Deficiency Compensation Under the Workmen's Compensation Law

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egation of "police" power would be perfectly in line with such a policy. The broader interpretation actually given the delegation of control over local waters by the First Circuit would appear to make the grant unconstitutional.

DEFICIENCY COMPENSATION UNDER THE WORKMEN'S COMPENSATION LAW

Ordinarily, when an employee, injured in the course of employment, receives reparation outside of the Workmen's Compensation Law from the party responsible for such injuries, he is entitled to any deficiency between the amount he received and that to which he would be entitled as a compensation award. Exceptions arise, however, where the circumstances surrounding the collateral recovery preclude the employee, or his dependents in case of death, from receiving deficiency compensation. One such instance is when the employee accepts a compromise or settlement of a cause of action against a third party tortfeasor without first receiving the consent of the employer or carrier liable for compensation payments. The theory of a denial of deficiency compensation in such a case is that the actions of the employee have prejudiced the subrogation rights of the employer or the carrier against the third party. Deficiency awards are also denied when an employee successfully terminates an action against the employer while his right to a compensation award is uncertain. Denial in the latter instance is founded on the premise that the employee should not be permitted to maintain inconsistent actions.

It is the purpose of this article to outline the New York statutory provisions and to examine the merits of preventing an injured employee from receiving deficiency compensation in the situations mentioned above. Particular concern will be given to those instances where an injured employee has, by some means outside the compensation law, received a sum less than the injury would have rated as compensation and seeks to recover the difference.

not the same as that of a State in the Federal Union, though both have in common complete powers of local self-government. . . . On balance, the Puerto Ricans justly feel that the status of the island . . . though different from that of a State of the Union, is one of no less dignity." Id. at 19-20.

See note 47 infra and accompanying text.

See note 48 infra and accompanying text.

See text accompanying note 101 infra.
Third Party Suits

In New York, Section 29 of the Workmen's Compensation Law governs the rights of the employee and the person or organization liable for the payment of compensation awards as against third party tortfeasors through whose negligence or wrong an employee has been injured in the course of employment. The statute, as enacted in 1913, required an injured employee to elect whether to proceed at law against the third party or submit a claim for compensation under the Act.\(^4\) Through acceptance of a compensation award, the employee automatically assigned his cause of action against the third party to the compensation payor; the latter could then proceed against the third party, subject only to the payment over of any recovery in excess of the compensation award to the injured employee.\(^5\) Should the employee proceed at law against the third party, he would thereby be precluded from submitting a claim for compensation unless the judgment was less than that to which he would otherwise be entitled as compensation, in which case he would ordinarily be entitled to the deficiency.\(^6\) Since 1937, however, the employee has no longer been obligated to make such a binding election, and has been entitled under the statute to collect compensation and still maintain an action at law against the third party, the recovery at law being subject to a carrier's lien for the amount of compensation paid.\(^7\) The employee is given preference

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The effect of § 29 in assigning the cause of action to the carrier is not to guarantee the collection of damages. The assigned cause may be valueless because of the contributory negligence of the employee, an inability on the part of the assignee to establish the negligence of the third party, financial irresponsibility of the third person, or conduct which is tortious where the compensation contract is enforceable is not tortious in the forum where the accident occurred. See Heaney v. P. J. Carlin Constr. Co., 269 N.Y. 93, 103, 199 N.E. 16, 20 (1935), aff'd, 299 U.S. 41 (1936).


\(^7\) N.Y. Sess. Laws 1937, ch. 684, §§29, 227. N.Y. WORKMEN'S COMP. LAW § 227 provides that the carrier shall have a lien on the proceeds of an employee's third party recovery, whether by judgment, settlement or otherwise, after the deduction of reasonable and necessary expenditures, including attorney's fees, to the extent of disability benefits paid. See Borgio v. Hegeman Farms Corp., 287 N.Y. 747, 40 N.E.2d 35 (1942) (memorandum decision); Matter of Applebaum, 180 Misc. 881, 41 N.Y.S.2d 227 (Surr. Ct. 1943).
in proceeding against the third party by a provision granting the employee, or his dependents in case of death, a six month period after receipt of the compensation award in which to bring an action against the third party. In any event, the employee must bring the action within one year from the time the cause of action accrues; if he fails to do so, the action will be automatically assigned to the person or organization liable for compensation payments. Pursuant to a 1951 amendment, however, the latter party is required to provide the employee with thirty days notice of the expiration of the period for the assignment to become effective. Neither assignment nor subrogation vests greater rights in the carrier than those of the original party in interest.

8 It would be an unwarranted interpretation of the statute to allow automatic assignment of the cause of action although the award was not paid by an uninsured and insolvent employer. Juba v. General Builders Supply Corp., 7 N.Y.2d 48, 163 N.E.2d 328, 194 N.Y.S.2d 503 (1959).


Any instrument by which an employee, as a prerequisite to employment, agrees not to maintain a common-law action against a specified third party in the event of injury is void. Western Union Tel. Co. v. Cochran, 302 N.Y. 545, 99 N.E.2d 582 (1952).

