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THE NO-DUTY RULE IN NEW YORK:
SHOULD COMPANY DOCTORS BE
CONSIDERED CO-EMPLOYEES?

The New York Workers' Compensation Law\(^1\) contains a provision which extends immunity from tort liability to all potential tortfeasors "in the same employ" as an injured employee.\(^2\) In a pair of cases decided in 1974 and 1975, the New York Court of Appeals established the rule that company doctors whose malpractice aggravates work-related injuries sustained by company employees or whose conduct originally injures company employees can qualify for such immunity by demonstrating minimal indicia of co-employment.\(^3\)

This Note criticizes the application of co-employee tort immunity to company doctors because it erodes the physician's common law duty, is contrary to the intent of the law, and does not correspond to the traditional "control"\(^4\) definition of employee status. In addition, this Note proposes that New York courts adopt a "dual capacity"\(^5\) doctrine with regard to company doctors. This approach would uphold the duty of medical professionals toward their patients and result in liability for medical malpractice, regardless of secondary-employment status. Further, this approach would benefit victims of malpractice by permitting injured plaintiffs to receive benefits under workers' compensation for the original and aggra-

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5. "Dual Capacity" is defined in the following manner:
   Under this doctrine, an employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent of those imposed on him as employer.

vation injuries while retaining the right to proceed in tort against negligent practitioners. As a result, injured employees would have the opportunity to obtain complete satisfaction of their damages, as well as better medical care in the workplace.

BACKGROUND

Prior to the enactment of state workers' compensation laws in the first two decades of this century, the remedy of an employee injured in the course of employment was a common law tort action. The employee could proceed against his or her employer or, where the injury was caused by a co-employee, directly against that co-employee. In either case, the employee had to prove negligence on the defendant's part in order to prevail. Both employer and co-employee defendants could, of course, raise the affirmative defenses of contributory negligence and assumption of the risk, and employer defendants could assert the fellow servant rule.

Effective use of these defenses, together with the fact that the majority of industrial accidents occurred without fault or were of a type making it impossible to assign fault, deprived injured employees of an effective and consistent remedy. As a result, concerned lawmakers in many states attempted to protect injured employees.


7. "[An employee] was required to exercise reasonable care for his own safety, and his recovery was barred by his contributory negligence." W. PROSSER, LAW OF TORTS § 80, at 527 (4th ed. 1971) (footnote omitted).

8. "[An employee] was said to have . . . assumed the risk of hazards normally incident to his employment." Id. § 80, at 527 (footnote omitted).

9. The law generally holds employers to be vicariously liable for torts committed by their employees within the scope of employment, under the doctrine of respondeat superior. Id. §§ 69, 70. Beginning in 1849, however, American courts adopted the fellow servant rule, under which employers were immune from liability for injuries which one employee inflicted on another. The rationales for the rule were that (1) employment constitutes an assumption of the risk of fellow servant negligence, (2) an employer does not undertake to protect his employee from another employee's negligence, (3) an employee is as capable of protecting himself against fellow servant negligence as is his employer, and (4) inducing each employee to heed the conduct of fellow employees for his own protection promotes worker and public safety generally. Id. § 80, at 528-29.


11. It has been estimated that from 70 to 94 percent of industrial accidents were left uncompensated by the common law system. W. PROSSER, supra note 7, § 80, at 526, 530 n.32.
workers by enacting important pieces of social legislation known as the workers’ compensation laws.\textsuperscript{12}

The principal parties to workers’ compensation are the employer and employee: the employment relationship triggers use of the statute. The employer and employee engage in a quid pro quo involving their legal rights and liabilities. Under New York’s version—and the version of most other states—the injured employee is guaranteed swift and certain, but only partial, \textsuperscript{13} compensation for lost wages and medical expenses resulting from any injury “arising out of and in the course of the employment.”\textsuperscript{14} In exchange for speed and certainty, the employee gives up all other remedies against his or her employer.\textsuperscript{15} The employer accepts liability for compensation without regard to fault, but avoids the expense of tort litigation and the possibility of greater liability. Because third parties who stand outside the employment relationship do not partake of this quid pro quo, they generally remain vulnerable to common law tort actions.\textsuperscript{16}

The compensation system becomes a cost of doing business because the employer is required to secure commercial insurance, become a member of the state insurance fund, or provide for self-insurance.\textsuperscript{17} Insurance costs are ultimately reflected in the price of

\textsuperscript{12} New York was one of the first states to recognize the inequities of the common law system. Official documents declared in 1910 that “[t]he present methods are satisfactory neither to employer nor employed and the rules of law governing legal liability offend the common sense of fairness.” Address by Governor Charles E. Hughes, Annual Message to the Legislature, before the N.Y. State Legislature, in Albany, N.Y. (Jan. 5, 1910), reprinted in \textit{STATE OF NEW YORK, PUBLIC PAPERS OF CHARLES E. HUGHES, GOVERNOR, 1910}, at 11, 36 (1910), and that “[t]he importance of providing a suitable scheme of compensation for industrial accidents and of avoiding the shocking waste and injustice of our present methods must be conceded by all open-minded students of industrial conditions.” Memoranda filed with Senate Bill No. 1208, entitled “An Act to Amend the Labor Law, in relation to workmen’s compensation in certain dangerous employments” (June 25, 1910), reprinted in \textit{STATE OF NEW YORK, supra}, at 236, 236.

\textsuperscript{13} Generally compensation is partial. For example, even for “permanent total disability” only two-thirds of average weekly wages is allowed. N.Y. \textit{WORK. COMP. LAW} § 15(1) (McKinney Supp. 1980-1981). However, there are exceptions. For example, twice the scheduled compensation may be required in cases involving illegally employed minors. \textit{Id.} § 14-a (McKinney Supp. 1980-1981).

\textsuperscript{14} \textit{Id.} § 10 (McKinney 1965).


the employer’s goods or services and, in this manner, are broadly distributed throughout society.\textsuperscript{18}

This outline of workers’ compensation schemes ignores the complicated issue of fellow employees, those in the same employ as the injured employee. Many workers’ compensation statutes immunize such employees from suit for injuries inflicted upon co-workers.\textsuperscript{19} The New York Workers’ Compensation statute, as enacted in 1914,\textsuperscript{20} did not provide immunity for co-employees. The statute was amended in 1934 by the addition of what is now section 29(6),\textsuperscript{21} which establishes workers’ compensation as the exclusive remedy of any employee injured through the negligence of a co-employee.

