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Akura Togasaki

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Then, the landlord would have the burden of producing further evidence⁶⁰ to rebut the presumption that his motive was retaliatory. To overcome the presumption, the landlord could compare the acts or omissions of the complaining tenant with the practices of non-complaining tenants to show that eviction is sought for some reason other than retaliation. Also, if the landlord needs the premises for the occupation of his family, the proof of this need should be sufficient to rebut the presumption that the motive was retaliatory.⁶¹ The use of a presumption would seemingly protect the legitimate interests of both the landlord and the tenant. If the eviction is justified, the landlord should not be deprived of his property rights. Likewise, the tenant should not labor under the practical difficulty of proof which is inherent in a statute prohibiting an undesirable motive. Legislative enactment of these basic concepts will go far to build a foundation for the improvement of substandard housing in California.⁶²

*Samuel P. Young**

⁶⁰ See CAL. EVIDENCE CODE §§ 603, 604.

⁶¹ It is unlikely that there would be fraudulent claims here, as most landlords would not want to live in substandard housing unless they actually had to.

⁶² Legislative prohibition of retaliatory eviction would avoid the problem of determining that there is a constitutional right to report violations of *local* laws to *local* authorities. See note 6 *supra*.

* Member, Second Year Class.

RECOVERY FROM A THIRD PARTY UNDER CALIFORNIA WORKMEN'S COMPENSATION: GUIDELINES FOR LEGISLATIVE CHANGE

An employee works for an employer who qualifies under the local Workmen's Compensation statute. A negligent third party, *i.e.* a party other than the employer,¹ causes an injury to the employee which arises out of and during the course of his employment. From these simple operative facts spring a complex array of specific legal alternatives which the interested parties may pursue. The common law negligence remedy interacting with the statutory remedies of the employer, his insurance carrier, and the employee create difficult legal problems. Add the attorneys' interest in obtaining fees from the distribution of judgment and a complex area of Workmen's Compensation results. For the purposes of this note, third party recovery is defined as the compensation given to the injured employee and his employer or insurance carrier for their losses.

California Labor Code section 3856(c) provides for the distribution of fees

¹ "In most jurisdictions, the concept of 'third persons,' against whom common-law actions may be brought for compensable injuries, includes all persons other than the injured person's own employer." ² LARSON, WORKMEN'S COMPENSATION LAW 170 (1961). See also CAL. LABOR CODE § 3852.

to the employer's attorney when the employer joins as party plaintiff in the employee's cause of action against the negligent third party.² In *Gurzi v. U.S. Rubber Co.*,³ where the employer intervened, a Los Angeles Superior Court held this statute unconstitutional. This fact situation presented a dilemma to the court which is a result of a weakness in the California statutory procedure for third party recovery. A critical analysis of the statutory system is required to delineate the weakness and to suggest guidelines for legislative change.

This note will (1) describe the California statutory provisions for third party recovery, (2) analyze the reasoning of *Gurzi*, (3) critically compare the California statutory provisions and other state statutes, and (4) suggest guidelines for a new statutory procedure in California.

California Statutory Provisions

Under the California statutes labeled "Subrogation of Employer,"⁴ a set of interrelated statutory sections have been enacted to deal with third party recovery under Workmen's Compensation. The injured employee has several options available: (1) he may pursue an action against the negligent third party without requesting Workmen's Compensation;⁵ (2) he may collect a compensation award including medical expenses and sue the third party subject to reimbursing the employer or insurance carrier for payments received;⁶ (3) he may join or the court may consolidate his action with the employer's action, and the judgment or settlement will be subject to the costs of litigation and the attorneys' fees of both the employer and employee;⁷ (4) he may allow the employer to pursue the action alone and recover the excess of the judgment or settlement over the compensation payments, costs of litigation and the attorney's fee of the employer.⁸

The employer or insurance carrier upon payment of compensation may (1) allow the employee to bring the action against the negligent third party and claim a lien for the payments,⁹ (2) join as party plaintiff in the employee's action and collect payments plus reasonable attorney's fees,¹⁰ (3) pursue the action independently, collect the costs of litigation, expenditures, and reasonable attorney's fees and pay the excess from the judgment or settlement to the employee.¹¹

² CAL. LABOR CODE § 3853 provides: "If either the employee or the employer brings an action against such third person, he shall forthwith give to the other written notice of the action, and of the name of the court in which the action is brought by personal service or registered mail. Proof of such service shall be filed in such action. If the action is brought by either the employer or employee, the other may, at any time before trial on the facts, join as party plaintiff or shall consolidate his action, if brought independently."

