasse v. Dealer's Transp. Co.*, 412 Ill. 179, 106 N.E.2d 124, 133-34 (1952).

33. See C.R. HEFT & C.J. HEFT, *supra* note 23.

34. See note 26 *supra*.

35. *Murray v. United States*, 405 F.2d 1361 (D.C. Cir. 1968). A compensation-covered employee sued a building owner who sought contribution. Although contribution was denied, the court concluded:

A tortfeasor jointly responsible with an employer is not compelled to pay the total common law damages. The common law recovery of the injured employee is thus reduced in consequence of the employee's compensation act, but that act gave him assurance of compensation even in the absence of fault.

Id. at 1366.

Thus, by judicial decision the third party's liability was reduced by 50 percent. *Id.* at 1365-66. The court cited *Martello v. Hawley*, 300 F.2d 721 (D.C. Cir. 1962), and the sharing of the costs where one joint tortfeasor settles. For a further discussion of settlements see note 68 *infra* and accompanying text.

Murray might be followed in Kansas and Nevada which have abandoned the joint and several liability rule in their comparative negligence statutes. KAN. STAT. ANN. § 60-258a (1974); NEV. REV. STAT. § 41.141 (1973). The latter provides:

3. Where recovery is allowed against more than one defendant in such an action:

(b) Each defendant's liability shall be in proportion to his negligence 201
as determined by the jury

Id.

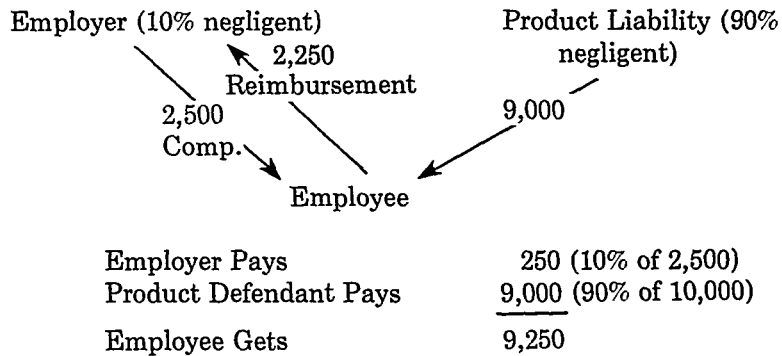
The *Murray* rule was followed in *Dawson v. Contractors Transp. Corp.*, 467 F.2d 727 (D.C. Cir. 1972) (a third party liable to an employee can reduce the liability by 50 percent if the employer can be shown to be negligent. The other 50 percent does not come from the employer).

jured compensation-covered employee to recover only one-half of the damages from a negligent third party if the employer is shown to be negligent. The other half does not come from the compensation-covered employer; the employee's recovery is the compensation plus the half recovered from the third party. It is probable that a future effect of *Reliable Transfer*³⁶ will be that the *Murray* rule will be modified to apportion damages to the relative degrees of fault rather than merely divide the damages.

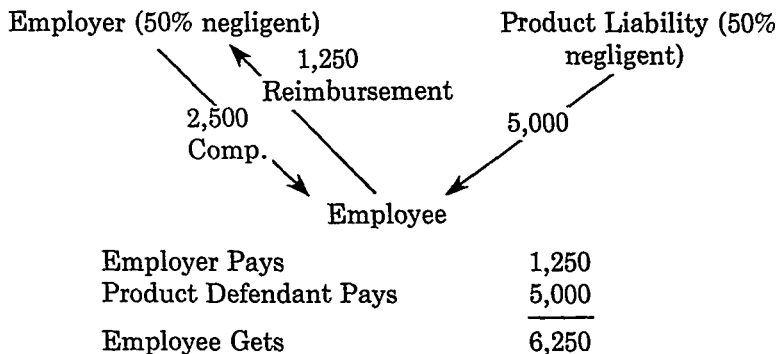
The Comparative Negligence Between Systems Approach

If we assume that the plaintiff's employer is free of fault or responsible only for a small degree of fault, then the interaction of the employer's fault with that of the product liability defendant under a comparison-of-systems approach should initially result in a recovery for the plaintiff of all compensation benefits, with payment starting immediately. Ultimately, however, the distribution of costs between the negligent fellow servants and employers (in the compensation system) and the product defendant (in the product system) would be fixed by a formula where each system contributes to the payment of losses in proportion to its degree of fault. The percentage of fault of actors in each system would be applied to the level of benefits within that system. Under this proposal the third-party defendant never pays more than an amount determined by multiplying the total common law damages by the percentage of fault attributable to the third party. Employees or dependents never get less than the full compensation award. They will also get the award from the common law fault system when the state statute does not provide for subrogation of the compensation carrier or employer. That award may be reduced by subrogation or reimbursement of the carrier in other states, but only by an amount determined by multiplying the compensation award by the proportion of fault not attributed to the employer. If subrogation is allowed to that extent, and only up to the amount of compensation benefits, a relatively fault-free compensation system can pass the costs of injury out of the system. To consider this solution graphically, assume the compensation package to be \$2,500, the common law benefits to be \$10,000, the product liability defendant's fault 90 percent and the fault of fellow servants or the employer in the compensation system 10 percent, then:

36. See note 27 *supra*.



As the percentages of negligence change, the burden on the product defendant and the compensation system will change. Assume the percentages of negligence were 50 percent for the product defendant and 50 percent for the employer, then:



If such a solution were legislative, the employee would attack the constitutionality of the reduction of recovery from the third party, perhaps using the theory of *Sunspan* by alleging that this takes "property," the vested right to sue for all the damages at common law in an action against a third party outside the compensation system, without due process of law.

If such a solution can be enacted, however, it is possible that the constitutional guarantee of access to the courts for redress of every injury and the "property" argument can be answered. While the proposal reduces the product defendant's liability in proportion to its fault, it also affects the employer and the compensation carrier's liability and 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."³⁷

The real gist of the employee's argument has been succinctly stated by Professor Larson when he attacks the *Murray* rule with an argument that will be directed against a comparison-of-systems approach:³⁸

By what logic can [an employee] be told that he should absorb a loss . . . for the benefit of the third-party tortfeasor? A rule capable of producing such a result is unacceptable, particularly since its legal underpinnings are as unsound as its practical result.

Although this statement seems to suggest a somewhat less than "evenly-balanced" view of *Murray*, it ignores the fact that in states that follow *Dole*, the employee's reduction in recovery would be for the benefit of negligent employers who in the compensation "trade-off" have settled for their negligence. If Professor Larson's purpose is to allow the employee injured by the concurrent negligence of a third-party and a fellow servant to get the full common law award from the third party without any reduction for the compensation settlement for employer negligence, then it must follow that the third party, not a part of the compensation trade-off, should be able to recover over against both the negligent fellow servant and the employer who has "settled" with the employee. Another answer to Professor Larson's question is that under the comparison-of-negligence approach employees will get, in exchange for a reduction of the award against the third party, exactly what the employees get when compensation statutes bring fellow servants within the compensation system: no responsibility for their own acts of negligence which injure fellow servants!

