Illinois Workers' Compensation Act and the Dual Capacity Doctrine - McCormick v. Caterpillar Tractor Co.

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The exclusive remedy provision of the Illinois Workers' Compensation Act (the Act) provides that an employee has no common law or statutory right to institute suit against his employer for work-related injuries. The Act has replaced an employee's right to sue for damages with a statutory scheme of compensation. This scheme, which provides for awards of fixed dollar amounts to injured workers according to the specific injury incurred, initially was attractive because it provided injured workers prompt and cer-

1. ILL. REV. STAT. ch. 48, § 138.1-.30 (1981). The exclusive remedy provision of the Illinois Workers' Compensation Act limits the recovery of injured employees to the benefits set forth in the Act. This provision states:

No common law or statutory right to recover damages from the employer, his insurer, his broker, any service organization retained by the employer, his insurer or his broker to provide safety service, advice or recommendations for the employer or the agents or employees of any of them for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury.


Originally, most workers' compensation awards were distributed on the basis of an employee's lost wages. The amounts were computed to equal a certain percentage of the lost wages while the employee was actually disabled. In many jurisdictions, as in Illinois, the wage-loss system gradually has been replaced by a schedule system. Compare Fla. Stat. Ann. § 440.15 (West 1981 & Supp. 1982) (amended 1979) (wage-loss benefits) with ILL. REV. STAT. ch. 48, § 138.1-.30 (1981) (comprehensive schedule system) and Minn. Stat. § 176.021(3) (West 1980) (amended 1974) (comprehensive schedule system). Under the schedule system, benefits are computed by reference to set schedules which list various parts of the body and prescribe a fixed number of weeks of compensation for the total or partial loss of that particular part. The rationale behind assigning fixed compensation sums for certain injuries is to prevent litigation. See Larson, The Wage-Loss Principle in Workers' Compensation, 6 WM. MITCHELL L. REV. 501, 507-08 (1980) [hereinafter cited as Wage-Loss].

4. Prior to the enactment of workers' compensation laws, prompt financial relief for employees injured in industrial accidents was a rarity. Under the common law system, it was
tain financial relief without requiring them to prove fault on the part of the employer. Occasionally, however, employees are dissatisfied with the benefits awarded because they represent inflexible damage amounts that generally do not provide total restitution for industrial injuries.

Several jurisdictions have begun to recognize an exception to the exclusive remedy provisions contained in their workers’ compensation statutes and have permitted employees to sue their employers for injuries sustained on the job. Utilizing the dual capacity doctrine, employees in these jurisdictions have sued their employers for tortious conduct emanating from a separate nonemployer capacity. Under this doctrine, an employer may be

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common for one or two years to elapse before an injured employee’s trial was completed. In Illinois, there are reports that cases were pending four to five years before their outcome was determined. These lengthy time delays magnified the injured worker’s problems because, even if the employee ultimately recovered, he and his dependents were usually without support during the worker’s disability when the need for income was often the greatest. ANGERSTEIN, supra note 1, § 13.

5. Under the workers’ compensation system, employees are not required to prove employer fault. The Illinois Supreme Court explained:

The liability imposed by the Workmen’s Compensation act has no connection with the negligence of either the employer or the employee. An injury arising out of and in the course of the employment creates the liability without any question of fault on the part of either the employer or the employee.

Decatur Ry. & Light Co. v. Industrial Bd., 276 Ill. 472, 477, 114 N.E. 915, 917 (1916). See Pathfinder Co. v. Industrial Comm’n, 62 Ill. 2d 556, 343 N.E.2d 913 (1976) (employee not required to show negligence on part of employer to receive an award under the Act); Freeman v. Augustine’s, Inc., 46 Ill. App. 3d 230, 360 N.E.2d 1245 (5th Dist. 1977) (the employment setting, rather than the actions of the employer or employee, creates liability under the Act thus, no need to prove employer fault).

6. Compensation awards were not designed to provide full restitution for wrongful acts committed against the employee. Rather, the concept behind the workers’ compensation laws was to aid the injured employee by providing medical and hospital expenses in addition to granting partial benefits as a substitution for loss of earning power. 1 T. ANGERSTEIN, ILLINOIS WORKMEN’S COMPENSATION § 8 (rev. ed. 1952) [hereinafter cited as ILLINOIS COMPENSATION].

7. Illinois, California, Ohio, and New York have allowed employees to successfully sue their employers under the dual capacity doctrine. See Note, Workers’ Compensation: The Dual Capacity Doctrine, 6 WM. MITCHELL L. REV. 813, 819 (1980) [hereinafter cited as Workers’ Compensation]. For a discussion of the various other jurisdictions that have addressed this issue, see id. at 814.

8. Larson explains the mechanics of the dual capacity doctrine as follows: “An employer may become a third person, vulnerable to tort suit by an employee, if—and only if—he possesses a second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal person.” See 2A LARSON, supra note 1, § 72.81, at 14-229.

9. Recently, the dual capacity doctrine has evoked a good deal of comment. See 2A LARSON, supra note 1, § 72.81; Malone, The Limits of Coverage in Workmen’s Compensation—The Dual Requirement Reappraised, 51 N.C.L. REV. 705 (1973); O’Connell, Worker’s Compensation as a Sole Remedy for Employees But Not Employers, 28 LAB. L.J. 287 (1977); Note, Manufacturer’s Liability as a Dual Capacity of an Employer, 12 AKRON L. REV. 747 (1979); Note, Dual Capacity Doctrine: Third-Party Liability of Employer-Manufacturer in Products Liability Litigation, 12 IND. L. REV. 553 (1979) [hereinafter cited as Dual Capacity]; Note, Tort-Workmen’s Compensation-Dual Capacity Doctrine Rejected, 8 MEM. ST. U. L. REV. 163 (1977); Employer Suability, supra note 1.
sued by an employee when his tortious conduct originates from a capacity independent of the employer-employee relationship. When an employer assumes a legal persona separate from that of employer, the worker can extricate himself from the exclusive remedy provision and seek full restitution for his industrial injury.

