

## WORKMEN'S COMPENSATION INSURER AS SUABLE THIRD PARTY

ARTHUR LARSON\*

*Until 1960, lawyers appeared to assume that the workmen's compensation insurance carrier partook of the employer's immunity to common law suit by an injured employee. Since then there has been a rapid succession of judicial decisions, some holding the carrier liable as a third party for negligent safety inspections or medical services, some holding the opposite. This article analyzes the state and direction of the law produced by these decisions and related legislative amendments, and proposes a solution.*

Of all the developments in the volatile field of third-party litigation under workmen's compensation, none has been so dramatic and fast-moving as the line of cases in which injured employees have attempted to treat the compensation carrier as a third party for purposes of tort suits, based usually on alleged negligence in either safety inspections or medical services. The present discussion will attempt to bring some order out of the welter of cross-currents and violent disagreements that characterize this class of decisions, but it must be stressed that at this writing the law is in a formative stage. In some key states the latest decisions are from intermediate courts, with courts of last resort still to be heard from. Legislatures too are busy, sometimes reversing the courts, sometimes confirming them, and sometimes doing a little of each.

The most important single legal issue in the area is this: Under a statute that does not plainly identify the carrier with the employer in its third-party or exclusive-remedy passages, or use language unmistakably showing intent that the carrier should not be treated as a third party, can the carrier be sued for negligence in the

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\*Professor of Law and Director of Rule of Law Research Center, Duke University School of Law. A.B. 1931, LL.D. 1953, Augustana College; M.A. (Juris.) 1938, D.C.L. 1957, Oxford University.

performance of such functions as making safety inspections and actually performing, as distinguished from paying for, medical services? On this issue, it would be rash at this time to announce that this or that is the "majority rule." What weight, for a start, should be given to carefully-reasoned decisions by high appellate courts which are then reversed by legislative action? Shall we say, as one court has done, that this discredits the decisions altogether, because it proves that the court was wrong all along about what the legislature intended?<sup>1</sup> This line of reasoning seems highly artificial, if only because the chances are that the legislature writing the amendment does not contain a single survivor of the legislature that wrote the language interpreted by the court, and so the current legislature has no more idea of what was originally intended than anyone else. In a state whose own statute still resembles the original statute before the amendment, it makes much better sense to say that a decision superseded by a statutory amendment is as good authority as it ever was. After all, as to authorities from sister states, what is at work is not *stare decisis*, but the persuasive force of the reasoning and judgment of a respected court—and the amendment of a statute certainly does not change that.

#### THE THIRD PARTY CONTROVERSY: A DECISIONAL OUTLINE

The modern story began with the 1960 New Hampshire case of *Smith v. American Employers' Insurance Co.*<sup>2</sup> The plaintiff had lost both her legs as the result of an explosion allegedly due to the negligence of the insurance company in making safety inspections, a function which it had assumed. It was held that an action would lie against the carrier and that the carrier was not protected by the exclusive-remedy clause of the compensation act. In short, the carrier could be sued as a third party when the other facts necessary to liability were present.

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<sup>1</sup> *Bartolotta v. United States*, 276 F. Supp. 66 (D. Conn. 1967). The court brushes aside *Smith v. American Employers' Ins. Co.*, 102 N.H. 530, 163 A.2d 564 (1960) (discussed in note 2 *infra* and accompanying text), and *Mays v. Liberty Mut. Ins. Co.*, 323 F.2d 174 (3d Cir. 1963), *rev'g* 211 F. Supp. 541 (E.D. Pa. 1962) (discussed in note 6 *infra*), because of subsequent statutory amendments, saying: "The Court is inclined to the view that such amendments indicate that the prior court decisions misinterpreted legislative intent." 276 F. Supp. at 73.

<sup>2</sup> 102 N.H. 530, 163 A.2d 564 (1960). The decision was shortly afterward nullified by statutory amendment, N.H. REV. STAT. ANN. § 281.2 (1966), which provides "[e]xcept where the context specifically indicates otherwise, the term 'employer' shall be deemed to include the employer's insurance carrier." *Id.*

*Smith* appears to have been the first case involving alleged negligence in safety inspections as a ground for third-party liability of the carrier. It was by no means the first case, however, to present the basic question whether a carrier can ever be sued as a third party; several earlier cases had been concerned with malpractice by physicians selected by the insurer, but all were decided in favor of the carrier.<sup>3</sup> The New Hampshire court passed over them as "not

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<sup>3</sup>*District of Columbia*: See *Fernandez v. Gantz*, 113 F. Supp. 763 (D.D.C. 1953). The carrier was held not liable in case of alleged malpractice of physician selected by employer, "in the absence of any negligence in the selection of such physician, which is not here alleged." *Id.* at 764. The implication is that the carrier is thus not necessarily immune as such.

*California*: *Sarber v. Aetna Life Ins. Co.*, 23 F.2d 434 (9th Cir. 1928); *Fitzpatrick v. Fidelity & Cas. Co.*, 7 Cal. 2d 230, 60 P.2d 276 (1936); *Noe v. Travelers Ins. Co.*, 172 Cal. App. 2d 731, 342 P.2d 976 (1959); *Nelson v. Associated Indem. Corp.*, 19 Cal. App. 2d 564, 66 P.2d 184 (1937).

*Idaho*: *Schulz v. Standard Acc. Ins. Co.*, 125 F. Supp. 411, 415 (E.D. Wash. 1954), holding that under a third-party statute referring to "some other person than the employer," the carrier cannot be sued by an employee injured by the malpractice of a physician examining the employee for the insurer. The opinion says the physician was "selected and employed" by the carrier. The significance of this case was questioned in *Smith v. American Employers' Ins. Co.*, 102 N.H. 530, 537, 163 A.2d 564, 570 (1960) (discussed in note 2 *supra* and accompanying text) on the ground that "it cannot be said with certainty precisely upon what grounds the decision rests," and on the ground that the main basis for the decision appears to be that the remedies against the employer and a third person were mutually exclusive and would open the door to a double recovery.

*Schulz* also leaves some doubt on the point left open by the District of Columbia Circuit Court in *Fernandez v. Gantz*, *supra*. The court in *Schulz* relies on *Fernandez* which, however, as noted above, leaves a strong implication that the carrier might not be immune to suit for its own direct negligence in selection of a physician. In *Schulz*, the plaintiff apparently did not allege any such negligence but proceeded on the theory that the carrier had a sort of vicarious liability for the physician. The statement by the court that the doctor was "a Spokane physician selected and employed by defendant" is not amplified; it seems doubtful that the physician was "employed" in the master-servant sense. Then, at the very end of its opinion the court says: "In view of the conclusion which I have reached, it is not necessary to consider defendant's contention that, in any event it would not be liable for the negligence of a physician selected to examine the plaintiff in the absence of negligence in the selection."

This seems to leave matters in a posture similar to that in the District of Columbia under *Fernandez*, with the issue of possible carrier liability not entirely settled in cases where actual carrier negligence in selection or in direct treatment is alleged.

*Missouri*: *Hughes v. Maryland Cas. Co.*, 229 Mo. App. 472, 76 S.W.2d 1101 (1934). This case holds that the compensation carrier cannot be sued for negligent medical services of physicians "employed" by the carrier. The court said: "The insurer is not a negligent third person, within the meaning of section 3309 [Mo. REV. STAT. § 3309 (1929)]." *Id.* at 476, 76 S.W.2d at 1104. Section 3325, Mo. REV. STAT. § 3325 (1929), provides that the liability of the employer shall be secondary and that of the insurer primary and the latter shall be directly liable to the insured employee. A negligent third person, within the meaning of the act, is one upon whom no liability could be entailed under the act. *Sylcox v. National Lead Co.*, 225 Mo. App. 543, 547, 38 S.W.2d 497 (1931). Under the provisions of Section 3325, the insurer

in point," partly because they arose under different statutes. In view of the dearth of authority, however, they might well have been given a little more attention; the central issue of carrier immunity is essentially the same in the inspection and malpractice cases, and most courts since *Smith* have, as is here done, treated them together.

The opening argument in the *Smith* opinion is disarmingly simple. The question is whether the insurer is "some person other than the employer." Is the carrier a "person"? Yes, by statutory definition. Is it one "other than the employer"? Of course, if the word "other" means anything.

There is a certain poignancy in the fact that the court cites a Massachusetts case<sup>4</sup> as its authority at this point for giving words the meaning they have in common usage, for Massachusetts has ended at the opposite pole from this refreshingly direct reading of statutory language. Not only have Massachusetts courts somehow interpreted "the insured" to mean all the contractors and subcontractors on the job, and "employer" to mean "employee,"<sup>5</sup> but now have crowned the process by holding "insured" to mean "insurer."<sup>6</sup>

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is substituted for the employer and "the carrier is subrogated to all the rights and duties of the employer." *Sarber v. Aetna Life Ins. Co.* 23 F.2d 434, 435 (9th Cir. 1928).

Missouri subsequently amended its statute to bolster this result further: "Any reference to the employer shall also include his insurer." MO. ANN. STAT. § 287.030.3 (1965).

