necessity of retaining the rule against retroactive compensation in all its vigor as one of the needed bulwarks against the further decline in the supply of risk capital.

WORKMEN'S COMPENSATION

COMPENSATED EMPLOYEE'S RIGHT TO SUE PHYSICIAN FOR AGGRAVATION

Despite a general tendency to construe Workmen's Compensation statutes liberally for the benefit of employees, the majority of courts have reached the result that an injured workman who accepts compensation is precluded from suing a physician for negligent aggravation of the original injury.[1] This result has recently been adopted by the Supreme Court of Appeals of West Virginia.

Makarenko broke his arm in the course of his employment at a coal mine. Because of Dr. Scott's negligence in treating the injury, the bone had to be refractured in an effort to properly align the arm. The treatment failed and the arm was permanently deformed. Makarenko's employer was a subscriber to the West Virginia Workmen's Compensation Fund, and compensation was awarded for both the original injury and the aggravation. The payments were based upon a fifteen per cent permanent disability. In addition, medical expenses of nearly $300 were paid from the fund. After accepting this award, Makarenko sought to recover $20,000 from Dr. Scott for the deformity and accompanying pain resulting from the negligent treatment. The Supreme Court of Appeals of West Virginia held that Makarenko, having accepted compensation, was precluded from suing Dr. Scott. *Makarenko v. Scott et al.*, 55 S. E. 2d 88 (W. Va. 1949).

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of risk capital nourishing our economy." *The Forgotten Men*, 21 THE OUTLOOK (Standard and Poor's) 970 (1949).

High taxes are, of course, a major factor in this trend. Bachrach, *Advantageous Tax Positions In Security Transactions*, 25 TAXES 720 (1947); Wolder, *The Dividend*, 25 TAXES 911 (1947); *Compensation and Incentives for Industrial Executives*, INDIANA UNIVERSITY BUSINESS PLANNING PROJECT No. 11. There is evidence, however, that lack of control by the stockholders is also a factor. REPORT OF ANNUAL MEETING, STANDARD OIL CO. OF NEW JERSEY 28 (1949) (point was made that a contributing factor which accounted for lack of risk capital was unrestricted control by director-officers); see note 23 *supra*.

1. Roman v. Smith, 42 F.2d 931 (D. Idaho 1930); Paine v. Wyatt, 217 Iowa 1147, 251 N. W. 78 (1933); McIntosh v. Atchison, etc., Ry. 109 Kan. 246, 198 Pac. 1084 (1921); Vatalaro v. Thomas, 262 Mass. 363, 160 N. E. 269 (1928); Hanson v. Norton, 340 Mo. 1012, 103 S. W.2d 1 (1937); Burns v. Vilardo, 26 N. J. Misc. 277, 60 A.2d 94 (1948); Polucha v. Landes, 60 N. D. 159, 233 N. W. 264 (1930); Alexander v. Von Wedel, 169 Okla. 341, 37 P.2d 252 (1934); McDonough v. Nat'l Hosp. Ass'n., 134 Ore. 451, 294 Pac. 351 (1930); Revell v. McGaughan, 162 Tenn. 532, 39 S. W.2d 269 (1931); Anderson v. Allison, 12 Wash.2d 487, 122 P.2d 484 (1942); Ross v. Erickson Const. Co., 89 Wash. 634, 155 Pac. 153 (1916); *Cf.* McConnell v. Hames, 45 Ga. App. 307, 164 S. E. 476 (1932); Hoover v. Globe Indemnity Co., 202 N. C. 655, 163 S. E. 758 (1932).

