Bell v. Industrial Vangas: The Employer-Manufacturer and the Dilemma of Dual Capacity

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The California workers' compensation system\(^1\) has recently become the subject of attack in the form of exceptions\(^2\) to its rule of exclusive remedy.\(^3\) These exceptions are based upon strong social policies that are extrinsic to the workers' compensation system itself.\(^4\) The Cal-

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1. **CAL. LAB. CODE §§ 3200-6208** (West 1971 & Supp. 1982). The workers' compensation scheme in California is authorized by the California Constitution, which provides in part: "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any and all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party . . . ." **CAL. CONST.** art. XIV, § 4 (added June 8, 1976).

Workers' compensation in California requires an employer other than the state either to secure insurance against employee injuries from an approved carrier, or be authorized to self-insure. **CAL. LAB. CODE** § 3700 (West Supp. 1982). Insurance benefits are in turn paid to injured employees when their injuries are sustained "in the course of employment" and are "proximately caused by the employment." **Id**. § 3600. As noted by one commentator, these benefits are not intended to be "fully compensatory" but rather are designed to assure "the injured workman and his dependents a reasonable subsistence while he is unable to work, and to [effectuate] his speedy rehabilitation and reentry into the labor market." 2 W. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION § 1.05[5] (1982).

2. The term "exceptions" as used in this Comment refers to instances in which an injured employee is not limited to recovery of workers' compensation benefits but may also pursue a suit at law. See, e.g., Johns-Manville Prods. Corp. v. Superior Court, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980) (suit at law allowed where it was alleged that the employer aggravated the employee's injury by withholding information concerning it); Unruh v. Truck Ins. Exch., 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972) (suit at law against insurance carrier allowed for intentional infliction of emotional distress); Renteria v. County of Orange, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978) (suit at law for intentional infliction of emotional distress allowed because no workers' compensation benefits provided for emotional injury); Magliulo v. Superior Court, 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1975) (suit at law allowed for assault and battery by employer).

3. **CAL. LAB. CODE** § 3601(a) (West Supp. 1982). Section 3601(a) provides in relevant part: "Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in Section 3706 [concerning employers who have failed to secure insurance], the exclusive remedy for injury or death of an employee against the employer or against any other employee of the employer acting within the scope of his employment . . . ."

4. Workers' compensation reflects a policy of allowing "the burden of the wearing out and destruction of human, as well as inanimate, machinery [to] be borne by industry just as other costs of production are assumed by the employer and ultimately passed on to the public." 2 W. HANNA, supra note 1, § 1.05[2]. While policies such as deterring the commis-
California Supreme Court in *Bell v. Industrial Vangas*\(^5\) recently applied and extended such an exception, the dual capacity doctrine,\(^6\) to allow an injured worker to maintain a products liability action against his employer. As a result of the holding in *Bell*, workers injured by products manufactured\(^7\) by their employers may now seek recovery at law for their injuries, as well as statutory workers' compensation benefits.

In reaching this result, the *Bell* court sought to apply the dual capacity doctrine in such a way as to conform to products liability theory. Following several California court of appeal decisions allowing workers to sue outside of the workers' compensation system when their injuries were caused by defective products manufactured by their employers,\(^8\) the *Bell* court held that different legal obligations arise from the capacities of employer and manufacturer.\(^9\) The court defined the scope of the employer's second capacity of manufacturer to be in harmony with the term "manufacturer" for products liability purposes, focusing on whether the employer had placed the injurious item in the stream of commerce rather than on any actual manufacturing capacity of the employer.\(^10\) This holding has the salutary effect of treating

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\(^6\) The dual capacity doctrine permits an injured employee to sue his or her employer at law when the injuries arise from a "second capacity" (e.g., doctor, landowner, manufacturer) of the employer. The suggestion has recently been made by a respected writer that the theory be renamed the "dual-persona doctrine." This theory provides that: "An employer may become a third person, vulnerable to tort suit by an employee, if—and only if—he possesses a second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal person." 2A A. Larson, *The Law of Workmen's Compensation* § 72.81, at 14-229 (1982).

\(^7\) The words "manufactured" and "manufacturer" are terms of art when used in the context of products liability theory. The proposed Model Uniform Products Liability Act provides: "‘Manufacturer’ includes a product seller who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer. It includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer.

“A product seller acting primarily as a wholesaler, distributor, or retailer of a product may be a ‘manufacturer’ but only to the extent that it designs, produces, makes, fabricates, constructs or remanufactures the product before its sale.” Model Uniform Products Liability Act § 102B (Proposed Draft), quoted in 2A L. Frumer & M. Friedman, Products Liability § 16E, at 3E30-31 (1982).


\(^10\) *Id.* at 278-79, 637 P.2d at 272-73, 179 Cal. Rptr. at 36-37.
workers and members of the general public the same with respect to suits based upon defective products.11 However, it also has the potential to place a large number of worker injury cases within the jurisdiction of the superior courts as well as within the workers' compensation system.12

This Comment assesses the impact of the expansion of the dual capacity doctrine upon the workers' compensation system in California. The history and function of California's workers' compensation system and its exclusive remedy provision are presented, followed by a discussion of the development of the dual capacity exception. The Comment then analyzes the Bell holding to determine the scope of the dual capacity exception in the employer-manufacturer situation. Following this analysis, alternative solutions to the problem addressed by Bell are considered. The Comment concludes that Bell represents a case of social policy overwhelming legal analysis and an improvident expansion of the dual capacity doctrine. The Comment argues the rights of injured workers are better served by changes in, and not exceptions to, the workers' compensation system.

**History of the Workers' Compensation System**

Workers' compensation legislation in California, as in other states, arose out of the increased industrial hazards and changing employer-employee relationships attending the industrial revolution.13 With an increase in the number of industrial accidents came the development of

11. *Id.* at 279, 637 P.2d at 273, 179 Cal. Rptr. at 37.

12. "If an initial injury is caused by a defect in a product manufactured by the employer, the manufacturer-user relationship may be deemed a 'dual capacity,' thus taking the full consequences completely out of the compensation system." Miller & Goldstein, *Double, Double, Toil and Trouble: Dual Capacity and Workers' Compensation in California*, 13 U. West L.A. L. Rev. 111, 120 (1981); see also *National Legal Center for the Public Interest, Final Edited Proceedings of the National Conference on Workers' Compensation and Workplace Liability* 140 (1981) (comments of Professor Sheila L. Birnbaum) [hereinafter cited as *Proceedings*].

13. In describing these changes, one author has observed that the industrial revolution radically altered the nature of the work environment: "Since employment could now be obtained without going through the long apprenticeship procedure, many workers were undisciplined, untrained, and unskilled. But the skilled and unskilled alike were exposed to unfamiliar and dangerous machinery and processes. These new and varied industrial hazards were further intensified by such factors as long work days, unsafe, badly lit, and ill-ventilated factory buildings, and the absence of safety devices. In addition, the corporate form of ownership made its appearance and took over the management of many of these industries, tending largely to eliminate the former personal relationship between employer and employee. . . . These extraordinary changes in economic and industrial conditions necessarily led to an increase in the number of employee injuries and a decrease in the employers' personal sense of responsibility for the welfare of employees." 2 W. Hanna, *supra* note 1, § 1.01[1].
the fellow-servant rule and the doctrines of assumption of the risk and contributory negligence, which served to protect employers from liability to injured employees. The scope of the employer's duty to

14. The fellow-servant rule precluded recovery by an injured employee when the injury arose from the negligence of a co-employee acting within the scope of his or her employment, and not from any fault on the part of the employer. The Supreme Court of Massachusetts, denying a railroad engineer an action against his employer for injuries sustained as a result of the negligence of a switchman, described the rule as follows: "[H]e who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils... incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others." Farwell v. Boston & Worcester R.R., 45 Mass. (4 Met.) 49, 57 (1842).

15. The assumption-of-the-risk doctrine in the employer-employee context was clearly related in theory to the fellow-servant rule. It provided that injured employees could not recover for injuries resulting from perils knowingly assumed as conditions of the particular employment. See 2 W. HANNA, supra note 1, § 1.02[3].

16. The doctrine of contributory negligence served to preclude injured workers from recovering from their employers in cases where both parties were negligent. Addressing such a situation, the California Supreme Court in Brett v. Frank & Co., 153 Cal. 267, 94 P. 1051 (1908), held that a tannery worker could not recover for injuries sustained when he stepped into a hole in the floor of his employer's factory. The court said, "The requirement that the place of employment shall be reasonably safe is itself always to be considered in connection with the rule of law as to the assumption by the employee of known and understood risks. But, aside from the consideration as to whether under these circumstances negligence in failing to provide a safe place for work may be imputed to the employer in this case, it is indisputable that the accident was occasioned through the negligent failure of the plaintiff himself to use ordinary prudence for his own protection." Id. at 272, 94 P. at 1052.

17. An example from Professor Larson's treatise on workers' compensation demonstrates how effectively employers were insulated from liability at common law:

"What then remained of employer's liability? Let us analyze the grounds of liability statistically, using German figures for 1907, since the German statistics of the period are unusually full and detailed.

"Classification of causes of accidents"

<table>
<thead>
<tr>
<th>Classification</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Negligence or fault of employer</td>
<td>16.81%</td>
</tr>
<tr>
<td>(2) Joint negligence of employer and injured employee</td>
<td>4.66</td>
</tr>
<tr>
<td>(3) Negligence of fellow-servant</td>
<td>5.28</td>
</tr>
<tr>
<td>(4) Acts of God</td>
<td>2.31</td>
</tr>
<tr>
<td>(5) Fault or negligence of injured employee</td>
<td>28.89</td>
</tr>
<tr>
<td>(6) Inevitable accidents connected with the employment</td>
<td>42.05</td>
</tr>
</tbody>
</table>

"It is at once apparent that, with Numbers 2 and 3 barred by common-law defenses, only under Number 1 is there any possibility of employer liability; accordingly, the employee at common law was remediless in 83 percent of all cases.

