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DUAL CAPACITY LIABILITY AND CO-EMPLOYEE COMPANY PHYSICIANS: UNDERMINING THE INTEGRITY OF THE WORKERS' COMPENSATION SYSTEM

Workers' compensation statutes[1] provide prompt, guaranteed payments to employees injured on the job in exchange for granting employers immunity from common-law tort actions associated with compensable injuries.[2] The injured party is assured payment for medical care without having to prove fault or combat charges of contribu-

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[1] Although these statutes were originally (and sometimes still are) referred to as workmen's compensation laws, the gender-neutral term "workers' compensation" is more appropriate because women make up 45% of the current work force. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1990, at 389 (1990).

[2] Snyder v. Congoleum/Kinder, Inc., 664 F. Supp. 975, 976 (E.D. Pa. 1987). Workers' compensation statutes speak clearly of this immunity. *See, e.g.*, PA. STAT. ANN. tit. 77, § 481(a) (Purdon Supp. 1989) ("The liability of an employer under this act shall be . . . *in place of any and all other liability* . . . .") (emphasis added); COLO. REV. STAT. § 8-41-102 (Supp. 1990) (employer immunity extends to "all causes of action, actions at law, suits in equity, proceedings, and statutory and common law rights and remedies for and on account of . . . death of or personal injury to any . . . employee" unless specifically excepted by other provisions of this statute).

In order to preserve both the concept and the practice of employer immunity for compensable injuries, statutory exceptions specifically removing a workplace injury from workers' compensation coverage, and thus eliminating the employer's exemption from suit for that injury, are usually narrowly drawn and narrowly construed. *See, e.g.*, PA. STAT. ANN. tit. 77, § 411(1) (Purdon Supp. 1990) (workers' compensation act not applicable to workplace injury "caused by an act of a third person intended to injure the employe [sic] because of reasons personal to him, and not directed against him as an employe [sic] or because of his employment"), as well as the construction of this provision in a case involving perhaps the ultimate on-the-job "injury," murder. Brooks v. Marriott Corp., 361 Pa. Super. 350, 356, 522 A.2d 618, 621 (1987) (to remove injury from compensation coverage and thus create employers' liability outside of the workers' compensation statute, plaintiff would have to prove that the murderer had "personal animus" against the victim and that this was the motive for the murder).

Courts have crafted judicial exceptions granting an employee recourse to common-law tort action against his employer in a few, highly specific situations involving egregious behavior of the employer. One example is illegal employment of a minor. *See* Blancato v. Feldspar Corp., 203 Conn. 34, 43, 522 A.2d 1235, 1240 (1987). *But see* O'Rourke v. Long, 41 N.Y.2d 219, 223, 359 N.E.2d 1347, 1351, 391 N.Y.S.2d 553, 557 (1976) (illegal employment of a minor does not remove employer from scope of workers' compensation law; rather it imposes double damages on employer; N.Y. WORK. COMP. LAW § 14(a) (Consol. Supp. 1989)). Another example is an employer's commission of an intentional tort. *See* Jett v. Dunlap, 179 Conn. 215, 217, 425 A.2d 1263, 1264 (1979). *But see* Poyser v. Newman & Co., 514 Pa. 32, 38, 522 A.2d 548, 551 (1987) (court refused to create an exception for employer's wilful and wanton behavior because Pennsylvania legislature had not seen fit to put intentional tort exception in its workers' compensation statute—as had legislatures of other states).

tory negligence.[3] In return, the statutes limit the dollar amount of the employees' recovery[4] and provide that the compensation award will be the exclusive workplace remedy,[5] although injured employees do retain their right to sue third parties whose negligence causes their injury.[6] Compensation laws thus represent a compromise in which each party surrenders certain benefits to gain others.[7]

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[3] 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 1.10 (1990). In describing a typical compensation act, Larson explains that "negligence and fault are largely immaterial, both in the sense that the employee's contributory negligence does not lessen his rights and in the sense that the employer's complete freedom from fault does not lessen his liability." *Id.*; *see, e.g.*, CAL. LAB. CODE § 3600 (West 1989) (liability for workers' compensation "shall, *without regard to negligence*, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment") (emphasis added); N.Y. WORK. COMP. LAW § 10 (Consol. Supp. 1989) (all employers shall "pay or provide compensation for their [employees'] disability or death from injury arising out of and in the course of the employment *without regard to fault as a cause of the injury*") (emphasis added). State constitutions give state legislatures the power to enact workers' compensation laws without regard to fault. *See, e.g.*, CAL. CONST. art. XIV, § 4 (empowering the legislature "to create, and enforce a complete system of workers' compensation . . . and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability . . . *irrespective of the fault of any party*") (emphasis added); N.Y. CONST. art. I, § 18 ("Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for . . . the payment . . . by employers . . . of compensation for injuries to employees . . . *without regard to fault* as a cause thereof . . . .") (emphasis supplied).

[4] 1 A. LARSON, *supra* note 3, § 2.50; *see* Note, *Dual Capacity in California: A Premature End to an Equitable Doctrine?*, 59 S. CAL. L. REV. 205 (1985). States may limit compensation payments not only by establishing basic formulas for determining awards, but by establishing the maximum amount of earnings toward which that formula may be applied. For example, if the basic statutory formula for computing the amount of compensation is two-thirds of actual earnings, and the cap on earnings which may be considered is $294 per week, the most any injured worker could receive as compensation benefits would be $196 per week (2/3 x $294). Note, *supra*, at 208 n.19.

[5] Comment, *The Dual Capacity Doctrine: Piercing the Exclusive Remedy of Workers' Compensation*, 43 U. PITT. L. REV. 1013, 1014 (1982). All state and federal workers' compensation statutes contain an exclusivity provision. *See, e.g.*, Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905 (1988) ("The liability of an employer [under this act] . . . shall be exclusive and in place of all other liability of such employer to the employee . . . ."); CAL. LAB. CODE § 3602(a) (West 1989) (when conditions for coverage under the act are met, "the right to recover such compensation is . . . the sole and exclusive remedy of the employee or his or her dependents against the employer"); CONN. GEN. STAT. ANN. § 31-284(a) (West 1987) ("All rights and claims . . . arising out of personal injury or death sustained in the course of employment . . . are abolished other than rights and claims given by this chapter . . . .").

[6] 1 A. LARSON, *supra* note 3, § 1:20; *see, e.g.*, CAL. LAB. CODE § 3852 (West 1989) (the workers' compensation claim of an employee "does not affect his or her claim or right of action for all damages proximately resulting from the injury or death *against any person other than the employer*") (emphasis added); GA. CODE ANN. § 34-9-11 (1988) (the rights and remedies of an employee under workers' compensation are exclusive, except "that no employee shall be deprived of any right to bring an action against any third-party tort-feasor").

[7] Ducote v. Albert, 521 So. 2d 399, 403 (La. 1988). In addition, the Third Circuit has described workers' compensation schemes as operating

> on a law of averages. In some instances where he could prove negligence, an employee may receive less compensation than he would recover in damages in a com-

In a similar manner, co-employees may be granted statutory immunity if they injure a fellow worker.[8] Thus, if an employee attempts to maintain a medical malpractice action against a co-employee company doctor, statutory co-employee immunity should generally protect the physician.[9] Co-employee immunity is based primarily on the same trade-off—relinquishing potentially larger tort remedies for quick and certain limited (and exclusive) payment.[10] In addition, this trade-off also protects co-employees from the potentially devastating financial results of suits brought by their fellow workers for accidental, on-the-job injuries.

Because tort law, unlike workers' compensation statutes, permits awards for pain and suffering and for punitive damages, and because juries evaluating common-law claims are not bound by statutory schedules limiting allowable payments,[11] injured employees have attempted to circumvent the exclusive workers' compensation rule and gain access to tort remedies[12] which offer the potential for full recovery. One legal theory they have used in such attempts has been the dual capacity doctrine which exploits the third-party exception to exclusive awards.[13] The dual capacity doctrine assumes that an individual can act in two or more capacities, each with separate and distinct duties and obligations. In medical malpractice actions against co-em-

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mon law suit. In other situations, an employer may have to pay compensation where he would not be liable for any sum at common law. Despite inequities in specific cases, the underlying assumption is that, on the whole, the legislation provides substantial justice.

Weldon v. Celotex Corp., 695 F.2d 67, 70 (3d Cir. 1982).

[8] Deller v. Naymick, 342 S.E.2d 73, 76 (W. Va. 1985); *see, e.g.*, CONN. GEN. STAT. ANN. § 31-293a (West 1987) (if an employee is entitled to workers' compensation benefits, "such right shall be the exclusive remedy . . . and no action may be brought against such fellow employee"); W. VA. CODE, § 23-2-6a (1985) (immunity from liability extends "to every officer, manager, agent, representative or employee of such employer when he is acting in furtherance of the employer's business").

[9] Rothstein, *Employee Selection Based on Susceptibility to Occupational Illness*, 81 MICH. L. REV. 1379, 1482 (1983). Most states have statutes that forbid, in some manner, co-employee suits for work-related injury. Ross v. Schubert, 180 Ind. App. 402, 405 n.3, 388 N.E.2d 623, 626 n.3 (1979). For specific statutory exclusions to co-employee immunity, see *infra* notes 119-20 and accompanying text. In those states which do not have co-employee immunity statutes, company physicians are vulnerable to suits brought by fellow workers. Rothstein, *supra*, at 1482 n.677.

[10] *Ducote*, 521 So. 2d at 403.

[11] *See* Stillman & Wheeler, *The Expansion of Occupational Safety and Health Law*, 62 NOTRE DAME L. REV. 969, 1005 (1987); Comment, *supra* note 5, at 1016-17.

[12] Stillman & Wheeler, *supra* note 11, at 1003.

[13] Comment, *supra* note 5, at 1017.

The dual capacity doctrine is premised on the fact that an employee retains his right to sue a third-party tortfeasor regardless of the existence of the workers' compensation remedy. A third-party tortfeasor's relationship to an injured worker is the same as that between any two parties to a common law suit. Thus an em-

ployee company physicians, for example, the doctrine holds that the company doctor has a dual legal personality, that of physician and that of co-employee.[14] If his improper conduct is said to arise out of the physician-patient relationship rather than in the course of ordinary employment, the physician can be prohibited from invoking the co-employee tort immunity provisions of a workers' compensation statute.[15] However, because the company physician is also an employee serving the same employer, the injury would remain covered by workers' compensation.

The main reason put forth for applying the dual capacity doctrine to claims involving injuries attributed to company physicians is to place employees treated by co-employee doctors on an equal footing with those treated by third-party physicians.[16] Nevertheless, to permit such suits undermines the intent of workers' compensation systems to provide guaranteed benefits to injured employees in exchange for relinquishing rights to tort actions against others in the same employ.[17] Americans today accept the *quid pro quo* of workers'

> ployer [or co-employee] who causes injury to an employee through acts taken in a capacity outside the employment relationship is likened to a third party.