Section 29 was not intended to shorten the statute of limitations for negligence actions. Among other things, the section was intended to define who, during the normal statutory period, should be entitled to bring the action against the third party. Grossman v. Consolidated Edison Co., 268 App. Div. 875, 50 N.Y.S.2d 785 (2d Dep't 1944), aff'd mem., 294 N.Y. 39, 60 N.E.2d 199 (1945).

A cause of action in negligence may not be assigned except by operation of law, as provided in § 29. Crawford v. O'Sullivan, 19 Misc. 2d 867, 189 N.Y.S.2d 724 (Sup. Ct. 1959).


Generally, a recovery against a third party is greater in amount than that to which the employee would be entitled under the Workmen's Compensation Law. This is partly because the measure of damages is greater, including the loss of actual wages, the value of pain and suffering, the cost of medical care, and other factors. If the employee maintains the action, he is entitled to retain the entire excess over the carrier's lien for any compensation payments already made. If the third party action, by reason of assignment, is maintained by the carrier and results in a recovery in excess of compensation paid, the injured employee is entitled to only two-thirds of such excess. The carrier, having no limitations upon settlement or compromise, might previously have been inclined to accept in settlement only the amount for which it was liable as compensation payments, rather than seek an excess recovery payable in its entirety to the injured employee.

Subdivision 5 of section 29 has dual provisions. First, it creates an additional and independent cause of action in the carrier against a third party tortfeasor when the former is obliged to make payments into certain special funds. The carrier is so obliged when there are no dependents to receive compensation from the carrier for the wrongful death of an employee, or when the representative of a deceased employee has recovered from a third party an amount equal to, or in excess of, the amount otherwise payable under the Workmen's Compensation Law. Secondly, subdivision 5 contains the controversial and troublesome provision which requires any compromise of the employee with a third party tortfeasor to receive the "written approval" of the state insurance fund or the person, association, corporation, or insurance carrier.

15 N.Y. WORKMEN'S COMP. LAW § 29(1).
16 N.Y. WORKMEN'S COMP. LAW § 29(2).
20 See N.Y. WORKMEN'S COMP. LAW §§ 15(8), (9), 25-a; Commissioners of the State Ins. Fund v. Consolidated Edison Co., 2 Misc. 2d 410, 151 N.Y.S.2d 215 (Sup. Ct. 1956) (per curiam) (where the third party's defenses are outlined in actions brought by the carrier for payment into special funds).
liable for the payment of deficiency compensation. This provision will be considered later in more detail.

Lastly, section 29 makes compensation the exclusive remedy of an injured employee when the injuries are a consequence of the negligence or wrong of a coemployee.\textsuperscript{22} This section may not be invoked as a defense, however, where the coemployee is sued for injuries resulting from his willful tort.\textsuperscript{23} The provision is supplemental to sections 53 and 11, which limit the liability of employers for personal injuries or death sustained by employees to the extent of coverage by the Workmen's Compensation Law.\textsuperscript{24} Thus, even if the negligence of an employer or coemployee could be proved, an employee injured in the course of employment, or his dependents in case of death, must look exclusively to his rights under the compensation law.

Judge Froessel recently summed up the purpose of section 29 in the following statement:

Section 29 of the Workmen's Compensation Law was designed to place the ultimate liability in damages for the loss sustained by the workman—or his dependents, as the case may be—on the third party who stands outside of the employer-employee relationship; to minimize the financial burden imposed upon the party liable for compensation and, at the same time, ensure a full—but only a single—recovery to the injured workman or his dependents.\textsuperscript{25}

Other Jurisdictions

Almost all jurisdictions have third party statutes designed primarily to provide the right of subrogation to the party liable for compensation payments and to prevent a double recovery by an injured employee.\textsuperscript{26} While the employee may be granted the right

\textsuperscript{22} N.Y. WORKMEN'S COMP. LAW § 29(6).
\textsuperscript{24} N.Y. WORKMEN'S COMP. LAW §§ 53, 11.
\textsuperscript{26} A.L.A. CODE tit. 26, § 312 (1940); ALASKA COMP. LAWS ANN. § 43-3-30 (1949); ARIZ. REV. STAT. ANN. § 23-1023 (1956); ARK. STAT. ANN. § 81-1340 (Supp. 1957); CAL. LAB. CODE § 3850-63 (Supp. 1960); Colo. REV. STAT. ANN. §§ 81-13-8 (1953); CONN. GEN. STAT. REV. § 31-156 (1958); DEL. CODE ANN. tit. 19, § 2363 (Supp. 1960); D. C. CODE ANN. § 36-501 (1951); Fla. STAT. ANN. § 440.39 (Supp. 1960); Ga. CODE ANN. § 114-403 (1956); HAWAII REV. LAWS §§ 97-10 (1955); IDAHO CODE ANN. § 72-204 (1947); ILL. ANN. STAT. ch. 48, § 166 (Smith-Hurd 1950); IND. ANN. STAT. § 40-1213 (Supp. 1960); IOWA CODE ANN. § 85.22 (1946); KAN. GEN. STAT. ANN. § 44-504 (Supp. 1959); KY. REV. STAT. ANN. § 342.055 (1955); LA. REV. STAT. §§ 23:1101-02 (1950), § 23:1103 (Supp. 1958); ME. REV. STAT. ANN. ch. 31, § 25 (1954); MD. ANN. CODE art. 101, § 58 (1957); MASS. ANN. LAWS ch. 152, § 15 (1957); MICH. STAT. ANN. § 17.189 (Supp. 1959); MINN. STAT. ANN. § 176.061 (Supp. 1960); MISS. CODE ANN. § 6998-36 (1942);
to collect a double recovery, no statute permits him to keep it. Ohio and West Virginia, however, have no subrogation or third party statutes whatsoever; and it seems in these states that the employee can retain both compensation payments and any recovery effected against the tortfeasor. The theory behind the denial of the right of subrogation to the employer or carrier is that such rights are purely statutory and the doctrine of equitable subrogation does not apply.