"What of the remaining 16.81 percent? The defense of assumption of risk might still apply, for even where the employer was at fault, many cases held that the employee, by continuing to work in spite of the defects or dangers created by the employer, consented to waive the employer's obligation." 1 A. LARSON, supra note 6, § 4.30, at 27-28 (footnotes omitted).
employees was also limited, resulting in the risks of employment falling primarily upon the worker. The common law rules were predicated upon the assumption that workers voluntarily choose the hazards of their employment, thus waiving their right to recover damages for injuries arising from dangers that are normal incidents of their employment. The difficulty of proving the employer's negligence and the difficulty in overcoming the common law defenses left many injured workers uncompensated.

The social problems associated with the lack of remedies for injured workers gave rise to legislative attempts to aid such workers. Workers' compensation legislation in California first modified, and later abolished, the common law defenses of the employer.

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18. An employer's common law duties to his or her employees were limited to providing a safe place to work, adequate tools and appliances, and a suitable number of fellow workers. In addition, employers were required to warn their employees of dangers with which they might be unacquainted and to promulgate employee safety rules. Mitchell, *Products Liability, Workmen's Compensation and the Industrial Accident*, 14 DuQ. L. REV. 349, 349-50 (1976).

The burden of litigating a claim for industrial injury plus the difficulty of proving employer negligence together made common law remedies inadequate for workers. As noted by one commentator, "A number of factors combined to make this [common law] remedy inadequate: (1) the expense and time consuming nature of litigation for the impecunious employee of the time; (2) the difficulty of proving the employer's violation of due care; (3) the natural reluctance of co-employee witnesses to testify against their employer; and (4) the employer's defenses." 2 W. HANNA, *supra* note 1, § 1.02[3].

19. "Despite the lack of any conscious, voluntary choice on the part of an employee to subject himself to an occupational hazard, he had no right to collect for an injury arising from dangers normally incident to his employment. An employee, by his decision to remain employed despite knowledge of industrial hazards, implicitly relieved his employer of the common law obligations to safeguard against such hazards." Mitchell, *supra* note 18, at 350.

20. See id. at 351 n.13: "Several states studied the problem; the estimated percentages of uncompensated industrial injuries were shockingly high. The New York Employer's Liability Commission's First Report in 1910 estimated the figure to be 87 percent . . . . Ohio's commission reported 94 percent . . . ." (citations omitted). See also *supra* note 18.

21. "By the end of the nineteenth century . . . the coincidence of increasing industrial injuries and decreasing remedies had produced in the United States a situation ripe for radical change . . . ." 1 A. LARSON, *supra* note 6, § 5.20, at 37.

22. In 1907, legislation limited the applicability of the defenses of the fellow-servant rule and assumption of the risk. The fellow-servant rule was modified to provide: "[T]he employer shall be liable for such injury when the same results from the wrongful act, neglect or default of any agent or officer of such employer, superior to the employee injured, or . . . when such injury results from the wrongful act, neglect or default of a co-employee engaged in another department of labor from that of the employee injured . . . ." The assumption-
acts making employer compliance mandatory were passed in 1913\(^2\) and 1917.\(^2\) The Workmen's Compensation, Insurance and Safety Act of 1917,\(^2\) with amendments, has become California's workers' compensation law.\(^2\) The Act is intended to provide a remedy for injured employees, regardless of fault, based upon the employment relationship, and not upon tort or contract principles.\(^2\)

**Theory and Function of Workers' Compensation**

The California workers' compensation system reflects a social policy of reallocating the burden of industrial injuries from the worker to society as a whole by allowing the cost of worker injuries to be included in the costs of production and later reflected in the prices consumers pay for products.\(^2\) The system results in a tradeoff for the injured
worker: while gaining a statutory no-fault remedy, the worker waives the right to sue his or her employer in tort for injuries sustained within the scope of employment.29

The chief benefit of the workers' compensation system for the injured employee is that it provides a much speedier and more certain recovery than a suit at law.30 By abolishing the requirement of proving negligence on the part of the employer, workers' compensation also makes some recovery available for injured workers in a large number of cases where employer fault would be difficult to establish.31 In contrast, the benefits of the system for industrial employers lie in the protection from excessive liability in tort for employee injuries.32 In a production, like the breakage of tools or machinery. The financial burden is lifted from the shoulders of the employee, and placed upon the employer, who is expected to add it to his costs, and so transfer it to the consumer." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 80, at 530-31 (4th ed. 1971) (footnotes omitted).

An argument has been made that one objective of workers' compensation is "to allocate the costs of the program among employers and industries according to the extent to which they are responsible for the losses to employees and other expenses. Such an allocation is considered equitable by supporters of this objective because each employer and industry pays its fair share of the cost. The economic effects are considered desirable because this allocation tends in the long run in a competitive economy to shift resources from hazardous industries to safe industries and from unsafe employers within an industry to safe employers. Higher workmen's compensation costs will force employers with hazardous operations to consider raising their prices. To the extent that consumers will not accept the price increase, employer profits and their willingness to commit resources to this use will decline." NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, COMPENDIUM ON WORKMEN'S COMPENSATION 25 (1973) [hereinafter cited as COMPENDIUM].

29. As one commentator has observed, "In return for the speedy adjudication of claims and diminished proof of eligibility under the workmen's compensation statutes, the employee was forced to waive his common law right to sue the employer in tort for work-related injuries. A provision that workmen's compensation was to be the 'exclusive remedy' for work-related injuries was incorporated in all of the state statutes." Mitchell, supra note 18, at 353 (footnotes omitted); see also CAL. LAB. CODE § 3601(a) (West Supp. 1982).

30. See 2 W. HANNA, supra note 1, § 1.05[8]: "[T]he simplicity and inexpensiveness of compensation procedure encourages the pressing of many claims which might otherwise have been abandoned. . . . In a great majority of cases, satisfactory adjustment of the compensation liability is made by the employer or his insurance carrier, without the need for resorting to the presenting of evidence to a compensation tribunal." But see COMPENDIUM, supra note 28, at 18: "Employers and labor are both dissatisfied with certain aspects of workmen's compensation. Labor attacks the system for inadequate benefits, coverage limitations, and exclusion of many injuries, illnesses, and disabilities that they consider job related. . . . Thus, while the early advocates of workmen's compensation conceived it as a simple, speedy, efficient, equitable remedy that would reduce litigation over industrial injuries, many doubt their hopes have been realized." See generally Berkowitz, Workmen's Compensation Income Benefits: Their Adequacy and Equity, in SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 189 (1973).

31. 2 W. HANNA, supra note 1, § 1.05[8](b), at 1-35.

32. That employers or their insurance carriers will generally be liable for much less in the way of an award to injured employees under a workers' compensation system is evident from the contrasting purposes of the two remedies: "A compensation system, unlike a tort
more general sense, workers’ compensation also benefits society by providing incentives for employers to run safe operations.\textsuperscript{33}

The quid pro quo of the workers’ compensation system in California is that an employee, injured within the course of his or her employment,\textsuperscript{34} gains a statutory no-fault remedy but sacrifices the right to pursue a potentially larger recovery in tort.\textsuperscript{35} Accordingly, the California workers’ compensation statutes provide that where the “conditions of compensation”\textsuperscript{36} exist, workers’ compensation provides the exclusive

recovery, does not pretend to restore to the claimant what he has lost; it gives him a sum which, added to his remaining earning ability, if any, will presumably enable him to exist without being a burden to others.” 1 A. Larson, \textit{supra} note 6, § 2.50, at 11. One commentator has observed with respect to workers’ compensation awards: “[A]n employee earning $500 a month would be entitled to $275 per month for 50 months, a total of $13,750. In contrast, a jury could award up to 100 per cent of the actual lost earnings and damages for pain and suffering. [The Arizona Supreme Court] noted recent jury awards of up to $186,735 for workmen with similar injuries and earning capacities.” Comment, \textit{Workmen's Compensation: Arizona's Elusive Exclusive Remedy}, 1974 Ariz. St. L.J. 485, 493-94 (footnotes omitted).

33. See Brodie, \textit{The Adequacy of Workmen's Compensation as Social Insurance: A Review of Developments and Proposals}, 1963 Wis. L. Rev. 57, 63 (“One of the few aspects of workmen's compensation about which there is no disagreement is the impetus it gave to accident prevention and safety.”).

34. The question whether an employee was acting within the “course” or “scope” of his or her employment at the time of injury has generated a considerable amount of litigation within the California workers’ compensation system. \textit{See}, e.g., McCarty v. Workmen’s Compensation Appeals Bd., 12 Cal. 3d 677, 527 P.2d 617, 117 Cal. Rptr. 65 (1974); Lockheed Aircraft Corp. v. Industrial Accident Comm’n, 28 Cal. 2d 756, 172 P.2d 1 (1946); Williams v. Workmen’s Compensation Appeals Bd., 41 Cal. App. 3d 937, 116 Cal. Rptr. 607 (1974); Gagnebin v. Industrial Accident Comm’n, 140 Cal. App. 80, 34 P.2d 1052 (1934). \textit{See generally} 2 W. Hanna, \textit{supra} note 1, §§ 9.01-9.03; W. Prosser, \textit{supra} note 28, at 533. Since recovery by injured employees under the dual capacity doctrine is not predicated upon the claim that such employees were outside the scope of their employment at the time of injury, this subject is beyond the scope of this Comment.

35. 2A A. Larson, \textit{supra} note 6, § 65.10, at 12-3: “Once a workmen’s compensation act has become applicable . . . it affords the exclusive remedy for the injury by the employee or his dependents against the employer and insurance carrier. This is part of the \textit{quid pro quo} in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts.”

