Notes

Dual Capacity Doctrine: Third-Party Liability of Employer-Manufacturer in Products Liability Litigation

I. INTRODUCTION

The dual capacity doctrine has received growing attention in recent years.[1] This doctrine permits an employee to sue his employer for tortious conduct which emanates from a "non-employer" capacity.[2] It has become a viable means of circumventing the exclusive remedy provided by workmen's compensation[3] and has resulted in a careful re-evaluation of the precepts which have traditionally supported workmen's compensation legislation.

Although workmen's compensation was designed primarily to benefit the industrial employee and to protect him from many inequities present in an industrial society,[4] the employer has found the exclusive remedy provision to be an effective vehicle for escaping the full economic sanction which would have been levied at common

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[1]2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 72.80 (1976); Larson, *Workmen's Compensation: Third Party's Action Over Against Employer*, 65 NW. U.L. REV. 351 (1970); Malone, *The Limits of Coverage in Workmen's Compensation—The Dual Requirement Reappraised*, 51 N.C.L. REV. 705 (1973); O'Connell, *Workmen's Compensation as a Sole Remedy for Employees But Not Employers*, 28 LAB. L.J. 287 (1977); Vargo, *Workmen's Compensation, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 289 (1974); Comment, *Tort—Workmen's Compensation—Dual Capacity Doctrine Rejected*, 8 MEM. ST. U.L. REV. 163 (1977); Comment, *Workmen's Compensation and Employer Suability: The Dual Capacity Doctrine*, 5 ST. MARY'S L.J. 818 (1974).

[2]2A A. LARSON, *supra* note 1, § 72.80, at 14-112; Vargo, *supra* note 1; Comment, *Workmen's Compensation and Employer Suability: The Dual Capacity Doctrine*, 5 ST. MARY'S L.J. 818 (1974).

[3]Workmen's compensation statutes specifically exclude any common law remedy of an employee against his employer for industry-related accidents. Provisions of this nature will typically state:

> The rights and remedies herein granted to an employee subject to this act [22-3-2-1 to -6-3] on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or death.

IND. CODE § 22-3-2-6 (1976). *See generally* Note, *Workmen's Compensation Act—Bar of Common Law Recovery for Non-Compensable Injuries*, 14 N.C.L. REV. 199 (1936).

[4]1 A. LARSON, *supra* note 1, § 4.00 (1978); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 80 (4th ed. 1971); W. SCHNEIDER, SCHNEIDER'S WORKMEN'S COMPENSATION § 1 (3d ed. 1941), B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 1.2 (1950). An early discussion of the social ramifications caused by the industrial society and the need for a workmen's compensation scheme can be found in Peet v. Mills, 76 Wash. 437, 136 P. 685 (1913). *See also* materials cited in note 14 *infra*.

law for his tortious conduct.[5] As a result, a number of jurisdictions have recognized exceptions which permit an employee, injured during his employment, to maintain a common law tort action against his employer under the dual capacity doctrine. Exceptions have been recognized in cases involving the malpractice of a doctor in providing treatment for injuries sustained at work by an employee,[6] cases involving insurance carriers of employers who have assumed responsibility for medical treatment[7] or safety inspection[8] at the place of employment, cases involving the intentional torts of an employer which result in injury to his employees[9] and cases involving a seaman's common law action against a shipowner for maintaining an unseaworthy vessel under the Longshoremen's and Harbor Workers' Compensation Act.[10]

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[5]*See* note 3 *supra.*

[6]*See, e.g.*, Duprey v. Shane, 39 Cal. 2d 781, 249 P.2d 8 (1952). *See also* 2A A. LARSON, *supra* note 1, § 72.80, at 14-112.

[7]*E.g.*, Mager v. United Hosps. of Newark, 88 N.J. Super. 421, 212 A.2d 664 (1965). *See also* 2A A. LARSON, *supra* note 1, § 72.90.

[8]*E.g.*, Sims v. American Cas. Co., 131 Ga. App. 461, 206 S.E.2d 121 (1974). *See also* 2A A. LARSON, *supra* note 1, § 72.90.

[9]*E.g.*, Conway v. Globin, 105 Cal. App. 2d 495, 233 P.2d 612 (1951). *See also* Note, *Right of Employee to Sue Employer for an Intentional Tort*, 26 IND. L.J. 280 (1951).

[10]33 U.S.C. §§ 901-50 (1976). Cases arising from this Act provide an analogous examination of the dual capacity theory. The Act's exclusive remedy provision bars any common law recovery against an employer by an injured seaman. Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. § 905 (1976). Under prior law an employee-seaman was permitted to bring a common law action against his employer in a second capacity as owner of the ship under the doctrine of unseaworthiness, thereby circumventing the Act's statutory bar to these actions. Act of Oct. 27, 1972, Pub. L. No. 92-576, § 18(a), 86 Stat. 1263 (formerly codified at 33 U.S.C. § 905 (1970)); Reed v. The Yaka, 373 U.S. 410 (1963); Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124 (1956); In Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Hertel v. American Export Lines, Inc., 225 F. Supp. 703 (S.D.N.Y. 1964). *See generally* 1A E. JHIRAD, BENEDICT ON ADMIRALTY § 27 (1977); 2A A. LARSON, *supra* note 1, § 72.80; Larson, *Conflicts Problem Between the Longshoremen's Act and State Workmen's Compensation Acts Under the 1972 Amendments*, 14 HOUS. L. REV. 287 (1977); Larson, *The Conflict of Laws Problem Between the Longshoremen's Act and State Workmen's Compensation Acts*, 45 S. CAL. L. REV. 699 (1972); Note, *Longshoremen, Longshoring Operations, and Maritime Employment: A Dual Test of Status After Northeast Marine Terminal Co. v. Caputo*, 64 VA. L. REV. 99 (1978).

It should be noted, however, that the 1972 amendments to the Act have created some uncertainty as to the current status of an employer-shipowner's common law liability to an injured seaman. *See* Johnson v. American Mut. Liab. Ins. Co., 559 F.2d 382 (5th Cir. 1977); Holland v. Allied Structural Steel Co., 539 F.2d 476 (5th Cir. 1976); Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); Haas v. 653 Leasing Co., 425 F. Supp. 1305 (D.C. Pa. 1977). *See also* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 6-57 (2d ed. 1975); Note, *The Injured Lognshoremen vs. The Shipowner After 1972: Business Invitees, Land-Based Standards, And Assumption of Risk*, 28 HASTINGS L.J. 771 (1977); 23 LOY. L. REV. 1029 (1977).

Because of the dynamic state of the law in this area and because its application of

In these cases, the employer has been treated as a third-party tortfeasor and has been held accountable for his tortious conduct. His third-party or "dual" liability has been the exception, however, and most jurisdictions have upheld the exclusive remedy and rejected the worker's common law action.[11] For example, the exception has not generally been extended to cases involving an employee's products liability action against his employer, who is also the manufacturer of the product which caused that employee's injury.[12] This adherence to the traditional exclusive remedy concept seems at odds with today's general expansion of a consumer's tort action against a manufacturer of defective products.[13]

This Note will first discuss the social tenets which support the workmen's compensation scheme. It will then analyze the justifications for the recognition of an employer's third-party liability in the exceptional cases and the problems associated with an extension of the dual capacity doctrine into the area of products liability litigation.

II. Development of A Workmen's Compensation Scheme

Workmen's compensation evolved from efforts to ameliorate the often inequitable and devastating effects of an industrial society.[14]

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a dual capacity theory is merely analogous to the employer-employee relationship under workmen's compensation, the relevance of dual capacity in the context of the Act will not be analyzed in the textual portion of this Note.

[11]2A A. Larson, *supra* note 1, §§ 72.80, 72.90.

[12]*See, e.g.*, Kottis v. United States Steel Corp., 543 F.2d 22 (7th cir. 1976), *cert. denied*, 430 U.S. 916 (1977).

[13]Analysis of the development of a consumer's tort action against a manufacturer has been undertaken by numerous commentators. *See* 2 L. Frumer & M. Friedman, Products Liability §§ 16, 16A (1978); W. Prosser, *supra* note 4, §§ 96-98; Calabresi & Hirschoff, *Toward A Test For Strict Liability in Torts*, 81 Yale L.J. 1055 (1972); Klemme, *The Enterprise Liability Theory of Torts*, 47 U. Colo. L. Rev. 153 (1976); Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. Rev. 803 (1976); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960); Ribstein, *Guidelines for Deciding Product Economic Loss Cases*, 29 Mercer L. Rev. 493 (1978); Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825 (1973). *See generally* Owen, *The Highly Blameworthy Manufacturer: Implications on Rules of Liability and Defense in Products Liability Actions*, 10 Ind. L. Rev. 769 (1977).