Larson, in his extensive work on Workmen’s Compensation Law, outlines five broad approaches to subrogation: (1) no subrogation provisions, where the employer, consequently, has no right of action against the third party; (2) “absolute subrogation,” whereby the employee, in electing to take compensation, automatically assigns his cause of action to the employer exclusively; (3) “subrogation and direct action coexistent,” where either party may maintain an action against the third party, but usually one may join in a suit by the other; (4) “employee priority,” as typified by the New York statute; (5) “subrogee priority,” wherein the employer would have the first right to maintain a third party action. Under most of the statutes, the operative act which effects assignment is the payment of compensation.

Although the trend is toward the abolition of such a requirement, some states still require the workman to elect whether to receive compensation or proceed at law against the third party.


27 See, e.g., Truscon Steel Co. v. Trumbull Cliffs Furnace Co., 120 Ohio St. 394, 166 N.E. 368 (1929); Mercer v. Ott, 78 W. Va. 629, 89 S.E. 952 (1916).


30 See cases cited note 27 supra.


34 2 Larson, op. cit. supra note 29, § 74.20.

Under such statutes, a settlement with the third party is usually considered tantamount to an election, and precludes the receipt of deficiency compensation by the injured workmen. The reason for the denial would seem to be that the purpose of the statute, to adjust the rights of the prospective parties, would be defeated in these jurisdictions by permitting an injured employee to demand compensation after impairing the employer's normal right of recovery against the third party tortfeasor.

Under those statutes which do not have an election requirement, the effect of a settlement and release may also be raised on the theory that the acceptance of such a settlement has prejudiced the employer's right to subrogation. Contrary to the New York view, however, it is usually held that a settlement without the consent of the employer does not prevent a subsequent third party action by the employer for the same injury. Such an action is permitted on the theory that the third party has constructive statutory notice of the employer's rights, which cannot be evaded by settlement with the injured employee.

New York is one of the jurisdictions that expressly precludes the employee's right to deficiency compensation when he has accepted a settlement without the approval of the employer or carrier. Some jurisdictions ignore such a settlement on the constructive notice theory outlined above, while others permit the employer to validate the settlement at his option. Some statutes require judicial approval of any settlement made by the employee with a third party; others require the employer's approval only when the


39 2 Larson, op. cit. supra note 29, § 73.22.

40 In New York, the third party statute regulates only the relation of employer-employee as to settlements. O'Brien v. Lodi, 246 N.Y. 46, 157 N.E. 925 (1927).

41 See, e.g., Oklahoma Natural Gas Co. v. Mid-Continent Cas. Co., 268 F.2d 508 (10th Cir. 1959); Everard v. Woman's Home Companion Reading Club, 234 Mo. App. 760, 122 S.W.2d 51 (1938).


amount of the settlement is less than that payable as compensation.\textsuperscript{48}
It does not seem that any statute, expressly or in application, has made the consent of the employer or carrier a prerequisite to deficiency compensation, with the added proviso that the withholding of such consent be subject to judicial review.

\textit{Compromise and Consent}

The consent provision of section 29 has been a subject of controversy since its inclusion in the original third party statute in 1913.\textsuperscript{44} The most cogent argument against it in its present form is that it permits an insurance carrier to arbitrarily withhold its consent from employee's settlements with third party tortfeasors.

It was early recognized in New York that the consent provision is operative only within the employer-employee relationship.\textsuperscript{45} In other words, subsection 5 of section 29 is binding on the employee and not the third party liable for damages; it is, therefore, not a restriction on the right of defendants to settle cases.

Chief Judge Desmond, recently speaking for the majority of the Court of Appeals, stated in this regard: "The sole purpose of present subdivision 5 of section 29 is to prevent imprudent settlements of such suits by the employee or his estate to the prejudice of the employer's [or carrier's] subrogated rights."\textsuperscript{46}

If the employee maintains an action against a third party tortfeasor resulting in a judgment less than the amount of compensation otherwise payable, he is entitled to recover the deficiency under the statute.\textsuperscript{47} If the action, pending or in progress, is settled without the requisite consent, then the employee cannot recover the deficiency.\textsuperscript{48} When the action is in progress at the time of an

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\textsuperscript{43} \textit{E.g.}, OKLA. STAT. ANN. tit. 85, § 44(a) (1951); VT. STAT. ANN. tit. 21, § 624 (Supp. 1959); WASH. REV. CODE § 51.24.010 (Supp. 1959).