In applying section 29(6), New York courts have employed two tests\textsuperscript{22} to determine whether one causing injury is a co-employee immunized from suit or a third party subject to suit. They are the control\textsuperscript{23} and indicia\textsuperscript{24} tests. The control test was used at common law to distinguish between employees, for whose negligence the employer was vicariously liable under the doctrine of respondent

\textsuperscript{18} Rheinwald v. Builders’ Brick & Supply Co., 168 A.D. 425, 426-27, 153 N.Y.S. 598, 601 (3rd Dep’t 1915) ("Injuries sustained by those who perform the manual and mechanical tasks of an industry must be deemed to have been intended by this statute to be made a social risk, a liability of the industry, a charge upon the production cost of the article manufactured or the service rendered."). For a discussion of the socio-economic policies underlying workers’ compensation, see A. Larson, \textit{supra} note 5, § 2.20 (1978); R. Pound, \textit{An Introduction to the Philosophy of Law} 95-106 (Rev. ed. 1954).


\textsuperscript{21} "The right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee, or in case of death his dependents, when such employee is injured or killed by the negligence or wrong of another in the same employ." Act of May 24, 1934, ch. 695, 1934 N.Y. Laws 1457 (codified at N.Y. WORK. COMP. LAW § 29(6) (McKinney 1965 & Supp. 1980-1981)).

\textsuperscript{22} For clarity, the control and indicia tests are treated here as two distinct standards. In fact, the indicia test is merely an extension of the control test. See text accompanying note 115 infra.


superior,\textsuperscript{25} and independent contractors, whose negligence could not be imputed to the employer.\textsuperscript{26} It defines an employee as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."\textsuperscript{27} An independent contractor is generally one who renders service to another and who, with respect to details of the means of accomplishing the work, is subject to the other's control or right to control "no [more] than is necessary to ensure a satisfactory end result."\textsuperscript{28}

In contrast to the functional approach of the control test, the indicia test determines employee status on the basis of more superficial factors. Among these are regular salary instead of fee-for-service, regular hours of work, and coverage under employer medical and workers’ compensation insurance policies.\textsuperscript{29}

**Emergence of a No-Duty Rule For Company Doctors**

The courts have always interpreted New York's Workers' Compensation Law as permitting an employee who is injured in the course of employment and whose injuries are aggravated by subsequent medical malpractice to obtain statutory benefits for both the original injury and the aggravation.\textsuperscript{30} However, in *Pitkin v. Chapman*,\textsuperscript{31} a New York trial court justice concluded that an employee who collects a workers' compensation award covering both the original injury and the aggravation cannot sue the negligent doctor for the aggravation.\textsuperscript{32} The court was concerned that the employee, if permitted to proceed against the doctor, might obtain two recoveries for one wrong\textsuperscript{33} and concluded that, having paid full compensation, the employer is subrogated to the employee's rights.

\textsuperscript{25} W. PROSSER, supra note 7, §§ 69, 70.
\textsuperscript{26} Id. § 71.
\textsuperscript{27} RESTATEMENT (SECOND) OF AGENCY § 220 (1958).
\textsuperscript{28} 1 C A. LARSON, supra note 5, § 44.00, at 8-31 (1980).
\textsuperscript{31} 121 Misc. 88, 200 N.Y.S. 235 (Sup. Ct. 1923). Pitkin is the earliest reported New York case on this issue.
\textsuperscript{32} Id. at 90, 200 N.Y.S. at 236.
\textsuperscript{33} Id. at 89-90, 200 N.Y.S. at 236.
against the doctor and is exclusively entitled to enforce these
rights. In addition, the court invoked the rule that a plaintiff who
receives satisfaction from one joint tortfeasor is barred from main-
taining an action against another joint tortfeasor.

Pitkin was quickly repudiated. In the 1927 case of Hoehn v. Schenck, an intermediate appellate court rejected Pitkin's premise that the employer and the doctor are joint tortfeasors, noting that the requisite concurrent action producing a single result is lacking. Furthermore, the court recognized that suit against the doctor need not result in double recovery if the payor of compensation is reimbursed out of any damage award against the doctor for that portion of the compensation allocated to the aggravation. In 1937, the subrogation section was finally amended to specifically allow award of compensation without automatic assignment of the cause of action in tort against the negligent third party. If the injured employee failed to pursue his or her tort remedy within a prescribed period of time, the payor of compensation obtained the right to initiate the action. This provision, by providing for a non-exclusive remedy, creates the presumption that a workplace injury and a subsequent aggravation due to malpractice are separable as to causation.

Between the adoption of the statutory co-employee bar in 1934 (current section 29(6)) and 1974, only a handful of cases were decided which dealt with the liability or employee status of com-
pany doctors. In all of these cases, the courts held that a doctor is personally liable for the consequences of his or her professional acts. In *Schneider v. New York Telephone Co.*, decided just three years after passage of section 29(6), the defendant doctor was employed part-time to treat employees on the employer's premises, using facilities and support staff provided by the employer. On these facts, the court might well have held the doctor to be a co-employee of the plaintiff, against whom the plaintiff could not recover. The court did not do so, holding instead that suit was permissible. The court applied the control test and found that because the employer lacked control over the physician's performance of medical acts, the physician was not an employee. The court stated: "A doctor employed under these conditions is not a servant of his employer but is engaged in an independent calling and his status is that of an independent contractor."

In *Weinmann v. Schmidt*, the court explicitly rejected the co-employee immunity defense and held a company doctor amenable to suit for breaking the plaintiff's wrist while thumping it with a book in an effort to reduce swelling. The *Weinmann* court reasoned:

> It would seem to be against public policy to hold that a physician, who controls the nature and extent of the treatment that he dispenses to a patient, should be considered a co-employee of a factory worker . . . so as to render him immune from responsibility for malpractice in connection with acts performed in his professional capacity in caring for and attending to the medical welfare of his patient . . . .