*Texas*: *Martin v. Consolidated Cas. Ins. Co.*, 138 F.2d 896 (5th Cir. 1943), involved an attempt by the deceased employee's widow to sue the carrier under a wrongful death statute for the negligent aggravation of the injury by physicians provided by the carrier. The court said: "It is settled law in Texas that the insurer stands in the place of the employer and may be held accountable only as the employer may be . . ." *Id.* at 899. The Texas third-party statute speaks of "some person other than the subscriber." TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (1967).

<sup>4</sup>*McDonald v. Employers' Liability Assurance Corp.*, 288 Mass. 170, 192 N.E. 608 (1934). An employee's injuries were aggravated by the alleged malpractice of the physician selected by the carrier. It was held that a carrier was a third party amenable to suit, but that the employee's election to proceed under the compensation act precluded an action at law against the insurer.

<sup>5</sup>*Bresnahan v. Barre*, 286 Mass. 593, 190 N.E. 815 (1934). A detailed discussion is presented in 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 72.32 (1968).

<sup>6</sup>*Matthews v. Liberty Mut. Ins. Co.*, 354 Mass. 410, 238 N.E.2d 348 (1968). The court held that "insurer" is not "some person other than insured," and therefore may not be sued for negligent performance of an allegedly assumed duty to inspect employment premises. The court declined to follow the implications of contrary language in *McDonald v. Employers' Liability Assurance Corp.*, 288 Mass. 170, 192 N.E. 608 (1934) (discussed in note 4 *supra*). The opinion in *Matthews* supplies an example of the hazards of stringing together a list of cases from other jurisdictions reaching the result of carrier immunity, without regard for distinctions between the statutes on which the decisions were based.

After defining "the question" as "whether the insurer is 'some person other than the

The New Hampshire court, then, having set forth the plain meaning of the statutory words, rightly proceeds on the theory that the burden from that point on would be to show a statutory intent different from the obvious meaning of the words. One by one the court briskly disposes of many of the arguments that have been worked over at great length in subsequent cases. The fact that the carrier would be subrogated to a claim against itself did not trouble the court; the amount of compensation could simply be set off, thus preventing a double recovery. The argument that the insurer has contracted to step into the employer's shoes is answered on straight contract grounds: An agreement between these two persons, to which the employee is not a party, cannot detract from the employee's rights against the carrier. The now-familiar argument that permitting recovery would have "undesirable results"—discouragement of voluntary safety services by carriers—is met in one sentence: "There is force in this contention but as we have often held such a question of policy is for the Legislature and not for this court."<sup>7</sup> The court concludes with a reminder that it cannot bar fundamental common law rights "in the absence of any provisions to this effect in the law," especially under a statute that is to be liberally interpreted.

The theme of the dissent in this three-to-two decision is, in effect, that throughout the history of the act it was always assumed that the insurer stood in the shoes of the employer. This is largely true. But the reports are full of cases in which what everybody had for years assumed turned out to be wrong.<sup>8</sup>

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insured," the court enumerated a supposed majority of jurisdictions answering "the question" in the negative by citing *Williams v. United States Fidelity & Guar. Co.*, 358 F.2d 799 (4th Cir. 1966), *Sarber v. Aetna Life Ins. Co.*, 23 F.2d 434 (9th Cir. 1928), and *West v. Atlas Chem. Indus., Inc.*, 264 F. Supp. 697 (E.D. Mo. 1966), all from states whose statutes identify the carrier with the employer. The court also cites *Kotarski v. Aetna Cas. & Sur. Co.*, 244 F. Supp. 547 (E.D. Mich. 1965), *aff'd*, 372 F.2d 95 (6th Cir. 1967), which had been discredited by *Ray v. Transamerica Ins. Co.*, 10 Mich. App. 55, 158 N.W.2d 786 (1968). This was perhaps understandable since, although *Ray* was decided almost three months before *Matthews*, it was released for publication only ten days before. What is not forgivable is the inclusion in the "majority" of *Hill v. United States Fidelity & Guar. Co.*, 272 F. Supp. 569 (M.D. Fla. 1967), followed by the words, "(Florida Workmen's Compensation Act)." *Hill* is not a workmen's compensation case at all. It happens to differ from *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 199 N.E.2d 769 (1964), *rev'g* 39 Ill. App. 2d 73, 187 N.E.2d 425 (1963) (discussed in note 10 *infra* and accompanying text) on a point of tort law, but never goes near the workmen's compensation law issue for which the Massachusetts court cites it.

<sup>7</sup>*Smith v. American Employers' Ins. Co.*, 102 N.H. 530, 534, 163 A.2d 564, 568 (1960).

<sup>8</sup>*See, e.g., Benintendi v. Kenton Hotel, Inc.*, 294 N.Y. 112, 60 N.E.2d 829 (1945), holding

As might have been expected, the *Smith* case caused some consternation in the insurance community. *Fabricius v. Montgomery Elevator Co.*,<sup>9</sup> a case reaching a similar result in Iowa, appeared three years later. But what really set off the alarm bells was *Nelson v. Union Wire Rope Corp.*,<sup>10</sup> decided the following year, in which the Illinois Supreme Court, applying the Florida statute, upheld a judgment of \$1,569,400 against a carrier based on negligent performance of a gratuitous safety inspection. Perhaps the sheer size of the judgment added to the shock. The two jurisdictions involved were major ones. And, although the vote on the decision was four-to-three, it is significant that the dissent was based entirely on the tort issue, that is, the extent of the liability of one who voluntarily undertakes a duty. Justice Schaefer, writing for the dissent, said: "When there has been reliance, or when the insurer has taken over the inspection duties of another, *there should be liability*. But in the absence of those circumstances, I am unable to see any sound reason for imposing liability."<sup>11</sup>

Thus, unlike the *Smith* case, in which the dissent went to the compensation law exclusive-remedy issue, the *Nelson* case stands as a decision, without dissent, that a compensation carrier can be made liable as a third party in tort for negligence in safety inspections. After *Nelson*, suits against carriers involving both safety inspection and malpractice appeared in jurisdiction after jurisdiction, accompanied by a corresponding burst of activity in legislatures.

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illegal the kind of control structure that thousands of close corporations had used for many years.

<sup>9</sup>254 Iowa 1319, 121 N.W.2d 361 (1963). A compensation carrier may be liable as a third party amenable to suit for an employee's injuries caused by the alleged negligent failure to inspect, note, and advise the employer of a defective elevator, if the carrier had assumed the duty to perform such service. The case was remanded for trial on the issues.

However, in 1965 the Iowa legislature amended its code to provide that no inspection of any place of employment made by an insurance company or other inspectors shall be the basis for imposition of civil liability upon the inspector or upon the insurance company or other person employing the inspector. IOWA CODE ANN. § 88A.14 (1966).

<sup>10</sup>31 Ill. 2d 69, 199 N.E.2d 769 (1964), *rev'g* 39 Ill. App. 2d 73, 187 N.E.2d 425 (1963). Injuries and fatalities suffered by employees of the general contractor and his subcontractors were found to have been caused by the negligent performance of the workmen's compensation carrier safety engineer's inspection of a material hoist. The Illinois Supreme Court, construing the Florida Workmen's Compensation Act, held that the carrier did not share the employer's immunity by identification with the employer, nor was the carrier immune as a subcontractor on the same project.

<sup>11</sup>*Id.* at 121, 199 N.E.2d at 797 (emphasis added).

## AN ANALYSIS OF TWO APPROACHES

The main outlines of the controversy are by now sufficiently clear to permit a systematic analysis of this volatile and hotly-contested issue. One may begin by identifying two approaches to the question, the conceptual and the functional. The conceptual approach asks: Who *is* the carrier? Is he a third party? The functional approach asks: What was the carrier *doing*? And what was the relation of that function to the act?

*The Conceptual Approach*

Under the first approach, the emphasis is on trying to extract from the language of the act any clues on whether the carrier was meant to be assimilated to the employer, or in any other way excluded from the third-party category. For the sake of completeness, we may begin with statutes that virtually dispose of the issue by express language. Among these statutes, some of which, as noted above, were deliberately enacted to reverse or confirm judicial holdings, are those of Alabama,<sup>12</sup> Colorado,<sup>13</sup> Delaware,<sup>14</sup> Georgia,<sup>15</sup> Hawaii,<sup>16</sup> Illinois,<sup>17</sup> Indiana,<sup>18</sup> Iowa,<sup>19</sup> Maine,<sup>20</sup> Missouri,<sup>21</sup>

<sup>12</sup>"The term 'employer' . . . shall if the employer is insured, include his insurer as far as applicable. . . ." ALA. CODE tit. 26, § 262(d) (1958).

<sup>13</sup>"[N]or shall such employer or the insurance carrier, if any, insuring such employer's liability under this chapter be subject to any other liability whatsoever . . . ." COLO. REV. STAT. ANN. § 81-2-6 (1967). Section 81-18-8 contains a similar express immunity as to the occupational disease article.

<sup>14</sup>"'Employer' . . . if the employer is insured, the term shall include the insurer as far as practicable. . . ." DEL. CODE ANN., tit. 19, § 2301 (1953).

