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# Liability of Third Parties under the Ohio Workmen's Compensation Act

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## SUMMARY

In a field as volatile as labor law it is difficult to draw unchanging conclusions. However, it appears settled that an "alter ego" may not under any circumstances, avoid the statutory duties of its predecessor. Apparently an "alter ego" is also bound by a contract made by its predecessor with the union. It also appears clear that a bona fide purchaser for value will be held liable for the statutory duties of its predecessor. Until the courts decide otherwise the Board will probably continue finding notice of a union contract to the successor bona fide purchaser from the most meager of circumstances to enforce statutory duties. However, it is highly questionable whether contractual duties will be charged to a bona fide purchaser in the absence of an express assumption. The question of "what is the disposition of the contract" has been given little consideration by the courts.

As to relocation of industry two problems remain unsolved. The first is whether the union employee may claim transportation costs to the new location, and second, what circumstances must be present before the Board will order a company to return to its original location.

The Board's attitude toward removing employers is apparently more sympathetic than in the early days of the Board's existence. This is probably due to the increased complexity of motives in the relocation of a business due to postwar conditions.

HAROLD L. TICKTIN

## *Liability of Third Parties Under the Ohio Workmen's Compensation Act*

**M**OST CASES that arise under the Workmen's Compensation Acts involve disputes between an employee and his employer or the insurer. Not infrequently, however, an employee, while working within the scope of his employment, is injured by the tortious act of someone other than himself or his employer, *i.e.*, a third person. For example, if an employee of a highway construction company is repairing a road and while so working is struck and injured by a motorist driving along the highway, several legal disputes may arise. These will be governed by the Workmen's Compensation Act of the particular state involved. As the Workmen's Compensation Acts of the several states contain greatly varying provisions, the scope of this article is limited to a discussion of the problems that have arisen under the Ohio Act<sup>1</sup> only and to only the liability of the person whose tortious conduct in-

<sup>1</sup> OHIO REV. CODE §§ 4123.01 to 4123.99 (OHIO GEN. CODE §§ 1465-41a to 1465-113).

jured the employee.<sup>2</sup> It is assumed throughout the article that the employee has the right to receive workmen's compensation from his employer.

Contrary to most states,<sup>3</sup> there is no provision in the Ohio Act dealing with the liability of the third person. Section 35 of Article II of the Ohio Constitution, which provides that workmen's " compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease , " affords no help since the action at law that was therein abrogated has been construed to be the action that existed in favor of the employee against his own employer.<sup>4</sup> Hence, the law concerning the liability of third parties that has been evolved in Ohio is case law, although the courts have placed reliance on the spirit of the Act.

The first major problem which arises is whether the injured employee, having received workman's compensation for his injury, can nevertheless recover damages from the third person whose negligence caused the injury. The first supreme court case to deal with this problem was *Trumbull Cliffs Furnace Co. v. Shachovsky*.<sup>5</sup> In that case an independent contractor was performing some work for the defendant, and the plaintiff, one of the employees of the independent contractor, was injured by the defendant's negligence. When sued for personal injuries the defendant claimed as a defense that both the independent contractor and the defendant had complied with

<sup>2</sup> The question of whether the third person has any rights as against the employer of the injured workman arose in *Bankers Indemnity Ins. Co. v. Cleveland Hardware & Forging Co.*, 77 Ohio App. 121, 62 N.E.2d 180, *app. dismissed*, 145 Ohio St. 615, 62 N.E.2d 251 (1945). In this case a seller negligently furnished oxygen instead of nitrogen which the defendant, the purchaser, had ordered. The defendant negligently allowed its employees to use such gas, resulting in an explosion and the deaths of the employees. The latter's dependents collected workmen's compensation from their employer, the defendant-purchaser. The dependents then sued the plaintiff's assured, the seller, for negligence, and the plaintiff, because of its insurance contract with the seller, settled such actions. The plaintiff then sued the defendant to recover the amount paid on settlement, on the theory that the defendant's negligence was the primary cause of the employees' death and that the seller, the third person, was only secondarily liable. The court held that there was no question of primary and secondary liability involved, and that an employer complying with the Workmen's Compensation Act is relieved of any common law liability because of injuries befalling his employees; hence the third person seller, through its insurer, cannot recover.