\textsuperscript{47} N.Y. WORKMEN'S COMP. LAW § 29(4).

\textsuperscript{48} In Wright v. Pleasant Waste Material Co., 3 App. Div. 2d 333, 160 N.Y.S.2d 607 (3d Dep't 1957), the court implied that § 29 would not preclude a settlement without consent in a wrongful death action if the settlement was for pain and suffering alone and not for personal injuries of the deceased.

Where a release is general in form, but neither party intends that it include personal injuries as well as property damage, the settlement without
alleged compromise, the reviewing court or board may have some difficulty in determining whether the result was in reality a judgment or a compromise.

In Bogdanoff v. Halper 49 the employer and carrier contested the jurisdiction of the State Industrial Board to make an award of deficiency compensation to a claimant who had instituted a third party suit. During trial of the third party action, the litigants entered into settlement negotiations in the judge's chambers. The carrier was asked to consent to a proposed settlement, but refused. Thereafter, the court directed the jury to return a verdict for claimant in the specific sum of $6,000. The Appellate Division, reversing the board's award of deficiency compensation, held that the verdict was, in substance, a judgment by confession, entered solely to render the compromise effectual. 50 It stated, in effect, that if an "impregnable barrier of sanctity" 51 were to bar an attack upon such a judgment, an easy and effectual way of circumventing section 29 would be provided. A similar case referred to such methods as a "subterfuge in an attempt to evade the requirements of section 29." 52

Section 29, however, was not intended to preclude recovery of deficiency compensation in the situation presented by the Gallagher v. Carol Constr. Co. 53 case. There, on the trial of a third party action, the employee received a $5,000 verdict. The trial court granted a motion by the defendant to set aside the verdict as excessive unless the employee agreed to a $3,000 reduction. The stipulation was given and judgment entered for $2,000. The claimant was subsequently awarded an additional $2,830 in deficiency compensation. Sustaining the board's award, the Court of Appeals held that the $2,000 judgment had been "rendered in accordance with immemorial common-law practice after a full and constitutional jury trial." 54 Even when there has been no jury trial, no contrary


49 268 App. Div. 556, 52 N.Y.S.2d 625 (Dep't 1944).

50 Cf. Kirby v. Bloomingdale, Bros., 256 App. Div. 1016, 10 N.Y.S.2d 443 (Dep't 1944) (memorandum decision), aff'd mem., 281 N.Y. 856, 24 N.E.2d 499 (1939) (claimant's acceptance of a confession of judgment was in direct violation of §29 and estopped her from receiving an award for deficiency).

51 Bogdanoff v. Halper, supra note 49, at 557, 52 N.Y.S.2d at 626.

52 Gilman v. Barden, 249 App. Div. 665 (Dep't 1936) (memorandum decision) (concurring opinion).

53 272 N.Y. 127, 5 N.E.2d 63 (1936).

54 Id. at 129, 5 N.E.2d at 64. Accord, Tubis v. H. Weaderhorn, Inc., 260 App. Div. 823, 22 N.Y.S.2d 331 (Dep't 1940) (memorandum decision), aff'd mem., 285 N.Y. 664, 34 N.E.2d 374 (1941) (where the judgment indicated that the parties had agreed as to the liability of the third party defendants and thereupon the court assessed the damages); Kushner v. Kingston Knitting Mills, Inc., 2 App. Div. 2d 394, 156 N.Y.S.2d 474 (Dep't
proof offered, and no cross-examination of the claimant followed by
a direction of the verdict for an amount almost identical to that
which the claimant agreed to accept as a compromise, it will not
be said that the judgment did not represent the trial court's con-
sidered judgment.55

Claimants persist, however, in hesitating to agree to the re-
duction of a verdict in third party suits. In the recent Luneau v.
Elinwood Gardens, Inc.56 decision, the jury returned a verdict against
the third party tortfeasor for $60,000. The court was of the
opinion that a reduction to $25,000 would be fair, but the com-
penation carrier refused to consent to such a reduction. With
reference to this refusal, Judge Shapiro stated:

I am informed that the compensation carrier has refused to give its consent
to the plaintiff's consenting to accept a reduction in the verdict if one were
ordered. Such an intransigent attitude by compensation carriers [the State
Insurance Fund excluded] is not unusual. It has necessitated many trials when
there could have been settlements redounding to the benefit of all concerned
including the compensation carrier. A change of the law in this regard may
well be overdue.57

This statement seems to be a general criticism of the consent
requirement rather than a material consideration in the instant
case. As noted by the court, on the authority of the Gallagher
decision the employee's consent to a reduction of the verdict would
not impair his rights to deficiency compensation. Confident that
such action would not impair the employee's rights, the court en-
tered a judgment in the reduced amount without the employee's
consent.

