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# UNRECOGNIZED THIRD PARTY ACTIONS

N. PALEY PHILLIPS\*

Wisconsin is one of the states that permits an employee to commence a third party action, and under certain restrictions and limitations, to collect both from the third party wrongdoer and under the Workmen's Compensation Act. In fact, in Wisconsin, the employee may disregard the Compensation Act if he desires, and just commence his action at common law. Furthermore, in Wisconsin the employee does not waive his rights under the Compensation Act by commencing the common law action provided he meets various requirements as to the Statute of Limitations, etc.

Unfortunately, in some jurisdictions, the employee, if he commences a third party claim, cannot turn around and attempt to collect compensation. Again, in other states, the employee has both rights; in other words, he can collect under the Compensation Act and also commence a third party action and keep all the proceeds. However, in most jurisdictions, the proceeds collected from the third party are divided so that either there is full reimbursement to the workmen's compensation carrier, or a proportionate reimbursement, as in Wisconsin.

Accordingly, we have four general groups of subrogation or third party statutes in the various jurisdictions. Examples of the first are Missouri and Illinois where the employee keeps both the tort and compensation rights and awards. The second group permits a third party claim with refund to the compensation carrier, as in Wisconsin. Incidentally, originally in Wisconsin, if a third party claim was commenced there was a waiver of compensation rights against the employer, but that has since been changed. Thirdly, we have a few statutes which only permit the insured or employer to commence the third party claim, and the recovery in that case in excess of what is paid out is turned over to the employee. And then we have the statutes which combine parts of all three; in other words, where the employee may sue if the insured does not within a specified time, or vice versa.

Under our Act, the injured employee and the employer or his insurance carrier, or both, can join in the making of the third party claim. Usually, the claim is made by the employee alone, with notice or consent of the employer's insurance carrier. On occasions, the

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insurance carrier wants to be a party plaintiff. However, if the insurance carrier does not want to be a party to the case, the third party or defendant can not interplead the insurance carrier and make them a party plaintiff, even though they have a right in the proceeds that are recovered.<sup>1</sup> One of the reasons for bringing the action in the name of the injured alone is that a jury probably would be more apt to hold for an individual than for another insurance company, and, of course, also, the amount recovered probably would be greater. However, on certain occasions it is advisable to bring in the name of the employer as a party plaintiff. For instance, where an employee of a municipality or a county is injured and workmen's compensation is paid, bringing in the name of the municipality or county as party plaintiff in the third party action would have a favorable effect on jurors, who will realize that their money had been used in paying compensation and would favor its replacement.

Next, under our statute, both parties have an equal voice in the prosecution of the claim, which means that the insurance carrier can have their own counsel or be of counsel with the employee's attorney, and share in the attorney fees. Some companies do that, but usually the attorney for the injured employee handles the case by himself, unless there is a considerable amount involved and settlement negotiations have taken place, in which case the compensation carrier wants to have their counsel there to see whether the settlement is favorable. We know that generally, under the Wisconsin Act, after the cost of collection, the employer or his insurance carrier is entitled to two-thirds of the balance of the proceeds, not exceeding the amount paid under the Act. Odd complications can result particularly where a substantial amount has been paid under the Compensation Act and the chances of recovery against the third party are not of the best, or there is not sufficient coverage. Under those circumstances, the compensation carrier, either through its claim manager or by its own counsel, will try to work out some adjustment so the matter can be disposed of by way of settlement, and the amount that the compensation carrier would ordinarily be entitled to is very often reduced in order to dispose of the litigation.

Along that line, it is to be noted that under our Statute, every form of settlement, each judgment, and even each distribution must be approved of by the court or by the Industrial Commission or the settlement is void. However, even if the court approves the settlement, the employee must be extremely careful under certain circumstances that he does not waive any of his rights under the Compensation Act. For example, if an employee is injured, and has a cause

<sup>1</sup> *Johannasen v. Peter Woboril*, 260 Wis. 341, 51 N.W. 2d 53 (1952). This case also discusses in detail the division of the proceeds among the various parties.

of action against a third party, and the employer has paid out \$1,000 worth of medicals and compensation and has paid permanent disability of \$2,500, and if a settlement is made where, for various reasons, the total settlement is \$5,000 because of bad liability, the compensation carrier will have to agree to such settlement because the compensation carrier or his employer would be getting less than the amount paid.

Under the same set of facts, where there is 5% permanent disability which has not as yet been received by the employee from the compensation carrier (the employee deeming it advisable to go ahead with a third party claim first) it would be absolutely necessary that the compensation carrier join in the settlement, since ultimately there will be less to them, and even though the court might approve a settlement, the employee would be unable to collect the full amount due for permanent partial disability, as the compensation carrier had no right to participate in the negotiations. This means that whenever there is a chance that the amount to be paid out will exceed the amount the compensation carrier is going to recover under a settlement, the compensation carrier should be brought into the settlement negotiations, and if necessary, joined as a party. An example would be where a settlement is had of \$15,000, which would be about \$6,667.00 for the compensation carrier if they had paid out that much. They might have been out \$4,000 or \$5,000. There might be a question of additional disability, and even though they have refunded the amount they paid out, the difference would not be a sufficient cushion to protect them unless they agreed to the settlement with the understanding that there might be additional liability on their part.