Id.

The verb "exploits" is used in the text because the dual capacity doctrine utilizes the third-party exception in a manner in which it was not intended to be used. The phrase used in most workers' compensation statutes to describe a third party is someone "not in the same employ." *See* N.Y. WORK. COMP. LAW § 13(c) (Consol. Supp. 1989). The plain language of this definition does not incorporate either an employer or a company-employed physician.

[14] Hoffman v. Rogers, 22 Cal. App. 3d 655, 99 Cal. Rptr. 455 (1972) (employee not only entitled to workers' compensation benefits but also permitted to bring malpractice action against co-employee company physician who allegedly aggravated a hernia condition which had its inception in an industrial accident).

[15] Ducote v. Albert, 521 So. 2d 399, 404 (La. 1988). The court reasoned that while a company physician may be an employee to the company, when he "treats a patient he treats the patient as a doctor," assuming all the special duties and obligations of the practice of medicine. The line dividing a company doctor's behavior resulting from a physician-patient relationship and that occurring in the course of ordinary employment is far from clear, and, in fact, most jurisdictions contest its existence. *See, e.g.*, Deller v. Naymick, 342 S.E.2d 73, 78 (W. Va. 1985) (holding such a distinction "untenable").

[16] Duprey v. Shane, 39 Cal. 2d 781, 249 P.2d 8 (1952) (superseded by statute in 1982, *see infra* notes 81 and 152 and accompanying text); Wright v. District Court, 661 P.2d 1167, 1168 (Colo. 1983).

[17] Jenkins v. Sabourin, 104 Wis. 2d 309, 311 N.W.2d 600 (1981). The provisions of the workers' compensation statutes represent

> a delicate balancing of the interests represented in our industrial society. . . .
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> . . . .
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> New liabilities on employers or employees should not be imposed by courts without compelling and well understood reasons. While a tort remedy could be beneficient [sic] and just in a particular case, such precedent, unless carefully considered from the viewpoint of general state policy, could well gut the Workers Compensation Act, create injustice, and substantially impair the exclusivity-of-remedy provision . . . .

compensation as a "fixed feature of the civil justice scene—so essential and obvious as to be beyond policy debate."[18]

This Note examines the insidious and inconsistent development of dual capacity liability in permitting negligence claims against co-employee company physicians. Part I surveys the social, economic, and historical reasons for instituting a no-fault workers' compensation scheme, as well as current reasons for attempts to escape the restraints of its exclusive remedy. Part II explores the rationales courts have employed (1) to uphold the dual capacity theory in medical malpractice actions against co-employee company doctors and (2) to reject the concept. Part III discusses the judicial responses to the related problem of dual capacity liability in medical malpractice actions against employers, as contrasted to co-employees. Part IV proposes that the dual capacity doctrine be abandoned in medical malpractice actions against co-employee company doctors, offers sound policy reasons for its rejection, and suggests statutory amendment to preclude judicial legislation. This Note concludes that there is little basis in law or logic for applying dual capacity liability to a co-employee company physician.

I. THE ORIGIN OF WORKERS' COMPENSATION

Workers' compensation systems developed in response to social and legal pressures that arose during the late nineteenth century as society became increasingly industrialized. Industrialization created an unprecedented number of work-related injuries.[19] At the same time, uncertainty and confusion pervaded the court-made law of master and servant,[20] leading to few cases being brought by employees against their employers, with far fewer being won.[21] As a result, large numbers of injured workers and their dependents had to be supported as public charges.[22]

Id. at 322-23, 311 N.W.2d at 607.

18 L. DARLING-HAMMOND & T. KNIESNER, THE LAW AND ECONOMICS OF WORKERS' COMPENSATION at vi (1980).

19 L. DARLING-HAMMOND & T. KNIESNER, *supra* note 18, at ix. With the advent of the Industrial Revolution, workers moved from the countryside to large cities where they went to work in large factories, subject to injuries caused by defective machinery, poor plant design, and lack of instruction and supervision. H. BRADBURY, BRADBURY'S WORKMEN'S COMPENSATION AND STATE INSURANCE LAW OF THE UNITED STATES at xiv (1912).

20 H. BRADBURY, *supra* note 19, at ix-xiii. Uncertainty and confusion in the administration of the law as it related to the liability of the master for work-related injuries revolved not only around determinations of which workers were to be compensated and the amount and sources of damages to be awarded, but the ability to enforce those awards that were made.

21 W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 573 (5th ed. 1984).

22 The estimated number of work-related injuries which went uncompensated around the turn of the century was "shockingly high." Compensated injuries reportedly accounted for

Reform movements arose to combat the lack of remedies for injured workers, and as a result, first in Europe and then in the United States, statutory provisions without reference to fault replaced doctrines of assumption of risk, contributory negligence, and the fellow-servant rule.[23] Abolition of this trio of defenses facilitated compensation awards to injured workers, transferring the burden of economic loss from employees[24] and society in general, to employers who were expected to add it to their costs and pass it on to their own consumers.[25] Workers' compensation statutes thus shifted the basic test for liability in workplace injuries from fault to the worker's employment status.[26]

Workers' compensation programs create a mechanism[27] assuring

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less than 15% of the total. Mitchell, *Products Liability, Workmen's Compensation and the Industrial Accident*, 14 DUQ. L. REV. 349, 351 n.13 (1976).

23 W. KEETON, *supra* note 21, at 568-572. The common-law responsibilities of a master (employer) to his servant (employee) were limited to using reasonable care in providing a safe workplace, safe equipment, a sufficient number of suitable fellow servants, and warnings of dangers of which the employee might not reasonably be aware. An employee's chance of recovering if injured at work was, however, greatly restricted, not only because of the need to prove that the employer had failed to use proper care, but by the broad application of the "unholy trilogy" of common-law defenses: the fellow-servant rule, contributory negligence, and assumption of risk. *Id.* at 569.

The fellow-servant rule held that an employer could not be held liable for an employee's injuries if caused by a co-worker, purportedly because an employee was as likely as the employer to know of such risks and equally able to protect against them. This rule was also promoted as a safety measure in that it would serve to make all workers watchful of the behavior of all others for their own protection. *Id.* at 571.

The contributory negligence doctrine made the worker shoulder the entire burden of a work-related injury if there was but a momentary lapse of care on his part, irrespective of whether the employer's negligence contributed to the injury. In addition, courts not only presumed that workers assumed all risks outside the scope of the specific common-law obligations of employers, but also generously implied waivers of the right to recovery in a wide range of job-related situations, as when an employee continued to work with knowledge of a dangerous condition. Reluctance to assume such risk was no excuse. Thus, courts held employees had assumed risks even though they remained at work under protest or threat of being fired. *Id.* at 569-71.

24 The three common-law defenses usually relieved the employer of liability. 1 A. LARSON, *supra* note 3, § 4.30.

25 W. KEETON, *supra* note 21, at 573.

26 Cudahy Packing Co. v. Parramore, 263 U.S. 418 (1923).

> Workmen's Compensation legislation rests upon the idea of status . . . that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes his capital . . . . 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.

Id. at 423.

27 Every employer who is subject to state or federal workers' compensation law must secure compensation for his employees. This involves procuring one of several types of insur-

workers who suffer employment-related[28] injury both cash benefits, as partial replacement of lost wages, and provision for medical care related to that injury.[29] Unlike tort law, however, workers' compensation is not intended to restore to the worker all that he has lost. Rather, workers' compensation payments are calculated to enable the injured worker to exist without being a burden to others during his period of disability—but, at the same time, without "dulling his incentive to return to the labor force."[30] Because compensation awards are thus often little higher than that which would keep a worker from "destitution,"[31] and because a tort remedy offers the potential for full recovery of injury-associated losses,[32] expanding the tort liability of employers—and of co-employees—has great appeal for injured workers. Employees who have sustained job-related injuries have therefore attempted to file claims which tend to enlarge the area within which the exclusivity of workers' compensation does not apply,[33] while re-

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ance, or, in the alternative, obtaining permission to be self-insured. *See, e.g.*, N.Y. WORK. COMP. LAW § 11 (Consol. 1982). Certain categories of workers, including farm hands, domestic servants, self-employed individuals, employees of small businesses, and persons employed by charitable organizations, are not subject to workers' compensation laws, but almost 90% of American employees currently enjoy workers' compensation benefits. L. DARLING-HAMMOND & T. KNIESNER, *supra* note 18, at x; Rothstein, *supra* note 9, at 1481.

28 Workers' compensation statutes generally define the employment relationship by using the terms "arising out of" and "in the course of" employment. These terms, however, are terms of art, subject to interpretation by the courts. In general, "in the course of employment" refers to "the time, place and circumstances of the injury," and "arising out of the employment" relates to "the requisite causal connection between the injury and the employment." McNeil v. Diffenbaugh, 105 Ill. App. 3d 350, 352, 434 N.E.2d 377, 380 (1982).

29 1 A. LARSON, *supra* note 3, § 1.00.

30 L. DARLING-HAMMOND & T. KNIESNER, *supra* note 18, at xv.

31 1 A. LARSON, *supra* note 3, § 2.50.

32 L. DARLING-HAMMOND & T. KNIESNER, *supra* note 18, at xv.

33 The state workers' compensation boards, not the courts, have primary jurisdiction for determining the applicability of workers' compensation law to any work-related situation. O'Rourke v. Long, 41 N.Y.2d 219, 359 N.E.2d 1347, 391 N.Y.S.2d 553 (1976). Courts do not have the authority to hear causes of action without prior determination by the boards unless it is clear that a relationship unrelated to employment exists between the parties. Jones v. General Motors Corp., 136 Mich. App. 251, 355 N.W.2d 646 (1984). When federal workers' compensation is involved, district courts lack jurisdiction if there is "a substantial question of coverage" under the Federal Employees Compensation Act (FECA), 5 U.S.C. § 8145 (1988); *see also* McCall v. United States, 680 F. Supp. 283, 284-85 (S.D. Ohio 1987) (malpractice action permitted because there was no substantial question of coverage under FECA).

If a decision is pending before a board, it has been held "inappropriate" for a court to express its views prior to the board's determination. *See, e.g.*, Botwinick v. Ogden, 59 N.Y.2d 909, 911, 453 N.E.2d 520, 521, 466 N.Y.S.2d 291, 292 (1983). On the other hand, the boards have discretion to make a decision even when a private lawsuit is pending in the courts. *O'Rourke*, 41 N.Y.2d at 227-28, 359 N.E.2d at 1354, 391 N.Y.S.2d at 560.