It is perhaps unfortunate that even if it is shown that the
carrier's rights have not been prejudiced by a third party com-
promise, the withholding of consent still operates to discharge the

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56 Where the circumstances surrounding a judgment against a third party indicate compromise, in claimant's subsequent proceeding for deficiency compen-
sation the board must determine as a question of fact whether the judg-
ment represented an independent evaluation or was the product of an agreement
Div. 2d 916, 167 N.Y.S.2d 78 (3d Dep't 157) (memorandum decision).

57 Id. at 259-60, 198 N.Y.S.2d at 938.
carrier from liability for deficiency compensation. This can be illustrated by two such instances in the reports. In *Roth v. Harlem Funeral Car Co.*, 68 decided when election of remedies was still the law in New York, the widow of a deceased employee elected to sue a negligent third party. While the jury was deliberating, the parties agreed to settle for $6,000, without the consent of the carrier and without the knowledge of the court or jury. Subsequent to the agreement, the jury returned a $5,000 verdict. The carrier conceded that it had not been prejudiced by the settlement, but insisted that the failure to obtain consent nevertheless barred deficiency compensation. Ruling in favor of the carrier, the court stated: "In the instant case the result is somewhat unfortunate for claimant. We must take the law, however, as it is written. The moment she settled her action without the written consent of the insurance carrier she released her right to deficiency compensation." 59

In *Gruhn v. Miller Brown, Inc.* 60 the widow of a deceased employee voluntarily discontinued an action against one of two third parties during the trial. The action continued against the party who would have been the active tortfeasor, and resulted in a verdict for the defendant. The compensation carrier was not prejudiced by the discontinuance, since a verdict in favor of the party alleged to be the active tortfeasor would necessarily have relieved the other of liability. However, it has been repeatedly held that a voluntary discontinuance constitutes a compromise within the meaning of section 29,61 and the court so ruled: "A compromise without the consent of the carrier relieves the carrier and employer of responsibility for the award even though there is no prejudice to the carrier arising from the compromise." 62 As noted earlier, the

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60 275 App. Div. 975, 90 N.Y.S.2d 724 (3d Dep't 1949) (memorandum decision).
61 If an action instituted by the injured employee is dismissed by default and the statute of limitations has run, the carrier's rights to subrogation are thereby lost. McKee v. White, 218 App. Div. 300, 218 N.Y. Supp. 215 (3d Dep't 1926), aff'd mem., 244 N.Y. 610, 155 N.E. 918 (1927). However, in Husing v. Medical Laboratories, Inc., 285 App. Div. 13, 135 N.Y.S.2d 157 (3d Dep't 1954), the claimant was held not to be deprived of her rights to compensation for a failure to prosecute while she was physically and mentally incapable of proceeding with the trial of her case. It is interesting to note that the board had suggested that the carrier could have been subrogated during the pendency of the third party action, a theory which has no definite authority to sustain it.
A wrongful death action settled with the approval of the Surrogate's Court does not require the written consent of the carrier. Alloco v. Ace
carrier gains neither greater nor lesser rights than the original party by reason of an assignment of the action under section 29. Once the employee institutes a third party action, the statute of limitations is tolled, and the substitution of the carrier for the original plaintiff, after a discontinuance by the latter, does not create a new cause of action to which the third party could properly plead the statute of limitations.63

The Court of Appeals recently refused to extend the consent provisions of section 29 where the widow of a deceased employee had settled a wrongful death action with a tortfeasor against whom the carrier could not conceivably have gained any rights through subrogation.64 The deceased had sustained an industrial accident for which he received a compensation award for total disability; subsequently he received injuries in an automobile accident which, the board determined, was not related to the industrial accident and was not the cause of death. The widow, as administratrix, settled a wrongful death action against the driver of the automobile that had injured her husband in the second accident. The Appellate Division reversed an award of death benefits to the widow, basing its decision upon a failure to comply with the consent provisions of section 29. This finding was an unwarranted extension of the scope of the statute, which the Court of Appeals emphatically struck down with the determination that the wrongful death action was clearly not a third party suit encompassed by the statute.

Even if written approval has not been granted, the carrier may be estopped from denying consent by its conduct during the settlement negotiations.65 This is particularly evident when the carrier plays a dual role as in Gray v. Jeremiah Burns, Inc.,66 where it

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66 It has been held that where an employer is estopped for advising an employee to settle, the insurance carrier would not be bound thereby, and the employer would be the sole source of a deficiency award, Beekman v. W. A. Brodie, Inc., 249 N.Y. 175, 163 N.E. 298 (1928) (per curiam). See Berenberg v. Park Memorial Chapel, 286 App. Div. 167, 170, 142 N.Y.S.2d 345, 348 (3d Dep't 1955) (dictum); Feiertog v. Postal Tel. Co., 256 App. Div. 866, 9 N.Y.S.2d 63 (3d Dep't 1939).

also handled the third party defendant's liability insurance. The third party action was settled for $32,700, from which the carrier was repaid $10,999.10 as reimbursement for its lien. In holding the carrier estopped from denying consent, the court considered unconscionable the carrier's contention that its actions were solely a result of its insurance contract with the third party defendant and were not binding upon it as carrier for the employer. The dissenting opinion of Judge Herlihy, however, indicated that the law should not be further extended by way of implication and judicial interpretation, any necessary corrections being a matter properly for the legislature.