In McCormick v. Caterpillar Tractor Co., the Illinois Supreme Court prohibited an employee from suing his employer based upon negligent medical treatment administered by the employer's physicians. Reasoning that the dual capacity doctrine was inapplicable, the McCormick court held that the employee's remedy was limited to the benefits flowing from the Workers' Compensation Act. According to the court, a manufacturing company that employed plant physicians to treat injured workers did not maintain a separate nonemployer capacity as a provider of medical services.

An examination of the purposes underlying both the workers' compensation laws and the dual capacity theory is necessary in order to fully understand the McCormick decision. Such an analysis reveals that the Illinois Supreme Court erred when it did not apply the dual capacity doctrine and denied the plaintiff's common law suit in McCormick. In view of this inappropriate result, the McCormick decision may have an adverse impact on the Illinois industrial community and the state's workers' compensation system.

**HISTORICAL BACKGROUND**

**Evolution and Purpose of Workers' Compensation Acts**

Prior to the enactment of workers' compensation laws, injured employees brought suit against their employers to recover damages for work-related injuries. Under this common law system, workers often were

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10. See 2A Larson, supra note 1, § 72.81.
11. According to Larson, "[a] mere separate theory of liability against the same legal person as the employer is not a true basis for use of the dual capacity doctrine; the doctrine instead requires a distinct separate legal persona." Id. at § 72.80.
12. Id.
14. Id. at 360, 423 N.E.2d at 879.
15. Id.
16. Id. at 358, 423 N.E.2d at 878.
17. Germany is credited with passing the initial workers' compensation act in 1884. Twenty-one other countries or provinces had enacted some form of workers' compensation before the first important compensation act surfaced in the United States in 1910. Ten states passed similar statutes in 1911, and by 1920, all but eight states had enacted compensation laws. As of January 1, 1949, every state had adopted the system. See Illinois Compensation, supra note 6, § 5; 1 Larson, supra note 1, § 5.30 (1978 & Cum. Supp. 1982); Wage-Loss, supra note 3, at 504-07.
18. See W. Prosser, Handbook of the Law of Torts § 80 (4th ed. 1971) [hereinafter cited as Prosser]. At common law, the employee was required to prove that his employer
denied recovery because the employers were typically successful in defending the action on the grounds of contributory negligence, assumption of risk, or the fellow-servant rule. As the country shifted from an agricultural to an industrial economy, a concomitant increase in industrial accidents magnified the plight of the injured employee. In an attempt to aid the worker and remedy the common law inequities, states began enacting workers' compensation laws.

breached a specific common law duty in order to recover damages. These common law duties were narrowly defined as follows:

1. The duty to provide a safe place to work.
2. The duty to provide safe appliances, tools, and equipment for the work.
3. The duty to give warning of dangers of which the employee might reasonably be expected to remain in ignorance.
4. The duty to provide a sufficient number of suitable fellow servants.
5. The duty to promulgate and enforce rules for the conduct of employees which would make the work safe.

Id. § 80, at 526. Additionally, the worker had to establish that the injury occurred during the course of his employment and that ordinary care was being exercised when the accident happened. See Illinois Compensation, supra note 6, § 2.

19. See Dual Capacity, supra note 9, at 557. Approximately 20% of employee actions at common law were successful. However, in the successful cases, attorney fees and court costs diminished the amount of compensation actually received to a minimum. Id.

20. See Larson, supra note 1, § 4.30. In approximately 35% of the pre-workers' compensation accidents, the employee was either partially or wholly responsible for his injury and, therefore, was precluded from recovery by the common law defense of contributory negligence. Id. See, e.g., Schlemmer v. Buffalo, R. & P. Ry., 220 U.S. 590 (1911) (contributory negligence bars employee's recovery).

21. See Illinois Compensation, supra note 6, § 2; 1 Larson, supra note 1, § 4.30 (1978 & Cum. Supp. 1982). If an employee's injury was due to the usual and ordinary hazards of his employment or, if it occurred because of extraordinary dangers of which the employee had knowledge, the recovery was denied because the employee had assumed the risk of employment. Since approximately 50% of the industrial accidents occurred due to risks inherent in the industry, the employer's defense of assumption of the risk precluded recovery in most of these cases. See, e.g., Limberg v. Glenwood Lumber Co., 127 Cal. 598, 60 P. 176 (1900) (assumption of risk barred recovery where employee knowingly works with employer's defective equipment); Atchison, T. & S.F.R.R. v. Schroeder, 47 Kan. 315, 27 P. 965 (1891) (worker assumed risk even though he complained to employer about employment dangers); O'Maley v. South Boston Gas Light Co., 158 Mass. 135, 32 N.E. 1119 (1893) (assumption of risk denied recovery because employee was on the job for 15 years and was aware of the risks involved).


23. The late 19th century marked the beginnings of the industrial revolution. For a discussion of this era, see generally R. Hartwell, The Industrial Revolution (1970).