³ 31 Cal. Comp. Cases 343 (Los Angeles Super. Ct. Oct. 3, 1966) (memorandum opinion).

⁴ CAL. LABOR CODE §§ 3850-64.

⁵ See CAL. LABOR CODE § 3852.

⁶ CAL. LABOR CODE §§ 3852, 3856(b).

⁷ CAL. LABOR CODE §§ 3853, 3856(c), 3860(e).

⁸ CAL. LABOR CODE §§ 3856(a), 3860(d).

⁹ CAL. LABOR CODE §§ 3856(b), 3860(b).

¹⁰ CAL. LABOR CODE §§ 3853, 3856(c), 3860(e).

¹¹ CAL. LABOR CODE §§ 3856(a), 3860(d).

The net effect of the statutory provisions is to permit the employer or insurance carrier and the employee independent causes of action coupled with an option for intervention or a compulsory consolidation of suits if both the employer and employee bring separate actions. Distribution of the judgment or settlement including the costs of litigation and attorney's fees are controlled by section 3856 and 3860 of the California Labor Code. Section 3856(c) provides:

If the action is prosecuted both by the employee and the employer, in a single action or consolidated actions, and they are represented by separate attorneys, the court shall first order paid from any judgment for damages recovered, the reasonable litigation expenses incurred in preparation and prosecution of such action or actions, together with reasonable attorneys' fees based solely on the services rendered for the benefit of both parties where they are represented by the same attorney, and where they are represented by separate attorneys, based solely upon the service rendered in each instance by the attorney in effecting recovery for the benefit of the party represented.

*The Gurzi Case*¹²

Gurzi, an employee of Marine Terminals Corporation, was injured due to the negligence of the U.S. Rubber Company while he was unloading freight cars. Gurzi received a Workmen's Compensation award and also brought suit against U.S. Rubber Company claiming damages for personal injuries. Marine Terminals intervened¹³ claiming a lien on the judgment award for 7,575 dollars representing temporary compensation and medical expenses paid to Gurzi. The attorneys for Gurzi and Marine Terminals appeared and participated separately. A judgment of 13,000 dollars was awarded to Gurzi. Marine Terminals, relying on section 3856(c), requested that the court deduct reasonable attorney's fees of 2,000 dollars from the judgment in addition to the accrued lien of 7,950 dollars. If the request had been granted, the injured employee would have received 3,050 dollars from which he would have to pay his own attorney's fees. The court held that section 3856(c) was unconstitutional insofar as it allows recovery of attorney's fees by the employer.¹⁴

The court reasoned as follows: the employee is forced to deduct the fees of the employer's attorney from the damage award even though the employee did not request the attorney's services; damages are a form of property which include medical expenses, compensation payments, pain and suffering, loss of earning capacity and other items; the employer's lien only covers medical expenses and compensation payments, and thus attorney's fees for the employer must come from that portion of the judgment which is the employee's property; an injury has been sustained by the employee without fault.¹⁵ Therefore, the court concluded that forcing the employee to pay the fees of the employer's attorney is taking his property without due process of law.¹⁶ The court also stated

¹² Gurzi v. U.S. Rubber Co., 31 Cal. Comp. Cases 343 (Los Angeles Super. Ct. Oct. 3, 1966) (memorandum opinion).

¹³ See statutes cited note 10 *supra*.

¹⁴ Gurzi v. U.S. Rubber Co., 31 Cal. Comp. Cases 343 (Los Angeles Super. Ct. Oct. 3, 1966) (memorandum opinion).

¹⁵ *Id.* at 344-47.