The decisions of the boards are final, unless reversed or modified on appeal. However, a board's findings are rarely set aside. *O'Rourke*, 41 N.Y.2d at 227, 359 N.E.2d at 1353, 391 N.Y.S.2d at 559-60. Whenever the issue of employment hinges on questions of fact or mixed questions of fact and law, as is generally the case, courts give great deference to the boards'

taining, whenever possible, workers' compensation benefits. This has led to substantial judicial interpretation and manipulation, with one such area of expansion being the application of dual capacity liability in medical malpractice claims arising from work-related injuries.[34]

II. THE EVOLUTION OF DUAL CAPACITY LIABILITY

The courts first utilized dual capacity liability in the employment setting in *Duprey v. Shane*, a 1952 medical malpractice action brought by a nurse who was injured at work.[35] Although she recovered workers' compensation benefits, the nurse-employee was permitted to maintain a malpractice action against her chiropractor employer who allegedly had treated her injury in a negligent manner. The court reasoned that the employer's decision to treat the employee established a second relationship between the two parties—that of doctor-patient in addition to employer-employee.[36] The dual capacity theory was necessary to circumvent the exclusivity of workers' compensation since employers, as employers, cannot be found liable to their employees in tort.[37] Therefore, a new status had to be fashioned—one which created duties and obligations separate and distinct from those of employer.[38] The status of treating practitioner fit the bill.

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decisions. Firestein v. Kingsbrook Jewish Medical Center, 137 A.D.2d 34, 528 N.Y.S.2d 85 (2d Dep't 1988). Questions regarding the applicability of FECA are determined by the Secretary of Labor and his designees; their decisions in allowing or denying a claim are final and not subject to judicial review. Wright v. United States, 717 F.2d 254, 256 (1983); 5 U.S.C. § 8128 (1988).

34 W. KEETON, *supra* note 21, at 576-77. Another example of judicial interpretation is the relaxation of the "intent to injure" standard utilized to permit an employee injured on the job to invoke the intentional tort exemption to the exclusivity of workers' compensation awards. As a result, grounds such as gross negligence and fraudulent concealment of serious risks have supported tort recovery against employers.

35 Duprey v. Shane, 39 Cal. 2d 781, 249 P.2d 8 (1952). Duprey, a nurse who was employed by a chiropractic partnership in California, sustained arm and shoulder injuries when she attempted to break the fall of a patient who started to slip off the treatment table. In a malpractice action, Duprey alleged that subsequent treatment by one of the partners, Dr. Shane, and by one of the employees of the partnership, Dr. Harrison, aggravated her injuries and caused further disability.

36 *Id.* at 793, 249 P.2d at 15. Although the court utilized a dual capacity doctrine in permitting the malpractice action imposing liability on Dr. Shane, the employer, it skirted the issue in terms of Dr. Harrison, the co-employee, simply holding the latter liable as a joint tortfeasor. *Id.* at 793, 794-95, 249 P.2d at 15, 16.

37 Miller & Goldstein, *Double, Double, Toil and Trouble: Dual Capacity and Workers' Compensation in California*, 13 U. WEST L.A. L. REV. 111, 115 (1981). A few exceptions to statutory employer immunity have been codified. *See supra* note 2.

38 2A A. LARSON, *supra* note 3, §§ 72.81, 72.81(a), 72.81(c) (1989). An attempt must be made to circumscribe the term "dual capacity doctrine." A separate relationship or theory of liability, alone, is not sufficient. The second relationship must impose additional duties and obligations of a totally separate nature, completely unrelated to those of employment. *Id.* §§ 72.81, 72.81(a).

A. *Dual Capacity for Co-employee Physicians*

For several decades, the dual capacity doctrine slumbered, posing no significant threat to the workers' compensation system.[39] Then, in the seventies and eighties it reemerged, this time with the practitioners' dual capacity applied to their role as co-employee as well as employer.[40] Thus, the dual capacity doctrine expanded from the practitioner-employer liability of *Duprey v. Shane*[41] to incorporate co-employee company doctors as well.[42] These cases held that although company physicians were in one sense co-employees of the injured workers they might treat, they could still be subject to suit for malpractice because they occupied a second position with respect to injured employees they treated. The second position, that of medical doctor, carried with it duties and obligations beyond the scope of workers' compensation, because those duties and obligations were incurred within the physician-patient relationship, a relationship distinct from that of co-employee-employee.[43]

The first case to apply dual capacity logic to a co-employee company physician was also in California.[44] It relied heavily on the *Duprey*[45] reasoning that a physician-employer could be someone other than an employer within the meaning of the California Labor Code,[46]

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[39] *Id.* § 72.81(c).

[40] Hoffman v. Rogers, 22 Cal. App. 3d 655, 99 Cal. Rptr. 455 (1972). In utilizing the dual capacity doctrine to permit a malpractice suit against a co-employee company physician, the *Hoffman* court noted that in *Duprey v. Shane*, Duprey had won a tort recovery not only from her employer, Dr. Shane, but also from a co-employee, Dr. Harrison, who along with Dr. Shane, had treated her injuries. In finding Dr. Harrison liable, albeit as a joint tortfeasor, the court implicitly, though not explicitly, found a dual capacity for the co-employee practitioner. *See* Wright v. District Court, 661 P.2d 1167 (Colo. 1983); Ducote v. Albert, 521 So. 2d 399 (La. 1988).

[41] 39 Cal. 2d 781, 249 P.2d 8 (1952).

[42] *Hoffman*, 22 Cal. App. at 661, 99 Cal. Rptr. at 450; *Wright*, 661 P.2d 1167; *Ducote*, 521 So. 2d 399; *see also* Davis v. Stover, 184 Ga. App. 560, 562, 362 S.E.2d 97, 98 (1987) (although not using the term "dual capacity," the court referred to the "unique duty" a company physician owes others (quoting Downey v. Bexley, 253 Ga. 125, 126, 317 S.E.2d 523, 524 (1984)), *aff'd*, 258 Ga. 156, 366 S.E.2d 670 (1988).

[43] *Ducote*, 521 So. 2d at 400-01.

[44] *Hoffman*, 22 Cal. App. 3d at 662, 99 Cal. Rptr at 455 (court specifically utilized dual capacity doctrine to permit mechanic to maintain tort action against co-employee company physician).

[45] Duprey v. Shane, 39 Cal. 2d 781, 249 P.2d 8 (1952).

[46] The controlling provisions of the California Labor Code at the time of the *Duprey* decision were § 3601(a) ("Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is . . . the exclusive remedy against the employer for the injury or death") and § 3852 (providing that an employee injured in a work-related incident could seek damages against a "person other than the employer." CAL. LAB. CODE § 3601(a) (West 1989) and CAL. LAB. CODE § 3852 (amended 1970).

At the time of the *Hoffman* decision, § 3601(a) had been modified to read that workers'

extending this rationale to co-employees. No further cases explicitly held that a dual capacity liability pertained to company physicians until two cases in the 1980s—*Wright v. District Court*,[47] decided in 1983, and *Ducote v. Albert*,[48] decided in 1988. Both cases were frank examples of judicial legislation, with the reporting justices unabashedly outlining their policy reasons for imposing this new liability on company physicians, despite statutory or judicial support for co-employee immunity[49]—and despite the courts' admissions that both defendant physicians were indeed the injured parties' co-employees.[50]

In *Wright*,[51] the Supreme Court of Colorado held that a malpractice action against a co-employee company doctor was not barred,[52] reasoning that in rendering medical services, the company physician had undertaken duties and obligations separate from the employment relationship and thus assumed a role more like that of third party than co-employee. The court also declared this second role to be identical to that of a private practitioner to any patient. Since a private practitioner would be liable in tort to the injured worker, stated the court, so should the company doctor.[53]

The court justified its position as "not inconsistent with" the pol-

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compensation remedies were exclusive not only against the employer, but "against any other employee of the employer acting within the scope of his employment." *Hoffman*, 22 Cal. App. 3d at 660 n.2, 99 Cal. Rptr. at 458 n.2.

47 661 P.2d 1167 (Colo. 1983). Cobb, an employee of a brewing company, suffered back injuries in a work-related accident. In a malpractice suit against Dr. Wright, a full-time company physician, Cobb alleged that Wright misdiagnosed his injury and advised him to return to work before recovery was complete.

48 521 So. 2d 399 (La. 1988). Ducote, a factory worker, injured his wrist at work. Dr. Albert, a full-time company physician, diagnosed the injury as a sprain. When the wrist worsened during the following week, Albert referred Ducote to outside physicians who diagnosed the injury as torn ligaments and noted a 35% loss of function. Ducote brought a malpractice action against Albert, alleging misdiagnosis and mistreatment. *Id.* at 400.

49 Louisiana clearly incorporates co-employee immunity in its workers' compensation law. LA. REV. STAT. ANN. § 23:1032 (1985) ("The rights and remedies herein granted to an employee or his dependent on account of an injury [compensable under this statute] . . . shall be exclusive of all other rights and remedies . . . against his employer, or any . . . employee of such employer. . . ."). Colorado does not have a co-employee immunity provision in its workers' compensation statute. *See* COLO. REV. STAT. § 8-40-101 to -54-127 (1986). Nonetheless, Colorado case law prior to 1983 had long held that a worker injured at work cannot bring suit against a co-employee when both are acting within the course of employment. Nelson v. Harding, 29 Colo. App. 76, 480 P.2d 851 (1970); Sieck v. Trueblood, 29 Colo. App. 432, 485 P.2d 134 (1971).

50 Wright v. District Court, 661 P.2d 1167, 1168 (Colo. 1983); Ducote v. Albert, 521 So. 2d 399, 400 (La. 1988).

51 *Wright*, 661 P.2d at 1167.

52 The court upheld a trial court's use of the dual capacity doctrine in refusing to grant summary judgment in a medical malpractice suit against a company doctor. *Id.* at 1168.

53 *Id.*

icies of the state law.[54] Primarily, the court relied on ways in which it felt that workplace injuries involving medical treatment by company doctors differ from most workplace accidents, thereby negating the philosophy underlying the workers' compensation scheme.[55] The court examined five distinctions in this area which it used to support its dual capacity concept.[56]

First, the court pointed out that most workplace accidents occur without fault, or in such a way as to make determination of fault extremely unlikely, since they are part of usual production risks. The company physician's negligence, on the other hand, usually occurs outside the production area[57] and can be judged by readily ascertainable medical standards.[58]

Second, the court stated that although occupational accidents

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[54] *Id.* at 1170.

[55] *Id.* at 1170-71. *See generally supra* notes 1-10, 25, 26 and accompanying text (discussing the philosophy behind workers' compensation systems).

[56] These five distinctions, involving ease of assessing fault, risk of occurrence, ability to sustain damages, relinquishing of risk, and deterrent effects, are discussed in greater detail in Jenkins, *The No-Duty Rule in New York: Should Company Doctors Be Considered Co-Employees?*, 9 HOFSTRA L. REV. 665 (1981).

[57] *But see Wright*, 661 P.2d at 1172 (Hodges, J., dissenting). A significant portion of today's work force functions "outside the production area." If "outside the production area" were to be taken literally as a salient distinction in interpreting the outcome of cases decided under workers' compensation statutes, the entire workers' compensation scheme would loose its validity as too many employees, such as office workers, would no longer qualify for coverage. *Id.*; Deller v. Naymick, 342 S.E.2d 73, 80 n.13 (W. Va. 1985).