Finally, in *Mrachek v. Sunshine Biscuit, Inc.*, the approach to the issue of employer control over the actions of company doctors was further refined. At issue was the common law liability of the employer, under the theory of respondeat superior, for an in-

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41. 249 A.D. 400, 292 N.Y.S. 399 (1st Dep't 1937), aff'd mem., 276 N.Y. 655, 13 N.E.2d 47 (1938).
42. *Id.* at 401, 292 N.Y.S. at 400.
43. *Id.* at 403, 292 N.Y.S. at 403.
44. *Id.* at 402-03, 292 N.Y.S. at 401-02.
45. *Id.* at 402, 292 N.Y.S. at 401.
46. 115 N.Y.L.J. 1568, col. 2 (1946) (Special Term, Kings County), aff'd mem., 271 A.D. 843, 66 N.Y.S.2d 45 (1946).
47. *Id.* col. 3.
48. *Id.*
jury inflicted upon a prospective employee by a company doctor performing a routine pre-employment examination.\textsuperscript{50} In holding the employer liable,\textsuperscript{51} the court of appeals based its conclusion upon the fact that the physician's negligence involved a non-discretionary task, rather than one requiring professional judgment.\textsuperscript{52} The implication is that, had the negligence involved a task requiring professional judgment, the court would have found the doctor not to be acting as an employee and, therefore, would not have held the employer liable.\textsuperscript{53}

In \textit{Schneider} and \textit{Weinmann}, the courts did not permit secondary factors of employment status to erode professional responsibility. In \textit{Mrachek}, the court considered such factors,\textsuperscript{54} but only as secondary to the functional control standard for determining employee status. All three cases explicitly recognize the special characteristics of doctors and their professional acts. Unfortunately, in two recent cases, the court of appeals reversed this thoughtful approach and, in so doing, ignored the unique characteristics of medical professionals.

\textit{Garcia v. Iserson}\textsuperscript{55} involved a defendant doctor who was paid $100 a week to spend four hours a day, three days a week, on the employer's premises, attending to the medical needs of employees.\textsuperscript{56} The "usual payroll deductions" were made from the doctor's salary, and he was covered by the employer's medical insurance and workers' compensation policy.\textsuperscript{57} On the basis of these indicia of employee status, the court of appeals held that the defendant doctor was "one in the same employ" as the plaintiff.\textsuperscript{58} The court dismissed plaintiff's cause of action for malpractice, citing the co-employee immunity provision.\textsuperscript{59} The question of control was not mentioned in the court's opinion, and none of the precedents dealing with the liability of company doctors was raised. Instead, the court focused on the fact that the medical service was "incidental" to employment because the plaintiff obtained the defendant's ser-

\begin{itemize}
  \item \textsuperscript{50} \textit{Id.} at 119, 123 N.E.2d at 803.
  \item \textsuperscript{51} \textit{Id.} at 122, 123 N.E.2d at 805.
  \item \textsuperscript{52} \textit{Id.} at 120-22, 123 N.E.2d at 803-05.
  \item \textsuperscript{53} \textit{Id.} at 120-21, 123 N.E.2d at 803.
  \item \textsuperscript{54} \textit{Id.} at 121-22, 123 N.E.2d at 804.
  \item \textsuperscript{55} 33 N.Y.2d 421, 309 N.E.2d 420, 353 N.Y.S.2d 955 (1974).
  \item \textsuperscript{56} \textit{Id.} at 423, 309 N.E.2d at 421, 353 N.Y.S.2d at 956.
  \item \textsuperscript{57} \textit{Id.}, 309 N.E.2d at 421, 353 N.Y.S.2d at 956-57.
  \item \textsuperscript{58} \textit{Id.}, 309 N.E.2d at 421, 353 N.Y.S.2d at 957.
  \item \textsuperscript{59} \textit{Id.} at 424, 309 N.E.2d at 422, 353 N.Y.S.2d at 958.
\end{itemize}
sices "not as a member of the public but only in consequence of his employment."\textsuperscript{60}

Shortly after \textit{Garcia}, a second court of appeals decision underscored the newly created co-employee immunity for company doctors. In \textit{Golini v. Nachtigall},\textsuperscript{61} the defendant doctor was on a yearly salary, received the company's usual fringe benefits, and worked in an office on company premises.\textsuperscript{62} Although he rendered part of the treatment while plaintiff's decedent was hospitalized,\textsuperscript{63} the court of appeals held the defendant immune from suit because of these indicia of employee status.\textsuperscript{64}

Thus, the rule has emerged in New York that any workplace injury that is aggravated by a doctor who is determined on the basis of unspecified indicia to be one in the same employ as the injured victim does not give rise to an independent cause of action. The effect of dismissing, as a matter of law, tort actions against negligent company doctors is to create a no-duty rule for medical professionals able to satisfy the \textit{Garcia/Golini} indicia test. They are excused under a liberal definition of employee status from liability for the injurious consequences of their professional acts and in effect have a license to be negligent.

UNDESIRABILITY OF THE \textit{GARCIA/GOLINI} NO-DUTY RULE

\textit{The Special Position of Medicine}

The practice of medicine enjoys a very special place in our society. Doctors are not only among the most highly respected and highly paid members of the community: they also control the supply of health care. Particularly in life-threatening crises, the physician may hold the only key to survival. Given the magnitude of the interest at stake and the potential for abuse, it is appropriate that the law demand from medical practitioners conduct commensurate with their important position.

Doctors are normally held to a duty and standard of reasonable professional care.\textsuperscript{65} When there is clear evidence that a doctor

\textsuperscript{60. Id. at 423-24, 309 N.E.2d at 421-22, 353 N.Y.S.2d at 957.}
\textsuperscript{61. 38 N.Y.2d 745, 343 N.E.2d 762, 381 N.Y.S.2d 45 (1973) (mem.).}
\textsuperscript{62. Id. at 746, 343 N.E.2d at 763, 381 N.Y.S.2d at 45.}
\textsuperscript{63. Id. at 746, 343 N.E.2d at 763, 381 N.Y.S.2d at 45.}
\textsuperscript{64. Id. at 746-47, 343 N.E.2d at 763, 381 N.Y.S.2d at 45.}
\textsuperscript{65. Pike v. Honsinger, 155 N.Y. 201, 49 N.E. 760 (1898), is the earliest New York case defining this duty:}
has failed to provide reasonable professional care, it is the court's function "to furnish to the injured patient the redress to which he is entitled." The co-employee tort immunity rule, as applied in Garcia and Golini, abrogates, by judicial fiat, the traditional common law duty of an entire group of doctors. The propriety of such a radical step depends upon the goals sought to be achieved. For example, few would argue that the New York State Legislature was not justified in enacting the "Good Samaritan" law, thereby modifying professional duty in order to encourage physicians to inter-

A physician and surgeon, by taking charge of a case, impliedly represents that he possesses, and the law places upon him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where he practices, and which is ordinarily regarded by those conversant with the employment as necessary to qualify him to engage in the business of practicing medicine and surgery. Upon consenting to treat a patient, it becomes his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed.


67. It is likely that the debate concerning any proposal to modify the existing duties and liabilities of doctors in any fundamental way would make the long and tumultuous debate over the merits of automobile no-fault legislation pale by comparison. Regardless of the merits of such a debate, it clearly belongs in the legislative forum because of the broad policy issues at stake.