<sup>15</sup>"'Employer' . . . [i]f the employer is insured, this term shall include his insurer as far as applicable." GA. CODE ANN. § 114-101 (1956).

<sup>16</sup>"The insurer of an employer is subject to such employer's liabilities and entitled to his rights and remedies under this Chapter as far as applicable." HAWAII REV. STAT. § 386-1 (1968).

<sup>17</sup>ILL. REV. STAT. ch. 48, § 138.5 (1967), as amended Pub. Act No. 76-282, § 5 (July 1, 1969), extending immunity beyond the employer and his employees to "his insurer, his broker, any service organization retained by the employer, his insurer or his broker to provide safety service, advice or recommendations for the employer or the agents or employers of any of them. . . ."

<sup>18</sup>"[H]e and those conducting his business and his workmen's compensation insurance carrier (are liable) . . . only to the extent and in the manner herein specified." IND. ANN. STAT. § 40-1205 (1965).

<sup>19</sup>IOWA CODE ANN. § 88A.14 (1966). See note 10 *supra*.

<sup>20</sup>"'Employer' . . . and if the employer is insured, it includes the insurer unless the contrary intent is apparent from the context or it is inconsistent with the purpose of this Act." ME. REV. STAT. ANN. tit. 39, § 2(6) (1964).

<sup>21</sup>"Any reference to the employer shall also include his insurer." MO. ANN. STAT. § 287.030.3 (1965). See note 3 *supra*.

Nebraska,<sup>22</sup> New Hampshire,<sup>23</sup> New Mexico,<sup>24</sup> Oregon,<sup>25</sup> Pennsylvania,<sup>26</sup> South Dakota,<sup>27</sup> Tennessee,<sup>28</sup> Texas,<sup>29</sup> Vermont,<sup>30</sup> Virginia,<sup>31</sup> and Wisconsin.<sup>32</sup> Although the California statute

<sup>22</sup>"For the purpose of this section if the employer carries a policy of workmen's compensation insurance, the term employer shall also include the insurer." NEB. REV. STAT. § 48-111 (1968).

<sup>23</sup>"Except where the context specifically indicates otherwise, the term 'employer' shall be deemed to include the employer's insurance carrier." N.H. REV. STAT. ANN. § 281:2 (1966).

<sup>24</sup>"Nothing in the Workmen's Compensation Act, however, shall affect, or be construed to affect, in any way, the existence of, or the mode of trial of, any claim or cause of action which the workman has against any person other than his employer, or the insurer, guarantor or surety of his employer." N.M. STAT. ANN. § 59-10-4(F) (1953).

<sup>25</sup>"The exemption from liability given to an employer under this section is also extended to the employer's insurer, the board, and the employees, officers and directors of the employer, the employer's insurer . . ." ORE. REV. STAT. § 656.018(3) (1967).

<sup>26</sup>PA. STAT. ANN. tit. 77, § 501 (1967): "Such insurer shall assume the employer's liability hereunder and shall be entitled to all of the employer's immunities and protection hereunder . . ." This statute was designed to reverse the result in *Mays v. Liberty Mut. Ins. Co.*, 323 F.2d 174 (3d Cir. 1963), *rev'g* 211 F. Supp. 541 (E.D. Pa. 1962), which involved an employee injured as a result of alleged negligent inspection of the premises for safety hazards. The court held the employer's immunity not applicable to the compensation carrier, and remanded for trial on the issue of negligence. *Contra*, *Roney v. Liberty Mut. Ins. Co.* (Pa. C.P., Philadelphia County, unreported, 1961). The compensation carrier was found not to have established a duty toward an injured employee for alleged negligent performance of safety inspection services. *Raines v. Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co.*, 391 Pa. 175, 137 A.2d 257 (1958). The employee's action was against the compensation carrier for breach of contract in negligently failing to furnish medical services. The court held that the carrier's sole liability on the insurance policy contract was to pay the statutory workmen's compensation benefits.

<sup>27</sup>"Employer . . . If the employer is insured, it shall include his insurer as far as applicable." S.D. COMP. LAWS ANN. § 62-1-2 (1967).

<sup>28</sup>"Employer . . . If the employer is insured, it shall include his insurer, unless otherwise herein provided." TENN. CODE ANN. § 50-902(a) (1966).

<sup>29</sup>The association, its agent, servant or employce shall have no liability with respect to any accident based on the allegation that such accident was caused by or could have been prevented by a program, inspection or other activity or service undertaken by the association for the prevention of accidents in connection with operations of its subscriber. TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (1967).

<sup>30</sup>"If the employer is insured, 'employer' includes his insurer as far as applicable." VT. STAT. ANN. tit. 21, § 601(3) (1967).

<sup>31</sup>In the definition of employer, the Virginia statute states, as to the term "employer": "If the employer is insured it includes his insurer so far as applicable." VA. CODE ANN. § 65-3 (1950). This leaves the plaintiff very little scope; he must do the best he can with "so far as applicable." In *Williams v. United States Fidelity & Guar. Co.*, 358 F.2d 799 (4th Cir. 1966), plaintiff tried to squeeze something out of this phrase, but failed. The action was for the "carrier's negligence in pursuing the employee-safety measures it has assumed." The carrier was held immune from suit. The court pointed out that Virginia courts limited the third-party concept to "a stranger to the business." *Id.* at 800; *see* *Rea v. Ford*, 198 Va. 712, 96 S.E.2d 92, 95 (1957). It then added that the carrier's liability in Virginia is primary under Section

expressly equates insurer and employer for purposes of the subrogation provision, leaving open the question whether the identification should be carried beyond that portion of the statute, the California courts have settled the question by choosing to apply the identification to the act as a whole.<sup>33</sup>

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65-107, which hardly makes it a stranger. Such cases as *Mays v. Liberty Mut. Ins. Co.*, 323 F.2d 174 (3d Cir. 1963), *rev'g* 211 F. Supp. 541 (E.D. Pa. 1962); *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 199 N.E.2d 769 (1964); and *Fabricius v. Montgomery Elevator Co.*, 254 Iowa 1319, 121 N.W.2d 361 (1963), were easily distinguished by the absence in each case of a statute so explicitly identifying the carrier with the employer. The court also invoked the Virginia concept that "the entire 'industrial family' is immune from suit." 358 F.2d at 799; *see Feitig v. Chalkley*, 185 Va. 96, 38 S.E.2d 73 (1946).

<sup>32</sup>Compensation is made the exclusive remedy against "the employer and the workmen's compensation insurance carrier," WIS. STAT. ANN. § 102.03(2) (1957), and the third-party provision, WIS. STAT. ANN. § 102.29(1) (1957), states that a claim against the employer or insurer would not bar a suit in tort against "any other" party (emphasis added). *See Kerner v. Employers Mut. Liability Ins. Co.*, 35 Wis. 2d 391, 151 N.W.2d 72 (1967) (safety-inspection case—carrier held immune under Wisconsin statute).

In 1965 Wisconsin enacted the following general provision:

The furnishing of or failure to furnish safety inspections or advisory services intended to reduce the likelihood of injury, death or loss shall not subject the insurer, its agent or employee undertaking to perform such services as an incident to insurance, to liability for damages from injury, death or loss occurring as a result of any act or omission in the course of such services. This section shall not apply if the active negligence of the insurer, its agent or employee, created the condition which was the proximate cause of injury, death or loss, nor shall it apply to such services when required to be performed under the provisions of a written service contract. WIS. STAT. ANN. § 895.44 (1966).

<sup>33</sup>*Burns v. State Compensation Ins. Fund*, 265 Cal. App. 2d 98, 71 Cal. Rptr. 326 (1968). The State Fund was held not subject to suit as a third party for alleged negligent inspections at lumber mill; Rating Bureau held immune by force of explicit statute, CAL. INS. CODE § 11758 (West 1955), ruling out civil liability for acts of Bureau.

In the main portion of its opinion the court said that the point had recently been decided in *State Compensation Ins. Fund v. Superior Ct. (the Breceda case)*, 237 Cal. App. 2d 416, 46 Cal. Rptr. 891 (1965), in which the facts and issue were substantially similar. Only one cited authority had come out since *Breceda*, *Mager v. United Hosp.*, 88 N.J. Super. 421, 212 A.2d 664 (1965), *aff'd per curiam*, 46 N.J. 398, 217 A.2d 325 (1966) (discussed in notes 77-78 *infra* and accompanying text), which the *Burns* court attempted to distinguish on the ground that the inspection function was more "intertwined" with the insurer's compensation role than the medical services in *Mager*.

As to California's statutory background, its subrogation section, Labor Code § 3850 states: "As used in this chapter: . . . (b) 'Employer' includes insurer as defined in this division." CAL. LABOR CODE § 3850 (West 1955). On the strength of this statutory language, the court distinguished the cases of *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 199 N.E.2d 769 (1964); *Fabricius v. Montgomery Elevator Co.*, 254 Iowa 1319, 121 N.W.2d 361 (1963); and *Smith v. American Employers' Ins. Co.*, 102 N.H. 530, 163 A.2d 564 (1960), in none of which was there a statute so identifying the insurer with the employer. Section 3850,

In the next category are those statutes that, while not expressly identifying the carrier with the employer, use language containing a strong implication to that effect. A good example is the Arkansas statute<sup>34</sup> which, closely resembling the Wisconsin statute,<sup>35</sup> states that a claim against the employer or insurer will not bar a suit in tort against any *other* party. Both the Wisconsin and Arkansas courts have reasoned that the carrier cannot be "other" than itself.