A type of estoppel has also been applied against the carrier when it consents to reduce its lien in order to facilitate a third party settlement. Here, the carrier is deemed to have consented to the settlement. Following such a reduction, the employee would therefore be entitled to deficiency compensation. A bill proposed in 1955 would have permitted such a reduction of the lien without effecting consent by the carrier. Apparently, such a provision is favored by the insurance carriers as a means toward facilitating the settlement of third party cases and as a possible alternative to amending the consent requirement of section 29.

A Special Committee Report in 1956 indicated that most third party suits are settled without the consent of the compensation carrier. In a survey of 300 such cases, requests for the carrier's approval were made in only 63 instances, and consent was given in only 52 of these. In addition, the Committee reported: "Documented in the board's files will be found records of tragic cases, in which claimants have succumbed to the temptation of..."
accepting third party settlements, only to end up eventually on the relief rolls." 72

It was stated in the 1958 New York University Annual Conference on Labor that "many insurance companies have an inflexible rule never to consent to settlements." 73 It has also been noted by a committee report that if a carrier refused consent in all its cases, it would benefit by virtue of the fact that many of the cases would be settled anyway. 74

If the statute allows the arbitrary withholding of consent by compensation carriers, the right to judicial review of such denial would seem to be a logical safeguard to the rights of the injured employee, as well as an adequate protection of the carrier's rights to subrogation. This was essentially the format of the Morgan Bill, 75 defeated by the governor's veto in 1955. 76 A similar provision was suggested by a special committee appointed to study the Workmen's Compensation Law in 1957. 77 The committee recommended judicial review as an "attempt to reconcile the conflicting views on this troublesome problem," 78 but, to prevent hasty judicial approval of ill-considered settlements, subjected it to the following safeguards:

(1) the court should be furnished with a competent estimate of the ultimate value of the claim under the Workmen's Compensation Law;

(2) in passing upon the propriety of the carrier's refusal, the court should give due consideration to the compensation value of the case as well as the questions of negligence, the financial responsibility of the third party, and all other pertinent matters;

(3) the court should not approve the settlement unless it has been shown, by a preponderance of the evidence, that consent was arbitrarily withheld and that the settlement is in the best interest of the employee or his dependents;

(4) the court should state the factors it took into consideration and the reasons for its decision as a part of the record in the case. 79

72 Id. at 60.
74 N.Y. Bar Ass'n, Report of Special Comm. Appointed to Study the Workmen's Comp. Law 75b, 197 (1957).
75 A. Int. 198, Pr. 4066 (1955).
76 New York Legislative Index 262 (1955).
77 N.Y. Bar Ass'n, Report of Special Comm. Appointed to Study the Workmen's Comp. Law 76 (1957).
78 Id. at 77.
79 Id. at 76-77.

The committee also tabulated the following as the carriers' objections to judicial approval.
There were two bills before the 1961 legislature which proposed the right of judicial review to correct this alleged deficiency in section 29. The Rosenblatt Bill provided, in part, that "written approval of . . . the insurance carrier need not be obtained if the employee or his dependents obtain a compromise order from a justice of the court in which the third party action was pending." The Albert Bill provided, in essence, that if the carrier refuses to approve a settlement, the employee or his dependents, after a lapse of fifteen days following written request for such approval, may make a motion for court approval of the settlement in the court in which the action is pending, or, if no action be pending, in any court in which the action could have been brought. Court approval of a settlement would be binding upon all the parties thereto and would preserve the employee's rights to deficiency compensation.

**Actions Against the Employer**

An employer with compensation coverage is relieved from all common-law liability for the personal injuries or death of employees sustained in the course of employment. In return, the employee is granted benefits which are not subject to the vagaries and uncertainties of litigation and the defenses that are ordinarily available thereto. However, should the employer fail to secure compensation, the injured employee or his dependents in case of death, may elect to either claim compensation or maintain a common-law action against the employer. In such an action, it is not necessary for the employee to prove freedom from contributory negligence, nor may the employer defend on the ground that the injury was caused by a coemployee or on any theory of assumption of risk.

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(1) It would add nothing to the protection the law now furnishes against improvident settlements.

(2) The court would merely be given authority to substitute its judgment for that of the carrier.

(3) Carriers normally approve reasonable settlement.

(4) Settlement for less than the lien should be under the lienor's control.

(5) There are not enough such cases to justify the inference that the withholding of consent has contributed to court congestion. *Id.* at 74-75.

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80 S. Int. 1153, Pr. 1155 (1961).

81 S. Int. 988, Pr. 988 (1961) (passed the Senate).

82 N.Y. Workmen's Comp. Law § 53 provides that an employer securing the payment of compensation is relieved of all common law liability for the injury or death of employees in the course of employment. N.Y. Workmen's Comp. Law § 11 grants the alternative common law remedy against an employer that has not secured compensation. N.Y. Workmen's Comp. Law § 52 makes the failure to secure compensation a misdemeanor.