36. Cal. Lab. Code § 3600 (West Supp. 1982): “Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as provided in Section 3706, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:

\begin{itemize}
  \item[(a)] Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.
  \item[(b)] Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment, and is acting within the course of his employment.
  \item[(c)] Where the injury is proximately caused by the employment, either with or without negligence.
\end{itemize}
right of recovery against the employer for work-related injuries.\footnote{37} Dissatisfaction with the scope of workers' compensation coverage\footnote{38} and the average workers' compensation recovery,\footnote{39} however, has led an increasing number of injured workers to argue that their injuries should be compensable outside of the workers' compensation system.\footnote{40}

The increase in the number of common law suits by injured employees is also partially the result of changes in the historical "tradeoff" of rights associated with workers' compensation. Whereas the prospects for recovery for injured workers under the common law were slim at the time of the enactment of the first workers' compensation law,\footnote{41}

\begin{itemize}
\item \textbf{37.} See id. § 3601(a), quoted \textit{supra} note 3.
\item \textbf{38.} A common criticism of workers' compensation is that it provides inadequate compensation for occupational diseases (e.g., asbestosis) as compared to compensation for industrial accidents. One commentator has noted: "In the small proportion of cases that are compensated the recovery is very small. Measured against the amounts received in accident cases, occupational disease recoveries are pathetic. The average payment to a worker who is totally disabled for life is $23,400 if he or she was injured in an accident. If the injury was caused by disease, however, the average payment is only $9,700." Kuchins, \textit{The Most Exclusive Remedy is No Remedy at All: Workers' Compensation Coverage for Occupational Diseases}, 32 \textit{LAB. L.L.} 221, 223 (1981). \textit{See generally Transcript of Assembly Committee Hearing on Report of National Commission on State Workmen's Compensation Laws, Assembly Finance and Insurance Committee, California Legislature (1972).}
\item \textbf{39.} Some commentators have noted that workers' compensation awards may be inadequate to compensate workers in many instances. \textit{See}, e.g., \textit{PROCEEDINGS, supra} note 12, at 87 (working paper by Professor Jerry J. Phillips); Johnson, \textit{Can Our State Workmen's Compensation System Survive?}, 3 \textit{FORUM} 264, 269 (1968); Mitchell, \textit{supra} note 18, at 353-54; Comment, \textit{Manufacturer's Liability as a Dual Capacity of an Employer}, 12 \textit{AKRON L. REV.} 747, 749-50 (1979).
\item \textbf{40.} "With a much more aggressive plaintiffs' bar and the expansion of products liability law, we are observing new developments in the area of employees bringing common law suits directly against employers. Through various novel theories, employees are attempting to bypass the traditional immunity that employers have had under the workers' compensation system." \textit{PROCEEDINGS, supra} note 12, at 116 (comments of Professor Sheila L. Birnbaum); \textit{see also} Miller & Goldstein, \textit{supra} note 12, at 113-14.
\item \textbf{41.} \textit{See supra} notes 13-20 & accompanying text.
\end{itemize}
theories such as strict products liability and comparative negligence make actions at common law much more attractive to injured workers today. The result has been the creation of theories such as the dual capacity doctrine, which circumvent the exclusivity of workers' compensation and allow recovery at law as well.

Development of Dual Capacity Theory in California

The dual capacity doctrine in California has primarily been developed in three factual situations: (1) the negligent treatment by an employer-doctor of his or her own employee; (2) the commission of a negligent or intentional tort resulting in injury to an employee by an employer's insurance carrier; and (3) an injury to an employee resulting from a defective item manufactured by his or her employer.

The first California dual capacity case to address the employer-doctor situation was Duprey v. Shane. In Duprey, the California Supreme Court allowed a suit outside of workers' compensation for a nurse whose job-related injury was aggravated by the negligent medical treatment of her employer, a chiropractor. In refusing to restrict the employee to the exclusive remedy of workers' compensation, the court held that when the employer-doctor elected to treat the injured employee himself, he undertook a new set of obligations that put him

42. See infra note 101.
44. As one commentator noted, "The original basis for workers' compensation enactments was, as much as anything else, the need to circumvent the harshness of 19th century common law restrictions on workplace claims. In giving up the highly restrictive 19th century common law tort remedy, the employee was not giving up much." PROCEEDINGS, supra note 12, at 87-88 (working paper by Professor Jerry J. Phillips).
45. See infra notes 48-59 & accompanying text.
46. See infra notes 63-74 & accompanying text.
47. See infra notes 79-88 & accompanying text.
49. Id. at 785-86, 249 P.2d at 10-12. The plaintiff in Duprey was initially injured when she broke the fall of one of the defendants' patients who had begun to roll off a treatment table. The plaintiff reported that as a result of catching the patient, she suffered a "terrific yank" to her shoulder. She subsequently reported to her employer that she had begun to have pains in her right arm and shoulder and had also begun to suffer headaches.

After the employer was informed of the injury, the plaintiff was treated over a five-day period by a chiropractor, Dr. Harrison, in the defendants' office. The injured employee was also seen by the defendant, Dr. Shane. After these treatments, the plaintiff began to suffer "terrible headaches" and noticed that her head "began to fall to one side." Id. at 787, 249 P.2d at 11. Despite these symptoms, the defendant chiropractors did not take X-rays of the employee's spine until five days after the initial injury. The facts showed the plaintiff had suffered a dislocated vertebra. According to the plaintiff's medical experts, the manipulation treatments she had received from the defendants probably caused the injury. Id. at 788, 249 P.2d at 12.
in the position of a “person other than the employer” for purposes of
the Labor Code.\textsuperscript{50} Thus, by considering the doctor to be a “third
party” as well as an “employer,” the \textit{Duprey} court avoided the unam-
biguous exclusivity language of California Labor Code section 3601.\textsuperscript{51}

The analysis of the factual situation in \textit{Duprey} led the court to the
conclusion that where the “dual legal personality” of the employer is
apparent, recognizing the fact is “realistic and not legalistic.”\textsuperscript{52}
Accordingly, the \textit{Duprey} court held that limiting the worker to a workers’
compensation recovery would be unjust since the employment relation-
ship had been essentially transmuted by the subsequent treatment of
the plaintiff into one of doctor and patient.\textsuperscript{53} The aggravation of the
employee’s initial, work-related injury was an incident of the doctor-
patient, not of the employer-employee, relationship and the worker was
allowed the same right to pursue a malpractice action as any other
patient.\textsuperscript{54}

The social policy justification for the \textit{Duprey} holding was the de-

\begin{itemize}
\item \textsuperscript{50} \textit{Id.} at 793, 249 P.2d at 15. Actions against third parties under workers’ compensa-
tion are not abrogated by virtue of Labor Code § 3852, which provides in part: “The claim
of an employer [sic] for compensation does not affect his claim or right of action for all
damages proximately resulting from such injury or death against any person other than the
employer.” \textit{CAL. LAB. CODE} § 3852 (West Supp. 1982).

\item \textsuperscript{51} \textit{Id.} at 793, 249 P.2d at 15. Unless the employer is defined as a third party, the
following language from Labor Code § 3601(a) would appear to preclude the type of
action pursued in \textit{Duprey}: “[T]he right to recover such compensation . . . is . . . the exclu-
sive remedy for injury or death of an employee against the employer.” \textit{CAL. LAB. CODE}
§ 3601(a) (West Supp. 1982) (emphasis added).

\item \textsuperscript{52} A third party analogy similar to the one made by the court in \textit{Duprey} was employed by
the United States Supreme Court in \textit{Reed v. The Yaka}, 373 U.S. 410 (1963), \textit{reh’g denied},
375 U.S. 872 (1963). In \textit{Reed}, the Supreme Court allowed an injured longshoreman recov-
er against his employer both within the Longshoremen’s and Harbor Workers’ Compensa-
tion Act (which is similar in function to workers’ compensation) and outside of the Act, on
the theory the employer was also a boat charterer, with the common law duty to provide a
seaworthy vessel. In reaching this result, the \textit{Reed} court observed that “[o]nly blind adher-
ee to the superficial meaning of a statute could prompt us to ignore the fact that Pan-
Atlantic was not only an employer of longshoremen but was also a bareboat charterer and
operator of a ship and, as such, was charged with the traditional, absolute, and nondelegable
obligation of seaworthiness which it should not be permitted to avoid.” \textit{Id.} at 415.

\item \textsuperscript{53} \textit{Id.} at 793, 249 P.2d at 15.

\item \textsuperscript{54} \textit{DUAL CAPACITY November 1982} 471

\end{itemize}
The employer-doctor could have discharged his duty to provide medical treatment for the injured employee by sending the employee to another doctor. The employee would then have had a right to sue that doctor for malpractice. The court found no logical reason that the employer-doctor should be shielded from liability for his negligence when he elected to treat the injured worker himself. Moreover, the Duprey court refused to extend the “defensive provisions” of workers’ compensation to bar actions to recover for liabilities that do not arise from the principal employer-employee relationship.

