Malpractice Liability of Company Doctors in Wisconsin

Michael L. Farrell

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol68/iss4/6

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
MALPRACTICE LIABILITY OF COMPANY DOCTORS IN WISCONSIN

I. INTRODUCTION

Wisconsin joined a growing number of states in 1978 when it amended the exclusive remedy provision of its Worker’s Compensation Act to bar an employee from bringing a common-law tort action against a co-employee. This amendment was a long-overdue realization that co-employee immunity is consistent with the theory of worker’s compensation. The amendment, however, should not be construed as abrogating the common-law right of an employee to bring a malpractice action against a company doctor simply because they share a common employer.

This Comment criticizes the majority view that co-employee immunity extends to company doctors because it arbitrarily destroys the traditional common-law duties of a group of doctors and is wholly inconsistent with the policy considerations upon which the law of worker’s compensation was founded. In addition, this Comment will examine the approaches courts in other jurisdictions have taken in attempting to deal with the issue of company doctor immunity and will offer a simple solution for courts in Wisconsin.

II. BACKGROUND

Worker’s compensation law was designed to alleviate the hardships employees faced when seeking redress for their

---


2. Wis. Stat. § 102.03(2) (1983-84) provides:
   Where such conditions exist the right to the recovery of compensation under this chapter shall be the exclusive remedy against the employer, any other employee of the same employer and the worker’s compensation insurance carrier. This section does not limit the right of an employee to bring action against any coemployee for an assault intended to cause bodily harm, or against a coemployee for negligent operation of a motor vehicle not owned or leased by the employer, or against a coemployee of the same employer to the extent that there would be liability of a governmental unit to pay judgments against employees under a collective bargaining agreement or a local ordinance. (emphasis added).
work-related injuries and to provide them with an effective and consistent remedy. At common law, an injured employee's only recourse was a tort action against the employer or against a fellow employee. Because of the difficulty of proving negligence in a complex industrial environment, coupled with the availability of the common-law defenses of contributory negligence, assumption of risk, and the fellow-servant doctrine, injured workers were often left without an adequate remedy. Worker's compensation represented a break with common-law tort principles in that a right to relief was based upon the fact of employment rather than upon fault. To receive compensation, the employee must merely show that the injury resulted from an accident that arose out of and in the course of employment. The employee and the employer engage in a *quid pro quo*. The employee gives up his right to sue his employer in tort and possibly receive a greater award of damages but, in return, receives immediate, though partial, compensation for lost wages and medical expenses. The employer relinquishes the right to assert the common-law defenses but escapes costly litigation and extravagant verdicts. The employer is required to insure itself through private insurance, state-fund insurance, or self-insurance. These costs are ultimately reflected in the price of the employer's goods or services and thus passed on to the consumers of the product.

---

3. 1 A. LARSON, WORKMEN'S COMPENSATION LAW, § 2.20 at 5-7 (1982) [hereinafter cited as A. LARSON].
4. Id. § 4.40, at 28.
6. Id.
7. Id. § 80, at 528-30.
9. "Thus, the test is not the relation of an individual's personal quality (fault) to an event, but the relationship of an event to an employment. The essence of applying the test is not a matter of assessing blame, but of marking out boundaries." Id. § 2.10, at 5. See also Cudahy Packing Co. v. Parramore, 263 U.S. 418, 423 (1923).
10. This is the language used in the typical worker's compensation statute. See 1 A. LARSON, supra note 3, § 1.10, at 1.
11. See generally id. § 1.10, at 1-2.
12. The cost of insurance is not placed on the public as a whole, as in a pure social insurance system, but is placed ultimately on the consumers of the particular product. This sets up a relationship between the hazards of the particular industry, the cost of insurance to the employer, and the price of the particular product produced. See 1 A.
One of the problems encountered by legislators in developing their worker's compensation schemes is outlining the perimeters of immunity. Virtually all worker's compensation acts preserve the right of an employee to bring a common-law tort action against third parties, based on the idea that the ultimate loss should fall on the wrongdoer. Many jurisdictions, however, have recognized sound economic reasons for extending tort immunity to employees for work-related accidents in which they are at fault. This is based upon a quid

LARSON, supra note 3, § 3.20, at 17-18. See also Val Blatz Brewing Co. v. Industrial Comm'n, 201 Wis. 474, 478, 230 N.W. 622 (1930).

13. 2A A. LARSON, supra note 3, § 71.00, at 14-1.


Although other jurisdictions do not expressly provide for co-employee immunity, some courts have construed their statutes to imply it. The Idaho Supreme Court has held employees immune from suits by co-employees because they are agents of the employer and thus share his immunity. See, e.g., White v. Ponozzo, 77 Idaho 276, 291 P.2d 843 (1955); House v. Mine Safety Appliances Co., 417 F. Supp. 939, 947 (D. Idaho 1976); Nichols v. Godfrey, 90 Idaho 345, 411 P.2d 763 (1966), construing, IDAHO CODE §§ 72-211, 72-223(1)(Supp. 1984). The Courts in Massachusetts have also construed their statute, MASS. GEN. LAWS ANN. ch. 152, § 15 (Supp. 1983), to allow the co-employee to share the employer's immunity. See, e.g., Rood's Case, 7 Mass. 915, 388 N.E.2d 1219 (App. Ct. 1979); Saharceski v. Marcure, 373 Mass. 304, 366 N.E.2d 1245
COMPANY DOCTORS

pro quo among employees: each gives up common-law rights against the others in exchange for tort immunity. Because third parties are not involved in the quid pro quo, they should not be afforded immunity for their negligent acts. Also, the industry and the consuming public should not have to bear the cost of injuries caused by those persons whose activity is unrelated to the workplace. Conversely, accidents caused by employees are work-related, common-place and inevitable occurrences, and thus, the cost of such should be borne by the


16. 2A A. Larson, supra note 3, § 72.61(b), at 14-205.
industry and, ultimately, the consumers of the product.\textsuperscript{17} Allowing employees to sue one another for work-related negligence\textsuperscript{18} would simply shift the burden of industrial accidents from one employee to another, effectively defeating the purpose of worker's compensation.\textsuperscript{19} Because the states' co-employee immunity provisions create no exceptions for different classes of employees, company doctors are impliedly immune from liability arising from their negligent acts.\textsuperscript{20}