By the same token, under the familiar type of statute that authorizes third-party suits against a "person other than the employer," it can be effectively argued, as the court did in the *Smith* case,<sup>36</sup> that the juxtaposition of the word "other" with the word "employer" (not "employer and insurer") can only mean that the insurer is "other" than the employer.

In many of the opinions which approach the issue conceptually, the statutes are combed for whatever implications might be drawn from express mention or omission of mention of the insurer at various points other than the three affecting the issue directly: the definition of employer, the exclusiveness section, and the third-party

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literally read, confines this identification of employer and insurer to the subrogation section, but the court in *State Fund* chose to treat it as if it suffused the entire compensation statute.

California has, in addition, a peculiar quirk in its statute that causes complications of its own. California Labor Code § 3755 says:

[I]f after the suffering of any injury the insurer causes to be served upon any compensation claimant a notice that it has assumed and agreed to pay any compensation . . . such employer shall be relieved from liability . . . . The insurer shall . . . be substituted in place of the employer . . . . CAL. LABOR CODE § 3755 (West Supp. 1968) (emphasis added).

The only difficulty with this provision in the inspection cases is that the negligent conduct of the carrier occurs *before* the suffering of the injury. This distinction may assume importance in the malpractice cases, since negligent treatment of a compensable injury comes after the suffering of an injury. See the line of cases holding compensation carriers not liable for malpractice of physicians selected by the carrier, note 3 *supra*. *Sarber v. Aetna Life Ins. Co.*, 23 F.2d 434 (9th Cir. 1928), for example, expressly recognizes that substitution of the insurer for the employer is a condition precedent to the insurer's inheriting the employer's immunity.

The *Breceda* and *State Fund* results, then, are not necessarily dictated by unambiguous statutory language. Section 3850 could readily have been confined to the subrogation function and § 3755 seems inapplicable to a wrong occurring before the injury and resultant substitution of the carrier for the employer.

<sup>34</sup>ARK. STAT. ANN. §§ 81-1305 & 81-337 (1956). See, e.g., *Horne v. Security Mut. Cas. Co.*, 265 F. Supp. 379 (E.D. Ark. 1967). Carrier held immune under the wording of the Arkansas third-party provision, in which the words "employer or carrier" are closely followed by "any third party," thus identifying the employer and carrier in third-party situations, and disassociating the carrier from "any third party."

<sup>35</sup>Wis. STAT. ANN. § 102.29(1) (1957). See note 32 *supra*.

<sup>36</sup>See note 2 *supra* and accompanying text.

section. Thus, the familiar provisions that notice to the employer shall be notice to the carrier, that jurisdiction of the employer shall be jurisdiction of the carrier, and that an award against the employer shall bind the carrier, have been invoked as evidence of the identity of employer and carrier.<sup>37</sup> Courts holding carriers suable have countered this argument by saying that these sections identify employer and carrier for *procedural* purposes only, and are not intended to affect *substantive* rights.<sup>38</sup> Indeed, the argument can cut both ways. The Illinois court in *Nelson*, after recognizing that the employer and carrier were mentioned together at some points in the act, argued:

Similarly, the use of the word "employer" in some sections of the act, while using the words "employer, or his insurer" in others, has significance under the rules of construction which state that words employed are to be given their plain meanings, and that the use by the legislature of certain language in one instance and wholly different language in another indicates that different results were intended. . . . Had it been the legislative intent that all rights, duties and liabilities of the employer and his insurer were to be equated, particularly as to the matter of exclusive liability, it would not have mentioned the insurer as an alternate in some sections, while failing to mention it in others.<sup>39</sup>

A statutory distinction that has figured prominently in judicial opinions on the issue of carriers' third-party status is that between primary and secondary liability of the carrier to the compensation claimant. The *Nelson* opinion had much to do with this emphasis. Having reached its decision through the kind of analysis of the Florida statute just described, bolstered by related cases from Florida and by the *Fabricius* and *Smith* cases, the Illinois court turned to the task of distinguishing several *contra* cases of the malpractice type.<sup>40</sup> It chose to base its distinction primarily on the ground that the *contra* holdings all arose under statutes in which the

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<sup>37</sup>See, e.g., *Bartolotta v. United States*, 276 F. Supp. 66 (D. Conn. 1967). More than a dozen such items are found in the Connecticut act. Applying the Connecticut act in an action based on negligence for failure to inspect machinery, resulting in leakage of argon gas, the court held the carrier was immune from liability as a "third person." *Id.*

<sup>38</sup>See, e.g., *Mays v. Liberty Mut. Ins. Co.*, 323 F.2d 174 (3d Cir. 1963), *rev'g* 211 F. Supp. 541 (E.D. Pa. 1962); *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 199 N.E.2d 769 (1964), *rev'g* 39 Ill. App. 2d 73, 187 N.E.2d 425 (1963); *Fabricius v. Montgomery Elevator Co.*, 254 Iowa 1319, 121 N.W.2d 361 (1963); *Mager v. United Hosp.*, 88 N.J. Super. 421, 212, A.2d 664 (1965), *aff'd per curiam*, 46 N.J. 398, 217 A.2d 325 (1966).

<sup>39</sup>*Nelson v. United Wire Rope Corp.*, 31 Ill. 2d 69, 100, 199 N.E.2d 769, 786 (1964).

<sup>40</sup>The court cited the *Sarber* (California), *Schulz* (Idaho), *Hughes* (Missouri), and *Martin* (Texas) cases, all discussed in note 3 *supra*.

carrier's liability to pay compensation is primary or can be substituted for that of the employer, while the Florida act "has no comparable provision which expressly makes the insurer primarily and directly liable to an injured employee . . . ."<sup>41</sup> This primary-secondary distinction has in turn been used to distinguish *Nelson* in states having primary insurer liability, such as Massachusetts.<sup>42</sup>

It is unfortunate that this distinction has acquired such a conspicuous place in these decisions.<sup>43</sup> It may be useful as a make-weight in building up a case one way or the other, but one cannot help asking: What difference of substance does it really make? The carrier is going to pay in the end. Should anything as crucial as its immunity from third-party suit turn on something as technical and ultimately inconsequential as whether the legislature happened to make its liability primary or secondary? After all, the argument does not really reach the true question: *Is* the insurer the employer? He may be primarily liable for an obligation of the employer. This is still not the same as saying that he *is* the employer. And unless he is, he must be some person other than the employer.

The California statute goes further than merely imposing primary liability on the carrier; after the carrier has assumed liability, the act goes on to say that the carrier is "substituted in place of the employer," and indeed the employer is relieved of liability. This idea of substitution goes much further in the direction of identification than the mere imposition of primary liability, and, coupled with other special features of the California statute,<sup>44</sup> makes that state's decisions largely unusable as precedents in other jurisdictions.

It is by no means impossible for a state with a primary liability statutory background to find the carrier suable. In Michigan the issue first arose in a federal district court, which relied heavily on "this primary, unvariable responsibility" of the carrier to justify a ruling that the carrier was not intended to be a third party.<sup>45</sup> But

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<sup>41</sup>31 Ill. 2d at 105, 199 N.E.2d at 789.

<sup>42</sup>*Matthews v. Liberty Mut. Ins. Co.*, 354 Mass. 470, 238 N.E.2d 348 (1968).

<sup>43</sup>*See, e.g., Perrin, Workmen's Compensation Insurer's Immunity to Claims of Its Insured's Employee*, 3 THE FORUM 86 (1968), which concludes that this is "the single most significant standard."

<sup>44</sup>*See* note 33 *supra* and accompanying text.

<sup>45</sup>*Kotarski v. Aetna Cas. & Sur. Co.*, 244 F. Supp. 547 (E.D. Mich. 1965), *aff'd*, 372 F.2d 95 (6th Cir. 1967). It should be noted that *Kotarski*, before it was disavowed as a statement

when it fell to the Michigan court itself to provide an authoritative reading of its own statute, the court, while quoting the relevant passage of the Michigan act in full,<sup>46</sup> did not find in it any compulsion to change the plain meaning of the words "employer" and "insurer."<sup>47</sup>

Another argument extensively exploited in decisions barring third-party suits against carriers runs like this: The carrier is subrogated to the injured employee's cause of action against a third-party tortfeasor; if the carrier can be a third-party tortfeasor, the carrier will end by suing itself, and the legislature could not have intended such a "ludicrously incongruous"<sup>48</sup> result.<sup>49</sup> This argument

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of Michigan law by the Michigan court, had been widely cited and relied upon in jurisdictions holding insurers immune.

<sup>46</sup>The carrier "hereby assumes all obligations imposed upon the said employer . . . ." MICH. STAT. ANN. § 17.195(e) (1968).