The result is obviously unjust since the doctor contributes nothing to the compensation fund, yet is absolved either partially or totally from liability for his negligence.[2] It is not surprising, therefore, that the preclusion of additional recovery has been attacked by some courts as a misapplication of tort principles and a misinterpretation of the compensation statutes.[3]

The West Virginia statute leaves to the courts the determination of the employee's rights against third persons.[4] In those states having similar statutes the courts find refuge in the tort rule that one who inflicts a personal injury is liable for its aggravation by a physician in the course of treatment.[5] Because of this, the injured person who has recovered from the original wrongdoer is denied an action against the physician on the theory that he has had an opportunity to recover full damages and is therefore presumed to have

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2. *See* Smith v. Golden State Hosp., 111 Cal. App. 667, 673, 296 Pac. 127, 129 (1931). See also note 9 *infra.*

3. *E.g.,* Smith v. Coleman, 46 Cal. App.2d 407, 116 P.2d 133 (1941); Froid v. Knowles, 95 Colo. 223, 36 P.2d 156 (1934); Hancock v. Halliday, 65 Idaho 645, 150 P.2d 137 (1943); Huntoon v. Pritchard, 280 Ill. App. 440, 14 N. E.2d 507, *aff'd,* 371 Ill. 36, 20 N. E.2d 53 (1939); McGough v. McCarthy Improvement Co., 206 Minn. 1, 287 N. W. 857 (1939); Viita v. Fleming, 132 Minn. 128, 155 N. W. 1077 (1916); Parkell v. Fitzporter, 301 Mo. 217, 256 S. W. 239 (1923); White v. Matthews, 221 App. Div. 551, 224 N. Y. Supp. 559 (1927); Hoffman v. Houston Clinic, (Tex. Civ. App.), 41 S. W.2d 134 (1931); Pawlak v. Hayes, 162 Wis. 503, 156 N. W. 464 (1916).

See in general Leidy, *Malpractice Actions and Compensation Acts,* 29 MICH. L. REV. 568 (1930).

4. ". . . the commissioner shall disburse the workmen's compensation fund to the employee of such employers as are not delinquent in the payment of premiums for the month in which the injury occurs, . . . and which employees shall have received personal injuries in the course of and resulting from their employment . . ." W. VA. CODE (Michie, 1943) § 2526. It has been held that this statute does not relieve third parties of their liability for negligence even though compensation had been accepted. Tawney v. Kirkhart, 130 W. Va. 550, 44 S. E.2d 634 (1947); Mercer v. Ott, 78 W. Va. 629, 89 S. E. 952 (1916).

5. Chicago City Ry. v. Saxby, 213 Ill. 274, 72 N. E. 755 (1904); Suelzer v. Carpenter, 183 Ind. 23, 107 N. E. 467 (1915); Gray v. Boston Elevated Ry., 215 Mass. 143, 102 N. E. 71 (1913); Reed v. Detroit, 108 Mich. 224, 65 N. W. 967 (1896); Sauter v. N. Y. Cent., etc., Ry., 66 N. Y. 50 (1876). See also PROSSER, TORTS § 49 (1941); HARPER, TORTS 286 (1933).

The principle requires a showing of causation and foreseeability. Purchase v. Seelye, 231 Mass. 434, 121 N. E. 413 (1918); *accord,* Hartford Acc. & Indem. Co. v. Sprague, 6 Cal. App.2d 61, 44 P.2d 361 (1935); Piedmont Hospital v. Truitt, 48 Ga. App. 232, 172 S. E. 237 (1933).

Early cases indicate that the principle was first postulated as a rule of proximate cause. It was thought that unskillful medical treatment was reasonably foreseeable. Gray v. Boston Elevated Ry., *supra;* Sauter v. N. Y. Cent., etc., Ry., *supra.* The results of the physician's mistakes were considered part of the damages which flow naturally from the original injury. Chicago City Ry. v. Saxby, *supra.* It is at least arguable that increases in medical skill in the last half-century warrant a reconsideration of the value of the principle.