24. See Angerstein, supra note 1, § 7. In 1907, Illinois began to investigate the common law system and its effects upon the industrial worker. The state appointed committees to undertake further investigation in 1910 and 1911. These studies showed that only eight out of one hundred industrial accident cases resulted in compensation payments. Id.

25. See supra note 17.
The primary purpose for workers' compensation laws is to provide prompt and certain recovery to employees injured as a result of inherent occupational risks.\(^\text{26}\) To achieve this goal, the Illinois workers' compensation scheme holds the employer accountable for all industrial accidents regardless of fault.\(^\text{27}\) By imposing a form of strict liability\(^\text{28}\) on the employer, the cost of industrial-related accidents is shifted from the worker to the employer.\(^\text{29}\) The employer, in turn, can transfer these additional costs to the price of his product or service.\(^\text{30}\)

In exchange for the employer's assumption of work-related injury costs, the employee forfeits his common law right to sue the employer.\(^\text{31}\) The practical effect of this exchange is that workers' compensation grants employers immunity from employee tort claims\(^\text{32}\) arising out of the employ-

\^\text{26}. \text{See General Motors Corp. v. Industrial Comm'n, 40 Ill. 2d 514, 240 N.E.2d 694 (1968) (purpose of workers' compensation is to protect employees against risks peculiar to work); O'Brien v. Rautenbush, 10 Ill. 2d 167, 139 N.E.2d 222 (1956) (purpose of Act is to provide prompt and definite compensation).\(^\text{27}. \text{See supra note 5.}\(^\text{28}. \text{Larson distinguishes absolute liability, as used in the workers' compensation context, from the ultrahazardous activities discussed in the \text{RESTATEMENT (SECOND) OF TORTS} \S \text{520} (1977), noting that while the former is true liability without regard to fault, the latter allows acts of God, acts of third party, and consent of plaintiff as defenses. See 1 \text{LARSON, supra note 1}, \S\S \text{2.20-30} (1978).}\(^\text{29}. \text{PROSSER, supra note 18, \S 80. Professor Prosser describes the concept underlying this policy in the following manner:}\)
The human accident losses of modern industry are to be treated as a cost of production, like the breakage of tools or machinery. The financial burden is lifted from the shoulders of the employee, and placed upon the employer, who is expected to add it to his costs, and so transfer it to the consumer. \text{Id.} \S \text{80}, \text{at 530-31.}\(^\text{30}. \text{Id.}\(^\text{31}. \text{In Illinois, the constitutionality of taking away the employee's common law right of action and extending employer liability was affirmed as a legitimate exercise of police power. See Duley v. Caterpillar Tractor Co., 44 Ill. 2d 15, 253 N.E.2d 373 (1969) (exclusive remedy provision does not deny due process); Matthiessen & Hegeler Zinc Co. v. Industrial Bd., 284 Ill. 378, 120 N.E. 249 (1918) (Act is a legitimate exercise of police power). But cf. Ives v. South Buffalo Ry., 201 N.Y. 271, 94 N.E. 431 (1911) (New York's initial workmen's compensation statute held unconstitutional on the grounds that it conflicted with both the state and federal constitutions).}\(^\text{32}. \text{A majority of compensation statutes only extend the employer's statutory immunity to cover accidental injuries arising out of the employment context. An example is the Illinois provision that provides, in pertinent part:}\)
An employer in this State, who does not come within the classes enumerated by Section 3 of this Act, may elect to provide and pay compensation for accidental injuries sustained by any employee, arising out of and in the course of the employment according to the provisions of this Act, and thereby relieve himself from any liability for the recovery of damages, except as herein provided. \text{ILL. REV. STAT. ch. 48, \S 138.2 (1981). If the employer commits an intentional tort against his employee, however, most states have allowed the employee to pursue a common law action for damages against the employer. See, e.g., Garcia v. Gusmack Restaurant Corp., 150 N.Y.S.2d 232 (1954) (employee may sue in tort for injury inflicted by employer's willful assault); Readinger v. Gottschall, 201 Pa. Super. 134, 191 A.2d 694 (1963) (an intentional assault by an
ment relationship. As a result, the employees' exclusive remedy against the employer is generally a fixed statutory compensation.

The receipt of these statutory benefits is not automatic, but is contingent upon a causal connection between the employee's injury and the risks inherent in his employment. This requirement is fulfilled if the accident causing the injury arises out of and occurs during the course of the employer on his employee is not covered by the Workers' Compensation Act, but mostly redressed under tort law). Cf. Heskett v. Fischer Laundry & Cleaners Co., 217 Ark. 350, 230 S.W.2d 28 (1950) (employer's felonious assault upon employee gives employee option of proceeding under the Workmen's Compensation Act or instituting a common law action). For a general discussion of the extent of an employer's immunity, see Page, The Exclusivity of the Workmen's Compensation Remedy: The Employee's Right to Sue His Employer in Tort, 4 B.C. INDUS. & COM. L. REV. 555, 559 (1963).

33. For a discussion of what constitutes a claim arising out of the employment relationship, see infra notes 35-36 and accompanying text.


One author discussed the necessary causal requirement and the purpose behind it as follows:

Workmen's compensation, under the Illinois Act, and similar acts, does not mean that the employer directly and the public indirectly, but ultimately, should pay compensation except in cases which are in fact industrial accidental injuries or deaths. The relationship of employer and employee must exist and the accidental injuries or death must in fact arise both out of and in the course of the employment. The employer is not an insurer of the safety of the employee at all times and under all conditions, and the public is not to be required to pay, as a part of the cost of goods or services, for other than such industrial accidents or deaths as do arise out of and in the course of the employment.

