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THE THIRD PARTY'S DILEMMA—THE EXCLUSIVE LIABILITY DOCTRINE, COMPARATIVE NEGLIGENCE, AND THE MINNESOTA WORKMEN'S COMPENSATION ACT

I. INTRODUCTION

It has been 60 years since the Minnesota Supreme Court affirmed the legislature's constitutional authority to abrogate an employee's common law right to sue his employer on account of job-related injuries and, within the statutory framework of a system of workmen's compensation, to vest in the employee, instead, an absolute right to be compensated by his employer for those injuries. Although the essential fairness and legality of the method by which the workmen's compensation system allocates the costs and risks of industrial injuries between employer and employee has long been recognized, there exists an ever-widening controversy as to how these risks and costs should be further allocated between the employer and third parties whose conduct may have contributed to the employee's injury.

The controversy revolves around what may conveniently be referred to as the exclusive remedy doctrine, a doctrine which has its origin in a statutory provision common to most workmen's compensation acts. Its net effect is to insulate an employer who has undertaken to pay compensation benefits from any further liability to the employee and those claiming through him, or, to use the statutory language, to "other persons," on account of the employee's injury. There is no longer any doubt that it is proper to deny to the employee the right to sue his employer in exchange for the employer's assumption of an absolute duty to compensate the employee for injuries.

2. For a discussion of the economic advantages of the manner in which workmen's compensation allocates costs between the employer and employee, see G. Calabresi, The Cost of Accidents 245-46 (1970). Simply stated, the costs of accidental injuries are reduced when losses are imposed on employers without regard to fault since employers are better able than employees to estimate accurately the costs of injuries and will adopt safety devices to reduce increased workmen's compensation costs. But cf. Sands, How Effective Is Safety Legislation? 11 J. Law & Econ. 165, 177-78 (1968).
4. Id.

The liability of an employer prescribed by this chapter is exclusive and in the place of any other liability to such employee, his personal representative, surviving spouse, parent, any child, dependent, next of kin, or other person entitled to recover damages on account of such injury or death. . . . Id. (emphasis added).
sustained in the course of employment. But what of the prejudice which results to a third party, who is outside of the workmen's compensation system and who has received no quid pro quo under the statutory scheme, when the shield of the exclusive remedy doctrine is raised against him, after he has been held liable to an employee in the latter's common law suit for damages and seeks to recover by way of contribution or indemnity against the negligent employer?

The Minnesota Supreme Court has had occasion to address itself to this question in two recent cases in which it was first hinted, and then held, that a statute substantially extinguishing a third-party tortfeasor's right to indemnity or contribution from a workmen's compensation employer deprives the third party of due process of law and violates the state's constitutional guarantee that there shall be a remedy for every wrong. As expansive as these judicial statements might appear at first blush, a closer reading of Carlson v. Smogard and its express reaffirmation of prior case law on the subject of employer liability to third persons discloses that the court has retreated from the sympathetic position it had taken in Haney v. International Harvester Co. toward the plight of the third party and his efforts to shift a portion of his liability for an employee's injury to the negligent employer. In point of fact, considerably less has been accomplished in providing relief to the third-party tortfeasor than is implied by the statement in Carlson that an otherwise "unrightable wrong" has now been corrected. As was the case prior to Haney, the third party who is unable to establish the existence of special, limited circumstances entitling him to recovery of indemnity against the employer will continue to bear 100 percent of a judgment entered against him in a common law action brought by an employee even though his wrongful conduct, when compared to that of the employer, was negligible or insignificant.

A change in the status of the third-party tortfeasor vis-à-vis the negligent employer is needed, and the point which emerges most clearly from the recent flurry of Minnesota case law is that any change must be effected by the legislature. This same conclusion is reached by Professor Arthur Larson, who describes the controversy as the most evenly balanced in all of compensation law.

8. MINN. CONST. art. 1, § 8.
9. Id. at 385, 201 N.W.2d at 146.
10. Id. at 385, 201 N.W.2d at 146.
11. Id. at 385, 201 N.W.2d at 146.
12. Id. at 385, 201 N.W.2d at 146.
13. 2 A. LARSON, WORKMEN'S COMPENSATION LAWS § 76.10 (1974) [hereinafter cited as LARSON].
II. THE THIRD PARTY'S DILEMMA—JUDICIAL AND LEGISLATIVE DEVELOPMENT

A. The Source of the Dilemma

Before embarking upon a more detailed discussion of the present status of the law governing the third-party tortfeasor's recovery-over rights against the negligent employer, and before considering the direction any legislative action on the question should take, it is important to underscore the several aspects of the compensation system which, in combination, form the basis for the third party's dilemma.

The first important aspect of the system is that the employer's liability under the Workmen's Compensation Act for injuries suffered by his employees while within the scope of their employment is exclusive to all other liability. The employer has no liability in tort to an injured employee.

The second pertinent feature of the compensation scheme is that the employee ordinarily is free to pursue any remedies he has at common law against third parties, even though he may have received compensation benefits from his employer. In such actions, the third party may not raise the employer's negligence as a defense, nor may he in most instances implead the employer as a third-party defendant.

Interwoven with the employee's right to maintain an action for damages against third persons who may have been instrumental in causing his injury is the right of the employer, either independently or in conjunction with the employee's action, to recover from third-party tortfeasors all compensation benefits which he was compelled to pay to his employee. Furthermore, any amounts received by the employee in his common law action which exceed the benefits previously paid out by the employer are available to the employer as credits against future payments which he would otherwise be obligated to make. As in the employee's action, the employer's negligence may not ordinarily be asserted by the third party as a defense to the subrogation claim.

17. The policy underlying the enactment of the Workmen's Compensation Act was the enlargement of the rights and remedies of the injured workman. See Gleason v. Geary, 214 Minn. 499, 507, 8 N.W.2d 808, 812 (1943), where the court, referring to a 1921 amendment of the compensation laws (Minn. Laws 1921 ch. 82, § 31), stated that the purpose of providing a workman a cause of action against a third party who was negligent was the restoration of a remedy which the worker had in Minnesota prior to the adoption of workmen's compensation.
18. See authority cited note 22 infra.
20. MINN. STAT. § 176.061, subd. 6(d) (1971).
The final feature of the compensation scheme which bears directly on the
dilemma of the third-party tortfeasor is the judicial rule which, until 1969,
defined the narrowly restricted circumstances in which a third party had a
right to indemnity against a negligent employer after being held liable in
damages to an injured employee. In 1969, the Minnesota Legislature
enacted an amendment to the Workmen's Compensation Act which went
even further in limiting those cases in which a third party could recover
against a negligent employer. It was this amendment which was held uncon-
stitutional in Carlson.

To highlight these aspects of the compensation system is to set out in sharp
relief the considerable disadvantage which the workmen's compensation laws
visit upon the third-party tortfeasor. Because the extent to which the em-
ployer's negligence caused the employee's injury cannot be litigated in the
employee's action against the third party, and because, in most situations, the
third party has no recovery-over rights against the employer, the third party
is struck a double-barreled blow. First, his effort to spread the liability for
the employee's injury to the employer in proportion to the employer's negli-
gence is thwarted. Thus, the third party must pay the full amount of the dam-
ages incurred, reduced only by the percentage of negligence assigned to the
plaintiff-employee. Second, the employer or his insurer may recover through
subrogation all of the compensation benefits previously paid to the employee,
and the statutory liability for future benefits may be substantially reduced.
Since the employer's recovery is not reduced in proportion to his own negli-
gence, the third party must subsidize the compensation system.