The holding in Duprey laid the foundation for the dual capacity doctrine but did not define its parameters. The negligent acts of the employer-doctor in Duprey were so removed from the employer-employee relationship that allowing the employee to sue in tort flowed naturally from the policy of the workers’ compensation system that rights against third parties are not abrogated. Because of the distinct legal obligations flowing from the capacities of doctor and employer, the employer-doctor situation presented in Duprey has remained a reliable factual situation for dual capacity recovery in California. The

55. Id.
56. Id. CAL. LAB. Code § 4600 (West Supp. 1982) provides: “Medical, surgical, chiropractic, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatus, including artificial members, which is reasonably required to cure or relieve from the effects of the injury shall be provided by the employer . . . .”
57. “Had [Dr. Shane] sent plaintiff to the insurance doctor and had that doctor been negligent in treating the industrial injury, that doctor would have been liable for malpractice.” 39 Cal. 2d at 793, 249 P.2d at 15; see Comment, Workmen’s Compensation and Employer Suability: The Dual Capacity Doctrine, 5 ST. MARY’S L.J. 818, 822 (1974).
58. 39 Cal. 2d at 793, 249 P.2d at 15.
59. Id. at 794, 249 P.2d at 16. The comment by the Duprey court that it would not extend the “defensive provisions” of workers’ compensation reflects the view that the exclusive remedy provision may serve as a shield from liability for employers. “When the exclusive remedy provision is unconditionally applied, the employer-third-party-tortfeasor can be comfortably aware that should injury occur because of his negligence, he or his carrier will be liable not to the full extent allowable in a common law recovery but only to the limited extent of the compensation benefit.” Comment, supra note 57, at 832.
60. The limited liability enjoyed by employers under the workers’ compensation statutes is not intended to extend to third parties: “[T]he employee’s right against the negligent third party is precisely the same as if the injury had occurred outside the employer-employee relationship. This right of action is preserved since the compensation system was not designed to provide immunity to strangers.” 2 W. HANNA, supra note 1, § 23.011[1].
61. The California Supreme Court recently reaffirmed the use of the dual capacity theory in the employer-doctor situation in D’Angona v. County of Los Angeles, 27 Cal. 3d 661, 669, 613 P.2d 238, 243-44, 166 Cal. Rptr. 177, 182-83 (1980). The court stated: “In treating plaintiff’s disease the county owed her a duty separate and distinct from its duty as her employer, and this was the duty to provide medical care free of negligence—the same duty that it owes to any member of the public who becomes a patient at its hospital.” See also Hoffman v. Rogers, 22 Cal. App. 3d 655, 99 Cal. Rptr. 455 (1972).

Courts in other states are split as to whether to apply the dual capacity theory in the
only court-imposed restriction upon the use of dual capacity in the employer-doctor situation has been the requirement that an employer must do more than merely give first aid to an injured employee.62

Another area in which the dual capacity doctrine has been applied in California concerns the negligent or intentional torts of an employer’s workers’ compensation insurance carrier. The California Labor Code provides that an employer’s insurer is “identified” with the employer for liability purposes.63 An argument has been made, based on the logic of Duprey, that when an insurance carrier commits a negligent or intentional tort, the carrier should be considered a person “other than the employer” and should be liable at law to an injured worker.64 California courts, however, have been reluctant to characterize the negligence of an insurance carrier as an activity outside of its normal capacity justifying separation of the insurer from the employer for liability purposes.65

An early attempt to apply the dual capacity doctrine to the actions of an insurer occurred in Hazelwerdt v. Industrial Indemnity Exchange.66 The court in Hazelwerdt refused to recognize the insurer’s separate capacity67 in the face of an allegation that the insurer had conspired with the attending physician to “mitigate and lessen” the plaintiff’s true condition.68 The Hazelwerdt court distinguished Duprey, holding that the defendant “does not become a ‘person other than the

employer-doctor context. Compare McCormick v. Caterpillar Tractor Co., 82 Ill. App. 3d 77, 402 N.E.2d 412 (1980); Guy v. Arthur H. Thomas Co., 55 Ohio St. 2d 183, 378 N.E.2d 488 (1978); Delamotte v. Unitcast Div. of Midland Ross Corp., 64 Ohio App. 2d 159, 411 N.E.2d 814 (1978) (allowing dual capacity suits), with McAlister v. Methodist Hosp., 550 S.W.2d 240 (Tenn. 1977) (rejecting dual capacity doctrine). In the McAlister case, the Supreme Court of Tennessee noted that the facts before it were very similar to those in Duprey. However, the court held: “[I]n the field of workmen’s compensation law, and in suits by a worker against his employer, the initial injury is the cause of all that follows, even where there is superimposed upon the original injury, a new, or additional or independent injury during the course of treatment, negligent or otherwise.” Id. at 245.


63. CAL. LAB. CODE § 3850(b) (West 1971) provides: “‘Employer’ includes insurer as defined in this division.” (emphasis added).


65. See infra notes 70-73 & accompanying text.


67. Id. at 763, 321 P.2d at 833.

68. Id. at 760-61, 321 P.2d at 832. The plaintiff in Hazelwerdt suffered an initial, work-related injury to his back, resulting in a finding by the Industrial Accident Commission of a 100% permanent disability. The defendant was subsequently ordered to provide the plaintiff with medical treatment. The plaintiff alleged that the insurer-defendant’s doctor then negligently failed to recommend surgery on the plaintiff’s spine and that the defendant conspired with the doctor to deprive the plaintiff of medical care by minimizing the true nature of the plaintiff’s condition.
employer," merely by conspiring to do something the liability for which is already covered by workmen's compensation law." 69

A different situation is presented, under California law, when the insurer's intentional act injures the plaintiff employee. Dual capacity recovery by an injured employee in this situation has been justified on the theory that the original identification of the employer and its insurer under the workers' compensation system does not encompass the commission of intentional torts by the insurer.

In Unruh v. Truck Insurance Exchange, 70 the plaintiff alleged that her employer's insurance carrier caused her to suffer a mental and physical breakdown when its investigating agents enticed her to perform acts beyond her physical capabilities. 71 While holding that the negligence of the insurer in failing to control its employees did not suggest a "dual capacity" under Duprey, the Unruh court found that the commission of an intentional tort did take the insurer outside of its normal role as compensation carrier and into a "second capacity." 72 Thus, although in most instances injuries resulting from the intentional torts of employers are compensable only under the workers' compensation system, 73 an intentional tort by an insurer may justify a suit against it as a third party tortfeasor. 74

One criticism of Unruh has been that the insurer was not really undertaking the new obligations of a separate legal capacity by committing an intentional tort. 75 Unlike Duprey, where the employer-doc-

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69. Id. at 765, 321 P.2d at 835. One California court of appeal has similarly refused to find a dual capacity for the insurer's allegedly negligent inspection, holding that safety inspections are within the "normal role" of an insurer. Williams v. State Compensation Ins. Fund, 50 Cal. App. 3d 116, 123 Cal. Rptr. 812 (1975).

70. 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972).

71. Id. at 621, 498 P.2d at 1066-67, 102 Cal. Rptr. at 818-19. Specifically, the plaintiff in Unruh alleged that one of the insurance agents "befriended her" for the purpose of investigating the validity of her claim. On one occasion the agent took the plaintiff to Disneyland, enticed her to cross rope and barrel bridges, and then shook the bridges while another agent filmed these activities. The film of the plaintiff was subsequently shown at a hearing of the Industrial Accident Commission. Upon learning of the agents' fraudulent behavior, the plaintiff suffered a mental and physical breakdown.

72. Id. at 630, 498 P.2d at 1073, 102 Cal. Rptr. at 825.


74. See supra notes 70-72 & accompanying text.

75. 2A A. Larson, supra note 6, § 72.86, at 14-259: "The court [in Unruh] in effect said that an insurance carrier remained an insurance carrier if it carried out a non-medical investigation of a case properly, but that it somehow became a different legal person when it carried out the same kind of investigation in an intentionally tortious manner. The distinction between this situation and all the legitimate dual-capacity examples here recognized is
tor undertook an obligation in the separate legal capacity of doctor, in *Unruh* the defendant committed the tortious acts in its original capacity as insurer. This conceptual distinction has become important in the employer-manufacturer situation. In this situation, when an article is a routine and integral part of the employment, an employer arguably does not become a separate legal persona by manufacturing it and providing it to his or her employees. The difficulty of determining whether employer and manufacturer are separate capacities in a given factual situation has kept courts in many jurisdictions from applying the dual capacity doctrine in the employer-manufacturer situation.

The requirements for dual capacity recovery in the employer-manufacturer context were first described in the California court of appeal decision of *Douglas v. E. & J. Gallo Winery.* In *Douglas,* two of Gallo’s employees were injured when an elevator scaffolding on which they were working collapsed. The injured workers argued that the scaffolding was manufactured by the defendant for sale to the public, obvious. In all these cases, the second persona was one recognized by law as having its own separate legal entity and its own set of separate legal obligations.” See also Miller & Goldstein, supra note 12, at 125-26.

76. The holding in *Unruh* was most likely the product of a developing policy to allow common law actions against employers who intentionally injure their employees: “[W]e perceive in *Magliulo, Meyer* and *Unruh* a trend toward allowing an action at law for injuries suffered in the employment if the employer acts deliberately for the purpose of injuring the employee or if the harm resulting from the intentional misconduct consists of aggravation of an initial work-related injury.” Johns-Manville Prods. Corp. v. Superior Court, 27 Cal. 3d 465, 476, 612 P.2d 948, 955, 165 Cal. Rptr. 858, 865 (1980).

77. 2A A. LARSON, supra note 6, § 72.83, at 14-244; see Birnbaum & Wrubel, *California Supreme Court Adopts a “Manufacturer” Liability Exception to the Exclusive Remedy of Workers’ Compensation,* 17 FORUM 939, 943-46 (1982).

78. Courts in many jurisdictions have declined to apply the dual capacity doctrine on the theory that the employment relationship, and thus the exclusive remedy provision, predominates over an employer’s other capacity. See, e.g., Mapson v. Montgomery White Trucks, Inc., 357 So. 2d 971, 972-73 (Ala. 1978) (suit by injured repairman against employer who sold, manufactured, and repaired trucks); Longever v. Revere Copper & Brass, Inc., 408 N.E.2d 857, 859 (Mass. 1980) (suit by employee injured by allegedly defective casting machine manufactured by one of the employer’s divisions); Billy v. Consolidated Machine Tool Corp., 51 N.Y.2d 152, 160, 412 N.E.2d 934, 939, 432 N.Y.S.2d 879, 884 (1980) (suit by spouse of decedent alleging defective design and manufacture of “boring ram” by employer); Schlenk v. Aerial Contractors, Inc., 268 N.W.2d 466, 469-70 (N.D. 1978) (suit by lineman for injuries sustained when clothes caught in wire winder, alleging both intentional injury by employer and manufacturer dual capacity); see also Cohn v. Spinks Indus., Inc., 602 S.W.2d 102 (Tex. Civ. App. 1980) (suit in wrongful death by spouse and child of helicopter pilot killed in crash alleging dual capacity of decedent’s employer as lessor of helicopters to the public).


