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# Manufacturer's Liability as a Dual Capacity of an Employer

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# MANUFACTURER'S LIABILITY AS A DUAL CAPACITY OF AN EMPLOYER

IN RECENT YEARS, a new theory of recovery for employees' injuries arising out of an employment situation has emerged where the employer's product is the proximate cause of the injury. In most situations the theory of recovery for the employee would be workmen's compensation statutes with their schedules which limit the amount the employee recovers. Recently, to avoid this inadequate measure of damages, employees' attorneys have, with increasing regularity, alleged that the injury arose out of a second or dual capacity of the employer, unrelated to and independent of the normal employer-employee obligations and duties.

By proving the dual capacity of the employer, the employee's amount of recovery is increased, thereby redressing the employee's injury more adequately than possible under workmen's compensation.

A total critique of pre-workmen's compensation common law and recovery under workmen's compensation statutes is not within the scope of this article, but a brief historical analysis is necessary to establish it as background.

In order to hold the employer liable at common law, the employee must prove negligence by the employer and breach of some specific duty of care that the employer owes the employee.[1] The duties of care owed by the employer have been narrowly defined by the courts and as a result, the vast majority of accidents resulted in no recovery for the employee.[2] The employee is further burdened in actions against the employer by common law defenses and by the implied incidents of the employment contract. Thus, by the employment contract the employer was relieved of common law obligations[3] by either express provisions of the employment contract,[4] or by the employee's decision to remain employed thereby assuming the work place hazards. Even if the employee's injury was not caused by his

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[1] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 80 (4th ed. 1971). *See* Mitchell, *Products Liability, Workmen's Compensation and the Industrial Accident*, 14 DUQ. L. REV. 349 (1976).

[2] W. PROSSER, *supra* note 1, at 526 nn. 91-95. The specific common law duties of the employer were commonly classified as follows:

1. The duty to provide a safe place to work.
2. The duty to provide safe appliances, tools, and equipment for the work.
3. A duty to give warning of dangers of which the employee might reasonably be expected to remain in ignorance.
4. The duty to provide a sufficient number of suitable fellow servants.
5. A duty to promulgate and enforce rules for the conduct of employees which would make the work safe.

[3] *See* Note, 47 VA. L. REV. 1444 (1961).

[4] Conway v. Furst, 57 N.J.L. 645, 32 A. 380 (N.J. App. 1895).

assumption of the risks[5] and if the employer had clearly breached a common law duty, the employee's action may still have been barred by his contributory negligence. For a momentary lapse of caution by the employee, the law penalized him by imposing the entire loss upon him despite the greater negligence of the employer.[6]

The last major common law pitfall for the employee was the fellow-servant rule, whereby the employer could not be held liable for the negligent conduct of an employee's fellow workers.[7] These affirmative defenses (the fellow-servant rule, contributory negligence, and assumption of the risk) were known as the three wicked sisters of the common law and imposed a tremendous barrier to the employee's recovery.[8]

The reluctance of the judiciary to modify common law concepts to more equitably distribute the economic loss and to make the injured party whole, resulted in the majority of industrial accidents remaining uncompensated.[9] This refusal of the judiciary necessitated legislative action taken in the form of workmen's compensation statutes drafted to reallocate the burden of employee injury to the employer as a cost of doing business.[10] Prosser states that the theory underlying the workmen's compensation acts is stated in the old campaign slogan: "the cost of the product should bear the blood of the workman."[11]

Workmen's compensation statutes charge the employer with all injuries arising out of business activities without recourse to issues of negligence, resulting in a form of strict liability.[12] Under workmen's compensa-

[5] The classic employee assumption of risk statement is contained in Boatman v. Miles, 27 Wyo. 481, 199 P. 933 (1921).

[6] *See* cases collected in W. PROSSER, *supra* note 1, at 427 nn. 96, 97, 98.

[7] C. LABATT, MASTER AND SERVANT 473 (1904). The employee was believed to be in a superior position to fend for himself against the negligence of his coworkers.

[8] *See* W. PROSSER, *supra* note 1, at 531.

[9] State studies of this problem resulted in findings that supplied the necessary impetus for legislative action. Ohio's commission found 94% of the industrial accidents were uncompensated. REPORT OF THE OHIO EMPLOYER'S LIABILITY COMM'N XXXV (1911). *See* W. PROSSER, *supra* note 1, at 530.

[10] State ex rel. Engle v. Industrial Comm'n, 142 Ohio St. 425, 52 N.E.2d 743 (1944).

[11] Prosser attributes this statement to Lloyd George. *See* W. PROSSER, *supra* note 1, at 530 n.37.

[12] *Id. See also* State ex rel. Munding v Industrial Comm'n, 92 Ohio St. 434, 450, 111 N.E. 299, 303 (1915), wherein the court said:

> the theory upon which the compensation law is based (which is now generally accepted) is that each time an employee is killed or injured there is an economic loss which must be made up or compensated in some way, that most accidents are attributable to the inherent risk of employment—that is, no one is directly at fault—that the burden of this economic loss should be borne by the industry rather than by society as a whole, that a fund should be provided by the industry from which a fixed sum should be set apart as every accident occurs to compensate the person injured, or his dependents, for his or their loss.

tion statutes, the sole issue controlling the employee's right to receive compensation is his status at the time of injury.[13] The amount recoverable is usually not at issue because most compensation statutes fix the amount recoverable as a percentage of the average statewide weekly wage.[14] Also, the workmen's compensation statutes eliminate the three common law defenses and relieve the employer of all common law duties of due care,[15] but the employee's cost for these benefits is the waiver of his common law right to sue the employer in tort.[16]

If the employee is injured while in the status of "employee," workmen's compensation laws would deem him covered under such. Once the statute becomes applicable, the exclusive remedy provision applies.[17] It is important to note however, that the exclusive remedy provision only abrogates an employee's cause of action against the immediate employer; not against a liable third party. This supplies the loophole for creative attorneys in their attempt to find a "third party" to sue at common law allowing them to supplement the inadequate damages provided for under workmen's compensation.

The workmen's compensation recovery schedules are inflexible and

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[13] *Cudahy Packing Co. v. Parramore,* 263 U.S. 418 (1923), wherein the Court discussed the concept of employee's status at 423:

> Workmen's Compensation legislation rests upon the idea of status, not upon that of implied contract . . . . The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured.

[14] This was the trade-off the employers made for their liability without fault versus the possible large award received in the court system. A. LARSON, THE LAW OF WORKMEN'S COMPENSATION (3d ed. 1970); I. SCHNEIDER, WORKMEN'S COMPENSATION 6 (2d ed. (1932).

[15] *See* W. PROSSER, *supra* note 1, at 531. *But see* cases collected in W. PROSSER, *supra* note 1, at 533 n. 64 not favoring this result.

[16] The exclusive remedy provision is included in all of the state statutes and is generally phrased as follows: "Employers . . . shall not be liable to respond in damages at common law or by statute for any injury . . . received . . . by any employee in the course of or arising out of his employment . . . ." OHIO REV. CODE ANN. § 4123.74 (Page 1973). *See also* OHIO CONST. art. II, § 55 which provides:

> For the purpose of providing a compensation to workmen and their dependents, for death, injuries, or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. *Such compensation shall be in lieu of all other rights to compensation,* or damages, for such death, injuries, or occupational disease, and *any employer who pays the premium* or compensation provided by law, passed in accordance herewith, *shall not be liable to respond in damages at common law* or by statute for such death, injuries or occupational disease . . . . (emphasis added).