<sup>47</sup>*Ray v. Transamerica Ins. Co.*, 10 Mich. App. 55, 158 N.W.2d 786 (1968). Under the Michigan third-party statute, referring to "some person other than a natural person in the same employ or the employer," MICH. STAT. ANN. § 17.189 (1968), an insurer can be sued as a third party on the ground that it voluntarily undertook to provide safety inspection services and allegedly negligently performed this undertaking. The court discredits the contrary holding of the federal court in *Kotarski v. Aetna Cas. & Sur. Co.*, 244 F. Supp. 547 (E.D. Mich. 1965), *aff'd*, 372 F.2d 95 (6th Cir. 1967), which, on substantially similar facts, purported to interpret the Michigan statute.

<sup>48</sup>*Barrette v. Travelers Ins. Co.*, 28 Conn. Supp. 1, 246 A.2d 102 (1968). Insurer was held not suable as third party for negligent inspection of machinery under third-party statute referring to "some other person than the employer," CONN. GEN. STAT. ANN. § 31-293 (Supp. 1969), and an exclusiveness provision limited to the employer, CONN. GEN. STAT. ANN. § 31-284 (Supp. 1969).

<sup>49</sup>*Mustapha v. Liberty Mut. Ins. Co.*, 387 F.2d 631 (1st Cir. 1967), *aff'g* 268 F. Supp. 890 (D.R.I. 1967). Applying the Rhode Island statute, the court held that a suit would not lie against an insurance carrier that had paid compensation benefits, for negligence in inspecting the employer's plant and machinery. The court did not feel bound to an opposite view by *Peabody v. Insurance Co. of N. America*, Civil No. 66-112 (Super. Ct. Washington County, June 30, 1967), for reasons that are by no means clear from the federal court's brief opinion. It quotes the Rhode Island case as saying that "if defendant [insurer] actually made an inspection and negligently failed to discover a danger or having discovered it failed to warn of the danger, defendant may be held liable in negligence." But merely because the Rhode Island court then went on to cite *Smith v. American Employers' Ins. Co.*, 102 N.H. 530, 163 A.2d 564 (1960), a case decided under New Hampshire law and later in effect reversed by statutory amendment, see note 2 *supra*, the federal court concluded, "We therefore do not construe the Rhode Island case as a decisive interpretation of Rhode Island law . . ." 387 F.2d at 632.

See also, among the opinions relying on the incongruity of an insurer suing itself, *Kotarski v. Aetna Cas. & Sur. Co.*, 244 F. Supp. 547 (E.D. Mich. 1965), *aff'd*, 372 F.2d 95 (6th Cir. 1967); *Schulz v. Standard Acc. Ins. Co.*, 125 F. Supp. 411 (E.D. Wash. 1954); and *Flood v. Merchants Mut. Ins. Co.*, 230 Md. 373, 187 A.2d 320 (1963) (discussed in note 55 *infra* and accompanying text).

has been rejected on several grounds by courts finding carrier liability. One is that the subrogation provisions are purely procedural and thus cannot be held to modify the definition of "employer."<sup>50</sup> Another is that the subrogation passage "does not deal with the subject matter" in issue, which is the question whether the employee's common law right is taken away from him.<sup>51</sup> The original *Smith* case<sup>52</sup> invoked a sort of dual-capacity doctrine, saying that the carrier was being sued not as compensation carrier but as an independent third party. All such cases made short work of the specter of double recovery by pointing out that the carrier would of course be entitled to set off in a judgment against itself as tortfeasor the amount of compensation paid by it as insurance carrier.<sup>53</sup> And, running through all these opinions was the thought that this kind of result was really not all that preposterous. By now the law is becoming quite accustomed to apparent incongruities of this kind, what with corporations, insurers, and even individuals "wearing different hats."<sup>54</sup> Increasingly common is the spectacle of an insurance carrier acting as compensation subrogation plaintiff and as defendant insurer on a third party's automobile liability risk. Problems of conflict of interest and of public policy may arise, but no one worries much any more about the conceptual problem of whether the carrier can sue itself. The present issue is not essentially different once it is recognized that the compensation carrier is being sued, not as compensation carrier, but as clinic operator or safety

<sup>50</sup>*Mays v. Liberty Mut. Ins. Co.*, 323 F.2d 174 (3d Cir. 1963), *rev'g* 211 F. Supp. 541 (E.D. Pa. 1962). See note 26 *supra*.

<sup>51</sup>*Fabricius v. Montgomery Elevator Co.*, 254 Iowa 1319, 121 N.W.2d 361 (1963). See note 9 *supra* and accompanying text.

<sup>52</sup>See note 2 *supra* and accompanying text.

<sup>53</sup>See, e.g., *Mays v. Liberty Mut. Ins. Co.*, 323 F.2d 174 (3d Cir. 1963), *rev'g* 211 F. Supp. 541 (E.D. Pa. 1962) (discussed in note 26 *supra*); *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 199 N.E.2d 769 (1964) (discussed in note 10 *supra* and accompanying text); *Fabricius v. Montgomery Elevator Co.*, 254 Iowa 1319, 121 N.W.2d 361 (1963) (discussed in note 9 *supra* and accompanying text); *Smith v. American Employers' Ins. Co.*, 102 N.H. 530, 163 A.2d 564 (1960) (discussed in note 2 *supra* and accompanying text); *Mager v. United Hosp.*, 88 N.J. Super. 421, 212 A.2d 664 (1965), *aff'd per curiam*, 46 N.J. 398, 217 A.2d 325 (1966) (discussed in notes 77-78 *infra* and accompanying text).

<sup>54</sup>For an example of a subdivided natural person, see *Duprey v. Shane*, 241 P.2d 78 (Cal. App.), *aff'd*, 39 Cal. 2d 781, 249 P.2d 8 (1952), holding that an employer-chiropractor who personally treated an employee was suable as a doctor. See also such comparable questions as that of the employer's contributing negligence in his suit as subrogee against a third party and the various dual-capacity situations discussed in A. LARSON, *supra* note 5, § 72.80 (1969).

inspection service, in which role it is just as differentiable as the automobile liability insurer.

### *The Functional Approach*

So far this discussion has dealt with the arguments that attack the problem by asking: Who *is* the carrier? *Is* he the employer, or is he a third person? As indicated at the outset, there is a second approach, the functional approach, that asks not who the insurer is, but what he was doing.

Three categories can here be discerned. The carrier may have been performing a duty imposed on the employer by law; he may have been performing a function which, whether or not required by law, was at least relevant to his role as a workmen's compensation carrier; or the function may have been unrelated to workmen's compensation altogether. The first category is well represented by the Maryland cases of *Flood v. Merchant Mutual Insurance Co.*<sup>55</sup> and *Donohue v. Maryland Casualty Co.*<sup>56</sup> The court in *Flood* held that the insurer, in selecting and providing a physician, was performing a duty imposed on the employer by the compensation statute, and therefore should obtain the employer's immunity. The federal court carried this reasoning a step further in applying it to a safety-inspection case. In *Donohue*, the court said:

In this case the duty which the insurer is charged with performing negligently is not a duty imposed on the employer by Article 101, but it is a duty which is imposed on the employer at common law. An employer has the duty to provide a reasonably safe place to work, and this includes the duty to make inspections and to take safety measures in fulfillment of that obligation.<sup>57</sup>

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<sup>55</sup>230 Md. 373, 187 A.2d 320 (1963). *Flood* was a suit against the carrier for alleged malpractice by two physicians selected by the carrier. The statute in question permitted third-party suits against persons "other than the employer." MD. ANN. CODE art. 101, § 58 (1957). The Maryland court held that the suit would not lie, since the carriers "stand in the position of the employer." 230 Md. at 377, 187 A.2d at 322. Note that the plaintiff's pleadings "contended that the appellee [insurer] was liable on the basis of *respondeat superior* and on the basis that appellee did not exercise a reasonable degree of intelligence, skill and ability in the selection of the physicians." *Id.* at 376, 187 A.2d at 322.

<sup>56</sup>363 F.2d 442 (4th Cir. 1966), *aff'g* for reasons in opinion below 248 F. Supp. 588 (D. Md. 1965). Under article 101 of the Maryland Code, the employer's immunity is extended to the carrier for an injury resulting from a hazard which should have been discovered during the carrier's safety inspections. The *Flood* case was accepted as authoritatively settling Maryland law.

<sup>57</sup>248 F. Supp. at 591. At the end of the quoted passage the court cites *Long Co. v. State Acc. Fund*, 156 Md. 639, 144 A. 755 (1929).