83 N.Y. Workmen's Comp. Law §§ 10, 11.

84 N.Y. Workmen's Comp. Law § 11.

Compensation was not intended to be the exclusive remedy where the injury or death of an employee was the result of an intentional tort by the employer or a coemployee. Thus, where an employee is injured by the intentional wrong of his employer, he may elect to seek relief under the compensation law or in a common-law action for damages. When the injury is a result of a coemployee's intentional act, the coemployee, in a common-law action for damages, may not assert a defense based on the exclusive remedy provided for the "negligence or wrong" of a coemployee under section 29. The employer would be liable in the employee's personal injury action only if the coemployee who committed the intentional tort was acting within the scope of his authority as agent of the employer. For the purposes of section 29, the coemployee who commits an intentional tort is treated as a third party; any compromise of a common-law action by the injured employee against his coemployee without the consent of the employer or carrier will preclude the subsequent recovery of deficiency compensation.

Furthermore, in order for workmen's compensation to be the exclusive remedy of the employee, the injury must arise both out of and in the course of employment. Although an injury might occur in the course of employment, it may be held not a natural incident of such employment and therefore not "out of" the employment. When an injury results from a coemployee's assault, the injured employee would be able to maintain an action against the coemployee, because he is not relieved of liability for his willful torts. If the coemployee were acting within the scope of his authority, an action would also be maintainable against the employer on the basis of respondeat superior. However, if an employee is injured through the negligence of a coemployee while both are in the course of employment, then the employee is precluded from maintaining a personal injury action against either the coemployee or the employer. An uncertainty prevailed in the derivative liability area.

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91 Mazarredo v. Levine, supra note 87.
92 Ibid.; DeCoigne v. Ludlum Steel Co., supra note 86.
until a recent determination that a common-law action cannot be maintained against the owner of an automobile driven by a co-employee of the injured party while both are in the course of the owner's employment. 95

Therefore, with the exceptions noted above, the injured employee has the benefit of workmen's compensation as his sole recourse for injuries arising in the course of employment. A weakness has arisen, however, in the immunity of the employer from common-law actions, since a passively negligent third party is permitted to seek indemnification against an actively negligent employer in an action by the injured employee against the third party. Indemnification of the third party is accomplished on the theory of the third party's right of recovery for the breach of an independent duty or obligation owed by the employer. 96 The result is that the employer is made liable indirectly for an amount which could not be recovered directly by the injured employee.

A problem arises when an employee, by reason of one of the exceptions noted above, proceeds at law against the employer and subsequently files a compensation claim for the same injury. Of course, if the action terminates in a judgment on the merits, the issues determined therein would be res judicata in a subsequent action for workmen's compensation. If, however, the common-law action against the employer is discontinued or settled, and the employee later claims to be entitled to compensation, the question is whether he is barred from receiving any award or deficiency compensation for having initially chosen to seek damages rather than compensation.

In order for the doctrine of election of remedies to be applicable, there must be an "irreconcilable inconsistency between the claims asserted by plaintiff in the present and former actions. . ." 97 It is a harsh rule which should not be extended beyond those cases where there is not only a complete knowledge of all the facts, but a clear understanding of the nature of the remedies between which an election is made. 98 Based upon this reasoning, an employee who pursues an action at law against his employer, which is later discontinued or terminated unsuccessfully, may not be barred from asserting a subsequent claim for compensation. 99 But if the em-

Employee participates in compensation proceedings which result in an award, he is thereby barred from later maintaining a common-law action against the employer.\textsuperscript{100} With similar effect, a party has been barred from asserting a claim inconsistent with that asserted in a former action.\textsuperscript{101}

Where an injured employee settles an action against his employer while his rights to compensation benefits remain uncertain, he is precluded from subsequently claiming compensation for the deficiency between the amount of the settlement and the amount the injury would rate under the compensation law. The leading case in this area is \textit{Russell v. 231 Lexington Ave. Corp.},\textsuperscript{102} decided at the time section 29 required an election by the employee or his dependents. The employee, in that case, died from injuries arising out of his employment as an elevator operator. After the accident, however, there was some doubt as to the identity of the employer. The dependents of the deceased employee filed three notices of election, and an action at law was brought against the 231 Lexington Ave. Corp. by the father of the deceased, as administrator of his estate. The action was settled before trial by the payment of $5,000 by Lexington and $750 by the third party. The mother and father of the deceased shared in the recovery, but the mother subsequently filed a claim as a dependent for deficiency compensation against Lexington as the employer of the deceased. An award by the board was reversed on the theory that it would be inconsistent to recover against Lexington as employer after sharing in the proceeds of an action which treated the employer as a third party.