80. *Id.* at 106-07, 137 Cal. Rptr. at 798-99. The exact manufacturing activity under-
rather than solely for use in its own business. The appellate court upheld the trial court and allowed the workers to sue their employer at law on the theory that by undertaking to manufacture the item which injured the plaintiffs, and by selling the item to the public, the employer occupied the second capacity of manufacturer.

The factual situation in *Douglas* presents an interesting contrast to the situation in *Duprey v. Shane*. In *Duprey*, the aggravation of the employee's original, work-related injury occurred in a context outside her normal duties as a nurse. In *Douglas*, the workers were injured while performing a task that was a normal incident of their employment. The *Douglas* court did not, however, focus its analysis on the question whether the employer-employee relationship predominated over the second relationship alleged. Instead, the *Douglas* court took a significant step beyond *Duprey* by changing the focus of the dual capacity determination from an analysis of the employer-employee relationship to an analysis of the various capacities of the employer.

Under the analysis applied by the *Douglas* court the employment does not have to be transmuted into a new relationship for an injured worker to be allowed to sue his or her employer in tort. Rather, the activities of the employer outside of the employment relationship may be sufficient by themselves to justify such a suit. This represents a

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1. Negligent manufacture, sale, etc., of the elevator scaffold device.
2. Failure to provide safe place to work (admitted by appellants as being barred by the Workers' Compensation remedy . . .).
3. Breach of warranty in the manufacture, sale, etc., of the cables and socket of the scaffold.
4. Products liability based on defective manufacture, sale, etc. of the scaffold and its parts.” *Id.* at 106-07, 137 Cal. Rptr. at 799.
5. *Id.* at 107, 137 Cal. Rptr. at 799.
6. *Id.* at 110, 137 Cal. Rptr. at 801.
7. See supra notes 52-59 & accompanying text.
8. 69 Cal. App. 3d at 106, 137 Cal. Rptr. at 798. Unlike the situation in *Duprey*, the injuries to the workers in *Douglas* which resulted in the suit against their employer arose directly out of the on-the-job accident, the collapse of the elevator scaffolding.
9. “Characterizing a defendant as an 'employer' and therefore automatically cloaked with immunity from common law suit is a simplification that tends to cloud proper analysis. The focus should be on the defendant's responsibility for his own acts or omissions where a different duty to take care or make sure that care is taken arises than that imposed on an employer.” *Id.* at 110, 137 Cal. Rptr. at 801.
10. The emphasis in *Douglas* on the activities of the employer can be contrasted with the approach taken in many jurisdictions which focuses on the activities of the employee. The latter approach weighs the value of the exclusive remedy provision heavily, and concludes that if the injury was sustained within the course of employment, the employer's actions in another capacity are irrelevant. Courts focusing on the activities of the employee justify restricting injured workers to recovery under the workers' compensation system on the basis of protecting the integrity of the system. See, e.g., Needham v. Fred's Frozen
strained application of the dual capacity theory initiated in *Duprey*, as the injuries are still the direct product of the employment relationship⁸⁷ even though the employer's capacity theoretically might be "changed" into that of a manufacturer. Thus, one criticism of the *Douglas* approach to dual capacity is that it does not require a separate legal persona of the employer, but rather only a separate theory of liability.⁸⁸

One important parallel between the holdings of *Duprey* and *Douglas* is that both courts justified employer liability on the basis that each employer had the option to obtain elsewhere the goods or service that injured the workers. In holding that the item that injured the plaintiffs was not intended for the "sole use" of the employer, the *Douglas* court noted that by "electing to manufacture elevator scaffolding for the public rather than obtaining it from a third party manufacturing firm, the defendant should be held to the standard of care of manufacturers generally."⁸⁹ As in *Duprey*, the employer became a third party by undertaking an obligation that could have been performed by another party who would have been liable to the employee for negligent performance.⁹⁰

An important requirement articulated in *Douglas* is that the prod-

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⁸⁷. This situation is in contrast to that of the nurse in *Duprey*, whose capacity was really that of a patient at the time of the aggravation of her injury. See *supra* note 53 & accompanying text.

⁸⁸. 2A A. LARSON, *supra* note 6, § 72.81, at 14-230-31: "The choice of the term 'persona' is not the result of any predilection for elegant Latinisms for their own sake; it is dictated by the literal language of the typical third-party statute, which usually defines a third party, in the first instance, as 'a person other than the employer.' This is quite different from 'a person acting in a capacity other than that of employer.' The question is not one of activity, or relationship—it is one of identity."

⁹⁰. The third party analogy applied by the *Douglas* court seems compelling in the situation where the injury-producing item is designed primarily for sale to the public and is only incidentally used in "defendant's other activities." *Id.* at 113, 137 Cal. Rptr. at 803. In such a case, the employer might actually have a choice whether or not to use the item. When the employer chooses to use such products in its other operations, it may be considered a "third-party manufacturer." The question *Douglas* left open, however, is how an employer should be treated when production of the allegedly defective item is the employer's primary activity. In such a situation, the purpose of the employment relationship is the production or distribution of the item, and the two capacities of "employer" and "manufacturer" become inseparable. *See supra* notes 56-59 & accompanying text.
uct injuring the worker be one that is offered for sale to the public.\textsuperscript{91} This aspect of the Douglas opinion has an important limiting effect on the scope of the dual capacity doctrine. As a result of this requirement there is no separate tort liability for an injury resulting from a defective product that is supplied to the worker solely as a tool of the employment.\textsuperscript{92} In this regard, the test for a finding of dual capacity closely parallels the requirement of strict products liability that the item be placed into the "stream of commerce."\textsuperscript{93}

Although there was a suggestion in the Douglas opinion that a case-by-case analysis is necessary to determine whether a particular employer's manufacturing activity is sufficiently distinct from the employment relationship to justify tort liability,\textsuperscript{94} the Douglas holding actually used the products liability definition of "manufacturer" as the standard for employer-manufacturer dual capacity liability.\textsuperscript{95} In this regard, the Douglas court sought to accommodate the important policies underlying both workers' compensation and products liability. The court questioned, for instance, whether the right of recovery represented by products liability theory could be encompassed by the workers' compensation system, which predated the development of products liability theory.\textsuperscript{96} Furthermore, as a matter of social policy, the court refused to frustrate the important loss-distribution policy of products liability by restricting injured workers to a workers' compensation remedy on the "chance circumstance" that the manufacturer also happened

\textsuperscript{91} 69 Cal. App. 3d at 113, 137 Cal. Rptr. at 803. The Douglas court sought to limit application of its holding to "a defendant who engages in manufacturing for sale to the general public. A single or occasional disconnected act does not constitute engaging in such manufacturing. The defendant who designs or manufactures a product for his own use and subsequently does sell an extra one of the products to his neighbor or to a similar business is not thereby subjected to manufacturers' liability when his own employee is injured in using the product." \textit{Id.}

\textsuperscript{92} \textit{Id.} at 109, 137 Cal. Rptr. at 800. The Douglas court distinguished two court of appeal decisions, Shook v. Jacuzzi, 59 Cal. App. 3d 978, 129 Cal. Rptr. 496 (1976), and Williams v. State Compensation Ins. Fund, 50 Cal. App. 3d 116, 123 Cal. Rptr. 812 (1975), in which dual capacity liability was refused because the allegedly injurious items were manufactured solely as tools for the use of the defendants' employees. 69 Cal. App. 3d at 109, 137 Cal. Rptr. at 800.

\textsuperscript{93} 69 Cal. App. 3d at 112-13, 137 Cal. Rptr. at 802.

\textsuperscript{94} \textit{Id.} at 113, 137 Cal. Rptr. at 803: "The proper standard for determining whether a defendant is engaged in manufacturing so as to make applicable the manufacturer's liability imposed hereunder is the exercise of judgment on a case by case basis to decide if the manufacturing by the particular defendant is such as to justify the conclusion that it is part and parcel of an activity which occupies the effort, attention and time of the defendant for the purpose of possible profit on a continuing basis."

\textsuperscript{95} \textit{Id.} at 107, 137 Cal. Rptr. at 799: "For purposes of this opinion, the term 'manufacturer' includes manufacturer, seller, distributor or any other person who may be subject to products liability."

\textsuperscript{96} \textit{Id.} at 112, 137 Cal. Rptr. at 802.
to be their employer.\textsuperscript{97} Thus, the \textit{Douglas} court gave the dual capacity doctrine analytical force of its own and used it to support the policies underlying products liability theory. In so doing, the \textit{Douglas} court set the stage for the elaboration of the products liability-dual capacity rationale in \textit{Bell}.\textsuperscript{98}

**Products Liability Policy Overcomes Exclusivity of Remedy: \textit{Bell v. Industrial Vangas}**

The California Supreme Court in \textit{Bell v. Industrial Vangas}\textsuperscript{99} significantly limited the scope of the exclusive remedy provision by following \textit{Douglas} in declaring a products liability dual capacity exception. The plaintiff in \textit{Bell} was a propane deliveryman who was injured in a fire resulting from alleged defects of “tank trucks, storage

\textsuperscript{97}. \textit{Id.} at 113, 137 Cal. Rptr. at 803.


