

1974

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Recommended Citation

Workmen's Compensation: Third Party Action Against a Virginia Employer in Tort, 9 U. Rich. L. Rev. 159 (1974).

Available at: <http://scholarship.richmond.edu/lawreview/vol9/iss1/8>

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WORKMEN'S COMPENSATION: THIRD PARTY ACTION AGAINST A VIRGINIA EMPLOYER IN TORT

The purpose of the Virginia Workmen's Compensation Act is to provide compensation to an employee disabled by an accident arising out of and in the course of his employment.¹ Under the Act, both the employer and employee gain and lose certain advantages. In exchange for his tort cause of action, the employee gets the benefit of certain recovery without the expense and delay normally attached to personal injury actions. The employer is no longer liable in a negligence action with its prospect of a sizeable jury award, but he loses the benefit of the fellow-servant rule and the defense of contributory negligence.²

The Act has undergone numerous amendments which have affected the rights and remedies of the employee.³ Today, the Act is interpreted as allowing an employee to proceed through administrative processes against his employer and by tort action against any other party alleged to have proximately caused his injury.⁴ Even though an employee is injured on the

1. *Rust Eng'r Co. v. Ramsey*, 194 Va. 975, 76 S.E.2d 195 (1953); *Ellis v. Commonwealth*, 182 Va. 293, 28 S.E.2d 730 (1944); *Burlington Mills Corp. v. Hagood*, 177 Va. 204, 13 S.E.2d 291 (1941).

2. *Fauver v. Bell*, 192 Va. 518, 65 S.E.2d 575 (1951).

3. The central statute is VA. CODE ANN. § 65.1-40 (Repl. Vol. 1973). It was originally enacted in 1918 and subsequently amended in 1920, 1924, 1930, 1932 and 1936. Each amendment substantially affected the rights and remedies available to the employee. In 1936 the General Assembly returned the statute to the wording of the 1920 amendment with the result that much confusion and uncertainty existed over just what remedies the employee had. The case of *Noblin v. Randolph Corp.*, 180 Va. 345, 23 S.E.2d 209 (1942), undertook an historical recounting of the amendments ending with a pronouncement on the status of the law which has been adhered to since.

4. The essence of the *Noblin* holding was that the original 1918 statute, which was carried forward verbatim into VA. CODE ANN. § 65.1-40 (Repl. Vol. 1973), was intended to govern only the relationship of employer to employee. In spite of the language that this compensation "shall exclude all other rights and remedies . . . at common law or otherwise . . .", the employee could maintain a suit against a third party whom he alleged to be solely or jointly responsible for his injury. The General Assembly seemed content with this construction of the statute, for in 1920, it added what is today VA. CODE ANN. § 65.1-42 (Repl. Vol. 1973). See note 6 *infra*.

The amendment was deemed necessary because the 1918 act gave the employee a double recovery—one from his employer and one from the negligent third party. The 1920 amendment was designed to meet the situation where a third party was the sole proximate cause of the employee's injury, but because the employee was on the job, the employer had to pay under workmen's compensation. The court in *Chesapeake & Ohio Ry. v. Palmer*, 149 Va. 560, 140 S.E. 831 (1927), explained the need for the 1920 amendment:

It soon became apparent that an employer might be mulct in compensation who was no wise at fault. The right of the employee to sue the wrongdoer had not been affected, and it was then possible for him to duplicate his recovery and to secure damages from two sources. Such a situation called for relief, it was given in the amendment in 1920,

job as a result of the sole negligence of a third person, the employee can demand compensation from his employer under the Act.⁵ The Code of Virginia subrogates a paying employer to the employee's tort claim against the third party,⁶ but it is unclear whether the third party can seek indemnity or contribution from the employer who is guilty of primary or contributory negligence. There are reasons available to explain this,⁷ but the fact

and written into the second paragraph of section 12. It gave to the employer the right to recover from the wrongdoer whatever he had actually paid, and it took from the employee the right *pro tanto* to a double recovery, but beyond this it left the employee's rights to recover as it was before. *Id.* at 573, 140 S.E. at 836.