### III. A Look at the Development of Wisconsin's Worker's Compensation Act

Wisconsin amended section 102.03(2),\textsuperscript{21} the exclusive remedy provision of its worker's compensation act,\textsuperscript{22} to extending tort immunity to "any employe of the same employer."\textsuperscript{23} Although there have been no decisions on the applicability of section 102.03(2) since its amendment,\textsuperscript{24} an examination of

\begin{itemize}
  \item \textsuperscript{17} See Marks, supra note 15, at 396-97.
  \item \textsuperscript{18} An often quoted case against co-employee immunity is the English case of Lees v. Dunkerley Bros., 1911 A.C. 5, 103, L.T. 467, 468 (Eng. 1910), where Lord Chancellor Loveburn stated, "I can hardly imagine a more dangerous or mischievous principle than [co-employee immunity].... [such immunity] would mean a free hand to everybody to neglect his duty towards his fellow servant and escape with impunity from all liability for damages for the consequences of his own carelessness or neglect of duty."
  \item \textsuperscript{19} Oliver v. Travelers Ins. Co., 103 Wis. 2d 644, 648, 309 N.W.2d 383, 385 (Ct. App. 1981). Employees would not only be subject to a suit for negligence and a possible judgment for damages but would also be subject to reimbursement liability for compensation paid to the injured worker by the employer or the employer's insurance carrier. Id. at 649 & n.2, 309 N.W.2d at 385-86 & n.2.
  \item \textsuperscript{20} Co-employee immunity has been criticized for several reasons: it shifts the burden of proving negligence to the employee; it deprives the employee of the opportunity to sue the co-worker and obtain a more complete recovery, and it encourages careless conduct. See Note, The Malpractice Liability of Company Physicians, 53 Ind. L.J. 585, 596-97 (1978) [hereinafter cited as Note, Company Physicians]. See generally Note, The Third Party Action—Expanding the Circle of Immunity: Coemployees, 48 Miss. L.J. 87 (1977).
  \item \textsuperscript{21} 1977 Wis. Laws 195, § 2.
  \item \textsuperscript{22} Wis. Stat. § 102.03(1)(c)1 (1983-84).
  \item \textsuperscript{23} Wis. Stat. § 102.03(2) (1983-84).
  \item \textsuperscript{24} For cases prior to the amendment allowing suits against co-employees see Laffin v. Chemical Supply Co., 77 Wis. 2d 353, 253 N.W.2d 51 (1977) (corporate officer acting as co-employee is liable as one); Pitrowski v. Taylor, 55 Wis. 2d 615, 201 N.W.2d 52 (1972) (corporate officer engaging in acts of employees is liable as a co-employee); Zimmerman v. Wisconsin Elec. Power Co., 38 Wis. 2d 626, 157 N.W.2d 648 (1968)(legislature never intended co-employees to be immune); Severin v. Luchinske, 271 Wis. 378, 73 N.W.2d 477 (1955)(co-employee is a "third party"); Bernard v. Jennings, 209 Wis. 116, 244 N.W. 589 (1932) (co-employees owe each other the duty to exercise ordi-
COMPANY DOCTORS

Wisconsin's legislative history shows an effort to protect an injured worker's right to maintain a common-law tort action against an attending doctor.\(^\text{25}\)

Prior to 1917, the employee had to elect whether to pursue worker's compensation benefits from the employer or bring a tort action against a third party.\(^\text{26}\) If the employee elected to pursue an action against a third party, he waived his right to compensation from the employer. However, if the employee chose to accept worker's compensation benefits, he assigned his cause of action against the third party to his employer.\(^\text{27}\)

The Wisconsin Supreme Court held that the assigned cause of action against a third party included actions against doctors for malpractice. In *Pawlak v. Hayes*\(^\text{28}\) the injured employee discovered, after receiving compensation benefits from his employer, that his doctor's negligence had aggravated his original injury.\(^\text{29}\) The court allowed the employee to return the compensation benefits and bring an action against the doctor because there was no election, and thus no assignment, until the facts creating third party liability came into existence.\(^\text{30}\)

---

\(^{25}\) nary care in discharging the duties of the common employer); McGonigle v. Gryphah, 201 Wis. 269, 272, 229 N.W. 81, 83 (1930) (citing Lees v. Dunkerley Bros. 1911 A.C. 5, 103 L. T. Rep. 467, 468 (Eng. 1910).


\(^{27}\) 1915 Wis. Laws § 2394-95(1). See also Pawlak v. Hayes, 162 Wis. 503, 505, 156 N.W. 464, 465 (1916).

\(^{28}\) Pawlak, 162 Wis. at 505-06, 156 N.W. at 465. A claim under the Worker's Compensation Act did not completely cut off the worker's rights against the third party. An assignment of the employee's cause of action to the employer was merely for the purpose of reimbursing the employer for the amount paid the employee. Any judgment in excess of that amount, less the reasonable cost of collection, belonged to the employee. Cermak v. Milwaukee Air Power Pump Co., 192 Wis. 44, 48, 211 N.W. 354, 356 (1927). The employer could also reassign the cause of action back to the employee, as was done in Cermak. Also, if the action by the employer against the third party was not commenced within 90 days of a written demand by the injured employee, the employee could maintain the action in his own name. Wis. STAT. § 102.29 (1923).

The original section, 1911 Wis. Laws 664, § 4 merely said the claim by the employee for compensation should operate as an assignment of the cause of action. It was amended by 1913 Wis. Laws 599, making a claim by the employee against a third party a waiver of any claim for compensation. See Employers Mut. Liab. Ins. Co. v. Icke, 225 Wis. 304, 274 N.W. 283 (1937).

\(^{29}\) Id. at 504, 156 N.W. at 465.

\(^{30}\) Id. at 506, 156 N.W. at 465.
In 1917 the legislature provided that although a claim for compensation benefits precluded the injured employee from bringing an action against a third party, the employee could claim benefits under worker's compensation and still maintain an action against any physician or surgeon for malpractice. The recovery, if any, in such action was reduced by the amount of compensation paid by the employer to the employee due to the malpractice. The Wisconsin Supreme Court in *Lakeside Bridge & Steel Co. v. Pugh* explained that the new statute was merely a modification of the original waiver section; it did not create in the employee a new cause of action for malpractice because this cause of action already existed at common-law.

In 1931 the legislature further expanded the rights of the injured employee by allowing him to accept worker's compensation benefits and pursue a tort claim against third parties. This made the recovery process less complex and eliminated the necessity of an assignment to the employee of a cause of action that the employer did not wish to pursue. The sec-

---

31. 1917 Wis. Laws 624 § 2394-24. Remaining substantially unchanged today, the present version, WIS. STAT. § 102.29(3) (1983-84) provides:
   Nothing in this chapter shall prevent an employee from taking the compensation he or she may be entitled to under it and also maintaining a civil action against any physician, chiropractor or podiatrist for malpractice. The employer or compensation insurer shall have no interest in or right to share in the proceeds of any civil action against any physician, chiropractor, or podiatrist for malpractice. This was done “to restore to an injured employee the right to collect damages from a physician who has treated him unskillfully.” Bull. of Indus. Commission of Wis., Sept. 1, 1917, at 34. The original section held the physician liable only for damages from malpractice that occurred within the 90 day period in which he was bound to provide medical services.