In \textit{Moreno}, the employer, a retailer, also had a division whose principal business was the manufacture of pool chemicals. The retail division directed one of its stockboys, the plaintiff, to pour out chlorine and muriatic acid from leaking, unlabelled bottles. The employee then poured the contents of the bottles together and was seriously injured from inhalation of fumes. 110 Cal. App. 3d at 181, 167 Cal. Rptr. at 748. The issue presented by the facts in \textit{Moreno} was whether the actions of the employee constituted a “use” of the product for products liability purposes. The defendant argued the items were not utilized by the employee as tools in his employment, unlike the situation in \textit{Douglas}, and so the injury did not arise from an “expected” use of the bottles. The \textit{Moreno} court, however, applied a liberal standard of “use” and held that movement of the bottles was a sufficiently expected use under the products liability rationale of \textit{Douglas} to justify allowing the injured worker to sue his employer at law. Although this result follows from the tests established by \textit{Douglas}, \textit{Moreno} has been criticized as possibly laying the foundation for dual capacity suits based solely upon exposure to dangerous substances in the workplace. See Miller & Goldstein, supra note 12, at 124.

\textit{Dorado} reveals another important area in which the \textit{Douglas} rationale may be applied in the future—cases in which one business asserts the exclusive remedy provision of workers’ compensation based upon its ownership of another business. In \textit{Dorado}, the defendant alleged that as the limited partner of the injured worker’s employer, the exclusive remedy provision should shield it from tort liability for the negligent manufacture of crates that injured the plaintiff. 103 Cal. App. 3d at 609, 163 Cal. Rptr. at 480. In allowing the worker to pursue a tort action, the \textit{Dorado} court noted that partners should not be given the benefit of the exclusive remedy provision when their acts are not undertaken “on behalf of the partnership.” \textit{Id.} at 614, 163 Cal. Rptr. at 482. This result is justifiable under the logic of \textit{Duprey} and \textit{Unruh}, since the activity that led to the plaintiff’s injury (manufacture of the crates) was undertaken for the benefit of the defendant and not the plaintiff’s employer. Given the increasing complexity of business ownership, however, fact situations similar to \textit{Dorado} could provide an area of expansion for dual capacity theory. See also Mercer v. Uniroyal, Inc., 49 Ohio App. 2d 279, 285-86, 361 N.E.2d 492, 496 (1976).

tanks, valves, couplings, hoses and other equipment.” 100 Using language associated with products liability, 101 Bell alleged that his employer and the customer to whom he made the delivery “were engaged in various activities constituting the marketing of defective prod-

100. *Id.* The plaintiff, William Bell, was delivering propane gas to Long Chemical Co., a customer of his employer, Industrial Vangas, Inc., at the time of his injury. Plaintiff did not allege that the injury was not sustained within the course of his employment as a route salesman for the defendant. Accordingly, the plaintiff pursued his workers' compensation remedy to final judgment prior to initiating his civil suit. The defendant argued successfully in the trial court that Bell's claim was barred by the exclusive remedy provision.

Opposing the plaintiff's appeal, the defendant argued: (1) that the dual capacity doctrine did not apply in the employer-manufacturer context; and (2) that by recovering his workers' compensation award, Bell had elected his remedy and could not later pursue a civil recovery. The court of appeal reversed on both grounds, holding that the dual capacity doctrine applied and that under the facts presented by the plaintiff, a workers' compensation award and a tort recovery were not inconsistent remedies. Petition for Hearing in the Supreme Court by Respondent Industrial Vangas, Inc. at 2-3 (Oct. 27, 1980).

The scope of Industrial Vangas' "manufacturing activity" is indicated by the following passage from the opinion in the Court of Appeal for the Second District: "The declaration of Ron Paliughi, respondent's vice president of operations and planning, stated that respondent 'did not manufacture any products or items of equipment which were present on the premises of LONG CHEMICAL, INC. at the time of the alleged accident' except for the propane bulk delivery truck, of which appellant was the driver and operator. That truck was 'assembled' by respondent 'using a 1969 Chevrolet truck chassis manufactured by General Motors Corporation, on which was fabricated a delivery system, skirting, metering and other component parts to adapt the truck for the specific use of INDUSTRIAL VANGAS, INC. in its propane dispensing operations.' The declaration further stated that with limited exceptions all of respondent's fleet of trucks were assembled exclusively for respondent's own use in propane dispensing operations. The exceptions were: out of approximately 200 bulk delivery trucks assembled since the model year 1969, respondent sold 4 exclusively to other propane dealers primarily as a customer service to companies with whom respondent does regular business in the wholesale dispensing of propane. In addition, eight 1969 model trucks had been withdrawn from service, dismantled, and then the vehicle chassis sold." 110 Cal. App. 3d 463, 466, 168 Cal. Rptr. 41, 43 (1980) (opinion subsequently deleted when California Supreme Court granted hearing).

101. Products liability actions against manufacturers may take three forms: negligence suits, actions based upon implied or express warranty, and suits based upon strict liability in tort. The last-named theory was developed in the landmark case of Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). Noting that strict liability theory removes the difficulties associated with proving manufacturer fault under a negligence theory, or an implied or express contract under a warranty theory, the Greenman court held that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

The Greenman rule is similar to that adopted by the RESTATEMENT (SECOND) OF TORTS § 402A (1965):

"(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

"(2) The rule stated in Subsection (1) applies although (a) the seller has exercised all
In other words, plaintiff alleged that the defendant had helped to place defective articles into the "stream of commerce." The defendant, Industrial Vangas, presented two arguments: (1) it was not a "manufacturer" within the meaning given that term by strict products liability doctrine, and (2) allowing the employee recovery in tort would upset the balance of the workers' compensation system.

The first argument is of particular interest because the court in Bell, unlike the court in Douglas, addressed the question whether the defendant had manufactured the allegedly defective items. The Bell court noted that Industrial Vangas had not actually manufactured any of the items involved in the accident. Rather, its "manufacturer's" liability arose from its involvement in the "marketing or distribution" of the items. Because the defendant negated only the claim that it had actually manufactured the items, the plaintiff in Bell was able to avoid a summary judgment based upon the exclusive remedy provision.

Possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller." The adoption of strict liability in tort by the California Supreme Court and the Restatement of Torts has spurred many courts to abandon warranty theory, with its ties to the law of contracts and sales. 2 L. FRUMER & M. FRIEDMAN, supra note 7, § 16A(3), at 3B-13 (1981 & Supp. 1982).

Bell alleged the defendants "were engaged in the business of designing, . . . constructing, assembling, processing, preparing, testing, inspecting, maintaining, repairing, installing, endorsing, selling, leasing, bailing, licensing the use of, and otherwise marketing" defective products. 30 Cal. 3d at 271, 637 P.2d at 268, 179 Cal. Rptr. at 32.

The term "stream of commerce" connotes an approach by which those who place a product in the stream of commerce, i.e. manufacturers, retailers, and wholesalers, are liable for injuries caused by product defect to any foreseeable user.

As the California Supreme Court held in Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969), bystanders are also protected by products liability theory: "If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable retailers, whereas the bystander ordinarily has no such opportunities." Id. at 586, 451 P.2d at 89, 75 Cal. Rptr. at 657.

Vangas argues that even assuming workers' compensation is not the exclusive remedy, Bell has failed to state a cause of action in strict products liability because Vangas is not in the business of manufacturing or marketing any of the allegedly defective products. While an uncontradicted declaration submitted in support of Vangas' motion adequately refutes any suggestion that Vangas was in the business of manufacturing or marketing the delivery truck driven by Bell, the complaint also refers to numerous other allegedly defective products which proximately cause Bell's injuries. While the declaration asserts such products were not manufactured by Vangas, it does not similarly deny any involvement in marketing or distribution which may be sufficient to give rise to strict liability for a defective product. . . . Since a defendant moving for summary judgment has the burden of negating every alternative theory of liability presented by the pleadings . . . , the Vangas declaration is insufficient to support the granting of summary judgment." (citations omitted).
the defendant to have prevailed on a summary judgment motion it would have had to negate “every alternative theory of liability presented by the pleadings.” 107

In holding that the plaintiff had stated a cause of action in products liability, the *Bell* court made subtle, yet important, changes in the dual capacity doctrine. The most significant of these changes was the expansion of the products liability exception to encompass all of the different capacities giving rise to strict liability in tort. 108 The test for dual capacity in the employer-manufacturer situation after *Bell* is whether the employer by some activity has helped to put a harmful item into the stream of commerce, not whether the employer has an actual manufacturing capacity distinct from the employment relationship. The *Bell* court, by citing *Greenman v. Yuba Power Products, Inc.*, 109 *Vandermark v. Ford Motor Co.*, 110 and *Price v. Shell Oil Co.*, 111 made clear that an injured employee may sidestep the exclusive remedy provision by alleging his or her employer aided in the marketing of a defective product, even though the employer's activities outside of the employer-employee relationship did not constitute any significant manufacturing activity. 112

The other change in the dual capacity analysis apparent in *Bell* is that the focus of the second capacity determination is now exclusively on the activities of the employer, rather than on the activities of the employer and employee taken together. The test to be applied, according to the *Bell* court, is:

If the duty flows solely from the employment relationship and the injury “arises out of” and “during the course of” that employment, then the recited policy considerations behind the exclusive remedy in workers' compensation mandating that the employer be immune from tort liability apply. If, however an additional concurrent duty flows from an “extra” employer status or a relationship that is distinct from that of employer-employee and invokes a different set of

107. *Id.*
108. *Id.* at 270-71, 637 P.2d at 267-68, 179 Cal. Rptr. at 31-32. The Douglas opinion in effect left this issue open since it was only faced with the allegation that the defendant had actually manufactured the scaffolding: “We hold that a plaintiff may state a cause of action (or causes of action) based on manufacturer's liability even though the defendant is also the plaintiff's employer and the alleged injuries take place in the course of employment, provided that the product is manufactured by the employer for sale ‘to the public’ rather than being manufactured for the sole use of the employer.” 69 Cal. App. 3d at 107, 137 Cal. Rptr. at 799.
110. 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964) (holding retailers strictly liable in tort as part of overall marketing enterprise).
111. 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970) (holding strict liability applicable to bailors and lessors).
112. 30 Cal. 3d at 271, 637 P.2d at 267, 179 Cal. Rptr. at 31-32.
obligations, then a second capacity arises and the employer status is coincidental.\footnote{113}{Id. at 277, 637 P.2d at 272, 179 Cal. Rptr. at 36.}