The English rule appears to be *contra.* Humber Towing Co. v. Barclay, 5 B. W. C. C. 142 (C. of A. 1911).

done so.[6] The difficulty of determining precisely where the original injury ended and the aggravation began led the courts to this presumption in an effort to prevent double recovery for the aggravation.[7]

In a personal injury action the wronged individual has an opportunity to recover full tort damages, so he is not prejudiced by the presumption which precludes subsequent recovery from the physician. But under compensation statutes the award is limited to an amount which only partially compensates for lost earning power and does not at all compensate for tort damages, such as pain, suffering, and deformity, which are likely to constitute the most substantial injury arising from negligent medical treatment.[8] It is incongruous,

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6. Keown v. Young, 129 Kan. 563, 283 Pac. 511 (1930); Milks v. McIver, 264 N. Y. 267, 190 N. E. 487 (1934); Tanner v. Espey, 138 Ohio St. 82, 190 N. E. 229 (1934); Thompson v. Fox, 326 Pa. 209, 192 Atl. 107 (1937); Conley v. Hill, 115 W. Va. 175, 174 S. E. 883 (1934). See also Noll v. Nugent, 214 Wis. 204, 207, 252 N. W. 574, 575 (1934).

It has been said that the result thus reached is improper in a compensation case because there is no original wrongdoer. White v. Matthews, 221 App. Div. 551, 224 N. Y. Supp. 559 (1927). See also Leidy, *supra* note 3, at 569.

7. This seems to be the only basis on which the tort application of the principle can be sustained. The principle clearly was not designed to protect physicians from the consequences of their negligence, since physicians should use the same degree of care in treating personal injury patients as in treating others. Nor can the doctor and the original tortfeasor be regarded as joint tortfeasors since their injuries are separate. Parchefsky v. Kroll Bros., 267 N. Y. 410, 196 N. E. 308 (1935); Mier v. Yoho, 114 W. Va. 248, 171 S. E. 535 (1933).

Where it can be shown that recovery from the original wrongdoer for injuries caused by the doctor's negligence was impossible, courts permit action against the physician. Noll v. Nugent, 214 Wis. 204, 252 N. W. 574 (1934); Purchase v. Seelye, 231 Mass. 434, 121 N. E. 413 (1918). One unusually interesting case permitted a second cause of action where it was shown that damages for the injuries received in treatment were not recovered in the original action. Parkell v. Fitzporter, 301 Mo. 217, 256 S. W. 239 (1923). The negligent physician was also the original tortfeasor.

Cases of settlement and release of the original tortfeasor must be distinguished since they involve a voluntary relinquishment of rights to recover damages. Makarenko v. Scott, 55 S. E.2d 88, 99 (W. Va. 1949) (dissenting opinion). Thus the reservation in a release of rights of action against other parties should not prevent action against those parties. Armieri v. St. Joseph's Hosp., 159 Misc. 563, 288 N. Y. Supp. 483 (1936). But where the release is given for large consideration it may be regarded as "full compensation for all injuries." Tanner v. Espey, 128 Ohio St. 82, 190 N. E. 229 (1934); Milks v. McIver, 264 N. Y. 267, 190 N. E. 487 (1934).

Unfortunately, some courts have concluded that the tort principle means that no independent cause of action arises against the doctor for his negligence. See, e.g., Roman v. Smith, 42 F.2d 931, 932 (D. Idaho 1930); Anderson v. Allison, 12 Wash.2d 487, 491, 122 P.2d 484, 486 (1942). Judges Kenna and Lovins dissenting in the Makarenko case, 55 S. E.2d 88, 99-102 (W. Va. 1949) challenge this conclusion. It seems plainly erroneous since the physician is subject to an action for negligence where the injured person has not recovered for the original injury. Seaton v. U. S. Rubber Co., 223 Ind. 404, 61 N. E.2d 177 (1945); Noll v. Nugent, 214 Wis. 204, 252 N. W. 574 (1934); *Cf.* Parchefsky v. Kroll Bros., 267 N. Y. 410, 196 N. E. 308 (1935).

8. For cases which thus recognize the nature of a compensation award, see N. Y. Central Ry. v. White, 243 U. S. 188, 193 (1916); Jordan v. Orcutt, 279 Mass. 413, 181 N. E. 661 (1932); Berkholz v. Benepe, 153 Minn. 335, 190 N. W. 800 (1922); Zimmer v. Casey, 296 Pa. 529, 146 Atl. 130 (1929); Mercer v. Ott, 76 W. Va. 629, 89 S. E. 952 (1916). See also IND. STAT. ANN. (Burns Repl. 1947) §§ 40-1301, 2, 3.

then, to apply the presumption to compensation cases because it assumes that the compensation award is the equivalent of full damages for the doctor's negligence.