Moreover, there is some authority for the proposition that the employer
has an independent cause of action against a third party on account of injuries
sustained by his employee. The employer is said to have a right, independent
of his statutory subrogation rights, to recover from the third party the costs
incurred in compensating his injured employee. Such costs may include
increased insurance premiums resulting under retrospective premium rating
policies because of the adverse effect which a compensable injury has on the
employer's loss ratio. Exclusivity, thus, is not a two-way street. While the

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22. These were the circumstances in Hendrickson v. Minnesota Power & Light Co., 258 Minn.
368, 104 N.W.2d 843 (1960).

Stat. § 176.061, subd. 10 (1971));

24. Minn. at __, 215 N.W.2d at 620.

F.2d 918 (7th Cir. 1968), aff'd 284 F. Supp. 740 (N.D. Ill. 1967).

26. Id. See generally Larson, Workmen's Compensation: Employer's Independent Action

employee's remedies are limited to those afforded under the compensation laws, the employer may have alternatives available to him beyond his statutory subrogation rights.

A system producing such results is a system gone awry. Assuming that any accident reparation system should, on the one hand, be fair and just, and on the other, reduce the costs of accidents, it is all too clear that the present hodge-podge scheme for apportioning the costs of industrial accidents between employee, employer, and third party satisfies neither goal and should be revamped.

In Haney, the court reflected upon the unfortunate circumstances of the third-party tortfeasor under the compensation laws but failed to consider the fundamental policy issue at stake in the third-party recovery-over problem. Any precise solution must await a determination of whether the employer should be stripped of the protection afforded him by the exclusivity doctrine and in that manner subjected ultimately to greater liability to his employee than that provided for under the compensation system. While that question is wholly ignored in Haney, the Carlson opinion gives it perfunctory treatment, stating that "no legitimate objective is fostered by preventing indemnification to a third-party tortfeasor from a negligent employer." The irony of the Carlson decision lies in the fact that the court took one step forward in striking down the statute which expressly insulated an employer from liability to the third-party tortfeasor, but then took two steps backward in gratuitously upholding case law which would produce similar results and which had been criticized by the Haney majority 1 year earlier.

B. Judicial Attempts to Solve the Deepening Dilemma

1. The Status of the Law Prior to Haney

In Carlson, the 1969 amendment to the workmen's compensation laws which had extinguished the right of a third party to recover contribution or indemnity from an employer was declared unconstitutional, the court relying on the objections first raised in Haney.

The constitutionality of the 1969 amendment was not at issue in Haney, however. Rather, it was prior case

29. Minn. at , 215 N.W.2d at 619.
30. For a similar judicial reaction to the plight of the third party, see McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Painting Co., 323 S.W.2d 788 (Mo. 1959); Brown v. Dickey, 397 Pa. 454, 155 A.2d 836 (1959). In his concurring opinion in Brown, Jones, J., articulated his "sense of unfairness" as follows:
While I believe that in the present posture of the law the result reached by the majority of this Court is correct, yet I strongly believe that the result is inequitable and unfair. The jury found Brown and Dickey equally liable to one injured person: under the result reached Brown must pay in discharge of this equal liability more than 90% of the amount of the verdict, a most shocking situation. 397 Pa. at 457, 155 A.2d at 840.
31. Minn. at , 215 N.W.2d at 618.
32. See text accompanying note 60 infra.
law limiting third-party actions against employers which the Haney court had challenged. Thus, an analysis of the two cases requires an understanding of the manner in which the exclusive remedy doctrine was applied in Minnesota.

The interpretation given the exclusive remedy provision of the compensation law in Minnesota is representative of the approach taken by most jurisdictions. Prior to the 1969 amendment, it had long been the rule that under certain limited circumstances, a third-party tortfeasor was entitled to relief by way of indemnity from a negligent employer. Thus, the court-made exclusivity doctrine was not always an absolute bar to recovery against a workmen's compensation employer. The application of this rule is no better demonstrated than in Hendrickson v. Minnesota Power & Light Co.

Hendrickson was an appeal by a defendant power company from the lower court's order dismissing a third-party action for contribution or indemnity which it commenced against the employer after being sued in a wrongful death action brought by the trustee for the next of kin of the deceased employee. The supreme court affirmed the lower court's order, but not without indicating that in the appropriate factual setting a third-party tortfeasor would be entitled to indemnity from a workmen's compensation employer for damages it was compelled to pay to an injured employee.

The case contains two significant statements of workmen's compensation law. The first is susceptible of brief exposition: an employer cannot be held liable for contribution by a third-party tortfeasor who has been sued by that employer's employee on account of injuries sustained on the job. An essential element of an action for contribution is common liability between the party seeking relief and the party sought to be charged. However, does not exist between the employer and the third-party tortfeasor. Because the Workmen's Compensation Act abrogates the employer's tort

34. See notes 46-62 infra and accompanying text.
36. 258 Minn. at 369, 104 N.W.2d at 846. After her husband was electrocuted while moving a house in the course of his employment, the plaintiff was paid workmen's compensation benefits. In the subsequent wrongful death action, the defendant power company impleaded the employer on the theory that the existing contract between it and the employer impliedly gave rise to a promise by the employer to indemnify it for any damages resulting from the contract's breach.
37. Id. at 372, 104 N.W.2d at 848. After determining that the facts of the case did not bring it within any of the five categories where indemnity was allowed, the court upheld the dismissal by the lower court of the power company's third-party claim.
38. Id. at 372, 104 N.W.2d at 849.
liability, he cannot be considered a joint tortfeasor as to his employee. Even though the employer may have been negligent along with the third party in causing the employee’s injuries, and even though the third party may have discharged more than his fair share of what might be considered their aggregate liability, an action for contribution does not lie. This, except in Pennsylvania, and possibly Rhode Island, is the universal rule.

The second principle of law to emerge from Hendrickson dealing with the equitable remedy of indemnity and the circumstances in which this remedy is available to a third-party tortfeasor against an employer is not as easily summarized. The court stated that there are five categories of cases in which such relief is available: (1) where the indemnitee’s liability is only vicarious or derivative—as in the case where mere ownership of a motor vehicle has resulted in liability under the safety responsibility laws; (2) where the indemnitee has been held liable because of actions performed at the direction of the indemnitor—as in the case of an agency relationship; (3) where the indemnitor’s breach of duty owed to the indemnitee resulted in the indemnitee’s liability to the third person—as in the case of the stevedore’s duty to use due care while working aboard ship; (4) where the indemnitee’s liability arose from his failure to discover the negligence of the indemnitor; and (5) where there is an express indemnity agreement.


42. The second element necessary for a contribution action is the payment of a disproportionate share of the liability by the party seeking relief. Bolles v. Boyer, 141 Minn. 404, 406, 170 N.W. 229, 230 (1919).

43. A peculiarity in Pennsylvania tort law allows an employer to be subjected to an action for contribution to the extent of his workmen’s compensation liability. Since Pennsylvania law only requires joint negligence, it is possible for two parties to be joint tortfeasors even though they have no common liability to the injured party. As a result, the exclusive remedy provisions of Pennsylvania’s workmen’s compensation law are of no avail to the employer. Chamberlain v. Carborundum Co., 485 F.2d 31 (3d Cir. 1973); Elston v. Industrial Lift Truck Co., 420 Pa. 97, 216 A.2d 318 (1966).