[14]W. Prosser, *supra* note 4, § 80; W. Schneider, *supra* note 4, § 1. *See* 1 A. Larson, *supra* note 1, § 2.20 (1978), wherein Professor Larson describes the underlying policy behind the workmen's compensation scheme as follows:

> The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most efficient, most dignified and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obligated to provide in any case in some less satisfactory form, and of allocating the burden of these

This scheme has replaced the common law tort action, once the sole recourse for an injured employee, with a statutory scheme which has generally abrogated principles of fault.[15] It has been designed to provide an expeditious remedy which will guarantee to the injured employee a minimum measure of recovery, instead of forcing him to battle his employer in a long and costly judicial proceeding which often leaves the worker with no recovery.[16]

The workmen's compensation scheme has rejected the common law defenses of contributory negligence, assumption of risk, and the fellow-servant rule.[17] These defenses had often acted to deprive an

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payments to the most appropriate source of payment, the consumer of the product.

Id. See also Brode, *The Adequacy of Workmen's Compensation as Social Insurance: A Review of Developments and Proposals*, 1963 WIS. L. REV. 57 (1963); Campbell, *Basic Principles of Workmen's Compensation*, 20 MISS. L.J. 117 (1949); Clayman, *Relation of Workmen's Compensation to Other Social Insurance*, 19 OHIO ST. L.J. 607 (1958); Grillo, *Fifty Years of Workmen's Compensation—An Historical Review*, 38 CONN. B.J. 239 (1964); Horovitz, *Modern Trends in Workmen's Compensation*, 21 IND. L.J. 473 (1946); Katz, *Workmen's Compensation in the United States*, 9 LAB. L.J. 866 (1958); Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORN. L.Q. 206 (1952); St. Clair, *The Case for Private Insurance of Workmen's Compensation*, 31 ROCKY MTN. L. REV. 397 (1959).

[15]1A A. LARSON, *supra* note 1, § 30.00 (1973). Prosser has enumerated five common law duties of a master for the protection of his servants:

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

W. PROSSER, *supra* note 4, § 80, at 526 (footnotes omitted).

[16]W. PROSSER, *supra* note 4, § 80, at 530-31. One author recognizes three choices for dealing with industrial accidents: (1) Refuse all aid to the injured worker, thereby forcing him to bear the entire loss; (2) compensate the worker from general tax revenues by way of the various welfare programs; or (3) grant the worker benefits under an employer-financed workmen's compensation plan. 1 A. LARSON, *supra* note 1, § 2.20 (1978). Larson rejects the first choice as immoral. He objects to the welfare payments because, while they would spread the loss, they stigmatize the worker as a pauper and force the cost of the accident upon a governmental body unconnected with the industry causing the worker's injury. He approves the grant of workmen's compensation benefits because it preserves the worker's dignity and requires the industry which produced the injury to absorb the loss as a cost of production. *Id. See also* Horovitz, *Symposium: Worldwide Workmen's Compensation Trends*, 59 KY. L.J. 35 (1970-71); Kelly, *Workmen's Compensation—Still a Vehicle for Social Justice*, 55 MASS. L.Q. 251 (1970); Larson, *supra* note 14.

[17]Prior to workmen's compensation legislation, several jurisdictions had attempted to mitigate the effect of these defenses. *See* 1 A. LARSON, *supra* note 1, §§ 4, 5 (1978). A number of states have deprived an employer of these defenses if that employer has failed to comply with his state's workmen's compensation act (*i.e.*, by

employee of any recovery at common law.[18] One writer estimated the effect of these defenses on a worker's chance to recover at common law and concluded that eighty percent of all employee actions at common law were unsuccessful.[19] In the remaining twenty percent of the cases, recovery was often so small, after costs and attorney fees, that little compensation was received by the employee.[20]

The inequities found under the common law system led various states to exercise their police and sovereign powers to create a new remedy which operated to exclude all other remedies without regard to the fault of either the employer or employee. The result has been to treat industrial accidents as a cost of production.[21] One court has explained this result:

> The employer and employe as distinctive producing causes are lost sight of in the greater vision, that the industry itself is the great producing cause, and that the cost of an injury suffered in any industry is just as much a part of the cost of production as the tools, machinery, or material that enter into that production, recognizing no distinction between the injury and destruction of machinery and the injury and destruction of men in so far as each is a proper charge against the cost of production.[22]

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refusing to pay premiums into the state's workmen's compensation fund). *See* Spaulding v. Ads-Anker Data Systems-Midwest, Inc., 498 F.2d 517 (4th Cir. 1974) (applying W. VA. CODE § 23-2-8 (1978)). Other jurisdictions have deprived an employer of these defenses if that employer fails to obtain insurance as required by the state's workmen's compensation act. *See, e.g.*, Haralson v. Rhea, 76 Ariz. 74, 259 P.2d 246 (1953) (applying ARIZ. REV. STAT. § 23-907 (1971)).

[18]W. PROSSER, *supra* note 4, § 80, at 526-28. Prosser pointed out that the possibility of recovery by the injured workman was greatly limited by this "unholy trinity" of common law defenses. The employee was deemed either to have bargained away his right to hold the employer responsible or to have assumed the risk of hazards normally incident to the type of employment in which he was engaged. If the employee remained at work voluntarily after he knew and appreciated the danger, the employer was totally absolved from responsibility for any losses resulting from his breach of duty. This was true even if the employee continued to work under protest, or under a direct order carrying a threat of discharge. It was only if the risk was not imminent, and the employer gave an assurance of safety or a promise to remedy the hazard, that the workman was held not to assume the risk by remaining on the job. *See generally* Moreland, *The General Development of Workmen's Compensation Acts*, 13 KY. L.J. 20 (1924).

[19]B. SMALL, *supra* note 4, § 1.2, at 3 (citing W. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION, 21 (1936)). Dean Prosser cited other estimates of the pre-workmen's compensation recovery rates for industrial accidents. *See* W. PROSSER, *supra* note 4, § 80 n.32.

[20]B. SMALL, *supra* note 4, § 1.2, at 3.

[21]1 A. LARSON, *supra* note 4, § 2.20 (1978); W. PROSSER, *supra* note 4, § 80, at 530-31; 1 W. SCHNEIDER, *supra* note 4, § 3.

[22]Peet v. Mills, 76 Wash. 437, 440, 136 P. 685, 686 (1913).

The net effect of workmen's compensation, therefore, has been to impose a form of strict liability upon the employer to pay for industrial accidents.[23] It has shifted the loss of accident away from the employee, who is unable to bear the loss of injury, and has forced the industry to absorb that loss.[24]

It should be noted that workmen's compensation is not designed as a general accident insurance[25] but as a means of compensating an employee for losses resulting from a risk to which an employee is exposed by his employment in the industry.[26] Workmen's compensation operates to: (1) Assure that the injured employee will receive necessary hospital and medical care and a modest but certain compensation for his injury, and (2) afford the employer immunity from the potentially exorbitant common law tort claims of his employee.[27] Workmen's compensation creates a new loss-spreading mechanism which is more stable, predictable, and efficient than traditional forms of recovery available at common law. It replaces a judicial determination of injury, administered by a jury by reference to the specific facts of each case, with a legislative determination, administered by an industrial board and governed by standardized criteria and uniform recovery rates.[28]

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[23]W. PROSSER, *supra* note 4, § 80, at 531. This form of strict liability should not be confused with that involving "ultrahazardous activities." Professor Larson distinguished the two forms in 1 A. LARSON, *supra* note 1, §§ 2.20, 2.30 (1978).

[24]*See* W. PROSSER, *supra* note 4, § 80, at 530-31.

[25]*See* 1 W. SCHNEIDER, *supra* note 4, § 5, at 13-14 which states:

> Primarily the acts are intended to provide financial protection against workmen and their dependents becoming public charges because of the risks and hazards of the workmen's employment, by assuring them the compensation prescribed by the acts, through substituting in most instances a method of insurance in place of common law liability.

See generally 1 A. LARSON, *supra* note 1, § 3 (1978). Larson distinguished workmen's compensation legislation from public-social insurance schemes. He pointed out that workmen's compensation does not place the loss upon the public as a whole, as would public-social insurance, but rather places the loss upon a particular class of consumers, thereby retaining a relation between the risk of industry and the ultimate loss-bearer.

[26]*See* Employers Mut. Liab. Ins. Co. of Wis. v. Konvicka, 197 F.2d 691 (5th Cir. 1952); Lewis v. W.B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963). *Compare* O'Connell, *supra* note 1, *with* Malone, supra note 1. *See also* Riesenfeld, *Forty Years of American Workmen's Compensation*, 35 MINN. L. REV. 525, 529 (1951).

[27]This dichotomous function has been recognized in several jurisdictions. *See* Smither & Co. v. Coles, 242 F.2d 220, 222 (D.C. Cir.), *cert. denied*, 354 U.S. 914 (1957); Provo v. Bunker Hill Co., 393 F. Supp. 778, 780-81 (D. Idaho 1975); Reed v. New England Tel. & Tel. Co., 175 F. Supp. 409, 410 (D.N.H. 1959); Sanchez v. Hill Lines, Inc., 123 F. Supp. 42, 44 (D.N.M. 1954) (quoting Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932)); Wilson v. Faull, 27 N.J. 105, 116, 141 A.2d 768, 774 (1958); Fallone v. Miscericordia Hosp., 23 A.D.2d 222, 227, 259 N.Y.S.2d 947, 952 (1965), *aff'd*, 17 N.Y.2d 648, 216 N.E.2d 594, 269 N.Y.S.2d 431 (1966). *See also* 1 W. SCHNEIDER, *supra* note 4, § 4.