The effect of the 1920 amendment was to allow the employee to keep his remedies against the employer and the third party, but to deprive him of his potential double recovery by entitling the employer to join in the suit against the third party. If the employer was not responsible for the injury to his employee, he would not have to pay out anything. By enacting this 1920 amendment, the General Assembly acknowledged that inequities arose in the situation where a third party, who was not included in the Compensation Act's coverage, became involved. The inequities were the potential double recovery by the employee and payment by the employer in a situation where he was not at fault.

In 1924, the legislature amended the statute so that the employee could maintain an action against either the third party or the employer, but that procurement of a judgment against one, barred his remedy against the other. It would seem that after this amendment, the injured employee could expect pressure from his employer to bring his action against the third party. In 1936, however, the General Assembly deleted this amendment, restoring to the employee the right to proceed against both employer and third party, but stripping him of his potential double recovery by the retention of the 1920 amendment.

5. VA. CODE ANN. § 65.1-40 (Repl. Vol. 1973) states:

The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death.

6. VA. CODE ANN. § 65.1-42 (Repl. Vol. 1973) states:

In any such action by such employee, his personal representative or other person against any person other than the employer, the court shall, on petition or motion of the employer at any time prior to verdict, ascertain the amount of compensation paid and expenses for medical, surgical and hospital attention and supplies, and funeral expenses, incurred by the employer under the provisions of this Act, and deduct therefrom a proportionate share of such amounts as are paid by the plaintiff for reasonable expenses and attorney's fees as provided in § 65.1-43; and in event of judgment against such person other than the employer the court shall in its order require that the judgment debtor pay such compensation and expenses of the employer, less said share of expenses and attorney's fees, so ascertained by the court out of the amount of the judgment, so far as sufficient, and the balance, if any, to the judgment creditor.

7. The explanations that can be advanced as to why the question of the rights of a third party against the employer have never been presented to the supreme court are:

(a) the third party, unlike the employer, can raise the issue of the employee's contributory negligence when sued by the employee;

(b) the third party, who was a defendant in this suit by the employee was unable to bring

remains that no Virginia Supreme Court decision has addressed the issue of whether a third party has the right to join an employer covered by Workmen's Compensation as a third party defendant.

Beginning with *Moretz v. General Electric Co.*,⁸ a line of federal district court cases have confronted this issue holding that Virginia law denies a third party the right of contribution and indemnity. This comment examines the Virginia precedent relied upon by these federal cases to determine the correctness of their conclusions. The federal result opts for the rights of the employer over those of the third party in both the indemnity and contribution setting, and, in the opinion of the author, fails to balance the rights of the two antagonists to give more equitable treatment by allowing contribution.

The employers met with immediate success in indemnity cases⁹ where the possible effect upon their rights was severe. The federal cases correctly ascertained that an inequitable hardship would be thrust upon the employer if recovery were allowed. Unfortunately, the courts in these cases failed to tailor the rules of law narrowly, and later courts have applied these broadly stated indemnity principles to contribution cases.

By seeking indemnity, a third party attempts to be made whole by shifting his loss to the employer. The employers argue that an inequitable

a third party action against the employer until October 1, 1951, when Rule 3:10 of the Supreme Court of Virginia restored it;

(c) VA. CODE ANN. § 65.1-41 (Repl. Vol. 1973) states that the employer, after payment to the employee, is entitled to maintain an action against the third party for indemnity, and that the third party can raise the issue of the employer's contributory negligence as well as any question of employer contribution.

8. 170 F. Supp. 698, *aff'd in part, rev'd in part*, 270 F.2d 780, *rehearing denied*, 272 F.2d 624, *cert. denied*, 361 U.S. 964 (1959).

The majority of cases involve a third party action for indemnity as opposed to contribution against the employer. Two reasons for this appear likely:

(a) many courts view indemnity simply as an advanced form of contribution and have allowed the third party to be made whole at the expense of the employer. *See Treadwell Constr. Co. v. United States*, 299 F.2d 789 (3rd Cir. 1962), *cert. granted*, 372 U.S. 772 (1963); *American Dist. Tel. Co. v. Kittleson*, 179 F.2d 946 (8th Cir. 1950). Thus, there is a monetary incentive to the third party to seek indemnity and not merely contribution.