The constitutionality of Ohio's Workmen's Compensation Act was upheld recently in Allen v. Eastman Kodak Co., 50 Ohio App. 2d 216, 362 N.E.2d 665 (1976). *See* also Davis, *Third-Party Tortfeasors Rights: Where Do Dole and Suspan Lead?,* 4 HOFSTRA L. REV. 571 (1976).

[17] A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 65.10, at 135 (1970).

are not designed to offer total restitution to the employee for all damages. The recovery schedules do not include many of the classic tort measures of damages such as pain and suffering, mental anguish[18] or, since the recovery is tied to the statewide average employee's weekly wage, the impairment of earning capacity.[19] Realizing the inequity of the recovery when the negligence of the employer has been gross or "reprehensible,"[20] a number of states enacted penalty awards to the injured employee.[21]

The employee has generally been barred from bringing suit against his employer for injuries received while in the status of employee. In recent years the employee's sole and exclusive remdy has been workmen's compensation recovery. The key determinant as to whether workmen's compensation recovery is available is the employee's status at the time of injury.[22]

By utilizing the underlying theory of workmen's compensation, the dual capacity doctrine logically follows and results in situations where the employer may be held liable as a third party. One authority has stated that, "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."[23] The second capacity of the employer is the basis for the employee's common law cause of action, this theory not being defeated by the "exclusive remedy provisions" of workmen's compensation statutes.[24]

To date, courts have struggled with the application of the dual capacity

[18] *See* REPORT OF THE NATIONAL COMM'N ON STATE WORKMEN'S COMPENSATION LAWS 125 (1972).

[19] *Id.* at 126.

[20] "There have been numerous attempts and suggestions made to make the employees whole again when the employer was grossly negligent or where reprehensible conduct may be deemed moral negligence." A. EHRENZIVERG, TRENDS TOWARD AN ENTERPRISE LIABILITY FOR INSURABLE LOSS: NEGLIGENCE WITHOUT FAULT 16, 61 (1951).

Some states allow the employee his common law cause of action for intentional torts as in Readinger v. Gottschall, 201 Pa. Super. 134, 191 A.2d 694 (1963). *See also* Conrad v. Youghiogheny & Ohio Coal Co., 107 Ohio St. 387, 140 N.E. 482 (1923), where the employee was required to elect between his remedies through workmen's compensation award or seek his damages in tort through judicial process. *But see* cases collected in 2 A. LARSON, *supra* note 17, at 153-64.

[21] The penalty awards are given to employees when their employers fail to obey safety rules. *See* OHIO CONST. art. II, § 35; *see also*, 2 A. LARSON, *supra* note 17, at § 70.20.

[22] *Workmen's Compensation and Employer Suability: The Dual-Capacity Doctrine*, 5 ST. MARY'S L. REV. 818 (1974).

[23] 2 A. LARSON, *supra* note 17, at § 72.80. For an additional study of the dual capacity doctrine *see* Comment, *supra* note 22. *See also* Mitchell, *supra* note 1 dealing with industrial accidents caused by product liability and the effect it has on workmen's compensation laws.

[24] *See* cases collected in Douglas v. E. & J. Gallo Winery, 69 Cal. App. 3d 103, 104 n.5, 137 Cal. Rptr. 797, 800 n.5 (1977).

doctrine under various situations such as the second capacity of the employer as owner, or applying the second capacity theory when the employer is operating another business, but still is only one entity.[25] Perhaps the most trying application of the dual capacity doctrine is in the area of product liability where employees are attempting to hold their employers liable in a second capacity as manufacturer.

One of the first cases arguing this theory was *Lewis v. Gardner Engineering*,[26] which resulted in a summary judgment for the defendant-employer based on the grounds that the employee was limited to the exclusive remedy of workmen's compensation since the "joint adventure is not a distinct legal entity separate and apart from the parties composing it, and consequently an employee of a joint adventure is an employee of each of the joint adventurers."[27] Therefore, the court held, the defendant-employer could not be considered a third party. The court further supported its holding by stating, "It is nothing more than a coincidence that Gardner [defendant], one of the joint venturers, happens to have manufactured the hoist."[28]

The dissent points out that the majority sidestepped plaintiff's main thrust, the dual capacity doctrine attempting to hold the employer liable as "third party".[29] Justice Fogleman, in the dissent, described the plaintiff's action as not trying to seek

> to recover for the furnishing of unsafe equipment by the joint venture or the joint venturer. They seek to recover from appellee [defendant] as a "third party" . . . on the basis of negligence or breach of warranty in the manufacture and distribution of a faulty device, a step that certainly was outside the purposes of the joint venture, *i.e.*, the construction of a lock and dam.[30]

Justice Fogleman further argued that the dual capacity doctrine should have been invoked under the facts of this case, since not to do so would be

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[25] *See* Comment, *supra* note 22.

[26] 254 Ark. 17, 491 S.W.2d 778 (1973). A joint venture was entered into by Gardner Engineering Corp. and San Ore Construction Co. for the construction of a dam. The plaintiff-employee was a pile-driving foreman employed by the joint venture. The plaintiff was injured when a hoisting clamp, allegedly defective, failed. The hoisting clamp was manufactured and designed by Gardner Engineering Corp., and rented to the joint venture.

[27] *Id.* at 18, 491 S.W.2d at 779.

[28] *Id.* at 19, 491 S.W.2d at 780.

[29] *Id.* at 20, 491 S.W.2d at 780. The judge quoted appellants' brief:

> II. The defendant Gardner Engineering Corporation, as a joint venturer, is a "third party" with respect to Gardner Engineering Corporation, as a manufacturer of the hoisting clamp.
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> III. The defendant should have been estopped from invoking the exclusive remedy provision of the Arkansas Workmen's Compensation Act in order to escape its liability as the manufacturer of a product separate and apart from the joint venture.

[30] *Id.* at 22, 491 S.W.2d at 781 (Fogleman, J., dissenting opinion).

unconstitutional[31] and would ignore the clear legislative intent[32] underlying the statute. "Liability under the act is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of the employment."[33] He argued further that "[t]he purpose of the act is to compensate only for losses resulting from the risks to which the fact of engaging in the industry exposes the employee."[34] Justice Fogleman's dissent points out the need and rationale for the dual capacity doctrine, but unfortunately for Lewis the majority found this second capacity to be just a "coincidence."

## I. DUAL CAPACITY DOCTRINE APPLIED IN OHIO

In Ohio, the case of *Mercer v. Uniroyal, Inc.*,[35] while similar to *Lewis*, was decided completely opposite to the *Lewis* decision. The plaintiff was an employee of a stevedoring company and pursuant to a lease agreement, drove trucks for Uniroyal, Inc. While plaintiff was resting in the sleeping compartment of the cab of one of the trucks, the front tire exploded causing a collision and injuring the plaintiff. The left front tire was manufactured by Uniroyal, the defendant-employer. Since Uniroyal had control of the truck drivers, the court held that the plaintiff was an employee of both Uniroyal and the stevedoring company for the purposes of workmen's compensation recovery.[36]

The appellate court quickly handled some procedural difficulties encountered by the plaintiff in order to reach the "novel and difficult issue" of the application of the dual capacity doctrine.[37] The court supported the finding that Uniroyal, as manufacturer, was acting in a second capacity. The court described the test to be applied as follows: "The decisive dual-capacity test is not concerned with how separate the second function of the employer is from the first but with whether the second function generates obligations unrelated to those flowing from the first, that of employer."[38] The majority reasoned that, "the hazard was not necessarily one of employment, but was one common to the public in general . . . . When the initiating cause is not a hazard of employment, there is no casual con-

[31] *Id.* at 26-27, 491 S.W.2d at 783-84.