32. This set up two independent causes of action against the physician: one by the employee to recover damages due to the malpractice less the compensation recovered from the employer for the malpractice, and the other by the employer to recover the amount of compensation paid to the employee due to the malpractice. Thus the employee did not recover double damages and the physician was responsible for the entire amount of damages arising from his negligence. *Lakeside Bridge & Steel Co. v. Pugh*, 206 Wis. 62, 67-68, 238 N.W. 872, 875 (1931). In 1919 section 102.29(3) was amended to allow the employee the benefit of any recovery in excess of the amount paid by the employer or the employer's insurance carrier. *Employers Mut. Liab. Ins. Co.*, 225 Wis. at 307, 274 N.W. at 285.

33. 206 Wis. 62, 238 N.W. 872 (1931).
34. *Id* at 67, 238 N.W. at 874.
35. 1931 Wis. Laws 132 (presently WIS. STAT. § 102.29 (1981 - 82)).
tion, remaining substantially unchanged today, provided that the employer or his insurer could join in the action and the recovery against the third party would be divided as follows: one-third to the employee, the remaining two-thirds (less the reasonable cost of collection) to the employer as reimbursement for the amount paid as compensation to the employee, with any remaining going to the employee.37

Finally, in 1949, the legislature eliminated the employer's right to reimbursement from the employee for any amount recovered in a third-party action against a physician.38 Although this is inconsistent with basic tort principles which deny an injured party double recovery for injuries resulting from malpractice,39 this provision, along with the other enactments mentioned previously, clearly demonstrates the legislature's intent to protect the injured employee's right to sue a doctor for malpractice regardless of the benefits received through the worker's compensation act.40 The amendment of section 102.03(2) extending immunity for liability for work-related negligence to employees raises doubt as to whether the right to sue a company doctor still exists. It appears that by leaving unchanged section 102.29(3)—preserving the right of an employee to bring a malpractice action against any physician—the legislature is impliedly excepting doctors from the co-employee immunity provision. Taking an opposite view—that the co-employee immunity provision excepts company doctors from liability—would frustrate the purposes of worker's compensation law and would eliminate a right that has been carefully protected by the legislature since 1917.41

Courts in other jurisdictions, deciding the issue of company doctor immunity without the benefit of a physician liability

---


39. See Jenkins, 104 Wis. 2d at 339 n.15, 311 N.W.2d at 614 n.11. (Abrahamson, J., dissenting). This result is criticized by Professor Larson who characterizes Wisconsin's action in creating this provision as "driven no doubt by its restless pioneering urge." 2A A. Larson, supra note 3, 2.72.65(e), at 14-224.

40. See Jenkins, 104 Wis. 2d at 339 n.15, 311 N.W.2d at 614 n.15.

41. See supra note 20 and accompanying text.
section similar to 102.29(3), have used different theories to circumvent their co-employee immunity provisions.

IV. OTHER APPROACHES TO COMPANY DOCTOR IMMUNITY

Several courts, apparently unwilling to relieve company doctors of their common-law liability for malpractice, have held that the doctor was not a co-employee either because (1) he was not subject to the employer's right to control and thus was an independent contractor, or (2) he was acting in dual capacities, one of a co-employee and one of a licensed physician. Neither of these theories provide a court with workable guidelines. In applying the two theories, courts have resorted to a strained construction of their worker's compensation statutes, drawn meaningless distinctions, and have added confusion to an already complex area of the law.

A. The Independent Contractor Theory

Generally, courts have held that independent contractors are not employees and are therefore subject to common-law liability as third parties under their worker's compensation acts.\(^4^2\) To determine whether someone is an employee for worker's compensation purposes, courts have looked to the traditional common-law relationship of master and servant and applied the right to control test:\(^4^3\) if the employer has the right to control the physical conduct of the worker in the performance of his service, then the worker is to be considered an employee and not an independent contractor.\(^4^4\) Some courts have applied this test, with minor variations, to determine whether company doctors were employees under their co-employee immunity provisions.

---

42. 81 AM. JUR. 2D Workmen's Compensation § 66 at 754 (1976).
43. For a criticism of the test as applied to compensation law, see 1C A. LARSON, supra note 3, §§ 44.00-44.35, at 8-31—8-136. Professor Larson lists the principal factors showing the right to control as: "(1) direct evidence of right or exercise of control; (2) method of payment; (3) the furnishing of equipment; and (4) the right to fire." Id. § 44.00, at 8-31.
In 1931, in *Hoffman v. Houston Clinic*, the Texas Civil Court of Appeals held that the plaintiff, after losing an eye due to the negligent treatment by a company doctor, was not barred from maintaining a suit for malpractice because the doctor was not an "agent, servant, or employee of the employer." Although the court did not elucidate which factors it considered controlling, two later cases expressly applied the right to control test and compared their facts with *Hoffman*.

In 1943, the Fifth Circuit Court of Appeals in *Martin v. Consolidated Casualty Ins. Co.*, applying Texas law, held that an employee could not bring a malpractice action against a doctor acting as an agent of the insurer. The court readily distinguished *Hoffman* because in this case, the doctor acted upon the "express instruction" of the insurance company in treating the plaintiff. In *Hoffman*, the court noted, there was merely an order saying, "Please render necessary treatment to S.R. Hoffman who was injured while in our employ engaged in his regular occupation." While the *Martin* court did not say how specific the instructions had to be, it concluded that the doctor in this case was under the "direction and control of the company."

More than twenty years later the Texas Supreme Court in *McKelvey v. Barber* held that a doctor was not immune from a suit for malpractice despite the fact that he could be considered the employer's agent for some purposes. The court explained, saying "[a]n important consideration in such cases is whether the employer had that right to control the physical details as to the manner of performance which is characteristic of the relationship of master and servant." The court then underwent a more extensive analysis of the facts than in the previous two cases, in light of the right to control test. The

47. 138 F.2d 896 (5th Cir. 1943).
48. *Id.* at 899.
49. *Id.*
50. *Id.*; 41 S.W.2d at 134.
51. 138 F.2d at 899.
52. 381 S.W.2d 59 (Tex. 1964).
53. *Id.* at 63.
54. *Id.* at 62-63.
court concluded that, although the defendant was a company doctor, the fact that he was engaged in the general practice of medicine, that only 15 to 20 percent of his practice was of an industrial nature, that he was not on a retainer but was paid for services when rendered, and that his charges for treating employees were paid by the compensation carrier while the employer paid the doctor's fee for physical examinations, showed he was not under the control of the employer and thus was not an "agent, servant, or employee." 55

Courts in Indiana have taken a different approach. In Ross v. Schubert 56 the Indiana Court of Appeals disregarded a factual analysis and instead held that all company doctors are independent contractors because the legislature, in adopting a co-employee immunity provision, could never have intended to immunize company doctors against malpractice actions. 57 The court rationalized this result by saying that company doctors are independent contractors because the employer cannot control the manner in which the work is performed. 58 Also, the court explained, the liability of such doctors arises from the physician-patient relationship, not from the employer-employee relationship. 59 "To hold otherwise," reasoned the court, "would encourage the company physician to be less assiduous." 60 A fear of rampant malpractice among company doctors and a concern for the well being of the injured worker apparently were the predominant considerations in prompting the court to make this sweeping judgment. 61 This decision, relied on in three subsequent cases, 62 was criticized by Professor Larson, perhaps the leading authority on worker's compensation law, because company doctors in Indiana, like those in Texas, can be considered employees for purposes of com-