(b) usually the third party is a large business which has learned from past experience to obtain written contractual indemnity from the employer before undertaking business dealings where injury to employees can be anticipated.

The majority of the cases in both state and federal courts allow the third party indemnity only in those situations where the third party has obtained it by written agreement with the employer. *See Larson, Workmen's Compensation: Third Party's Action Over Against Employer*, 65 Nw. U.L. REV. 351, 367-420 (1970). *Contra*, *Treadwell Constr. Co. v. United States*, 299 F.2d 789 (3rd Cir. 1962), *cert. granted*, 372 U.S. 772 (1963); *American Dist. Tel. Co. v. Kittleson*, 179 F.2d 946 (8th Cir. 1950).

9. *See PROSSER, TORTS* §§ 51, 52 (1971).

situation arises when indemnity is allowed since they have paid the employee once already under Workmen's Compensation. If the third party, who suffered judgment at the hands of the employee, is allowed indemnity, the employer is in effect paying twice. This indirectly defeats the purpose¹⁰ of the Compensation Act, which is, to limit the recovery that can be obtained against the employer. The rule announced in indemnity cases is based upon the working of the compensation acts, which invariably specify that the creation of this automatic right to compensation in the employee bars all other remedies he has against his employer, specifically his tort remedy.¹¹ The third party is said to be claiming through the rights of the employee, and since the employee has no tort remedy, neither can the third party seek indemnity in tort. The majority of courts so hold.¹²

With this rule handed down in indemnity cases, it was a simple step to apply the same rule to contribution. Most courts hold that for contribution to lie the parties must be jointly liable or joint tortfeasors. If, then, the only basis for the employer's liability to employee lies in an administrative action based upon employer-employee relationships, while the third party's liability is in tort, they cannot be joint tortfeasors; and contribution by the third party is, therefore, impossible.¹³

This application of the indemnity rule in contribution cases is incorrect, for the third party's ability to obtain contribution should be based upon fault and not mechanistic legal theory. Contribution is based upon a set of equities different from those which govern an indemnity action. In contribution the third party is not attempting to shift the entire burden upon the employer. He seeks rather to demonstrate that the employer is jointly at fault in causing the injury and asks that the employer be made to pay accordingly. That two parties equally at fault should pay equally for the injury incurred is unquestionably just.¹⁴ However, the courts have not adequately distinguished between contribution and indemnity and have failed to weigh the equities of the opposing parties to see if the balance is different in a contribution action. *American District Telegraph Co. v.*

10. See note 2 *supra*.

11. See *Slattery v. Marra Bros., Inc.*, 186 F.2d 134 (2nd Cir. 1951); *Rea v. Ford*, 198 Va. 712, 96 S.E.2d 92 (1957); VA. CODE ANN. § 65.1-40 (Repl. Vol. 1973); Note, *Contribution and Indemnity: The Effect of Workmen's Compensation*, 42 VA. L. REV. 959, 961-63 (1956). See note 3 *supra*.

12. See note 28 *infra*.

13. See Larson, *Workmen's Compensation: Third Party's Action Over Against Employer*, 65 Nw. U.L. Rev. 351, 353 (1970) for a collection of cases.

14. Yet at common law there was no right of contribution. *Norfolk & P.B.L. Ry. v. Parker*, 152 Va. 484, 147 S.E. 461 (1929). It was brought into Virginia in 1919 by statute, now VA. CODE ANN. § 8-627 (Repl. Vol. 1957).

Kittleson,¹⁵ exposes how inequitable the denial of contribution may be to the third party. The district court refused to allow the third party to join the employer in a suit by the employee and entered a \$60,000 judgment against the third party even though it found as a fact that the employer was primarily negligent. The employer had paid only \$6,800 under the Compensation Act award. The circuit court, declaring this result to be unconscionable, reversed by construing the language of the Iowa Workmen's Compensation Act as governing the rights and remedies of *only* the employer and employee, and thus not preventing a contribution suit by the third party.¹⁶

Denial of the right to contribution to a third party has the inequitable effect of causing one wrongdoer to bear substantially the entire loss. If the reason for the indemnity rule is that an inequitable burden is placed upon the employer, that burden is reduced considerably in a contribution action where he is asked only to share the third party's loss.