ILLINOIS COMPENSATION, supra note 6, § 9.

35. Under the Illinois Workers' Compensation Act, an injury must "arise out of" as well as occur "in the course of" employment for compensation to be paid. ILL. REV. STAT. ch. 48, § 138.2 (1981). The majority of states, including Illinois, utilize the increased-risk test to determine whether an injury "arises out of" a worker's employment situation. 1 LARSON, supra note 1, §§ 6.00-30 (1978 & Cum. Supp. 1982). Under the increased-risk test, if a worker's employment magnifies the exposure to a particular risk that is shared by both the employee and the public, an injury resulting from the employment risk would nevertheless "arise out of" the employment. Id. See Johnson Outboards v. Industrial Comm'n, 77 Ill. 2d 67, 394 N.E.2d 1176 (1979) (phrase "arising out of" presupposes a causal connection between employment and injury); Mast v. Rogers, 118 Ill. App. 2d 288, 254 N.E.2d 179 (2d Dist. 1969) (accident "arises out of" employment if an employee's work exposes him to a risk common to the general public but to a greater degree). But see Lybrand, Ross Bros. & Montgomery v. Industrial Comm'n, 36 Ill. 2d 410, 223 N.E.2d 150 (1967) (accident "arises out of" employment if occurring at compulsory employee outing); Jewel Tea Co. v. Industrial Comm'n, 6 Ill. 2d 304, 128 N.E.2d 699 (1955) (accident "arises out of" employment if occurring during intracompany softball competition). For a discussion of the "arising out of" requirement in Illinois, see generally Kinzie & Nyhan, Workers' Compensation: A System In Need, 30 DEPAUL L. REV. 347 (1981).

36. The phrase "in the course of" related to the time, place, and circumstances of the accident. An injury is sustained "in the course of" employment when it occurs within a period of employment while the worker is fulfilling his duties at a place reasonably connected to the employment. See ILLINOIS COMPENSATION, supra note 6, §§ 391-519. See also 1 LARSON, supra note 1, § 7.00 (1978 & Cum. Supp. 1982); Burnett. Workmen's Compensation Claims "Arising Out Of" and "In The Course Of", 2 A.B.A. FORUM 35 (1966).
worker’s employment. By demanding a nexus between the employee’s injury and the employment situation, the workers’ compensation laws insure that only costs properly attributable to the production of a particular product are transferred to the employer and thereafter distributed through the products.

The basis for the workers’ compensation system, therefore, is an equitable balancing through which the employee receives immediate compensatory benefits while the employer receives immunity from tort claims arising out of the employment relationship. This balance is distorted, however, when the employer attempts to encompass within the statutory immunity certain tort claims not arising out of the employment relationship. The dual capacity doctrine has emerged to deter this practice.

The Dual Capacity Doctrine

Although the exclusive remedy provision of the Illinois Workers’ Compensation Act prohibits an employee from suing his employer, injured workers traditionally have been permitted to institute suits against negligent third parties not protected by the statute. This ability to maintain third

37. Without the requirement of a causal connection between a worker's injury and his employment, the employer would become a general accident insurer. One author states that this clearly was not contemplated by the Act.

Workmen’s compensation does not mean—as many mistakenly suppose—that the employer is an insurer of the employee’s safety at all times during the period of employment. Workmen’s compensation is not health, accident, or life insurance and to so regard it is to completely misconceive its scope and basic purpose. Illinois Compensation, supra note 6, § 9. See also Dual Capacity, supra note 9, at 558 (workers’ compensation is not general insurance, but is a means of compensating employees for losses resulting from exposure to risks in employment setting).

38. The reason an employer would attempt to sweep employee tort claims into the compensation system is aptly illustrated by comparing two 1960 industrial accident cases. In both accidents, each worker sustained an amputation of both legs and an arm. One employee was covered by the state compensation act and received a $15,000 award for his injuries. Orth v. Shiely Petter Crushed Stone Co., 258 Minn. 513, 104 N.W.2d 512 (1960). The other employee, however, was covered by the Federal Employer’s Liability Act which permitted an employee to seek tort damages. This individual received a jury award of $157,400. Texas & N.O.R.R. v. Flowers, 336 S.W.2d 907 (Tex. Civ. App. 1960).


40. While employees could maintain suits against third party tortfeasors under the early compensation statutes, the decision to institute an action was a difficult one. If the employee did sue the negligent third party, his right to statutory compensation was forfeited. This was true even if his suit was unsuccessful. If the employee elected statutory benefits, he assigned any rights against the negligent third party to his employer. Later enactments, however, modified the compensation system enabling injured employees to receive statutory benefits while retaining the right to sue negligent third parties. See Millender, Expanding Employees' Remedies and Third Party Actions, 17 CLEV.-MAR. L. REV. 32, 33 (1968); Employer Suability, supra note 9, at 819-20.
party suits provides the basis for the dual capacity doctrine. Under the doctrine, an employer who negligently injures a worker while assuming a nonemployer capacity can be sued as a third party tortfeasor.