It should not be forgotten that compensation is a group system. Fellow-servant liability is part of the common law's focus on the individual,³⁹ and fellow-servant immunity a product of a

37. Statutes granting insurance carriers immunity have resisted constitutional attack. See *Carroll v. Zurich Ins. Co.*, 286 So. 2d 21, 23 (Fla. App. 1973); *Towns v. Kessler*, 10 Ill. App. 3d 356, 293 N.E.2d 761, 765 (1973). And the 1973 amendment to the Alabama compensation act bringing fellow servants within the protection of the act (giving them immunity where their negligence causes injury to a covered employee) has been applied retroactively. *Barr v. Preskitt*, 389 F. Supp. 496, 502 (M.D. Ala. 1975).

38. Larson, *supra* note 3, at 366 n.35.

39. 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* xxvii (1956) states that the common law of torts can be summed up in the word "individualism."

group approach.⁴⁰ Thus the comparison-of-systems approach is an adjustment between groups, giving immunity to negligent employers who have made a compensation settlement and reducing recovery by employees injured by the negligence of fellow servants and their employers.

Having proposed a solution, it is necessary to ask whether it is likely that it will be adopted. First, such a solution might appeal to legislatures in *Sunspan* states, where other legislative remedies have been tried.

"No-reimbursement" States May Move

Ohio, a state which denies the compensation system a right of subrogation or reimbursement from the employee's recovery against the third-party tortfeasor, is said to be an *IPALCO* state.⁴¹ Because the employee gets both compensation and third-party recovery, such a state seems to be a logical one for the use of "load-sharing."⁴² Why is this not the case? An explanation may be that the costs of the third-party suit are such that the employee who is successful in the third-party suit will "net" no more than the common law benefits. That is, if we assume that the common law benefits run four times as much as the compensation benefits and the attorney's fees for the successful employee are only one-fourth of that recovery, the employee will receive, after payment of the fee, only common law benefits. Although this may be a pragmatic answer, it is unprincipled and the "no-reimbursement" states may move to "load-sharing," if not to a *Dole* theory.

IPALCO States Which Allow an Injured Employee to Sue a Negligent Fellow Servant as a Third-Party Tortfeasor at Common Law May Move

Although there has been a trend to bring fellow servants of injured covered employees within the immunity of the compensation system,⁴³ 15 states still permit suits by injured employees

40. For an interesting discussion of the need to recognize and deal with group systems see Cowan, *Group Interests*, 44 VA. L. REV. 331 (1958). For an effort to apply the concept in compensation see Davis, *Safety Rules, Misconduct and Workmen's Compensation*, 33 AM. TRIAL LAW. L.J. 140, 144-47 (1970).

41. *Madrin v. Wareham*, 344 F. Supp. 166 (W.D. Pa. 1972) (dicta).

42. See the net paid to the employee in the example in the text accompanying note 14 *supra*.

43. For examples of state statutes illustrative of those expressly immunizing fellow employees as third-party tortfeasors see Appendix III.

against their fellow servants.⁴⁴ Interestingly enough, the same year the Iowa court decided *IPALCO*, insulating the employer from indemnity or contribution liability to the third party, fellow servants were held to be third parties, not immune to suit.⁴⁵ Since the injured employee's right to sue the negligent fellow servant would satisfy the "plaintiff's direct right" requirement of the restitution theory of contribution,⁴⁶ if respondeat superior applies, as it may,⁴⁷ the third party can reach the employer through the fellow servant. Because most employers act through employees, an employer's negligence is likely to be fellow-servant negligence, and such suits should be expected.

It may be through the liability of the fellow servant, so clearly established at common law, that the *Sunspan* reasoning can be used to effect a change in all *IPALCO* states, not merely those where fellow servants lack immunity. All the compensation acts giving fellow servants immunity to suits by injured employees can be argued to be unconstitutional under *Sunspan* (where an *IPALCO* statute following the adoption of the *Dole* theory was struck down). However, the "trade-off" theory should ultimately support them.⁴⁸ But even if fellow-servant immunity by statute is upheld, the injured employee's common law right to sue fellow servants would support a contribution theory.⁴⁹

Employers anxious to continue shifting all costs out of the compensation system in *IPALCO* states, as well as employees and their attorneys anxious to avoid any comparison of negligence between systems that might reduce employee recovery against the third party, will retreat and urge that even though under the common law an injured employee could sue a fellow servant, that right cannot be the direct right against the employers required in

44. For the state statutes construed by courts to permit suits against fellow employees as third parties see Appendix IV.

45. *Price v. King*, 259 Iowa 921, 146 N.W.2d 328 (1966).

46. See *Furnish, Distributing Tort Liability: Contribution and Indemnity in Iowa*, 52 IOWA L. REV. 31 (1966).

47. See *Dale v. Whiteman*, 388 Mich. 698, 202 N.W.2d 797 (1972). There, a car owner was held liable when one employee of a car wash while driving the owner's car ran into another employee. The car owner was entitled to indemnity from the employer despite the exclusive remedy provision of the compensation act.

48. See note 37 *supra*.

49. The statutory immunity of fellow servants would be part of the compensation "trade-off." If it did not include some trade-off for the third party, the reasoning of *Carlson v. Smogard*, 298 Minn. 362, 215 N.W.2d 615 (1974) would support the third party's right to sue the negligent fellow servant. See notes 6, 20 *supra*.

the restitution theory of contribution because of the common law fellow-servant rule.⁵⁰

There is a great deal of "technical" learning in this area, but as Holmes told us in *The Common Law*, "[i]gnorance is the best of law reformers."⁵¹ If there are candidates for "areas of greatest ignorance" in tort law, the area of contribution is nominated. The reforms taking place in the two-party suit, where contributory negligence as a bar is being abandoned, suggest that technical learning is giving way to a principle which distributes losses in proportion to fault. Under pressure of this reforming principle, *IPALCO's* conclusion that the full loss should fall solely upon outside defendants cannot be expected to survive. Restitutionary theories, as the only basis of contribution, will have to give way to the principle which distributes losses in proportion to fault. If the fault in each of two interacting systems is not multiplied by the benefits in each system to limit the employee's recovery, the result will be *Dole*.

The Mechanics of the Employer's Right to be Reimbursed out of the Recovery from the Third Party

Third-party suits are sources of income for attorneys.⁵² Therefore, it might be appropriate to examine the mechanics of the subrogation statutes⁵³ to see how a comparison-of-systems approach would affect those involved in the loss-shifting process, principally attorneys.