The Pennsylvania Supreme Court, which rejects the argument that contribution requires joint liability to the injured party and holds the employer liable to the third party, recently summarized its prior holdings by stating:

Implicit in these holdings is the view that the definition of 'joint tortfeasors' does not require that they have a common liability toward the injured party but only that their combined conduct be the cause of the injury.¹⁷

15. 179 F.2d 946 (8th Cir. 1950).

16. In *Kittleson*, the court stated:

. . . [A] statute will not be held to have abolished a common-law right existing at the date of its enactment, unless that result is, imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory. [citing cases].

. . . No statute is to be construed as altering the common law, farther than its words import. [citing cases].

. . . We can discover nothing in the language of the Iowa Compensation Act indicating a purpose to abolish common law actions in tort except as between employer and employee. *Id.* at 952-53.

The Virginia Supreme Court declared that the right of contribution did not exist at common law, *Norfolk & P.B.L. Ry. v. Parker*, 152 Va. 484, 147 S.E. 461 (1929). The action was created by statute in 1919, now VA. CODE ANN. § 8-627 (Repl. Vol. 1957). The theory behind contribution is "equality is equity" and, thus, each joint tortfeasor should be made to pay his pro rata share of the damages. For the purpose of creating exceptions to the contribution rule, the court has interpreted the Virginia statute as requiring joint liability to the injured party as a prerequisite to maintaining a contribution action. See note 30 *infra*.

17. *Elston v. Industrial Lift Truck Co.*, 420 Pa. 97, 102 n.2, 216 A.2d 318, 320 n.2 (1966).

Further, the logic behind the employer's argument is questionable. In *Slattery v. Marra Brothers, Inc.*¹⁸ the court paraphrases the language of a compensation statute relied on by the employer:

We are therefore to assume that Slattery's (the employee) contract of employment with the Spencer Company (the employer) was a 'surrender . . . of . . . *any other method*, form or amount of compensation' for any injuries he might receive 'in the course of his employment.'

Employers have successfully argued that the italicized language, resulting in the loss of the employee's tort action against the employer, also results in the loss of any contribution action against him by the third party. However, if this language truly denies the employee any other method or form of recovery for his injury,¹⁹ then he should likewise be precluded from maintaining a tort action against a third party. But, the Virginia Supreme Court has consistently held that the employee can sue the third party, holding that the Compensation Act governs only the rights and remedies between employer and employee.²⁰ Therefore, the language of the statute

18. 186 F.2d 134 (2nd Cir. 1951). The court had the express duty of interpreting the New Jersey Workmen's Compensation Act. The plaintiff, Slattery, was an employee of a stevedore, Spencer and Sons, which had a crew working on a pier leased by defendant Marra Brothers. Plaintiff's injury entitled him to workmen's compensation. He also filed a tort action against Marra Brothers seeking indemnity. The court held that the language of the New Jersey statute would not allow a third party suit against an employer where there was no duty running directly from the employer to the third party. The court held:

We are therefore to assume that *Slattery's contract of employment with the Spencer Company was a 'surrender * * * of * * * any other method, form or amount of compensation'* for any injuries which he might receive 'in the course of his employment'; and the Spencer Company was under no liability to him of any kind. Therefore, the right of Marra Bros., Inc., to indemnity from the Spencer Company cannot rest upon any liability of that company to Slattery; and if it exists at all, it is hard to see how it can arise in the absence of some legal transaction between the two corporations, other than that of joint tortfeasors: such as contract - * * *'. *Id.* at 138 (emphasis added).

19. VA. CODE ANN. § 65.1-40 (Repl. Vol. 1973), states that this administrative remedy shall exclude all other remedies of the employee, "at common law or otherwise, on account of such injury, loss of service or death." At one time, the General Assembly denied the employee the right to sue the third party. *See* note 5 *supra*. The addition of VA. CODE ANN. §§ 65.1-41, 42, (Repl. Vol. 1973) has forced the Virginia Supreme Court to conclude that the language of § 65.1-40 must have application only to the relation between employer and employee.