[28]These concepts and recovery schedules are embodied in most workmen's com-

The focal point of a workmen's compensation analysis is the *employment* relationship—the status of the parties as employer and employee.[29] If the employment relationship exists, the provisions of the workmen's compensation scheme apply. The courts have generally construed the language of workmen's compensation statutes liberally in order to bring an injured employee within the protection of the statutes[30] and to increase the employer's immunity from common law actions.[31]

A further prerequisite to the recovery of workmen's compensation benefits is that a direct causal connection must exist between the employment relationship and the injury.[32] It is not sufficient for an award of compensation that the injury befell the worker while he was "on the job."[33] Rather, the causal connection will be deemed to exist only if the accident which results in injury is found to "arise

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pensation statutes. *See, e.g.*, IND. CODE § 22-3-3-8 (1976), dealing with awards for total disability arising from job-related injuries, which states in part:

> With respect to injuries occurring on and after July 1, 1976, causing temporary total disability or total permanent disability for work, there shall be paid to the injured employee during the total disability a weekly compensation equal to sixty-six and two-thirds percent (66 2/3%) of his average weekly wages . . . for a period not to exceed five hundred (500) weeks.

See also Comment, *The Test for the Employment Relationship Under Workmen's Compensation*, 1 U.C.L.A.-ALAS. L. REV. 40, 44 (1971).

[29]*See generally* 1B A. LARSON, *supra* note 1, § 43.00-.54 (1978). As a general rule, the test for determining whether an employment relationship exists is the employer's "right to control" the worker's conduct, as distinguished from the right merely to require certain results in conformity with a contract. *See* Lawson v. Lawson, 415 S.W.2d 313, 319 (Mo. App. 1967); Myers v. Workmen's Compensation Comm'r, 150 W. Va. 563, 567, 148 S.E.2d 664, 667 (1966); Sears, Roebuck & Co. v. Poole, 112 Ga. App. 527, 527-28, 145 S.E.2d 615, 616 (1965); Travelers Ins. Co. v. Arnold, 378 S.W.2d 78, 82 (Tex. Civ. App. 1964). *Compare* Edelston v. Builders & Remodelers, Inc., 304 Minn. 550, 550-51, 229 N.W.2d 24, 25 (1975), wherein the court considered the following factors in determining the existence of an employment relationship: (1) The right to control the means and manner of performance, (2) the mode of payment, (3) the furnishing of materials or tools, (4) the control of the work site, and (5) the right to discharge, *with* RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958), which enumerates several factors relevant to the determination of an employment status. *See also* Comment, *supra* note 28.

[30]*See* New England Tel. & Tel. Co. v. Central Vt. Pub. Serv. Corp., 391 F. Supp. 420, 428 (D. Vt. 1975); Loveless v. Garrison Furniture Co., 251 Ark. 776, 779, S.W.2d 158, 160 (1972); Prater v. Indiana Briquetting Corp., 253 Ind. 83, 86, 251 N.E.2d 810, 811 (1969); Keenan v. Young, 119 Ohio App. 233, 235, 195 N.E.2d 382, 385 (1963). *See generally* Campbell, *supra* note 14, at 126-29.

[31]*See* Arnold v. Shell Oil Co., 419 F.2d 43 (5th Cir. 1969); Liles v. Riblet Prods. of La., Inc., 363 F. Supp. 358 (W.D. La. 1973); Johnson v. Wisconsin Lumber & Supply Co., 203 Wis. 304, 234 N.W. 506 (1931).

[32]1 A. LARSON, *supra* note 1, §§ 6.00, 6.10 (1978); Larson, *The Legal Aspects of Causation in Workmen's Compensation*, 8 RUTGERS L. REV. 423 (1954).

[33]Malone, *supra* note 1, at 711.

out of" *and* "during the course of" employment.[34] "Arising out of" involves the risk or hazard to which the employee would not have been exposed had he not been performing the duties or incidental tasks of employment.[35] "During the course of" deals with the time and place of the accident and the circumstances under which the accident occurred.[36] Many jurisdictions have treated these terms in conjunction and permitted recovery only when both are found to exist.[37]

Therefore, before a worker will be entitled to recover workmen's compensation benefits, he must show: (1) An employment relationship between the employer and himself, and (2) an accident which arose out of and during the course of employment. Once these two tests have been met, then, except for a few narrowly drawn exceptions, workmen's compensation eliminates both the relevance of fault and the worker's common law action in tort against his employer. With this background in mind, the dual capacity doctrine will now be examined.

III. Dual Capacity Doctrine

As noted above, workmen's compensation was designed to alleviate many of the hardships faced by an employee at common law.[38] In return for a guaranteed recovery of benefits, the employer was given immunity from further liability to his employee.[39] It has become apparent, however, that the employer has taken refuge in this statutory immunity and has thereby avoided certain tort claims which arguably do not result from the employment relationship. The dual capacity doctrine has been designed to correct this anomaly. The doctrine entitles an employee to recover from his employer if

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[34]*See* Burnett, *Workmen's Compensation Claims "Arising Out of" and "In the Course of,"* 2 Forum 35 (1966); Larson, *supra* note 32; Malone, *supra* note 1; Comment, *"Arising Out of" and "In the Course of Employment" in Workmen's Compensation*, 28 Tenn. L. Rev. 367 (1961).

[35]1 A. Larson, *supra* note 1, §§ 6.00-.50 (1978). Larson recognized three prevailing tests for determining whether an injury "arises out of" the risk of employment: (1) *Increased-risk doctrine*—the employment increases the risk to the workman, not shared generally by the public; (2) *actual-risk doctrine*—the employment subjects a worker to an actual risk of harm, even if that risk is common to the public as a whole; and (3) *positional-risk doctrine*—the injury would not have occurred *but for* the fact that the employment placed the worker in the position in which he was injured. *Id.*

[36]*Id.* § 14. The question of whether the injury occurred on the employer's premises is only one factor to consider in determining the existence of a causal relationship between the accident and the employment relationship. *See, e.g.*, Jack v. Belin's Estate, 149 Pa. Super. Ct. 531, 27 A.2d 455 (1942).

[37]*See, e.g.*, Lincoln v. Whirlpool Corp., 151 Ind. App. 190, 279 N.E.2d 596 (1972).

[38]W. Prosser, *supra* note 4, § 80.

[39]*See* W. Schneider, *supra* note 4, § 4.

that employer occupies a second capacity conferring on him rights and obligations independent and unrelated to those generated by his capacity as employer.[40]

The controlling factor in a dual capacity analysis is the nature of the duty owed by the employer to his employees. As one writer has put it: "The decisive dual-capacity test is not concerned with how separate or different the second function of the employer is from the first but with whether the second function generates obligations unrelated to those flowing from the first, that of employer."[41] If the duty flows from the employment relationship and the injury "arises out of" and "during the course of" that employment, then the strong policy considerations behind workmen's compensation mandate that the employer be immune from tort liability. If, however, the duty flows from an "extra" employer status *or* does not "arise out of" and "during the course of" the employment, then a second capacity arises and the employer's status is merely coincidental.[42] The employer will then be treated as a third-party tortfeasor and will not be immune from a common law tort action by his employee.[43]

The third-party liability of the employer has been recognized in several jurisdictions. As noted above, this liability has been found in cases involving a physician-employer who negligently treats an employee,[44] insurance carrier cases,[45] cases involving an employer's intentional torts[46] and seamen claims under the Longshoremen's and Harbor Workers' Compensation Act.[47] Much has been written on an employer's dual liability in these areas and, therefore, the subject will not be discussed here. A brief examination of the policy supporting an acceptance of the dual capacity theory is, however, germane to an evaluation of the merits of rejecting this theory in the area of products liability litigation.

A. Physician-Employer's Negligent Treatment of His Employees

Several jurisdictions have held that if an employer-physician negligently treats his employee for injury "arising out of" and "during the course of" employment, the statutory immunity provided by workmen's compensation will not bar that employee's tort claim

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[40]*See* 2A A. LARSON, *supra* note 1, § 72.80.

[41]*Id.* at 14-117.

[42]*See* Mercer v. Uniroyal, Inc., 49 Ohio App. 2d 279, 361 N.E.2d 492 (1976).

[43]2A A. LARSON, *supra* note 1, § 72.80. Larson recognized two prongs to a dual capacity analysis: (1) Whether a valid dual capacity situation exists, and (2) which of the two capacities should control. *Id.* at 14-122.