[32] "It was never intended that our workmen's compensation statutes should immunize one who happens to be an employer from any and all liability to one who happens to be his employee." *Id.*

[33] *Id. citing* McGregor & Pickett v. Arrington, 206 Ark. 921, 175 S.W.2d 210 (1970).

[34] *Id. citing* Birchett v. Tuff-Nut Garment Mfg. Co., 205 Ark. 483, 169 S.W.2d 574 (1969).

[35] 49 Ohio App. 2d 279, 361 N.E.2d 492 (1976).

[36] *Id.* at 281, 361 N.E.2d at 494.

[37] *Id.* at 282, 361 N.E.2d at 494.

[38] *Id.* at 283, 361 N.E.2d at 495, *citing* 2 A. LARSON, *supra* note 17, at § 72.80, who supported this position *citing* Constanza v. Mackler, 34 Misc.2d 188, 227 N.Y.S.2d 750 (Sup. Ct. 1962).

nection between the employment and the injury."[39] This court held, as would have Justice Fogleman, that "it was only a matter of circumstance" that the manufacturer was also the employer.[40] The court was not disturbed by the fact that plaintiff might recover workmen's compensation and also at common law. It stated, "[m]ultiple recovery by an injured employee is a situation which many employers find difficult to accept, but the concept is not unique to workmen's compensation."[41]

In *Mercer*, Judge Wiley vigorously dissented, stating that plaintiff is estopped from bringing a common law action on any other theory, and that the dual capacity doctrine contravenes the law of Ohio.[42]

> [T]he immunity established under the Constitution of Ohio[43] and implemented by the statutes[44] pertaining to workmen's compensation, and as interpreted by the courts of Ohio, have created such an established doctrine of law that any change so fundamental as eliminating the immunity of the employer who complies with the statutory requirements should be brought about only by legislative action and probably only by a constitutional amendment.[45]

The dissent points out that the courts have liberally applied the exclusive remedy provision granting immunity to complying employers and "[a]ny doubt, then, should be resolved in favor of preserving rather than abolishing the statutory right of immunity."[46]

The dissent seems to ignore the fact that it is the province of the judiciary to construe the constitution and the statutes and that to abrogate or to delegate this duty to the legislature would itself be against the laws of Ohio. In this case the plaintiff merely sought the court's interpretation of the

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[39] 49 Ohio App. 2d at 285, 361 N.E.2d at 496.

[40] *Id.*

[41] *Id. citing* YOUNG, WORKMEN'S COMPENSATION LAW OF OHIO 42 (2d ed. 1971). *See also* Trumbull Cliffs Furnace Co. v. Shachovsky, 111 Ohio St. 791, 146 N.E. 306 (1924) (where the employee of an independent contractor was performing work for a corporation-owner of premises received workmen's compensation from his employer, then brought suit against owner-contractor for personal injuries and was awarded a jury verdict. The court held that the owner was a third person and therefore liable.)

[42] *Id.* at 287, 361 N.E.2d at 497.

[43] OHIO CONST. art. II, § 35.

[44] OHIO REV. CODE ANN. § 4123.74 (Page 1973).

[45] 49 Ohio App. 2d at 290, 361 N.E.2d at 499.

[46] 49 Ohio App. 2d at 290, 361 N.E.2d at 498. *See* Bevis v. Armco Steel Corp., 86 Ohio App. 525, 93 N.E.2d 33, *appeal dismissed*, 153 Ohio St. 366, 91 N.E.2d 479, *cert. denied*, 340 U.S. 810 (1949) where it was held that the common law liability of employers complying with workmen's compensation laws was abolished and employees are limited to the exclusive remedy of workmen's compensation in every case where the damage arose out of the employment, no matter how incurred, except if self-inflicted. *See also* Industrial Comm'n v. Brosky, 128 Ohio St. 372, 191 N.E. 456 (1934), Lopez v. King Bridge Co., 108 Ohio St. 1, 140 N.E. 322 (1923).

meaning of the words found in Ohio Revised Code Section 4123.74. The majority construed the term "employers" and "any injury . . . received . . . by an employee in the course of or arising out of his employment" to mean that the hazard which causes the injury must be causally connected to the dangers of the industrial employment.[47] Here the danger is one common to the general public and it was only a fortuitous circumstance that the manufacturer was also the employer.[48] This Ohio court has correctly held that the employer can be held liable as a third party in a second capacity notwithstanding the fact that it is still only one legal entity.

The Ohio Supreme Court had occasion to examine the *Mercer* holding in *Guy v. Arthur H. Thomas Co.*,[49] a case certified by the appellate court as being in conflict with the appellate court rendering the *Mercer* decision. Although the court did not expressly approve the *Mercer* decision, the court did apply the dual capacity doctrine when the employee was injured by a breach of an obligation owed by the employer which was unrelated to and independent of those imposed upon an employer because of the employment relationship. The Supreme Court of Ohio further held that the employee's action is not barred by the exclusive remedy provision of the Ohio Constitution or the Ohio workmen's compensation statute when plaintiff's cause of action is based upon a breach of duty springing from the employer's second or dual capacity.[50] The court reasoned that the statutes stress that workmen's compensation is based on "the essentiality of the status . . . by the usage of the very terms 'employer' and 'employee.' "[51]

The court further approved the rationale of related decisions.[52] The court found "no compelling reason why an action should be less viable merely because the traditional obligations and duties of the tortfeasor spring from the extra-relational capacity of the employer, rather than a third party."[53] The decision is carefully limited to imposing liability on the employer only when the obligations are generated from its second function un-

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[47] 49 Ohio App. 2d at 285, 361 N.E.2d at 496.

[48] *Id.*

[49] 55 Ohio St. 2d 183, 378 N.E.2d 488 (1978). Plaintiff was a nurse who contracted mercury poisoning in the course of her employment at the defendant hospital-employer. The defendant hospital treated her for these injuries, such treatment resulted in enhancement of the injury by the alleged negligence in diagnosing her condition. The plaintiff conceded that she has no action against the employer for the original compensable injury, but asserts she may still sue for malpractice. These facts are remarkably similar to those in Duprey v. Shane, 39 Cal.2d 781, 249 P.2d 8 (1952).

[50] 55 Ohio St.2d at 186, 378 N.E.2d at 490.

[51] *Id.*

[52] *Id.* at 189, 378 N.E.2d at 492. *See* 39 Cal.2d 781, 249 P.2d 8; Reed v. The Yaka, 373 U.S. 410 (1963).

[53] *Id.* at 190, 378 N.E.2d at 492.

related to its function as an employer.[54] The court does not base its decision upon a one-injury versus second-enhanced injury distinction but correctly bases the decision upon what obligation was breached by the employer.

It is also important that the employer involved in this case is only one legal entity, thus leaving the door open for product liability cases similar to *Mercer*. The injury in *Guy* occurred when the plaintiff was not acting in the course and scope of her employment, although logical analysis still allows the possibility that injuries occurring within the scope of employment might be generated from a second function, unrelated to that of employer, thus allowing the application of the dual capacity doctrine. The court's statement that the employer's capacity must be unrelated does not imply that the act must be done sequentially, but that the act may be simultaneously performed while acting also as an employer and still be unrelated.