55. Id. at 63.
57. Id. at 626.
58. Id. at 629.
59. Id.
60. Id.
61. Id. See also 2A A. LARSON, supra note 3, § 72.61(b), at 14-204.
Compensation benefits and independent contractors for malpractice claims.\textsuperscript{63}

Courts in Pennsylvania have declined to follow Indiana's lead in classifying all company doctors as independent contractors and instead have examined the particular facts of each case in applying the traditional right to control test. In \textit{Lemonovich v. Klmoski}\textsuperscript{64} an injured employee brought a malpractice action against his employer's "surgical liaison officer" who was responsible for attending to hospitalized employees. The federal court, construing Pennsylvania law, explained that the "particular criterion which distinguishes an employer-employee relationship from an independent contractor relationship is the right to control the means of accomplishing the result."\textsuperscript{65} The court held that instructions from the employer directing the doctor to act as "surgical liaison officer" and to refer certain problems to certain specialists was not enough to confer upon the employer any right to control the doctor or establish an employer-employee relationship.\textsuperscript{66}

More recently, the Pennsylvania Superior Court has found the facts existing in two cases sufficient to establish that the doctor was subject to the employer's right to control and thus was an employee rather than an independent contractor. In

\textsuperscript{63} 2A A. \textsc{Larson}, \textit{supra} note 3, § 72.61(b), at 14-204. Professor Larson claims that his holding breaks down the \textit{quid pro quo} among employees because the doctor loses his right to sue co-employees while remaining liable to such suits himself. \textit{Id.} at 14-205 to 14-206. This argument is weak because company doctors are rarely in a position to be harmed by the negligence of a co-employee. \textit{See infra} note 135 and accompanying text.

Wisconsin has a statute which expressly provides for independent contractors to be considered employees under certain conditions. \textsc{Wis. Stat.} § 102.07(8)(1983-84) provides:

Every independent contractor who does not maintain a separate business and who does not hold himself out to and render service to the public, provided he is not himself an employer subject to this chapter or has not complied with the conditions of § 1.2.28(2), shall for the purpose of this chapter be an employee of any employer under this chapter for whom he is performing service in the course of the trade, business, profession or occupation of such employer at the time of injury.


\textsuperscript{65} \textit{Id.} at 1292.

\textsuperscript{66} \textit{Id.}
Babich v. Pavich the court held that a company doctor was "in the same employ" as the deceased worker and was thus immune from liability for negligently causing his death. The court, in looking at the totality of the circumstances, seemed to ignore the Lemonovich test:

Although the record does indicate that Bethlehem does not control the manner and method of treating patients, this fact alone is not controlling in determining whether appellee is an employee or independent contractor. The following facts point to the conclusion that appellee is an employee rather than an independent contractor: he worked for Bethlehem on a full-time basis; Bethlehem paid him a fixed salary and did not allow him to engage in private practice; his fringe benefits were the same as those received by Bethlehem's supervisory employees; and Bethlehem controlled the hours and number of days that appellee worked.

The court in Budzichowski v. Bell Telephone Co. held that two company doctors were not independent contractors but employees and thus immune from a claim for malpractice brought by a telephone installer. The court found all the facts listed in Babich present here, except that there was no prohibition against engaging in an outside practice. The court did not consider this to be significant but noted that the fact that the doctors in this case were supervised by a company doctor made the case for finding the doctors to be employees stronger here than in Babich.
The right to control test has often been criticized because it is difficult to apply, has few ascertainable standards, and is really an inference or conclusion rather than a demonstrable fact. These shortcomings are even more glaring when applying the test to a company doctor. Because a doctor must exercise independent medical judgment in the performance of his professional skills, the manner in which the doctor performs his work cannot be controlled by a lay person. To hold otherwise ignores reality and accentuates the inapplicability of the right to control test in compensation law. Other courts have recognized this fact and have resorted to other approaches to determine the status of company doctors.

The court declined to hold that all company doctors are independent contractors, explaining that such a rule was best left to the legislature. Id. at —, 473 A.2d at 170.

The Georgia Court of Appeals also used the right to control test to determine whether a company doctor was an employee or an independent contractor. In Bexley v. Southwire, 168 Ga. App. 431, 309 S.E.2d 379 (1983), a trial court granted summary judgment for a company doctor based on Georgia’s co-employee immunity provision, GA. CODE ANN. S. 34-9-11 (1982). The court of appeals looked at various factors: the doctor worked at the facility full-time, was paid a salary not based upon the number of employees he saw, had an office located in the facility, had equipment and supplies provided by the employer, and had his work periodically reviewed by his supervisors. Bexley, 168 Ga. App. at —, 309 S.E.2d at 381. The court noted that the evidence also showed that the doctor was in charge of the company’s health services, that he had absolute discretion and authority to determine what tests to administer to employees, and that the results of the tests were not revealed to the company but remained subject to the doctor-patient privilege. Id. at —, 309 S.E.2d at 381-82. The court of appeals reasoned that, in light of the conflicting evidence, the issue of whether the doctor was subject to the company’s right to control was a question for the jury. Accordingly, the court reversed the trial court’s order granting summary judgment for the doctor. Id. at —, 309 S.E.2d at 382.

72. See, e.g., 1C A. LARSON, supra note 3, §§ 44.00 at 8-31, 45.00 at 8-137; Note, Company Physicians, supra note 20, at 592-93; Comment, Employee or Independent Contractor: The Need for a Reassessment of the Standard Used Under California Workmen’s Compensation, 10 U.S.F.L. REV. 133, 141 (1975).

73. See Note, Company Physicians, supra note 20, at 591-92.


75. See Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 71, 417 A.2d 505, 512 (1980): “Employees who are professionals owe a special duty to abide not only by federal and state law, but also by the recognized codes of ethics of their professions. That duty may oblige them to decline to perform acts required by their employers.”

Perhaps the most controversial approach used thus far is the dual capacity doctrine.

B. The Dual Capacity Doctrine

The dual capacity doctrine is a judicially created exception to the exclusive remedy provision in worker's compensation law. Under the dual capacity doctrine an employer can become a third party, amenable to suit by an employee, if the employer acts in a second capacity, independent of and unrelated to his capacity as employer. The doctrine has been extended to apply to company doctors based on the idea that he has two working capacities: one as a co-employee of the injured worker, and the other as an independent professional physician subject to liability. The second capacity arises because the relationship between a physician and his patient generates duties and obligations separate and unrelated to those existing between employees. Adoption of the dual capacity doctrine is the apparent result of an unwillingness on the part of the courts to allow a licensed practitioner to escape liability for his negligence because he is technically a member of an immune class.