In contrast to the original \textit{Duprey} standard of a second capacity creating a new legal persona,\footnote{114}{See supra notes 53-54 & accompanying text.} the \textit{Bell} approach represents a significant expansion of the dual capacity doctrine. While the employee injury in \textit{Duprey} was the result of activities of the employer in the second capacity as doctor, the injury in \textit{Bell} arose from the supplying of defective tools to employees, an act which should be considered within the employer's original capacity.\footnote{115}{Professor Larson has noted in his discussion of \textit{Douglas} that in no sense can the obligations of employer and manufacturer be deemed separate where tools are supplied to employees: "[E]ven under the most permissive definition of dual capacity, the Ohio and California cases cannot be justified. The second set of obligations, under that definition, \textit{must be independent of the defendant's obligations as an employer}. Here they are completely intertwined. The employer has a duty as employer to provide safe scaffolding; he has a duty as manufacturer to make safe scaffolding; if he makes unsafe scaffolding and provides it to his employee to be used in his work, the two obligations are braided together so tightly they cannot possibly be separated." 2A A. LARSON, \textit{supra} note 6, § 72.83, at 14-245 (emphasis added).} Under the products liability definition of "manufacturer" however, the employer in \textit{Bell} occupied a second capacity because of its activities helping to put the items into the stream of commerce.\footnote{116}{According to Industrial Vangas' declarations filed in the trial court, the "marketing activities" were minor in the sense that they only involved the sale of used trucks. \textit{See supra} note 100.}

The dissent in \textit{Bell} by Justice Richardson illustrates an approach to the dual capacity determination that focuses on whether the employment relationship predominates in the context of the employee's injury. The dissent cogently distinguished the factual situation in \textit{Duprey} from that presented by \textit{Bell}:

There was no point during Bell's use of the equipment that he ceased to be an employee. In \textit{Duprey}, on the other hand, the defendant stepped out of his general role as employer into a special capacity as physician. The \textit{Duprey} injury did not occur during the course of her employment by Dr. Shane, but rather during his medical treatment of her as his patient. The legal obligations which Dr. Shane owed to Duprey as his patient were entirely different from those which he owed her as his employee.\footnote{117}{30 Cal. 3d at 285, 637 P.2d at 277, 179 Cal. Rptr. at 41 (Richardson, J., dissenting).}

The dissent concluded that because the obligations of Industrial Vangas as "employer" and "manufacturer" were "coequal" and "coextensive," the exclusive remedy provision of workers' compensation should bar recovery at law by \textit{Bell}.\footnote{118}{\textit{Id.}} Considering the close relationship between the employment and the nature of Bell's injury, this would ap-
pear to be the better result.119

In answer to the defendant Industrial Vangas' second argument, that allowing the injured worker to recover in tort would upset the balance of the workers' compensation system, the Bell majority cited the history of the judicial exceptions to the exclusive remedy provision.120 Strictly construed, of course, the exclusive remedy language of California Labor Code section 3601 is difficult to avoid.121 However, as the majority noted in Bell, the development of dual capacity theory is indicative of California courts' refusal to apply the exclusive remedy provision where the employment relationship does not predominate.122 In

119. Although the majority, citing Mercer v. Uniroyal, Inc., 49 Ohio App. 2d 279, 361 N.E.2d 492 (1976), characterized Bell's injury as "only a matter of circumstance," 30 Cal. 3d at 278, 637 P.2d at 272-73, 179 Cal. Rptr. at 37, the dissent argued that this claim was "absurd." Id. at 283, 637 P.2d at 276, 179 Cal. Rptr. at 40. The following hypothetical from the defendant's brief illustrates that the duties owed Bell as an employee were not separate from those owed him as a "user" of the allegedly defective products: "S, a large retail store, sells lawnmowers to the general public. A, B, and C are all employees of S. A decides to purchase a lawnmower from S for his personal home use; he goes to B, a store lawnmower salesman, during regular working hours, and while B is demonstrating the lawnmower for A it breaks, injuring both A and B. C, the store's gardener, is injured when an identical lawnmower furnished to him by S breaks while he is using it to mow the grass at S's store entrance. A, B, and C all bring actions at law against S for marketing a defective product.

"The case of A is analogous to Duprey v. Shane, and is a classic case for assertion of dual capacity. While the injury is sustained at work, the employee A is not 'performing service growing out of . . . his employment; . . . the employee is free to pursue a civil action against the employer as seller of the dangerous product, just as if he had been injured while using the same product at home . . . .

"The action brought by C in the hypothetical is analogous to that approved by the Court of Appeal in Douglas v. E. & J. Gallo Winery . . . . It may be arguable that in furnishing to C the same lawnmower which it sells to the general public, S stepped outside the bounds of the employment relationship and chose to treat C as an ordinary consumer of its product . . . .

"The action brought by B in the hypothetical is exactly analogous to the cross-complaint of Appellant William Bell herein against his employer Industrial Vangas, Inc. Whether or not B actually files a claim for workers' compensation benefits, it is clear that the employer-employee relationship as to him has never been interrupted. He stands in the shoes of his employer as its agent for the purposes of marketing the product, and cannot now claim the right to simultaneously occupy the shoes of a user or consumer of the very products which it was his own particular job to sell . . . ." Petition for Hearing in the California Supreme Court by Respondent Industrial Vangas, Inc. at 15-17 (Oct. 27, 1980).

120. 30 Cal. 3d at 272-76, 637 P.2d at 269-71, 179 Cal. Rptr. at 33-35.

121. See supra note 3 for text of California Labor Code § 3601. Commentators have noted: "[T]he majority of the [Bell] court seemed to attach rather little importance to the clear, unambiguous language of the California statute mandating the exclusive remedy rule and to the overwhelming weight of authority in other jurisdictions." Birnbaum & Wrubel, supra note 77, at 945.

122. 30 Cal. 3d at 272, 637 P.2d at 269, 179 Cal. Rptr. at 33. The Bell majority cited a number of cases supporting its argument that the "37-year history of California legal precedents" contradicted Industrial Vangas' statement of the scope of the exclusive remedy provision. The court observed that California's liberal interpretation of the exclusive remedy provision began with the case of Baugh v. Rogers, 24 Cal. 2d 200, 148 P.2d 633 (1944).
In this context, the *Bell* majority emphasized that employer-employee relations and employee remedies have changed since the adoption of the workers' compensation system, making the exclusivity arguments less compelling in the products liability context.\(^\text{123}\)

The *Bell* court sought to define the employer-manufacturer dual capacity exception in such a way as to grant to injured workers the products liability rights enjoyed by the general public.\(^\text{124}\) Recognition of the public policy of deterring the manufacture and distribution of dangerous articles is central to the *Bell* majority’s analysis.\(^\text{125}\) The court also noted that products liability theory comprehends that loss to the user should be reallocated to the enterprise which can best distribute it to society.\(^\text{126}\)

The *Bell* court was obviously concerned with giving injured workers and injured members of the public equivalent treatment with respect to suits based on defective products.\(^\text{127}\) The majority argued that “the historic tradeoff” of workers’ compensation did not encompass products liability rights “not yet in being.” The desire to expand the rights of employees with respect to products liability actions led the *Bell* court to observe:

> To accept Vangas’ construction and application of these statutes would require this court to hold that employees are not entitled to maintain a products liability action against a manufacturer in circumstances where all other users of defective products could maintain such an action. By interpreting the workers’ compensation law in harmony with product liability doctrine a manufacturer will not escape liability to its employees for defective products where there

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\(^\text{Baugh, an employee, injured within the scope of his employment while riding as a passenger in a car driven by his employer, was allowed (under Labor Code § 3852) to pursue an action at law against a third-party lessor of the automobile. 30 Cal. 3d at 273, 637 P.2d at 269, 179 Cal. Rptr. at 33.}\)

\(^\text{123. 30 Cal. 3d at 279-80, 637 P.2d at 273, 179 Cal. Rptr. at 37: “To deny Bell such a cause of action because he is an employee, gives the employer more protection than envisioned by the 1911 Act.”}\)

\(^\text{124. Id. at 279, 637 P.2d at 273, 179 Cal. Rptr. at 37: “The public policy goals underlying product liability doctrine should not be subverted by the mere fortuitous circumstance that the injured individual was an employee of the manufacturer whose product caused the injury.”}\)

\(^\text{125. Id.: “The imperative of public safety, the deterrence of the manufacture of shoddy products, was a powerful force motivating the establishment of product liability law. The manufacturer is held strictly liable because it is in a peculiarly strategic position to promote the safety of [its] products. . . . [T]he pressure of strict liability could scarcely be exerted at a better point if accident prevention is to be furthered by tort law.” (citation omitted).}\)

\(^\text{126. Id. As the California Supreme Court held in Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963), “The purpose of [products] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”}\)

\(^\text{127. 30 Cal. 3d at 278, 637 P.2d at 272, 179 Cal. Rptr. at 36.}\)
would be liability to any other injured person.\textsuperscript{128}

The strength of this argument, however, depends upon the degree to which the dangerous article actually reaches the public. In the context of the \textit{Bell} case itself, the argument that the injured worker should not be denied products liability rights enjoyed by the general public is not persuasive for two reasons: first, the "products" were only sold on an extremely limited basis; second, the use of the product was confined to the immediate purposes of the employment.\textsuperscript{129}

The most unsettling aspect of the \textit{Bell} opinion is that, although the court recognized the argument that a products liability dual capacity exception would open a "Pandora's box" of employee injury cases outside of the workers' compensation system,\textsuperscript{130} it neglected to analyze the effect of expanding the dual capacity doctrine upon the workers' compensation system in California. While many employers may be able to negate the claim that they are manufacturers of a defective item, because of the scope of the "manufacturer" exception employers will also have to prove they have not helped in some way to put the item into the "stream of commerce." This may be a difficult task.\textsuperscript{131} Moreover, there is already a significant amount of products liability litigation in the workplace brought against third-party manufacturers,\textsuperscript{132} indicating that products liability suits against employers may become common occurrences.\textsuperscript{133}

The result in \textit{Bell} indicates a conflict between the administration of the workers' compensation system and products liability theory.