There are two possible flaws in this rationale. One was pointed out by a Michigan court:

We cannot say that as a matter of law the duty assumed in this case was the duty of the employer and not an independent undertaking on the part of the insurer for its own internal purposes. Perhaps the duty assumed was coincident with that of the employer, but was that what the insurer was asserted to have assumed?<sup>58</sup>

Reinforcing this criticism is the undoubted fact that the carrier has reasons of its own for making safety inspections. The more it can cut down on accidents, the lower will be its outlay for losses. Moreover, as was emphasized in *Nelson*,<sup>59</sup> the provision of safety services is a major selling and advertising feature with some insurers, including the defendant in *Nelson*. Furthermore, the *Nelson* dissent brought out the fact that the insurer had not taken on the entire safety inspection job; what it did was partial and supplementary. "[N]o one concerned relied upon the insurance company for complete inspection."<sup>60</sup> The dissent distinguished cases in which an insurance company purports to take over the safety inspection function so completely as to displace the employer. If it does less than this, surely the reasoning of *Donohue* should not apply. And, the chances are that in these cases the insurer has done less than this, since they would greatly increase their chances of being held liable under tort law if they took on the entire safety inspection job, thus supplying the element of reliance required in some jurisdictions.<sup>61</sup> Add to all this the rule that the employer's safe-place duty is not delegable anyway, in the sense of delegating so as to escape liability,<sup>62</sup> and little remains to support the concept that the insurer in making inspections has assumed a duty imposed on the employer by law.

The other flaw in the *Flood-Donohue* formulation is that, even if it is true that the insurer assumed a duty imposed on the employer, that simply is not the same thing as saying that the insurer *is* the

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<sup>58</sup>Ray v. Transamerica Ins. Co., 10 Mich. App. 55, 64, 158 N.W. 2d 786, 790 (1968). See note 47 *supra* and accompanying text.

<sup>59</sup>31 Ill. 2d at 79-80, 199 N.E.2d at 776. See note 10 *supra* and accompanying text.

<sup>60</sup>199 N.E.2d at 796.

<sup>61</sup>See *Hartford Steam Boiler Inspection & Ins. Co. v. Pabst Brewing Co.*, 201 F. 617 (7th Cir. 1912).

<sup>62</sup>Conner v. Utah Constr. & Mining, 231 Cal. App. 2d 263, 276, 41 Cal. Rptr. 728, 737 (1964); Maia v. Security Lumber & Concrete Co., 160 Cal. App. 2d 16, 20, 324 P.2d 657, 660 (1958).

employer. To say that it is only equitable that the carrier should enjoy the employer's immunities to the extent he assumes his burdens may appeal to the court's sense of symmetry and fairness. The only catch is that this is not what the statute says. Nor does it necessarily follow that the carrier should be treated here exactly the same as the employer. The employer assumes compensation burdens in exchange for tort immunity. The carrier assumes compensation burdens in exchange for payment of an insurance premium. In the one respect that is decisive for present purposes, their positions are not identical at all. From this it can be deduced that, if the legislature chose to grant immunity by name to the employer and not to the insurer, this is not to be explained as some kind of oversight, so long as there is a perfectly reasonable explanation on grounds of compensation theory and policy that could account for the difference.

The second category in the functional approach, that of relation of the activity to the compensation system, is best represented by the federal district court opinion in *Kotarski v. Aetna Casualty & Surety Co.*<sup>63</sup>

If the activity of the insurer, for which it is alleged to be negligent, bore no substantial relation to its position as the employer's workmen's compensation carrier, (e.g., if an automobile collision occurred between the employee, while driving his employer's vehicle on his employer's business, and a vehicle operated by the insurance company's employee who also happened to be acting in the course of his employment) there would be no logical reason to hold the carrier to be immune. However, where the carrier is performing an *integral part* of its function under the Workmen's Compensation Act, it should be immune under the same reasoning which makes it immune when performing a required activity.<sup>64</sup>

At this point, it may simply be said that this passage represents the "same reasoning" already shown to be shaky for several reasons, and obviously the case is weaker, if anything, when the activity is merely related rather than required. Indeed, the court goes on to say that "although the statute does not require insurers to

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<sup>63</sup>244 F. Supp. 547 (E.D. Mich. 1965), *aff'd*, 372 F.2d 95 (6th Cir. 1967).

<sup>64</sup>*Id.* at 558 (emphasis added). See also *West v. Atlas Chem. Indus., Inc.*, 264 F. Supp. 697 (E.D. Mo. 1966). Relying on *Hughes v. Maryland Cas. Co.*, 229 Mo. App. 472, 76 S.W.2d 1101 (1934) (discussed in note 3 *supra*), and adding the 1965 Missouri statutory amendment quoted in note 3 *supra*, the court in *West* found employer immunity in a safety inspection case. The holding could be said to partake of the nature of dictum, since the court had already held the action barred by the statute of limitations; but under the present Missouri statute the rule seems clear enough in any event.

inspect the buildings and equipment of employers, they must do so for their own protection."<sup>65</sup> And so we are left with the rather odd conclusion that as a reward for doing what it must do for its own protection the carrier should in addition be given an implied bonus in the form of tort immunity at the expense of a plaintiff injured by its negligence.

The third category, included merely to round out the pattern, is that of a function unrelated to compensation. It is well illustrated by the example in the *Kotarski* quotation and requires no further discussion.

It is interesting to note that the strength of connection of the particular function with the compensation system has figured in attempts to distinguish between the malpractice cases and the safety inspection cases—in both directions. In the California case of *Burns v. State Compensation Insurance Fund*,<sup>66</sup> a safety inspection case, the court observed that the only case that had appeared since the *Breceda* case,<sup>67</sup> a California precedent which it considered controlling, was *Mager v. United Hospital*<sup>68</sup> in New Jersey—a medical services case—and added:

Arguably the *Breceda* court would find that in maintaining a medical clinic the insurer steps from its role as insurer since the actual performance of the medical care, as opposed to compensation for its cost, is not one of the purposes of the workmen's compensation system.<sup>69</sup>

*Breceda* had held that safety inspections were "inextricably interwoven" with the Fund's status of insurer, since fostering of safe working conditions is one of the principal purposes of the workmen's compensation act. But so is the fostering of recovery and rehabilitation of injured workmen through provisions of medical services. One only has to read the *Burns* quotation to realize that it rings very false at the end. Something is obviously wrong with the attempted distinction.

Similarly, the Massachusetts court in *Matthews v. Liberty Mutual Insurance Co.*,<sup>70</sup> a safety inspection case, in attempting to

<sup>65</sup>244 F. Supp. at 558.

<sup>66</sup>265 Cal. App. 2d 98, 71 Cal. Rptr. 326 (1968). See note 32 *supra*.

<sup>67</sup>State Compensation Ins. Fund v. Superior Ct., 237 Cal. App. 2d 416, 46 Cal. Rptr. 891 (1965) (discussed in note 33 *supra*).

<sup>68</sup>*Mager v. United Hosp.*, 88 N.J. Super. 421, 212 A.2d 664 (1965), *aff'd per curiam*, 46 N.J. 398, 217 A.2d 325 (1966).

<sup>69</sup>265 Cal. App. 2d at 102 n.2, 71 Cal. Rptr. at 329 n.2.

<sup>70</sup>354 Mass. 470, 238 N.E.2d 348 (1968).

distinguish the statement in *McDonald v. Employers' Liability Assurance Corp.*,<sup>71</sup> a malpractice case, that the insurer is a person other than the insured, said:

We do not extend the implications of this statement to conclude the present case, as we are of the opinion that our Workmen's Compensation Act does not have as a purpose that the insurer be sued as a third party for performance of a function which furthers the goals of the entire compensation program.<sup>72</sup>

Are we then, in this era of emphasis on the dominant role of sustained high-quality medical care and rehabilitation in the compensation process, to imply that medical care does *not* further the goals of the entire compensation program?

By contrast, in some cases it seems to be assumed that it is the provision of medical care that is most obviously part of the compensation process. Thus, the *Smith* opinion brushed aside the malpractice cases as not in point.<sup>73</sup> The *Nelson* case<sup>74</sup> distinguished them as involving a function performed pursuant to a policy or statutory obligation, while the safety inspection was "entirely gratuitous conduct." Even in the *Flood-Donohue* cases in Maryland,<sup>75</sup> one gets the impression that the medical-services case, which came first, was viewed as the more firmly grounded, being based on a statutory requirement, while the safety-inspection case required an extension of this principle to a common law duty, that of maintaining a safe work place.

#### A REAPPRAISAL

The above survey of the many and varied judicial attempts to find a solution to the carrier-as-third-party problem indicates that none has been altogether satisfactory. An effort will now be undertaken to supply a rational formulation applicable to those states whose statutory language does not expressly identify the carrier with the employer or extend to him immunity from third-party liability.

At the outset, the conceptual approach will be passed over in

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<sup>71</sup>288 Mass. 170, 192 N.E. 608 (1934).

<sup>72</sup>354 Mass. at \_\_\_\_\_, 238 N.E.2d at 350.

<sup>73</sup>*Smith v. American Employers' Ins. Co.*, 102 N.H. 530, 163 A.2d 564 (1960). See note 2 *supra*.

<sup>74</sup>*Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 199 N.E.2d 769, *rev'g* 39 Ill. App. 2d 73, 187 N.E.2d 425 (1963). See note 10 *supra* and accompanying text.