[44]*See* note 6 *supra.*

[45]*See* notes 7 & 8 *supra.*

[46]*See* note 9 *supra.*

[47]*See* note 10 *supra.*

against his employer.[48] Since the employer assumes an obligation not required by either the employment relationship or the workmen's compensation statute, his status shifts from that of an employer to that of a third party.[49] Thus, the duty owed the employee emanates from the physician-patient relationship and not the employer-employee relationship.[50] The coincidental status of employer as physician does not affect the legal obligations owed to his employee.[51]

In *Duprey v. Shane*,[52] the California Supreme Court recognized that a dual capacity should not be blindly ignored in order to protect an employer's immunity under workmen's compensation. It stated:

> It is true that the law is opposed to the creation of a dual personality, where to do so is unrealistic and purely legalistic. But where, as here, it is perfectly apparent that the person involved—Dr. Shane—bore towards his employee two relationships—that of employer and that of doctor—there should be no hesitancy in recognizing this fact as a fact. Such a conclusion, in this case, is in precise accord with the facts and is realistic and not legalistic.[53]

Duprey supports the proposition that the exclusive remedy provision should be adhered to only if the policy considerations supporting the workmen's compensation scheme are invoked by the facts of a particular case. If, however, adherence to this provision works an inequity and deprives a workman of a tort action solely because of the coincidence that his physician was also his employer, then the exclusive remedy no longer facilitates the workmen's compensation scheme and mere "legal adherence" to that scheme is unjustified.

B. Employer's Insurance Carrier's Negligent Provision of Medical Services to Employees

A number of jurisdictions have considered cases in which an employer has contracted with an insurance carrier to provide medical services for his employees. Although many courts have rejected an employee's action against a carrier for negligently pro-

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[48]*See, e.g.*, Duprey v. Shane, 39 Cal. 2d 781, 249 P.2d 8 (1952) (upholding judgment in favor of injured employee against employer-physician for malpractice in treatment of industry-related injury).

[49]2A A. LARSON, *supra* note 1, §§ 72.61, 72.80.

[50]*Id.*; *see* Note, *The Malpractice Liability of Company Physicians*, 53 IND. L.J. 585 (1978).

[51]2A A. LARSON, *supra* note 1, §§ 72.61, 72.80.

[52]39 Cal. 2d 781, 249 P.2d 8 (1952).

[53]*Id.* at 793, 249 P.2d at 15.

viding medical services,[54] several jurisdictions have recognized this right.[55] In *Tropiano v. Travelers Insurance Co.*,[56] an employee brought an action in trespass against his employer's workmen's compensation carrier for negligence in supplying medical treatment for injuries sustained while acting within the scope of employment. The Pennsylvania Supreme Court reversed a lower court ruling[57] which had upheld the employer's immunity under the state law requiring an employer or his insurance carrier to furnish medical services to employees for work-related injuries.[58] The Pennsylvania Supreme Court concluded that the carrier's negligent treatment was not causally linked to the employment itself. It stated:

> The medical treatment of injuries is a separate and distinct function of the insurance carrier which does not concern the employer and is not part of the employer's business operations. The alleged acts of negligence in this case were committed by the insurance carrier subsequent to and independent of the original injury and with no involvement of the employer whatsoever.[59]

The carrier, by assuming duties independent of those imposed by the employment relationship, placed itself outside the workmen's compensation scheme and was not immune from tort liability.

A simliar result has been reached in cases involving the negligence of a physician who served the employer on a regular basis.[60] The ground for denying immunity to the doctor was that he served as an independent contractor, and was therefore a third party under the workmen's compensation scheme.[61]

Some jurisdictions have also refused to extend the employer's immunity to insurance carriers if those carriers maintain their own hospitals and clinics, and if nothing in the workmen's compensation

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[54]Sarber v. Aetna Life Ins. Co., 23 F.2d 434 (9th Cir. 1928); Flood v. Merchants Mut. Ins. Co., 230 Md. 373, 187 A.2d 320 (1963). *Cf.* Unruh v. Truck Ins. Exch., 7 Cal. 3d 700, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972) (refusing to extend employer immunity so as to bar plaintiff's intentional tort claim against the carrier for failure to properly supervise and control investigators it hired to conduct a nonmedical investigation of plaintiff-employee's claim for compensation).

[55]Mager v. United Hosps. of Newark, 88 N.J. Super. 421, 212 A.2d 664 (1965); Tropiano v. Travelers Ins. Co., 455 Pa. 360, 319 A.2d 426 (1974); McKelvy v. Barber, 381 S.W.2d 59 (Tex. 1964); Potter v. Crump, 555 S.W.2d 206 (Tex. Civ. App. 1977).

[56]455 Pa. 360, 319 A.2d 426 (1974).

[57]*Id.* at 363, 319 A.2d at 427, *rev'g* 227 Pa. Super. Ct. 487, 303 A.2d 515 (1973).

[58]77 PA. CONS. STAT. ANN. §§ 1-1603 (Purdon 1952 & Supp. 1978-79).

[59]455 Pa. at 363, 319 A.2d at 427.

[60]*See, e.g.*, McKelvy v. Barber, 381 S.W.2d 59 (Tex. 1964).

[61]*Id.* at 62-63. *See also* Potter v. Crump, 555 S.W.2d 206 (Tex. Civ. App. 1977).

statute requires that these separate clinics be maintained.[62] If the provision of clinical services is undertaken voluntarily in an effort to reduce costs and achieve immunities under workmen's compensation, it has generally been held in these jurisdictions that the carrier is entitled to no immunity under the workmen's compensation statute.[63]

Despite these and similar cases allowing recovery, most courts have refused to permit a common law action against an insurance carrier who negligently provides medical services for its employer. By granting immunity to the carrier, these courts have treated the employer and carrier as "one" entity if: (1) Its treatment proximately results from an injury "arising out of" and "during the course of" employment, and (2) the services are rendered pursuant to a statute which provides that the carrier is not a third party under the act.[64] In the latter situation, however, the employee may retain a common law right to sue the individual physician or hospital for its malpractice.[65]

C. Injury Resulting from Employer's Insurance Carrier's Negligent Safety Inspection

Authority is divided on the question of liability by an insurance carrier for negligent inspection of an employer's working premises which results in the injury of an employee.[66] Some courts have denied the employee a common law action against the carrier for negligent inspection.[67]

In *Bartolotta v. Liberty Mutual Insurance Co.*,[68] employees sustained personal injuries when overcome by argon gas while making repairs in a cylindrical chamber on the employer's premises. As the employer's workmen's compensation carrier, Liberty Mutual reserved the right to inspect the employer's place of business and did make inspections on a number of occasions. The plaintiff argued that his injuries resulted from Liberty Mutual's negligent inspection and

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[62]*See, e.g.*, Mager v. United Hosps. of Newark, 88 N.J. Super. 421, 212 A.2d 664 (1965) (holding that an employee was entitled to bring an action for malpractice against a clinic maintained by and for the employer's workmen's compensation carrier).

[63]*Id.* at 427, 212 A.2d at 667-78.

[64]*See* Flood v. Merchants Mut. Ins. Co., 230 Md. 373, 187 A.2d 320 (1963).

[65]2A A. LARSON, *supra* note 1, § 72.61.

[66]*See generally* Comment, *Workmen's Compensation—The Carrier's Reserved Right of Inspection and the Injured Employee*, 16 DEPAUL L. REV. 89 (1966).

[67]*See* Mustapha v. Liberty Mut. Ins. Co., 268 F. Supp. 890 (D.R.I. 1967), *aff'd per curiam*, 387 F.2d 631 (1st Cir. 1967); Donohue v. Maryland Cas. Co., 248 F. Supp. 588 (D. Md. 1965), *aff'd per curiam*, 363 F.2d 442 (4th Cir. 1966); Matthews v. Liberty Mut. Ins. Co., 354 Mass. 470, 238 N.E.2d 348 (1968).

[68]411 F.2d 115 (2d Cir. 1969).

failure to report the dangerous condition to the employer. Liberty Mutual moved to dismiss the action alleging that it was acting as the employer's legal representative when making inspections. It claimed that this capacity entitled it to employer immunity under Connecticut's Workmen's Compensation Act.[69] The trial court granted Liberty Mutual's motion to dismiss and the decision was affirmed by the Second Circuit on appeal.[70]

The court found Liberty Mutual to be the "alter-ego" of the employer under Connecticut law and, therefore, entitled to employer immunity.[71] It stated that the Connecticut legislature intended to extend the employer's immunity to the insurance carrier, and to hold otherwise would result in the discouragement of voluntary inspections by such carriers.[72] The court further determined that an insurance carrier should share equally in the benefits and immunities of an employer if it undertakes the employer's duty to make safety inspections.[73] The court distinguished those cases in which the carrier's negligence is unrelated to its role as compensation carrier from those cases in which the inspections for the employer are clearly within the scope of its function as insurance carrier.[74] This is particularly significant if the carrier's conduct does not increase the risk of accident to the employee.[75]

The trend in numerous jurisdictions has been away from the holding in cases like *Bartolotta*.[76] In *Sims v. American Casualty Co.*,[77] the Georgia Court of Appeals reversed a lower court's dismissal of an action brought by a mother against an insurance carrier for the wrongful death of her son. The son had been killed during the course of employment when volatile alcohol-based products ignited. The court held that a wrongful death action was not barred by the payment of death benefits to the mother under workmen's compensation.[78] The court further held that the carrier would be liable in tort for failure to use reasonable care and skill in conduct-

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[69]CONN. GEN. STAT. §§ 31-275, -293, -340 (1961).