<sup>3</sup> "Compensation Acts may be divided into three general classes with respect to remedies against negligent third persons: first, those which have no provision in the Act relating thereto; second, those which have such provision but do not differentiate between third persons under the Act and not under the Act; and third, those which make the latter differentiation." 3 SCHNEIDER, *WORKMEN'S COMPENSATION* 176 (3d ed. 1943). For a general discussion of the employee's rights against third persons under the different types of statutes before and after collecting workmen's compensation, see 3 SCHNEIDER, *op. cit. supra* at 180 and HOROVITZ, *WORKMEN'S COMPENSATION* 342-344 (1944).

<sup>4</sup> *Ohio Pub. Service Co. v. Sharkey*, 117 Ohio St. 586, 160 N.E. 687 (1927).

<sup>5</sup> 111 Ohio St. 791, 146 N.E. 306 (1924).

the Workmen's Compensation Act, and the employee had applied for and received compensation under the Act. The court, however, held that under Ohio Revised Code Section 4123.01 (Ohio General Code Section 1465-61)<sup>6</sup> the defendant was not the employer of the injured employee but rather a third person, and the employee, even though he had accepted compensation, could recover in a common law tort action.

The court implied that if the independent contractor employer had failed to comply with the Act, its injured employee could elect to treat the general contractor as a statutory employer under the above section who may be liable to respond under the act, or as a third person who is not protected by the Act. It is also implicit in the decision that the employee need not elect beforehand between accepting compensation and suing the third person. He can recover compensation even though he has already recovered from the third person.<sup>7</sup> The doctrine established by this case, that the injured employee can recover from the third person tortfeasor even though the third person is another employer complying with the Workmen's Compensation Act, has been fully borne out in other Ohio cases.<sup>8</sup> In *Harbruck v. Burger Iron Co.*,<sup>9</sup> it was held that the employee can recover from the negligent third person even though the third person and the injured man's employer were engaged at the time in a common enterprise and the injury was caused in the prosecution of such enterprise. The court held that the latter fact " would make no difference so long as the circumstances are not such as to create the relation of master and servant between the party sued and the injured party."<sup>10</sup>

Since the suit between the employee and the third person is for personal

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<sup>6</sup> "Every person in the service of any independent contractor or subcontractor who has failed to [comply with the Act] shall be considered as the employee of the person who has entered into a contract with such independent contractor unless such employees, or their legal representatives or beneficiaries elect, after death or injury, to regard such independent contractor as the employer."

<sup>7</sup> *Cf. Vayto v. River Terminal & Ry.* 18 Ohio N.P. (N.S.) 305, 28 Ohio Dec. 401 (Cuyahoga Com. Pl. 1915), where it was held that the employee's right to receive compensation is not lost by reason of his settlement with the third person tortfeasor.

<sup>8</sup> *George v. Youngstown*, 139 Ohio St. 591, 41 N.E.2d 567 (1942); *Ohio Pub. Service Co. v. Sharkey*, 117 Ohio St. 586, 160 N.E. 687 (1927); *Kasunic v. Euclid East Seventeenth Street Co.*, 32 Ohio L. Rep. 261 (Ohio App. 1929); *Arnold v. Ohio Gas & Elec. Co.*, 28 Ohio App. 435, 162 N.E. 765 (1928); *Ohio Traction Co. v. Washington*, 6 Ohio App. 273 (1916); *Luthy v. Cincinnati, N.Y. & Tex. P. Ry.*, 2 Ohio L. Abs. 207 (Cincinnati Super. Ct. 1924); *Kenning v. Interurban Railway & Terminal Co.*, 18 Ohio N.P. (N.S.) 526 (Cincinnati Super. Ct. 1915); *Biddinger v. Steininger-Taylor Co.*, 18 Ohio N.P. (N.S.) 42 (Hardin Com. Pl. 1915); *Vayto v. River Terminal & Ry.*, 18 Ohio N.P. (N.S.) 305, 28 Ohio Dec. 401 (Cuyahoga Com. Pl. 1915).

<sup>9</sup> 44 Ohio App. 475, 186 N.E. 372 (1933).