<sup>75</sup>See notes 55 & 56 *supra* and accompanying text.

favor of the functional. Fictions have no place in the interpretation of a detailed modern statute. Concepts like "the blending of jural personalities,"<sup>76</sup> and statements that "the insurer merges into the employer," or "stands in his shoes," or even "is the employer," may serve as metaphors describing a conclusion, but they are not legal reasons supporting a conclusion. Far-reaching consequences wrung from fine points of statutory phrasing, or from practically insubstantial distinctions between primary and secondary carrier liability, or from supposed incongruity in the picture of a subrogated carrier suing itself, leave one with the sensation that the essence of the matter somehow has been missed and that too much is being made to depend on relatively minor features of the act that were never designed to control this issue.

When we come to the functional approach, the distinctions on which the cases turn also prove to be unsatisfactory, inaccurate, and at times irrelevant: between acts in performance of a duty imposed on the employer and those volunteered; between safety inspections and medical services; between acts that further the compensation program and those that do not. The solution here suggested is this: a distinction should be drawn between the carrier's function of *payment* for benefits and services, on the one hand, and, on the other, any function it assumes in the way of direct or physical performance of services related to the act. For negligent performance of the latter it should be liable in tort as a "person other than the employer."

This distinction has not been fully developed in any jurisdiction but was adumbrated in the *Mager* decision in New Jersey.<sup>77</sup> It came about in this way: the court cited the new line of cases holding carriers liable—*Nelson*, *Fabricius*, *Mays*, and *Smith*. It observed that the insurer sought to distinguish these cases on the ground that

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<sup>76</sup>*Barrette v. Travelers Ins. Co.*, 28 Conn. Supp. 1, 246 A.2d 102 (1968). See note 48 *supra*.

<sup>77</sup>*Mager v. United Hosp.*, 88 N.J. Super. 421, 212 A.2d 664 (1965), *aff'd per curiam for reasons in opinion below*, 46 N.J. 398, 217 A.2d 325 (1966) (7-0, one justice concurring only in the result). The case reversed 81 N.J. Super. 585, 196 A.2d 282 (1963). Decedent suffered a compensable injury, and was treated at a clinic operated by the defendant, his employer's workmen's compensation carrier. The clinic was alleged to have negligently caused decedent serious injury and eventual death. The court held that the insurer, as operator of the clinic, was not immune to a tort action by the administratrix of decedent's estate. *Cf. Vidulich v. Greater N.Y. Mut. Ins. Co.*, 80 N.J. Super. 15, 192 A.2d 596 (1963) (compensation carrier found not to have contracted to perform safety inspections; summary judgment for carrier; issue of immunity avoided).

in them the obligation the carrier was carrying out—safety inspection—was not an obligation imposed by statute, whereas here the carrier, by maintaining a clinic, was carrying out a duty imposed by the statute, requiring the employer to furnish medical and hospital services. However, the court said “there is nothing in the Workmen’s Compensation Act which requires a compensation carrier, any more than an employer, to maintain and operate a clinic.”<sup>78</sup> Here at last is the key this area of compensation law had been waiting for—the distinction between paying for services and physically performing them. The two have been lumped together in almost all treatments of the problem, although on closer examination the two actions have a crucial difference. It is virtually impossible to cause physical injury by writing a check. It is very possible to cause physical injury by administering medical treatment to a patient or by making a safety inspection.

It is true that safety is a central concern of the compensation program. It is equally true that medical care is of the essence of compensation. And it is true that the insurer is a vital part of the compensation process—when it is performing its basic role of *paying*. But it is not of the essence of the compensation process that the carrier should step out of its fundamental role as financial guarantor and payor and go into the safety inspection service or medical clinic business directly. There is a very big difference. If the carrier merely puts up the money and the employee obtains medical services from an independent physician or clinic, the employee in case of malpractice has someone he can sue. But, if the carrier performs the service directly and if third-party liability is destroyed, the employee has no one to sue. The *Mager* court continued: “Defendant’s operation of such a clinic was clearly in its own interest. Since it is ultimately bound to pay for medical services provided by insured employers, its clinic was obviously a means adopted to reduce costs and achieve possible economies.”<sup>79</sup> The court could have added that one of these economies—in the absence of the *Mager* result—would be the privilege of operating a clinic free of the normal cost of liability for negligence, which means free of the cost of premiums on malpractice liability insurance.

It is interesting to note that something like this distinction was

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<sup>78</sup>88 N.J. Super. at 427, 212 A.2d at 667.

<sup>79</sup>*Id.*

apparent in what seems to have been the earliest case imposing third-party liability on a carrier for an act connected with workmen's compensation. In a case decided in 1931,<sup>80</sup> the carrier had insisted that the injured employee be transferred from one hospital to another. The employee's injury was aggravated by the roughness of the trip, and the carrier was held liable for the aggravation. The court drew a sharp distinction between merely furnishing medical care, which could not impose liability on the carrier even for the negligence of the physician, and interfering in medical care, which might result in liability if the interference was wrongful. Here it was found to be so, because the transfer was ordered without competent medical advice. The court said:

The Workmen's Compensation Act contemplates the selection by the employer of competent physicians, surgeons and hospitals, and that the injured employee will be treated under their direction and not under the direction of the employer. Where the employer *attempts to control their action*, he violates the rights of the injured employee and for that injury the Workmen's Compensation Act provides no remedy. For damages arising from such an injury, the employer is liable in an action at law so far as the damages are not cognizable under the provisions of the Workmen's Compensation Act.<sup>81</sup>

Thus, the decisive question becomes: Did the insurer *control* the event that caused injury, as distinguished from furnishing it in the sense of paying for it? By this test, the result in *Mager* follows easily. The carrier certainly controlled the operation of its clinic. The clearest case for liability, then, is that in which the carrier actually performs or controls the performance of the services that caused the harm. And under the same test of control, the carrier that actually performs safety inspections should logically be suable.

But what about negligence of the carrier in selection of the physician? It is ancient learning, going back to the cases involving selection of doctors by railroads, that if the employer exercises reasonable care in selection he is not liable for the acts of the doctor. "The reason is that A does not undertake to treat B through the agency of the physician, but only to procure for B the services of the physician. The relation of master and servant is not established

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<sup>80</sup>Aetna Life Ins. Co. v. Watts, 148 Okla. 28, 296 P. 977 (1931).

<sup>81</sup>*Id.* at 34, 296 P. at 983 (emphasis added). It should be noted that the court earlier had explained that it was using the term "employer" to cover the carrier.

between A and the physician."<sup>82</sup> But the old cases also agreed that the railroad or employer furnishing medical care was bound to use reasonable care in the selection of a physician and was liable in an action at law for negligence in that selection.<sup>83</sup>

Most of the cases involving attempts to fasten liability on the carrier for negligence of a physician in treatment of a compensable injury have never found it necessary to go into the distinction between merely paying for such services and failing to use care in selection of the physician.<sup>84</sup> Sometimes the opinion indicates that negligence in selection was alleged;<sup>85</sup> sometimes it does not, and in such cases one gets the impression that some kind of *respondeat superior* liability is being relied upon.<sup>86</sup> Under the distinction here proposed, it would be logical to assimilate the act of selecting a physician to the act of performing medical service, rather than to the mere payment for services. Again the operative consideration is that the act of selection is an act which, if negligently performed, could cause physical injury. To the extent that the carrier exercises the function of selecting the physician, it shares in the control of the event, which cannot be said if it merely supplies the money to pay for the services. *Fernandez v. Gantz*,<sup>87</sup> often cited as authority for the third-party immunity of carriers, actually contains a definite implication that carriers might be liable for negligent selection. The court said that the carrier was not liable for the alleged malpractice of a physician selected by the employer "in the absence of any negligence in the selection of such physician, which is not here alleged."<sup>88</sup>

It was said earlier that the carrier could not cause physical harm by writing a check. It might be contended, however, that he can cause physical harm by refusal to write a check. In *Noe v. Travelers Insurance Co.*,<sup>89</sup> the carrier's own physician had recommended

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<sup>82</sup>Annot., 19 A.L.R. 1168, 1185 (1922). See, e.g., *Atchison, T. & S.F.R.R. v. Zeiler*, 54 Kan. 340, 38 P. 282 (1894); *Pearl v. West End St. Ry.*, 176 Mass. 177, 57 N.E. 339 (1900).

<sup>83</sup>See, e.g., *Aetna Life Ins. Co. v. Watts*, 148 Okla. 28, 296 P. 977 (1931). See also cases collected at Annot., 19 A.L.R. 1168, 1185 (1922).

<sup>84</sup>See, e.g., the California malpractice cases cited at note 3 *supra*. See also *Hughes v. Maryland Cas. Co.*, 229 Mo. App. 472, 76 S.W.2d 1101 (1934).

<sup>85</sup>*Flood v. Merchants Mut. Ins. Co.*, 230 Md. 373, 187 A.2d 320 (1963).

<sup>86</sup>See, e.g., *Schulz v. Standard Acc. Ins. Co.*, 125 F. Supp. 411 (E.D. Wash. 1954).

<sup>87</sup>113 F. Supp. 763 (D.D.C. 1953).

<sup>88</sup>*Id.* at 764.