In addition, such a distinction would emasculate co-employee immunity provisions, making large numbers of workers liable to others simply because they worked at different tasks in different places. Persons performing different tasks in different places should, as long as working for the same employer, be considered co-employees for the purpose of immunity. *Deller*, 342 S.E.2d at 76.

[58] Standards used in determining fault in medical malpractice actions are no more "readily ascertainable" than those which would be applied in tort actions against an employer—and maybe less so.

Expert testimony is generally necessary to prove the standard of care against which any particular medical practice is judged. Hall v. Hilbun, 466 So. 2d 856 (Miss. 1985). Furthermore, while outright lack of medical skill may involve a relatively straight-forward assessment, acceptable standards of medical judgment vary and include the "respectable minority" exception, *see* Hamilton v. Hardy, 37 Colo. App. 375, 379, 549 P.2d 1099, 1104 (1976). *But see* Hood v. Phillips, 554 S.W.2d 160, 165 (Tex. 1977) (standard for malpractice not to be determined by poll of medical profession) (other elements of this opinion superseded by statute as stated by Price v. Hurt, 711 S.W.2d 84 (Tex. App. 1986)). Acceptable standards also include the "honest error in judgment" doctrine, Haase v. Garfinkel, 418 S.W.2d 108, 114 (Mo. 1967); *cf.* Ouellette v. Subak, 391 N.W.2d 810, 816 (Minn. 1986) (physician must use reasonable care to obtain information needed to exercise "honest" judgment) and the "reasonable and prudent" physician concept, Henderson v. Heyer-Schulte Corp., 600 S.W.2d 844, 847 (Civ. App. Texas 1980).

Few absolute truths exist in medical practice, and therefore it is reasonable to conclude that different physicians can arrive at varying, albeit correct solutions, to the same clinical problem. When the infinite genetic variability of patients is factored into the equation, it be-

could be considered an unavoidable risk of the production process in a complex technological environment, medical malpractice is not.[59]

Third, assigning workers' compensation liability to employers when one employee injures another makes sense in terms of efficient risk distribution, because employers are more likely to be able to bear the cost and/or spread the risk than employees. Company doctors, however, are set apart from their fellow workers in that they generally have higher incomes than most other co-employees[60] and, in addition, usually carry professional liability insurance.[61]

Fourth, because the company doctor is generally removed from the production area, he is not likely to be injured in the production process. Thus, the physician relinquishes the right to sue for an unlikely occurrence in exchange for immunity against a more likely

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comes clear that the results in patients properly managed with the same treatment can vary significantly, despite the efforts of competent and highly motivated practitioners.

[59] Medical malpractice encountered in the treatment of an industrial injury is surely as much an "unavoidable risk of the production process" as are many other situations which have been found to be so, such as an employee being injured during his lunch hour in a football game after having eaten in the employees' cafeteria, *see* Tatrai v. Presbyterian Univ. Hosp., 497 Pa. 247, 254, 439 A.2d 1162, 1165 (1982) (citing Haas v. Brotherhood of Transp. Workers, 158 Pa. Super. 291, 44 A.2d 776 (1945)), or an employee slipping on the snow when leaving a co-employee's car after having been driven to work. *See* Brooks v. New York Tel. Co., 87 A.D.2d 701, 448 N.Y.S.2d 859, *aff'd*, 57 N.Y.2d 643, 439 N.E.2d 882, 454 N.Y.S.2d 73 (1982).

[60] *But see Deller*, 342 S.E.2d at 80 n.13. The co-employee immunity provisions of workers' compensation statutes do not protect only "average employees." *Id.* There is no evident intent in these provisions to classify fellow employees, Bergen v. Miller, 104 N.J. Super. 350, 250 A.2d 49, *certif. denied*, 53 N.J. 582, 252 A.2d 158 (1969), or to exclude any particular categories, Boyle v. Breme, 93 N.J. 569, 461 A.2d 1164 (1983). Furthermore, salaries of company physicians, while admittedly higher than those of many workers, are often not higher (and are frequently considerably lower) than those of co-employee executives.

[61] *But see Deller*, 342 S.E.2d at 80. This reasoning would allow any worker injured by a co-employee in the course of employment to bring a tort action simply because the co-employee was covered by some form of liability insurance. To realize how greatly this would erode the co-employee immunity provisions, one need only visualize the number of suits that might be brought against co-employees simply because they carry automobile liability insurance. *Id.*

In addition, while malpractice insurance may, at first glance, seem like an attractive source for funding fuller recovery for injured workers than available through workers' compensation, this will only place additional burdens on the already crisis-ridden malpractice-insurance system, threatening the medical care available not only for industrial injuries, but all illnesses and disabilities. "[S]kyrocketing malpractice premium costs . . . [are] resulting in a potential breakdown of the health delivery system, severe hardships for the medically indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care. . . ." B. FURROW, S. JOHNSON, T. JOST & R. SCHWARTZ, HEALTH LAW: CASES, MATERIALS AND PROBLEMS 276-77 (1987) (quoting the preamble to the California Medical Injury Compensation Reform Act) [hereinafter B. FURROW].

happenstance.[62]

Finally, the threat of workers' compensation liability acts as a deterrent to employers, providing them with incentive to carefully train and supervise its workers and make sure their workplace is as safe as possible. Providing co-employee immunity to company physicians, on the other hand, would remove the deterrent effect that vulnerability to a malpractice action would provide.[63]

In *Ducote*,[64] as in the Colorado case, the Louisiana Supreme Court permitted an injured worker to maintain a malpractice action against a co-employee company doctor,[65] basing the company physician's liability on the dual capacity doctrine. The court again viewed the defendant company physician as functioning simultaneously in two different roles, each carrying a distinct set of duties and obligations.[66]

Despite the plain language of the Louisiana workers' compensation statute,[67] the *Ducote* court defended its position as "comport[ing] with the policy" of the state's workers' compensation laws.[68] In rationalizing its use of the dual capacity doctrine, it recycled the five reasons the Colorado court had utilized in differentiating injuries

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62 *But see Deller*, 342 S.E.2d at 80 n.13. The same reasoning would have to apply to office workers.

63 *But see id.* An employer's compensation premiums are tied to the number of compensable work-related injuries occurring at his place of business, regardless of their source. Thus, the employer has the same incentive to provide a safe workplace whether the increase in workers' compensation premiums results from the medical malpractice of a company physician or the negligence of a plant foreman. *Id.* In truth, the realities of today's industrial practice give an employer significant control over the quality of medical care provided by a company doctor, not only in terms of the equipment and staffing provided at a company clinic, but in terms of the threat of discharge.

64 Ducote v. Albert, 521 So. 2d 399 (La. 1988).

65 A Louisiana trial court initially dismissed the medical malpractice action against a company physician because the state workers' compensation statute provided co-employee immunity for job-related injuries. The appellate court reversed, again on a statutory basis, holding that the physician was an independent contractor, not a co-employee, and thus was liable to suit. Ducote v. Albert, 503 So. 2d 85, 86 (La. App. 1987), *aff'd*, 521 So. 2d 399 (1988). The Louisiana Supreme Court then affirmed the physician's liability, but repudiated the finding of the appellate court that the physician was an independent contractor. Ducote v. Albert, 521 So. 2d 399, 404 (La. 1988).

66 According to the Louisiana court, the company physician was liable because he occupied a second position with respect to his co-employee, that of medical doctor, and it was in that second role that he was vulnerable to suit, regardless of his co-employee status. *Ducote*, 521 So. 2d at 400.

67 The Louisiana workers' compensation law states that when an injury is compensable under the statute, an injured worker is constrained from bringing any other action not only against his employer, but against "any . . . employee of such employer." LA. REV. STAT. ANN. § 23:1032(A)(1)(a) (West Supp. 1990).

68 *Ducote*, 521 So. 2d at 403.

resulting from medical malpractice and other workplace injuries.[69] In addition, it concluded that the same policy reasons which prompted the legislature to exclude independent contractors from coverage under compensation laws were applicable to company physicians,[70] even if they technically did not fall within this classification.[71]

Both the *Wright* and *Ducote* courts[72] also placed strong reliance on cases readily distinguishable because they dealt with the dual capacity of employers, primarily hospitals or other entities providing health care services.[73] While it is conceivable that an employer-physician or employer-health care provider might, in some circumstances, be considered to possess the entire array of employer-employee duties as well as those related to medical services, this is simply not the case with a company doctor. As the leading treatise in the field of workers' compensation clearly states: in relation to his co-employees, the company doctor functions solely as the company doctor.[74]

The court in *Wright*[75] had to rely heavily on, and in fact, liberally cited,[76] dissenting opinions[77] to support its views, which, in turn, supported the views of the *Ducote*[78] court. In addition, both courts[79] placed heavy reliance on California's long-standing recognition of the dual capacity doctrine in medical malpractice cases brought by in-

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69 Jenkins, *supra* note 56, at 675-77; Wright v. District Court, 661 P.2d 1167, 1170-71 (Colo. 1983).

70 *Ducote*, 521 So. 2d at 403-04 (noting injury caused by independent contractors excluded from workers' compensation coverage because employers lack control over independent contractor's work and therefore have little opportunity to protect their employees from harm caused by an independent contractor's negligent action).

71 Of interest is the concurring opinion which rejected both the independent contractor and the dual capacity reasoning in upholding the physician's liability. Rather, it applied the more traditional theory utilized in seeking to bring suit against a company physician, namely that the injury did not "arise[] out of" the employee's employment, and thus was not covered by, nor subject to, the exclusivity provisions of the workers' compensation laws. *Id.* at 404 (Lemmon, J., concurring). It should, however, be noted that aggravation of an industrial accident by medical treatment is generally considered to be part of the original occupational injury for purposes of permitting workers to secure recovery under workers' compensation laws. *See* Firestein v. Kingsbrook Jewish Medical Center, 137 A.D.2d 34, 37, 528 N.Y.S.2d 85, 87 (2d Dep't 1988); McAlister v. Methodist Hospital, 550 S.W.2d 240, 242 (Tenn. 1977).

72 *Ducote*, 521 So. 2d 399; *Wright* 661 P.2d 1167.

73 *Ducote*, 521 So. 2d at 402; *Wright*, 661 P.2d at 1168-69; *see infra* notes 131-40 and accompanying text.

74 2A A. LARSON, *supra* note 3, § 72.61(b), at 14-228.47.

75 661 P.2d 1167.

76 *Id.* at 1169.

77 McCormick v. Caterpillar Tractor, 85 Ill. 2d 352, 360, 423 N.E.2d 876, 880 (1981) (Simon, J., dissenting); Jenkins v. Sabourin, 104 Wis. 2d 309, 323, 311 N.W.2d 600, 607 (Abrahamson, J., dissenting).