[70]411 F.2d at 119.

[71]*Id.* at 116.

[72]*Id.* at 117.

[73]*Id.* at 119.

[74]*Id.* at 118-19.

[75]The court stated: "[T]here is no liability unless the negligent performance or nonperformance is either relied upon by the injured party or increases the risk of harm." *Id.* at 119.

[76]*See* Ruth v. Bituminous Cas. Corp., 427 F.2d 290 (6th Cir. 1970); Mays v. Liberty Mut. Ins. Co., 323 F.2d 174 (3d Cir. 1963); Sims v. American Cas. Co., 131 Ga. App. 461, 206 S.E.2d 121 (1974), *aff'd per curiam*, 232 Ga. 787, 209 S.E.2d 787 (1974); Nelson v. Union Wire's Rope Corp., 31 Ill. 2d 69, 199 N.E.2d 769 (1964).

[77]131 Ga. App. 461, 206 S.E.2d 121 (1974).

[78]*Id.* at 478, 206 S.E.2d at 133.

ing safety inspections,[79] even if inspections were undertaken pursuant to contractual or statutory obligation.[80] *Bartolotta* considered the insurance carrier to be "one" with the employer and immune from tort liability for its negligent inspection, *Sims*, on the other hand, determined that the carrier occupied a dual status with differing obligations and liabilities flowing from each status.[81]

The *Sims* court cited Professor Larson's treatise on workmen's compensation[82] for the proposition that an insurance carrier may be liable as a third-party tortfeasor if its negligence results in injury to an employee.[83] Larson believes that a distinction should be drawn between a carrier's duty to provide benefits and services and duties which it might assume in the way of direct performance of services related to the act.[84] The carrier shares the employer's immunity for breach of the first duty, whereas the carrier is liable as a third-party tortfeasor for breach of the latter duty.[85]

Most important, the *Sims* court recognized two competing fundamental ideals at work when an employer or carrier's liability as a third-party tortfeasor becomes an issue: "The one is the original idealistic compensation theory that the whole industrial problem should be 'swept within' the compensation act. The other is the even more ancient principle that common law rights of action shall not be deemed abolished except by clear statutory language."[86] These two competing viewpoints are at the heart of the dual capacity analysis. As the court indicated, if the policy goals sought to be furthered by the workmen's compensation scheme do not exist, then strict adherence to the exclusive remedy provision is less warranted. Thus, the workmen's compensation statute should not insulate an employer or carrier from its liability as a "non-employer" tortfeasor.

D. Employer's Intentional Torts Against His Employees

An employer will be subject to civil action for his intentional torts resulting in injury to his employees. The general rule has been that workmen's compensation will be the exclusive remedy if the employee's injury is fairly traceable to an incident of employment[87]

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[79] *Id.* at 469, 206 S.E.2d at 127-30.

[80] *Id.* at 473, 206 S.E.2d at 130.

[81] *Id.*

[82] 2A A. LARSON, *supra* note 1, § 72.90.

[83] 131 Ga. App. at 476-77, 206 S.E.2d at 132.

[84] 2A A. LARSON, *supra* note 1, § 72.90, at 14-151.

[85] *Id.*

[86] 131 Ga. App. at 478, 206 S.E.2d at 133 (quoting 2A A. LARSON, *supra* note 1, § 72.90).

[87] *See* Flanagan v. Ethyl Corp., 390 F.2d 30 (3d Cir. 1968); Ulicny v. National Dust Collector Corp., 391 F. Supp. 1265 (E.D. Pa. 1975); Burkhart v. Wells Elecs. Corp., 139 Ind. App. 658, 215 N.E.2d 879 (1966).

but will not operate to foreclose common law recovery for injury connected to personal grievances unrelated to the employment relationship.[88] This rule has been premised upon the traditional notion that workmen's compensation deals only with industry-related injuries which "arise out of" and "during the course of" employment.[89] Workmen's compensation does not include injuries which result from an employer's willful, unlawful, or malicious wrongs.[90]

An employer's intentional torts have been handled under workmen's compensation in three ways. First, through legislative enactments, some workmen's compensation acts contain provisions which expressly reserve common law remedies for injuries resulting from an employer's willful acts of misconduct.[91] Second, other jurisdictions provide increased benefits under the workmen's compensation scheme for intentional torts.[92] Finally, some workmen's compensation legislation gives an employee a right to pursue his remedy under either workmen's compensation or at common law.[93]

The basis for departing from the exclusive remedy of workmen's compensation is the concept that an employer who intentionally inflicts bodily injury upon his employee severs the employment relationship and should no longer be permitted to claim immunity under the workmen's compensation act.[94] One court has held that to permit an employer to claim immunity for injury resulting from his intentional wrongs would sanction conduct which is both tortious and criminal.[95] Further, it would shield him from liability for conduct which is independent of the employment relationship and not within the scope of the workmen's compensation scheme.[96]

In these cases, as in the cases involving the physician-employer or insurance carriers,[97] the policies and goals which support workmen's compensation are not affected if the accident does not "arise out of" and "during the course of" employment. Thus, if the obligations owed the employee by the employer flow from a "non-employment" relationship, the employee should not be forced to look

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[88]*See* Conway v. Globin, 105 Cal. App. 2d 495, 233 P.2d 612 (1951); Readinger v. Gottschall, 201 Pa. Super. Ct. 134, 191 A.2d 694 (1963).

[89]Readinger v. Gottschall, 201 Pa. Super. Ct. 134, 191 A.2d 694 (1963).

[90]*Id. See also* Artonio v. Hirsch, 4 Misc. 2d 42, 157 N.Y.S.2d 398 (Sup. Ct. 1956), *modified & aff'd*, 3 A.D.2d 939, 163 N.Y.S.2d 489 (1957).

[91]*See, e.g.*, Heskett v. Fisher Laundry & Cleaners Co., 217 Ark. 350, 351-52, 230 S.W.2d 28, 29 (1950); 81 AM. JUR. 2d *Workmen's Compensation* § 55 nn.62-64 (1976).

[92]81 AM. JUR. 2d *Workmen's Compensation* § 55 nn.62-64 (1976).

[93]*Id.*

[94]*E.g.*, Boek v. Wong Hing, 180 Minn. 470, 231 N.W. 233 (1930).

[95]Conway v. Globin, 105 Cal. App. 2d 495, 498, 233 P.2d 612, 614 (1951).

[96]*Id.*

[97]*See* notes 6-8 *supra*.

to workmen's compensation as his only remedy. This seems to be particularly true if the employer's second capacity was voluntarily assumed and not mandated by either contractual or statutory dictate. With these precepts in mind, an analysis of the efficacy of the dual capacity doctrine in the area of products liability litigation will now be undertaken.

IV. Dual Capacity Doctrine in Products Liability Litigation

The development of case law in the area of workmen's compensation has been paralleled by an expanding body of law involving a manufacturer's liability for his defective products.[98] The former has emerged to deal with inequities resulting from industrial accidents, the latter has challenged the problems of consumer-related injuries. This has resulted in the creation of separate mechanisms for disbursement of economic losses.

In cases involving industry-related accidents, workmen's compensation has replaced an employee's common law tort claim against his employer with a statutory scheme. This scheme has created a loss-disbursement mechanism which shifts the loss from an industrial accident onto the industry which has created the risk of employment.[99] Inadequacies in the common law remedy, combined with an employer's significant control over working conditions, have led to this result. The courts have sought to construe liberally workmen's compensation benefits.[100] The increased predictability and reduced delay in obtaining recovery are thought to benefit both the employer and worker and thereby enhance the economic climate in which industry must develop.

The consumer of manufactured goods has found himself in circumstances analogous to those faced by the industrial employee. The manufacturer controls the design and manufacture of his products and forces the consumer to rely upon the quality of those goods.[101] The consumer, as a general rule, has little opportunity or knowledge with which to inspect the product to determine the existence of quality defects.[102] Therefore, like the industrial employee

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[98]*See* note 13 *supra.*

[99]W. Prosser, *supra* note 4, § 80, at 530-31.

[100]*E.g.*, New England Tel. & Tel. Co. v. Central Vt. Pub. Serv. Corp., 391 F. Supp. 420 (D. Vt. 1975).

[101]*See* Restatement (Second) of Torts § 402A, Comment c (1977); Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 Tex. L. Rev. 1185 (1976); Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825 (1973).

[102]*See* Henningsen v. Bloomfield Motors, Inc., 32 N.H. 358, 161 A.2d 69 (1960); Santor v. A&M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965). Justice Traynor in his dissenting opinion in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436

who has little control over the risk inherent in employment, the consumer has little control over the risk inherent in the product. Furthermore, the consumer has traditionally faced a number of legal obstacles in bringing an action against the manufacturer for injuries resulting from defective products. Privity,[103] disclaimers of warranty,[104] statutes of limitation[105] and the burden of proving fault[106] have been common impediments to a consumer's claim against a manufacturer.