As the result commonly attained in these cases is neither just nor legally sound,[9] there is every reason to follow the minority which permit the employee to recover from the physician those losses not included in the compensation award. The danger of double recovery is limited to that part of the award which is paid for the loss of earning power caused by the doctor's negligence, but even this has been avoided by allowing the doctor, in a suit against him, to show such compensation in mitigation of damages.[10] It is true that the doctor is partially absolved of liability at the expense of the employer. But the employer is in no worse position since the prevailing view allows him no recourse against the physician. The employee, on the other hand, is allowed a fair recovery for the injuries he has sustained.

Many state legislatures, like the Indiana General Assembly, rather than leave the question of employee's rights against third persons to the courts, have included within compensation statutes provisions for the determination of these rights. These statutes, like that of West Virginia, allow compensation for the negligent aggravation of an injury by utilizing the tort principle attributing the aggravation to the original injury.[11] But they also provide that the employer, upon paying compensation, is subrogated to the injured employee's rights against third persons responsible for the injury.[12] Courts in these states, through superficial interpretation of these subrogation pro-

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9. The effect of the Makarenko case is to relieve the physician of liability for his negligence. West Virginia has no statute subrogating the employer to the employee's rights of action against third persons. Tawney v. Kirkhart, 130 W. Va. 550, 44 S. E.2d 634 (1947). It has been previously held that there is no common law right of subrogation or indemnity in West Virginia. Crab Orchard Improvement Co. v. Chesapeake, etc., Ry., 115 F.2d 277 (4th Cir. 1940); Merrill v. Marietta Torpedo Co., 79 W. Va. 669, 92 S. E. 112 (1917). Thus it appears that none of the interested parties can bring action against the doctor.

Judges Kenna and Lovins, dissenting in Makarenko v. Scott, 55 S. E.2d 88, 102 (W. Va. 1949):

> The law does not favor the wrongdoer, and yet, under the rule laid down by the majority opinion, as I understand it, an employer without fault may be required to respond in compensation to an employee whose injury is due to his own negligence, while a doctor plainly guilty of malpractice in treating the injury is completely protected by the money paid by a blameless subscriber to the fund. It puts the compensation patient in a legal class by himself without enforceable right of any kind. I do not believe that doctors as a whole need nor desire that type protection. To have it known that they did would detract from public confidence and lower the earned dignity of their profession.

10. Parchefsky v. Kroll Bros., 267 N. Y. 410, 196 N. E. 308 (1935); Hoehn v. Schenck, 221 App. Div. 371, 223 N. Y. Supp. 418 (1927).

11. Hancock v. Halliday, 65 Idaho 645, 150 P.2d 137 (1943); Seaton v. U. S. Rubber Co., 223 Ind. 404, 61 N. E.2d 177 (1945).

12. IND. STAT. ANN. (Burns Repl. 1947) § 40-1213. See note 15 *infra*.

visions, have denied to the compensated employee his action against the physician. Many courts hold that the subrogation takes place when the employee accepts compensation.[13] The employer may then gain reimbursement for compensation paid because of the physician's negligence, but the doctor is relieved of liability in excess of the loss of earning power. Other courts have held that the statutory provisions do not cover injuries caused by a negligent physician.[14] The objection here is that the employer is deprived of reimbursement from the physician.

Neither of these interpretations seems proper in view of other provisions of these statutes which offer a basis for substantial justice to both the employee and employer. A common provision allows the employee to elect between the compensation award and an action against the negligent third person.[15] An election, however, presumes knowledge, and the mere acceptance of compensation should not be deemed sufficient to meet this requirement. Injuries resulting from negligent medical treatment occurring during the time compensation is being paid may not be discovered until after the employee has accepted the award. In a personal injury action the injured party is aware of the aggravation and may recover full damages from the original tortfeasor, though he may be unaware that his injuries are partially attributable to a third person. So it must be recognized that the original injury and the aggravation are two distinct injuries for which compensation is payable, and that there has been no election by the employee until he has knowledge of the two injuries. This analysis is the one adopted by the better reasoned opinions.[16]

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13. Polucha v. Landes, 60 N. D. 159, 233 N. W. 264 (1930); *cf.* McDonough v. National Hosp. Ass'n., 134 Ore. 451, 294 Pac. 351 (1930); Baker v. Wycoff, 95 Utah 199, 19 P.2d 77 (1938).