78 521 So. 2d 399.

79 *Wright*, 661 P.2d 1167; *Ducote*, 521 So. 2d 399.

jured employees,[80] despite California's apparent rejection of such court-made law by amendment to its compensation statutes, effective before either decision was made.[81]

While not explicitly applying the dual capacity doctrine, a 1987 Georgia court[82] held that, notwithstanding a state statute providing co-employee immunity from tort action,[83] company physicians were not entitled to claim that statutory defense because of the "unique duty" a company physician owed others.[84] The court based its authority on an earlier decision[85] in which a company physician had been held liable for medical malpractice accompanied by fraud and deceit, elements absent in the case at bar. Calling for a broad reading of the prior decision, the court held that a company physician would not be able to claim the defense of co-employee immunity when sued for "*any* tortious breach of conduct applicable to his profession generally."[86]

1. Fraudulent or Deceitful Action by Co-Employee Company Physicians

Cases in which there is alleged fraudulent or deceitful action on

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[80] *Wright*, 661 P.2d at 1168; *Ducote*, 521 So. 2d at 401.

[81] In 1982, the California state legislature, addressing the issue of dual capacity in workers' compensation cases, amended § 3602(a) to read, effective January 1, 1983:

> Where the conditions of compensation . . . concur, the right to recover such compensation is . . . the sole and exclusive remedy of the employee or his or her dependents against the employer, and the fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer.

CAL. LAB. CODE § 3602(a) (West 1989); 2 A. LARSON, *supra* note 3, § 72.81(c), at 14-243; Note, *Workers' Compensation Exclusivity and Wrongful Termination Tort Damages: An Injurious Tug of War?*, 39 HASTINGS L.J. 1229, 1235 & n.46. In addition, California had previously amended its labor code to protect co-employees by limiting their tort liability to those situations in which the co-employee engaged in a willful and unprovoked aggressive act or was intoxicated. CAL. LAB. CODE § 3601(a)(1)-(2) (West 1989); *see infra* notes 149-53 and accompanying text.

[82] Davis v. Stover, 184 Ga. App. 560, 362 S.E.2d 97 (1987). Davis, an assembly-line worker, experienced chest pains and sought medical assistance from Dr. Stover, the company physician. Stover diagnosed the ailment as a respiratory problem for which he prescribed medication. The next day, Davis suffered a heart attack and died. Mrs. Davis filed a malpractice action, alleging misdiagnosis and negligent treatment.

[83] The Georgia workers' compensation laws make no provision for any exception to its co-employee immunity clause. GA. CODE ANN. § 34-9-11 (Supp. 1990).

[84] *Davis*, 184 Ga. App. at 562, 362 S.E.2d at 98.

[85] Downey v. Bexley, 253 Ga. 125, 317 S.E.2d 523 (1984). Bexley, who contracted lead dust poisoning as a result of his employment, claimed that Dr. Downey, the company physician, covertly monitored his declining heath, did nothing about his failing condition, and intentionally concealed the situation from him.

[86] *Davis*, 184 Ga. App. at 562-63, 362 S.E.2d at 99.

the part of a company physician[87] can supply an attractive wedge for those who wish to enlarge the scope of medical malpractice liability in the workplace. Such cases exemplify the warning of a Wisconsin court that although a common-law remedy might be fit and fair in a particular situation, such precedent could, if not carefully considered from a general policy viewpoint, emasculate the workers' compensation system.[88] These cases should therefore not be construed as denying company physicians tort defenses because co-employee immunity does not apply. Rather, they should be interpreted to fall within the intentional tort exceptions to the exclusivity of workers' compensation awards.[89]

2. The Independent Contractor Doctrine

Closely allied with the use of the dual capacity doctrine in defining the tort immunity or liability of company physicians is the application of the independent contractor doctrine.[90] The Indiana courts, for example, have steadfastly held to the notion that company physicians are independent contractors for liability purposes,[91] even though, for all other purposes, they may be considered employees in the ordinary meaning of the word.[92] One leading commentator has stated that doctors and nurses are

> routinely held to be employees for purposes of compensation benefits, and it is unthinkable that a legislature should intend that a given person should be an employee under the act for one purpose and an independent contractor for another. . . . [O]nce a particular

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87 *Downey*, 253 Ga. 125, 317 S.E.2d 523; McGinn v. Valloti, 363 Pa. Super. 88, 525 A.2d 732 (1987).

88 Jenkins v. Sabourin, 104 Wis. 2d 309, 322-23, 311 N.W.2d 600, 607 (1981); *see supra* note 17.

89 *McGinn*, 363 Pa. Super. at 96, 525 A.2d at 736.

90 A typical statutory definition of "independent contractor" can be found in LA. REV. STAT. ANN. § 23:1021(6) (West 1985) (an independent contractor is "any person who renders service, other than manual labor, for a specified recompense for a specified result . . . under the control of his principal as to results of his work only, and not as to the means by which such result is accomplished").

91 Stevens v. Kimmel, 182 Ind. App. 187, 394 N.E.2d 232 (1979); Ross v. Schubert, 180 Ind. App. 402, 388 N.E.2d 623 (1979). Both courts held that company physicians should be subject to tort actions by co-workers because (1) the co-employee immunity provision of Indiana's workers' compensation statute was not intended to protect company physicians from claims arising out of a doctor-patient relationship and (2) company physicians should not be immunized from malpractice actions when independent physicians who perform identical services are not.

92 McDaniel v. Sage, 419 N.E.2d 1322 (Ind. Ct. App. 1981). Like the company physicians in *Ross*, 180 Ind. App. at 402, 388 N.E.2d at 623 (1979), a company nurse met all requirements for being a salaried employee, but also like those company physicians, "training, experience and skill as a professional" placed her in the category of independent contractor and thus made her liable for tort action. *McDaniel*, 419 N.E.2d at 1325-26.

> category of persons, like company doctors, has been placed in the employee classification, that classification must govern for all purposes.[93]

Applying the independent contractor theory to company physicians also wreaks havoc with the traditional workers' compensation trade-off among employees—giving up the right to tort recovery in exchange for a swift and sure compensation award. As an employee, the company doctor gives up the right to sue fellow workers, but as an independent contractor he remains vulnerable to suit.[94]

While there is no hard-and-fast rule to determine whether an individual is an employee or an independent contractor, the basic inquiry is usually the degree of control the employer retains over the performance of services rendered. The physician mystique, however, makes it difficult to conceive of a nonmedical employer having "control" over medical personnel. Nonetheless, a Pennsylvania court has stated that an employer-employee relationship may exist even if "a particular occupation may involve such technical skill that the employer is wholly incapable of supervising the details of performance."[95] Otherwise, not only physicians, but other full-time salaried professionals including accountants, architects, and engineers would also be precluded from ever being "in the same employ."[96]

An Illinois court[97] declared that nothing in the law precludes a physician from being an employee and subject to his employer's control and direction while treating patients. The court considered a number of criteria which would indicate that a doctor is, in fact, under an employer's control and direction: the employer regulates the hours of work, the employer provides the places and facilities for work, the employer pays an annual salary which does not depend on the number of patients seen, the physician makes no extra charges for individual patients treated, the employer makes social security contributions, the employer provides the same fringe benefits as all other salaried employees receive, and the employer maintains the power to discharge.[98] These same criteria have been applied by other courts in determining that physicians may be considered to be "in the same employ" and thus protected by co-employee immunity.[99] An em-

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93 2A A. LARSON, *supra* note 3, § 72.61(b), at 14-228.49.

94 *Id.*

95 Babich v. Pavich, 270 Pa. Super. 140, 144, 411 A.2d 218, 221 (1980) (quoting Potash v. Bonaccurso, 179 Pa. Super. 582, 588, 117 A.2d 803, 806 (1955)).

96 *Babich*, 270 Pa. Super. at 145, 411 A.2d at 221.

97 Komel v. Commonwealth Edison Co., 56 Ill. App. 3d 967, 372 N.E.2d 842 (1977).

98 *Id.* at 971-72, 372 N.E.2d at 845.

99 Young v. St. Elizabeth Hospital, 131 Ill. App. 3d 193, 195, 475 N.E.2d 603, 604 (1985)

ployer's selection of a physician with an independent practice to perform medical services for his employees is not, however, sufficient to establish an employer-employee relationship and remove the physician from the category of independent contractor.[100]

3. Outside the Scope of Employment

A co-employee company physician may be liable in tort to an injured worker if the particular injury for which damages are being sought did not arise out of or in the course of employment and so is not covered by workers' compensation.[101] However, attempting to utilize this rationale to maintain tort actions questionably involving a workplace incident undermines the purpose of workers' compensation statutes to provide the broadest possible coverage for job-related injuries.

In addition, by placing the activities of the company doctor outside the employment relationship, the injured worker has to relin-

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(annual salary not contingent on number of patients treated, services available to co-employees without charge, fixed weekly hours, fringe benefits, social security contributions made by employer, facilities and support personnel provided by employer, employer retained power to discharge); Garcia v. Iserson, 33 N.Y.2d 421, 423, 309 N.E.2d 420, 421, 353 N.Y.S.2d 955, 956-57 (1974) (workers' compensation coverage and medical benefits provided by employer); Budzichowski v. Bell Tel. Co., 503 Pa. 160, 165-66, 469 A.2d 111, 113-14 (1983) (40-hour week, no outside practice, fixed salary, fringe benefits); Deller v. Naymick, 342 S.E.2d 73, 76 (W. Va. 1985) (services provided on a largely exclusive basis, at specified times and for a regular salary).

[100] *See* Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966); German v. Chemray, Inc., 564 P.2d 636 (Okla. 1977).

Some interesting permutations on the independent contractor/employee distinction in medical malpractice cases arose in Bryant v. Fox, 162 Ill. App. 3d 46, 515 N.E.2d 775 (1987). Two professional football players sued an orthopedic surgeon employed by their club. They also sued the club itself under the theory of respondeat superior, asserting the physician was an employee of the club. The players claimed that at the time of their injuries the club was not covered under workers' compensation, so employer and co-employee immunity did not apply.

Should workers' compensation apply, however, the players had an alternative plan which would also permit them to escape the employer and co-employee immunity provisions and still maintain both their tort suits. They declared that *they* were independent contractors, primarily because their work required special skills.

The court remanded the case for further consideration as to the status of the club under the workers' compensation act. It then resolved the employment status of both the physician and the players, because, should the trial court decide the club was covered, the issue of whether the physician and the players were employees or independent contractors would determine the parties' amenability to suit. The court held that the players were not independent contractors (because the team exercised substantial control over the manner in which they performed their work and subjected their compensation to deductions for various payroll taxes), but that the physician was (because the team made no social security contributions and provided no fringe benefits and because he received separate, nonfixed fees for any surgery performed on an injured player in addition to his fixed stipend).

