

February 1950

## Workmen's Compensation--Third Party Tortfeasor--Compensation Payment as Bar to Action

T. N. C.

*West Virginia University College of Law*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Torts Commons](#), and the [Workers' Compensation Law Commons](#)

---

### Recommended Citation

T. N. C., *Workmen's Compensation--Third Party Tortfeasor--Compensation Payment as Bar to Action*, 52 W. Va. L. Rev. (1950).

Available at: <https://researchrepository.wvu.edu/wvlr/vol52/iss2/7>

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

(1927), where a drawing for an automobile was conducted without charge among those attending an auction. The Virginia court held that one's attendance at the sale was legal detriment which supplied the element of consideration necessary to constitute a lottery. The court in the *Huntington Theatre* case did not refer to this Virginia case in rendering its decision.

On the other hand, a minority of courts hold that a valuable consideration is necessary to constitute a lottery, and that such is not shown by a mere technical consideration or by increased revenues arising from larger attendance or by the purchase of a ticket of admission where that is not a condition precedent to participation. *State v. Eames*, 87 N. H. 477, 183 Atl. 590 (1936); *State v. Hundling*, 220 Iowa 1369, 264 N. W. 608 (1936); *People v. Shafer*, 160 Misc. 174, 289 N. Y. S. 649, *aff'd*, 273 N. Y. 475, 6 N. E.2d 410 (1936); *People v. Cardas*, 137 Cal. App. 788, 28 P.2d 99 (1933).

It must be pointed out that in the *Huntington Theatre* case, the court was apparently dealing with a scheme whereby all but a few were required to purchase a ticket of admission in order to participate in the give-away program. It does not necessarily follow that the court will find the element of consideration present where participation is open to all without the necessity of purchasing a ticket, even though such a requirement as presence in the vicinity of the theatre in order to claim the prize promptly serves to induce nearly all those desiring to participate to purchase tickets so as to be seated in the theatre at the time the awards are made. However, the court cited with approval and appeared to base its decision upon the reasoning of many of the cases herein cited under the majority view. It would seem to be a fair inference that the court in the future will not tolerate any similar scheme which is cloaked with a flimsy veil of "free participation" and designed to evade the lottery statute.

J. T. C., Jr.

---

WORKMEN'S COMPENSATION—THIRD PARTY TORTFEASOR—COMPENSATION PAYMENT AS BAR TO ACTION.—*A* fractured his arm in a coal mine. *A* and his employer, *B*, were subject to the Workmen's Compensation Act. Dr. *X* of *Y* hospital treated *A*, and the state compensation commissioner paid for the medical and surgical care. Compensation paid to *A* for his total injury was upon a fifteen per-

cent permanent partial disability basis. *A* then brought suit against *X* and *Y* for their alleged negligence. The circuit court dismissed the action. *Held*, that an employee who is paid compensation for an injury received in the course of employment, including any aggravation thereof, cannot maintain an action against a physician chosen by him for malpractice in negligently aggravating such injury. Affirmed. *Makarenko v. Scott*, 55 S. E.2d 88 (W. Va. 1949).

If the principal case were out of simple tort, no fault could be found with the court's decision. See W. VA. REV. CODE c. 55, art. 7, §12 (Michie, 1949) and annotations. But compensation payment does not affect tort liability so as to release a subsequent tortfeasor. It is a contractual obligation, similar to accident or life insurance, substituted in lieu of the employer's common law liability, and is imposed regardless of fault. Note 38 HARV. L. REV. 971 (1925). "That a person may be protected by accident insurance and at the same time have a right of action against a person whose negligence produced the accident resulting in his injury is well settled." *Merrill v. Torpedo Co.*, 79 W. Va. 669, 679, 92 S. E. 112, 116 (1917). An employer making payment under the West Virginia Compensation Act, W. VA. REV. CODE c. 23 (Michie, 1949), fulfills only his own contractual obligation, and does not satisfy liability of the third party tortfeasor to the employee. *Crab Orchard Improvement Co. v. Chesapeake & Ohio Ry.*, 115 F.2d 277 (4th Cir. 1940). Thus, if the above view as to the effect of compensation payment is adopted, the argument as to recovery of compensation and recovery from the third party being a double recovery for a single wrong should give way to the principle that one should be held accountable for the consequences of his own wrong.