1. Other Jurisdictions

The California Supreme Court became the first court to adopt the dual capacity doctrine in a medical context in *Duprey v. Shane*. In *Duprey* the plaintiff suffered an injury while working for a chiropractic partnership and was negligently treated by one of the partners. The court held that the partner acted...
COMPANY DOCTORS

in dual capacities, as an employer and also as an attending doctor. By acting as a doctor, the partner was "a person other than the employer" and thus was subject to liability. The court reasoned that the partner did not treat the plaintiff because of the employer-employee relationship but rendered treatment as an attending doctor in a physician-patient relationship. After adoption of its co-employee immunity provision, the California Supreme Court extended the dual capacity doctrine to apply to company doctors as well. In Hoffman v. Rogers the court accepted the Duprey rationale in holding a full-time, salaried company doctor liable for malpractice, reasoning that "[t]here is nothing in the [co-employee] amendment to undermine the dual personality theory." Unfortunately, the holding in Hoffman has had little acceptance among courts in other jurisdictions.

Though not expressly applying the dual capacity doctrine, several courts have used a dual capacity approach in determining the liability of its company doctors. In Garcia v. Iser- son the New York Court of Appeals held that a defendant doctor, who spent four hours a day, three days a week on the employer's premises attending to injured employees, was one "in the same employ" as the plaintiff and thus was immune from an action for malpractice. The court emphasized the

84. Id. at —, 249 P.2d at 15.
87. Id.
88. See supra note 15.
90. Id. at —, 99 Cal. Rptr. at 460. California, however, has not applied the dual capacity doctrine in every medical malpractice case. In Dixon v. Ford Motor Co., 53 Cal. App. 3d 499, 125 Cal. Rptr. 872 (1975), a worker died because the first aid staff negligently failed to provide proper treatment. The court did not allow suit by the widow because the worker's compensation benefits were the exclusive remedy when the death occurred in the course of employment. The court explained that Duprey was a unique situation where the employer was also a doctor. Id. at 507, 125 Cal. Rptr. at 877. Accord Deauville v. Hall, 188 Cal. App. 2d 535, 10 Cal. Rptr. 511 (1961). But see D'Angona v. County of Los Angeles, 27 Cal. 3d 661, 613 P.2d 238 (1980), where the plaintiff, an employee at a county hospital, contracted a disease in the course of her work and was negligently treated by the hospital staff. The court allowed suit against the hospital relying on Duprey.
92. Id. at 423, 309 N.E.2d at 421, 353 N.Y.S.2d at 957.
fact that the medical treatment was “incidental” to the employment because the plaintiff was treated “not as a member of the public but only in consequence of his employment.”

The court compared this situation with one in an earlier New York case in which it was held that the doctor was not immune to a suit for malpractice because he was acting in different capacities. In *Volk v. City of New York*, the plaintiff, a nurse who became ill while on duty, received negligent treatment at the hospital where she was employed. Using a dual capacity framework, the court noted that in rendering treatment to the nurse the hospital was acting in its professional capacity rather than in its capacity as her employer. The *Garcia* court construed the holding in *Volk* to apply only when the medical services are available to the general public, thus distinguishing it from the instant case where the doctor treated only employees while he was on the employer’s premises.

This questionable distinction was accepted by the Michigan Court of Appeals in the case of *Fletcher v. Harafajee*. In *Fletcher* a police officer was shot while on duty and subsequently received negligent medical treatment from a city medical center. The court allowed a malpractice action to be brought against the treating doctors despite the objection by the doctors that the police officers and their status as employees of the city rendered them immune from suit under their co-employee immunity provision. The court reasoned that it would be unfair to apply the co-employee immunity provi-

94. *Garcia*, 33 N.Y.2d at 424, 309 N.E.2d at 421-22, 353 N.Y.S.2d at 957
95. 284 N.Y. 279, 30 N.E.2d 596 (1940).
96. Id. at —, 30 N.E.2d at 597.
97. Id. The court explained:

[T]he risk of the injury which plaintiff suffered was not incidental to her employment. It was a risk to which any one [sic] receiving like treatment at the hospital would have been subjected. The occurrence of the injury was not made more likely by the fact of her employment. Consequently, the injury did not arise out of and in the course thereof (citations omitted).

Id. at 283, 30 N.E.2d at 597.
98. 33 N.Y.2d at 424, 309 N.E.2d at 422, 353 N.Y.S. at 957. See also Note, The No-Duty Rule, supra note 15, at 688.
100. Id. at —, 299 N.W.2d at 54.
101. Id.
sion to government employees because they carry out many diverse and unrelated functions. The court distinguished this case from Jones v. Bouza where the Michigan Supreme Court held that a full-time staff physician was a co-employee and thus immune from malpractice liability. The Fletcher court observed that in the instant case, the doctor was not employed for the sole purpose of treating employees. Rather, his services were available to the general public.

The distinction between medical treatment in a company clinic and medical treatment in a public facility has little logical basis. To hold, as the courts in New York and Michigan have, that the ability to maintain an action for malpractice depends upon where the employee is treated implies that protection of the negligent party is more important in worker's compensation theory than protection of the injured worker.

While most courts have either applied the dual capacity doctrine in a limited fashion or rejected it entirely, at least one court has adopted the California position in Hoffman and

102. Id. at —, 299 N.W.2d at 55.
104. Id. at —, 160 N.W.2d at 882. The court strictly construed the co-employee immunity provision reasoning that the legislature intended to abolish all common-law actions against fellow employees, malpractice being no exception. Id. See also Sergeant v. Kennedy, 352 Mich. 494, 90 N.W.2d 447 (1958).
105. 100 Mich. App. at —, 299 N.W.2d at 55.
107. See supra notes 3-12 and accompanying text.
108. The Illinois Supreme Court rejected application of the dual capacity doctrine in a medical context in McCormick, 85 Ill. 2d 352, 423 N.E.2d 876. The plaintiff injured his foot in the course of his employment and was negligently treated by two company doctors. The appellate court held that the dual capacity doctrine did not apply to the doctor but did apply to the employer under Duprey and Smith v. Metropolitan Sanitary Dist. 77 Ill. 2d 313, 396 N.E.2d 524 (1979). The Illinois Supreme Court held that the dual capacity doctrine that was applied in Smith did not apply in this case. The test for dual capacity, the court stated, "is whether the employer's conduct in the second role or capacity has generated obligations that are unrelated to those flowing from the company's or individual's first role as an employer." Id. at —, 423 N.E.2d at 878. Because the Illinois Worker's Compensation Act required the employer to provide medical services, the court concluded that the employer was merely fulfilling a duty imposed upon it by the Act and was thus acting only in its employer capacity. Id. See also Collier v. Wagner Castings Co., 70 Ill. App. 3d 233, 388 N.E.2d 265 (1979), aff'd, 81 Ill. 2d 229, 408 N.E.2d 198 (1980); Komel v. Commonwealth Edison Co., 56 Ill. App. 3d
applied the doctrine to company doctors. The Supreme Court of Colorado in Wright v. District Court expressly following the holdings in Duprey and Hoffman, held that a full-time company doctor occupied the dual capacities of co-employee and physician and, in the latter capacity, was subject to liability for malpractice. The second capacity, explained the court, resulted in the new relationship of physi-