Notwithstanding any inconsistent provision of any general, special or local law, any licensed physician who voluntarily and without the expectation of monetary compensation renders first aid or emergency treatment at the scene of an accident or other emergency, outside a hospital, doctor's office or any other place having proper and necessary medical equipment, to a person who is unconscious, ill or injured, shall not be liable for damages for injuries alleged to have been sustained by such person or for damages for the death of such person alleged to have occurred by reason of an act or omission in the rendering of such first aid or emergency treatment unless it is established that such injuries were or such death was caused by gross negligence on the part of such physician. Nothing in this subdivision shall be deemed or construed to relieve a licensed physician from liability for damages for injuries or death caused by an act or omission on the part of a physician while rendering professional services in the normal and ordinary course of his practice.

Further evidence of legislative hostility to alteration of duty rules may be found in N.Y. BUS. CORP. LAW § 1505(a) (McKinney Supp. 1980-1981), which explicitly denies any variation of professional liability for members of professional corporations.
vene in emergency situations where they might otherwise be reluctant to help. Such a law responds to an overriding societal need. A no-duty rule for company doctors serves no similar beneficial purpose. Indeed, the justifications for co-employee immunity are weakest when applied to these practitioners.

Objectives of Workers' Compensation

A brief look at some of the reasons for co-employee immunity shows that such immunity for company doctors does not further the objectives sought by workers’ compensation. Most workplace-accident cases bear certain characteristics which justify immunity for fellow workers—characteristics not present when the tortfeasor is a company doctor.

Absence of fault.—Most accidents involving fellow workers occur without fault, or at least without manifest fault.69 Thus, co-employee immunity is based on the assumption that workers benefit by exchanging the slight possibility of full tort recovery for the certainty of limited benefits under workers’ compensation.70 This assumption is, however, inapplicable to injuries resulting from medical malpractice. While ordinary co-employee negligence may blend with risks inherent in the production process to make assignment of fault nearly impossible, medical negligence is easier to identify. Most often it occurs subsequent to the original injury in an area physically removed from production activity. More importantly, it can be judged in light of ascertainable standards.71 To the extent that the difficulty of proving fault and recovering in a negligence action justifies co-employee immunity, the justification evaporates with regard to company doctors.

Intimate connection between the accident and the workplace.—Workplace accidents are a concomitant of our technological era. Implicit in co-employee immunity is the recognition that most injuries inflicted by one employee upon another are due not to unreasonable conduct, but to the fact that an employer has furnished complex equipment to workers and has made demands on them.72

69. See sources cited note 10 supra.
71. See notes 65-66 supra and accompanying text.
In a sense, most occupational accidents, regardless of cause, are the inevitable result of an intimacy between men and machines which is created within the employer's enterprise.\textsuperscript{73} When a company doctor aggravates injuries suffered previously by an employee, it is neither inevitable nor a risk that is inherent in the production process. Since the same risk of malpractice would exist if the employee sought private treatment away from the workplace, intimate connection with the employer's enterprise is lacking.

Efficient risk distribution.—In situations where one employee injures another, the employer is a better risk-bearer and risk-distributor than the worker.\textsuperscript{74} The latter is less likely to have substantial resources from which to satisfy a judgment, is less likely to carry liability insurance, and has little ability to distribute risk through the price charged for his services. Company doctors, however, differ from conventional workers in this regard. They have higher incomes and often carry professional liability insurance.

Existence of a quid pro quo.—In the usual situation, co-employee tort immunity is consistent with the quid pro quo policy of workers' compensation.\textsuperscript{75} The risk of injuring a co-employee and the risk of being injured by a co-employee are essentially equivalent. By relinquishing the right to sue co-employees but acquiring immunity from suit, each worker partakes in a fair exchange. Because the company doctor is segregated from the production area, however, she is far less likely to be the victim of injury than she is to be its perpetrator.\textsuperscript{76} Thus, the doctor who acquires tort immu-

Stat. 391 (codified at 33 U.S.C. § 933(i) (1976)), reveals that:

The rationale of [the] change in the law [creating co-employee immunity] is that when an employee goes to work in a hazardous industry he encounters two risks. First, the risks inherent in the hazardous work and second, the risk that he might negligently hurt someone else and thereby incur a large common-law damage liability. While it is true that [the] provision limits an employee's rights, it would at the same time expand them by immunizing him against suits where he negligently injures a fellow worker. It simply means that rights and liabilities arising within the "employee family" will be settled within the framework of the . . . Act.


74. See note 18 supra.

75. See note 72 supra.

76. Note, supra note 5, at 596-97.
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nity partakes in an exchange heavily weighted in her favor.

Accident deterrence.—The final justification for the co-employee bar is accident deterrence. The employer, by virtue of his ability to select, train, assign, oversee, and discipline workers and his ability to organize the enterprise in a safety-conscious manner, is best able to prevent accidents. The threat of liability provides direct monetary incentive to do so. Employer liability presumes that the employer exercises substantial control over the workplace and the workforce. Since the employer lacks significant control over professional acts of the company doctor, there is little deterrent effect in holding him liable for medical accidents.

The Need to Deter Company Doctors

Society has a strong interest in promoting good health in the workplace, evidenced, for example, by passage of the Occupational Safety and Health Act of 1970. By removing the threat of malpractice liability for doctors in a position to contribute to a healthier workplace, the Garcia/Golini no-duty rule operates to undermine this interest: “Claims under the fault system have proved to be a powerful stimulant for improved medical care and the avoidance of questionable practices. If that mechanism is lost, then society will have lost an important means of encouraging quality care.”

77. It is arguable that not immunizing employees from liability for negligence would have a similar preventative effect. This argument must be rejected, however, in light of the level of control exercised by the employer over the working environment:

It is recognized that the same [preventative] argument applies to workers as well. As long as they are able to avoid accidents and disease, paying the costs of disability will encourage workers to decrease dangerous activities. However, as noted throughout this report, management has traditionally had more control over hazards. Workers often do not know the hazards they face, or are too weakly organized to take action, or are afraid of losing their jobs. . . . [M]anagement traditionally wishes workplace control to rest in its own hands.

N. ASHFORD, CRISIS IN THE WORKPLACE, § 8.2.3, at 390-91 (1976); see McCoid, supra note 70, at 400.

78. For a more detailed discussion of employer control over the acts of company doctors, see text accompanying notes 107-110 infra.