44. Two federal courts have intimated that Rhode Island would adopt the contrary rule. See Newport Air Park, Inc. v. United States, 293 F. Supp. 809 (D.R.I. 1968), vacated, 419 F.2d 342 (1st Cir. 1969). Applying Rhode Island law, the trial court noted the lack of Rhode Island cases on point and argued that the Rhode Island Supreme Court would choose this rule if presented with the question. Although the court of appeals vacated the trial court’s judgment and applied the majority rule, it did so on the theory that Rhode Island law, though it might follow the minority rule, was inapplicable to the Federal Employees’ Compensation Act claim before the court.

45. 2 Larson § 76.21.

46. 258 Minn. at 372, 104 N.W.2d at 848, citing Hanson v. Bailey, 249 Minn. 495, 83 N.W.2d 252 (1957) and Restatement of Restitution § 76 (1937). In Hendrickson, the court described indemnity as a remedy available to a party who had discharged a liability which more properly and equitably should have been fully discharged by another. See Iowa Power & Light Co. v.
In discussing these five categories of cases, the court pointed out that although indemnity is traditionally thought to spring from a contractual relationship or a special legal relationship between the parties, the increasingly accepted view is that the remedy rests primarily on principles of equity. The court's reliance on this equitable aspect of indemnity may explain its willingness to find an implied non-contractual duty to indemnify in situations where some jurisdictions deny recovery. In this respect, the rule is wider in scope in Minnesota than in those jurisdictions where the courts insist upon a contractual relationship between the parties before permitting indemnity.

In any event, Hendrickson stands for the proposition that a third-party tortfeasor who can establish that his relationship with the workmen's compensation employer falls within one of the five categories is entitled to be indemnified by the employer. In those circumstances the exclusive remedy provision of the compensation laws offers no shield to the employer for two reasons. First, the original legislative intent that the Workmen's Compensation Act control only rights and liabilities as between the employer and the employee means that the statutory "other persons" as to whom the employer's liability is exclusive do not include third-party tortfeasors. Second, the employer's liability to the third-party tortfeasor does not arise "on account of injuries" sustained by the employee, but rather, on account of

Abild Constr. Co., 259 Iowa 314, 322, 144 N.W.2d 303, 308 (1966), which, in cases of (1) express contract; (2) vicarious liability; (3) breach of an independent duty; (4) active versus passive negligence, would permit indemnity.


48. 258 Minn. at 371, 104 N.W.2d at 847.

49. For arguments against implying such non-contractual duties to indemnify, see Royal Indem. Co. v. Southern Calif. Petroleum Corp., 67 N.M. 137, 353 P.2d 358 (1960); Forney, Employers' Liability for Indemnity or Contribution, 34 INS. COUNSEL J. 362 (1967); authorities cited note 115 infra.

50. More often than not, if the third party relies on an implied indemnity agreement as the basis for his action, he will have to prove (1) that he is a party to an existing contract with the employer; (2) that the employer has expressly promised to perform a service or task for the third party; and (3) that the nature of the work to be performed necessarily requires that it be done in a workmanlike manner using due care. See Forney, supra note 49, at 366-71.

51. 258 Minn. at 374, 104 N.W.2d at 849. See also Kipka v. Chicago & N.W. Ry., 289 F. Supp. 750 (D. Minn. 1968); Gleason v. Geary, 214 Minn. 499, 8 N.W.2d 808 (1943); Thorton Bros. v. Reese, 188 Minn. 5, 246 N.W. 527 (1933).

52. Most of the workmen's compensation acts were drafted in the early 1900's, at which time no thought was given to third-party actions per se. Therefore, the exclusive remedy provisions of those acts should not be construed to apply to anyone other than the employee and those in privity to him. Comment, The Right of a Third Party to Contribution or Indemnity from a Louisiana Workmen's Compensation Employer, 38 TUL. L. REV. 536, 538 (1964).

53. It is this nexus between the employee's injury and the "other person's" cause of action which triggers the exclusive-remedy provision. MINN. STAT. § 176.031 (1971).
the breach of a duty owed by the employer to the third party.\textsuperscript{54}

Juxtaposed to \textit{Hendrickson} and illustrative of the type of case in which indemnity will be available to a third-party tortfeasor, is \textit{Keefer v. Al Johnson Construction Co.}\textsuperscript{55} \textit{Keefer} was an appeal from an order denying a new trial in the suit of an injured employee against a third party. The third party, a general contractor seeking indemnity, impleaded the subcontractor which employed the injured party. The general contractor's third-party complaint alleged that the subcontractor had breached its contract by failing to observe safety rules with respect to the equipment that it had furnished the injured employee. At trial, the issue of the subcontractor's negligence had been submitted to the jury along with that of the general contractor and the employee. By special verdict, the jury attributed 28 percent of the total causal negligence to the general contractor, 55 percent to the employer, and 17 percent to the plaintiff-employee. The court awarded the general contractor indemnity against the subcontractor for the full amount of the judgment recovered by the plaintiff against the general contractor.\textsuperscript{56}

The two primary issues on appeal were whether the exclusive remedy provisions of the Workmen's Compensation Act protected the subcontractor from liability to the general contractor and whether the trial court erred in submitting the question of the subcontractor's negligence to the jury for apportionment under the comparative negligence statute.\textsuperscript{57} The court first rejected the employer's contention that it was immune from suit, citing \textit{Hendrickson} and subsequent cases.\textsuperscript{58} It also decided that the case was not governed by the 1969 amendment,\textsuperscript{59} since it had previously determined that this particular amendment to the compensation laws was not to be applied retroactively.\textsuperscript{60} Indemnity was proper, stated the court, because the subcontractor's failure to provide safe equipment constituted active negligence, while the general contractor was guilty only of passive negligence, and, thus, the liability of the former was primary.\textsuperscript{61} Moreover, by providing the employee with unsafe equipment, the employer exposed the general contractor to suit and thereby breached its contractual duty to protect the general contractor from liability.\textsuperscript{62}


\textsuperscript{55} 292 Minn. 91, 193 N.W.2d 305 (1971).

\textsuperscript{56} \textit{Id.} at 97, 193 N.W.2d at 309.

\textsuperscript{57} \textit{Id.} at 98, 101, 193 N.W.2d at 309, 311.

\textsuperscript{58} \textit{Id.} at 100, 193 N.W.2d at 311.

\textsuperscript{59} \textit{Id.} at 103, 104, 193 N.W.2d at 312.

\textsuperscript{60} Cooper v. Watson, 290 Minn. 362, 187 N.W.2d 689 (1971).

\textsuperscript{61} \textit{See} 292 Minn. at 101, 193 N.W.2d at 311.

\textsuperscript{62} \textit{Id.}
Though *Keefer* is significant as an illustration of a situation in which an employer is not immune from suit by a third-party tortfeasor, perhaps more significant in the context of a discussion of the status of the law prior to *Haney* is its resolution of the comparative negligence issue. The court took the position that the trial court's submission of the issue of the employer's negligence to the jury for apportionment under the comparative negligence statute was improper. Without citation to prior cases, the court simply stated that since "there was no common source of liability between the employer and the [third-party tortfeasor] . . . there could be no issue of comparative negligence between them." The court added that to permit apportionment of negligence by the jury would effectively render the remedy of indemnity identical to that of contribution, a transmutation of the law which it was not prepared to undertake.