Some areas of concern for those involved in the loss-shifting process are:

1. The need for notice when the employee brings suit.⁵⁴

50. The leading English fellow-servant rule case is *Priestley v. Fowler*, 3 M. & W. 1 (1837). See also C. DAVIS, W. BOYD, H. DAHL, W. BUMP & R. WEINTRAUB, *THE IOWA LAW OF WORKMEN'S COMPENSATION* 2 (1967) where this author suggests that the Iowa "fellow servant" case, *Kroy v. Chicago, R.I. & P. Ry.*, 32 Iowa 357 (1871) and its reasoning indicates that the "fellow servant" rule is merely a facet of the doctrine of assumption of the risk.

51. O.W. HOLMES, *THE COMMON LAW* 78 (1881).

52. See Laing, *For the Plaintiff: Lawyers Specializing in Personal-Injury Suits Find Business Is Good*, Wall St. J., Aug. 2, 1972, at 1, col. 1, reprinted in J. O'CONNELL AND R. HENDERSON, *TORT LAW, NO-FAULT AND BEYOND* 158-64 (1975).

53. See generally McCoid, *supra* note 3.

54. For state statutes illustrative of those requiring the employee to give notice of any suit against a third-party tortfeasor to his or her employer or insurance carrier see Appendix V.

2. Provisions for immediate or delayed assignment of employees' rights.⁵⁵
3. The need for employer approval of settlements with the third party.⁵⁶
4. Statutory schemes for the regulation of attorney's fees and expenses—distributing these between the employer and the employee.⁵⁷ (This is an area of great concern because a comparison-of-systems approach would reduce the recovery against the third party and result in the reduction of fees based on the size of the recovery.)
5. Statutes which provide:
 - A. That the employee will get a portion of the recovery from the third party, despite employer subrogation.⁵⁸
 - B. That the employer (or carrier) receive more than is needed to reimburse the compensation actually paid.⁵⁹

Any legislative solution will have to account for these "vested" rights, although the problems seem political rather than constitutional.

The Collusion Objection

One might object that a proposal of comparative negligence between systems will lead employers to suggest to employees that the employee, as well as the employer, will get more (and the product defendant pay more) if they can get fellow servants to "overlook" or "forget" evidence of negligence inside the compensation system.⁶⁰ But a *res ipsa*, "smoking out the evidence,"

55. For state statutes illustrative of those providing for an automatic assignment of the employee's rights against a third-party tortfeasor see Appendix VI.

56. For state statutes illustrative of those requiring notice to, and approval by, the employer of any settlement by the employee with a third-party tortfeasor see Appendix VII.

57. For state statutes illustrative of those regulating the apportionment of expenses and attorney's fees see Appendix VIII.

58. For state statutes illustrative of those guaranteeing to the employee a minimum amount of any recovery against a third-party tortfeasor see Appendix IX.

59. For state statutes illustrative of those permitting the employer to retain more of any recovery from a third party than is due him for reimbursement purposes see Appendix X.

60. The obvious collusion analogy concerns efforts by employers to shift costs to the second injury fund. The New York rule is set out in *Zyla v. A.D. Juilliard & Co.*, 277 App. Div. 604, 102 N.Y.S.2d 255 (3d Dep't 1951) where the court said:

The statute does not in express terms require that the parties know of the existence of the permanent physical impairment. But the knowledge on the part of the employer, though not necessarily of the employee, is required by the implication of the statutory formula.

Id. at 605, 102 N.Y.S.2d at 257. This requirement of actual employer knowledge of the

theory⁶¹ may help overcome such collusion when the product is delivered into the employer's custody with the warning intact, and the suit is based on the fact that the warning was removed before the use which injured the employee. Further, compensation carriers, who also underwrite employer liability losses under *Dole*, might well cooperate with the product liability defendant, applying the pragmatic theory that once a loss has come within an insurance system, such as compensation, there is no net gain, only increased costs when such losses are shifted around. However, if the possibility of collusion exists, the solution might better be found in sharpening the tools of discovery, rather than changing substantive rights or abrogating the principle that losses be distributed in proportion to fault.

Another collusion problem might arise where an employee waits until the day before the statute of limitations runs on the claim against the product liability defendant in the hope that a suit over against the negligent fellow servant or the employer will be barred because the defendant cannot file suit in time. A court which considers the action brought by the product defendant as an indemnity or contribution action, where the cause of action does not arise until the product defendant suffers an adverse judgment,⁶² can handle such suspected collusion easily. Further, where the damages are apportioned to the degree of fault, with the third party not being held responsible for a greater degree of damages than that fixed by his or her degree of fault, a collusive delay in filing cannot alter the degree of damages that fall on the third party.

Settlements by One of Several Tortfeasors

The *IPALCO* cases, which deny the third party all relief despite employer fault, turn on two basic arguments. First, the statutes provide that the employer's compensation liability is exclusive, an argument which suggests a "no-duty" analysis.⁶³

impairment has led to much litigation regarding adequate employer knowledge, with resultant criticism of the rule itself. See A. LARSON, *supra* note 32, at § 59.33 n.99.

61. See Jaffee, *Res Ipsa Loquitur Vindicated*, 1 BUFFALO L. REV. 1 (1951).

62. See Furnish, *supra* note 46, at 53.

63. Under a duty analysis, compensation statutes granting employers immunity may be regarded as "no duty" statutes, much like the automobile guest statutes can be construed to say a host has "no duty" to avoid ordinary negligence to a guest. A supplier of lumber is entitled to assume that a building contractor will not select an obviously defective piece of lumber to use in constructing a scaffold, see *Stultz v. Benson Lumber Co.*, 6 Cal. 2d 688, 59 P.2d 100 (1936), yet the *Santisteven* court quotes Larson, *supra* note 3, at 419:

This argument fails to indicate why a trade-off or settlement between the employers and employees should cut off the rights of third parties; yet the argument has convinced some courts⁶⁴ although not others.⁶⁵ The second argument is that because the compensation statute makes the employer immune to suits by the employee, there is no common liability of the employer and the third party to the employee, and therefore, under the common law, or the statute governing contribution,⁶⁶ there can be no contribution by the immune employer. This argument similarly fails to explain how the settlement or compromise between employers and employees (although it has legislative approval)⁶⁷ can be deemed to have this effect on third parties.

The acid test for the common liability argument will arise when one of two concurrently negligent tortfeasors settles with a compensation-covered employee. If one settles and gets a covenant not to sue from the employee, will that covenant bar a suit for contribution when the employee sues the other?⁶⁸ Unless the

When a purchaser buys a product, however, does he make an implied contract with the manufacturer to use the goods in such a way as not to bring liability upon the manufacturer? This would be stretching the concept of contract out of all relation to reality.

Santisteven v. Dow Chem. Co., 506 F.2d 1216, 1220 n.11 (9th Cir. 1974). Perhaps the *Santisteven* court was influenced by the compensation statute to say there was no duty.