The New Jersey Superior Court rejected the dual capacity doctrine in Boyle v. Breme, 187 N.J. Super. 129, 453 A.2d 1335 (1982), aff'd, 93 N.J. 569, 461 A. 2d 1164 (1983), where an injured employee attempted to sue a company doctor for malpractice because creating exceptions to the co-employee immunity provision was the function of the legislature. The court recognized that in enacting and amending its worker's compensation act, the legislature had "constructed a highly technical framework of complex design and complicated parts...[this court] should not threaten the integrity of this scheme by presuming an exception in the case of a coemployee who happens to be a doctor." Id. at 1337. See Bergen v. Miller, 104 N.J. Super. 350, 250 A.2d 49 (1969).

The Mississippi Supreme Court in Trotter v. Litton Systems, Inc., 370 So. 2d 244 (Miss. 1979), likewise held the dual capacity doctrine inapplicable absent legislative enactment. The court refused to allow an employee, who suffered the loss of a thumb through the negligent treatment of a cut on his thumb by a nurse in the employer's clinic, to sue his employer because aggravation of a compensable injury is compensable, thus the employer's immunity extends to the subsequent negligent act. Id. at 247.


109. The Supreme Court of Ohio has accepted the Duprey rationale in holding a hospital liable to an employee for malpractice but has not extended the doctrine as far as the court in Hoffman in holding a company doctor liable for malpractice. In Proctor v. Ford Motor Co., 36 Ohio St. 2d 3, 302 N.E.2d 580 (1973), the court held that full-time salaried physicians employed to operate a plant medical facility were employees within the meaning of their co-employee immunity provision and thus were immune from liability for malpractice. Five years later the court in Guy v. Arthur H. Thomas Co., 55 Ohio St. 2d 183, 378 N.E.2d 488 (1978), held an employer-hospital liable for failing to diagnose an employee's medical condition, which she contracted during the course of her employment, as mercury poisoning. The court, citing Duprey, adopted the dual capacity doctrine, concluding that "[t]he appellee hospital, with respect to its treatment of the appellant, did so as a hospital, not as an employer, and its relationship with the appellant was that of a hospital-patient with all the concomitant traditional obligations." Id. at 492. The court declined to expressly overrule Proctor, implying that the dual capacity doctrine does not extend to company doctors. Id. See 2A A. LARSON, supra note 3, § 72.61(b), at 14-204 n.65.3.


111. Id. at 1168.

112. Id.
Stressing the importance of the physician-patient relationship, the court concluded that no doctor, whether employed in a company clinic or working in private practice, should be able to disclaim liability for malpractice. The court criticized the holdings in *Garcia* and *Fletcher* for drawing the distinction that an employee who is treated at a hospital receives the same services as the general public while the employee who is treated at a company clinic receives services merely as an incident of his employment.

The court explained,

> It is not the *public* practice of medicine which creates a dual capacity for the attending physician; it is the very practice of medicine, with its special duties and responsibilities, which charges a doctor with all of the obligations which normally arise in the doctor-patient relationship. One’s need for protection from malpractice is not affected by the configuration of the employment relationship or the location of the treatment.

Arguing that holding a company doctor liable for malpractice is consistent with the policies underlying worker’s compensation law, the court also observed that the reasons justifying tort immunity for employers and employees are not applicable when the tortfeasor is a company doctor.

---

113. *Id.*
114. *Id.* at —, —, 661 P.2d at 1168, 1171.
115. *Id.* at —, 661 P.2d at 1170.
116. *Id.* (emphasis in original).
117. *Id.* 2A A. LARSON *supra* note 3, § 72.81, at 14-229—31. Because of the confusion with the term “dual capacity” Larson substitutes the term “dual persona” in its place, explaining:

> In a sense, a single legal person may be said to have many “capacities,” since that term has no fixed legal meaning. As a result, a few courts have stretched the doctrine so far as to destroy employer immunity whenever there was, not a separate legal person, but merely a separate relationship or theory of liability. When one considers how many such added relations an employer might have in the course of a day’s work...it is plain enough that this trend could go a long way toward demolishing the exclusive remedy principle. . . .

> . . .

> The choice of the term “persona” . . . is dictated by the literal language of the third-party statute, which usually defines a third party, in the first instance, as “a person other than the employer.” This is quite different from “a person acting in a capacity other than that of employer.”

*Id.* § 72.81, at 14-229 to 14-231 (emphasis in original).
The dual capacity doctrine, despite being based on sound public policy considerations, has received little acceptance by the courts and has been criticized by Professor Larson because it has been misapplied, abused, and overextended by the courts.118 Specifically criticizing the extension of the doctrine to company doctors, Larson states,

The fallacy in this extension is simply that the company doctor does not have two capacities. He has only one: company doctor. That is the entire extent of his relation to his co-employees. All he does, all day long, is perform in this single capacity in relation to his co-employees.119

Although there is some logic to Professor Larson's argument against application of the dual capacity doctrine to company doctors, he seems to ignore the fact that many worker's compensation acts implicitly destroy the traditional common-law duties of a group of doctors. Despite the criticism that they have overextended the dual capacity doctrine beyond justifiable limits,120 the courts in Hoffman and Wright should be commended for recognizing the importance of the physician-patient relationship and attempting to preserve its concomitant rights, duties, and obligations in the face of careless legislation.

2. Wisconsin

In 1982 the Supreme Court of Wisconsin rejected application of the dual capacity doctrine in Jenkins v. Sabourin.121 In Jenkins, the plaintiff was injured by the prank of a fellow employee. Because the accident occurred before the legislature amended section 102.03(2) granting tort immunity to employees,122 the plaintiff brought a third party action against the

---

118. Id. § 72.61(b), at 14-203—04. See Wright, 661 P.2d at 1172 & n.2 (Hodges, C. J., dissenting). It is interesting to note that some courts which have cited Larson's Workmen's Compensation Law for support in applying the dual capacity doctrine have been criticized for such application in a subsequent edition. See, e.g., D'Angona v. County of Los Angeles, 27 Cal. 3d 661, 613 P.2d 238, 166 Cal. Rptr. 177 (1980) and 2A A. Larson, supra note 3, § 72.61(c), at 14—209—11.