In spite of the fact that the third party was successful in recovering indemnity against the employer, the *Keefer* decision, overall, must be considered adverse to the third-party tortfeasor's efforts to recover-over against the negligent employer because of the court's refusal to bring the comparative negligence statute to bear on indemnity claims. The third-party tortfeasor will be given relief only if, as a matter of law, his involvement in causing the injury was merely technical, constructive, or vicarious or if there is some contractual or special legal relationship between the employer and the third party which can be said to give rise to a duty to indemnify. Just as important, the third party is precluded from avoiding or minimizing his liability to the employee by proving that the employer's negligence caused the plaintiff's injuries. To admit such evidence, it is said, might seriously prejudice the rights of the employee, contrary to the policy of the compensation laws.

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63. *Id.* Since there was no showing of prejudice to the parties, the outcome of the case was not affected. In ruling that the contractor was entitled to indemnity as a matter of law, the court disregarded the jury's answers relative to the comparative fault of the parties.

64. *Id.* at 102, 193 N.W.2d at 312.

65. The court's reluctance to apply comparative negligence principles to indemnity actions reappeared in Bjorklund v. Hantz, 296 Minn. 298, 208 N.W.2d 722 (1973).

66. *See* 292 Minn. at 101, 193 N.W.2d at 311.


68. Nyquist v. Batcher, 235 Minn. 491, 498, 51 N.W.2d 566, 571 (1952) ("The right of the employer, as a subrogee, to indemnification for his compensation liabilities is secondary, and the assertion of his secondary right is no justification for seriously impairing the preferred status of the employee or his dependents."). *Accord*, Sargent v. Axel H. Ohman, Inc., 343 F. Supp. 316, 319 (D. Minn. 1972). The defendant attempted to join the employer in *Sargent* in order to have the question of his negligence litigated. If successful, this would reduce the proportion of the verdict which would be recovered by the subrogated employer. The court, however, was fearful that this would confuse the jury and prejudice the employee's claim.
This, then, in broad outline, was the status of the law with respect to third-party actions against employers when *Haney* was decided. Contribution was never available to the third-party tortfeasor. Indemnity was permitted in special instances where there was a contractual or legal relationship between the parties which would provide the basis for a duty to indemnify and where the employer sought to be charged was actively or primarily negligent and the third party was only secondarily or passively negligent. In any event, the issue of the employer's negligence could not be submitted to the jury. After the 1969 amendment to the compensation laws, of course, the employer could be held liable for indemnity only if he had entered into a written indemnity agreement with the third-party tortfeasor prior to the injury to the employee.

2. *The Adoption of Comparative Negligence—Basis for Change*

*Haney* intimated a fundamental change in the law in Minnesota governing the third party's right of recovery-over against the negligent employer.\(^6^9\) The court expressed consternation at the fact that a third-party tortfeasor responsible only for 10 percent of the fault which caused an employee's injuries could be required to pay 100 percent of the employee's judgment in a common law action, while the employer, to whom 90 percent of the total negligence was attributable, would avoid any liability on the judgment and might even recoup all benefits previously paid to the employee.\(^7^0\) Perhaps motivated by the equitable maxim that one who has contributed to his own loss ought not be granted a right of subrogation,\(^7^1\) the court seized upon the adoption of comparative negligence as a possible basis for overruling prior law and made sweeping pronouncements which could fairly have been interpreted as a preview of comprehensive future changes in the third party's rights under the compensation laws.\(^7^2\)

*Haney* was a products liability action brought by a truck driver against International Harvester for injuries arising out of a collision which resulted when the truck he was driving went out of control. International impleaded the driver's employer as a third-party defendant.\(^7^3\) Since the accident had occurred in April of 1969, International's third-party action against the employer was not governed by the 1969 amendment.\(^7^4\) Prior to trial, the

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\(^{69}\) The court, in Guillard v. Niagara Mach. & Tool Works, 488 F.2d 20, 24 (8th Cir. 1973), announced its belief that the *Haney* court had indicated its intention to change the rule precluding an indemnity action against a negligent employer. In so doing, it treated the issue in *Guillard* as involving unformulated, rather than unclear, state law.

\(^{70}\) See 294 Minn. at 382, 201 N.W.2d at 144.

\(^{71}\) See Thornton Bros. v. Reese, 188 Minn. 5, 246 N.W. 527 (1933); H. McClintock, *Equity* § 123 (2d ed. 1948).

\(^{72}\) See 294 Minn. at 382-87, 201 N.W.2d at 144-47.

\(^{73}\) Alleging that in failing to maintain and inspect the truck involved in the accident the employer was actively negligent, the third-party complaint sought relief by way of contribution or indemnity.

\(^{74}\) See note 60 *supra* and accompanying text.
employer successfully moved the court for an order dismissing the third-party complaint on the ground that his liability on account of injuries to his employee was exclusively under the compensation laws. International appealed.\footnote{294 Minn. at 376, 201 N.W.2d at 141.}

In its opinion reversing the lower court's order, the supreme court first noted that the dismissal of the third-party complaint was consistent with Minnesota case law, if not actually required by a strict construction of the exclusive remedy provision of the compensation statute.\footnote{Id. at 380, 201 N.W.2d at 143.} The court then stated that with the adoption of comparative negligence,\footnote{Minn. Stat. §604.01 (1971).} the time may have come for a reconsideration of the rights of third-party tortfeasors vis-à-vis negligent employers.\footnote{See 294 Minn. at 385, 201 N.W.2d at 146.} Citing the "obvious unfairness" to a third party who must bear the full weight of the employee's judgment when the overwhelming proportion of the negligence which caused the accident is attributable to the employer,\footnote{Id. at 383, 201 N.W.2d at 145.} the court remarked in dictum that to deprive the third party of his right to recover contribution or indemnity from a negligent employer might constitute a denial of the due process of law.\footnote{"With this in mind, there may be a due process violation when the third-party tortfeasor's right to indemnity is extinguished by the Workmen's Compensation Clause without providing him a reasonable substitute for his right." Id. at 385, 201 N.W.2d at 146.} In further dictum, the court proposed that the unfairness to the third-party tortfeasor be mitigated by permitting indemnity where there was a great disparity in the percentage of fault attributable to the parties.\footnote{Id. at 383, 201 N.W.2d at 145.} Rather than deciding the issues presented on the basis of the limited record before it, the court remanded the case for a trial of all of the issues of law and fact.\footnote{Id.}

Although \textit{Haney} was the first case in which the court indicated its sympathy with the plight of the third-party tortfeasor under the workmen's compensation laws, the opinion is remarkably devoid of any discussion of the policy underlying the exclusive remedy doctrine, problems relating to insurance underwriting, or the comparative negligence statute. Therefore, one might appropriately question the significance of the adoption of comparative negligence and ask why the employer's immunity from suit should be lessened merely because of a change in tort law. In answering this question, one of the basic canons of compensation law must be remembered, \textit{i.e.}, the right to proceed against a third party on account of job-related injuries is reserved for the primary benefit of the injured employee and his dependents.\footnote{Nyquist v. Batcher, 235 Minn. 491, 498, 51 N.W.2d 566, 571 (1952).} The