Guest statutes which provided that the host had "no duty" to avoid ordinary negligence to the guest have been held to be unconstitutional. The argument that the employer has no duty to use due care because it cannot be implied from the purchase contract may also fail, especially if the "no-duty" is in fact implied from the compensation statute rather than the contract.

It should be noted that the cases holding the guest statutes unconstitutional, such as *Brown v. Merlo*, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973), have solved the inequity of having the full cost of guest injury fall on the third party in auto accidents, and that the analysis suggested here might well apply to such cases. See also *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962), discussed in note 24 *supra*.

64. See cases collected in note 11 *supra*.

65. See cases collected in note 9 *supra*.

66. Generally, contribution statutes have been modeled after either the 1939 draft of the Uniform Contribution Among Tortfeasors Act, 1939 HANDBOOK OF THE NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS & PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING 243, 12 UNIFORM LAWS ANNOT. 57 (1975), the 1955 revision of the Act, 1955 HANDBOOK OF THE NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS & PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING 218, 12 UNIFORM LAWS ANNOT. 63, or the decisions of various courts applying the two versions.

67. See W. BLUM & H. KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM 25-27 (1965).

68. For an analysis of settlements and releases by one of multiple tortfeasors in comparative negligence states see Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 St. Mary's L.J. 655 (1973); Thode, *Comparative Negligence*,

IPALCO courts hold that there is no right to contribution in this situation, it seems unreasonable to hold that there is no right to contribution when the employer has "settled" with the employee under the compensation act. Just as there is no common liability once the compensation statute gives immunity to the employee's suit, there is no common liability when one of two concurrent tortfeasors gets a covenant not to sue.

It was suggested above that apportioning the damages recoverable to the respective degrees of fault may lead to collusion between employers and employees to shift all the costs of injury caused by concurrent fault out of the compensation system. It might be that giving effect to settlements by one of multiple defendants could similarly lead to collusion. An employee injured by concurrent acts of negligence of a third party and a fellow servant might well settle with the fellow servant for a nominal sum and then seek full common law damages from the third party, who would be denied the right to recover contribution because there is no "common liability."

To avoid saddling the defendant who has not settled with total responsibility for acts of concurrent fault with another who has, it might be appealing to allow a defendant who does not settle to recover contribution from the defendant who does. This result, however, would discourage settlements and allow the claimant who settled at one benefit level to break through to a higher level. This would result in a conflict between the level of damages in the common law system and the level in the settlement system. It can be suggested that this conflict should be handled by having each defendant's responsibility limited to the degree of fault as applied to the appropriate level of benefits. Where one of multiple defendants settles, another who refuses to settle would be responsible only for his or her own percentage of fault multiplied by the damage level of the common law system, not for the full amount less what the settling defendant paid.⁶⁹

Contribution Among Tort-Feasors and the Effect of a Release—A Triple Play by the Utah Legislature, 1973 UTAH L. REV. 406. Settlements and their effect in the District of Columbia are discussed in note 35 *supra*. See also N.Y. GEN. OBLIG. LAW § 15-108(a) (McKinney Supp. 1974) which was designed to encourage settlements by assuring a plaintiff that he may settle his claim with one joint tortfeasor without prejudicing his right to sue the others. A recently decided New York Court of Appeals case will affect this statute. *Rock v. Reed-Prentice Div. of Pack-Mach. Co.*, 175 N.Y.L.J. 46, Mar. 9, 1976, at 1, col. 6.

69. See Thode, *supra* note 68, at 433 n.100, where the suggestion that the collusive effects of "sweetheart" settlements can be avoided by proportioning fault to the settlement level is further explored. See also *Reynolds v. Southern Ry. Co.*, 320 F. Supp. 1141 (N.D. Ga. 1969), where a railroad employee was crushed between a railroad car and a

The suggestion here is that a covered employee's "settlement" with the compensation-covered employer should allow the employee to recover from the third party only in proportion to the third party's degree of fault. This is merely an adjustment to the appropriate benefit levels in the distribution of losses in proportion to degrees of fault. When one of multiple outside tortfeasors settles with a compensation-covered claimant, that agreement may also be a fixing of "benefits"—adjusted in proportion to degree of fault—and thus similarly call for encouragement by courts. Thus, courts could, in the ultimate distribution of the costs among multiple defendants (some of whom settled and some of whom did not), allow the claimant to recover damages in proportion to their fault from those who refused to settle, while holding the responsibility of those who settled to the figure the claimant accepted. Even claimants' attorneys might ultimately see that cash settlements that come from allowing any defendant the right to buy peace would offset the reduced damages that might be recovered from defendants who refuse to settle. If the damages are not reduced in suits against the defendant who refuses to settle and that defendant can recover contribution from a defendant who has settled, the benefit level of the settlement has been breached for the benefit of the claimant by the defendant who refused to settle! Such a result would probably lead to fewer settlements because no defendant could rely upon a separate settlement any more than Urban could rely upon the compensation settlement with Dole when sued by Dow.

The Abandonment of Joint and Several Liability

A final effect of comparative negligence statutes on *Dole*-type conflicts is that at least two states have statutes which limit the liability of concurrent tortfeasors to their proportionate degree of fault.⁷⁰ The abandonment of joint and several liability for concurrent tortfeasors may allow courts in such states to reduce the employee's recovery against the third party in proportion to the third party's degree of fault.

retaining wall. After settling with the employee under the FELA, the employer brought suit against the wall builder. The action was a common law action even though the employee's claim was statutory, and, to avoid the imposition of the effect of a collusive settlement between the employer and the employee on the third party, the court required the railroad to show that the settlement was not collusive.

70. Kansas and Nevada have abandoned the joint and several liability rule in their comparative negligence statutes. KAN. STAT. ANN. § 60-258a (1974); NEV. REV. STAT. § 41-141 (1973) (set out in part in note 35 *supra*).

Interestingly, one of the states which has abandoned joint and several liability is Nevada, the *Santisteven* or "load-sharing" state. It will be worth watching to see if the new statute helps move Nevada from "load-sharing" to the distribution of losses in proportion to fault.

It can be suggested that a compensation-covered employee, who seeks to recover against an outside defendant when there is fault both within and without the compensation system, can be distinguished from claimants seeking judgments against concurrent tortfeasors, one of whom may have no assets, where joint and several liability secures the plaintiff's full satisfaction. The compensation-covered employee will receive compensation. There is little risk of nonpayment. The reduction of the third party's liability to the degree of fault can be made without risk. Therefore, if the legislature of a state where concurrent tortfeasors are jointly and severally liable chooses to provide that covered employees can recover damages from third parties only in proportion to the degree of fault, there is reason, as well as at least one analogy,⁷¹ which would support such a statute when it is attacked as a denial of equal protection because other claimants enjoy the right to hold concurrent tortfeasors jointly and severally liable.