The dual capacity doctrine was first implemented in the California Supreme Court decision of *Duprey v. Shane.* In *Duprey,* the plaintiff nurse was injured during her employment and subsequently received workers' compensation for the injury sustained. The initial injury, however, was aggravated by negligent medical treatment administered by her employer, a chiropractor. The nurse instituted suit against the chiropractor for aggravation of her initial injury, but the defendant contended that the state workers' compensation act provided the exclusive remedy for her injury. The *Duprey* court disagreed and concluded that the defendant had entered into two separate relationships with the nurse: one as employer and another as physician. In his role as a physician, the *Duprey* court determined that the chiropractor had no basis for asserting the statutory immunity provided to employers under the compensation act and, therefore, was subject to liability in his nonemployer capacity.

Subsequent to *Duprey,* the dual capacity theory has been addressed under a variety of factual situations in other jurisdictions. Application of the

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41. See Employer Suability, supra note 9, at 821-24.
43. 39 Cal. 2d 781, 249 P.2d 8 (1952). *Duprey* is generally recognized as the first opinion to adopt the dual capacity theory. For a citation to pre-*Duprey* cases involving an employee's unsuccessful attempt to sue his employer, see Workers' Compensation, supra note 7, at 816 n.15.
44. 39 Cal. 2d at 784-89, 249 P.2d at 10-13.
45. Id. at 784, 249 P.2d at 10.
46. Id.
47. Id. at 793, 249 P.2d at 15.
48. Id. The *Duprey* court stated that "an employee injured in an industrial accident may sue the attending physician for malpractice if the original injury is aggravated as a result of the doctor's negligence, and that such right exists whether the attending doctor is the insurance doctor or the employer." Id.
49. Employees have argued that their employers have assumed one or more of the following nonemployer roles which gave rise to a separate capacity and liability under the dual capacity doctrine: (1) manufacturer of a defective product; (2) provider of medical services; (3) insurer; (4) corporate subdivision; (5) government subdivision; (6) owner of real estate; (7) vendor; and (8) statutory duties not imposed by worker compensation laws. See Worker's Compensation, supra note 7, at 815-16.
50. Twenty-seven jurisdictions have addressed the dual capacity question. See Workers' Compensation, supra note 7, at 814 n.8. In Illinois, the doctrine has received a great amount
doctrine has turned upon a finding that the employer occupied a second capacity that carried obligations and responsibilities different from those assumed in the employer role. In McCormick v. Caterpillar Tractor Co., the Illinois Supreme Court examined the dual capacity doctrine in relation to a company’s provision of in-house medical services and concluded that no second capacity existed.

THE MCCORMICK DECISION

Factual Background

While in the course and scope of his employment with the Caterpillar Tractor Company, Max D. McCormick sustained an injury to his left of attention. Recently, in Smith v. Metropolitan Sanitary Dist., 77 Ill. 2d 313, 396 N.E.2d 524 (1979), the Illinois Supreme Court adopted the dual capacity theory within the products liability context because as a manufacturer, seller, or lessor of a product, the employer is acting in a separate legal role in which he is not immune from liability under the Workmen's Compensation Act. Prior to Smith, various Illinois appellate courts had denied application of the dual capacity doctrine in the products liability context. See, e.g., Goetz v. Avildsen Tool & Mach., Inc., 82 Ill. App. 3d 1054, 403 N.E.2d 555 (1st Dist. 1980) (doctrine inapplicable because employer did not publicly market defective product); Profilet v. Falconite, 56 Ill. App. 3d 168, 371 N.E.2d 1069 (1st Dist. 1977) (doctrine inapplicable to employer leasing defective machine); Rosales v. Verson Allsteel Press Co., 41 Ill. App. 3d 787, 354 N.E.2d 553 (1st Dist. 1976) (doctrine inapplicable to employer who removes safety devices on press).

Another area in Illinois that has been subject to litigation involving the dual capacity doctrine concerns employers who are also owners of the property upon which their employees work. Compare Marcus v. Green, 13 Ill. App. 3d 699, 300 N.E.2d 512 (5th Dist. 1973) (obligations assumed under Structural Work Act differ from those of an employer) with Walker v. Berkshire Foods, Inc., 41 Ill. App. 3d 595, 354 N.E.2d 626 (1st Dist. 1976) (duties under Structural Work Act do not create a second capacity).

Although the United States Supreme Court has never specifically referred to the dual capacity doctrine by name, the Court implicitly addressed the theory in Reed v. The Yaka, 373 U.S. 410 (1963). In Reed, the defendant, a bareboat ship charterer, personally hired longshoremen instead of employing a separate stevedoring company to supervise the loading and unloading of the ship. The plaintiff, hired as an employee for the defendant's personal stevedoring company, was injured during his employment. Subsequently, the plaintiff instituted suit against the employer in its capacity as a bareboat charterer. Although the employer asserted that the Longshoremen's and Harbor Workers' Compensation Act provided the exclusive remedy for the injured employee, the Supreme Court disagreed and allowed the suit stating that "only blind adherence to the superficial meaning of a statute could prompt us to ignore the fact that . . . [the] employer of longshoremen . . . was also a bareboat charterer . . . charged with the traditional, absolute, and nondelegable obligation of seaworthiness which it should not be permitted to avoid." Id. at 415. Subsequent cases in the lower federal courts have supported Reed. See, e.g., Smith v. M/V Captain Fred, 546 F.2d 119 (5th Cir. 1977) (repairman allowed to sue owner of vessel as third party even though vessel's owner was his employer); Napoli v. Hellenic Lines, Ltd., 536 F.2d 505 (2d Cir. 1976) (employee could sue vessel owner who also acted as his employer). But see, e.g., Lucas v. Brinknes Schiffahrte Ges., 379 F. Supp. 759, 766-67 (E.D. Pa. 1974) (court dicta indicated employer might be immune from employee's suit).