[101] This was the theory offered in the concurring opinion in the *Ducote* case. Ducote v. Albert, 521 So. 2d 399, 404 (La. 1988) (Lemmon, J., concurring); *see supra* note 71.

quish his swift and certain, though limited, workers' compensation payment for the chance to obtain a questionable, though far larger, tort award.[102] Gone would be the employer's no-fault strict liability. In its place, the worker would have to prove the doctor's treatment was negligent and that no affirmative defense applied.[103] While most jurisdictions have replaced contributory negligence with comparative negligence,[104] have made the fellow-servant rule a historical relic,[105] and have replaced assumption of risk with a modern attitude toward labor and enlightened social philosophy,[106] the injured worker will still have given up the automatic coverage that would have been his even though he, himself, might have been negligent.[107] Furthermore, the injured worker subjects himself to a lengthy period of disability without compensation, as the delays inherent in private actions postpone payment.[108]

B. *Dual Capacity Liability for Company Physicians Rejected*

Most jurisdictions which have addressed the issue explicitly refuse to apply the dual capacity[109] or the related independent contractor doctrine[110] in support of malpractice actions against company

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102 *See* Roa v. Lodi Medical Group, 37 Cal. 3d 920, 931, 695 P.2d 164, 171, 211 Cal. Rptr. 77, 84 (1985) (explaining that "an unusually high percentage of medical malpractice cases that go to trial result in defense verdicts").

103 Jenkins v. Sabourin, 104 Wis. 2d 309, 321-22, 311 N.W.2d 600, 606 (1981) (suggesting that placing the burden of a common-law tort action on the injured worker "is hardly a step forward in workers' rights").

104 W. KEETON, *supra* note 21, at 471 (as of 1982, 40 states had adopted a comparative negligence standard).

105 *Id.* at 575-76.

106 *Id.* at 568, 572-73.

107 One way to view the dual capacity doctrine is as an effort to utilize the "outside the scope of employment" exception without losing compensation benefits—surely an attempt to have one's cake and eat it too.

108 *See* Mitchell, *supra* note 22, at 352.

109 *See, e.g.*, Young v. St. Elizabeth Hospital, 131 Ill. App. 3d 193, 196, 475 N.E.2d 603, 605 (a company doctor has only one legal persona, namely company doctor); McCormick v. Caterpillar Tractor Co., 82 Ill. App. 3d 77, 80, 402 N.E.2d 412, 415 (1980), *aff'd in part, rev'd in part*, 85 Ill. 2d 352, 423 N.E.2d 876 (1981) (co-employee immunity is not waived merely because an employee is serving an employer in a capacity different than that of another employee he might injure); Deller v. Naymick, 342 S.E.2d 73, 78 (W. Va. 1985) (a company doctor functions in only one capacity towards his co-employees and that is company doctor). *See generally* Siva v. General Tire & Rubber Co., 146 Cal. App. 3d 152, 194 Cal. Rptr. 51 (1983) (the first judicial renunciation of the dual capacity rationale in California after legislative rejection of the doctrine).

110 *See, e.g.*, Proctor v. Ford Motor Co., 36 Ohio St. 2d 3, 6, 302 N.E.2d 580, 582 (1973) (company physician is not an independent contractor because his employment is not casual and is in the usual course of business of his employer; specifically, maintenance of a full-time plant medical facility directly enhances the efficiency of assembly-line workers); Babich v. Pavich, 270 Pa. Super. 140, 145, 411 A.2d 218, 221 (1980) (even if an employer cannot control

physicians by co-employees.[111] The major reason given by most courts for refusing to apply the dual capacity doctrine to company physicians is their hesitance to interfere with comprehensive legislative schemes.[112] The courts have expressed apprehension that judicial creation of an exception to co-employee immunity and the exclusivity provisions of the workers' compensation laws would improperly upset the balance which legislatures had carefully struck in this area.[113] Such changes, it is felt, are best left to legislative, not judicial, action.[114]

Legislative intent not to carve out a company physician exception to co-employee immunity may be implied from the time of enactment of such provisions. For example, the New Jersey provision for co-employee immunity[115] was not added to the state workers' compensation laws until 1961, when many employers already provided medical care at company clinics staffed by employee doctors and nurses.[116] Since co-employee provisions were, in general, added to workers' compensation statutes at a time when the company physician was an accepted feature of the workplace environment,[117] it is

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the manner and method of treating patients, a company doctor who is employed on full-time basis, is paid a fixed salary for a set number of hours each week, does not engage in private practice, and receives the same fringe benefits as other employees, is not an independent contractor); *cf.* Kerr v. Olson, 59 Wash. App. 470, 798 P.2d 819 (1990) (co-employee immunity extended to two doctors engaged by an employer as independent contractors on the basis that they were rendering a personal service to that employer and thus were "workers" as defined by WASH. REV. CODE. ANN. § 51.-08.180(1) (West 1990) ("worker" includes "every person in this state who is engaged in the employment of or *who is working under an independent contract, the essence of which is his or her personal labor for an employer*") (emphasis supplied)).

111 Courts also hesitate to employ the traditional "outside the scope of employment" rationale because, by limiting the type of injury which arises out of or in the course of employment, it undermines the purpose of workers' compensation statutes to provide the broadest possible no-fault coverage. *See* Jenkins v. Sabourin, 104 Wis. 2d 309, 322-23, 311 N.W.2d 600, 606-07 (1981).

112 *See, e.g.*, Jones v. Bouza, 381 Mich. 299, 302, 160 N.W.2d 881, 882 (1968) (judges should "read it like it is—and give effect to the plain words that the legislature has used"); Boyle v. Breme, 93 N.J. 569, 570, 461 A.2d 1164, 1164 (1984) (if the legislature had wanted to exclude company physicians from co-employee immunity, it would have done so); *Deller*, 342 S.E.2d at 77 (when the " 'statutory grant of [co-employee] immunity is clear and unambiguous' . . . the legislative intent . . . should be applied and not construed") (quoting Jones v. Laird Found., 156 W. Va. 473, 484, 195 S.E.2d 821, 825 (1973)); Franke v. Durkee, 141 Wis. 2d 172, 178-79, 413 N.W.2d 667, 670 (1987) (creation of exceptions to the exclusive remedy provisions of the workers' compensation statute is a matter of general policy and so lies within the province of the legislatures, not the courts).

113 Panaro v. Electrolux Corp., 208 Conn. 589, 604-05, 545 A.2d 1086, 1093-94 (1988).

114 *Franke*, 141 Wis. 2d at 179, 413 N.W.2d at 670.

115 N.J. STAT. ANN. § 34:15-8 (West 1988).

116 *Boyle*, 93 N.J. at 570, 461 A.2d at 1164.

117 *See, e.g.*, Recent Development, Ducote v. Albert: *Louisiana Adopts Dual Capacity and Strips Company Doctors of Co-Employee Immunity Under Worker's Compensation Law*, 63 TUL. L. REV. 935, 937 (1989) (Louisiana added its co-employee immunity provision in 1976);

logical to assume that the legislature could have excluded this class of co-employee had it chosen to do so.[118]

Legislatures have, in fact, provided other exceptions to the exclusivity of workers' compensation awards for injuries occurring in the workplace. Many states provide that intentional or willful acts invalidate the statutory protection granted co-employees against tort action.[119] Accidents resulting from a co-worker's negligent operation of a motor vehicle have also been statutorily excluded.[120] Without evidence to the contrary, statutory itemization should be taken to indicate that the legislatures rejected other possibilities and intended the designated categories to be exclusive.[121]

Ascribing a dual capacity to company physicians for purposes of making them liable for tortious conduct in treating co-employees is, at best, a legal fiction, and "legal fictions have no place in the interpretation of detailed modern statutes, such as compensation acts."[122] Taking "a statute consisting of 45 pages of fine print, complete with elaborate definitions of what the key words mean, and then announc[ing] judicially that those words do not mean what the legislature said they mean" can only lead to misapplication and abuse.[123]

Nor does "the shiny prospect of a large damage verdict justif[y] interference with what is essentially a policy choice of the Legislature."[124] Excepting physicians from co-employee immunity because

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Jenkins v. Sabourin, 104 Wis. 2d 309, 311 n.2, 311 N.W.2d 600, 602 n.2 (1981) (in 1957 Wisconsin amended its workers' compensation statute to prohibit third-party action against a co-employee).

118 Recent Development, *supra* note 117, at 937.

119 *See, e.g.*, CONN. GEN. STAT. ANN. § 31-293a (West 1987) (common-law action against co-employee permitted for "wilful or malicious" acts); PA. STAT. ANN. tit. 77, § 72 (Purdon Supp. 1990) (no common-law liability for co-employee "except for intentional wrong"); W. VA. CODE § 23-2-6a (1985) (no co-employee immunity if injury inflicted "with deliberate intention").

120 *See, e.g.*, CONN. GEN. STAT. ANN. § 31-293a (West 1987) (adding to the specificity of this exclusion, motor vehicles, for the purpose of this provision, do not include "contractors' mobile equipment such as bulldozers, powershovels, rollers, graders or scrapers, farm machinery, cranes, diggers, forklifts . . . or other similar equipment designed for use principally off public roads"); WIS. STAT. ANN. § 102.03(2) (West 1988) (tort action permitted against co-employee for injury caused by that co-employee's "negligent operation of a motor vehicle not owned or leased by the employer").

121 Boyle v. Breme, 187 N.J. Super. 129, 453 A.2d 1335 (1982), *aff'd*, 93 N.J. 569, 461 A.2d 1164 (1983).

122 2A A. LARSON, *supra* note 3, § 72.81(a), at 14-231. Legal fictions are particularly inappropriate in construing statutes which, like the compensation laws, have been in existence for decades and have been amended over long periods of time, as legislatures saw fit, to meet perceived demands of any changes occurring in the workplace.

123 *Id.*

124 Panaro v. Electrolux Corp., 208 Conn. 589, 605, 545 A.2d 1086, 1094 (1988) (quoting Azevedo v. Abel, 264 Cal. App. 2d 451, 459, 70 Cal. Rptr. 710, 715 (1968)).

the company doctor (or his insurance carrier) can "afford to pay"[125] has been considered a denial of traditional equal protection principles and should be "shunned" by the courts.[126]

A number of practical problems may arise from ascribing a dual capacity to company physicians in order to make them liable for their actions in the workplace. Excepting company doctors from co-employee immunity could force employers to assume medical malpractice insurance payments for these employees.[127] This, in turn, might "discourage employers from maintaining on-site dispensaries, to the detriment of employees' health."[128] A similar situation did, in fact, arise in Louisiana prior to its inclusion of co-employee immunity in its workers' compensation statute. Workers were permitted to bring tort actions against corporate executive officers and, as a result of the flood of executive officer cases which deluged the Louisiana courts, employers were forced to provide such officers with liability insurance.[129]

In addition, use of the dual capacity doctrine to eliminate a company physician's co-employee immunity could dictate the same result for other categories of co-employee. Not only would this undermine a basic *quid pro quo* supporting the workers' compensation scheme, but for those co-employees so designated, it would eliminate the protection workers' compensation systems currently provide them from a liability which could be financially crippling.[130]

III. DUAL CAPACITY OF EMPLOYERS IN MEDICAL MALPRACTICE ACTIONS

No consideration of the dual capacity doctrine and medical malpractice actions in the workplace would be complete without a discussion of the dual capacity liability of employers. The seminal dual capacity case, *Duprey v. Shane*,[131] primarily involved a physician who was also the employer of the injured worker. Thus, it is no surprise that when the dual capacity doctrine expanded, it also extended into the realm of employers, mainly hospitals, who were being sued for negligence occurring during medical treatment furnished to their em-

125 *See supra* note 61.