Conclusion

Where systems such as compensation and product liability have different benefit levels, there will be conflict-of-systems litigation whenever there is negligence in both systems. The suggestions here for the resolution of such conflicts are based on the assumption that the only practical solution is to key employee recovery to the benefit levels in each system and to distribute losses in proportion to the respective degrees of fault in each system.

71. In *Edwards v. State, Military Dep't*, 8 Ore. App. 620, 494 P.2d 891 (Ct. App. 2d Dep't 1972), it was claimed that it violated equal protection for a government waiver of tort immunity to preserve immunity for claims by persons covered by worker's compensation. The plaintiff argued, "why does the exception not provide that any person otherwise insured cannot recover?" 494 P.2d at 894. The court held it was not a denial of equal protection to exclude compensation-covered employees from tort recovery against the sovereign even though other persons could recover, stressing the presence of the alternate compensation system of recovery.

This approach suggests that a statute which left the damages attributable to each system in that system might well be upheld, and it supports the constitutionality of the judicial "load-sharing" approach.

APPENDIX I

These recent cases indicate the states which appear to have adopted the result of *IPALCO*.

ALASKA: *Golden Valley Elec. Ass'n v. City Elec. Serv., Inc.*, 518 P.2d 65 (Alas. 1974) (third party cannot recover from employer because of exclusive remedy provision of the compensation act);

ARIZONA: *Desert Steel Co. v. Superior Court, County of Maricopa*, 22 Ariz. App. 279, 526 P.2d 1077 (1974);

ARKANSAS: *Jack Morgan Constr. Co. v. Larkan*, 254 Ark. 838, 496 S.W.2d 431 (1973) (claim for contribution by a third-party tortfeasor was rejected, reasoning from the exclusivity of the employer's liability under the compensation act);

COLORADO: *Hilzer v. MacDonald*, 169 Colo. 237, 454 P.2d 928 (1969) (act precludes employer's liability to third party);

CONNECTICUT: *A.A. Equip., Inc. v. Farmoil, Inc.*, 31 Conn. Supp. 322, 330 A.2d 99 (1974) (third party not entitled to contribution from employer absent a contractual right);

DELAWARE: *Howard, Needles, Tammen & Bergendoff v. Steers, Perini & Pomeroy*, 312 A.2d 621 (Del. 1973) (earlier case, *Diamond State Tel. Co. v. University of Delaware*, 269 A.2d 52 (Del. 1970) distinguished as a case of implied contract);

GEORGIA: See note 14 *supra*;

HAWAII: *Kamali v. Hawaiian Elec. Co.*, 54 Hawaii 153, 504 P.2d 861 (1972) (exclusiveness of compensation statute stressed);

KENTUCKY: *Cassidy v. Sullivan & Cozart, Inc.*, 468 S.W.2d 260 (Ky. 1971) (claim for indemnity against employer disallowed); *Ashland Oil & Ref. Co. v. Bertram & Thacker*, 453 S.W.2d 591 (Ky. 1970) (no right to contribution); *Employers Mut. Liab. Ins. Co. v. Griffin Constr. Co.*, 280 S.W.2d 179 (Ky. 1955);

LOUISIANA: *LeJeune v. Highlands Ins. Co.*, 287 So. 2d 531 (La. App. 1973), *writ denied*, 290 So. 2d 903 (1974). See also Judge Tate's well-reasoned dissent in the rehearing of *Vidrine v. Michigan Millers Mut. Ins. Co.*, 263 La. 300, 268 So. 2d 233, 246-7 (1972), on the basis of which he dissented from the denial of the writ in *LeJeune*;

MAINE: *Roberts v. American Chain & Cable Co.*, 259 A.2d 43 (Me. 1969) (no contribution or indemnification in absence of express indemnity provision);

MARYLAND: *American Radiator & Standard Sanitary Corp. v. Mark Eng'r Co.*, 230 Md. 584, 187 A.2d 864 (1963);

MICHIGAN: *Vaughn v. Vakula*, 38 Mich. App. 368, 196 N.W.2d 319 (1972). But see *Nanasi v. General Motors Corp.*, 56 Mich. App. 652, 224 N.W.2d 914 (1974) (perhaps a move to bring Michigan out of *IPALCO*; third party's action over for indemnity established, although the court adheres to no contribution rule); *Dale v. Whiteman*, 388 Mich. 698, 202 N.W.2d 797 (1972) (car owner who was held liable when one employee of car wash driving owner's car ran into another employee, was entitled to indemnity from employer despite exclusive remedy provision of compensation act);

MISSOURI: *Howard v. Wilson Concrete Co.*, 57 F.R.D. 8 (W.D. Mo. 1972);

NEBRASKA: *Petznick v. Clark Equip. Co.*, 333 F. Supp. 913 (D. Neb. 1971) (compensation act insulates employer from claims for contribution or indemnity);

NEW JERSEY: *Ruvolo v. United States Steel Corp.*, 133 N.J. Super. 362, 336 A.2d 508 (1975);

NEW MEXICO: Gulf Oil Corp. v. Rota-Cone Field Operating Co., 84 N.M. 483, 505 P.2d 78 (Ct. App. 1972) (discussed in note 8 *supra*, *Rota-Cone* puts New Mexico at the most extreme position of all states which hold that the compensation statute protects the employer from all claims, even under express contracts to indemnify!);

NORTH DAKOTA: White v. McKenzie Elec. Cooperative, 225 F. Supp. 940 (D.N.D. 1964) (exclusive provision of worker's compensation act eliminates cause of action by third party for contribution or indemnification);

OHIO: See note 14 *supra*;

RHODE ISLAND: Cacchillo v. H. Leach Mach. Co., 111 R.I. 593, 305 A.2d 541 (1973) (since employee injured by third party's machinery cannot sue employer under compensation act, third party cannot sue employer for contribution);

SOUTH DAKOTA: Kessler v. Bowie Mach. Works, Inc., 501 F.2d 617 (8th Cir. 1974)(no common liability);

TENNESSEE: Dawn v. Essex Conveyors, Inc., 498 F.2d 921 (6th Cir.), *cert. denied*, 419 U.S. 1040 (1974);

TEXAS: McCann Constr. Co. v. Joe Adams & Son, 458 S.W.2d 477 (Tex. Civ. App. 1970), *rev'd*, 475 S.W.2d 721 (Tex. 1971) (employer liable for contribution or indemnity *only* under terms of written agreement with third party);

VIRGINIA: Jennings v. Franz Torwegge Mach. Works, 347 F. Supp. 1288 (W.D. Va. 1972)(employee injured using machine may recover from third party who cannot recover from the compensation-covered employer even if it is assumed that the employer was negligent in failing to instruct the employee in the safe use of the machine);

WASHINGTON: Montoya v. Greenway Aluminum Co., 10 Wash. App. 630, 519 P.2d 22 (1974);

WEST VIRGINIA: See note 14 *supra*;

WISCONSIN: Lampada v. State Sand & Gravel Co., 58 Wis. 2d 315, 206 N.W.2d 138 (1973) (no contribution or indemnity can be recovered from compensation-immune employer).