However, as a practical matter, where there is a substantial amount involved, the compensation carrier will often settle their claim at a much smaller figure than they would be entitled to under a settlement in order to avoid litigation with a chance of recovering nothing. There are many cases where compensation carriers have paid out \$20,000 and more, but because of bad liability, have agreed to reimbursement of a considerably smaller amount than the two-thirds of two-thirds in order to avoid the chance of getting nothing, reasoning that the employee has an advantage to gain by trying the case but very little to lose if it is lost, where the amount paid is substantial.

Incidentally, under our statutes, when there is a penalty ordered paid to the employee for violation of any safety order of the Commission or any other order, penalty is not recoverable by the employer in any third party claim.

As to the reasonable costs of collection, this matter is up to the trial judge, and one can assume that the usual fee prevailing in a community would govern. A similar disposition would be made of the court costs in the event of a settlement and a judgment. Expert witness fees not taxable as costs could be considered the reasonable costs of collection. Ordinarily, it is considered two-thirds of two-thirds to the compensation carrier. However, as was stated, each case is subject to its own peculiar circumstance, and usually the compensation carrier will take a smaller amount. However, again, it is important in making a settlement that possible future disability and compensation liability be considered, particularly where the settlement is with bad liability or because of limited coverage and therefore less than the injuries are worth. For example, assume there has been serious injury and the compensation carrier has paid out some \$4,500 in medicals and temporary total disability. The extent of permanent disability has not been determined. There is limited coverage of \$10,000 which is offered in settlement. If the compensation carrier does not completely approve the settlement, but it is merely approved by a court and the amount paid by the compensation carrier is reimbursed to it, the cushion is only a few hundred dollars. Therefore, if there would be a 10% disability the employee might have difficulty in getting that in the event the compensation carrier refused to pay. However, if the compensation carrier agreed to the settlement, even though there was 10% disability, they would have to pay that, less the small cushion of the settlement of two-thirds of two-thirds, or a few hundred dollars.

The statute was amended several years ago to the benefit of the employee by providing that where the employee is negligent and found negligent against a third party tortfeasor, the amount due the employer or assured is diminished in proportion to the amount of negligence attributed to the employee. Technically, an employee might be benefited under certain circumstances, and of course, he never would suffer a disadvantage under the amendment.

Another important aspect of our Act is that any claim for malpractice by an employee against the treating physician becomes his alone, and the employer or compensation insurer does not participate in such recovery. This is different, of course, from malpractice in a common law suit wherein the wrongdoer is liable for the additional damages caused by the malpractice of the physician or surgeon, but in the event of judgment or settlement has a right to an assignment of that cause of action and is subrogated.

In *Severin v. Luchinske*,<sup>2</sup> the Court held that the right to bring a third

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<sup>2</sup> 271 Wis. 378, 73 N.W. 2d 477 (1955).

party action is not affected by the Workmen's Compensation Law and that the rights existing at common law were neither enlarged nor impaired by enactment of Section 102.29. That case further held that an action may be brought against a co-employee and the employer's insurance carrier if the injured employee was a guest, notwithstanding that the liability policy purported to except liability as to any obligation under the Workmen's Compensation Law. In other words, the liability insurer of the employer's vehicle or of the driver (i.e. the co-employee) are liable as third parties. Now, who are third persons? It is generally held that third persons are all persons other than the employer personally, and that these suits or actions may be brought against fellow employees, all contractors, and all their employees as well as suppliers. In fact, in a recent circuit court case before Judge Drechsler, the court held that an employee of a partnership who received workmen's compensation benefits could maintain a third party action against one of the parties based on negligence, since the partnership and not the individual was the employer within the meaning of the Statutes.<sup>3</sup>

Naturally, doctors are also third parties, and as stated, an action can be brought against a physician for malpractice even if the physician was selected by the employee or the employer or even if he was actually on the payroll of the employer.

A common type of third party claim is against a contractor or employee of a contractor on a construction job, or against the owner of the property. Many times these actions are overlooked by counsel. It is of extreme importance to check into the injury sustained by an employee where there are other contractors in the vicinity because quite often there are third party claims that are not originally noticeable. This is true particularly where there are closely related companies, one company being the general contractor and another with the same officers, same location, but a different name, being the immediate employer. At first blush it would appear that the injury was caused by the negligence of the employer, but investigation often indicates that the negligence was caused by the general contractor or his servants or agents. As an illustration, a certain construction company actually has no employees but obtains many contracts of substantial size. Worden-Allen Co. with practically the same officers, does the steel erecting. Should an injury be sustained by an employee of Worden-Allen, the general contractor would in most circumstances be liable, so there is almost invariably a third party claim. Wherever there is a construction job it is usually considered a place of employment, and high standards of care are required. It is also apparent that it is extremely important to discover

<sup>3</sup> *Sterk v. Luebke*, Milwaukee County Cir. Ct. No. 304-284 Wis. (1962).

the various causes of the injury and the various persons who can be charged with responsibility for them.