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75. 294 Minn. at 376, 201 N.W.2d at 141.  
76. \textit{Id.} at 380, 201 N.W.2d at 143.  
77. \textit{Minn. Stat.} § 604.01 (1971).  
78. \textit{See} 294 Minn. at 385, 201 N.W.2d at 146.  
79. \textit{Id.} at 383, 201 N.W.2d at 145.  
80. "With this in mind, there may be a due process violation when the third-party tortfeasor's right to indemnity is extinguished by the Workmen's Compensation Clause without providing him a reasonable substitute for his right." \textit{Id.} at 385, 201 N.W.2d at 146.  
81. \textit{Id.}  
82. \textit{Id.} Prior to retrial, \textit{Haney} was settled. For treatment of the issue by a federal court, see \textit{Guillard v. Niagara Mach. & Tool Works}, 488 F.2d 20 (8th Cir. 1973).  
\end{flushright}
secondary subrogation rights of the employer\textsuperscript{84} will not be permitted to prejudice or impair the employee’s chance of a full recovery in a common law action for damages against a third-party tortfeasor.\textsuperscript{85}

The adoption of comparative negligence is significant because it permits adjustments in the rights of employers and third-party tortfeasors without sacrificing the rights of the injured employee and because it exacerbates the inequity of the present system. Prior to the adoption of comparative negligence, the employee’s contributory negligence was a complete bar both to his recovery and to the recovery of a subrogated employer against a third party.\textsuperscript{86} Under comparative negligence, however, such contributory negligence is a bar to recovery only if the employee’s negligence is the same as or greater than that of the third party.\textsuperscript{87} In other words, the statute increases the third party’s vulnerability in actions brought by an injured employee or the subrogated employer or insurance carrier.

A similar change is wrought with respect to the contributory negligence of the employer. Under the former system, the employer’s contributory negligence was a bar to recovery against the third party in those cases where the employee stood no chance of benefiting from the employer’s recovery.\textsuperscript{88} Under comparative negligence, the employer is permitted to recover so long as no more than 49 percent of the negligence causing the injuries for which he was compelled to pay benefits is attributable to him.\textsuperscript{89} Again, the third party’s liability is increased.

Moreover, comparative negligence permits a reconciliation of two conflicting principles of compensation law which otherwise provide the grist for a substantial amount of confusion and litigation. The first of these principles, the primacy of the employee’s rights under the compensation system, has already been alluded to.\textsuperscript{90} The second principle is that the compensation laws are not intended to control rights and liabilities between employers and third persons.\textsuperscript{91}

When applied, the first principle conflicts with the policy underlying the second, for in favoring the rights of the employee and preventing the third party from litigating the question of the employer’s negligence, the compensation system does, in fact, limit the right of the third party to shift some

\textsuperscript{84}. Id. The secondary right referred to is the employer’s or insurer’s right of subrogation as set forth in Minn. Stat. § 176.061, subds. 6-7 (1971).

\textsuperscript{85}. See note 68 supra and accompanying text.


\textsuperscript{87}. Minn. Stat. § 604.01 (1971).

\textsuperscript{88}. See Nyquist v. Batcher, 235 Minn. 491, 498, 51 N.W.2d 566, 571 (1952).

\textsuperscript{89}. Minn. Stat. § 604.01 (1971).

\textsuperscript{90}. See notes 83-85 supra and accompanying text.

\textsuperscript{91}. Hendrickson v. Minnesota Power & Light Co., 258 Minn. 368, 374, 104 N.W.2d 843, 846 (1960).
of the burden of the employee's common law judgment against him onto the negligent employer. Comparative negligence may offer a solution to this conflict. At the very least, it allows for the apportionment of negligence between all of the parties, whether they are actively involved in the litigation or not. Any negligence assigned by the jury to the employer can form the basis of an offset against the employer's portion of the employee's common law recovery. No prejudice would result to the employee since it is only that portion of the judgment earmarked for the employer that is reduced.

Paradoxically, then, the adoption of comparative negligence could facilitate the correction of a long-standing injustice in the compensation system or serve as the vehicle for the visitation of further inequity upon the third-party tortfeasor. Since the outcome depends upon the judicial response to the adoption of the statute, the supreme court's wisdom in urging a reexamination of the rights of the third-party tortfeasor vis-a-vis the negligent employer is apparent.

3. The Court Declines to Effect Radical Change

It is somewhat anti-climactic that Haney effected no actual change in the law governing the third party's right to recover indemnity or contribution from the employer. Even if the court had elected to decide the issue which had been presented on appeal, instead of remanding the case for a trial in the lower court, the 1969 amendment to the compensation laws, which was not at issue in the case, would have continued to insulate the employer from liability to the third-party tortfeasor in the absence of a written indemnity agreement. Therefore, after 14 months of confusion in the trial courts and several conflicting federal court interpretations of the status of Minnesota law, the court was asked, in Carlson v. Smogard, to give relief to the third party and to clarify the dicta of Haney.

The construction and constitutionality of the 1969 amendment was squarely at issue for the first time in Carlson. The case reached the supreme court on an appeal from the trial court's order dismissing the third-party complaint of Smogard against the plaintiff's employer. Since the plaintiff's

92. See notes 150-163 infra and accompanying text.
93. See notes 150-163 infra and accompanying text.
94. Minn. Stat. § 176.061, subd. 10 (1971) did not take effect until September 1, 1969, 5 months after the accrual of the cause of action in Haney. Thus, International Harvester's right of recovery-over was governed by the case law interpreting Minn. Stat. § 176.031 (1971).
97. Id. An employee of Quality Mercury sued Smogard after the hood on Smogard's automobile flew open while the employee was test driving it. In his third-party complaint against Quality, Smogard sought indemnity or contribution on the ground that Quality had breached warranties made to Smogard at the time of his purchase of the vehicle from them. Smogard also sought indemnity on the grounds that Quality had been actively negligent while his own negligence had been only passive.
cause of action had arisen after 1969, the subsequent third-party action against the employer was correctly held by the trial court to be governed by the 1969 amendment.\textsuperscript{98}

By-passing entirely the earlier suggestions that the common law rules governing the remedy of indemnity be changed so as to give relief to the beleaguered third-party tortfeasor, the court instead ruled that the legislature could not properly deprive a third party outside of the workmen's compensation system of his common law remedy without providing a substitute remedy.\textsuperscript{99} The 1969 amendment was therefore held to violate the fifth and fourteenth amendments to the United States Constitution and article 1, section 8, of the Minnesota constitution.\textsuperscript{100}

It is worth noting that no cases are cited in direct support of the court's holding on the constitutional issue. In point of fact, every other case to address the issue has held the contrary.\textsuperscript{101} One circuit court of appeals easily disposed of the constitutional issue by saying that it had no doubt but that a state legislature has the constitutional power to insulate an employer from all liability beyond that imposed by the compensation laws, including liability to a third person seeking contribution or indemnity, even though so to do might cut across equitable considerations.\textsuperscript{102}