51. See supra notes 8-12 and accompanying text.
52. 85 Ill. 2d 352, 423 N.E.2d 876 (1981).
foot. After the accident, McCormick visited the plant clinic where he was examined by a full-time plant physician. After studying x-rays of the foot, the physician diagnosed the injury as a simple strain and instructed McCormick to return to work. Approximately one month later, McCormick returned to the clinic complaining of continued pain in his foot. He was diagnosed by another plant physician who found only mild swelling and again returned McCormick to work. A third trip to the clinic produced similar results. On McCormick's fourth trip to the clinic, it was discovered that his foot was broken.

Pursuant to the Illinois Workers' Compensation Act, McCormick filed for benefits. It was determined that he had suffered a twenty-five percent permanent loss of the use of his left foot, and accordingly, he received the award specified under the Act for such an injury. Subsequently, McCormick instituted suit against three of the treating physicians and his employer, Caterpillar Tractor Company. The trial court dismissed the suit against Caterpillar and one of the physicians and granted a motion for summary judgment in favor of the remaining two doctors. The appellate court affirmed the dismissal of the suit and summary judgment order against Caterpillar's physicians but reversed the dismissal of Caterpillar under the dual capacity doctrine. The Illinois Supreme Court reversed the appellate court's finding in regard to Caterpillar.

53. *Id.* at 354, 423 N.E.2d at 876. Because McCormick’s initial injury arose out of and occurred during his course of employment with Caterpillar, it was compensable under the Act. *Id.* See Ill. Rev. Stat. ch. 48, § 138.2 (1979).

54. 85 Ill. 2d at 354, 423 N.E.2d at 877. As treatment for the sprain, the physician who first examined McCormick instructed him to wrap his foot and place ice on it. *Id.*

55. *Id.*

56. *Id.* at 354, 423 N.E.2d at 877. While at the clinic for the third time, McCormick was treated by yet another Caterpillar physician. This physician concluded that McCormick's continuing pain was due to an elastic bandage. *Id.*

57. *Id.* at 355, 423 N.E.2d at 877. This fourth examination disclosed stress fractures of the second and third metatarsal bones of the left foot. *Id.*


59. 85 Ill. 2d at 355, 423 N.E.2d at 877. The loss was computed in accordance with the Act's schedules. Ill. Rev. Stat. ch. 48, §§ 138.8-.10 (1981). See supra note 3.

60. 85 Ill. 2d at 355, 423 N.E.2d at 877.

61. 82 Ill. App. 3d 77, 80, 402 N.E.2d 412, 415 (4th Dist. 1980). Due to their full-time positions with the company, the physicians were considered Caterpillar employees. The appellate court, pursuant to the statutory immunity afforded to co-employees under the Illinois Workers' Compensation Act, found the doctors immune from a suit by a co-employee and, therefore, affirmed the order granting summary judgment for the physicians. *Id.*

62. *Id.* The appellate court held that Caterpillar, by directly administering medical services to its employees rather than sending them to outside physicians, maintained two separate capacities; one as employer and the other as provider of medical services. By maintaining two separate capacities, each with differing obligations, the court reasoned that Caterpillar had subjected itself to tort liability under the dual capacity doctrine. *Id.*

63. McCormick v. Caterpillar Tractor Co., 85 Ill. 2d 352, 423 N.E.2d 876 (1981). Justice Simon was the sole dissenter. *Id.* at 360-76, 423 N.E.2d 876, 880-87 (Simon, J., dissenting) (since Caterpillar not obligated to provide an employee clinic, it was acting in role other than employer).
The McCormick Court's Analysis

In overturning the appellate court's decision, the Illinois Supreme Court found that the dual capacity doctrine was inapplicable to the situation in McCormick and held that the exclusive remedy provision of the Workers' Compensation Act limited the employee's recovery to benefits flowing from the Act. In reaching its decision, the McCormick court adopted a "dual-capacity" test, which determines the employer's potential liability by assessing whether new obligations were created in a nonemployer capacity. Under this theory, Caterpillar would be liable in its role as a provider of medical services if, while in that capacity, it generated duties and responsibilities independent of those flowing from its capacity as employer.

To determine whether Caterpillar was operating in a nonemployer capacity, the McCormick court examined Caterpillar's statutory obligations as an employer under the Illinois Workers' Compensation Act. According to the plain language of the statute, the court found that Caterpillar had an obligation as an employer to provide and pay for all reasonable medical expenses incurred by its employees. In response to this duty, the McCormick court noted that Caterpillar employed its own physicians to provide medical treatment. Because Caterpillar was only fulfilling a responsibility imposed upon it by the Act, the court concluded that Caterpillar's actions in hiring physicians did not exceed the scope of its obligations as an employer, and thus, Caterpillar did not engage in activities in a nonemployer capacity.

In addition to delineating the scope of Caterpillar's obligations, the majority also distinguished the Duprey v. Shane decision. The appellate court had cited Duprey as support for holding Caterpillar liable under the dual capacity doctrine. For a discussion of Duprey, see supra notes 43-48 and accompanying text.
McCormick, on the other hand, the court maintained that Caterpillar provided medical treatment due to the employment relationship. Because McCormick's treatment occurred as a result of Caterpillar's status and obligations as an employer, the McCormick court reasoned that any responsibilities generated from the treatment flowed solely from the employment relationship. The dual capacity doctrine, therefore, was inapplicable because any obligations Caterpillar incurred as a provider of medical services were directly related to its statutory responsibilities as an employer.