APPENDIX II

State statutes codifying employee's rights against third-party tortfeasors and giving employers subrogation or reimbursement rights.

ALA. CODE tit. 26, § 312 (Cum. Supp. 1973);
ALASKA STAT. § 23.30.015 (1972);
ARIZ. REV. STAT. ANN. § 23-1023 (Cum. Supp. 1975);
ARK. STAT. ANN. § 81-1340 (1960);
CAL. LABOR CODE § 3852 (West 1971);
COLO. REV. STAT. ANN. § 8-52-108(1) (1973);
CONN. GEN. STAT. ANN. § 31-293 (1972);
DEL. CODE ANN. tit. 19, § 2363 (1975);
FLA. STAT. ANN. § 440.39 (Cum. Supp. 1975);
HAWAII REV. STAT. § 386-8 (Cum. Supp. 1975);
IDAHO CODE § 72-223 (1973 replacement volume);
ILL. ANN. STAT. ch. 48, § 138.5 (Smith-Hurd Cum. Supp. 1975);
IND. ANN. STAT. § 22-3-2-13 (Burns Cum. Supp. 1975);
IOWA CODE ANN. § 85.22 (Cum. Supp. 1975);
KAN. STAT. ANN. § 44-504 (Cum. Supp. 1974);
KY. REV. STAT. ANN. § 342.700 (Cum. Supp. 1974);
LA. REV. STAT. ANN. § 23:1101 (West 1964);
ME. REV. STAT. ANN. tit. 39, § 68 (1964);
MD. ANN. CODE art. 101, § 58 (Cum. Supp. 1975);
MASS. GEN. LAWS ANN. ch. 152, § 15 (Cum. Supp. 1975);
MICH. STAT. ANN. § 418.827 (Supp. 1975);
MINN. STAT. ANN. § 176.061 (Cum. Supp. 1976);
MISS. CODE ANN. § 71-3-71 (1972);
MO. ANN. STAT. § 287.150 (Vernon 1965);
MONT. REV. CODES ANN. § 92-204.1 (Cum. Supp. 1975);
NEB. REV. STAT. § 48-118 (1974);
NEV. REV. STAT. § 616.560 (1973);
N.H. REV. STAT. ANN. § 281:14 (1966 replacement volume);
N.J. STAT. ANN. § 34:15-40 (1959);
N.M. STAT. ANN. § 59-10-25 (1974);
N.Y. WORKMEN'S COMP. LAW § 29 (McKinney Supp. 1975);
N.C. GEN. STAT. § 97-10.2 (1972 replacement volume);
N.D. CENT. CODE § 65-01-09 (Supp. 1975);
OKLA. STAT. ANN. tit. 85, § 44 (Cum. Supp. 1975) (except in death cases);
ORE. REV. STAT. § 656.578 (1974);
PA. STAT. ANN. tit. 77, § 671 (Cum. Supp. 1975);
R.I. GEN. LAWS ANN. § 28-35-58 (1969);
S.C. CODE ANN. § 72-126-1 (Cum. Supp. 1974);
S.D. COMPILED LAWS ANN. § 62-4-38 (1967);
TENN. CODE ANN. § 50-914 (1966 replacement volume);
TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Vernon Cum. Supp. 1975);
UTAH CODE ANN. § 35-1-62 (Cum. Supp. 1975);
VT. STAT. ANN. tit. 21, § 624 (1967);
VA. CODE ANN. § 65.1-42 (1973 replacement volume);
WASH. REV. CODE ANN. § 51.24.010 (Cum. Supp. 1974);
WIS. STAT. ANN. § 102.29 (1973).

APPENDIX III**State statutes expressly immunizing fellow employees as third-party tortfeasors.**

ALA. CODE tit. 26, § 312 (Cum. Supp. 1973);
 ALASKA STAT. § 23.30.015 (1972);
 ARIZ. REV. STAT. ANN. § 23-1023 (Cum. Supp. 1975);
 CAL. LABOR CODE § 3601(a) (West 1971) (except where willful and unprovoked or caused by fellow employee's intoxication);
 COLO. REV. STAT. ANN. § 8-52-108(1) (1973);
 CONN. GEN. STAT. ANN. § 31-293a (1972) (except when automobile involved or unless willful or malicious);
 DEL. CODE ANN. tit. 19, § 2363 (1975);
 HAWAII REV. STAT. § 386-8 (Cum. Supp. 1975) (except where willful and wanton misconduct causes injury);
 IND. ANN. STAT. § 22-3-2-13 (Burns Cum. Supp. 1975);
 KAN. STAT. ANN. § 44-504 (Cum. Supp. 1974);
 MICH. STAT. ANN. § 418-827 (Supp. 1975);
 MONT. REV. CODES ANN. § 92-204.1 (Cum. Supp. 1975) (except where intentional and malicious);
 NEV. REV. STAT. § 616.560 (1973);
 N.M. STAT. ANN. § 59-10-25 (1974);
 N.Y. WORKMEN'S COMP. LAW. § 29 (McKinney Supp. 1975);
 N.C. GEN. STAT. § 97-9 (Cum. Supp. 1975);
 N.D. CENT. CODE § 65-01-08 (1960);
 OHIO REV. CODE ANN. § 4123.741 (1973 replacement volume);
 OKLA. STAT. ANN. tit. 85, § 44 (Cum. Supp. 1975);
 ORE. REV. STAT. § 656.018 (1974);
 S.C. CODE ANN. § 72-126.1 (Cum. Supp. 1974);
 TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967);
 UTAH CODE ANN. § 35-1-62 (Cum. Supp. 1975);
 WASH. REV. CODE ANN. § 51-24.010 (Cum. Supp. 1974);
 W. VA. CODE ANN. § 23-2-6a (1973 replacement volume).

State statutes construed by courts to immunize fellow employees as third-party tortfeasors.

IDAHO CODE § 72-223 (1973 replacement volume);
 ILL. ANN. STAT. ch. 48, § 138-5 (Smith-Hurd Cum. Supp. 1975);
 KY. REV. STAT. ANN. § 342.700 (Cum. Supp. 1974);
 MASS. GEN. LAWS ANN. ch. 152, § 15 (Cum. Supp. 1975);
 PA. STAT. ANN. tit. 77, § 671 (Cum. Supp. 1975);
 TENN. CODE ANN. § 50-914 (1966 replacement volume);
 VA. CODE ANN. § 65.1-40 (1973 replacement volume).

APPENDIX IV

State statutes construed by courts
to permit suits against fellow em-
ployees as third parties.