This same approach was recently taken by the federal court for the district of Minnesota in a case which rejected out of hand the dicta in \textit{Haney}.\textsuperscript{103} Expressing wonder that the Minnesota Supreme Court could posit a due process problem concerning the application of the statute, the court wrote: "Nowhere does the Constitution provide that common law judicial decisions are property rights or are guaranteed to continue, unchanged, fixed, and unaltered."\textsuperscript{104}

\begin{itemize}
  \item \textsuperscript{98} See \textit{Id.} at 618, 215 N.W.2d at 618.
  \item \textsuperscript{99} \textit{Id.} __, 215 N.W.2d at 620.
  \item \textsuperscript{100} \textit{Id.} __.
  \item \textsuperscript{102} Hill Lines, Inc. v. Pittsburgh Plate Glass Co., 222 F.2d 854, 856 (10th Cir. 1955). In most instances, the due process claim has been rejected on the theory that the third party's cause of action for indemnity or contribution is not a "vested right." E.g., Coates v. Potomac Elec. Power Co., 95 F. Supp. 779, 783 (D.D.C. 1951), \textit{motion to amend original third-party complaint denied}.
  \item \textsuperscript{103} \textit{Id.} at 412.
\end{itemize}
If the decision in *Carlson* is contrary to the weight of authority, the result nevertheless might be explained by the Minnesota constitutional provision upon which the court relied in part in invalidating the statute and which guarantees a remedy in law for every wrong. While no federal due process violation may result from the rigid application of the exclusive remedy doctrine, there may, in fact, be a denial of the state constitutional guarantee to the extent that the equitable remedies of contribution or indemnity are "remedies under the law." Concern over the validity of the court's constitutional argument may be academic, for *Carlson* effected little real change. Though it invalidated the 1969 amendment, the *Carlson* court perpetuated the dilemma of the third-party tortfeasor by expressly reaffirming the prior Minnesota case law as set forth in *Hendrickson*. Thus, if the *Haney* case were again before the trial court on a motion to dismiss the third-party complaint, *Carlson* would require the granting of the motion. While the *Carlson* opinion does not expressly foreclose the possibility raised in *Haney* of creating a new category of cases where indemnity is permitted, the court's current position is probably best indicated by a case decided shortly before *Carlson* in which it announced its adherence to the *Hendrickson* categories and its preference for limiting indemnity actions to those "rare cases" in which the parties seeking indemnity have been guilty of no active negligence.  

4. *Carlson*: A Critique

The attempt to solve the third party recovery-over problem must be regarded as wholly inadequate. Not only does it leave the minimally culpable third-party tortfeasor bearing 100 percent of an employee's judgment, a totally inequitable consequence, but the purported solution is conceptually defective as well. The rule developed in the case law and approved in *Carlson* bars third-party actions for contribution because of the absence of common liability between employer and third-party tortfeasor, but permits recovery in indemnity by a passively negligent third-party tortfeasor against an actively negligent employer, exclusive remedy doctrine notwithstanding. The conceptual difficulty lies in the fact that the tortfeasor's negligence whether "active" or "passive" must be determined in light of the duties he owed to the injured employee, rather than in terms of the duties he

105. MINN. CONST. art. 1, § 8.
106. See id.
107. — Minn. at —, 215 N.W.2d at 620.
108. In *Haney* the supreme court indicated that the third-party tortfeasor was unable to establish a right to indemnity under one of the five theories set forth in *Hendrickson*. 294 Minn. at 380, 201 N.W.2d at 143.
110. See notes 38-45 supra and accompanying text.
112. E.g., the mere failure to discover the negligence of another.
might have owed his fellow tortfeasor. This, in turn, means that there must have been a common liability between the two tortfeasors. Yet, where this common liability is abrogated by a statute such as the Workmen's Compensation Act, and where as a result the employer has no liability in tort to the injured employee, the basis for indemnity withers away.

It may be argued that no such incongruity exists and that the right to indemnity between the active and passive tortfeasor springs not from some mutual relationship of the tortfeasors to the injured party, but from a legal relationship inter se in which the duty to indemnify is implied as a matter of law. According to this rationale, the implied duty to indemnify over-rides the exclusive remedy provision of the compensation laws.

In taking this approach, however, the Minnesota court would adopt a rule which has been rejected in many jurisdictions. At the theoretical level, it is

113. See authorities collected notes 115-117 infra.
114. See authorities collected notes 115-117 infra.
argued that an implied legal duty to indemnify is far too broad a tort duty upon which to base a cause of action which is impervious to the employer’s exclusive remedy defense. The practical difficulties of the rule are demonstrated most graphically in a recent Minnesota case in which the court was finally compelled to answer the question of whether indemnity lies where liability is merely vicarious, where the relative culpability of the parties conduct is disparate, or where the active-passive dichotomy is applicable, by saying that “[N]o one has come up with a complete answer and we will have to permit indemnity on a case-by-case basis where our sense of fundamental fairness seems to require it.”

The conceptual problem is further illustrated by the efforts of the Minnesota court to apply tort-like language and measures of damages to actions for

La. 41, 46, 91 So. 359, 541 (1922); Baltimore Transit Co. v. State, 183 Md. 674, 39 A.2d 858 (1944), aff’d, 184 Md. 250, 40 A.2d 678 (1945); Royal Indem. Co. v. Southern Calif. Petroleum Corp., 67 N.M. 137, 353 P.2d 358 (1960); Algrem v. Nowlan, 37 Wis. 2d 70, 154 N.W.2d 217 (1967); Engel v. Bindel, 27 Wis. 2d 456, 134 N.W.2d 404 (1965).

In Iowa Light & Power Co., the injured employee brought an action against the power company for failing to move its power lines after having been notified that construction work was to be done in the area. It sought contribution or indemnity from the employer who had negligently failed to see to it that the lines were moved before sending its employees to work. The power company argued that its negligence was merely passive while that of the employer was active and that the employer had breached certain duties owed to the power company. The Iowa court held that the breach of duty argument must fail because of the absence of common liability and added that appellant power company’s reliance on the active-passive dichotomy as creating a special duty between two tortfeasors is too broad to serve as a basis for permitting indemnity. 259 Iowa at 326, 144 N.W.2d at 311.

Similarly, Engel v. Bindel notes that the relationship between two strangers whose negligence has combined to cause injury to one person is not one of the special legal relationships which warrants an action for indemnity. The Wisconsin court stated:

[W]e have concluded the legislature intended to limit the liability [of the employer] in exchange for his absolute liability under the Workmen’s Compensation statute. If the liability of the employer is to be extended beyond the limits intended by the legislature, it should not be by a legally implied agreement to indemnify. 27 Wis. 2d at 458, 134 N.W.2d at 407.

119. In Pachowitz v. Milwaukee & Suburban Transport Co., 56 Wis. 2d 383, 202 N.W.2d 268 (1972), the Wisconsin Supreme Court declined an invitation to base the availability of indemnity upon a distinction between active and passive negligence. The court could not justify requiring an actively negligent tortfeasor to whom five percent of the causal negligence was attributable to pay all of the judgment, while excusing from liability the passively negligent tortfeasor responsible for 95 percent of the negligence. Contra, Miller v. DeWitt 37 Ill. 2d 273, 226 N.W.2d 630 (1968), aff’g in part, rev’g in part, 59 Ill. App. 2d 38, 208 N.W. 249 (1965); American Dist. Tel. Co. v. Kittleson, 179 F.2d 946 (8th Cir. 1950). The federal court’s construction of Iowa law in Kittleson is strongly criticized by the Iowa Supreme Court in Iowa Power & Light Co. v. Abild Constr. Co., 259 Iowa 314, 144 N.W.2d 303 (1966). See Kentucky Util. Co. v. Jackson County Rural Elec. Coop., 438, S.W.2d 788 (Ky. App. 1969); 2 Larson § 76.44.

indemnity, actions which are essentially *ex contractu*. While these efforts may spring from the court’s sense of “fundamental fairness,” confusion and inconsistency are the net result. As Dean Prosser has noted, it is virtually impossible to predict, in those jurisdictions which permit indemnity actions by passive wrongdoers against active wrongdoers, whether relief will be granted in a particular case. Ultimately, the question resolves itself into an inquiry as to whether in the opinion of the community, justice is served by imposing the responsibility for the accident upon one party rather than the other.