¹⁶ *Id.* at 345.

that the statute denied the employee equal protection of the laws; even though the *employer* may intervene and recover attorney's fees in the *employee's* action against the negligent third party, the *employee* has no corresponding right to intervene and recover attorney's fees in the *employer's* action against the third party.¹⁷

The employer urged that the California Constitution¹⁸ gave the legislature plenary power to enact Workmen's Compensation statutes and thus authorized the taking of the employee's property. The court said "the situation is not a matter of workmen's compensation at all."¹⁹ A claim for compensation does not affect the injured employee's recovery against the negligent third party. "All the workmen's compensation law seeks to do in this field is to prevent double recovery"²⁰

How sound was the reasoning of the court? The court was correct in saying that the Workmen's Compensation statute does not change Gurzi's remedy against the negligent third party; but the Workmen's Compensation statute does give the employer remedies against the third party because of Gurzi's employment status and his receipt of a compensation award.²¹ Gurzi's acceptance of the compensation award from Marine Terminals, therefore, brings this case under the Workmen's Compensation statute.

It is doubtful whether the statute in question denied Gurzi equal protection of the laws. The requirement of equal protection is satisfied "if the classification of persons or things affected by the legislation is not arbitrary and is based upon some difference in the classes having a substantial relation to the purpose for which the legislation was designed."²² The Legislature has wide discretion in classifying and the court will not overthrow the statute unless it is "arbitrary and beyond rational doubt erroneous."²³ The legislative power to create the employer-employee classification under Workmen's Compensation has been held constitutional.²⁴ Legislation controlling contracts between the employer and a third party under Workmen's Compensation has also been held constitutional.²⁵ Legislative power to give the court control over the distribution of attorney's fees has been upheld as constitutional.²⁶ Extension of legislative power to control the distribution of fees to the intervening employer's attorney does not seem to be "arbitrary or beyond rational doubt erroneous." This extension of power is a reasonable and rational means of protecting the employer's interest in the

¹⁷ *Ibid.*

¹⁸ CAL. CONST. art. XX, § 21.

¹⁹ Gurzi v. U.S. Rubber Co., *supra* note 14, at 346.

²⁰ *Ibid.*

²¹ CAL. LABOR CODE § 3852. Cf. Board of Administration, SERS v. Ames, 215 Cal. App. 2d 215, 29 Cal. Rptr. 917 (1963).

²² Sacramento Municipal Util. Dist. v. Pacific Gas & Elec. Co., 20 Cal. 2d 684, 693, 128 P.2d 529, 535 (1942) (statute imposing liability for attorney's fees if injunction to restrain issuance of securities is denied).

²³ *Ibid.*

²⁴ Mountain Timber Co. v. Washington, 243 U.S. 219 (1917).

²⁵ Thornton v. Duffy, 254 U.S. 361 (1920) (employer's contract with a private insurance company).

²⁶ Savitt v. L. & F Constr. Co., 123 N.J.L. 149, 8 A.2d 110 (1939), *modified*, 124 N.J.L. 173, 10 A.2d 728 (1940).

employee's judgment award after the employer has paid and the employee has accepted the compensation award.

It is also doubtful whether Gurzi's property was taken in violation of the due process clause. The *Gurzi* court stated that the employer's lien only applied to the portion of the judgment covering compensation payments and medical expenses²⁷ and that distribution of fees to the employer's attorney would be forced payment of the employee's property coming from that part of the employee's damage award which includes pain and suffering along with items not covered by the Workmen's Compensation statute. This does not mean that the legislature is taking property without due process of law. A legislature can deprive a person of property in the valid exercise of the state's police power. An example is the Workmen's Compensation award itself.²⁸ The difficulty is determining when the legislature in the exercise of this police power violates the due process clause. The United States Supreme Court has said that it leaves "debatable issues as respects business, economic, and social affairs to [state] legislative decision."²⁹ The statute in question must be unreasonable and arbitrary as considered by a "rational legislator."³⁰ Since the employee has voluntarily claimed and accepted the compensation award, it is neither unreasonable nor arbitrary for the legislature to protect the employer's interest in the judgment when a negligent third party causes the injury. Extension of this protection to include the expenses of an attorney seems to be a debatable issue and should not be considered an arbitrary exercise of the state legislative power.