20. In *Feitig v. Chalkley*, 185 Va. 96, 38 S.E.2d 73 (1946), the court held:

It seems clear that it was the legislative intent to make the act exclusive in the industrial field so that, in the event of an industrial accident, the rights of all those engaged in the business would be governed solely thereby. The remedies afforded the employee under the act are exclusive of all his former remedies within the field of the particular business, *but the act does not extend to accidents caused by strangers to the business*. If the employee is performing the duties of his employer and is injured by a stranger to the business, the compensation prescribed by the act is available to

should not be construed to stand for the proposition that its effect is to prohibit the third party from seeking contribution. Can the statute be logically construed to allow the employee rights against third parties and to deny third parties rights against the employer?

The inequity to the third party is intensified in those states, like Virginia, which not only deny him contribution, but allow the employer indemnity against him. Virginia sets forth two procedures by which the employer can seek indemnity. First, having paid the employee, the employer is subrogated to the tort claim against the third party.²¹ This procedure has at least an element of fairness in that, since the employer is prosecuting the action as plaintiff, he is subject to the defenses available to the third party, such as contributory negligence. Second, under § 65.1-42 of the Virginia Code,²² the employer may submit a petition to the court in a suit by the employee against the third party setting forth the amount of compensation paid to the employee. If the employee recovers judgment from the third party, the employer is reimbursed out of it. Here the employer is not a party to the suit and thus not subject to the defenses of the third party. The employer may, therefore, pay out nothing to his employee in a situation where he is guilty of primary or contributory negligence.²³

In *Moretz v. General Electric Co.*,²⁴ the district court concluded that Virginia law would deny the third party contribution.²⁵ It thus fell in line

him, but that does not relieve the stranger of his full liability for the loss, and, if he is financially responsible, there is no reason to cast this loss as an expense upon the business. *Id.* at 102, 38 S.E.2d at 75 (emphasis added).

21. See VA. CODE ANN. § 65.1-41 (Repl. Vol. 1973).

22. See note 6 *supra*.

23. Thus, employing the figures cited in *American Dist. Tel. Co.*, note 15 *supra*, where the employer had to pay \$6,800 under workmen's compensation, he could receive back this amount from the third party who would pay the remainder of the \$60,000 judgment, or \$53,200 to the employee.

Allowing a suit for indemnity by the employer, but denying even the right to seek contribution to the third party would seem to violate the equitable principle requiring mutuality of remedy as a prerequisite for instituting suit. This argument would no doubt be of little value in a court of law where it could easily be argued that the Workmen's Compensation Act has destroyed this principle of natural justice.

24. *Moretz v. General Elec. Co.*, 170 F. Supp. 698 (W.D. Va. 1959).

25. The Court said:

The right of contribution is governed in Virginia by statute, § 8-627, Va. Code Ann., 1950 as amended, and this statute has been interpreted to mean that no right to contribution exists when the original party plaintiff has no right of action against the alleged joint tortfeasor. See *Norfolk Southern Ry. v. Gretakis*, 162 Va. 597, 174 S.E. 841 (1934). Here, the plaintiff had no right of action in tort against his employer since his rights against his employer were exclusively governed by the Tennessee Workmen's Compensation Law. *Id.* at 704.

with the majority of federal cases interpreting similar state statutes.²⁶ In reaching this conclusion, the court cited a Virginia case, *Norfolk Southern*

26. It is valuable to undertake an exploration of the federal court cases, especially those of the U.S. Supreme Court, for the holdings either deal with state compensation acts quite similar to Virginia's or deal with the Federal Compensation Act, 5 U.S.C. § 8116(c) (1966) or the Longshoremen's and Harbor Worker's Act, 33 U.S.C. § 901 *et seq.* (1927).

A noted authority in the field of workmen's compensation, Arthur Larson, author of *THE LAW OF WORKMEN'S COMPENSATION* (1970) has made a thorough review of the recent federal cases in his article *Workmen's Compensation: Third Party's Action Over Against Employer*, 65 Nw. U.L. REV. 351 (1970). Mr. Larson's conclusion that the Supreme Court has not explicitly passed on the third party's right to seek indemnity or contribution is subject to question.