126 Wright v. District Court, 661 P.2d 1167, 1172 (Colo. 1983) (Hodges, J., dissenting). There is no rational reason for singling out company physicians, putting them in a class by themselves, and making them singularly liable to relinquish the co-employee immunity of workers' compensation statutes.

127 Recent Development, *supra* note 117, at 941.

128 Deller v. Naymick, 342 S.E.2d 73, 79 (W. Va. 1985); Recent Development, *supra* note 117, at 941.

129 Recent Development, *supra* note 117, at 941.

130 *See supra* notes 8-10 and accompanying text.

131 39 Cal. 2d 781, 249 P.2d 8 (1952).

ployees under compensation law.[132] Again, the decisive test used by the courts for determining dual liability was the presence of a second capacity or function conferring on the employer duties and obligations unrelated to those of the employment relationship with the injured worker.[133] These decisions rested on the assumption that, in relation to treatment of injured employees, the employer-hospitals stood as hospitals, not employers, and that the hospital-patient relationship generated traditional duties and obligations which were both distinct from the employer-employee relationship and identical to those owed to the general public.[134]

As with the dual capacity doctrine applied to co-employee company physicians, most jurisdictions which considered dual capacity

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132 The dual capacity doctrine has also been utilized to extend the liability of employers in areas other than the provision of medical care. *See* Reed v. The Yaka, 373 U.S. 410 (1963) (injured seaman entitled to tort recovery because company not only employer of longshoremen but charterer and operator of boat, with obligation, outside of employment relationship, to maintain seaworthiness of vessel); Douglas v. E. & J. Gallo Winery, 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977) (employer who was also manufacturer of scaffolding used by the general public has two capacities: one as employer and one as scaffold manufacturer; employee injured on scaffold could bring suit against employer-manufacturer in latter capacity); Smith v. Metropolitan Sanitary Dist., 77 Ill. 2d 313, 396 N.E.2d 524 (1979) (contractor held to have been functioning in separate and distinct capacity when he leased vehicle to employee for employee's use on the job; contractor thus subject to the strict liability imposed, in general, on lessors of vehicles). *But see* Sharp v. Gallagher, 95 Ill. 2d 322, 447 N.E.2d 786 (1983) (contractor-employer who owned land on which employee was injured was not liable as owner or occupier of land; because virtually all employers own or occupy land (or premises), permitting dual capacity liability on that basis would virtually eliminate the exclusive workers' compensation award).

133 *See* Wright v. United States, 717 F.2d 254 (6th Cir. 1983) (when a *hospital which is not obligated to treat* an injured employee elects to do so, it establishes a "doctor-patient" relationship in addition to that of employer-employee); McCall v. United States, 680 F. Supp. 283 (S.D. Ohio 1987) (when *an injured worker who is under no obligation* to undergo treatment in an employer-operated facility elects to do so, the treating employer acts not as employer, but in a second persona, provider of medical care); D'Angona v. County of Los Angeles, 27 Cal. 3d 661, 669, 613 P.2d 238, 243-44, 166 Cal. Rptr. 177, 182-83 (1980) (when an injured county hospital employee seeks treatment at that hospital, the county has an obligation distinct from that owed as employer, namely to provide medical care free of negligence); Guy v. Arthur H. Thomas Co., 55 Ohio St. 2d 183, 190, 378 N.E.2d 488, 492 (1978) (when an employer hospital is also the treating hospital, it treats as a hospital and not as an employer, with all the duties traditionally arising from a hospital-patient relationship; tort action should be no less viable because the obligations "of the tortfeasor spring from the extra-relational capacity of the employer, rather than a third party").

134 *D'Angona*, 27 Cal. 3d at 669, 613 P.2d at 243-44, 166 Cal. Rptr. at 182-83; *Guy*, 55 Ohio St. 2d at 189-90, 378 N.E.2d at 492. *See generally* Tatrai v. Presbyterian Univ. Hosp., 497 Pa. 247, 439 A.2d 1162 (1982) (employee's presence in emergency room was not in furtherance of her employer's business, so workers' compensation was not exclusive remedy; also risk of injury which she suffered was a risk to which any member of the public obtaining similar treatment would have been subjected). The Pennsylvania Supreme Court has not applied the dual capacity doctrine since the *Tatrai* decision. Callender v. Goodyear Tire and Rubber Co., 387 Pa. Super. 283, 297-98, 564 A.2d 180, 188 (1989).

liability of employers have rejected the doctrine. Rejection is usually the rule when the employer is a large company maintaining its own clinic or first-aid station[135]—even more so when workers' compensation statutes[136] require that the employer provide and pay for all necessary medical services needed to treat occupational injuries.[137] The same is true when the medical services provided are not available to members of the general public, but only as a result of employment.[138]

Also as with co-employee physician dual capacity, courts pause before "tinker[ing]" with carefully conceived statutory plans.[139] In

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135 *See, e.g.*, Therrell v. Scott Paper Co., 428 So. 2d 33, 36-37 (Ala. 1983) (providing medical care to injured employees is not a second capacity but an obligation flowing from an employer's role as employer); Warwick v. Hudson Pulp & Paper Co., 303 So. 2d 701, 702-03 (Fla. Dist. Ct. App. 1974) (dual capacity doctrine held contrary to both exclusivity provisions of the state's workers' compensation statute and immunity granted those who accept its liability); McCormick v. Caterpillar Tractor Co., 85 Ill. 2d 352, 358-59, 423 N.E.2d 876, 878-79 (1981) (no dual capacity when an employer meets its statutory duty to provide injured employees medical services by staffing a company clinic, because in providing such treatment, it does so "on the basis of the employer-employee relationship and not as a treating physician"); Trotter v. Litton Syst., 370 So. 2d 244 (Miss. 1979); Budzichowski v. Bell Tel. Co., 503 Pa. 160, 167-68, 469 A.2d 111, 114-15 (1983) (no dual capacity if employer-provided medical services not offered to the public and there is no expectation on the part of an injured worker that those services would be rendered were he not an employee); McAlister v. Methodist Hospital, 550 S.W.2d 240, 246 (Tenn. 1977) (dual capacity doctrine disallowed because nothing in workers' compensation statute "may be construed to evince a legislative intent that an employer may ever be classified as a 'third person' "); Jenkins v. Sabourin, 104 Wis. 2d 309, 317-18, 311 N.W.2d 600, 605 (1981) (role of medical provider not inconsistent with role as employer—simply an additional employment-related function). As mentioned earlier, after three decades of experience with judicially imposed dual capacity liability, California statutorily rejected the dual capacity doctrine for employers. Note, *supra* note 4, at 214-15.

136 *See, e.g.*, ILL. ANN. STAT. ch. 48, para. 138.8(a) (Smith-Hurd 1986 & Supp. 1990) (an employer is to "provide and pay for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury"); MISS. CODE ANN. § 71-3-15 (1972 & Supp. 1988) ("The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, artificial members, and other apparatus for such period as the nature of the injury or the process of recovery may require.").

137 When an employer provides medical services at a company clinic in a state which requires that an employer provide and pay for such services, that employer is "meeting a duty imposed upon it as an employer under the Workmen's Compensation Act. That it [should choose] to provide the services directly rather than through physicians hired independently does not alter the fact that medical services were rendered in response to the Act in its capacity as an employer." *McCormick*, 85 Ill. 2d at 358, 423 N.E.2d at 878.

138 Garcia v. Iserson, 33 N.Y.2d 421, 423, 309 N.E.2d 420, 421, 353 N.Y.S.2d 955, 957 (1974) (three-part test determines if medical care received by an injured worker falls within scope of workers' compensation law; care must be (1) made available by the employer to employees, (2) not generally available to members of the public, and (3) offered to employee only as a consequence of employment); *Budzichowski*, 503 Pa. at 168, 469 A.2d at 115 (when treatment is not available to the general public but only on basis of employment, there is no dual capacity, only an employer-employee relationship.).

139 *Jenkins*, 104 Wis. 2d at 323, 311 N.W.2d at 607.

addition, they hesitate to do "violence to the plain language" of statutes which permit common-law suits against "some person other than the employer" (as do most workers' compensation laws) by using the dual capacity doctrine to characterize the employer as "some person other than the employer."[140]

IV. A PROPOSAL

A. *A Matter of Policy*

The dual capacity doctrine should not be utilized to sustain medical malpractice actions by injured workers against co-employee company doctors. Application of the dual capacity doctrine to company physicians undermines the exclusivity provisions which are the mainstay of workers' compensation laws.[141] It is also contrary to the mutual compromise of rights which underlies the co-employee immunity provisions of those statutes in that physicians have to give up their right to sue without getting protection against actions commenced by their fellow workers.[142] Since the turn of the century, workers' compensation statutes have met the needs of our society in providing a mechanism for quick and certain payment for injured workers. These laws are an overwhelmingly accepted part of today's workplace environment. It is a step backwards to reintroduce the negligence concept into an area long accepted as compensable under the no-fault workers' compensation system.

The harm to company physicians caused by expanding their liability clearly lies in the increased financial exposure and emotional costs associated with a greater vulnerability to malpractice actions. The harm to the worker population desirous of utilizing the dual capacity doctrine is less obvious, especially in the light of some large awards that would undoubtedly be issued. Nonetheless, it is worth careful consideration.

The erosion of co-employee immunity, begun by excluding com-

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140 McAlister v. Methodist Hospital, 550 S.W.2d 240, 246 (Tenn. 1977).

141 The third-party provisions of workers' compensation statutes may permit an injured worker to maintain a common-law tort action and accept compensation benefits as well. *See, e.g.*, MICH. COMP. LAWS ANN. § 418.827(1) (West 1985); WIS. STAT. ANN. § 102.29(3) (West 1988 & Supp. 1990).

While dual recovery is permitted when third parties are sued in conjunction with recovery of workers' compensation benefits, double recovery is not. Workers' compensation laws prescribe specific methods for subrogating that amount of any tort award that has been paid as a workers' compensation benefit to the payor of that benefit. *See, e.g.*, N.Y. WORK. COMP. LAW § 227(1) (Consol. 1982 & Supp. 1989) (employer or insurance carrier who pays workers' compensation benefits has lien on award from a civil action to the amount of benefits paid).