Although the reasoning of the court is questionable, the court reached a just result. When other statutory alternatives are examined, the injustice to the employee resulting from intervention by the employer or insurance carrier becomes apparent. The unreasonable aspect of section 3856(c) appears when this section is compared with sections 3856(a)³¹ and (b)³² When the employer

²⁷ The court's reasoning in dividing the award into components (medical expenses, disability, pain and suffering, etc.) to distribute the judgment is questionable. In *Heaton v. Kerlan*, 27 Cal. 2d 716, 166 P.2d 857 (1946), Justice Traynor construed the language "first lien against the entire amount of any judgment for any damages" as meaning that the employer's lien was applicable to the total judgment, thus making it unnecessary to divide the judgment into components. *Id.* at 723, 166 P.2d 861. The statutory language construed in this case appears in Cal. Stat. 1937, ch. 90, § 3856, at 274. CAL. LABOR CODE § 3856(b) now provides for a "first lien against the amount of such judgment for damages."

²⁸ See *Arizona Employers' Liability Cases*, 250 U.S. 400 (1919); *Mountam Timber Co. v. Washington*, 243 U.S. 219 (1917); *N.Y. Cent. R.R. v. White*, 243 U.S. 188 (1917).

²⁹ *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 425 (1952).

³⁰ SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, PART II THE RIGHTS OF PROPERTY 59 (1965).

³¹ CAL. LABOR CODE § 3856(a) provides: "If the action is prosecuted by the employer alone, the court shall first order paid from any judgment reasonable litigation expenses together with a reasonable attorney's fee After the payment of such expenses and attorney's fees, the court shall reimburse the employer for the amount of his expenditure for compensation and shall order any excess paid to the injured employee"

³² CAL. LABOR CODE § 3856(b) provides: "If the action is prosecuted by the employee alone, the court shall first order paid from any judgment reasonable litiga-

alone pursues the action against the negligent third party under section 3856(a), the employee's recovery can be represented by the following equation:

- (a) Employee's recovery = Judgment — Litigation expenses — Employer's attorney's fees — Compensation expenditures.

When the employee alone pursues the action against the third party under section 3856(b), the employee's recovery can be represented as follows:

- (b) Employee's recovery = Judgment — Litigation expenses — Employee's attorney's fees — Compensation expenditures.

When the employer intervenes in the employee's action against the negligent third party distribution of the judgment is controlled by section 3856(c) which was ruled unconstitutional in *Gurzi*, and the employee's recovery is as follows:

- (c) Employee's recovery = Judgment — Litigation expenses — Employee's attorney's fees — Intervening employer's attorney's fees — Compensation expenditures.

Assume that the judgment would be the same whether the action was pursued by the employer's or employee's attorney. Also assume that when pursued to judgment by a single attorney, the attorney's fees would be the same whether the action was pursued by the employer's or employee's attorney, *i.e.* the fees of the employer's attorney in case (a), and the fees of the employee's attorney in cases (b) and (c) would be the same.³³ Applying these assumptions, the employee's recovery is reduced by the amount of the fee paid to the intervening employer's attorney. The employee is prejudiced by the fact that the employer chose to intervene.

The facts and reasoning of the *Gurzi* case point out a troublesome area in the third party recovery statutes of California. The problem is whether the employer should be given the privilege of intervening in the employee's cause of action. An employer has a dual purpose in intervening; (1) to seek reimbursement of his compensation payments from the judgment, and (2) to assure proper prosecution of the employee's negligence action against the third party. Section 3856(b) of the California Labor Code allows the employer a first lien on the judgment for the employer's compensation expenditures.³⁴ In *Chase v. Southern Pacific Co.*,³⁵ the court held that an insurance carrier's lien under Workmen's Compensation will be protected. The court stated that the carrier did not have to sue or intervene to protect his first lien.³⁶ The employer, *a fortiori*, will receive protection without recourse to intervention.

Depriving the employer of the privilege of intervention after payment of compensation is a serious step. The employer would be without legal recourse if

tion expenses together with a reasonable attorney's fee After the payment of such expenses and attorney's fee the court shall, on application of the employer, allow as a first lien against the amount of such judgment for damages, the amount of the employer's expenditure for compensation

³³ This assumes that the parties involved would engage in the same type of contract for the attorney's services.

³⁴ Statute quoted note 32 *supra*.

³⁵ 6 Cal. App. 2d 273, 43 P.2d 1108 (1935). This case construes "first lien" in Cal. Stat. 1931, ch. 1119, § 1, at 2370.