ARK. STAT. ANN. § 81-1340 (1960);
FLA. STAT. ANN. § 440.39 (Cum. Supp. 1975);
GA. CODE ANN. § 114-103 (1973);
IOWA CODE ANN. § 85.22 (Cum. Supp. 1975);
LA. REV. STAT. ANN. § 23:1101 (West 1964);
MD. ANN. CODE art. 101, § 58 (Cum. Supp. 1975);
MISS. CODE ANN. § 71-3-71 (1972);
MO. ANN. STAT. § 287.150 (Vernon 1965);
NEB. REV. STAT. § 48-118 (1974);
N.H. REV. STAT. ANN. § 281:14 (1966 replacement volume);
N.J. STAT. ANN. § 34:15-40 (1959) (willful and malicious acts only);
R.I. GEN. LAWS ANN. § 28-35-58 (1969);
S.D. COMPILED LAWS ANN. § 62-4-38 (1967);
VT. STAT. ANN. tit. 21, § 624 (1967);
WIS. STAT. ANN. § 102.29 (1973).

APPENDIX V

State statutes requiring employee to give notice of any suit against a third-party tortfeasor to his or her employer or insurance carrier.

ALASKA STAT. § 23.30.015 (1972);
 ARK. STAT. ANN. § 81-1340 (1960);
 CAL. LABOR CODE § 3853 (West 1971) (employer must also give employee notice of any suit by way of subrogation);
 COLO. REV. STAT. ANN. § 8-52-108(1)(1973) (must give notice of election to take workmen's compensation or sue third party);
 CONN. GEN. STAT. ANN. § 31-293 (1972)(employer must also give notice to employee of any suit by way of subrogation);
 DEL. CODE ANN. tit. 19, § 2363 (1975)(employer must also give notice to employee of any suit by way of subrogation);
 FLA. STAT. ANN. § 440.39 (Cum. Supp. 1975)(employer must also give notice to employee of any suit by way of subrogation);
 HAWAII REV. STAT. § 386-8 (Cum. Supp. 1975);
 ILL. ANN. STAT. ch. 48, § 138.5 (Smith-Hurd Cum. Supp. 1975);
 IND. ANN. STAT. § 22-3-2-13 (Burns Cum. Supp. 1975);
 IOWA CODE ANN. § 85.22 (Cum. Supp. 1975);
 KY. REV. STAT. ANN. § 342.700 (Cum. Supp. 1974);
 LA. REV. STAT. ANN. § 23:1102 (West 1964);
 MICH. COMP. LAWS ANN. § 418.827 (Supp. 1975);
 MISS. CODE ANN. § 71-3-71 (1972);
 MONT. REV. CODES ANN. § 92-204-1 (Cum. Supp. 1975);
 NEB. REV. STAT. § 48-118 (1974);
 NEV. REV. STAT. § 616.560 (1973);
 N.Y. WORKMEN'S COMP. LAW § 29 (McKinney Supp. 1975);
 ORE. REV. STAT. § 656.593 (1974);
 S.C. CODE ANN. § 72-126.1 (Cum. Supp. 1974) (employer must also give notice to employee of any suit by way of subrogation);
 UTAH CODE ANN. § 35-1-62 (Cum. Supp. 1975);
 VT. STAT. ANN. tit. 21, § 624 (1967);
 WASH. REV. CODE ANN. § 51.24.010 (Cum. Supp. 1974);
 WIS. STAT. ANN. § 102.29 (1973) (employer must also give notice to employee of any suit by way of subrogation).

APPENDIX VI

State statutes providing for an automatic assignment of employees' rights against a third-party tortfeasor.

- ALASKA STAT. § 23.30.015 (1972) (if employee fails to sue third party within one year after receiving workmen's compensation award);
- ARIZ. REV. STAT. ANN. § 23-1023 (Cum. Supp. 1975) (if employee fails to sue within one year after his cause of action accrues against third party);
- COLO. REV. STAT. ANN. § 8-52-108(1) (1973);
- FLA. STAT. ANN. § 440.39 (Cum. Supp. 1975) (if employee fails to sue within one year after his cause of action accrues, for one year, then cause of action reverts to employee);
- IND. ANN. STAT. § 22-3-2-13 (Burns Cum. Supp. 1975) (if employee fails to sue within two years after his cause of action accrues, for one year);
- KAN. STAT. ANN. § 44-504 (Cum. Supp. 1974) (if employee fails to sue within one year after his cause of action accrues, or if in the event of death his estate fails to sue within 18 months);
- ME. REV. STAT. ANN. tit. 39, § 68 (1964) (as long as employer commences suit against third party within 30 days of demand by employee);
- MD. ANN. CODE art. 101, § 58 (Cum. Supp. 1975) (for two months following award of compensation);
- N.M. STAT. ANN. § 59-10-25 (1974);
- N.Y. WORKMEN'S COMP. LAW § 29 (McKinney Supp. 1975) (if employee fails to sue within one year after his cause of action accrues);
- OKLA. STAT. ANN. tit. 85, § 44 (Cum. Supp. 1975);
- ORE. REV. STAT. § 656.591 (1974) (if employee elects not to bring action, and he can be compelled to so elect by notice procedures);
- S.C. CODE ANN. § 72-126.1 (Cum. Supp. 1974) (if employee fails to sue within one year of award after employer gives notice, reassignment back to employee if employer fails to sue under specified conditions);
- TENN. CODE ANN. § 50-914 (1966 replacement volume) (if employee fails to sue within one year after cause of action accrues, for six months);
- UTAH CODE ANN. § 35-1-62 (Cum. Supp. 1975);
- VA. CODE ANN. § 65.1-41 (1973 replacement volume) (the making of a claim for workmen's compensation operates as an assignment);
- WASH. REV. CODE ANN. § 51-24.010 (Cum. Supp. 1974) (if employee has not sued or settled his claim within one year following his notice of intention to sue required to be given to employer prior to claiming workmen's compensation).

APPENDIX VII

State statutes requiring notice to and approval by employer of any settlement by employee with third-party tortfeasor.