The *Guy* decision still leaves the path the *Mercer* decision traced open for travelers. But refinement of dual capacity is being hampered by courts obstinately refusing to analyze factual situations completely, their apparent satisfaction with basic reasoning such as the classic "but for"[55] doctrine, and their further justification based on their fear of opening the "floodgate to the docket."[56]

## II. DECISIONS IN FAVOR OF THE DUAL CAPACITY DOCTRINE

A recent California[57] decision has fine tuned the dual capacity theory with a thorough study of case law both favoring and rejecting the doctrine.[58] In *Douglas v. E. & J. Gallo Winery*,[59] plaintiff was employed by the defendant who was discovered to be the manufacturer of the defective scaffolding which caused injury to the employees. The trial court sustained the employer's demurrer to the complaints without leave to amend, whereupon the employees appealed.

On appeal the court held that plaintiffs did state a cause of action based on manufacturer's liability notwithstanding the fact that the defendant was also plaintiff's employer and that the injury occurred in the course and

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[54] *Id.*

[55] *See* Profilet v. Falconite, 56 Ill. App. 3d 168, 371 N.E.2d 1069 (1977); Rosales v. Verson Allsteel Press Co., 47 Ill. App. 3d 787, 354 N.E.2d 553 (1976); Neal v. Roura Iron Works, Inc., 66 Mich. App. 273, 238 N.W.2d 837 (1975).

[56] *See* Meedham v. Fred's Frozen Foods, Inc., 359 N.E.2d 544 (Ind. Ct. App. 1977); 47 Ill. App. 3d 787, 354 N.E.2d 553 (1976); 66 Mich. App. 273, 238 N.W.2d 837 (1975).

[57] 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977).

[58] *Id.* at 109-10, 137 Cal. Rptr. at 800-01.

[59] Defendant was served as Doe XXXI where the complaint alleged Does XXI through L were "manufacturers, sellers, distributors, designers, suppliers, jobbers, repairers, and owners" of the defective device. *Id.* at 106 n.1., 137 Cal. Rptr. at 799 n.1.

scope of plaintiff's employment, when "the product involved is manufactured by the employer for sale *to the public* rather than being manufactured for the sole use of the employer."[60] The court based its holding on the dual capacity doctrine stating that

> [t]his is not a legalistic machination; nor is it "conjuring a non-employer doppelganger" out of the manufacturer's activity. There is nothing ghostly or fictional about two capacities. 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. Which combination of jural opposites or jural correlatives apply is dependent in the specific role assumed at the particular time involved. While it may be that a defendant cannot *simultaneously* be two distinct entities, a defendant can act in two distinct capacities *sequentially*.[61]

Using this reasoning, the court held that the employer, when acting as employer, is granted immunity by the exclusive remedy provision, but when an employer acts as "manufacturer of a product for sale to the public, the employer assumes all of the duties and liabilities of such manufacturer" and will be held to the same duty of care imposed on the manufacturer.[62] The workmen's compensation law allows the employee to sue third parties at common law, thus, "a third party action should be no less viable because the duty owned [sic] by the tortfeasor springs from an extra-relational capacity of the employer rather than arising from another third party."[63] Workmen's compensation gives immunity for "all of the hazards and risks of employment which naturally flow from that employment," but the employee does not relinquish his rights as a consumer of a product.[64]

The court would not assume that the legislature intended to protect the employer from the duties and liability of the product liability doctrine developed long after the Workmen's Compensation Act, realizing that "[t]he existing Worker's Compensation statute is not (nor was it intended to be) a complete system of social insurance."[65] The court felt that it was only a

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[60] *Id.* at 107, 137 Cal. Rptr. at 799.

[61] *Id.* at 110-11, 137 Cal. Rptr. at 801 (footnotes omitted).

[62] *Id.* at 110, 137 Cal. Rptr. at 801.

[63] *Id.* at 111, 137 Cal. Rptr. at 802 *citing* Comment, *supra* note 22, at 832.

[64] *Id.* at 111, 137 Cal. Rptr. at 801.

[65] *Id.* at 112, 137 N.E.2d at 802. *But see* Winkler v. Hyster Co., 54 Ill. App. 3d 282, 369 N.E.2d 606 (1977). *See also* 47 Ill. App. 3d at 797, 354 N.E.2d at 561 where Judge Simon argues in the dissent:

> The Workmen's Compensation Act was adopted long before the *Suvada* doctrine [this case imposed strict product liability upon manufacturers for unreasonably dangerous goods]. . . . I therefore find no justification for imputing to the legislature an intent to adopt a Workmen's Compensation scheme which permits an employer to withhold from his employee the protection the *Suvada* doctrine requires a manufacturer to provide.

"fortuitous circumstance" that the consumer was also an employee, and to limit the employee's remedy in this circumstance would be against the general rules attempting to "make the injured party whole" and the deterrent effect would be eliminated so the manufacturer had no incentive to provide safe products.[66] The court limited its holding to employers engaged in manufacturing products for sale to the general public, thus the hazard is not necessarily one of employment but is common to the public in general.[67]

To determine if an employer also has a second capacity as a manufacturer, the court developed the following test: If the product manufactured and the defendant's activity in manufacturing it "is such as to justify the conclusion that it is part and parcel of an activity which occupies the effort, attention and time of the defendant for the purpose of possible profit on a continuing basis,"[68] then the employer's capacity as manufacturer is applied. This test at first glance would appear difficult to construe or apply, but the court gave a number of hypotheticals in attempting to make the standard more meaningful.[69]

In *Gallo Winery,* the court correctly utilized basic concepts of jurisprudence to invoke and apply the dual capacity doctrine. It held that any one individual or legal entity has various vested legal rights at any one particular time. The court then reviewed the basic purpose of the workmen's compensation statutes and the legislative intent of their enactment and concluded that the statutes were designed only to overcome the difficulties encountered at common law in the master-servant relationship, thus the status or existence of the employee-employer relationship and its corresponding obligations are the only ones to be covered by the workmen's compensation statutes.[70] The court accommodated and amalgamated these

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[66] 69 Cal. App. 3d at 112, 137 Cal. Rptr. at 802.

[67] *Id.* at 113, 137 Cal. Rptr. at 803. For a similar position see 49 Ohio App. 2d 279, 361 N.E.2d 492.

[68] 69 Cal. App. 3d at 113, 137 Cal. Rptr. at 802.

[69] The court states:

> A single or occasional disconnected act does not constitute engaging in such manufacturing. The defendant who designs or manufacturers a product for his own use and subsequently does sell an extra one of the products to his neighbor or to a similar business is not thereby subjected to manufacturers' liability when his own employee is injured in using the retained product . . . . [M]anufacturers' liability clearly arises where the plaintiff employee is injured in using a product designed and manufactured by his employer primarily for sale to the general public and only incidentally used in defendant's other activities. In between those extremes, the matter must be resolved on the facts of the particular case.

*Id.* at 113, 137 Cal. Rptr. at 803.

[70] *Id.* at 110-11, 137 Cal. Rptr. at 800-01. The exclusive remedy provision "is part of the *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts." 2 A. LARSON, *supra* note 17, at § 65.10. *See also* 41 Ill. App. 3d 787, 798, 354 N.E.2d 553, 561-62 (dissenting opinion) where

basic positions by realizing that the employer, in its capacity as manufacturer, caused the injury to the employee in the role of user of the product. It then logically follows that the action would not be barred by the exclusive remedy provision because the cause of the accident was not the employment relationship but the employer's defective manufacturing activity. There would be no justification for exonerating the manufacturer's culpable negligence. The court allowed plaintiff to redress the wrongdoing suffered and to make himself whole by claiming damages. Recovery for this type of plaintiff will serve the ends of social justice in that it has a deterrent effect against further damage to society since the manufacturer will now have incentive to provide safe goods.