<sup>10</sup> *Id.* at 481, 186 N.E. at 374.

injuries predicated upon common law negligence,<sup>11</sup> the third person can avail himself of the usual defenses in such an action,<sup>12</sup> but the employee's right to recover is not affected by any negligence on the part of his employer contributing to the injury, so long as the injury was the direct and proximate result of the third person's negligence.<sup>13</sup>

Various rationales are given by the Ohio courts as to why the injured employee can recover from the negligent third person even though he has also a right to compensation. In the *Shachovsky* case, the supreme court reasoned that the third person had no contractual relation with the employee, that the third person was a total stranger, and hence he cannot contend "that it is inequitable to allow the workman to have two recoveries, one under the Compensation Act and one under this suit."<sup>14</sup> Perhaps a better statement is that the Workmen's Compensation statutes relate solely to the relationship of employer and employee,<sup>15</sup> and the Act does not change the nature or existence of the cause of action against the third person.<sup>16</sup> A lower Ohio court said there was no provision in the Act making the remedy therein provided against the employer exclusive.<sup>17</sup> Still other courts have decided that there is, in actuality, no double recovery, for the compensation awarded under the Act is not full or complete and its amount can be later changed or modified.<sup>18</sup>

There is one instance, however, when the injured employee cannot recover from the negligent third person. This occurs when the third person and the injured man are employees<sup>19</sup> of the same employer. In the leading

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<sup>11</sup> *Hartford Acc. & Indemnity Co. v. Proctor & Gamble Co.*, 91 Ohio App. 573, 109 N.E.2d 287 (1952).

<sup>12</sup> *Kasunic v. Euclid East Seventeenth Street Co.*, 32 Ohio L. Rep. 261 (Ohio App. 1929) (contributory negligence)

<sup>13</sup> *Fidelity & Cas. Co. v. Cedar Valley Elec. Co.*, 187 Iowa 1014, 174 N.W. 709 (1919)

<sup>14</sup> *Trumbull Cliffs Furnace Co. v. Shachovsky*, 111 Ohio St. 791, 796, 146 N.E. 306, 308 (1924).

<sup>15</sup> *George v. Youngstown*, 139 Ohio St. 591, 41 N.E.2d 567 (1942); *Hartford Acc. & Indemnity Co. v. Proctor & Gamble Co.*, 91 Ohio App. 573, 109 N.E.2d 287 (1952).

<sup>16</sup> *Hartford Acc. & Indemnity Co. v. Proctor & Gamble Co.*, 91 Ohio App. 573, 577, 109 N.E.2d 287, 289 (1952)

<sup>17</sup> *Ohio Traction Co. v. Washington*, 6 Ohio App. 273 (1916) The court added that the rule that settlement with one joint tortfeasor is a bar to recovery from the other has no application and cannot be invoked in such a case.

<sup>18</sup> *Kenning v. Interurban Railway & Terminal Co.*, 18 Ohio N.P. (N.S.) 526 (Cincinnati Super. Ct. 1915); *Vayto v. River Terminal & Ry.*, 18 Ohio N.P. (N.S.) 305, 28 Ohio Dec. 401 (Cuyahoga Com. Pl. 1915)

<sup>19</sup> The third person cannot get immunity from the fact that he is a shareholder in the corporate employer; the separate entity concept is recognized. *Landrum v. Middaugh*, 117 Ohio St. 608, 160 N.E. 691 (1927)

case of *Landrum v. Middaugh*,<sup>20</sup> an employee was injured by a negligent act of his foreman, performed in the regular course of the foreman's employment, while both the employee and his foreman were working for an employer who had complied with the Act. In an action for personal injuries against the foreman, the court denied recovery on the ground that the acts of the foreman were the acts of the employer, and since the employer was immune from common law suits under the Ohio Constitution,<sup>21</sup> the foreman was also. A third person who is not an employee of the same employer is liable because the employer has no control over his acts. In other words, the fellow-employee causing the injury is not a true third person. Such "immunity" reasoning implies that if both employees worked for a common employer who had not complied with the Act, the injured employee could elect<sup>22</sup> to sue his fellow-employee at common law, for the employer would have no immunity from such a suit that could be extended to the negligent employee.<sup>23</sup>