119. See 2A A. Larson, supra note 3, § 72.61(b) at 14-203 - 204.

120. See Id. at 45.43(a).

121. 104 Wis. 2d 309, 311 N.W.2d 600 (1981).

122. The accident occurred on March 31, 1976. 104 Wis. 2d at 311, 311 N.W.2d at 60. The amendment of Wis. STAT. § 102.03(2)(1981-82) became effective January 1, 1978.
COMPANY DOCTORS

defendant-co-employee, the defendant's insurance company, and the employer as nominal defendant for subrogation purposes. The defendants cross-claimed against the employer for contribution, claiming against the employer for contribution and arguing that there was a failure to exercise ordinary care in the course of providing medical attention to the plaintiff. On the motion of the employer the trial court dismissed the cross-claim on the grounds that, because the aggravation of the injury was compensable under the Act, the employer was immune from all liability for any injuries arising out of the employment, including injuries from negligent medical treatment. The Wisconsin Supreme Court agreed with the reasoning of the trial court: 

It is established Wisconsin law that, when an employee is treated for a work-related injury and incurs an additional injury during the course of treatment, the second injury is deemed as one growing out of, and incident to, employment . . . . and subjects the employer only to compensation liability and not to damages in tort.

The defendants argued that the dual capacity doctrine applied, contending that when the employer undertook to render medical services to the employee, it stepped out of its role as employer and assumed the role of medical services provider with no immunity under the Act. The court rejected this contention reasoning that the employer did not enter into a new capacity but merely provided medical services in its capacity as employer as required by the Act. "The obligation to a work-injured employee of the medical-service function," the court explained, "stemmed wholly from, and was a part of, the employer's function and is mandated by the Worker's Compensation Act."

Although the defendants in Jenkins declined to bring an action against the treating doctor, the court hinted in dicta that such an action might be permissible. Interestingly, in

123. 104 Wis. 2d at 311-12, 311 N.W.2d at 602.
124. Id. at 312, 311 N.W.2d at 602.
125. Id.
126. Id. at 316, 311 N.W.2d at 604.
127. Id.
128. Id. at 319, 311 N.W.2d at 605.
129. Id.
130. Id at 322, 311 N.W.2d at 607.
briefly discussing the liability of a company doctor the court made no mention of the newly-enacted co-employee immunity provision.131 The court instead relied upon section 102.29(3)132 in observing that "[f]acially, it would appear, although we do not decide, that the worker could recover under this statute even from a physician who served full-time on an employer's staff."133 Thus it appears that the court is willing to hold company doctors liable for malpractice notwithstanding the enactment of the provision granting immunity to co-employees. Therefore, Wisconsin courts can preserve the rights, duties and obligations of the physician-patient relationship based on a plain reading of section 102.20(3) rather than resorting to the independent contractor theory, the dual capacity doctrine, or other judicially created fictions.

V. ARGUMENTS AGAINST COMPANY DOCTOR IMMUNITY

Because of his special role in the workplace, the arguments for granting immunity from tort liability to an employee are not valid when applied to a company doctor. As stated previously, the idea of co-employee immunity recognizes a quid pro quo among employees.134 The company doctor does not participate in this reciprocal exchange of rights; he is removed from the production area making it far less likely that he will be injured by a co-employee's negligence than for a co-employee to be harmed by his negligence. Thus, realistically, the company doctor does not give up a common-law right to sue in return for co-employee immunity.135

Another reason for co-employee immunity and worker's compensation in general is the idea that fault is difficult to trace when the injury occurs in a complex industrial environment.136 This justification is inapplicable to injuries resulting

131. The amendment of Wis. Stat. § 102.03(2)(1981-82) was mentioned at the beginning of the decision. Id. at 311 n.2, 311 N.W.2d at 602 n.2.
132. 104 Wis. 2d at 322, 311 N.W.2d at 607.
133. Id.
134. See supra note 16 and accompanying text.
136. Prosser, supra note 5, § 80, at 527.
from medical malpractice. Unlike common employee negligence, medical negligence occurs after the original injury and in a place separate from the production area.\textsuperscript{137} Moreover, the acts of the doctor can be evaluated in accordance with established medical standards.\textsuperscript{138} It has been argued that because the theory of worker's compensation is fault-based judging doctors alone on fault is unfair and contrary to the act.\textsuperscript{139} Yet this argument ignores the very reason that worker's compensation is not fault-based in the first instance: the burdens of proving fault and overcoming the common-law defenses consistently left workers without an adequate remedy.\textsuperscript{140} Also, it is more unfair for an injured worker to be inadequately compensated than it is to hold a doctor responsible for not maintaining a minimal level of competency.\textsuperscript{141}

Finally, co-employee immunity is a further recognition that industrial accidents are the inevitable result of the intimate relationship between people and machines.\textsuperscript{142} Unlike the risk of injury from employee negligence, the risk of injury from medical malpractice in not inherent in the production process\textsuperscript{143} nor is the injury therefrom an inevitable consequence of our highly industrial age.\textsuperscript{144} Legislatures clearly did not contemplate this in creating worker's compensation schemes.\textsuperscript{145} It is argued, however, that it is not the connection with the workplace that determines the perimeters of immu-


\textsuperscript{138} Note, The No-Duty Rule, supra note 15, Wright, 661 P.2d at 1170.

\textsuperscript{139} Wright, —Colo. at —, 661 P.2d at 1172 (Hodges, C. J., dissenting).

\textsuperscript{140} See supra notes 4-9 and accompanying text.

\textsuperscript{141} The Virginia Court of Appeals in Fauver v. Bell, 192 Va. 518, 65 S.E.2d 575, 578 (1951), explained that the difference between the liability of the employer and the liability of the company doctor arises from the different purposes of the two recoveries:

Employer's liability is not based upon tort or other wrongful conduct on the employer's part, but because it is incident to the relationship of employer-employee and a part of employer's contractual liability under the Act. On the other hand, the liability of the malpracticing physician is based upon negligence, a tort, and a tort recovery is for damages for the full wrong.

\textsuperscript{142} Note, The No-Duty Rule, supra note 15, at 675-76.

\textsuperscript{143} Id.


\textsuperscript{145} Wright, —Colo. at —, 661 P.2d at 1170.
nity but rather the employment status of the doctor at the time of the negligent act. This common misconception results from an overly mechanical interpretation of co-employee immunity and a neglect of one of the main reasons for the development of worker’s compensation: increasing industrial accidents due to changing industrial conditions. While some state that worker’s compensation is based on the fact of employment, it is really more accurate to say, in light of the underlying purposes of worker’s compensation law, that coverage under the act is based upon the type of accident rather than the status of a particular person at the time of the accident. As one court correctly observed, “in essence an award under the Act is based upon a statutory jurisdiction over a certain class of industrial accidents and only as a derivation thereof over those persons connected with them.” The same court followed this reasoning two years later in concluding that “[a]n injury sustained due to the malpractice of a physician does not come within the class of industrial accidents which the Act was designed to encompass.”