The manufacturer should not complain since it is in the best position to guard against defects it initiated. Further, the manufacturer assumed the liabilities by placing the product in the stream of commerce. The manufacturer may allocate the cost of product liability to the cost of goods, which will ultimately spread the burden to the consumers. The rationale espoused in *Gallo Winery* to support the dual capacity doctrine is both logical and equitable and should not be swept aside by the swift currents of justice some courts may utilize to clear their dockets by analyzing these cases with the "but for" test.

## III. JUDICIAL ATTEMPTS TO SCUTTLE DUAL CAPACITY

A stumbling block which courts encounter in applying the dual capacity doctrine appears when only one legal entity, the employer, is involved. In these cases the courts' reasoning will sometimes stop in midstream, holding simply that the mere separateness in the divisions of an employer's business will not make the employer liable and that plaintiff's exclusive remedy is the workmen's compensation recovery, simultaneously ignoring that a separate and distinct obligation may have arisen from the role the division or department played in the employee's injury.[71]

Justice Simon states, "I would not extend the *quid pro quo* justification for the exclusive remedy provision . . . to deprive an employee as a condition of an employment relationship of the protection afforded him by the strict product liability doctrine." For the opposite view, *see* the dissenting opinion in 65 Ill. 2d 437, 359 N.E.2d 125.

[71] *See* 2 A. LARSON, *supra* note 17, at § 72.80. For outstanding examples of this type of reasoning *see* 254 Ark. 17, 491 S.W.2d 778, which involved a product liability claim where the plaintiff alleged the employer was a third party manufacturer. *See also* Hudson v. Allen, 11 Mich. App. 511, 161 N.W.2d 596 (1968). (The plaintiff in the course and scope of employment was delivering a hamburger to a customer from the drugstore where she was employed. While she was walking down the street, the door of a laundromat suddenly opened and struck her, causing plaintiff to incur severe cuts. Unfortunately for plaintiff the defendant happened to own both stores and for convenience kept both business records in common and paid taxes for both under the drugstore's title. Plaintiff relied on the *Duprey* dual capacity holding but the court distinguished *Duprey* as involving two injuries whereas in this case only one injury was involved. The court stated that "the two operations realistic-

If the courts fail to recognize the obligations which are different from the usual obligations created by the employer-employee relationship, the dual capacity doctrine will be effectively nullified in the product liability area. Therefore, when the manufacturer of a defective product is also the employer of the consumer or user of the defective product, and the product causes an injury which arises out of the scope of employment, the manufacturer-employer may force plaintiff to forego his new common law rights and accept his exclusive remedy of workmen's compensation. This "would produce the harsh and incongruous result"[72] of depriving an employee of his common law rights. The United States Supreme Court avoided this result by construing the compensation statute liberally and applying the dual capacity rationale.[73]

The duties imposed on the manufacturer of products which are to be placed in the stream of commerce are distinct from the duties of the employer to provide a safe place to work and safe tools, since the hazard of the manufactured product is a risk shared by the general public. This distinction is clearly cognizable in the hypothetical situation where an automotive assembly worker, in the scope of his employment, drives a newly assembled automobile off the line and is rear-ended or backs into an obstruction causing the gas tank to be pierced (assuming it was defectively positioned) thus resulting in an explosion causing the employee to be severely burned. In this hypothetical situation only one entity is involved, Fortune Motor Co., the employer, and the injury arises out of the employment thereby covered by workmen's compensation. If the court stopped its analysis at this point and held that the exclusive remedy provision of workmen's compensation applies, the employee and society would clearly be damaged. The injured employee will not be made whole and society is robbed of the deterrent effect of the award.

Analyzing these facts further, the court may find that the automotive manufacturer enhanced the employee's injury causing a second injury. The court may find that this "second" injury is also covered solely by workmen's compensation if it does not analyze the legal obligation involved. Upon analysis of the legal duties the court will most likely find that the injury was one not arising out of hazards common to the general public. This obligation which the manufacturer owes to the public is independent

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ally represent a single unit with a single employer, and we do not find a dual legal personality." Clearly a separate, distinct legal obligation was owed to the plaintiff outside of the employer-employee relationship.

[72] Reed v. The Yaka, 373 U.S. 410, 415 (1962) *quoting* Voris v. Eikel, 346 U.S. 328, 333 (1953).

[73] *Id.* This case involved the Longshoreman's Act, 33 U.S.C. § 905 (1927) subsequently amended to expressly prohibit the dual liability, 33 U.S.C. § 905 (B).

and unrelated to the obligations associated with the employer-employee relationship.[74]

It may be said that when the court applies the dual capacity doctrine in the products liability area that, "the court is doing nothing more or less than carrying out an historic and necessary function of the court to bring the law into harmony with modern day needs and with concepts of justice and fair dealing."[75]

The courts have shirked this duty by pigeon-holing the various product liability/dual capacity cases before them. The courts, fearing the opening of floodgates, employ three major rationales on which to rest their decision: the single entity theory; the "but for" related test; and finally "safe place to work" test (tools supplied only for the employees' own use in their employment).

The first of these rationales will clearly fall upon careful analysis. While almost everyone will agree that "[m]ere separateness in the [employer's] divisions or departments is insufficient to establish dual capacity,"[76] the test cannot logically stop there since separateness is not required in product liability cases when the employer-manufacturer may be held liable for a defective product. The basis of the liability is its second capacity and the obligations it owes to the employee-user.

Courts in both Indiana and Illinois have been in a constant struggle with this theory since 1973. Some of their cases involve the plaintiff alleging dual capacity on the employer's part as owner of property. In *Marcus v. Green*[77] the court was able to find that the exclusive remedy provision did not preclude the employee from maintaining suit against the employer-owner of the property. The facts were viewed in such a way that actually two distinct legal entities were involved; the employer, James Green d/b/a Jim Green Construction Co., and the owners, a partnership consisting of James Green and Herman Schroeder. The plaintiff was injured in the course of his employment, a fact which both parties stipulated to.[78]

In *Marcus*, the broad language of the holding adopts the dual capacity doctrine although it has since been whittled away by subsequent decisions. The

[74] This would be a logical extension of the rules laid down in 55 Ohio St.2d 183, 378 N.E.2d 488. These facts are analogous to those in 49 Ohio App. 2d 279, 361 N.E.2d 492.

[75] Bing v. Thunig, 2 N.Y.2d 656, 657, 163 N.Y.S.2d 3, 11, 143 N.E.2d 3, 9 (1969).

[76] 69 Cal. App. 3d 103, 109, 137 Cal. Rptr. 797, 800. *But see* Davis, *Workmen's Compensation—Using an Enterprise Theory of Employment to Determine Who Is a Third Party Tort-Feasor*, 32 U. PITT. L. REV. 289 (1971).

[77] 13 Ill. App. 3d 699, 300 N.E.2d 512 (1973). The court relied upon 373 U.S. 410.