³⁶ 6 Cal. App. 2d at 277, 43 P.2d at 1110.

he felt that the employee's cause of action was being handled poorly. Before such a step is taken, an analysis of the factors underlying third party actions³⁷ and a classification of statutory enactments is required.

*Third Party Actions*³⁸

Four postulates provide the theoretical basis for third party actions. First, the ultimate loss should fall on the wrongdoer.³⁹ Second, the injured employee should be compensated for his injury. Third, double recovery by the injured employee is undesirable.⁴⁰ Finally, the negligent party should not be subjected to undue hardship, *i.e.* the cause of action should be settled in one suit.⁴¹ Postulates one and two protect the interests of the injured employee. Postulates one and three protect the employer or insurance carrier. Postulate four protects the third party from multiple suits.

Out of these simple requirements spring a diverse array of statutory enactments. Classifying the statutes is an extremely difficult⁴² and hazardous task but it is necessary to compare statutory alternatives. Classification is hazardous because of the difficulties of statutory construction. Many states have recently revised their third party recovery statutes and hence the statutory language has not been construed by the courts.

For the purposes of this survey, third party statutes will be divided into six groups:⁴³

- 1) Two states require the injured employee's election of either accepting a compensation award or pursuing an action against the third party. A claim or acceptance of compensation subrogates the employer to the rights of the employee;⁴⁴

³⁷ For the purposes of this note, third party actions are defined as the delineation under local Workmen's Compensation statutes of the legal interests—rights, powers, privileges and immunities—of the employer, insurance carrier, injured employee and the negligent third party.

³⁸ For a general discussion see 2 LARSON, WORKMEN'S COMPENSATION LAW ch. XIV (1961); 3 SCHNEIDER, WORKMEN'S COMPENSATION TEXT ch. 15 (1943, Supp. 1959); Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L. REV. 531, 559-78 (1954).

³⁹ "The basic concept underlying third party actions is the simple moral idea that the ultimate loss from wrongdoing should fall upon the wrongdoer" 2 LARSON, *op. cit. supra* note 37, at 165.

⁴⁰ "It is equally elementary that the claimant should not be allowed to keep the entire amount both of his compensation award and of his common-law damage recovery" *Id.* at 166.

⁴¹ Behrendt, *The Rationale of the Election of Remedies Under Workmen's Compensation Acts*, 12 U. CHI. L. REV. 231, 242 (1945).

⁴² Riesenfeld, *supra* note 37, at 569.

⁴³ Two states, Ohio and West Virginia, have no statutory provisions for third party actions.

⁴⁴ IDAHO CODE ANN. § 72-204 (1947); TEX. REV. CIV. STAT. ANN. art. 8306, §§ 3, 3a and art. 8307, § 6a (1967). These statutes do not assure the injured employee an amount equal to a compensation award if the employee elects to pursue a cause of action against the third party. However, when compensation is awarded and the employer receives a judgment, the employee receives any excess of the judgment over the cost of enforcement and the employer's compensation expenditures.

- 2) Three states require the employee's election between receiving a compensation award or pursuing an action against the third party, but assure the employee of at least the amount of the compensation award;⁴⁵
- 3) Four states consider acceptance of the compensation award as an assignment or subrogation of rights to the employer or insurance carrier for a limited period of time, after which the cause of action may be pursued by the employee;⁴⁶
- 4) Eighteen states allow the employee to collect the compensation award and pursue an action against the third party. When the employee fails to bring suit or settle within a specified period, the power to pursue the action is shifted to the employer or insurance carrier;⁴⁷
- 5) Five states do not require election but control double recovery by making receipt of compensation a limited assignment of the cause of action or by controlling the distribution of the employee's judgment;⁴⁸
- 6) Ten states allow the employer or the insurance carrier's action and the employee's cause of action to coexist. Most states require joinder of the two suits when brought independently.⁴⁹

⁴⁵ ARIZ. REV. STAT. ANN. § 23-1023 (Supp. 1966); COLO. REV. STAT. ANN. § 81-13-8 (1963); OKLA. STAT. ANN. tit. 85, § 44 (1951).