81. American Association of Trial Lawyers, A Position of Responsibility, TRIAL, May/June, 1975, at 49, 57 (emphasis in original); see Corboy, The Expanding Uni-
Heretofore, incompetent company doctors could be forced out of practice by recurring litigation expenses and increased liability-insurance premiums. Now, by clothing themselves with Garcia/Golini indicia, they can continue to practice without fear of liability or onerous insurance costs. In effect, the court of appeals has invited incompetents into the field of occupational medicine by providing an inducement in the form of tort immunity:

“That independent professions by the fact of business contact with the employer should be absolved of responsibility for mistake, avoidable or unjustified neglect resulting in secondary affliction, seems obnoxious to the purpose and spirit of such a [workers' compensation] statute. To so hold might induce industry to encourage quackery, and place a premium upon negligence, inefficiency and wanton disregard of the professional obligations of medical departments of industry, toward the artisan.”

Company doctors need the deterrent effect of malpractice litigation. As a group, their professional qualifications are unremarkable, and they are frequently held in low esteem by their patients and by colleagues in other medical fields. The company doctor is often perceived, by employer and employee alike, as an extension of the employer and his interests; that is, as placing the pecuniary welfare of the employer above the health of the patient. Because of the specialty's poor reputation, the duty of company doctors should be stated in the strongest terms possible.


83. Company doctors tend not to have any recognized specialty, even in occupational medicine. When given the opportunity to state their areas of interest and expertise, few company doctors list occupational medicine. Company doctors tend to be general practitioners who practice occupational medicine on a sporadic basis, and whose profile is indistinguishable from that of all doctors in their locality. Jenkins & Kotelschuck, Is There a Doctor in the Shop?, HEALTH/PAC BULL., Sept. 1979, at 8.


85. For discussions on the allegiance of company doctors, see THE CONFERENCE BOARD, INDUSTRY ROLES IN HEALTH CARE 17-18 (1974); Kerr, Occupational Health—A Discipline in Search of a Mission, 63 AM. J. PUB. HEALTH 381, 382 (1973); Samuels, Problems of Industry-Sponsored Health Programs, in BACKGROUND PAPERS ON INDUSTRY'S CHANGING ROLE IN HEALTH CARE DELIVERY 153 (1977);
The physician is a professional with an ethical and moral doctrine, a defined body of knowledge, and a circumscribed sphere of activity that demands of him that he work for no purpose other than the benefit of his patients. In occupational medicine, this is the worker... That some companies wish their physician to act only in the corporation's interest, and that some physicians may do so, does not in any way weaken the basic premise that the physician is the "agent" of the profession and not of any other body.86

The best way to enforce that duty is to subordinate consideration of indicia of employee status and hold company doctors liable in money damages for all lapses in reasonable professional conduct.87

Lack of Predictability

As discussed previously,88 the accident-deterrence rationale for co-employee immunity assumes that the employer is capable of exercising effective control over the actions of his employees. In Garcia and Golini, the court completely ignores the question of employer control over the acts of company doctors and opts, instead, for a laundry list of minor indicia to determine employee status.89 Unfortunately, neither decision offers any guidance as to

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86. Tabershaw, supra note 85, at 413.
87. For information on the prophylactic effect of tort litigation, see S. Law & S. Polan, Pain and Profit 1 (1978); W. Prosser, supra note 7, § 4.
88. See text accompanying notes 77-78 supra.
89. Golini, 38 N.Y.2d at 746, 343 N.E.2d at 763, 381 N.Y.S.2d at 45; Garcia, 33 N.Y.2d at 423, 309 N.E.2d at 421, 353 N.Y.S.2d at 956-57.

According to Larson, the common law employee "‘definition’ usually consists largely of a listing of relevant characteristics or tests, coupled with the warning that all except the control test are merely indicia pointing one way or the other.” 1B A. Larson, supra note 5, § 43.10, at 8-2 (1980) (emphasis added); see Note, supra note 5.
the weight to be given to the various indicia. Unweighted and ill-defined criteria destroy predictability in the application of the law by permitting unlimited discretion. Indeed, shortly after Garcia and Golini, the intermediate appellate court, relying upon the indicia test, found that an employer-designated police surgeon, serving in an unpaid honorary capacity, was the co-employee of an injured police officer. The case illustrates that the indicia test can work to reduce the concept of employment relationship to an absurdity.

In addition to inviting unbridled discretion, ill-defined criteria may serve to encourage collusion between employers and doctors. Under the Garcia/Golini rule, a doctor can acquire the shelter of tort immunity by the simple expedient of joining the company’s fringe-benefit program or changing the form of his compensation from fee-for-service to fixed retainer. The result is an irrational patchwork in which some malpractitioners are immune from suit while others are not, depending on the arrangements worked out with their employers.

**ALTERNATIVE APPROACHES**

There are several ways to remedy the evils wrought by Garcia and Golini. The clearest means of resolving uncertainty about the co-employee status of company doctors would be to amend section 29(6) to exclude medical professionals. Unfortunately, now that company doctors have been clothed with tort immunity by judicial construction, it is highly unlikely that organized medicine will sit by idly as that immunity is withdrawn by statute. For this reason, a more practical approach is for the court of appeals to reinterpret section 29(6) in light of common law concepts, legislative intent, and the rules of liberal construction required by the workers’ compensation law.

In ruling that company doctors are covered by section 29(6), the court of appeals opted for a literal interpretation of the statute.

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Despite the lack of historical documentation,92 there is reason to believe that such an interpretation was not intended by the legislature.93 Malpractice suits against company doctors were permitted prior to 1934,94 and there is no evidence that the legislature was dissatisfied with this policy at the time it provided for co-employee immunity. Reports on medical care under workers’ compensation transmitted to the 1932 and 1934 legislatures by Governors Roosevelt and Lehman95 mention problems of “inadequate treatment”96 and “inferior professional services.”97 The fact that the legislature had these reports before it when enacting section 29(6) suggests that it did not intend that section to be inter-

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92. Legislative committee proceedings are not printed as a matter of course in New York, and the house journals merely record actions taken. The co-employee provision was absent from the original bill. N.Y.A. 234, 157th Sess. (1934), but was added by the Senate, after the Assembly had passed the bill without the co-employee provision, and concurred in by the Assembly. N.Y. ASSEMBLY J., 157th Sess. 2290-91 (1934).

93. Virginia’s highest court rejected a literal interpretation of a similar provision in these words:

It would seem unreasonable to assume that the legislature in its enactment of the Workmen’s Compensation Act intended to save a class of wrongdoers unrelated to the compensation scheme from the liability which the law had theretofore imposed upon them, or that independent professionals by the fact of business contact with the employer should be relieved of responsibility for mistake or neglect resulting in secondary affliction. Such a holding would leave the injured employee without adequate relief, and would, we think, present a situation in contravention of the Act.