In *Baccile v. Halcyon Lines*, 187 F.2d 403 (3rd Cir. 1951), *rev'd*, 342 U.S. 282 (1952), the circuit court refused to apply the existing majority rule that the employer could not be liable in contribution, yet it was unwilling to renounce the theory either. Instead, it held that the peculiar rules applicable to admiralty allowed mutual liability between employer and third party. The Supreme Court reversed on a technical point, declaring that contribution has never been allowed in a non-collision admiralty case such as *Baccile*. *Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597 (1963) (referred to as *Weyerhaeuser I* by Mr. Larson) was an admiralty collision case; wherein the Supreme Court allowed contribution by the third party stating:

In the present case there was no contractual relationship between the United States and the petitioner, governing their correlative rights and duties. There is involved here, instead, a rule of admiralty law which, for more than 100 years, has governed with at least equal clarity the correlative rights and duties of two shipowners whose vessels have been involved in a collision in which both were at fault. *The Schooner Catharine v. Dickinson*, 17 How. 170, 177; *The North Star*, 106 U.S. 17, 21. See *Halcyon Lines v. Haenn Ship Corp.*, 342 U.S. 282, 284. Long ago this court held that the full scope of the divided damages rule must prevail over a statutory provision which, like the one involved in the present case, limited the liability of one of the shipowners with respect to an element of damages incurred by the other in a mutual fault collision. *The Chattahoochee*, 173 U.S. 540. *Id.* at 603.

In this case, as in *The Chattahoochee*, we hold that the scope of the divided damages rule in mutual fault collisions is unaffected by a statute enacted to limit the liability of one of the shipowners to unrelated third parties. *Id.* at 604.

In *United Air Lines v. Wiener*, 335 F.2d 379 (9th Cir.), *cert. denied*, 379 U.S. 951 (1964), the court held that the *Weyerhaeuser* decision was limited to the admiralty law field and denied contribution to the third party against the employer, the United States. In *Weyerhaeuser* and in *Wiener*, the United States was the employer sought to be joined for contribution. The United States raised the language of the applicable federal acts, the Longshoremen's and Harbor Worker's Act, 33 U.S.C. § 901 *et seq.* (1927), and the Federal Compensation Act, 5 U.S.C. § 8116(c) (1966) as a defense, arguing the language denied a contribution action:

The liability of the United States or an instrumentality thereof under this subchapter of this title or any extension thereof with respect to the injury or death of an employee is exclusive, and instead of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, because of the injury or death in any direct judicial proceeding, in a civil action or in admiralty, or by any administrative or judicial proceeding under

Railway Co. v. Gretakis,²⁷ which it interpreted as announcing the general

workmen's compensation statute or under a Federal tort liability statute: However, that this subsection does not apply to a master or a member of the crew of a vessel. 5 U.S.C. § 8116(c) (1966) (emphasis added).

These acts, in essence, declare that the United States shall not be liable to anyone else on account of such injury after it has compensated the employee. There is no equivalent language in the Virginia Compensation Act, as VA. CODE ANN. § 65.1-40 (Repl. Vol. 1973) deals only with the rights and remedies of the employee.

In spite of this broad statutory language, the district court in *Treadwell Constr. Co. v. United States*, 299 F.2d 789 (3d Cir. 1962), *cert. granted*, 372 U.S. 772 (1963), allowed a third party contribution against the United States. The injury was on a construction job and no admiralty action was involved. The district court opinion was rendered in 1961, two years before *Weyerhaeuser*. The circuit court reversed, holding that the language of the Federal Compensation Act prohibited contribution. The Supreme Court granted certiorari to the third party one month after its decision in *Weyerhaeuser*:

Per Curiam. The petition for writ of certiorari is granted. The judgment of the United States Court of Appeals for the Third Circuit is vacated and the case is remanded to the United States District Court for the Western District of Pennsylvania for further consideration in light of *Weyerhaeuser Steamship Co. v. United States*, 372 U.S. 597, 772 (1963).

On remand, the district court entered judgment for the third party on his contribution claim. This decision of the Supreme Court occurred in 1963, yet in 1964 it denied certiorari in the *Wiener* case where the circuit court had refused contribution to the third party.