⁴⁶ ME. REV. STAT. ANN. tit. 39, § 68 (1964) (thirty days after employee's written demand); MD. ANN. CODE art. 101, § 58 (1964) (two months after compensation award); MASS. GEN. LAWS ANN. ch. 152, § 15 (Supp. 1966) (fifteen months after injury); S.C. CODE ANN. §§ 72-124, -126 (1962) (three months after employee's request).

⁴⁷ ALA. CODE tit. 26, § 312 (Supp. 1965) (employer has six months after the statute of limitations); ALASKA STAT. § 23.30.015 (Supp. 1966) (one year after compensation award); DEL. CODE ANN. tit. 19, § 2363 (Supp. 1964) (two hundred sixty days after injury); FLA. STAT. ANN. § 440.39 (Supp. 1966) (one year after the action exists then for two years to the employer); HAWAII REV. LAWS § 97-8 (Supp. 1963) (nine months after injury); ILL. ANN. STAT. ch. 48, § 138.5(b) (Smith-Hurd Supp. 1966) (three months before the statute of limitations); IND. ANN. STAT. § 40-1213 (1965) (two years after the cause of action accrues); IOWA CODE ANN. § 85.22 (1949) as amended, IOWA CODE ANN. § 85.22 (Supp. 1966) (ninety days after written notice); KAN. GEN. STAT. ANN. § 44-504 (1964) (one year from injury or 18 mos. from injury if employee dies); MICH. STAT. ANN. § 17.189 (1960) (one year from injury); MONT. REV. CODES ANN. § 92-204 (1964) (six months after injury); N.H. REV. STAT. ANN. § 281.14 (1966) (nine months after injury); N.J. STAT. ANN. § 34:15-40 (1959) (one year after the accident); N.Y. WORKMEN'S COMP. LAW § 29 (McKinney 1965) (six months after award within thirty days after notice); N.C. GEN. STAT. § 97-10.2 (1965) (twelve months from injury with reversion sixty days before the statute of limitations); N.D. CENT. CODE § 65-01-09 (Supp. 1965) (sixty days from injury to carrier, sixty days later to employer); TENN. CODE ANN. § 50-914 (1966) (one year after injury with employer allowed six months to sue); VT. STAT. ANN. tit. 21, § 624 (Supp. 1965) (one year after injury).

⁴⁸ N.M. STAT. ANN. § 59-10-25 (Supp. 1965) (assignment); R.I. GEN. LAWS ANN. § 28-35-58 (Supp. 1966) (subrogation); S.D. CODE § 64.0301 (1939) (power to collect); UTAH CODE ANN. § 35-1-62 (1966) (employer or insurance carrier becomes trustee of the employee); WYO. STAT. ANN. § 27-54 (1959) (control on distribution of employee's judgment).

⁴⁹ ARK. STAT. ANN. § 81-1340 (1960) (all claims determined in one suit after reasonable notice); CAL. LABOR CODE §§ 3852-60; CONN. GEN. STAT. REV. § 31-293 (1961) (failure to join after notice abates the action); LA. REV. STAT. §§ 23:1101-03

The remaining states have statutory provisions which are difficult to classify.⁵⁰ It should be noted that the above classification does not cover the many possible variations in statutory provisions.⁵¹

The injured employee is placed in a dilemma if the statute requires an election of remedies and does not assure him at least the payment of the compensation award for the particular injury. Election to pursue a third party negligence action is based on the hope that the judgment (less litigation costs and attorney's fees) will be greater than the compensation award. Some statutes (states in group two) assure the employee at least the amount of the compensation award.⁵² This type of statute protects the employee but can result in a loss to the employer if the jury award in the negligence action is less than the compensation payments. Some states have modified the strict election doctrine because of the hardships placed on the employee.⁵³ In these states, election to accept compensation transfers the power to pursue the cause of action to the employer. A provision is usually added which requires distribution of any excess in the judgment award over the compensation payments and medical expenses to the employee. However, this type of statute sometimes leads to a result which is prejudicial to the employee. The employer wishes to settle for the value of his expenditures; the employee, however, desires complete compensation. Thus some states no longer require election but permit the employee recovery of a compensation award and allow pursuit of the negligence action.⁵⁴ Protection is given to the employer by transferring the power to him when the employee fails to bring suit within a specified time period. California, along with other states,⁵⁵ allow coexistent causes of action with joinder provisions when either the employer or employee brings a