In a dictum, the court in the *Landrum* case said that "if the foreman willfully, maliciously, or wantonly, in the pursuance of his own unlawful purpose, injures a fellow employee, his act is not that of the employer."<sup>24</sup> As a result one might be led to the conclusion that the employee would be liable. But in *Rosenberger v. L'Archer*,<sup>25</sup> which was an action by an employee whose employer had complied with the Act to recover damages from the manager of the employer's business for alleged wanton negligence while plaintiff and the manager were driving in the employer's car on company business, the plaintiff relied on the dictum in the *Landrum* case. The court of appeals reversed a judgment for the plaintiff, and entered final judgment for the defendant after holding that there was no evidence of the manager's willful or wanton negligence. The court explained the dictum in the *Landrum* case by stating, "the judge had in mind a case in which it appeared that the blameworthy employee was acting 'in pursuance of his own unlawful purposes' and not in pursuance of the purposes—lawful or unlawful—of his employer."<sup>26</sup> Under the former circumstances, the court continued, the employer would not be liable at common law because the employee would no longer be acting within the scope of his employment;

<sup>20</sup> 117 Ohio St. 608, 160 N.E. 691 (1927).

<sup>21</sup> Article II, § 35.

<sup>22</sup> When an employer has failed to comply with the Act, his injured employee may elect to sue him at common law or to file a claim with the Industrial Commission for compensation. OHIO REV. CODE §§ 4123.77, 4123.75 (OHIO GEN. CODE §§ 1465-73, 1465-74.)

<sup>23</sup> Gallick v. Ott, 39 Ohio L. Abs. 38, 51 N.E.2d 404 (Ohio App. 1940) *semble*.

<sup>24</sup> *Landrum v. Middaugh*, 117 Ohio St. 608, 615, 160 N.E. 691, 693 (1927)

<sup>25</sup> 30 Ohio L. Abs. 552, 31 N.E.2d 700 (Ohio App. 1936).

<sup>26</sup> *Id.* at 554, 31 N.E.2d at 702.

there would be no relation of employer-employee, and it is only to that relation which the Act applies. But where only wanton negligence is charged, the plaintiff would have no common law cause of action against the employer, being relegated to his remedy under the Workmen's Compensation Act because "the degree of the negligence could not affect the question of whether the injury resulted from a hazard of the business in which [the employee] was engaged,"<sup>27</sup> and there could therefore be no recovery from the tortfeasor-employee.

The holding of the *Landrum* case has been weakened by a later supreme court decision, *Morrow v. Hume*.<sup>28</sup> In this case, the defendant was vice-president and general manager in charge of sales for a corporation, and the plaintiff's decedent was a salesman for the same corporation. The plaintiff and the defendant were sent to interview a prospective purchaser in Detroit, and, acting under their employer's authority and directions, they went in defendant's car, with defendant driving. They were involved in an automobile accident. Plaintiff collected compensation under the Act, and then sued the defendant for negligence [the accident occurred before the Ohio "guest statute" was enacted]. The defendant relied on the fact that the plaintiff had collected compensation as a defense, per the *Landrum* case, but the court held that plaintiff could recover nevertheless. Although defendant was acting under the employer's authority and direction and in furtherance of the employer's business, "no facts [were] alleged which show that the employer had any power or right to direct the operation and control of the automobile."<sup>29</sup> The court reasoned that in the *Landrum* case the foreman who started the machinery which crushed the employee's arm was the alter-ego of the employer in the operation of the employer's machinery, but that here the defendant was in a different position because he was operating and controlling his own car. This distinction by the court in the *Morrow* case seems at best a weak one, for in neither case did the employer have actual physical control over his employee, and the fact that an employee is driving his own car, rather than the employer's, does not materially lessen the control the employer has over him as a result of the employment relationship.<sup>30</sup>

The fact that the third person is a doctor who treated the plaintiff for his injury is no basis for a distinction from the rule laid down in the *Landrum*

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<sup>27</sup> *Id.* at 554, 31 N.E.2d at 701.

<sup>28</sup> 131 Ohio St. 319, 3 N.E.2d 39 (1936)

<sup>29</sup> *Id.* at 326, 3 N.E.2d at 42.