Since Larson's article in 1970, the Supreme Court has not spoken to this question again; but the Fourth Circuit Court of Appeals in *Wallenius Bremen G.m.b.H. v. United States*, 409 F.2d 994 (1969) rejected *Wiener* and viewed the Supreme Court's action in *Treadwell* as definitive:

Weyerhaeuser permits indemnity to the shipowner who had satisfied the claim of the injured United States employee, even though the injured employee could not himself have maintained a suit for damages against the United States because of the limitation of the Act. Thus it seems clear that the exclusive remedy provision of the Act is not per se a bar to an action for indemnity.

That the Court may have thought that other types of obligations, as well as the divided damages rule, were intended to be undisturbed by the Federal Employees' Compensation Act when claims based on them were pressed by third parties, is indicated by the disposition of *Treadwell Const. Co. v. United States*, 372 U.S. 772, 83 S. Ct. 1102, 10 L.Ed.2d 136 (1963). The conclusion of the Court of Appeals for the Third Circuit, sub nom., *Drake v. Treadwell Const. Co.*, 299 F.2d 789 (3d Cir. 1962), was that the United States could not be made to contribute as a joint tortfeasor when prosecution of a tort action by the injured person against the United States was barred by § 7(b) of the Compensation Act. This decision was vacated and the case was remanded to the district court to consider in the light of *Weyerhaeuser* the validity of a claim by a government contractor paid damages to a government employee who was injured by the explosion of a tank provided by the contractor.

But the government urges that *Ryan*, *Weyerhaeuser* and *Treadwell* are distinguishable, and therefore not controlling, and press upon us the view of the Ninth Circuit denying indemnity in *Wien Alaska Airlines, Inc. v. United States*, 375 F.2d 736 (9th Cir. 1967), and in *United Air Lines v. Wiener*, 335 F.2d 379 (9th Cir. 1964), *cert. denied* 379 U.S. 1951, 85 S.Ct. 452, 13 L.Ed.2d 549 (1964). *Id.* at 996-97.

27. See *Norfolk Southern Ry. v. Gretakis*, 162 Va. 597, 174 S.E. 841 (1939).

rule that the third party cannot seek contribution since he is not jointly liable with the employer. But an examination of the facts of this case suggest that such an interpretation is too broad.

In *Gretakis*, a railroad company was denied contribution from the father of an unemancipated infant. The child was injured due to the joint negligence of the father and the railroad. The Virginia Supreme Court viewed the suit by the railroad as an indirect attempt by the infant to recover in tort from her parent.²⁸ Balancing the equities, the court concluded that the social value of preserving family harmony outweighed the railroad company's right to hold a joint wrongdoer accountable.²⁹ To legally justify the denial of this right to the railroad, the court formulated the rule that there can be no contribution where one of the wrongdoers is immune from suit by the injured party. Without comparing the equity of the third party's situation to that of the railroad company's in *Gretakis*, the district court applied this parent-child contribution rule to a suit by a third party against the employer. The error is that the policy reason justifying the imposition of the rule in *Gretakis* did not exist in the workmen's compensation situation. The *Gretakis* case laid down a parental immunity rule in automobile accident cases. The Virginia Supreme Court has since abrogated this immunity, expressly overruling *Gretakis*.³⁰ *Gretakis* has

28. The court stated:

According to the great weight of authority an unemancipated minor child cannot sue his or her parent to recover for personal injuries resulting from an ordinary act of negligence. *Id.* at 600, 174 S.E. 842.

But, in the *Gretakis* case, the child was not suing her father. The court, without speaking to the point, realized that to allow contribution to the railroad would indirectly sanction a suit against the father by the child. Thus, the court continued:

Section 5779, Code Va. 1919, gives a right of contribution only where the person injured has a *right of action* against two persons for the same indivisible injury. Though the concurring negligence of two persons may have resulted in an indivisible injury to a third, if the third person has a cause of action against only one of them, that one cannot enforce contribution from the other. The statute allowing contribution does not create any greater liability than existed before its enactment. See in this connection, *Consolidated Coach Corp. v. Burge*, 245 Ky. 631, 54 S.W.(2d) 16, 85 A.L.R. 1086; *Ackerson v. Kibler*, 138 Misc. 695, 246 N.Y.S. 580. *Id.* at 600, 174 S.E. at 842.

Section 5779, now VA. CODE ANN. § 8-627 (Repl. Vol. 1957) states:

Contribution among wrongdoers may be enforced when the wrong is a mere act of negligence and involves no moral turpitude.