As a result, legislatures and courts have begun to reduce the obstacles facing a consumer in bringing a tort action against a manufacturer. The adoption in many states of section 402A of the *Restatement (Second) of Torts*[107] has spurred this movement. Section 402A has assisted the consumer in sustaining his burden of proof by eliminating fault principles and imposing a form of strict liability upon the manufacturer who introduces an unreasonably defective product[108] into the stream of commerce.[109] In addition, section 402A has eliminated privity as a defense to a consumer's action.[110] Development under this section has resulted in an expansion of the concept of "consumer" beyond the actual purchaser of a product so as to include all foreseeable users of a product.[111] This has been

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(1944) noted the changes in the relationship between manufacturer and consumer:

> As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered. Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks.

Id. at 467, 150 P.2d at 443 (Traynor, J., dissenting). *See generally* Dickerson, *The ABC's of Products Liability-With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439, 440 (1969); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965).

[103]2 L. FRUMER & M. FRIEDMAN, *supra* note 13, § 16A [5].

[104]*Id.*

[105]*Id.*

[106]*Id.*

[107]RESTATEMENT (SECOND) OF TORTS § 402A (1977).

[108]*See* 2 L. FRUMER & M. FRIEDMAN, *supra* note 13, § 16A[4][g]; W. PROSSER, *supra* note 4, §§ 98-99; Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30 (1973); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965); Vargo, *Products Liability in Indiana—In Search of a Standard for Strict Liability in Tort, Symposium: 1977 Products Liability Institute*, 10 IND. L. REV. 871 (1977); Wade, *A Conspectus of Manufacturers' Liability for Products, Symposium: 1977 Products Liability Institute*, 10 IND. L. REV. 755 (1977).

[109]Vargo, *supra* note 108.

[110]*See generally* W. PROSSER, *supra* note 4, § 98.

[111]*See* RESTATEMENT (SECOND) OF TORTS § 402A, Comment l (1977).

predicated upon the belief that a manufacturer can better anticipate, prevent, and spread any loss resulting from a defective product than can a consumer who has little control over the risk involved in using that product. The loss is, therefore, shifted to the manufacturer to be spread throughout the industry rather than to the consumer.[112]

Workmen's compensation and section 402A thus represent two loss-disbursement mechanisms designed to impose liability upon the manufacturer or employer, parties which have traditionally benefited from the fault concept. In recent years, however, there has emerged a slight overlap of these two mechanisms. Cases evidencing this fact generally involve an employee who is injured during his employment by products defectively manufactured by his employer. The employer has in most instances argued that the worker must look to workmen's compensation for his exclusive remedy because the accident occurred during the worker's employment. With increasing frequency, however, the worker has relied upon the dual capacity doctrine by bringing suit against the employer in his "non-employer" capacity as manufacturer of the defective product.

An example will serve to illustrate this problem. Assume *A* is in the business of manufacturing punch presses and *B* is employed by *A* to operate a press so manufactured by *A*. Under the prevailing view, if *B* is injured while operating that press due to a defect in the manufacture or design caused by *A*, *B*'s sole remedy will be under workmen's compensation and he will be barred from bringing a products liability action against *A*. If, however, *B* was employed by *C* to operate a press at *C*'s plant (assume that *A* also manufactured this press) and was injured because of a defect in that press, then *B* would be eligible to recover workmen's compensation benefits from *C* and also be permitted to sue *A* in a products liability action.

Advocates of *A*'s tort liability to *B* argue that *A* enjoys two relationships to *B*; one of employer and one as manufacturer of the product which caused *B*'s injury. They argue that separate obligations flow from each status and that separate liabilities should, therefore, exist. Although this logic makes a compelling argument for the application of the dual capacity doctrine, the doctrine has generally been rejected on the grounds that the best interest of the employee will be served if the workmen's compensation remedy is accepted and the common law remedy rejected.[113]

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[112]*See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 67, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); 2 L. FRUMER & M. FRIEDMAN, *supra* note 13, § 16A[1]; RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1977).

[113]*See* Kottis v. United States Steel Corp., 543 F.2d 22 (7th Cir. 1976), *cert. denied*, 430 U.S. 916 (1977); Lewis v. Gardner Eng'r Corp., 491 S.W.2d 778 (Ark. 1973); Williams v. State Comp. Ins. Fund, 50 Cal. App. 3d 116, 123 Cal. Rptr. 812 (1975); Needham v. Fred's Frozen Foods, Inc., 359 N.E.2d 544 (Ind. Ct. App. 1977).

In *Provo v. Bunker Hill Co.*,[114] an employee, while working in his employer's smelter plant, received severe burns when molten zinc blew from an uncovered pot. The employee received workmen's compensation benefits, and then instituted an action against Bunker Hill for negligence in failing to provide its employees with safe equipment. The employee attempted to separate the various duties flowing from the employer's status by asserting the dual capacity doctrine. Bunker Hill answered the employee's complaint by asserting the exclusive remedy provision of Idaho's Workmen's Compensation Act[115] as a defense and moved for summary judgment.

The United States District Court granted judgment for Bunker Hill and rejected the dual capacity rationale. The court held that the duty of an employer to provide safe machinery cannot be separated from his general duties as employer.[116] It further held that, if the accident "arises out of" and "in the course of" employment, any violation of the employer's duty is compensable under the Idaho Act regardless of fault.[117] The employer was, therefore, found to be immune from the worker's tort claim.[118] The court stated that the purpose of workmen's compensation is to provide the employee a certain and expeditious remedy and to supply the employer a limited and determinative liability.[119] It concluded: "[A]nything that tends to erode the exclusiveness of either the liability or the recovery strikes at the very foundation of statutory schemes of this kind, now universally accepted and acknowledged."[120]

Although *Provo* is not a products liability case, it does demonstrate a general preference for the workmen's compensation remedy and indicates that the consumer loss-disbursement mechanism is perceived as antagonistic to the goals of the workmen's compensation scheme. This preference has resulted in a refusal to substitute the consumer loss-disbursement mechanism, prevalent in the products liability field, for the workmen's loss-disbursement mechanism created by the workmen's compensation scheme.

Three arguments have been advanced by opponents of the dual capacity doctrine in the products area: (1) Even though the employer shares a second capacity as manufacturer, an employment relationship exists and the employee's injury is, therefore, within the con-

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[114]393 F. Supp. 778 (D. Idaho 1975).

[115]IDAHO CODE § 72-203 (1977).

[116]393 F. Supp. at 787.

[117]*Id.*

[118]*Id.*

[119]*Id.* at 780-81.

[120]*Id.*

templation of the workmen's compensation act;[121] (2) the employee's injury "arises out of" and occurs "during the course of" employment and, therefore, any dual status of the employer is merely coincidental and should not affect an employer's immunity under the workmen's compensation act;[122] and (3) to permit a tort action against the employer in his capacity as manufacturer would emasculate the policy supporting workmen's compensation by reintroducing principles of fault into a determination of the employer's liability.[123] Each of these arguments will be analyzed to determine their merit in light of the dual capacity theory.

A. Existence of an Employment Relationship

The first argument suggests that an employee must look to workmen's compensation if his injury occurs during his employment relationship. Therefore, he cannot circumvent the exclusive remedy provided by the workmen's compensation scheme separating the various roles or "dual" capacities of the employer.

In *Kottis v. United States Steel Corp.*,[124] a craneman employed by United States Steel was killed at United States Steel's plant. It was undisputed that the death "arose out of" and "during the course of" the employment and that the dependents of Kottis had received benefits under Indiana's Workmen's Compensation Act.[125] Kottis' estate brought an action against United States Steel alleging a dual capacity theory. The administratrix argued that United States Steel occupied two capacities in addition to that of an employer, namely: (1) Owner of the land upon which Kottis was killed, and (2) manufacturer of the crane on which the accident occurred. She contended that United States Steel owed its employees, as owner of the land, a duty of care that was owed to invitees to discover defects or dangerous conditions on its premises, and that as manufacturer it had a duty to manufacture products which were reasonably safe for their intended use.

The Seventh Circuit affirmed the district court's summary dismissal in favor of United States Steel[126] and held that the action against United States Steel, in its capacity as manufacturer, was barred by the exclusive remedy provided by the Indiana compensa-

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[121]*See, e.g.*, Kottis v. United States Steel Corp., 543 F.2d 22 (7th Cir. 1976), *cert. denied*, 430 U.S. 916 (1977).

[122]*E.g.*, Needham v. Fred's Frozen Foods, Inc., 359 N.E.2d 544 (Ind. Ct. App. 1977).

[123]*See, e.g.*, Lewis v. Gardner Eng'r Corp., 254 Ark. 17, 491 S.W.2d 778 (1973).

[124]543 F.2d 22 (7th Cir. 1976), *cert. denied*, 430 U.S. 916 (1977).

[125]IND. CODE § 22-3-2-1 to 6-3 (1976 & Supp. 1978).