14. Powell v. Galloway, 229 Ky. 37, 16 S. W.2d 489 (1929); McGough v. McCarthy Improvement Co., 206 Minn. 1, 287 N. W. 857 (1939); Hanson v. Norton, 340 Mo. 1012, 103 S. W.2d 1 (1937).

15. The Indiana statute is illustrative. It provides:

> Whenever an injury . . . for which compensation is payable under this act, shall have been sustained under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto, the injured employee . . . at his option, may claim compensation from the employer or proceed at law against such other person to recover damages . . . but he shall not collect from both; and, if compensation is awarded and accepted under this act, the employer, having paid compensation or having become liable therefore, may collect in his own name or in the name of the injured employee . . . from the other person in whom legal liability for damage exists, the compensation paid or payable to the injured employee . . .

IND. STAT. ANN. (Burns Repl. 1947) § 40-1213.

While these provisions in other states vary somewhat in wording, the purpose and substance is the same. Leidy, *supra* note 3, at 570-1.

16. The situation is exemplified by Pawlak v. Hayes, 162 Wis. 503, 156 N. W. 464 (1916), in which an action was permitted against the physician because the plaintiff disclaimed further compensation immediately after he discovered that the treatment had

In states permitting a true election, a just result is attained by assuring the employee an opportunity to exercise his statutory right to receive full damages from the negligent physician. At the same time, the employer retains his subrogation rights against the doctor if the employee elects to take compensation. If discovery of the doctor's negligence is delayed and compensation has been paid for part of the aggravation, double recovery can be avoided by following the Idaho courts in requiring the employer and employee to join in the action against the physician.[17]

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been negligent. Subsequently a statute was enacted providing that acceptance of compensation should not prevent a suit for malpractice; it was held to be declaratory of the common law rule. Lakeside Bridge & Steel Co. v. Pugh, 206 Wis. 62, 238 N. W. 872 (1931).

Indiana courts have shown a tendency toward liberal construction of the statute in order not to relieve a negligent third party of liability. See, e.g., Weis v. Wakefield, 111 Ind. App. 106, 38 N. E.2d 303 (1941); Pittsburgh, etc. Ry. v. Keith, 89 Ind. App. 233, 146 N. E. 872 (1928). See also Seaton v. U. S. Rubber Co., 223 Ind. 404, 415, 61 N. E.2d 177, 181 (1945), quoting with approval from Pawlak v. Hayes, *supra*.

17. See Hancock v. Halliday, 67 Idaho 119, 171 P.2d 333 (1946). Or the compensation received might be considered in mitigation of damages. See note 10 *supra*. The primary concern should be only that the employee is not actually paid twice for the same damages. Leidy, *supra* note 3, at 583.

The problems of subrogation and distribution of damages can be more effectively solved by statutory amendment. See Fla. Laws 1947, c. 23822, § 1, amending FLA. STAT. 1941 § 440.39; ILL. STAT. ANN. (Jones Repl. 1947) § 143.16 (29); N. Y. WORK. COMP. LAW § 29. The Florida statute would seem to achieve excellent results by the following procedures:

1. The workman may elect to take compensation or to sue the third party.
2. If compensation is taken, the employer is subrogated to rights of action against the third person.
3. If the employer sues the third party, he retains costs and compensation paid and the remainder goes to the workman.
4. If the employer fails to sue the third party within six months after subrogation, the cause of action revests in the workman who may then sue and retain all he recovers in addition to the compensation received.

See Note, 1 U. FLA. L. REV. 278 (1948).