The Court of Appeals recently reviewed a case similar in content to the \textit{Russell} case. In \textit{Martin v. C. A. Productions Co.},\textsuperscript{103} an action at law was maintained against the defendant company, although it was uncertain whether the injury arose out of the course of employment. The personal injury action was settled for $7,500, of which $2,500 was paid on behalf of the company. In a subsequent proceeding for deficiency compensation, the board found the employee was not estopped from maintaining such a claim. The decision was affirmed by the Appellate Division.\textsuperscript{104}

\textsuperscript{102} 366 N.Y. 391, 195 N.E. 23 (1935).
\textsuperscript{104} The Appellate Division affirmed on the grounds that there is no substance to the election theory, that a settled lawsuit does not settle any legal issue,
Appeals reversed, in reliance upon the holding of the *Russell* case, reasoning that "a party should not be permitted to experiment with an action at law for the purpose of ascertaining how much he can get, and then, if dissatisfied, repudiate the recovery and seek to claim the benefits of workmen's compensation."\(^{105}\)

Even before examining the merits of the case, the court forecast its result by stating that since the *Russell* rule "has not met with apparent disapproval of the Legislature, it does not seem appropriate to consider a reversal of the policy announced in that case."\(^{106}\) In fact, the sole case relied upon by the court as adhering to the *Russell* rule since New York discontinued the election requirement, concerned the propriety of an award to certain special funds by the carrier after an award of deficiency compensation had been rescinded by the board on the advice of the Attorney General based on the *Russell* rule.\(^{107}\) In the *Martin* case, the employee was held to be estopped from maintaining inconsistent remedies; however, the estoppel concepts applied by the court were derived from areas of the law which are not representative of the strong policy against compromising the rights of claimants that is inherent in the Workmen's Compensation Law.\(^{108}\)

Chief Judge Desmond dissented in the *Martin* case emphasizing that the result of the decision was in direct opposition to the fundamental policy of the act which forbids waiver, compromise or release of an employee's rights to workmen's compensation benefits.\(^{109}\)


\(^{106}\) *Martin v. C. A. Productions Co.*, 8 N.Y.2d 226, 230, 168 N.E.2d 666, 668, 203 N.Y.S.2d 845, 848 (1960).\(^{107}\) *Ryan v. Sheffield Farms Co.*, 256 App. Div. 867, 9 N.Y.S.2d 8 (3d Dep't 1939) (memorandum decision), with the alternative holding that (1) if the injuries were received while not in the course of employment, there would be no basis for an award to special funds, and (2) if there was an accident in the course of employment, then the settlement was compensation, and an award cannot be made on a theory there were no dependents.\(^{108}\) See *Sengstack v. Sengstack*, 7 Misc. 2d 1012, 166 N.Y.S.2d 576 (Sup. Ct.), \(^{105}\) *aff'd mem.*, 4 App. Div. 2d 1035, 169 N.Y.S.2d 487 (1st Dep't 1957), \(^{107}\) *aff'd*, 4 N.Y.2d 502, 151 N.E.2d 887, 176 N.Y.S. 2d 337 (1958) (concerning whether a New York domiciliary, a self-acknowledged incompetent and so adjudicated in another jurisdiction, is entitled to maintain a separation action in New York); *Houghton v. Thomas*, 220 App. Div. 415, 221 N.Y. Supp. 630 (1st Dep't 1927), \(^{106}\) *aff'd mem.*, 248 N.Y. 523, 162 N.E. 509 (1928) (to set aside the accounting of a law partnership on dissolution on the ground of fraud).\(^{108}\) N.Y. WORKMEN'S COMP. LAW § 31 declares void any agreement for the employee to contribute toward compensation. N.Y. WORKMEN'S COMP.
It is interesting to note that twenty-five years prior, Judge Crouch had similarly dissented in the Russell case, asserting such a finding to be contrary to the intent and spirit of the Workmen's Compensation Law forbidding waiver, compromise or release of an employee's rights.\textsuperscript{110}

\textit{Conclusion}

In light of the apparent inequities and attempted subterfuges which have developed as a result of the present form of section 29, it would seem that the statute is overdue for amendment of the consent requirement and rectification of the holding in the Russell case.

It would seem that the Albert Bill, introduced before the most recent session of the New York legislature, provides a sound foundation for future amendment of the consent requirement of section 29. From the standpoint of the insurance carrier, however, the Albert Bill was lacking in at least one important respect. Of prime consideration as to whether consent should be given or withheld is the matter of the reserve set apart by the carrier in a compensation case based on the value of the claim. The bill, although it seemed to go into unnecessary detail, had no provision which would require particular consideration of this factor by a reviewing court. In addition, a factor which has perhaps been of material significance in the defeat of such bills may not have been adequately protected against in the Albert Bill: it would seem that under the bill, attorneys might have been encouraged to settle cases for less than their true value to obtain a fee, and then relax, knowing that their client has retained the right of deficiency compensation to the detriment of the carrier.

From the attitude of the Court of Appeals in the recent Martin decision, it would also appear that the rule of the Russell case is not to be rectified except by legislative action. Perhaps the cases are few where an employee settles an action against his employer while his right to compensation is in doubt, and then subsequently claims deficiency compensation, but this, of course, is not a valid reason for delaying correction of the situation. If the Russell rule were justifiable under the facts from which it arose and at the time when employees were required to elect either to receive compensation or proceed at law, it seems clear that it is not presently in accord with the spirit and intent of the Workmen's Compensation Law.