Fauver v. Bell, 192 Va. 518, 530-31, 65 S.E.2d 575, 582-83 (1951). There is support for the proposition that the co-employee immunity provision is meant to be applied only between equally situated, industrial employees. For example, the Longshoremen’s and Harbor Workers’ Compensation Act’s legislative history refers to the co-employee immunity provision as regulating the rights and liabilities within the “employee family.” See note 72 supra. The idea that a company doctor can be equated with an industrial worker has been criticized as stretching the meaning of co-employee too far: “The suggestion that the legislature intended . . . to include the company physician as a fellow employee of the injured industrial worker is a startlingly illogical concept.” Ross v. Schubert, 388 N.E.2d 623, 628 (Ind. Ct. App. 4th Dist. 1979); see McLaughlin v. American Oil Co., 391 N.E.2d 864 (Ind. Ct. App. 3d Dist. 1979); Proctor v. Ford Motor Co., 32 Ohio App. 2d 165, 289 N.E.2d 366, 370 (Cuyahoga County 1972), rev’d in relevant part, 36 Ohio St. 2d 3, 303 N.E.2d (1973).

94. See notes 30-39 supra and accompanying text.

95. N.Y. LEGIS. Doc. No. 83, 155th Sess. (1932); N.Y. LEGIS. Doc. No. 75, 157th Sess. (1934). Both committees were composed of doctors, and their reports deal primarily with the evils of doctors “lifting” workers’ compensation patients from one another, the need for more generous fees, and the need for greater control over access to the system by county medical societies.

96. N.Y. LEGIS. Doc. No. 83, 155th Sess. 7 (1932).

interpreted in a manner which would aggravate quality-of-care problems. Since construing section 29(6) as applicable to company doctors would have such an effect, it is reasonable to conclude that the legislature did not intend such an interpretation.

Still stronger evidence that the legislature did not intend section 29(6) to apply to company doctors may be gleaned from the judicial response to the matter during the first forty years after passage of the provision. During that period, the court in Weinmann v. Schmidt addressed the question of company doctor co-employee immunity and rejected it outright on the grounds of public policy and the professional nature of the acts in question. By way of negative implication, no decision concerning company doctors rendered during the period applied the provision. The Garcia and Golini decisions, however, ignored this history. Admittedly, the legislative intent as to company doctors is not immediately apparent. Even so, had the court adhered to established rules of construction, it would have concluded that company doctors are excepted from the immunity provision. There is general agreement that workers' compensation statutes are to be construed liberally because their purpose is remedial. A liberal construction entails interpreting the New York statute so that the relief af-

98. See notes 80-81 supra and accompanying text. 99. The courts will not indulge in a presumption that the Legislature intended unwise or injurious results to flow from its action, and where the consequences of one construction of a statute are mischievous or disastrous, a more fortunate construction should be sought and effectuated if possible. . . . Where infinite mischief will result from a construction which would establish a different rule from that long followed, the customary or practical interpretation will be followed if not clearly contrary to legislative intent.

100. See notes 41-54 supra and accompanying text.
101. 115 N.Y.L.J. 1568, col. 2 (1946) (Special Term, Kings County), aff'd mem., 271 A.D. 843, 66 N.Y.S.2d 45 (1946); see notes 46-48 supra and accompanying text.
102. Id. col. 3 (quoted at text accompanying note 48 supra).
103. The plaintiffs in Garcia and Golini likewise did not raise this line of argument (copies of plaintiffs' briefs on file at Hofstra Law Review).
104. N.Y. Stats. § 302 (McKinney 1971); McGough v. McCarthy Improvement Co., 205 Minn. 1, 11, 287 N.W. 857, 864 (1939) ("Mindful, as we ever must be, 'that the compensation act should receive a broad and liberal construction in the interests of workmen,' . . . we should studiously avoid a narrow or forced construction of the third party statute.") (citation omitted); Rheinwald v. Builders' Brick & Supply Co., 168 A.D. 425, 438, 153 N.Y.S. 598, 609-09 (3d Dep't 1915). For a discussion of canons of construction, see Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed, 3 VAND. L. REV. 395 (1950).
forded employees is maximized. Since the combined remedy of a private tort action and statutory benefits clearly maximizes relief, liberal construction should result in exclusion of company doctors from co-employee tort immunity.

Application of the traditional common law control test should provide a similar result. Several court of appeals cases support the proposition that an employer cannot exercise control over the professional acts of a doctor in its employ. For example, in Allan v. State Steamship Co., the court paid deference to the special knowledge possessed by doctors:

Can we hold that a sailor shall have supervision over the doctor, or that an unskilled man with no ability to tell one drug from another may direct the professional acts of a doctor? The answer is clearly no. The case is Allan v. State Steamship Co.


More specifically, professionals may be covered by the statute for the purpose of receiving benefits. See Schechter v. State Ins. Fund, 6 N.Y.2d 506, 160 N.E.2d 901, 190 N.Y.S.2d 656 (1959); Egan v. State Joint Legislative Comm., 2 A.D.2d 418, 158 N.Y.S.2d 47 (3d Dep't 1956). Both cases involved attorneys. One developed heart trouble in the course of his professional career, and the other was involved in an automobile accident. Their illnesses were held to be compensable. This is a patently distinguishable situation from those in Garcia and Golini, for the issue in the former cases was eligibility for benefits, not the question of tort liability. See generally 1 C. Larson, supra note 5, § 45.32 (1980 & Supp. 1980).

The same liberality should not be applied to limit benefits, either those available through the workers' compensation system, or those available through a suit in tort:

We note that while a measure of liberality is indulged in construing the legislative definition of "employee" to the end that an injured workman or his dependents may not be deprived of the benefits of the Act ... we find no similar position toward expanding the construction of "in the same employ" for purposes of permitting individuals to escape liability. Ross v. Schubert, 385 N.E.2d 623, 629 (Ind. Ct. App. 4th Dist. 1979) (citation omitted) (footnote omitted).