[78] *Id.*

same court only three years later limited the *Marcus* decision to factual situations where there are separate and distinct entities.[79] In that same year another Illinois court was presented with the identical issue of an employee attempting to hold the employer liable utilizing the dual capacity of owner.[80] This court found that no dual capacity existed and correctly analyzed the obligation breached by the employer. The court stated that the employer "occupied a position as plaintiff's employer and no other."[81] In *Walker* the court stated, "if the *Marcus* decision retains any viability at the present time, it is limited to the principle that the Workmen's Compensation Act bars all other remedies of an employee against his employer unless that employer is existing as one or more distinct legal entities."[82]

The Illinois courts were subsequently presented with three more cases involving the same issue: the second capacity springing from the ownership of the premises.[83] In *Laffoon v. Bell & Zoller Coal Co.*,[84] the court did not allow the owner of the premises to subrogate himself to the position of plaintiff's immediate employer, a subcontractor, who did not carry workmen's compensation insurance. Thus, the owner who paid the plaintiff's workmen's compensation claim was also liable at common law for his negligence as owner of the premises.

It is important to note that this case involves two legal entities so that the dual capacity doctrine is really not involved. But the defendant's argument was that the exclusive remedy provision provided him with immunity from an action for damages by an employee, the exact argument made in all dual capacity cases, in this aspect relating to this article. Justice Kluczynski, speaking for the majority, answered defendant's contention by holding that to allow the employer immunity would deny the employee the due process and equal protection of law.[85]

This unique holding is analogus to product liability dual capacity because the court determined that "the evil to be remedied by that [workmen's compensation] act was that under the common-law rules of master-servant liability, employees injured in the course of their employment had to bear practically the full measure of their loss, hence a substitute system

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[79] Dintelman v. Granite City Steel Co., 35 Ill. App. 3d 509, 341 N.E.2d 425 (1976).

[80] Walker v. Berkshire Food, Inc., 41 Ill. App. 3d 595, 354 N.E.2d 626 (1976).

[81] *Id.* at 599, 354 N.E.2d at 629.

[82] *Id.* at 598, 354 N.E.2d at 629.

[83] Profilet v. Falconite, 56 Ill. App. 3d 168, 371 N.E.2d 1069 (1977); McCarty v. City of Marshall, 51 Ill. App. 3d 842, 366 N.E.2d 1051 (1977); Laffoon v. Bell & Zoller Coal Co., 65 Ill. 2d 437, 359 N.E.2d 125 (1976).

[84] *See* 65 Ill. 2d 437, 359 N.E.2d 125.

[85] *Id.* at 447, 359 N.E.2d 125.

of liability was provided."[86] The applicability of this holding to the product liability area is due to the fact that the strict liability doctrine evolved subsequent to the Workmen's Compensation Act and does not involve the evils encountered in the master-servant relationship discussed previously. Thus an equal protection argument may add weight to the dual capacity rationale.[87]

A subsequent Illinois decision[88] adopted a narrow interpretation of *Laffoon* as only conferring immunity from common law actions for damages upon employers when sued by their immediate employees. In dissent, presiding Justice Craven argued that the majority ignored the plain holding of *Laffoon* which recognized the validity of the dual capacity doctrine.[89] The dissent cites a number of cases for the principle "that an employer cannot accept the benefits of two positions and the liabilities of only one."[90]

In *Profilet v. Falconite*,[91] the employee brought an action attempting to hold his employer strictly liable as owner and lessor of an unreasonably dangerous product. The court held that when there is only a single entity involved the exclusive remedy provision applies notwithstanding the strict product liability charge. The court employs the "but for" test to show that the injury would not have occurred except for plaintiff's employment. In *Profilet* the court held that in Illinois an employee may not maintain an action against his employer for injuries alleged to have occurred because of the employer's secondary capacity. However, this decision does pass muster because under precompensation days the employer was under a duty to provide safe tools which was the only obligation raised under the facts of this case. Hopefully the plaintiff also sued the manufacturer of the crane.

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[86] *Id.* at 444, 359 N.E.2d at 128 *citing* Grasse v. Dealer's Transport Co., 412 Ill. 179, 195, 106 N.E.2d 124, 133 (1952). The court gave the following example:

> Two men are working on a beam which suddenly collapses injuring both men. The first man is an employee of a subcontractor who has workmen's compensation insurance. This man will receive compensation benefits from his employer and can subsequently sue the general contractor . . . who . . . is tortiously liable for his injuries. The second man is an employee of a subcontractor who carries no compensation insurance . . . and will receive compensation from the general contractor.

*Id.* If defendant is permitted to be immune from the employee's common law action by operation of an exclusive remedy provision the court said this creates an illogical distinction among the two employees. The classification must be based upon a real and substantial difference in kind, which bears a relation to the evil to be remedied.

[87] ***But see*** dissenting opinion, *id.* at 450-51, 359 N.E.2d at 130-32.

[88] McCarty v. City of Marshall, 51 Ill. App. 3d 842, 366 N.E.2d 1052 (1977).

[89] *Id.* (dissenting opinion).

[90] *Id.* (dissenting opinion, *see* citations collected therein).

[91] 56 Ill. App. 3d 168, 371 N.E.2d 1069. The employer supplied both a crane and the plaintiff to assist the crane operator to the lessee, a subcontractor. The boom of the crane came in proximity with overhead electrical wires; it did not come in contact with them but an electrical arc was created thereby conducting an electric current down the boom, causing severe burns to the plaintiff.

Illinois is not the only state struggling with this issue. In *Strickland v. Textron Inc.*,[92] a federal court in South Carolina failed to find a dual capacity in a product liability action. The machine which injured plaintiff was manufactured by Talon, Inc. and installed in one of their plants. Subsequently Textron, Inc. acquired all the assets of Talon, Inc., which was then dissolved. The plant which housed the machine became designated as the Talon Division of Textron, Inc.: this division employed the plaintiff. The court found that Textron, Inc. would be plaintiff's employer under the Workmen's Compensation Act, and then cited a long list of authorities for the basic principle that doubts of jurisdiction must be resolved in favor of the inclusion of employers and employees under the workmen's compensation laws.[93]

In rejecting the dual capacity doctrine the court relied on *Kottis v. United States Steel Corporation*,[94] a vague decision to be discussed herein. The court in *Textron* did not analyze the factual situation completely. It failed to discover if Talon, Inc. manufactured the machine for sale to the public, thereby assuming the risk of being a manufacturer and the attendant responsibilities. It is from this circumstance that the dual capacity will arise and subject the employer to strict product liability, notwithstanding the fact that the employee was injured in the course of her employment.

The employer and employee act simultaneously in a number of distinct capacities. The quid pro quo principle of workmen's compensation was meant only to protect the employer in the capacity of employer in his dealings with employees in the master-servant relationship. It was not meant to strip the employee of all her legal rights. This decision avoided this type of reasoning by holding that plaintiff's injury was directly related to her employment because it occurred during the course of employment.[95] The "but for" doctrine again avoided complete legal analysis.

### A. *Quasi-Manufacturer Role of the Employer*

The courts are not completely at fault or are perhaps even innocent

[92] 433 F. Supp. 326 (D.C.S.C. 1977). The plaintiff was injured when her hair was caught in the gears of a machine during the course of employment. She applied for and received workmen's compensation benefits. Plaintiff then brought suit against Textron, Inc. alleging that it was the supplier of a negligently designed and dangerously defective product.

[93] *Id.* at 328.

[94] 543 F.2d 22 (7th Cir. 1976).