<sup>89</sup>172 Cal. App. 2d 731, 342 P.2d 976 (1959).

surgery, but the carrier had "wilfully" refused to authorize it. The plaintiff employee alleged that the resultant delay aggravated his compensable injury. Suit against the carrier was held barred by the exclusive-remedy clause.

This result is correct under the proposed test. If at first glance it appears harsh, recall that the employee has it within his power to protect himself. He could have obtained the surgery and compelled the carrier to pay for it.<sup>90</sup> A little reflection will show that any other rule would be unworkable. To hold the carrier liable in these circumstances would mean that tort litigation would flow from almost every difference of medical judgment, or perhaps even from delay in making payments.

In concluding this analysis of the carrier as third party, one must note that almost every opinion on the issue as related to safety inspections has included a treatment of the element of public policy. A typical statement is that in *Kotarski*,<sup>91</sup> quoted with approval by the Massachusetts court as the central ground of its decision in *Matthews*:<sup>92</sup>

Insurance companies which engage in accident prevention work, the social desirability of which cannot be questioned, should be able to do so without incurring unlimited liability for failing to discover a hazard that some jury might think should have been discovered. If an insurance company can escape tort liability altogether by not making any inspections on the premises of the insured, but may incur unlimited tort liability by making some inspections, it more than likely will decline to make any, unless required to do so by statute. The ultimate losers will be workmen and their families.<sup>93</sup>

This type of policy argument also weighed heavily with the dissent in the *Nelson* case.<sup>94</sup> Justice Schaefer said that "[t]he opinion thus apparently announces a kind of 'all or nothing' rule of law that will frustrate the possibility of limited inspection services by requiring that if any inspections are undertaken, complete inspections must be made."<sup>95</sup> To this several answers have been made. One is that the carriers still have enough self-interest at stake in making inspections that they will continue the practice even under

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<sup>90</sup>See A. LARSON, *supra* note 5, § 61.12.

<sup>91</sup>See note 45 *supra* and accompanying text.

<sup>92</sup>See note 6 *supra* and accompanying text.

<sup>93</sup>244 F. Supp. at 558-59.

<sup>94</sup>See note 10 *supra* and accompanying text.

<sup>95</sup>31 Ill. 2d at 119, 199 N.E.2d at 796.

the shadow of potential tort liability.<sup>96</sup> Another is that in any event no inspection at all is preferable to a negligent inspection.<sup>97</sup>

In the *Nelson* case, the defendant for purposes of the tort issue stressed that its inspection was only partial and casual, so as to defeat the argument that anyone would rely on it. The argument backfired when the public policy argument was raised. The majority said:

[T]he scope and value of the safety inspections, represented thus in an effort to sustain this contention, are highly inconsistent with defendant's claims under the negligence phase of the case that the activity of its safety engineer was only "casual observation," for its own purposes.<sup>98</sup>

But the all-purpose answer to the public policy argument, in practically every case from *Smith* on down, has been the familiar maxim that questions of public policy are for the legislature. Sometimes this maxim appears as the last refuge of a cautious court confronted with a hard decision. But here it makes good sense. The issue of public policy is a complex one, and it is by no means limited to workmen's compensation law. The tort issue at stake, whether the performance of volunteered services, in the absence of reliance, can impose liability for negligence in the performance, is in its way as controversial as the compensation law issue here discussed. Probably the reason that *Nelson*-type decisions have not been even more frequent than they are is the inability of plaintiffs to hurdle the tort issue in states that require a showing of reliance.<sup>99</sup> An adequate legislative solution, then, might have to deal with the tort problem as well as the exclusive-remedy issue.

Legislative attention is also desirable because the optimum solution of the exclusive-remedy issue itself may well be something other than a yes-or-no answer. The public policy factor is by no means completely one-sided. True, public policy would favor promotion of safety through safety inspections by insurance carriers and would presumptively disfavor anything that would tend to discourage such efforts. At the same time, it must be asked: Does

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<sup>96</sup>See, e.g., *Mays v. Liberty Mut. Ins. Co.*, 323 F.2d 174 (3d Cir. 1963), *rev'd* 211 F. Supp. 541 (E.D. Pa. 1962); *Fabricius v. Montgomery Elevator Co.*, 254 Iowa 1319, 121 N.W.2d 361 (1963).

<sup>97</sup>*Fabricius v. Montgomery Elevator Co.*, 254 Iowa 1319, 121 N.W.2d 361 (1963).

<sup>98</sup>1 Ill. 2d at 110, 199 N.E.2d at 792.

<sup>99</sup>A discussion of the tort issue is, of course, out of place here. The *Nelson* opinion contains an extensive treatment of the topic. See also RESTATEMENT (SECOND) OF TORTS § 323 (1965).

public policy generally favor relieving tortfeasors of the burden of paying for the consequences of their wrongs? If it does not, the issue becomes one of balancing policy considerations. Is the public interest in encouraging safety inspections by carriers so great that the public is willing to add to the carrier's own motives for this activity a further incentive in the form of immunity from normal liability for its negligence?

The issue is complicated further by the implications of the point raised by Justice Schaefer in his *Nelson* dissent.<sup>100</sup> Just how valuable is the insurer's safety inspection contribution if it is limited, casual, and supplemental? Would an all-or-nothing responsibility really be a bad thing? Might it not be desirable to be able to assume that anyone undertaking safety inspections around a plant will do a complete job and take the responsibility for it?

These are all factors bearing on the public policy argument. Clearly this is not the kind of choice that should flow from some quirk of language in a statute written long before the modern practice of systematic carrier safety inspections was even dreamed of.

The need for legislative involvement also stems from the fact that the policy argument turns on facts that should be known rather than guessed at. Have carriers quit making inspections in states where they are vulnerable to suit? If so, have other ways been found to get the same job done? No statistics have been published at this writing that cast any light on these factual questions.

This suggestion of overall legislative analysis of the problem is not satisfied by the kind of precipitous legislative reversals of judicial decisions that have occurred, for example, in New Hampshire and Pennsylvania<sup>101</sup>—amendments that have taken the form of expressly identifying the carrier with the employer. It might be noted in this connection that this type of amendment may not in itself lock the door completely on carrier liability. Under the dual-capacity doctrine, the employer himself conceivably may be liable as a third party,<sup>102</sup> the most vivid example being *Duprey v. Shane*,<sup>103</sup> in which the employer-chiropractor was held, in his capacity as doctor, liable to his own employee for negligence in treatment. Now suppose that

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<sup>100</sup>See note 10 *supra* and accompanying text.

<sup>101</sup>See notes 2 & 26 *supra* and accompanying text.

<sup>102</sup>A. LARSON, *supra* note 5, § 72.80 (1969).

<sup>103</sup>241 P.2d 78 (Cal. App.), *aff'd* 39 Cal. 2d 781, 249 P.2d 8 (1951).

a case were to arise in California, where the identification of carrier with employer is complete *after* the carrier assumes liability, in which the carrier operated a clinic and injured the employee through negligent treatment in the clinic. How could *Duprey* be distinguished? Indeed, the California court in *Burns*<sup>104</sup> may have foreshadowed a holding similar to the New Jersey result in *Mager*,<sup>105</sup> for in distinguishing that case from the *Breceda* case<sup>106</sup> the California court said:

However, the holding in that case is not antithetical to the reasoning in *Breceda*. *Breceda* held that when an insurer assumes by contract the duty to inspect, it acts *as an insurer* . . . . Arguably the *Breceda* court would find that in maintaining a medical clinic the insurer steps from its role as insurer since the actual performance of the medical care, as opposed to compensation for its cost, is not one of the purposes of the workmen's compensation system.<sup>107</sup>

Since the greater includes the lesser, so to speak, the door is still open a crack—even in states explicitly identifying the carrier with the employer—to hold the carrier as third party in situations where the employer might be so held, because of actually performing some function that generates a set of obligations to the employee independent of his obligations as employer.

An example of the kind of statutory amendment that gives evidence of being something more than a reflex reaction against carrier liability is the Wisconsin statute addressed, not specifically to inspection by compensation carriers, but to the liability of insurers generally for safety inspections.<sup>108</sup> It rules out such liability generally, but with two exceptions. The first is active negligence in creating the condition causing the injury, which seems a rather unlikely situation. The second applies to services required to be performed under a written service contract. This exception is no doubt designed to take some of the vagueness out of the relation created by voluntary and even casual inspections. Of course, Wisconsin already had a rather explicit statute assimilating the carrier to the employer,<sup>109</sup> but the new statute is evidence of a consciousness that the total subject of safety inspection liability is deserving of legislative attention.

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<sup>104</sup>See note 33 *supra* and accompanying text.

<sup>105</sup>See notes 33 & 68 *supra* and accompanying text.

<sup>106</sup>See note 33 *supra* and accompanying text.

<sup>107</sup>265 Cal. App. 2d at 102 n.2, 71 Cal. Rptr. at 329 n.2.

<sup>108</sup>The statute is set out in full at note 32 *supra*. Iowa has also approached the problem by way of a general statute on safety inspection liability; see note 9 *supra* and accompanying text.

<sup>109</sup>See note 32 *supra* and accompanying text.