It is difficult to avoid the conclusion that the reasoning in *Haney* regarding the due process issue was lost on the majority in *Carlson*, thus giving rise to a second conceptual problem. While citing *Haney* in support of its position on the constitutional issue, the *Carlson* majority apparently failed to recognize that the constitutional attack launched in *Haney* was aimed as much at the case law exemplified by *Hendrickson* as at the 1969 amendment. It is remarkable that the case law so severely criticized in *Haney* should be gratuitously approved in *Carlson*. As one federal district court pointed out, there was in reality no applicable common law rule to affirm, the previous cases having been so vehemently rejected in *Haney* that a court-made void existed with respect to the question.

### III. An Analysis of Proposed Solutions

In light of the adoption of comparative negligence in Minnesota and the opportunity which it offers for ameliorating the present prejudice to the third-party tortfeasor, the questions raised in *Haney*, but forgotten in *Carlson*, must be resurrected. Since apportionment of the negligence of all parties is possible under comparative negligence, no prejudice can result to the employee, and the primary policy reason for withholding from the jury all evidence relative to the employer’s negligence is overcome. The added advantage in litigating the issue of the employer’s negligence is that the sum

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121. In the active-passive case where indemnity is said to be proper, the action sounds in breach of contract. The contract is one implied at law under the terms of which the actively negligent tortfeasor is deemed to have promised to indemnify another tortfeasor whose negligence is merely passive.


124. *Id.*

125. This conclusion is in accord with a federal court’s interpretation of *Haney*. In *Guillard v. Niagara Mach. & Tool Works*, 488 F.2d 20 (8th Cir. 1973), confronted with the precise issue which had been treated in *Haney*, the court noted that *Haney* was addressed to the inequitable results often obtained in applying the *Hendrickson* rule.

126. *Id.* at 24.

127. Professor Larson has observed that a solution to “this most evenly balanced of controversies” is difficult to reach within the context of the common law which requires that total victory be granted either to the plaintiff or the defendant. The very essence of comparative negligence, of course, is that such “total victory” is no longer required. 2 *Larson* § 76.22.
which the third-party tortfeasor would otherwise be obligated to pay to the subrogated insurer can, as a result of the apportionment of negligence of all parties, be reduced in proportion to the amount of negligence assessed to the employer. This latter result remains true to the inviolable equitable principle that the employer should not be permitted to profit from his own wrong by a recovery against a third-party tortfeasor where it was the employer's conduct which occasioned the employee's injury.\(^\text{128}\)

The obvious response to any suggestion that the doctrine of comparative negligence be used to adjust the liabilities of employer and tortfeasor is that which was raised in \textit{Keefer}\(^\text{129}\) and later in \textit{Froysland v. Leef Bros.}\(^\text{130}\) Since there is no common source of liability between the employer and the third party, the argument goes, there can be no comparison of fault.\(^\text{131}\) This response, however, does not flow from a conflict between the policies underlying the exclusive remedy doctrine and comparative negligence, but is rather a technical argument premised on certain legal fictions resorted to by courts in permitting contribution between joint tortfeasors.\(^\text{132}\) It is these same legal fictions which the \textit{Haney} court suggested should be abandoned if continued adherence to them would perpetuate unfairness and injustice to the third party.\(^\text{133}\)

The invalidation of the 1969 amendment is merely the first step toward resolving the third-party tortfeasor's dilemma. The second step, as Professor Larson has indicated,\(^\text{134}\) must be taken by the legislature, for even the most imaginative and comprehensive of judicial efforts to effect a change will result in only stop-gap measures. An example in support of this proposition may be found in the \textit{Haney} case itself.

\textbf{A. Haney Proposals: Inadequate}

\textit{Haney} suggested that a solution to the third party recovery-over problem might lie in the establishment of a new category of cases in which indemnity would be permitted: those in which there is a gross disparity in the degree of fault attributable to the parties.\(^\text{135}\) All things considered, the court in \textit{Carlson} was wise in bypassing this proposal. Where would the line be drawn in determining whether a "gross disparity" exists? Would indemnity be permitted if the disparity is 90 percent to 10 percent? Why, then, not where it is

\footnotesize{\begin{itemize}
\item 128. See Thibault v. Bostrom, 270 Minn. 511, 134 N.W.2d 308 (1965), where the employer was allowed subrogation under the Workmen's Compensation Act because the third party's negligent conduct had necessitated the payment of benefits to the employee.
\item 129. 292 Minn. 91, 193 N.W.2d 305 (1971).
\item 130. 293 Minn. 201, 197 N.W.2d 656 (1972).
\item 131. See note 63 supra and accompanying text.
\item 132. See 294 Minn. at 383, 201 N.W.2d at 145.
\item 133. \textit{Id}.
\item 134. Grede Foundries, Inc. v. Price Erect. Co., 38 Wis. 2d 502, 157 N.W.2d 559 (1968); 2 \textit{LARSON} \S 76.53.
\item 135. 294 Minn. at 385-86, 201 N.W.2d at 146.
\end{itemize}}
85 to 15 percent? More important, how can a rule permitting indemnity between joint tortfeasors be upheld while contribution, under the same circumstances, is disallowed? Far from abolishing legal fictions, creating a new category of cases where indemnity is permitted would necessitate engrafting a new legal fiction into the law of indemnity—a promise implied at law by the one substantially at fault to indemnify one whose fault is minimal. 136 Beyond these considerations, the difficulty, if not impossibility, of adequately framing the issue in an instruction for submission to the jury may in itself be sufficient reason for rejecting the suggestion. 137

The doctrine enunciated in Keefer and Froysland forbids apportionment of the fault of the employer, the employee, and the third-party tortfeasor under the comparative negligence statute 138 and gives rise to a fourth reason for rejecting the court's proposal. Since the issue of the employer's negligence cannot be submitted to the jury, there would be no mechanism available for determining the percentage of total fault attributable to him, a determination essential to the question of whether he is under a duty to indemnify the third party.

The court's proposals in Haney are symptomatic of the problem at the heart of the third party recovery-over controversy. Because of the exclusive remedy provision of the compensation laws, the employer cannot be held liable in tort to the third party. Therefore, in strained efforts to do justice, courts have sought to give the third party relief by dressing his remedies in contractual trappings. In the case of the actively negligent employer and the passively negligent third party, for example, the courts find an "implied contract" between the two parties that each will use due care so as not to subject the other to liability by causing injury to an employee. The breach of this implied contract, say the courts, gives rise to yet another implied contractual arrangement, a promise made by the actively negligent employer to indemnify the passively negligent third party.