<sup>30</sup> See *Rosenberger v. L'Archer*, 30 Ohio L. Abs. 552, 31 N.E.2d 700 (Ohio App. 1936), where recovery was denied in a suit against an employee. Here the injuries were the result of an accident caused by the alleged negligence of the defendant while he was driving the common employer's car. The court put no emphasis on the fact

case. If the plaintiff hires an independent doctor to treat him and the doctor is guilty of malpractice, the plaintiff can recover from the doctor even though he is receiving increased compensation for the aggravated injury;<sup>31</sup> but if the plaintiff's injuries are aggravated by a doctor in the employ of the plaintiff's employer, the plaintiff cannot recover in an action against the doctor, even though he has not applied for additional compensation.<sup>32</sup>

The problem of the amount of damages recoverable from the third person by the injured employee who was receiving benefits under the Act has troubled the courts. Prior to 1927 several lower courts had held that the compensation recovered under the Act could not be pleaded by the third person in mitigation of damages in a suit against such third person by the employee.<sup>33</sup> But in that year *Ohio Public Service Co. v. Sharkey*,<sup>34</sup> the first supreme court case dealing expressly with this problem,<sup>35</sup> held that recovery in an action against the negligent third person could only be pro tanto, and only for such portion of the damages as had not been compensated for under the Workman's Compensation Act, on the ground that:

the common law doctrine that it is inequitable to allow a double satisfaction for the same injury was not abrogated, either expressly or impliedly, by the Workman's Compensation Act, the purpose of which is to insure to workmen injured during their employment the compensation precisely commensurate with the injury.<sup>36</sup>

However, the question was raised again in the subsequent case of *Truscon Steel Co. v. Trumbull Cliffs Furnace Co.*, in which the supreme court expressly overruled its earlier holding and allowed full recovery by the injured employee from the negligent third person. This has remained the law in Ohio to the present time.<sup>38</sup> The courts' rationale is that the allowance of compensation under the Act is in the nature of occupational insurance

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that the car was the employer's; on the contrary, it stressed that the defendant was acting in pursuance of the employer's purposes.

<sup>31</sup> *Thackery v. Helfrich*, 5 Ohio L. Abs. 396 (Ohio App. 1927).

<sup>32</sup> *Anderson v. Libby Glass Mfg. Co.*, 6 Ohio L. Abs. 400 (Ohio App. 1928).

<sup>33</sup> *Thackery v. Helfrich*, 5 Ohio L. Abs. 396 (Ohio App. 1927); *Luthy v. Cincinnati, N.Y. & Tex. P. Ry.*, 2 Ohio L. Abs. 207 (Cincinnati Super. Ct. 1924); *Brunk v. Cleveland, C., C. & S.L. Ry.*, 20 Ohio N.P. (N.S.) 360 (Clark Com. Pl. 1918).

<sup>34</sup> 117 Ohio St. 586, 160 N.E. 687 (1927).

<sup>35</sup> The issue of the amount of recovery was not raised in *Trumbull Cliffs Furnace Co. v. Shachovsky*, 111 Ohio St. 791, 146 N.E. 306 (1924).

<sup>36</sup> *Ohio Pub. Service Co. v. Sharkey*, 117 Ohio St. 586, 160 N.E. 687, 690 (1927); *accord*, *Arnold v. Ohio Gas & Elec. Co.*, 28 Ohio App. 435, 162 N.E. 765 (1928).

<sup>37</sup> 120 Ohio St. 394, 166 N.E. 368 (1929). See Note 48, *infra*.

<sup>38</sup> *Overland Construction Co. v. Sydnor*, 70 F.2d 338 (6th Cir. 1934); *Pappas v. Baltimore & O. Ry.*, 37 F.2d 271 (6th Cir. 1930); *McDowell v. Rockey*, 32 Ohio App. 26, 167 N.E. 589 (1929).



and hence cannot be deducted and treated as an offset to a claim for damages.<sup>39</sup>

When the problem of whether the two-year<sup>40</sup> or the six-year<sup>41</sup> statute of limitations applies to the injured employee's cause of action against the negligent third person arose, *Hartford Acc. & Indemnity Co. v. Proctor & Gamble Co.*,<sup>42</sup> the only Ohio case on the problem, decided that the two-year statute is applicable, " for the reason that the cause of action is for personal injuries predicated upon common law negligence."<sup>43</sup> In this case, the plaintiff became the assignee of the injured employee's claim by virtue of a New York statute,<sup>44</sup> but the court applied Ohio adjective law. Which statute of limitations applied depended upon whether plaintiff's right to sue was a common law right to sue for personal injuries arising out of tort or was a right to sue upon a liability created by statute. The court held that although plaintiff became the employee's assignee because of the New York statute, it merely stood in the employee's shoes, and the latter's cause of action existed independently of the statute as a common law right to recover for personal injuries. Therefore, since the Workmen's Compensation statutes do not change the nature of the cause of action, the two-year statute is applicable.