(1964); MISS. CODE ANN. § 6998-36 (1952) (all claims determined in one suit after reasonable notice); MO. ANN. STAT. § 287.150 (1965) (no joinder requirement stated); NEB. REV. STAT. § 48-118 (1960) (joinder required when compensation paid and employee brings suit); NEV. REV. STAT. § 616.560 (1963) (no joinder requirement stated); VA. CODE ANN. §§ 65-38, -39 (Supp. 1966) (no joinder requirement stated); WIS. STAT. ANN. § 102.29 (1957) (after reasonable notice all claims determined in one suit).

⁵⁰ GA. CODE ANN. § 114-403 (Supp. 1966); KY. REV. STAT. § 342.055 (1962); MINN. STAT. ANN. § 176.061 (1966); ORE. REV. STAT. §§ 656.576-83 (1965); PA. STAT. ANN. tit. 77, § 671 (Supp. 1966); WASH. REV. CODE ANN. § 51.24.010 (1962).

⁵¹ Statutes vary as to distribution of attorneys' fees, costs of litigation, settlement provisions and requirements of notice. One state in group four provides the employer with incentive to diligently pursue the employee's cause of action by permitting the employer one-third the balance remaining after the compensation payments, medical expenses and reasonable expenditures have been deducted. N.Y. WORKMEN'S COMP. LAWS § 29 (McKinney 1965). Another state in group four provides that if the employee brings suit, the employer may recover only half of the compensation award and medical expenses; if the employee fails to pursue the cause of action and the employer brings suit, the employer is entitled to reimbursement for the full amount of his expenditures. MONT. REV. CODES ANN. § 92-204 (1964). This sample of variations indicates the possibility of an almost infinite number of variations.

⁵² Statutes cited note 45 *supra*.

⁵³ Statutes cited note 46 *supra*.

⁵⁴ Statutes cited note 47 *supra*.

⁵⁵ Statutes cited note 49 *supra*.

separate action or intervenes. This type of statute favors the employer by allowing him several options. Once compensation is paid, the employer has a means of exercising control over the pursuit of the negligence action either by suing the third party himself or intervening in the employee's action. By allowing intervention an additional expense (employer's attorney's fees) is added which reduces the recovery of the employee.

Conclusion

California should discard the present system of statutory subrogation of the employer and its concept of intervention and coexisting causes of action. The *Gurzi* case points out the weaknesses of the present system. These weaknesses include the possibility of additional litigation and a result prejudicial to the employee. Additional litigation stems from intervention and the presence of two attorneys. As a consequence, a dispute over what are reasonable attorney's fees and the manner of distribution arises. In addition, the employee is required to pay the fees of the employer's attorney when the employee had no control over the employer's entry into the suit and may not receive any benefits from the intervention. Analysis of other state statutes indicates that the California statute favors the employer or insurance carrier and thus violates the fundamental purpose of Workmen's Compensation. The fundamental purpose of Workmen's Compensation is to protect and compensate the employee. The intervention procedure in California leads to a result which is prejudicial to the injured employee.

Legislation is necessary to replace the present statutory procedure. To pose guidelines for this legislation, a priority of postulates must be established. A third party recovery statute should: first, compensate the injured employee fully; second, reimburse the employer or insurance carrier fully; and third, cause the minimum of hardship on the negligent third party. The statute itself should satisfy the following guidelines:

- 1) The employee need not elect between compensation and the common law action for negligence;
- 2) Acceptance of compensation by the employee gives the employer or insurance carrier the power to apply for a lien which will be protected by the courts without the necessity of intervention or active representation in a suit;
- 3) For a stated statutory period, the employee should have the exclusive power to institute suit and pursue the action to judgment. Settlement within this period would require consent of the court and the employer or the insurance carrier;
- 4) Failure by the employee to pursue the action within a stated period will transfer the power to institute the suit to the employer or the insurance carrier;
- 5) When the judgment awarded is less than the compensation award, litigation expenses and attorney's fees, the court should have the power by statute to order a new trial unless the negligent third party agrees to pay