[95] 433 F. Supp. 326. Two other courts have adopted similar positions under analogous facts, each court incompletely analyzing the facts by not making a finding whether the product was sold to the general public. 359 N.E.2d 544 (relying upon and adopting Kottis v. United States Steel Corp., 543 F.2d 22 (7th Cir. 1976)); Taylor v. Pfaudler Sybron Corp., 150 N.J. Super 48, 374 A.2d 1222 (1977) (plaintiff argued the enterprise theory of liability that a plaintiff employed by one enterprise and injured by another may still bring suit against the "third party" notwithstanding the fact that both are divisions of a single legal entity.) *See also* Davis, *supra* note 76.

when the plaintiff fails to develop his product liability allegations in dual capacity cases. The second or dual obligations of the employer do not arise when the machine or product is supplied solely for the use of employees. That was the common law duty of the employer at the time workmen's compensation statutes were enacted. The dual obligations arise when the employer supplies the machine or product to consumers, the general public, and also supplies it to employees.[96] A California court was quick to point out this precise issue to plaintiff's counsel when they failed to allege that the product involved was sold or placed in commerce other than to employees.[97] The court went on to correctly state that the supplying of tools to employees is an integral and auxiliary activity to the firm's principal manufacturing operation.[98]

A more difficult issue is presented where the employer purchases a machine from a third party to install in its production facility and subsequently alters or modifies the machine. This factual situation arose in *Rosales v. Verson Allsteel Press Co.*,[99] where the employee attempted to avoid the exclusive remedy bar asserted by defendant.[100] Plaintiff stressed that defendant, as "quasi-manufacturer" of the punch press, assumed a dual obligation thereby being liable at common law. The majority opinion avoided the issue by stating, "[t]he continued effectiveness of the workmen's compensation scheme depends upon the continued ability to spread the risk of such losses . . . . If employers are required to provide not only workmen's compensation, but also to defend and pay in common law actions, their ability to spread such risks through reasonable insurance premiums is threatened. Any exceptions to the exclusive remedy provision . . . which allow that provision to be circumvented must be strictly construed . . . ."[101] Plaintiff argued that the risk was not one associated with the master-servant

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[96] An employer-manufacturer really depends on the blind luck of the injured party being an employee, thus limiting recovery to workmen's compensation benefits, rather than a strict product liability action by an injured consumer where the recovery is designed to make the injured party whole, such recovery having been designed to serve societal interests. Fortuitous circumstances should not govern the law in these situations. *See* 49 Ohio App. 2d 279, 361 N.E.2d 492.

[97] Williams v. State Compensation Ins. Fund, 50 Cal. App. 3d 116, 123 Cal. Rptr. 812 (1975). The complaint did not allege that the employer manufactured the product as a separate business enterprise, the complaint "admitted" that the machine was manufactured for use by the employees during the course of employment.

[98] *Id.*

[99] 41 Ill. App. 3d 787, 354 N.E.2d 553 (1976).

[100] *Id.* During the scope of his employment the plaintiff was injured by a dangerous condition created by the employer modifying the two-safety control on a press, thereby becoming a quasi-manufacturer of the press. The employee further alleged that the employer modified the press for economic reasons and such act was willful and wanton. The employee also accepted workmen's compensation benefits from the employer-defendant.

[101] *Id.*

relationship with which workmen's compensation statutes dealt, but concerned the risk of being the manufacturer of a product. The court stated that the employer does not sell punch presses, it only provides them for employees, thereby being an incident of the employment relationship which would not create legal obligations to the general public.[102] The court reasoned that sustaining the dual capacity doctrine under these circumstances would in effect abrogate the exclusive remedy provision for all employers when they furnish tools to their employees.[103]

This reasoning is incorrect because logically there are four situations which would allow other remedies when the employer furnishes tools to the employee. The first situation exists when the employer manufactures tools for the sole use of employees; the dual capacity doctrine has no application in this instance. A second situation exists when the employer may manufacture tools both for employees and for sale to the general public, thus assuming a dual obligation. Thirdly, the employer may purchase tools from a third party, and if defective, the employee using them may recover both workmen's compensation *and* from the third party at common law. Finally, the employer may purchase tools from a third party which may either be latently defective or not fit for their purpose and then modify the tools making them unreasonably dangerous to the employee.

In the fourth situation, if the tool was hazard-free when purchased and the employer modified it causing it to become defective, the employer has robbed the employee of an obligation which the third party manufacturer owed the employee.[104] By the employer's act in modifying or removing a safety device, a defense may have been created for the third party manufacturer. The employer's act may be considered as constituting an intervening and superseding cause relieving the third party manufacturer from liability.

In this fourth situation a number of inequitable results may occur. A jury may slant the issues of defect and proximate causation when forced to choose between a wealthy manufacturer and the injured worker. A further injustice may occur in that once the worker recovers, the employer will then be subrogated to the employee's action to the extent of his share of any workmen's compensation payments made. Thus, the employer stands a chance to be "rewarded" by his own wrongful conduct. Further problems occur between the manufacturer and the employer in the areas of contribution between the joint tortfeasors and exactly how the loss may be distributed equitably.

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[102] *Id.*

[103] *Id.*

[104] *Id.* (dissenting opinion).

In *Rosales* the fourth situation was present and the court feared that it would open the floodgates to the docket[105] so its decision was rendered without completely analyzing all four situations. The majority further retreated to the safe confines offered by the "but for" test.[106] The majority also held that the fact that the safety device was modified for economic reasons would not aid plaintiff. In the absence of a deliberate intent to injure workers, the removal of a safety device "for the sole purpose of increasing . . . production for greater increments and profits" is within the purview of employers' acts which the workmen's compensation remedies were designed to cover.[107]

In the dissenting opinion, Justice Simon argued that the employer's reprehensible conduct of reconstructing equipment manufactured by others, thereby increasing the worker's risk for the employer's profit, should make the employer liable as quasi-manufacturer.[108] Justice Simon summed up the fourth hypothetical situation by stating:

> The characterization of any employer as acting in the capacity of a "quasi-manufacturer" can be limited to instances where his own alteration of tools or machines manufactured by others removes equipment designed to protect users against injury. In these situations the employer should be held responsible to his employees if his conduct makes the machine more dangerous than when it was manufactured. I would not extend the *quid pro quo* justification for the exclusive remedy provision explained in the majority opinion to deprive an employee as a condition of an employment relationship of the protection afforded him by the strict product liability doctrine.[109]

The fourth hypothetical situation is so very similar to the pre-workmen's compensation duties of providing the employees with safe tools that perhaps only jurisdictions which have adopted the strict product liability doctrine may make the fine distinction involved. Previously, the employee would have to prove negligence in manufacture or design in order to hold the manufacturer liable. Under strict product liability the employee must only prove a defect exists and that the defect proximately caused his injury. In the situation where the employer removes the safeguard and creates a

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[105] *Id. citing* 66 Mich. App. 273, 238 N.W.2d 837.

[106] *Id.* at 790, 354 N.E.2d at 557. "Plaintiff's injuries could not have possibly happened *but for* the fact that he was employed by defendant as a punch press operator." (emphasis added).

[107] *Id.* at 791, 354 N.E.2d at 558 *citing* Santiago v. Brill Monfort Co., 11 A.D. 2d 1041, 20, 5 N.Y.S.2d 919, *affirmed,* 10 N.Y.2d 718, 219 N.Y.S.2d 266 (1960).

[108] *Id.* (dissenting opinion), "I disagree with the majority in that I do not regard as an incident of the employment relationship conduct of an employer which intervenes to deprive an employee of protection the law obligates the manufacturer of a product to provide."