Clearly, the reasons which justify granting tort immunity to co-employees are not nearly as persuasive when attempting to justify extending this immunity to company doctors. In addition to the practical arguments discussed above, there are

---

147. See supra notes 3-4 and accompanying text.
148. See supra note 9 and accompanying text.
149. See Ross, 180 Ind. App. at —, 388 N.E.2d at 628 n.6, where the court explained that co-employee immunity results “because of the type of accident involved, not because of a direct objective to immunize particular persons.”
152. See McCormick, 85 Ill. 2d at —, 423 N.E.2d at 884 (Simon, J., dissenting) where Justice Simon, arguing for adoption of the dual capacity doctrine, added, “[i]ndustrial medical malpractice is just like any other medical malpractice, with none of the special problems that led the legislature to a special solution for industrial accidents.”

Another justification for co-employee immunity which is inapplicable to the company doctor is accident deterrence. The threat of liability gives the employer an economic incentive to prevent accidents. He is able to do this because he controls the workplace; i.e., he supervises the training, assigning, disciplining, and organizing of employees. Because the employer cannot exercise any significant control over the company doctor there is little deterrent effect in making him responsible for medical
COMPANY DOCTORS

also sound public policy reasons for not extending tort immunity to company doctors.

Because of the great societal interest in competent medical treatment, courts have uniformly imposed a high duty of care on those persons rendering such treatment. The purpose of the duty, explained one court, "is to protect the health and lives of the public . . . from the unskillfulness or negligence of medical practitioners, by holding such practitioners liable to respond in damages for the results of their unskillfulness or negligence." This purpose is no less important with respect to the duty of company doctors.

The relationship between a company doctor and an injured worker is more than just an employee-co-employee relationship; it is a physician-patient relationship with all its concommitant rights, duties, and obligations. Abrogating the duties and obligations that a doctor owes to his patient removes much incentive to render quality medical care. One court expressed its concern that rampant malpractice would result if company doctors were granted immunity:

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

malpractice. See Note, The No-Duty Rule, supra note 15, at 677. See also Wright, - Colo. at —, 661 P.2d at 1171.

153. 61 AM. JUR. 2D Physicians, Surgeons, and Other Healers § 200 (1981).


This concern is well justified in the case of company doctors who possess an especially poor reputation among health-care providers.  

An injured worker's relationship with a company doctor is identical to that of a patient with a private doctor. A patient treated by a private doctor has the right to expect the doctor to exercise reasonable care and the right to hold the doctor responsible in damages for any mistreatment. Certainly an injured employee can expect no less. His need for protection from malpractice is the same as any other person and should not be affected by the employment status of the treating doctor. It is incongruous to permit an injured worker a tort recovery from a negligent private doctor but not from a company doctor. There is no reason why an employee should lose his rights simply because he chose to be treated by a company doctor rather than a private one. This incongruity was noted in the dissenting opinion of the Illinois Supreme Court in *McCormick v. Caterpillar Tractor Co.*:

McCormick's waiver of his tort rights by going to the Caterpillar clinic is especially unfair because there was nothing to warn him of the legal effect of his apparently innocuous choice of doctors. He did not understand what he was giving up for the convenience of a doctor on the work premises.

Another reason why an employee's right to maintain an action for malpractice against a company doctor should be

160. 61 AM. JUR. 2D Physicians, Surgeons, and Other Healers § 201 (1981).
163. *See Wright*, — Colo. at —, 661 P.2d at 1170. *But see* Jenkins v. Sabourin, 104 Wis. 2d 309, 321, 311 N.W.2d 600, 606 (1981), where the court says this incongruity is "part and parcel of the compromise that constitutes the Workers Compensation Act."
165. 85 Ill. 2d at —, 423 N.E.2d at 880-87.
166. *Id.* at —, 423 N.E.2d at 883-84.
preserved is the general inadequacy of worker's compensation benefits. The employee's recovery under worker's compensation is fixed by statute. He receives full compensation for medical expenses but is only partially compensated for loss of earnings and receives no compensation for pain and suffering, disfigurement, and other losses unrelated to earnings.\textsuperscript{167} This is because recovery is based not upon wrongful conduct but upon the contractual liability of the employer.\textsuperscript{168} In a medical malpractice situation the loss from pain and suffering and disfigurement can be greatly enhanced, yet the victim receives no corresponding increase in benefits.\textsuperscript{169} The worker whose injury is aggravated by the wrongful conduct of a licensed doctor should have the right to be made whole, not just partially whole.\textsuperscript{170}

By allowing company doctors to disclaim liability for their own negligence courts effectively shift the cost of malpractice to the worker, the party that can least afford it.\textsuperscript{171} This is inconsistent with a basic tenet of worker's compensation law which holds that the cost of industrial accidents should be borne by the employer as the most efficient risk-bearer and cost distributor.\textsuperscript{172} Company doctors, however, through higher incomes and professional liability insurance, are much more likely to be able to pay the cost of their malpractice.\textsuperscript{173} The employer can still serve as the risk distributor by paying the doctor's insurance premiums or by agreeing to compensate workers for the doctor's malpractice.\textsuperscript{174}

\textsuperscript{167} I A. Larson, supra note 3, §§ 2.40-50, at 10-12.
\textsuperscript{168} Ross 180 Ind. App. at --, 388 N.E.2d at 629-30 n.11.
\textsuperscript{169} Note, Company Physicians, supra note 20, at 598-99.
\textsuperscript{170} Ross, 180 Ind. App. at --, 388 N.E.2d at 629-30 n.11. See also Hancock, 65 Idaho at 650, 150 P.2d at 140, where the court explains that granting the doctor immunity would "permit the wrongdoer to go practically unscathed for grievous damage to another, and would likewise sentence the workman to a lifetime of dreary and hopeless existence through inability to work and live a normal life. ..with his only compensation limited to a sum totally inadequate to cover his sustained losses."
\textsuperscript{171} See Note, The No-Duty Rule, supra note 15, at 676.
\textsuperscript{172} See supra note 12 and accompanying text.
\textsuperscript{173} Note, Company Physicians, supra note 20, at 597.
\textsuperscript{174} Id. at 599.
VI. CONCLUSION

The problem of company doctor immunity is basically a conflict between a literal statutory interpretation of a co-employee immunity provision and the public policy considerations which underlie the rights, duties and obligations of the physician-patient relationship. While most courts recognize the importance of encouraging quality medical care, few are willing to interfere with their legislature's comprehensive, well thought out worker's compensation schemes. Courts in Wisconsin do not face such a problem. The legislature has already provided for the malpractice liability of medical practitioners. The co-employee immunity provision should in no way be interpreted as an abrogation of the traditional common-law right of an employee to bring a malpractice action against a company doctor, a right that has been carefully protected in Wisconsin worker's compensation law.

MICHAEL L. FARRELL