CRITIQUE OF THE MCCORMICK DECISION

The McCormick court's dual capacity test focuses on whether an employer's conduct has created obligations on the employer unrelated to those required by the Act. To employ this test properly, Caterpillar's responsibilities as an employer should have been distinguished from those obligations that are more appropriately characterized as nonemployer functions. The McCormick court, however, misinterpreted the employer's obligations under the Act and thereby erroneously concluded that the provision of medical services by Caterpillar's own physicians constituted a duty incidental to those imposed by the Act.

The Illinois Workers' Compensation Act requires an employer to "provide and pay" for all reasonable medical services necessary to treat a worker's on the job injury. The Act does not, however, specifically require an employer to be the provider of medical services or to maintain a clinic on its premises. Thus, Caterpillar's only medical obligations under the Illinois Act are to insure that injured employees receive adequate treatment and to pay for any expenses incurred in receiving such treatment. An employer-employee relationship, but did so as an attending doctor, and his relationship to ... (plaintiff) was that of doctor and patient." Id. (quoting Duprey v. Shane, 39 Cal. 2d 781, 793, 249 P.2d 8, 15 (1952)).

The decisive test to determine if the dual-capacity doctrine is invocable is not whether the second function or capacity of the employer is different and separate from the first. Rather, the test is whether the employer's conduct in the second role or capacity has generated obligations that are unrelated to those flowing from the company's or individual's first role as an employer. If the obligations are not related, the doctrine is not applicable.

85 Ill. 2d at 357, 423 N.E.2d at 878. See supra note 6.

In referring to what the Illinois Workers' Compensation Act requires of an employer, one commentator stated that "[t]he 1975 legislation excludes the employer from having anything to say about the medical care of an injured employee; he just pays the cost of whatever medical care the employee seeks." Stevenson, The Illinois Workmen's Compensation System: A Description and Critique, 27 DePaul L. Rev. 675, 707 (1978) [hereinafter cited as Stevenson].
employer may discharge these duties either by sending injured employees to outside doctors or by hiring physicians as independent contractors. The employer, therefore, has no obligation to establish a clinic staffed with company physicians. Because Caterpillar was not required to serve as the actual provider of medical treatment, its employment of company physicians to administer medical treatment should have been found by the McCormick court to constitute a new obligation unrelated to those expressly required of employers under the Act. Specifically, Caterpillar voluntarily assumed the duty to act with due care in its treatment of injured employees. Because the court misinterpreted Caterpillar’s obligations as an employer under the Illinois Workers’ Compensation Act, it was unable to accurately ascertain whether Caterpillar generated new obligations by establishing a medical clinic.

The court’s dismissal of McCormick’s action is furthermore flawed because McCormick’s injury can be viewed as the act of a negligent third party. If Caterpillar had directed McCormick to independent physicians, those physicians, and not Caterpillar would have been responsible for acts negligently aggravating McCormick’s injuries. Because the aggravation occurs outside the scope of employment, the employee may, in addition to seeking workers’ compensation from his employer, institute a common law suit against the negligent third party responsible for the aggravation.

78. See 85 Ill. 2d at 361, 423 N.E.2d at 880 (Simon, J., dissenting).
79. The obligation to operate a clinic in a non-negligent manner can be derived from the following principle:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or
(b) the harm is suffered because of the other’s reliance upon the understanding.

RESTATEMENT (SECOND) OF TORTS § 323 (1965).
81. See PROSSER, supra note 18, § 44, at 279 n.63 (employer not liable for negligence of independent physician selected by defendant with reasonable care).
82. Under the Illinois Workers’ Compensation Act, when an injury occurs in the course of employment, the employer is liable for both the original injury and any aggravation of that injury traceable to the original accident. ILL. REV. STAT. ch. 48, § 138.2 (1981). See, e.g., International Harvester Co. v. Industrial Comm’n, 46 Ill. 2d 238, 263 N.E.2d 49 (1970) (aggravation outside employment setting compensable absent employee negligence or intent); Shell Oil Co. v. Industrial Comm’n, 2 Ill. 2d 590, 119 N.E.2d 224 (1954) (employer liable under the Act for aggravation of disabilities traceable to original injury).
83. See Rylander v. Chicago Short Line Ry., 17 Ill. 2d 618, 161 N.E.2d 812 (1959) (employee’s common law action against a third party whose negligence caused his injury not barred by the Act).
McCormick's aggravated injury was attributable to Caterpillar's negligent performance in its separate capacity as a provider of medical treatment. Therefore, in addition to its liability under the Act for aggravation of injuries directly traceable to the original accident, Caterpillar could have been found liable in its separate capacity as a medical provider under a negligent third party theory for the actions of the doctors in its employ.

Finally, in treating McCormick's malpractice injury as an industrial accident arising from his employment with Caterpillar, the court neglected the principle upon which the Illinois Workers' Compensation Act is grounded—that risks inherent in a particular industry should be borne by the industry itself rather than the worker. Although it is undisputed that McCormick's initial injury occurred due to employment related risks, it is certainly arguable that the aggravation of that injury caused by the physicians' malpractice was related to risks inherent in the manufacturing industry. By incorporating McCormick's malpractice claim into the compensation system, the McCormick majority has effectively attributed risks arising from medical malpractice from the medical profession to the manufacturing industry. In so doing, the majority necessarily requires the manufacturing industry to bear costs attributable to negligence in the medical profession and transforms industry into a medical malpractice insurer. This result clearly was not contemplated by the Illinois Workers' Compensation Act.