106. See McCoid, supra note 70, at 401-03; notes 30-54 supra and accompanying text.

107. 132 N.Y. 91, 30 N.E. 482 (1892).
other shall have authority over the skilled experienced physician? To so hold would nullify the law, and put inexperience over experience and ignorance where the law requires knowledge and professional skill.\textsuperscript{108}

Similarly, in \textit{Mrachek v. Sunshine Biscuit, Inc.}\textsuperscript{109} the court recognized that while an employer is capable of exercising control over an employee doctor performing administrative tasks, the special expertise of the doctor makes it impossible for the employer to exercise control over acts involving medical discretion:

Where the physician's negligence has occurred in the course of treatment which he determined to give, we have, as already noted, applied the rule that if at the time of the tort he was engaged in a "professional" (sometimes called "medical") act, he was acting as an independent contractor, and the hospital would not be liable. If, on the other hand, his negligence was "administrative", [sic] then the hospital will be held responsible, for he was acting as its servant. . . \textsuperscript{110}

While the control test may permit company doctors to be labeled independent contractors in situations where they are exercising medical discretion, it is not an entirely satisfactory solution to the problems raised. It can be used, for example, to bar compensation to a doctor who is injured in the workplace while performing as a medical professional,\textsuperscript{111} an application which would frustrate the liberal construction policy underlying workers' compensation.\textsuperscript{112} In addition, there are factual situations in which a doctor may be controlled, in the classical Restatement sense,\textsuperscript{113} by his employer. A physician who works under the supervision of another doctor in a medical department may be such a case.\textsuperscript{114} Strict application of the control test could lead to the conclusion that such a supervised physician is a controlled employee and therefore immune from suit for negligence. Reliance on the control test to determine liability in such a situation would be tantamount to sanctioning a "Nuremberg defense" and would irrationally distinguish

\textsuperscript{108}. \textit{Id.} at 98-99, 30 N.E. at 484-85.
\textsuperscript{109}. 308 N.Y. 116, 123 N.E.2d 801 (1954); see notes 49-54 \textit{supra} and accompanying text.
\textsuperscript{110}. 308 N.Y. at 120-21, 123 N.E.2d at 803-04 (citations omitted).
\textsuperscript{111}. \textit{See} 1C A. LARSON, \textit{supra} note 5, \S 45.32 (1980).
\textsuperscript{112}. \textit{See} notes 104-105 \textit{supra} and accompanying text.
\textsuperscript{113}. \textit{See} text accompanying note 27 \textit{supra}.
\textsuperscript{114}. For an example of such a fact pattern, see \textit{Komel v. Commonwealth Edison Co.}, 56 Ill. App. 3d 967, 372 N.E.2d 842 (1st Dist. 1978).
between private practitioners and "organization men" so far as professional responsibility is concerned.

More important, however, in administering the test, the courts have strayed far afield of the functional, common law concept of control. In an effort to extend the beneficial provisions of workers' compensation as widely as possible, the courts have expanded the definition of control to encompass secondary indicia of employment which are often unrelated to actual control. To the extent that the resulting indicia test arose to facilitate a finding of employment and permit recovery under the workers' compensation statute, it may be justified. Unfortunately, the same approach can be, and has been, used to cut off legitimate private remedies. In short, the control test is subject to misuse.

In order to effect liberal construction of the workers' compensation statute, it is necessary to consider a company doctor an employee for purposes of providing statutory benefits, and an independent contractor for purposes of the co-employee immunity provision. A single standard, whether it be the control or the indicia test, cannot accomplish both objectives. Only a bifurcated approach can uphold the personal responsibility of the physician for his or her professional acts, while maintaining the compensatory function of the statute. The necessary flexibility is permitted by the dual-capacity doctrine, which splits the company doctor into two distinct, co-existing legal persona.

THE DUAL-CAPACITY DOCTRINE

A company doctor functions simultaneously in two roles, each carrying a different set of legal obligations. Despite the fact that the defendant doctor may be considered plaintiff's co-employee, he may nevertheless be amenable to suit because he also occupies another position with respect to plaintiff which carries duties and obligations outside the scope of workers' compensation. Under the

115. Since the defendants in Garcia and Golini were not clearly employees even in the indicia-test sense, the court could have easily reached the opposite result. As doctors are more closely integrated into industry, however, much clearer cases are bound to arise involving full-time doctors with no outside work. Without a firm understanding of the goals to be attained, there is no question but that Garcia/Golini would be extended to immunize them from liability for the adverse results of their professional acts.

116. See 2A A. Larson, supra note 5, § 72.80, at 144 (Supp. 1980). The dual-capacity doctrine, by recognizing distinct legal persona, is in the nature of a demurrer to an offered defense of employer or co-employee status.

117. See authorities cited note 5 supra.
dual-capacity doctrine, a company doctor can be held liable for breach of duty attendant upon the role of medical professional, regardless of co-employment status.\textsuperscript{118}

A series of California workers' compensation cases has applied the doctrine to both employer medical professionals and co-employee medical professionals. In \textit{Duprey v. Shane},\textsuperscript{119} the California Supreme Court held that California's workers' compensation statute, which makes compensation the exclusive remedy of an injured employee,\textsuperscript{120} did not prevent an employee nurse from suing her chiropractor employer for the latter's negligent acts.\textsuperscript{121} In the opinion of the court, "'[I]t is perfectly apparent that the [employer] bore towards his employee two relationships—that of employer and that of a doctor . . . .'")\textsuperscript{122} The court concluded that "‘when the employing doctor elected to treat the industrial injury . . . the doctor assumed the same responsibilities that any doctor would have assumed had he been called in on the case.’"\textsuperscript{123}

The rationale underlying the duty-based dual-capacity doctrine enunciated in \textit{Duprey} was capsulized in \textit{Douglas v. E. & J. Gallo Winery}:\textsuperscript{124}

Characterizing a defendant as an “employer” and therefore automatically cloaked with immunity from common law suit is a simplification that tends to cloud proper analysis. The focus should be on the defendant’s responsibility for his own acts or omissions where a different duty to take care or make sure that care is taken arises than that imposed on an employer.

Our society is pluralistic. The same person (real or artificial) from time to time obviously adopts many roles in relationship with others. . . .