As noted previously, the negligent third person is liable to the injured employee; the question then arises whether the third person may also be liable to the employer of the injured employee. The leading case on this problem is *Truscon Steel Co. v. Trumbull Cliffs Furnace Co.*<sup>45</sup> Here the plaintiff was a self-insurer which had paid its employee \$2800 for injuries received as a result of the third party-defendant's negligence. The defendant had been sued by the employee and had, as the result of adverse judgment,<sup>46</sup>

<sup>39</sup> *McDowell v. Rockey*, 32 Ohio App. 26, 167 N.E. 589 (1929); *Thackery v. Helfrich*, 5 Ohio L. Abs. 396 (Ohio App. 1927); *Brunk v. Cleveland, C., C. & S.L. Ry.*, 20 Ohio N.P. (N.S.) 360 (Clark Com. Pl. 1918); *cf. Dietrich v. Peters*, 28 Ohio App. 427, 162 N.E. 753 (1928); *Shields v. Cincinnati Traction Co.*, 13 Ohio N.P. (N.S.) 133, 24 Ohio Dec. 253 (Hamilton Com. Pl. 1911); *Pittsburgh, C. & S.L. Ry. v. Fagin*, 3 Ohio N.P. (N.S.) 30, 15 Ohio Dec. 605 (Cincinnati Super. Ct. 1905), *aff'd*, 74 Ohio St. 491, 18 N.E. 1135 (1906) *MCCORMICK, DAMAGES* 323 (1935).

<sup>40</sup> 91 Ohio App. 573, 109 N.E.2d 287 (1952)

<sup>41</sup> "An action for bodily injury shall be brought within two years after the cause thereof arose." OHIO REV. CODE § 2305.10 (OHIO GEN. CODE § 11224-1).

<sup>42</sup> 91 Ohio App. 573, 577, 109 N.E.2d 287, 289 (1952).

<sup>43</sup> N.Y. WORKMEN'S COMPENSATION LAW § 29.

<sup>44</sup> "An action upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued." OHIO REV. CODE § 2305.07 (OHIO GEN. CODE § 11222)

<sup>45</sup> 120 Ohio St. 394, 166 N.E. 368 (1929).

<sup>46</sup> *Trumbull Cliffs Furnace Co. v. Shachovsky*, 111 Ohio St. 791, 146 N.E. 306 (1924).

paid him \$10,000. Here the plaintiff-employer sought to recover from the negligent third party the \$2800 it had paid as compensation to its employee. The court denied recovery, relying on the provision<sup>47</sup> of the Ohio Workmen's Compensation Act which declares indemnity contracts to be void. The court said:

Nothing could be clearer than that the legislature, by the provisions of this section, indicated its intention to prevent the reimbursement of the employer for any amount paid pursuant to the provisions of the Workmen's Compensation Act to an injured employee. . . In some of the states the Workmen's Compensation Act recognizes the right of reimbursement where there has been a full recovery in a direct suit against a third person whose negligence was the cause of the injury, but nothing of that kind appears in the Workmen's Compensation Act of Ohio.<sup>48</sup>

The same rule was followed in a later case,<sup>49</sup> and it would seem to be in accord with the general principle in insurance cases that there is no subrogation of the insurer on an accident or life policy to the claim of the insured against the one who injured or killed him.<sup>50</sup> Ohio's Act contains no provision for the subrogation of the employer to his employee's rights, and hence the employee, and not the employer, can recover the full amount from the negligent third person.<sup>51</sup>

But there are, nevertheless, occasions when the employer can recover from the negligent third person, namely, where the negligence of the third person constitutes a breach of a contract he has made with the injured man's employer. Thus, in *Midvale Coal Co. v. Cardox Corp.*,<sup>52</sup> one of the plaintiff's employees was injured by an explosion due to the defendant's failure to inspect and service a blasting cartridge as required the terms of a contract between the plaintiff and the defendant. The employee was awarded

<sup>47</sup> OHIO REV. CODE § 4123.82 (OHIO GEN. CODE § 1465-101).