Assume now that there is negligence of fellow employees. The fellow employee is a third party. When he is operating a vehicle which is insured, the insurance company on the vehicle covers. If the fellow employee's negligence does not arise out of the operation of an insured vehicle, it may be difficult to collect a judgment against him. The fellow employee might have liability insurance. Also, the employer very often takes a liability policy which not only mentions him as the named insured but usually mentions the employer's officers, agents or employees. That provision was originally put into policies to protect the employer against third party claims where the employee was negligent; but it will also protect a fellow employee in most cases. Unfortunately, often the same insurance company carries the compensation liability and the liability for negligence, and it is difficult to get cooperation. Some time ago there was a rather interesting case in one of the local plants where it appears that after lunch at an across-the-street tavern, one of the employees took it upon himself to drive his lift truck as close as he could to the female employees for the purpose of frightening them. This time he did not control it and he struck one of the employees who was injured and had disability. A third party action was commenced against the fellow employee. Unfortunately, he did not have insurance. His union, when the contract with the employees was later considered, insisted that the employer obtain insurance covering employees for their negligence. In the future, under those circumstances, there will be insurance coverage.

Another third party claim involves the law of products liability. In other words, if a piece of equipment or machinery is defective and injury results there is a third party claim. Quite often these are overlooked even by the compensation insurance carriers. One example is the plank scaffolding that breaks. Investigation will often show that the employer ordered planks for scaffolding from some lumber yard. This must be a specified type of planking and if the lumber yard delivered improper planking, according to the Industrial Commission Code there would be liability. Another ignored claim is where an employee sustains an industrial accident or illness as a result of using hazardous substances. There is an act known as the "Federal Hazardous Substances Label Act". This act is under the jurisdiction of the Food and Drug Administration. There are various federal regulations which are quite often not complied with. There are too many to mention, but one can obtain this act by sending away to the Editorial Branch, Division of Public Information, Food and Drug Administration, 300 Independence Avenue, S.W.,

Washington 25, D.C. It is issued in loose leaf form and I believe the fee, if any, is very nominal. There are too many items to be mentioned regarding that, but as an example, Methyl Alcohol or mixtures thereof must be labeled in a specific manner. And if they are not, an employee could have a third party claim. This also applies to other mixtures such as turpentine and various petroleum products. Furthermore, fire extinguishers must be labeled in a certain manner, so that if a certain fire extinguisher is used by an employee to put out a small electrical fire and the employee receives a shock, there is again a third party claim. Various flammable material must also be properly labeled. Another example of liability under this act would be where an employer sends the employee to a gas station to obtain gasoline in an improperly labeled can. In such a situation, it is the duty of the gas station proprietor to have the can properly labeled if it is not labeled when brought in. If for some reason there is a fire and the employee or any other employee is injured, there can be liability for violation of this act on the part of the gasoline station.

Another third party claim that is quite often overlooked is the claim against the insurance carrier of a truck which is in the process of being loaded when an employee is injured. Quite frequently the injured employee is injured through some negligence or want of care on the part of a fellow employee in the loading of a truck and even though the truck is owned by the employer and is stationary at the time, there can be and frequently is liability against the insurance company covering the truck.

Another question which arises is whether or not there can be contribution against an employer if the employer is negligent as well as the third party. Under the rule in Wisconsin in the case of *A. O. Smith Corp. v. Associated Sales & Bag Co.*,<sup>4</sup> our Court held that the sole liability of an employer because of the injury of an employee in the course of his employment either to the employee or anyone else is under the Workmen's Compensation Act. Therefore there can be no contribution. However, that case apparently left open the question as to whether or not the employer can be denied subrogation for the amount it paid if its negligence—not the employee's negligence—exceeded that of the third party.

There are other claims of an injured employee which might not be considered third party actions but which are quite frequently overlooked. Quite often an employee that is injured does get some form of insurance which occasionally does not exclude recovery if the injury occurs while the employee is covered by workmen's compensation. Also, if the employee is driving a vehicle while in the employ of his employer and is involved in an accident, and the employee has medical pay insurance on his own automobile he can collect the medical pay.

<sup>4</sup> 16 Wis. 2d 145, 113 N.W. 2d 562 (1962).

Another interesting point involving an accident with a vehicle arises where the third party is uninsured and the employee has an uninsured motorist provision on his own car. The insurance carrier would be in the position of a third party if the policy covered.

Another problem involves the loaned-employee doctrine. When an employee is loaned by a general employer to a special employer, the special employer may become liable for compensation along with the general employer. Generally, the loaned-employee doctrine applies only if:

1. Employee has made contract of hire expressly or impliedly with special employer.
2. Work being done essentially that of special employer.
3. Special employer has right to control details of the work.

An imaginative lawyer can create many more possibilities for third party claims, many of which have not been determined in this state. For instance, a fireman who is injured in fighting a fire caused by the negligence of the owner of the building in violating a fire code, may have a third party claim. We have already established that a police officer can sue a brother officer and the insurance carrier for the city if there is negligence on the brother officer's part in operating a vehicle.