The *Gretakis* court stated that this statute gives a right of contribution only when the injured party has a cause of action against both wrongdoers. Yet, what conceivable construction of the language of the statute can justify this conclusion? Clearly, the court was legislating and was simply loath to admit it.

29. See *Wright v. Wright*, 213 Va. 177, 178, 191 S.E.2d 223, 224 (1972); *Smith v. Kauffman*, 212 Va. 181, 183, 183 S.E.2d 190, 192 (1971).

30. *Smith v. Kauffman*, 212 Va. 181, 183 S.E.2d 190 (1971). The *Gretakis* case was overruled but the principle that an unemancipated infant could not sue her parent in tort was

never been cited by a later Virginia Supreme Court case for the proposition that contribution will not be allowed where one of the wrongdoers is immune from suit by the injured party. In fact, the only cases which have quoted the *Gretakis* contribution rule with approval are federal court cases involving Workmen's Compensation.³¹

The Virginia Supreme Court needs to examine the equities in favor of the third party and the employer in the contribution setting. If the court balances these opposing equities, contribution should be allowed to the third party where both parties are jointly negligent.³² Unlike indemnity, contribution does not seek to place the entire burden upon just one of the wrongdoers. By leaving the third party without a contribution action, while allowing the employer indemnity against the third party, the Virginia act places an inequitable and often crushing burden upon the third party. The General Assembly enacted the Compensation Act to regulate the rights and remedies of employee and employer. It did not anticipate the situation

only partially overruled. In the *Gretakis* case, the father of the infant was driving an automobile which collided with a railroad train. After the *Kauffman* case, the infant could maintain an action involving "automobile accident litigation." In *Kauffman*, the court found that domestic harmony would not be harmed by allowance of the suit and declared in effect that if the reason for the rule no longer exists, neither should the rule. Thus if the parent is liable to the child in an automobile accident case contribution against the parent may be sought by a third party.

31. The federal cases are: *Moretz v. General Elec. Co.*, 170 F. Supp. 698, *aff'd in part, rev'd in part*, 270 F.2d 780, *rehearing denied*, 272 F.2d 624, *cert. denied*, 361 U.S. 964 (1959); *Drumgoole v. Virginia Elec. & Power Co.*, 170 F. Supp. 824, 825 (E.D. Va. 1959); *Mahone v. McGraw-Edison Co.*, 281 F. Supp. 582 (E.D. Va. 1968); and *Jennings v. Franz Torwegge Mach. Works*, 347 F. Supp. 1288 (W.D. Va. 1972). *Drumgoole* and *Mahone* simply cite the *Moretz* and *Gretakis* cases. *Jennings* cites *Gretakis* and *Drumgoole*. It is interesting to note that the district court in *Moretz* denied the third party contribution or indemnity. The circuit court found the employer primarily negligent and allowed indemnity based on a contract imposed by I.C.C. regulations. The circuit court affirmed the district court's findings as regards that part of the suit by the employee against the third party; but reversed the dismissal of General Electric's third party action against Mason & Dixon. The third party action was for contribution or indemnity. The circuit court never once mentioned contribution, having found a basis for recovery in indemnity. But when it reversed the action of the district court "insofar as it dismisses the third-party action," it is arguable that it overruled by implication that part of the decision by the district court on contribution. With both the validity of the district court's holding in *Moretz* and the Virginia Supreme Court's holding in *Gretakis* in doubt, the need for a definitive holding by the Virginia court is clear.

32. While many courts still continue to hold that the third party cannot sue the employer, there is certainly no bar to a suit by the third party against officers in the employer's corporation whose negligence can be seen as contributing to the employee's accident. Since a corporation can only function through its directors, officers and employees, it thus becomes a real possibility that the alleged negligence of the corporation is in fact the negligence of one of its officers. Thus, the officer's or manager's insurance carrier is made to share the loss sustained by the third party. *See* 46 TUL. L. REV. 352 (1971).

in which a third party with rights against the employer is thrust into the picture. A construction of its language to deny the third party any remedy against an employer under Workmen's Compensation coverage is harsh and inequitable.

K.C.W. II