<sup>48</sup> 120 Ohio St. 394, 397-399, 166 N.E. 368, 369 (1929). Ohio Revised Code Section 4123.82(b) [Ohio General Code Section 1465-101(b)] was amended in 1951. The court also felt that this decision was "irreconcilable on principle," *Id.* at 399, 166 N.E. at 369, with the pro tanto theory of recovery of Ohio Pub. Service Co. v. Sharkey, 117 Ohio St. 586, 160 N.E. 687 (1927), and so overruled that theory.

<sup>49</sup> *Cleveland, Columbus & Cincinnati Highway, Inc. v. Bookmyer*, 67 Ohio App. 476, 37 N.E.2d 393 (1941).

<sup>50</sup> *Mercer Cas. Co. v. Perlman*, 62 Ohio App. 133, 23 N.E.2d 502 (1939); *Gatzweiler v. Milwaukee Elec. Ry. & Light Co.*, 136 Wis. 34, 116 N.W. 633 (1908). VANCE, *INSURANCE* 796-797 (3d ed. 1951).

<sup>51</sup> *Herbruck v. Burger Iron Co.*, 44 Ohio App. 475, 186 N.E. 372 (1933); *Vayto v. River Terminal & Railway Co.*, 18 Ohio N.P. (N.S.) 305, 268 Ohio Dec. 401 (Cuyahoga Com. Pl. 1915). "While it has been held that the subrogation provisions of the various Acts are merely declaratory of the common law rule and subrogation would be available to the employer regardless of such provision of the Acts, it has also been held that without such provision in the Acts the employer would have no subrogation rights." 3 SCHNEIDER, *WORKMAN'S COMPENSATION* 179 (3d ed. 1943).

<sup>52</sup> 157 Ohio St. 526, 106 N.E.2d 556 (1952).

compensation under the Workmen's Compensation Act, and as a result the plaintiff's premiums to the insurance fund were increased under the merit-rating system.<sup>53</sup> The plaintiff sought to recover from the defendant the total sum of the additional premiums it had to pay. The court held it could recover in an action for breach of contract, because the damages resulting from the breach were not too remote to be recoverable. By this decision the *Truscon* case was expressly limited to its facts. However, the total amount of such damages could not exceed the total sum awarded and paid as a result of the employee's injuries, because "the parties did not contemplate premiums in excess thereof due to accident experience and increased pay-rolls."<sup>54</sup>

A similar decision was reached in *Bittner v. Boyajohn & Barr, Inc.*<sup>55</sup> Here the plaintiff, a sub-contractor, sued the defendant, the principal contractor, for a balance due. The plaintiff and the defendant had had a contract wherein the plaintiff agreed to carry workmen's compensation and protect the defendant from loss or liability on account of any accidents or damage. The Defendant loaned the plaintiff an employee, who was injured and collected workmen's compensation by reason of the protection growing out of his employment by the defendant. The plaintiff had not complied with the Workmen's Compensation Act, in violation of its contract, and because of the compensation paid to the defendant's employee, the defendant was required to pay an increased rate of premium into the Workmen's Compensation fund. The defendant counter-claimed to recover this increased amount from plaintiff, and the court affirmed a judgment for the defendant-employer on the ground that the damages flowed from a violation of the terms of the contract. It may therefore be seen that employers may be protected<sup>56</sup> to some extent from increased premiums by proper provisions in their contracts with others.

In conclusion, it may be said that the law in Ohio regarding the liability of third persons under the Workmen's Compensation Act fully supports the observation that:

the feeling of many lawyers that the mere existence of a compensation act wipes out common law suits is not justified by the cases; and the lawyer is still needed to protect and enforce those rights — common law and statutory — which the compensation act does not abolish or effect.<sup>57</sup>

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<sup>53</sup> OHIO REV. CODE § 4123.34 [OHIO GEN. CODE § 1465-54(3)].

<sup>54</sup> 157 Ohio St. 526, 531, 106 N.E.2d 556, 559-650 (1952).

<sup>55</sup> 19 Ohio L. Abs. 325 (Ohio App. 1935)

<sup>56</sup> *Accord*, *American Mut. Liability Ins. Co. v. United States Elec. Tool Co.*, 55 Ohio App. 107, 9 N.E.2d 157 (1936).

<sup>57</sup> HOROVITZ, *WORKMEN'S COMPENSATION* 353 (1944).