85. *Contra* 2A LARSON, supra note 1, § 72.62, at 14-212 to 213 (author agrees with the Illinois court's decision in McCormick that the employer should not be held liable under employee's tort claim).

86. *See* PROSSER, supra note 18, § 80, at 530-31. *See also supra* notes 34-37 and accompanying text.

87. 85 Ill. 2d at 354, 423 N.E.2d at 876.

88. Justice Simon stated in his dissent:

The theory of workmen's compensation was that industrial accidents were not to be considered anyone's fault in particular; fault was not to be disputed; rather, accidents were an inherent risk of employment. The great producing cause of injury was regarded as the industry itself, and the industry, not the worker, was to bear the cost like any other cost of production . . . .

Medical malpractice is not an inherent risk of the tractor business, or of whatever line of work McCormick was in when first injured. It is a feature of medical practice, and its costs should be borne by the medical profession, an ancient and distinct one.

85 Ill. 2d at 370-71, 423 N.E.2d at 884 (Simon, J., dissenting).

89. *See* United States Indus. Prod. Mach. v. Industrial Comm'n, 40 Ill. 2d 469, 240 N.E.2d 637 (1968) (Act not intended to insure employees against all accidents); Ace Pest Control, Inc. v. Industrial Comm'n, 32 Ill. 2d 386, 205 N.E.2d 453 (1965) (Act not intended to make employer insurer for the total safety of his employees). *See also* Brodie, *The Adequacy*
The *McCormick* decision carries important ramifications for the industrial community. By immunizing employers from malpractice liability, the *McCormick* decision will effectively encourage employers to maintain in-house clinics. This appears to be the preferable result because it enables the employee to obtain prompt medical treatment for an injury sustained on the job.\(^9\) If the court had found Caterpillar liable for its physicians' negligence, it seems likely that many employers would close their plant medical clinics and simply direct workers to outside physicians thereby avoiding the potential for malpractice liability.\(^9\)

Although employees arguably may benefit from in-house medical clinics, the quality of that treatment may be inadequate, as demonstrated by *McCormick*. Because the employer receives immunity from tort liability if one of its company physicians administers negligent medical treatment to any employee,\(^2\) there is no incentive to deter negligent medical treatment in employer-run medical clinics.\(^9\) Moreover, because the company physician is immune from liability under the co-employee exception of the Illinois Workers' Compensation Act,\(^4\) the injured employee is prohibited from

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90. One commentator asserts that not only is the employer the only person in a position to furnish prompt medical attention, but also the employer (or his insurance company) can provide a better quality of patient care than most employees can command on their own. Steven-son, *supra* note 72, at 706-07.

91. The threat of malpractice may render in-house medical centers infeasible because the economic costs of medical malpractice litigation will prohibit the employment of company physicians, nurses, and other personnel who work in company clinics. As a result, the employee, if injured at the plant, can no longer be assured of immediate medical attention. Brief for Petitioner at 16, *McCormick v. Caterpillar Tractor Co.*, 85 Ill. 2d 352, 423 N.E.2d 876 (1981).

92. See 85 Ill. 2d at 353, 423 N.E.2d at 878.

93. The possibility of inadequate medical treatment being provided by a physician who acquired the immunity of an employer was discussed in *Duprey v. Shane*, 39 Cal. 2d 781, 249 P.2d 8 (1952). The *Duprey* court stated:

> That independent professions by the fact of business contact with the employer should be absolved of responsibility for mistake, avoidable or unjustified neglect resulting in secondary affliction, seems obnoxious to the purpose and spirit of such a statute. To so hold might induce industry to encourage quackery, and place a premium upon negligence, inefficiency and wanton disregard of the professional obligations of medical departments of industry, toward the artisan.

Id. at 791, 249 P.2d at 14 (quoting Smith v. Golden State Hosp., 111 Cal. App. 667, 672, 296 P. 127, 129 (1931)).

bringing a malpractice action against the negligent physician. The unfortunate result is that the employer and physician are insulated from liability for negligent medical treatment and the employee is limited to the compensation specified in the Act. Although one commentator has asserted that the employer's financial stake in his employee's health promotes a high quality of medical care, the employers' financial interest in expediting the healing process may translate into pressure on the company's physicians to return injured employees to work as soon as possible. Without any significant safeguards to insure quality medical care, the McCormick decision may, in fact, endanger the industrial worker.

**CONCLUSION**

Under the dual capacity doctrine, an employer normally shielded from tort liability by the workers' compensation laws may be sued by an employee for tortious conduct arising from a separate nonemployer capacity. This nonemployer capacity imposes obligations upon the employer that are independent of those incurred in an employee-employer relationship. Before a determination can be made concerning the applicability of the doctrine, it is essential that courts ascertain the employer's obligations in his role as employer. By misinterpreting the employer's original obligations under the Illinois Workers' Compensation Act, the McCormick court erroneously determined that the obligations Caterpillar incurred upon establishing a medical clinic were incidental to duties it possessed as an employer under the Act.

As a result of the McCormick decision, it appears that employers who employ in-house physicians will be immune from liability for the negligence of these doctors. Equipped with this immunity, employers may have little incentive to seek out qualified physicians to render quality medical care for their injured employees.

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95. See Stevenson, *supra* note 72, at 707. The author asserts that the high quality of medical services provided by an employer is assured because of the direct financial interest the employer has in regaining the services of a valuable employee and reducing its worker compensation payments. *Id.*