\textsuperscript{128} \textit{Id}.

\textsuperscript{129} \textit{See supra} note 100. \textit{Cf.} Mercer v. Uniroyal, Inc., 49 Ohio App. 2d 279, 361 N.E.2d 492 (1976), in which the allegedly defective item, a truck tire, was widely sold to the public and was utilized in a personal, as well as business, context.

\textsuperscript{130} 30 Cal. 3d at 271-72, 637 P.2d at 268, 179 Cal. Rptr. at 32.

\textsuperscript{131} \textit{See supra} notes 108-16 & accompanying text.

\textsuperscript{132} "One study indicates that employer negligence is involved in something over half of the product-caused workplace injuries. The same study also indicates that, but for workers' compensation exclusivity of remedy, employers would be impleaded in two thirds of the workplace products liability suits." PROCEEDINGS, \textit{supra} note 12, at 87 (working paper by Professor Jerry J. Phillips). In addition, nearly half of products liability litigation is currently workplace-related. \textit{Id.} at 9.

\textsuperscript{133} 30 Cal. 3d at 279, 637 P.2d at 273, 179 Cal. Rptr. at 37. Although the majority clearly regarded the situation where an employee is injured by a product "manufactured or supplied" by his or her employer as unique, the dissent recognized the obvious danger in the exception: "I am convinced that the majority’s adoption of the \textit{Douglas} rule will drive a substantial wedge into the exclusivity principle which characterized the workers' compensation laws from their very inception. If an employer is to be held civilly liable to injured workers in the employer’s capacity as a 'manufacturer,' what compelling reason can exist for denying similar liability for injuries attributable to the employer’s other relationships including his status as ‘landowner,’ ‘motor vehicle operator,’ or ‘cafeteria proprietor’? Yet employers in our ‘pluralistic society’ frequently assume multiple roles in the course of their ordinary business pursuits." \textit{Id.} at 287, 637 P.2d at 278, 179 Cal. Rptr. at 42 (Richardson, J., dissenting).
This conflict arises from the tendency of courts to construe both theories liberally. Workers' compensation laws have been interpreted to bring more worker injuries within their provisions, while products liability theory utilizes an expansive definition of "manufacturer" in order to impute liability to all parties responsible for the distribution of defective products. Thus, the products liability definition of "manufacturer" in the dual capacity context may tend to work against the policy of the workers' compensation system of adjudicating as many worker injury claims as possible within its jurisdiction. In a broad social sense, the policies of workers' compensation and products liability are not necessarily antagonistic since they both have as their goal the reallocation of the cost of injuries from the injured party to society as a whole. However, in a more immediate sense, the Bell holding substantially alters the "tradeoff" of workers' compensation by increasing the number of suits against employers outside of workers' compensation. To the extent the Bell holding is based on questionable legal analysis, the result seems particularly unjustified.

Possible Alternatives to the Products Liability Exception

As an alternative to its products liability approach, the Bell court might have established a test for dual capacity based upon the employer's undertaking significant manufacturing activities outside of the employer-employee relationship. Under such a test, where the employment relationship predominates over the circumstances of the employer's other capacity, the exclusive remedy provision would bar suit by an injured worker against the employer. A variant of this test is the "balancing approach," in which the policies underlying the workers' compensation system are balanced against the policies supporting

134. There is a statutory presumption favoring recovery for an injured worker under the California workers' compensation system where there is doubt as to the worker's status as an "employee." See Laeng v. Workmen's Compensation Appeals Bd., 6 Cal. 3d 771, 494 P.2d 1, 100 Cal. Rptr. 377 (1972); Las Flores School Dist. v. Industrial Accident Comm'n, 13 Cal. App. 2d 180, 56 P.2d 581 (1936). See generally 2 W. Hanna, supra note 1, § 3.01[3], at 3-5.
135. See supra notes 111-14 & accompanying text.
137. As Justice Richardson observed: "There can be no question but that this delicate balance, carefully conceived and preserved for many years by the Legislature, is significantly altered and disturbed when we hold that each of the thousands of employers in this state engaged in manufacturing for ultimate sale to the public loses the statutory immunity to any employee who is injured by defects in the goods or products manufactured." 30 Cal. 3d at 288-89, 637 P.2d at 279, 179 Cal. Rptr. at 43 (Richardson, J., dissenting).
138. See supra notes 108-19 & accompanying text.
139. Advocates of this approach would most likely disapprove of the results in Bell and Douglas since the manufacturing activity in each case was closely related to the purpose of the employer-employee relationship.
liability for the employer acting in the second capacity. A difficulty with undertaking this type of case-by-case analysis of the employer-manufacturer’s dual capacity is the likelihood of unpredictable and inconsistent recoveries for injured workers. An advantage to the Bell approach is that it provides employers and employees with some notice as to what activities will give rise to dual capacity liability for employers.

A more drastic solution to the dual capacity problem is to eliminate such suits by legislative fiat. This could be accomplished by altering the language of California Labor Code section 3601 to make it clear that the exclusive remedy provision applies to employers acting in any capacity at the time of injury. A problem inherent in this approach, however, is that it does not remove the motivating factor for injured employees to attempt to circumvent the exclusivity of workers’ compensation—the perception of workers’ compensation benefits as inadequate.

Another alternative regarding dual capacity is to amend the workers’ compensation laws to allow a more adequate recovery for workers injured by defective products in the workplace. Such an amendment could take the form of a statutory products liability action, allowing a larger workers’ compensation award for an employee injured by a product manufactured by his or her employer. Authority for this type of approach already exists in California in the form of Labor Code

140. Miller & Goldstein, supra note 12, at 116: “[The balancing] approach considers the rationale of the compensation system and then decides whether the policies behind the second relationship are, in fact, important enough to override the purposes behind the framework. This approach may lead to the preservation of the primacy of workers’ compensation in providing for injuries in the workplace.”

141. A bill was defeated in the California Legislature that would have changed California Labor Code § 3601(a) to read: “Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation, pursuant to the provisions of this division is, except as otherwise provided in Division 1 and this division, the exclusive remedy for injury or death of an employee against the employer or against any other employee of the employer acting within the scope of his employment, except as provided in subdivision (b). If the conditions of compensation concur, the fact that the employer also occupies any other capacity prior to or at the time of injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer in that capacity under any theory of law.” A.B. 2065, introduced by Assemblyman Nolan (April 2, 1981) (emphasis added).

The Legislative Counsel’s Digest noted that A.B. 2065 “would also state the finding of the Legislature that the provisions of the bill do not constitute a change in, but are declaratory of existing law . . . .” (emphasis added).

142. See supra notes 38-39 & accompanying text.

143. This form of statutory amendment has also been suggested in Massachusetts, a jurisdiction that does not allow dual capacity recovery in the employer-manufacturer situation. See Note, Rejecting Dual Capacity Doctrine in Products Liability Litigation Against Employer-Manufacturer, 15 SUFFOLK U.L. REV. 520, 535 (1981): “A more viable alternative would require the employer to pay a statutory penalty to the employee for injuries resulting from the defective manufacture of products used in the employment. Such an amendment
section 4553, which provides for an increased recovery for an injured employee when his or her injuries arise from the "willful" act of the employer.¹⁴⁴

A statutory amendment providing for increased recovery under the workers' compensation system for defective product injuries has the advantage of accommodating the products liability policies of deterring the manufacture of defective products and spreading the costs of product injuries throughout society, and the workers' compensation policies of predictable and efficient resolution of disputes over worker injuries. Moreover, such an amendment would not seriously upset the balance of worker and employer rights represented by the workers' compensation system. This course would be superior to the present uncertainty caused by the judicial creation of exceptions to the workers' compensation system such as the dual capacity doctrine.

**Conclusion**

The California Supreme Court in *Bell v. Industrial Vangas* significantly expanded the dual capacity doctrine to allow products liability suits for injured workers against their employers. While the decision supports the policies underlying products liability theory, it is fundamentally inconsistent with the original dual capacity test articulated in *Duprey v. Shane*. In *Bell*, the activities of the employee which resulted in injury were direct incidents of the employment, thus making the employer's "manufacturing" activity not really a "second" capacity at all. The *Bell* opinion thus adopted a very liberal standard for employer-manufacturer dual capacity that will result in numerous suits for worker injuries outside of the workers' compensation system.

The dual capacity doctrine as articulated by the court in *Bell* creates a game of pleading in which the burden is on the employer to negate its activity in every possible capacity in which a person or entity can be sued under products liability theory. The California Legislature should act to reduce the uncertainty inherent in this approach by bringing products liability actions within the quid pro quo of the workers' compensation system.

¹⁴⁴. **CAL. LAB. CODE** § 4553 (West Supp. 1982) provides:

"The amount of compensation otherwise recoverable shall be increased one-half where the employee is injured by reason of the serious and willful misconduct of any of the following: (a) The employer, or his managing representative. (b) If the employer is a partnership, on the part of one of the partners or a managing representative or general superintendent thereof. (c) If the employer is a corporation, on the part of an executive, managing officer, or general superintendent thereof.

"But such increase of award shall in no event exceed ten thousand dollars ($10,000); together with costs and expenses incident to procurement of such award, not to exceed two hundred fifty dollars ($250)."
compensation system. By adopting a statutory products liability award analogous to California Labor Code section 4553, the legislature can protect the integrity of the workers' compensation system while removing some of the incentive to circumvent its exclusive remedy provision. At the same time, important products liability policies will be accommodated.

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