[126]543 F.2d at 22.

tion act.[127] The court found that the employment relationship predominated and that injury resulting from the use of a crane was precisely the type of injury that workmen's compensation was intended to cover.[128] It stated that the Indiana compensation statute specifically abolished common law actions against an employer,[129] noting that the dual capacity argument does considerable violence to the statutory language "which abrogates 'all other rights and remedies . . . at common law or otherwise, on account of such injury or death' except those against 'some other person than the employer and not in the same employ'."[130] In addition, the court pointed out that an employer's failure to provide a safe working environment had been a major claim in pre-workmen's compensation cases and was one basis of employer liability which workmen's compensation was designed to eliminate.[131] The court determined: "Allowing a remedy in addition to workmen's compensation for such cases would make substantial, if not devastating, inroads on the Indiana workmen's compensation scheme."[132]

The Seventh Circuit recognized that an employer may assume various roles in relation to his employees, but determined that generally these roles were sufficiently within the employment relationship to be unseverable and thus exclusively covered by Indiana's compensation act. The problem with this approach, however, is that the employer's assumption of a manufacturer's status was not necessitated by either the employment contract or the workmen's compensation scheme. This is the same issue faced in the cases involving an insurance carrier's voluntary establishment of a clinic or hospital for its own benefit to mitigate costs and achieve possible immunities under the workmen's compensation statutes.[133] As discussed above, some jurisdictions have held that insurance carriers under these circumstances are unable to claim an employer's immunity from a malpractice action if the establishment of clinics was calculated to benefit the carriers and was not a duty created by the employment contract or workmen's compensation scheme.[134] Applying the same rationale to the duties voluntarily assumed by an employer in using his manufactured goods at his place of business, it

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[127] *Id.* at 24. Indiana's exclusive remedy provision is found in IND. CODE § 22-3-2-6 (1976).

[128] 543 F.2d at 26.

[129] *Id.* at 24.

[130] *Id.*

[131] *Id.* at 26.

[132] *Id.*

[133] *E.g.*, Mager v. United Hosps. of Newark, 88 N.J. Super. 421, 212 A.2d 664 (1965).

[134] *Id.* at 667.

would seem that such duties do not flow from the employment relationship. The employer should not, therefore, be immune to an employee's products liability action.

Opponents of the dual capacity doctrines argue that to permit application of the doctrine in products liability litigation would result in increased efforts to predicate tort liability upon the many "non-employer" functions which might arise. This would arguably lead to numerous exceptions to an employer's immunity and, thereby, undermine a primary objective of workmen's compensation—providing the worker a guaranteed recovery in return for employer immunity from further economic liability. It should be noted, however, that the dual capacity rationale has been adopted only when alternate social goals have been found to exist. For example, some decisions have implied that the strong social need for competence in medical treatment by employer-physicians outweighs the social benefits which would result from an employer's immunity under workmen's compensation.[135] Proponents of the dual capacity doctrine might argue that an employer's immunity should not bar an action against an employer who assumes a second capacity and, thus, incurs these social obligations. This would be particularly true if that second capacity is voluntarily assumed to improve an employer's economic position at the expense of his employees.

There may also be constitutional problems in the grant of tort immunity to an employer-manufacturer under workmen's compensation. Equal protection of the law may bar a result which permits a manufacturer to escape tort liability to its employees while permitting all other users, including employees of third-party employers, to maintain a products liability action against the manufacturer. As noted above, workmen's compensation is to apply only if the injury "arises out of" and "during the course of" employment. If, however, the employment relationship is merely coincidental and the employer's duty flows from a manufacturer-foreseeable user relationship rather than one of employer-employee, arguably, no legal basis exists for treating the two classes of employees differently.

B. Effect of "Arising out of" and "During the Course of"

The dual capacity concept has also been defeated in products liability litigation by advocates alleging that the employee's injury "arose out of" and "during the course of" employment and was, therefore, within the contemplation of the workmen's compensation

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[135]*See, e.g.*, Duprey v. Shane, 39 Cal. 2d 781, 789, 249 P.2d 8, 14 (1952); Smith v. Golden State Hosp., 111 Cal. App. 667, 672, 296 P. 127, 129 (1931). *See also* Comment, *supra* note 2, at 822.

scheme. This differs from the first argument in that the former focuses on the status of the parties as employer-employee and the existence of an employment relationship. The second argument assumes an employment relationship and focuses on the specific nature of risk created by that employment.

In *Needham v. Fred's Frozen Foods, Inc.*,[136] an employee brought an action against his employer for injuries sustained because a pressure cooker which he had been cleaning exploded and sprayed him with scalding grease. The Indiana Court of Appeals affirmed a lower court dismissal of the worker's action against his employer for the negligent manufacture of the pressure cooker.[137] The plaintiff argued that he should be permitted an independent cause of action against his employer for manufacturing a defective product which he used in the course of employment. He argued that the defendant's liability resulted from a capacity which created obligations apart from those imposed by the employer-employee relationship and that the exclusive remedy provision of Indiana's Workmen's Compensation Act[138] should not bar his action.

The Indiana court held that, if an employee's injuries "arise out of" and "in the course of" employment, then they are of the type which the workmen's compensation statute was designed to cover.[139] It concluded that the trial court's rejection of the dual capacity doctrine was proper.[140]

Although *Needham*[141] and *Kottis*[142] describe the injury as "arising out of" and "during the course of," it is not clear that they have adequately distinguished between these two concepts. Rather, they apparently, have used these terms singularly to refer to injuries occurring because of the employment relationship. Such a treatment seems inconsistent with other holdings which have recognized a conceptual difference between these terms.[143] As previously discussed, "arising out of" refers to the cause of injury or the source of the risk of employment.[144] "During the course of," on the other hand,

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[136]359 N.E.2d 544 (Ind. Ct. App. 1977).

[137]*Id.* at 545.

[138]IND. CODE § 22-3-2-6 (1976).

[139]359 N.E.2d at 545.

[140]*Id.*

[141]359 N.E.2d 544 (Ind. Ct. App. 1977).

[142]543 F.2d 22 (7th Cir. 1976), *cert. denied*, 430 U.S. 916 (1977).

[143]*E.g.*, Lincoln v. Whirlpool Corp., 151 Ind. App. 190, 195, 279 N.E.2d 596, 599 (1972) wherein the court stated:

> The statutory term[s] "arising out of" and "in the course of" are not synonymous. They are conjunctive terms. The term "arising out of" refers to the origin and cause of the "accident." The term "in the course of" refers to the time, place and circumstances under which the "accident" occurred.

See generally Malone, *supra* note 1.

[144]*See* 1 A. LARSON, *supra* note 1, § 6.00 (1978).

refers to the circumstances under which the accident occurred and the actions of the employee at the time of injury.[145]

If this conceptual difference is accepted, *Needham* and *Kottis* do little to resolve the issue posed by the dual capacity argument. In both cases the injury occurred "during the course of" employment in that the employee was working at his employer's place of business, using his employer's equipment, and performing at his employer's direction. It does not appear, however, that the injuries "arose out of" the employment. In both cases, the risk flowed from an employer's voluntary use of products which he had manufactured, and did not flow directly from the employment relationship. In light of this anaylsis, *Kottis* and *Needham* are arguably at odds with the general requirement that both forms of risk must be found to exist before the workmen's compensation scheme becomes applicable.[146]

C. Undermining the Workmen's Compensation Scheme

Opponents of the dual capacity doctrine finally argue that recognition of an employer's dual liability will revive the principles of fault which the workmen's compensation scheme was designed to eliminate. It is argued that these fault concepts will, in the long run, mitigate, rather than enhance, an employee's chance to recover for industry-produced injuries.

In *Lewis v. Gardner Engineering Corp.*,[147] the Arkansas Supreme Court rejected an employee's products liability claim. The employee had been injured by a malfunctioning hoist clamp manufactured by Gardner Engineering, one of two companies engaged in the joint venture which employed Lewis. The plaintiff argued that workmen's compensation immunities extended to members of the joint venture only if a member was acting within the scope of the joint venture. Plaintiff sought recovery, not for Gardner Engineering's failure to provide safe equipment, but for its negligence as a third party for manufacturing and using a faulty device outside the purposes of the joint venture.

The court stated the general rule that an employee of a joint venture is an employee of each joint venturer and that workmen's compensation provides employer immunity for each venturer.[148] It stated that Gardner Engineering was responsible for payment of workmen's compensation benefits only.[149] The court further stated

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[145]*Id.* § 14.

[146]*See generally* 1 A. LARSON, *supra* note 1, § 6.00, 6.10 (1978); Comment, *supra* note 28.

[147]254 Ark. 17, 491 S.W.2d 778 (1973).