Viewing compensation payment in this light, the courts generally hold that, in the absence of an express statutory provision subrogating the employer or insurer to the employee's rights against a third party, the employee can recover both from the compensation fund and against the third party tortfeasor. *Crab Orchard Improvement Co. v. Chesapeake & Ohio Ry.*, *supra* (holding that the employer is not subrogated to employee's right of action against the third party, in West Virginia); *Hotel Equipment Co. v. Liddell*, 32 Ga. App. 590, 124 S. E. 92 (1924); *Newark Paving Co. v. Klotz*, 85 N. J. L. 432, 91 Atl. 91 (1914); Notes, 38 HARV. L. REV. 971 (1925), 46 YALE L. J. 695 (1937), 26 VA. L. REV. 524 (1939). This result has been followed in West Virginia in cases where the third party was the original wrongdoer. *Mercer v. Ott*, 78 W. Va. 629, 89 S. E. 952

(1916); *Merrill v. Torpedo Co.*, *supra*. And before the overruling effect of W. VA. REV. CODE c. 23, art. 2, §6a (Michie, 1949), the fact that the third party was a co-employee did not change this. *Tawney v. Kirkhart*, 44 S. E.2d 634 (W. Va. 1947). To the effect that a physician has the status of any other third party in reference to the workmen's compensation acts see Leidy, *Malpractice Actions and Compensation Acts*, 29 MICH. L. REV. 568 (1931).

While it is true that a majority of states prevent the employee from recovering both from the compensation fund and the negligent physician, the applicability of these decisions in West Virginia may be seriously questioned; the statutes in all but three states, West Virginia, Ohio and New Hampshire, contain some subrogation provisions. 3 SCHNEIDER, WORKMEN'S COMPENSATION 176 (3d ed. 1943). For example, the following cases concur with the instant case in result, *i.e.*, in holding that receipt of compensation prevents the employee from maintaining an action against the physician, but the statutes involved all have subrogation provisions transferring his right to the employer or insurer so that the physician does not escape the consequences of his negligence: *Vatalaro v. Thomas*, 262 Mass. 363, 160 N. E. 269 (1928); *Jordon v. Orcutt*, 279 Mass. 413, 181 N. E. 661 (1932) (employer's suit); *Polucha v. Landes*, 60 N. D. 159, 233 N. W. 264 (1930); *McDonough v. National Hospital Ass'n*, 134 Ore. 451, 294 Pac. 351 (1930); *Revell v. Caughan*, 162 Tenn. 532, 39 S. W.2d 269 (1931); *Retelle v. Sullivan*, 191 Wis. 576, 211 N. W. 756 (1927); *Huntoon v. Prichard*, 280 Ill. App. 440, 14 N. E. 2d 507 (1938), *aff'd*, 371 Ill. 36, 20 N. E.2d 53 (1939) (employee's suit for joint benefit of himself and employer).

The West Virginia court distinguished the instant case from prior West Virginia cases involving third parties on a factual basis, *i.e.*, original wrongdoers as distinguished from a subsequent tortfeasor. Thus, one seemingly finds the court saying that compensation is in the nature of a contractual payment which does not release an original tortfeasor. Yet, where the physician is a subsequent tortfeasor the court says compensation payment is, in effect, payment releasing the physician from tort liability. If compensation payment does not release the tortfeasor in the one instance, it should not release a tortfeasor in the other. The sounder view would seem to be that payment from the fund, in the absence of any subrogation provision, should not affect the employee's rights against any third party tortfeasor. To hold otherwise, as in the instant case, would allow the physician to escape completely the consequences of his

negligence. If the instant case is to be the law, preventing the employee from bringing suit, the employer should be allowed, by statute, to recover from the physician. For as it now stands the employer pays for the physician's negligence, but the tortfeasor escapes all liability. Such a result would seem to be unjust.

The instant case raises the further question, as yet undecided in West Virginia: is the remedy of workmen's compensation in cases of aggravation caused by a physician exclusive, or may the employee split his cause of action, that is, accept compensation for the original injury only, and sue the physician for his malpractice? It will suffice for present purposes to say that there is a division of authority upon the point. Cases holding that an employee may split his remedy are: *King v. Baur Confectionery Co.*, 100 Colo. 528, 68 P.2d 909 (1937); *Smith v. Mann*, 184 Minn. 485, 239 N. W. 223 (1931). *Contra: McDonald v. Employer's Liability Assur. Corp.*, 288 Mass. 170, 192 N. E. 608 (1934); *William v. Dale*, 139 Ore. 105, 8 P.2d 578 (1932).

—T. N. C.