[109] *Id.* To preserve the protection that the strict product liability doctrine offers, the dissent would depart from the *Santiago* rationale.

defect he robs the employee of the obligations owed by the manufacturer. Can the employer withhold these protections owed to employees?

Workmen's compensation statutes were enacted to prevent the injustices the employee often suffered at the hands of the judiciary's interpretation of the common law. Here the judiciary is again protecting the employer from the emasculation of the exclusive remedy provision and protecting itself from its fears of a deluge of complaints descending upon it. Will the legislature be forced to step in again to protect the employee?

B. *Immunity when the Employment Relationship Predominates*

One decision is often cited and relied upon for the principle allegedly stated in its holding that the employee is relegated to the exclusive remedy of workmen's compensation benefits where the employment relationship predominates over all other circumstances in the causation of the injury.[110] In *Kottis*[111] the plaintiff brought suit against the employer in its capacities as owner of the land and manufacturer of defective equipment. The employer was granted summary judgment by the district court from which the employee's estate appealed. Analyzing this decision carefully, the authoritativeness of the holding dissipates. Judge Tone seems to realize that workmen's compensation statutes were meant to correct the injustices suffered by the employees under the master-servant doctrine as interpreted by the courts, but he then changes plaintiff's argument to be one alleging only that the employer failed to provide a safe place to work, "one of the most important grounds for master-servant actions at common law.[112]

Perhaps the judge is correct in changing the argument as to the alleged "owner-dual capacity," but he defeats the reasoning of his own argument when he characterizes the alleged "manufacturer-dual capacity" as involving the master-servant relationship. Clearly the duties imposed on manufacturers today have drastically changed since the inception of workmen's compensation statutes. In fact, for the most part the manufacturer's liability has been judicially created after the workmen's compensation statutes were enacted.

The majority of state jurisdictions now apply the doctrine of strict product liability, and a growing trend is to apply the enterprise theory of liability. Keeping this in mind, the court's holding as to employer's capacity as manufacturer is surely not supported by its statement that:

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[110] 543 F.2d 22. The employee was killed while performing his duties as a craneman during the course of his employment.

[111] *Id.* at 24. The court in a footnote pointed out that the district court found that the employer was not the manufacturer of the equipment.

[112] *Id.* at 26.

> The remedies of the act should extend to all situations where the employee would have his remedy at common law if there was no act, and the act should be so construed where its language reasonably permits such a construction, since the general purpose of the act was to substitute its provisions for pre-existing rights and remedies.[113]

Notwithstanding subsequent decisions which cite the *Kottis* decision as "thoroughly analyzing and accurately applying" the exclusive remedy provision,[114] it appears that the court in *Kottis* felt that to decide otherwise would devastate the workmen's compensation scheme, so the court refused to pick up the guiding "lantern as they made their *Erie* way."[115]

One court has gone even further in extending the quid pro quo of the exclusive remedy provision by holding that the employee's cause of action must be entirely unrelated or only incidentally involved.[116] In *Neal v. Roura Iron Works, Inc.*, the employee, a drill press operator, brought suit against the employer as vendor of work gloves claiming they were unfit for the purpose purchased, such purpose being known to the employer-vendor.[117]

The court set forth a three-prong test for determining when the exclusive remedy provision precluded the employee from bringing a common law action: the first question is if the injury arose out of the course of employment; the second, whether the action is for personal injuries, and finally, is the suit based upon the employer-employee relationship?[118] The court answered all three questions affirmatively thereby precluding the employee's action. The court felt that to hold otherwise would emasculate the exclusive remedy provision.[119] It seems that the quid pro quo rationale in this jurisdiction would strip the employee of the protection of his implied warranties in law when the vendor is also the employer and the injury occurs during the scope of employment. Did the legislature intend this result when workmen's compensation statutes were enacted?

### C. *Employee's Status versus Employer's Capacity*

In a recent decision, *Winkler v. Hyster Company,* the court looked

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[113] *Id.* at 24, *citing* North v. United States Steel Corp. 495 F.2d 810, 813 (7th Cir. 1974).

[114] 359 N.E.2d 544, 545.

[115] Ford Motor Co. v. Mathis, 322 F.2d 267, 272 (5th Cir. 1963). In *Kottis* the court approached the dual capacity issue as one of first impression, and stated that if the adoption of the doctrine is to occur, "its author should be a court of the State of Indiana, not a federal court, whose duty is to apply state law as it appears to have been laid down by the courts of the state." 543 F.2d at 26.

[116] 66 Mich. App. 273, 276, 238 N.W.2d 837, 840 (1975).

[117] *Id.* at 274, 238 N.W.2d at 838. The employee lost his arm when his glove became entangled in the drill press.

[118] *Id.*

[119] *Id.* The accident could not possibly have happened *but for* the fact that he was employed as a drill press operator.

exclusively at the employee's status and ignored the employer's capacity.[120] The court rejected plaintiff's theory "that the manufacturer of the equipment created a duty to all who might be affected by its use, that it be free of defect, and that without relation to his status as an employee, he was one of those to whom the duty was owed."[121] The court felt that the employer owed the employee a duty to provide safe equipment whether the equipment was purchased or the employer manufactured it himself.[122] As so construed, the plaintiff's action was determined to be only for a safe place to work and safe tools to use. The court reasoned that the workmen's compensation statutes covered this. This reasoning allows the employer-manufacturer immunity from a duty that a third party-manufacturer would be liable for breaching. Such judicial legislating expands the workmen's compensation benefits to the employer while the employee loses more rights. In *Winkler*, the majority reasoned that the workmen's compensation statute abrogated all rights, not only those which were in existence prior to the enactment, but also those created after, such as rights arising out of strict product liability.[123] If the courts are allowed to give employers immunity to all newly developed causes of action and rights of employees the legislative balance will be forever lopsided in favor of employers. The legislature clearly never intended this result and the courts should not imply such a result except where there is clear legislative intent to do so.

## CONCLUSION

The arguments for the dual capacity doctrine merit approval and the arguments rejecting the doctrine fail because of their incomplete legal analysis. The doctrine's application to product liability cases is evident because of the employer's manifest distinct obligations involved. Complete factual analysis is required in the product liability arena, but the analysis creates the same burden required of the courts by many other types of cases. The courts' fear of opening the floodgates to the docket should not override the courts' duty to decide these cases justly and logically. The situation where the employee claims to have been injured by a product which the employer-manufacturer has produced for sale to the general public should arise infrequently. Thus, the courts' fear should be allayed.

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[120] 54 Ill. App. 3d 282, 369 N.E.2d 606. The employee was injured during the course of his employment when cargo fell from a fork lift truck upon him. The truck was manufactured in the ordinary course of business for sale to the public. Plaintiff asserted that the fork lift was defectively designed.

[121] *Id.* The court reviewed *Gallo Winery* but was not persuaded by its reasoning.

[122] *Id.*

[123] *Id. But see* dissenting opinion *quoting* Moushon v. Nat'l Garages, Inc., 9 Ill. 2d 407, 411, 137 N.E.2d 842, 844, *appeal dismissed,* 354 U.S. 905 (1956). "The act was designed as a substitute for *previous rights of action* of employees against employers and to cover the whole ground of liabilities of the master, and it has been so regarded by all courts."

Furthermore, the dual capacity doctrine will benefit the needs of society when applied in the product liability situation, in that the manufacturer will not escape his culpable conduct. The mere circumstance that one of his employees suffered injury rather than a consumer should not allow a manufacturer to escape liability. Legal reasoning should govern these situations instead of a plaintiff's blind luck.

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