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

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

that it was only a coincidence that Gardner Engineering was also manufacturer of the hoist clamp which had caused Lewis' injury.[150]

The majority opinion inspired a strong dissent which rejected the notion that Gardner Engineering's capacity as manufacturer was merely a coincidence. The dissent argued that Gardner Engineering was acting outside the scope of its duties as an employer because nothing in either the contract creating the joint venture or the Arkansas Workmen's Compensation Act[151] required an employer to furnish equipment which it had designed and manufactured.[152] The dissent advocated acceptance of the dual capacity doctrine[153] and stated:

> The remedy under the act is made exclusive . . . [but] this applies only to liabilities arising out of the employer-employee relationship. We have said that the purpose of the act is to compensate only for losses resulting from risks to which the fact of engaging in the industry exposes the employee. Birchett v. Tuf-Nut Garment Mfg. Co., 205 Ark. 483, 169 S.W.2d 574. Liability under the act is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of the employment. . . . [W]e should not extend the limitation on the injured employees' remedy beyond the purposes of the act or beyond the constitutional limitation on the act. Failure to recognize the dual capacity doctrine in this case does both.[154]

The dissent concluded that a common law cause of action should be preserved unless clear statutory language abolishes that action,[155] and that any doubt should be resolved in favor of preserving rather than abolishing that right of action.[156]

Under this view, the goals supporting workmen's compensation are in no way frustrated by adopting the dual capacity doctrine and by permitting the employee to sue the employer in his "dual" capacity of manufacturer. One writer has expanded upon this position and stated:

> The plain intent of current compensation schemes is to protect the employee for injuries which occur in the course of

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[150] *Id.*

[151] ARK. STAT. ANN. §§ 81-1301 to 1363 (1939).

[152] 254 Ark. at 21, 491 S.W.2d at 780 (Fogleman, J., dissenting).

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

[154] *Id.* at 27, 491 S.W.2d at 784 (Fogleman, J., dissenting).

[155] *Id.* at 22-26, 491 S.W.2d at 781-83 (Fogleman, J., dissenting) (citing 2A A. LARSON, *supra* note 1, § 72.80, at 14-123).

[156] *Id.* at 26, 491 S.W.2d at 783 (Fogleman, J., dissenting).

> his employment while also preserving his right to bring third-party actions. A third-party action should be no less viable because the duty owed by the tortfeasor springs from an extra-relational capacity of the employer rather than arising from another third-party. All the reasons supporting the justness of recovering from third parties generally can be assembled to support dual-capacity liability. The employee, in accepting employment, can be presumed to have accepted all the conditions of his employment obvious to him and to have implicitly or explicitly agreed to the workmen's compensation compromise. But he cannot be presumed to have waived his right to bring common law actions against negligent third parties who coincidentally share the role of employer.[157]

The theory behind the dual capacity doctrine, advocated by the *Lewis* dissent, was adopted in *Mercer v. Uniroyal, Inc.*[158] In that case, the Ohio Court of Appeals reversed a lower court's summary dismissal of a products liability action against Uniroyal and the American Stevedoring Corporation.[159] The plaintiff, an employee of American Stevedoring Corporation, worked as a truck driver. He was injured while riding in a truck leased by Uniroyal from Avis Truck Rental while on a hauling trip for Uniroyal. The truck's left front tire, manufactured by Uniroyal, blew out, resulting in a collision and injuries to the plaintiff. A lease agreement existed between American Stevedoring and Uniroyal whereby American Stevedoring furnished its employees to Uniroyal. Uniroyal then had control of the truck drivers in all phases of its hauling operations. Under the agreement, American Stevedoring paid the drivers' wages, payroll taxes, and workmen's compensation and employer's liability insurance.

The plaintiff charged Uniroyal with a breach of express and implied warranties in the manufacture of the defective tire. He alleged that the cause of action was not subject to summary judgment under Ohio's Workmen's Compensation Act[160] because "it did not arise out of the employer/employee relationship."[161] The plaintiff also alleged that he did not seek recovery against Uniroyal in its capacity as employer for negligence, but sought recovery from Uniroyal in its capacity as manufacturer of a defective product. Further, he brought his action, not as an employee, but as a reasonably foreseeable user of a defective product.

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[157]Comment, *supra* note 2, at 831-32.

[158]49 Ohio App. 2d 279, 361 N.E.2d 492 (1976).

[159]*Id.* at 286, 361 N.E.2d at 496.

[160]Ohio Rev. Code Ann. § 4123.74 (Page 1973).

[161]49 Ohio App. 2d at 282, 361 N.E.2d at 494-95.

The court accepted the dual capacity theory[162] and found the risk created by Uniroyal's defective product to be one not necessarily of employment, but one common to the public in general.[163] It stated that if the initiating cause is not a risk of the employment relationship, there can be no causal connection between the employment and the injury.[164] Therefore, the exclusive remedy provision of workmen's compensation cannot bar a products liability action for injury not falling within the scope of the workmen's compensation scheme.[165]

The court seems to have rejected the argument that recognition of the dual capacity doctrine in the area of products liability litigation would act to emasculate the workmen's compensation scheme. Rather, it pointed to the realities of industrial life and implied that the dual capacity of an employer, as a basis for common law liability, might be essential to facilitate the goals of the workmen's compensation scheme. The court stated:

> It was only a matter of circumstance that the tire on the truck in which the plaintiff was riding was a Uniroyal tire rather than a Sears, Goodyear or Goodrich. In recent years, corporations and employers have entered a variety of fields and economic factors have promoted diversification rather than specialization. Conglomerates have become the rule. A corporation's economic structure should not dictate the right of the injured to recover or that each new corporate merger erases a like number of causes of action. For the foregoing reasons, the second assignment of error is well taken. Plaintiff should have his opportunity to establish a cause of action based upon product liability.[166]

The majority opinion was criticized in a dissent which argued that the plaintiff should be barred from a common law recovery for two reasons: (1) Plaintiff had received workmen's compensation benefits for injuries and should, therefore, be estopped from maintaining a common law action for damages on any extra-statutory theory, and (2) the Ohio workmen's compensation statute rejects the dual capacity doctrine by providing an exclusive remedy for industry-related injuries. The dissenting justice challenged the view that common law causes of action should be preserved unless destroyed by express statutory language. Instead, he argued that

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[162] *Id.* at 285, 361 N.E.2d at 496.

[163] *Id.*

[164] *Id.*

[165] *Id.* at 286, 361 N.E.2d at 496.

[166] *Id.* at 285-86, 361 N.E.2d at 496.

the workmen's compensation scheme should be applied liberally in granting immunity to complying employers and that any doubt should be resolved in favor of preserving, rather than abolishing, the statutory right of immunity.[167]

V. Conclusion

The general view which rejects the dual capacity doctrine in products liability litigation indicates a belief that the long term goals of workmen's compensation will be facilitated only through a strict compliance with those statutes and by a liberal construction of the exclusive remedy provision in order to reduce common law claims. If a common law remedy *is* to be recognized against an employer who acts in a capacity of manufacturer, then the majority view consistently has been to let the change occur through legislative action or constitutional amendment.[168]

The problem with the majority view, however, is that it considers the dual capacity doctrine to be antagonistic to the perpetuation of the workmen's compensation scheme. This conclusion may not necessarily be warranted because, under both workmen's compensation or a consumer rights theory, the ultimate goal is to reduce the burden of recovery faced by the employee or consumer, and to shift any loss onto the industry that created the initial risk of injury. By rejecting the dual capacity doctrine, the employer is permitted to escape full liability for the defective manufacture of goods simply by using those goods in his own plant. This becomes especially important since employer diversification might cause a number of employees, who are employed by the manufacturer, to be limited to a workmen's compensation remedy even though the nature and scope of the employment is quite unrelated to the manufacturer-employer's business of producing goods. The employee, an intended and foreseeable user, must, therefore, bear the full loss under the consumer loss-disbursement mechanism, while a non-employee party can force that loss onto the manufacturer. Thus, a smaller loss will usually be shifted onto the industry through the worker loss-disbursement mechanism of workman's compensation than that which would be shifted if the consumer loss-disbursement mechanism were to be invoked.

In addition, there might be some deterrent value to imposing tort liability upon the employer-manufacturer.[169] If an employer can

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[167]*Id.* at 290, 361 N.E.2d at 498 (Wiley, J., dissenting in part).

[168]*See, e.g.*, Needham v. Fred's Frozen Foods, Inc., 359 N.E.2d 544, 545 (Ind. Ct. App. 1977).

[169]This argument was discussed in Comment, *supra* note 2, at 832.

shield himself from losses caused by his defective products, simply by occupying a second capacity of employer, he will have little incentive to correct the dangerous condition produced by the defect. In fact, an employer might reap several benefits at the expense of his employees by using his own manufactured products. He might reduce the cost of machinery by not purchasing from another manufacturer. More important, he might find it cheaper to risk an industrial accident and to pay workmen's compensation benefits than to replace the defective machinery.[170] Such a result would seemingly defeat a major goal of the workmen's compensation scheme: to better the industrial environment and to facilitate economic growth within that industry.

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[170]Vargo, *Workmen's Compensation, Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 289, 294-95 n.34 (1974). The author hypothesized:

> It is very unlikely that an employer, faced with enormous expense, would voluntarily alter his business in order to provide a safe place for an employee to work. For example, assume the following facts. An employer owns an unsafe machine costing several million dollars. In order to sustain his business, he must continue to operate the machine. Its unsafe condition does not interfere with its efficiency; however, its condition is dangerous to the employees. While it would cost several hundred thousand dollars to repair the unsafe condition of the machine, the maximum cost of compensation for injury or death to an employee is only thirty thousand dollars. In such a situation, although the thought processes of the employer may not amount to a cold calculation of mere costs when considering the safety of his employees, cost must be a factor that would at least subconsciously influence his choice.