ALASKA STAT. § 23.30.015 (1972);
 ARIZ. REV. STAT. ANN. § 23-1023 (Cum. Supp. 1975);
 ARK. STAT. ANN. § 81-1340 (1960) (or court's approval);
 CAL. LABOR CODE § 3859 (West Supp. 1975) (however, only employer must give notice and obtain approval of employee to any compromise);
 COLO. REV. STAT. ANN. § 8-52-108(1)(1973);
 CONN. GEN. STAT. ANN. § 31-293 (1972) (employer must also give employee notice and obtain his approval of any compromise);
 FLA. STAT. ANN. § 440.39 (Cum. Supp. 1975) (employer must also give employee notice and obtain his approval of any compromise);
 HAWAII REV. STAT. § 386-8 (Cum. Supp. 1975) (employer must also give employee notice and obtain his approval of any compromise);
 ILL. ANN. STAT. ch. 48, § 138.5 (Smith-Hurd Cum. Supp. 1975);
 IND. ANN. STAT. § 22-3-2-13 (Burns Cum. Supp. 1975);
 IOWA CODE ANN. § 85.22 (Cum. Supp. 1975) (employer must also give employee notice and obtain his approval of any compromise);
 LA. REV. STAT. ANN. § 23:1103 (West 1964) (employer must also give employee notice and obtain his approval of any compromise);
 ME. REV. STAT. ANN. tit. 39, § 68 (1964) (court must approve, other party must have opportunity to be present with counsel);
 MISS. CODE ANN. § 71-3-71 (1972);
 NEB. REV. STAT. § 48-118 (1974) (or court may approve);
 N.H. REV. STAT. ANN. § 281:14 (1966 replacement volume) (court's or labor commissioner's approval necessary when either employee or employer settles with third party);
 N.Y. WORKMEN'S COMP. LAW § 29 (McKinney Supp. 1975);
 N.C. GEN. STAT. § 97-10.2 (1972 replacement volume);
 OKLA. STAT. ANN. tit. 85, § 44 (Cum. Supp. 1975);
 ORE. REV. STAT. § 656.578 (1974);
 S.C. CODE ANN. § 72-126.1 (Cum. Supp. 1974);
 UTAH CODE ANN. § 35-1-62 (Cum. Supp. 1975) (employer cannot compromise without labor commission's approval);
 VT. STAT. ANN. tit. 21, § 624 (1967);
 VA. CODE ANN. § 65.1-41 (1973 replacement volume) (voluntary settlement by employee bars a workmen's compensation claim, employer cannot compromise without approval of both employee and industrial commission);
 WASH. REV. CODE ANN. § 51.24.010 (Cum. Supp. 1974);
 WIS. STAT. ANN. § 102.29 (1973) (court must approve).

APPENDIX VIII

State statutes providing for the pro rata sharing of expenses and attorney's fees when the employee sues and recovers from a third-party tortfeasor.

ALA. CODE tit. 26, § 312 (Cum. Supp. 1973);
 FLA. STAT. ANN. § 440.39 (Cum. Supp. 1975);
 HAWAII REV. STAT. § 386-8 (Cum. Supp. 1975);
 IDAHO CODE § 72-223 (1973 replacement volume);
 ILL. ANN. STAT. ch. 48, § 138.5 (Smith-Hurd Cum. Supp. 1975);
 IND. ANN. STAT. § 22-3-2-13 (Burns Cum. Supp. 1975);
 KAN. STAT. ANN. § 44-504 (Cum. Supp. 1974) (court may apportion expenses and fees only when the employer sues the third party by way of subrogation);
 KY. REV. STAT. ANN. § 342.700 (Cum. Supp. 1974) (if the employee recovers his employer is subrogated to recover amount of workmen's compensation paid less the entire amount of the employee's attorney's fees);
 MD. ANN. CODE art. 101, § 58 (Cum. Supp. 1975);
 MICH. COMP. LAWS ANN. § 418.827 (Supp. 1975) (court to determine as respective interests may appear);
 MINN. STAT. ANN. § 176.061 (Cum. Supp. 1976);
 MO. ANN. STAT. § 287.150 (Vernon 1965);
 MONT. REV. CODES ANN. § 92-204.1 (Cum. Supp. 1975);
 NEB. REV. STAT. § 48-118 (1974) (unless employee fails to give his employer proper notice of his suit);
 N.H. REV. STAT. ANN. § 281:14 (1966 replacement volume) (court shall order division of expenses "as justice may require");
 N.J. STAT. ANN. § 34:15-40 (1959);
 N.C. GEN. STAT. § 97-10.2 (1972 replacement volume);
 N.D. CENT. CODE § 65-01-08 (1960);
 PA. STAT. ANN. tit. 77, § 671 (Cum. Supp. 1975);
 R.I. GEN. LAWS ANN. § 28-35-58 (1969);
 S.D. COMPILED LAWS ANN. § 62-4-40 (1967);
 TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Vernon Cum. Supp. 1975) (employer to pay employee's attorney's fees in employee's suit against third party);
 UTAH CODE ANN. 35-1-62 (Cum. Supp. 1975);
 VA. CODE ANN. § 65.1-43 (1973 replacement volume);
 WASH. REV. CODE ANN. § 51.24.010 (Cum. Supp. 1974).

State statutes providing for expenses to come "off the top" in any recovery from a third-party tortfeasor.

ALASKA STAT. § 23.30.015 (1972);
 ARIZ. REV. STAT. ANN. § 23-1023 (Cum. Supp. 1975);
 ARK. STAT. ANN. § 81-1340 (1960);
 CAL. LABOR CODE § 3856 (West 1971);
 CONN. GEN. STAT. ANN. § 31-293 (1972);
 DEL. CODE ANN. tit. 19, § 2363 (1975);
 ME. REV. STAT. ANN. tit. 39, § 68 (1964);

MD. ANN. CODE Art. 101, § 58 (Cum. Supp. 1975) (when the employer sues third party only);
MISS. CODE ANN. § 71-3-71 (1972);
NEB. REV. STAT. § 48-118 (1974) (when no notice of suit against third party is given);
N.Y. WORKMEN'S COMP. LAW § 29 (McKinney Supp. 1975);
ORE. REV. STAT. § 656.593 (1974);
S.C. CODE ANN. § 72-126.1 (Cum. Supp. 1974);
TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Vernon Cum. Supp. 1975) (for costs only, not attorney's fees);
VT. STAT. ANN. tit. 21, § 624 (1967) (but court may apportion expenses as the interests of the parties may appear);
WIS. STAT. ANN. § 102.29 (1973).

APPENDIX IX

State statutes guaranteeing to employee a minimum amount of any recovery against a third-party tortfeasor.

ARK. STAT. ANN. § 81-1340 (1960) (after deducting costs, one-third of recovery automatically goes to employee);

MINN. STAT. ANN. § 176.061 (Cum. Supp. 1976) (after deducting costs, one-third of recovery automatically goes to employee);

MONT. REV. CODES ANN. § 92-204.1 (Cum. Supp. 1975) (after deducting costs, one-third of recovery automatically goes to employee);

N.D. CENT. CODE § 65-01-09 (Supp. 1975) (after deducting costs, one-half of recovery automatically goes to employee);

ORE. REV. STAT. § 656.593 (1974) (after deducting costs, one-fourth of recovery goes to employee);

WIS. STAT. ANN. § 102.29 (1973) (after deducting costs, one-third of any recovery goes to employee).

APPENDIX X

State statutes permitting employer to retain more of any recovery from third party than is due him for reimbursement purposes.

ALASKA STAT. § 23.30.015 (1972) (one-fourth of any recovery made by employer in excess of costs and workmen's compensation payable, up to \$10,000);

N.Y. WORKMEN'S COMP. LAW § 29 (McKinny Supp. 1975) (one-third of any recovery made by employer in excess of costs and workmen's compensation payable).