. . . The dual capacity concept is within the highest tradition of analytical jurisprudence. Dual capacity recognizes the long accepted doctrine that every person is a bundle of rights, no rights, liabilities and immunities.\textsuperscript{125}

\textsuperscript{118} Note, \textit{supra} note 5, at 595.
\textsuperscript{119} 39 Cal. 2d 781, 249 P.2d 8 ("in Bank"), aff'g per curiam 241 P.2d 78 (Dist. Ct. App. 1st Dist. 1952).
\textsuperscript{120} Act of April 24, 1937, ch. 90, \$ 3601, 1937 Cal. Stats. 185 (current version at \textit{CAL. LAB. CODE} \$ 3601 (West Supp. 1980)).
\textsuperscript{121} 39 Cal. 2d at 789, 249 P.2d at 13, 15.
\textsuperscript{122} \textit{Id.} at 793, 249 P.2d at 15 (quoting 241 P.2d at 85).
\textsuperscript{123} \textit{Id.} at 789, 249 P.2d at 13 (ellipsis in original) (quoting in part 241 P.2d at 82).
\textsuperscript{124} 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (5th Dist. 1977).
\textsuperscript{125} \textit{Id.} at 110, 137 Cal. Rptr. at 801 (emphasis in original) (footnote omitted).
California extended the doctrine to co-employee medical professionals in *Hoffman v. Rogers*,\(^{126}\) where an employee was treated for a work-related injury on the employment premises by a salaried company doctor.\(^{127}\) In holding the doctor amenable to suit, the court analogized to *Duprey* and found that "[t]here is nothing in the [co-employment] amendment to undermine the dual personality theory."\(^{128}\) Extending the dual-capacity doctrine to medical employees is consistent with its application in the medical-employer context. The doctrine evolved as a way of avoiding the unjust results of mechanically invoking the exclusive-remedy provision where the employer injures an employee while under a greater duty of care toward the worker than that raised by the employment relationship. The same rationale should apply to company doctors. The common thread is professional responsibility.

Like California, New York has recognized that a medical employer may bear several legal relationships to an employee. The earliest New York case to adopt a dual-capacity approach to medical employers is *Volk v. City of New York*,\(^{129}\) decided in 1940. A nurse employed by a city hospital became ill while on duty and was treated in an employee infirmary with a negligently maintained and administered morphine solution which caused serious injury.\(^{130}\) When she sued the city of New York, the city attempted to argue that workers' compensation was the plaintiff's exclusive remedy.\(^{131}\) In rejecting this defense and holding the city amenable to suit, the court of appeals stated:

The risk of the injury which plaintiff suffered was not incidental to her employment. It was a risk to which any one [sic] receiving like treatment at the hospital would have been subjected. The occurrence of the injury was not made more likely


\(^{127}\) 22 Cal. App. 3d at 657, 99 Cal. Rptr. at 456-57.

\(^{128}\) Id. at 662, 99 Cal. Rptr. at 460.


\(^{130}\) 284 N.Y. at 282-84, 30 N.E.2d at 597.

\(^{131}\) Id. at 283, 30 N.E.2d at 597.
by the fact of her employment. Consequently, the injury did not arise out of and in the course thereof.\textsuperscript{132}

The \textit{Volk} court focused on the nature of the act and the actor. Though not couching its decision in dual-capacity, duty terminology, it nevertheless demonstrated sensitivity to the issues involved in a dual-capacity analysis. The \textit{Volk} court permitted a common law tort action because in rendering medical treatment to the nurse, the hospital was acting in its professional capacity and not in that of employer.\textsuperscript{133}

\textit{Volk} was reinterpreted by the court in \textit{Garcia}. While recognizing that the \textit{Volk} record indicated that the plaintiff was treated in a nurses' infirmary not open to the public,\textsuperscript{134} \textit{Garcia} interpreted \textit{Volk} as being "postulated on the hypothesis that the injuries occurred in facilities which were open to the general public."\textsuperscript{135} The \textit{Garcia} court indicated that had the nurse in fact been treated in a public facility, the \textit{Volk} ruling would be correct.\textsuperscript{136}

Thus, the version of the dual-capacity doctrine which survives \textit{Garcia} is one which permits suit against medical employers only where treatment is rendered in a place open to the public. This situs distinction can lead to absurd results.\textsuperscript{137} Hereafter, whether a hospital employee can maintain a negligence suit against his or her employer is dependent on whether he or she happens to be treated in the emergency room or the employee clinic, clearly a petty consideration.

The \textit{Garcia} court did seize upon part of the \textit{Volk} rationale: that workers' compensation is the sole remedy where the risk of in-

\begin{itemize}
\item \textsuperscript{138} Id. (citations omitted).
\item \textsuperscript{139} Id.
\item \textsuperscript{134} 33 N.Y.2d at 424, 309 N.E.2d at 422, 353 N.Y.S.2d at 957; 284 N.Y. at 283, 30 N.E.2d at 599.
\item \textsuperscript{135} 33 N.Y.2d at 424, 309 N.E.2d at 422, 353 N.Y.S.2d at 957; 284 N.Y. at 283, 30 N.E.2d at 597.
\item \textsuperscript{136} 33 N.Y.2d at 424, 309 N.E.2d at 422, 353 N.Y.S.2d at 957.
\item \textsuperscript{137} Even such a minor distinction as in which room an injured employee is treated is not too fine a distinction for the court of appeals, as evidenced by the footnote to \textit{Garcia}:
We do not now reach, and accordingly leave open, the question whether workmen's compensation would be the exclusive remedy if an employee were injured while availing himself of services or facilities furnished by his employer to the general public if the employee's access to such services or facilities was a benefit regularly furnished by the employer in consequence of a union contract, an individual agreement, or otherwise.
\item \textsuperscript{Id.}, 309 N.E.2d at 422, 353 N.Y.S.2d at 958.
\end{itemize}
LIABILITY FOR COMPANY DOCTORS

jury is "incidental" to and "a consequence of employment." However, while the plaintiffs in Garcia and Golini received medical treatment because of an arrangement between the doctor and the employer, the treatment was unrelated to the employer's enterprise. Instead of focusing on the nature of the act, as did the Volk court, the Garcia court focused on the relationship between the employer and the physician and foreclosed further inquiry. Under this approach, little survives of the dual-capacity doctrine in New York, and it is almost impossible to conclude that the medical acts of a company doctor are ever outside the exclusive remedy of workers' compensation.

CONCLUSION

The Garcia and Golini decisions extend co-employee tort immunity to company doctors whose treatment injures company employees or aggravates previously sustained injuries if those doctors can demonstrate minimal indicia of co-employment. This approach does not further the purposes of workers' compensation that are served by the co-employee immunity doctrine and ignores the traditional common law duty of medical professionals. A more rational result can be achieved through recognition that the company doctor has two roles— that of employee and that of medical professional with personal responsibility for his or her professional acts. Application of the dual-capacity doctrine to company doctors would allow the injured employee to collect from his or her employer under the workers' compensation statute for work-related injury and any aggravation caused by the company doctor but would not preclude a tort suit against any physician who injures, or aggravates the injuries of, an employee. Such an approach satisfies the compensatory purposes of workers' compensation without frustrating the basic policy of employer "no fault." At the same time, it encourages a higher standard of medical care in the workplace.

Glenn Jenkins*

138. Id. at 423, 309 N.E.2d at 421-22, 353 N.Y.S.2d at 957; 284 N.Y. at 28, 30 N.E.2d at 597.

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