142 *See supra* notes 7-10, 60, 62 and accompanying text.

pany physicians, may continue and incorporate more exceptions, leaving an increasing number of workers exposed to the financial threat of tort liability from workplace accidents. In addition, the quality of medical care in the workplace may suffer, either because employers, balking at having to pay their employee-physicians' insurance premiums in addition to those required for workers' compensation, close company clinics,[143] or because, as has been evidenced in the current medical malpractice crisis, physicians leave the field of medicine as additional demands are placed on the malpractice insurance system—and passed on to them in the form of higher premiums.[144]

B. *A Model Statutory Provision*

The proposal of a major change in social and economic policy, such as the introduction of new liabilities into the workers' compensation scheme, is within the province of the legislature, not the judiciary. To date, however, legislatures, have not seen fit to act on the subject of dual capacity liability other than, in California, to specifically condemn the theory.[145] The attraction of a "deep pockets" award should not warrant judicial interference in a policy decision essentially belonging to the people as expressed by their elected representatives.

While the legislature's silence in the face of a long-established, complex, carefully worded statute should suffice to give the judiciary clear indication of legislative intent[146] that the statute be read as written, statutory amendment may be necessary to protect the exclusive remedy rule from sneak attack by application of the dual capacity doctrine. The legislature can maintain its specifically imposed workers' compensation trade-offs and can ensure that the exclusive remedy rule will not be breached to the detriment of any group of co-employees, by enacting a provision similar to that adopted by California[147]

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143 *See supra* notes 127-28 and accompanying text.

144 Koleszar, *How Satisfied are Doctors with Medicine?*, PHYSICIAN'S MGMT., Aug. 1984, at 94, 96-97 (1986) (42% of 754 physicians surveyed reported that they had seriously considered leaving medicine, and malpractice costs were a major reason); *see also* B. FURROW, *supra* note 61 (attributing "depletion of physicians" to "skyrocketing malpractice premium costs").

145 The amendment to the California Labor Code renouncing the dual capacity doctrine was part of an extensive workers' compensation reform program which not only strengthened the exclusivity provisions of the workers' compensation system, but also increased monetary awards for workers injured on the job. Note, *supra* note 81, at 1229, 1235 & n.46 (1988); Note, *supra* note 4, at 214. There was no clear explanation for the legislature's repudiation of the dual capacity doctrine. The actual motivation of the legislature has been largely obscured by the many trade-offs involved in the total package, most significantly a lessening of employers' (and insurers') liability for an increase in workers' benefits. *Id.* at 214-15.

146 *See supra* notes 112-14 and accompanying text.

147 CAL. LAB. CODE § 3602(a) (West 1989); *see* discussion *supra* note 81.

after its woeful experience with excessive application of the dual capacity doctrine in the workplace.

The following provision is suggested to indicate the impropriety of bringing an action at law against a company physician. In addition, it provides a single comprehensive section dealing with the exclusivity of workers' compensation remedies, incorporating both employer and co-employee immunity.

> Where the conditions of compensation as set forth in this statute concur, the right to recover such compensation is, except as specifically provided in this statute, the sole and exclusive remedy of the employee or his or her dependents against the employer or any person in the same employ, and the fact that either the employer or the person in the same employ also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law against the employer or anyone in the same employ.

Each state can insert, after the first use of the phrase "in this statute," the specific statutory section defining the conditions of compensation, and after the second use of the phrase, the specific sections delineating any exceptions to the exclusive remedy rule which presently exist by legislative fiat.[148]

This provision is essentially the California amendment,[149] modified by the insertion of the phrase "anyone in the same employ" at three places to clearly extend protection to co-employees, including company physicians. The lack of such a phrase in the California amendment has, in fact, recently revived the potential of dual capacity liability in that state—at least with respect to co-employee company physicians.[150] An intermediate appellate court, in reversing the decision of a trial court, has held that

> the restrictive language in section 3602, subdivision (a), with respect to the use of dual capacity applies only to lawsuits against employers. Consequently, nothing in the language of section 3602 immunizes . . . a co-employee . . . from liability or prevents . . . [a fellow worker] from using the dual capacity theory in seeking damages against [a co-employee company physician].[151]

Thus, this court has attempted to reestablish a foothold for the dual

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148 *See supra* notes 119-20 and accompanying text.

149 CAL. LAB. CODE § 3620(a) (West 1989).

150 Hendy v. Losse, 224 Cal. App. 3d 279, 274 Cal. Rptr. 31, (treating physician, an employee of a professional football team, is subject to malpractice suit by co-employee football player on basis of dual capacity liability), *modified on other grounds on denial of reh'g*, 224 Cal. App. 3d 1412a (1990) .

151 *Id.* at 292-93, 274 Cal. Rptr. at 40.

capacity liability of company doctors, despite the fact that, up to the date of this decision, the California amendment had been considered a virtually complete rejection of the judicially crafted dual capacity doctrine both by the California courts[152] and by the leading treatise in the area of workers' compensation.[153] Of course, such protection assumes the company physician can, in fact, be classified as a co-employee.[154] Furthermore, because the suggested model provision relates to both employer and co-employee immunity, it provides a statutory co-employee immunity provision in states which have judicially adopted such protection as consistent with their worker's compensation statutes, but have not actually incorporated such immunity into their workers' compensation law. Separate co-employee immunity sections, as are common in a number of jurisdictions,[155] would no longer be necessary.

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152 Shortly after the passage of § 3602(a), the dual capacity doctrine was considered overruled by statute. Siva v. General Tire & Rubber Co., 146 Cal. App. 3d 152 ,157, 194 Cal. Rptr. 51, 54 (1983) ("The last, and what may be the final, state Supreme Court expression of the dual capacity doctrine came in *Bell v. Industrial Vangas, Inc.* . . . 30 Cal. 3d 268, 179 Cal. Rptr. 30, 637 P.2d 266 [1981].") (footnote omitted). This interpretation of legislative intent was continuously reiterated by the California courts. Jones v. Kaiser Indus., 43 Cal. 3d 552, 561, 737 P.2d 771, 777, 237 Cal. Rptr. 568, 574 (1987) ("In 1982 . . . the Legislature severely limited the scope of the [dual capacity liability] rule by confining its application to a narrow class of product liability cases. (§ 3602, subd. (c).)"); Bell v. Macy's Cal., 212 Cal. App. 3d 1442, 1450 n.3, 261 Cal. Rptr. 447, 452 n.3 (1989) ("In 1982, the Legislature amended Labor Code section 3602 to abolish the dual capacity doctrine except as allowed by statute [referring to limited product liability exceptions].").

153 2A A. LARSON, *supra* note 3, § 72.81(c), at 14-243 ("In August, 1982, the California legislature abolished the dual capacity doctrine.") (citing ASSEMBLY BILL NO. 684 sec. 6, amending CAL. LAB. CODE § 3602). The heading of § 72.81(c), incidentally, is "The rise and fall of dual capacity." 2A A Larson, supra note 3, § 72.81 (c) at 14-236.

While conceding that § 3602(a) refers to employers, but does not apparently apply to co-employee company physicians, *id.* § 72.61(b), at 14-228.47 n.65.1, Larson believes that a company physician, even without legislative rejection of the dual capacity doctrine, would be amply protected by the co-employee immunity provision of the California worker's compensation statute, since, in relation to his fellow workers, the company physician "does *not* have two capacities. . . . All he does, all day long, is perform in th[e] single capacity [of company doctor]." *Id.* at 14-228.47. The physician who is also an employer, on the other hand, might need the added protection of the dual capacity provision, since he incurs all the duties and obligations of employer, which are not only in addition to his medical activities, but are, in relation to his employees, quantitatively greater. *Id.* Nonetheless, Larson points out, duties additional to those of employer should not, in and of themselves, permit breach of the exclusive remedy rule; to do so, such duties must be not only additional, but "totally separate from and unrelated to those of the employment." *Id.* § 72.81(c), at 14-243. Otherwise, considering the many "additional" roles an employer might play in relation to an employee—landowner, product manufacturer, product repairer, safety inspector, provider of medical care—little would be left to the exclusivity of the workers' compensation remedy. *Id.* § 72.81(a), at 14-229, § 72.81(c), at 14-243.

154 *See supra* notes 109-10.

155 *See, e.g.*, N.Y. WORK. COMP. LAW § 29(6) (Consol. 1982).

CONCLUSION

An analysis of the law and logic supporting dual capacity liability makes it clear that the doctrine is inappropriate with respect to co-employee company physicians. The dual capacity doctrine is a judicially crafted concept which was developed merely to circumvent historical immunities to tort liability afforded by workers' compensation laws, thereby permitting more extensive resort to tort litigation by those injured at work.

The current need for the clear legislative action to eliminate the dual capacity liability of co-employee company physicians is evident not only from the recent action of the California intermediate appellate court,[156] but also from the continued testing of the dual capacity doctrine by plaintiffs in work-related medical malpractice actions in courts of other states; some states, while not approving the doctrine, have not precluded its application, either.[157] Currently, only two states, Louisiana and Colorado, clearly hold that company physicians can have a dual capacity.[158] In both states, the courts based their decisions largely on policy grounds, on the original California case which, at the time of their decisions, had apparently been repudiated by California statute, on dissenting opinions, and on cases involving employer-defendants (who possess inherently different characteristics in terms of dual capacity possibilities than do employee-defendants). Louisiana, interestingly, has recently rejected the use of the dual capacity doctrine in products liability suits while reaffirming its vitality in medical malpractice actions.[159]

The dual capacity doctrine flies in the face of the established scheme that has not only served as the major support system of those injured on the job, but has provided, as well, protection for *all* co-employees from potentially financially devastating suits brought by their fellow workers, a not insignificant consideration in our increasingly litigious society. As the centuries prepare to turn again, that's a good point to ponder before attempting to alter the balance of rights

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156 Hendy v. Losse, 224 Cal. App. 3d 279, 274 Cal. Rptr. 31, modified on other grounds on denial of reh'g, 224 Cal. App. 3d 1412a (1990); *see supra* notes 150-51 and accompanying text.

157 *See, e.g.*, Barrett v. Rodgers, 408 Mass. 614, 562 N.E.2d 614 (1990) (stating in nonmedical malpractice action: "We neither endorse nor preclude such an action [medical malpractice suit on a basis of dual capacity liability] but leave it rather for another day."); Gatlin v. Truman Medical Center, 770 S.W.2d 510, 511, 513 (Mo. App. 1989) (court declined to consider in the context of the case at bar—a medical malpractice action by employee nurse against both co-employee nurse and employer hospital—whether the dual capacity doctrine should be adopted by Missouri).

158 Ducote v. Albert, 521 So. 2d 399 (La. 1988); Wright v. District Court, 661 P.2d 1167 (Colo. 1983).

159 Deagracias v. Chandler, 551 So. 2d 25, 26 (La. App. 1989).

supporting the historical compromises that permitted the establishment of the original workers' compensation statutes.

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