If it is necessary to operate within the theoretical confines of a contractual relationship existing between the employer and the third party, adjusting the relative rights of parties whose fault contributed to the employee's injuries within the framework of tort principles such as contributory and comparative negligence becomes a Herculean task. 139 Moreover, the advantages accruing from the application of the contract fiction may be illusory. If, in the end, the claim for indemnity brought by the third party against the employer arises "on account of" the employee's injury or death, and not on account of the

136. See id. at 382-83, 201 N.W.2d at 145.
137. As one commentator has asked in his criticism of the gross-disparity-in-fault basis for awarding indemnity: how would an instruction to the jury be framed to identify with sufficient clarity the point at which the relative disparity in the gravity of the faults becomes great enough to justify indemnity? Davis, Indemnity Between Negligent Tortfeasors: A Proposed Rationale, 37 IOWA L. REV. 516 (1952).
138. See note 63 supra and accompanying text.
139. Larson, supra note 35, at 380.
separate contractual obligation running from the employer to the third party, the exclusivity doctrine cannot be avoided.\footnote{140}

\section*{B. The Alternatives}

Even if the proposals voiced in Haney had been adopted by the Minnesota Supreme Court, the third-party tortfeasor would continue to bear an often disproportionate share of the responsibility for compensating injured workmen. It is just as inequitable that a third party to whom 30 percent of the total fault giving rise to the injury is attributable pay 100 percent of the judgment obtained by the employee as it is that one to whom 10 percent of the negligence is attributable should bear the total liability. Thus it is necessary to turn to possible legislative approaches to solving the dilemma of the third-party tortfeasor.

\subsection*{1. A New Definition for "Other Persons"}

One proposal for change that might be suggested is an amendment of Minn. Stat. § 176.031 to exclude from the category of "other persons" third parties who have been sued by injured employees and who then seek relief against the negligent employers. Additional language might appropriately be added to the statute, stating that for the purposes of a third party's claim for relief, the employer may be considered a tortfeasor as to his injured employee. The amendment would not alter the employer's immunity from direct suit by the injured employee.

The effect, however, would be to open the flood-gate of claims for indemnity and contribution against the employer, and the employer's protection against double liability to his employee would be completely emasculated. Since the employer has surrendered his common law defenses to claims for work-related injuries and has agreed to pay benefits to his injured employee up to a maximum limit without regard to fault, to impose upon him additional liability to his employee by compelling him to contribute all or part of a judgment entered against the third-party tortfeasor would deprive the employer of the quid pro quo for his concessions and subvert the basic premise of the compensation system.\footnote{141} The unfairness of permitting the employee to recover indirectly from his employer sums which the exclusive remedy doctrine would forbid him to recover directly is apparent.\footnote{142}

\begin{footnotes}
\footnote{140. \textit{Minn. Stat.} § 176.031 (1971) provides: "The liability of an employer prescribed by this chapter is exclusive and in the place of any other liability to such employee . . . on account of such injury or death." (emphasis added).}
\footnote{141. \textit{Cf.} 2 \textit{Larson} § 76.52.}
\footnote{142. \textit{Reed v. New England Tel. & Tel. Co.}, 175 F. Supp. 409 (D.N.H. 1958).}
\end{footnotes}
Therefore, while it might readily be agreed that the negligent employer should not be permitted to escape all financial responsibility while the third party, in effect, pays the compensation bill, stripping the employer of his protection from indirect tort liability to his employee merely substitutes one injustice for another. The 1969 Minnesota Legislature addressed this very problem when it enacted Minn. Stat. § 176.061, subd. 10, in an attempt to guarantee that the employer would not be subjected to double liability on account of an employee's injury. Based upon this legislative expression of public policy with respect to third-party recovery-over rights, it is undoubtedly a fair assumption that the Legislature would take similar action again in 1975 but for the constitutional limitations disclosed in Carlson.

2. An Upper Limit on Employee's Recovery Against Third Parties

Limiting the right of the employee to sue negligent third persons or setting upper limits on the damages recoverable from the third party might afford another avenue of relief. Other states have experimented with such a solution. In Illinois at one time, an employee could not bring an action against a third party if that party were an employer or employee covered by the state's compensation scheme.\(^{143}\) This scheme, known as a "family" system of compensation,\(^{144}\) has been struck down in every jurisdiction which has implemented it on the grounds that it unconstitutionally denies the employee his right of action against third persons who have caused his injuries.\(^{145}\)

In Minnesota, a variation of the "family" type of compensation scheme is embodied in the election of remedies provision of the Act.\(^{146}\) Although the provision, on its face, would appear to provide considerable protection to the third-party tortfeasor who is also an insured employer pursuant to the Act, the supreme court has construed the provision in such a way that the employee is put to an election in only an extremely limited number of cases.\(^{147}\)

Since the Legislature has had ample opportunity to amend the election provision, it must be assumed that it has acquiesced in the strict construction

\(^{143}\) Ill. Laws 1913, P. 335 §§ 3, 30 (repealed 1959).
\(^{144}\) See Comment, *The Right of a Third Party to Contribution or Indemnity from a Louisiana Workmen's Compensation Employer*, *supra* note 52, at 556.
\(^{146}\) Minn. Stat. § 176.061, subd. 1 (1971) provides:

> Where an injury or death for which compensation is payable occurs under circumstances which create a legal liability for damages on the part of a party other than the employer and at the time of such injury or death that party was insured or self-insured in accordance with this chapter, the employee, in case of injury, or his dependents, in case of death, may proceed either at law against that party to recover damages or against the employer for compensation, but not against both.

The election must be made only when the third party is insured or self-insured and engaged in the due course of business with the injured employee’s employer “in furtherance of a common enterprise” or in “the accomplishment of the same or related purposes in operation on the premises where the injury was received . . . .” *Id.* at § 176.061, subd. 4.

\(^{147}\) Cf. Urbanski v. Merchants Motor Freight, Inc., 239 Minn. 63, 57 N.W.2d 686 (1953); Gleason v. Geary, 214 Minn. 499, 8 N.W.2d 808 (1943).
given to the statute by the supreme court. One factor no doubt at work is the Legislature's view that the statutory compensation scheme, standing alone, frequently provides inadequate benefits to reimburse the injured employee for his damages. The likelihood, therefore, is that reform will not consist of restrictions upon the employee's right to maintain a common law action against a negligent third party.

### 3. Limiting Employer's Subrogation Recovery

Even though affirmative relief cannot be provided to the third-party tortfeasor by permitting him to recover contribution from a negligent employer and even though the right of the employee to bring an action against third parties is to be preserved intact, the vulnerability of the third-party tortfeasor can be lessened by limiting subrogation rights. This solution would require two changes in present law. First, Minn. Stat. § 176.061 should be amended to provide, in effect, that in any action by the employee against a third person, that third person may join the employer so that the negligence of all those involved can be apportioned by the jury. This amendment would pave the way for the second change in the law, a reversal of the rulings in Keefer v. Al Johnson Construction Co. and Froysland v. Leef Bros. that the negligence of a compensation employer may not be apportioned under the comparative negligence statute.

That a finding of negligence on the part of the employer would not render him liable directly to the employee should not preclude submitting the issue to the jury. In Wisconsin, the issue of all parties' negligence is submitted even though the plaintiff may not, in fact, be able to recover against all of the defendants because of a personal defense available to one or more of them. Wisconsin's practice is best illustrated in Pierringer v. Hoger, where one of two joint tortfeasors had entered into a settlement agreement with the plaintiff. The settling tortfeasor's negligence was submitted to the jury even though he would not be liable to the plaintiff on any judgment entered in the plaintiff's favor. This procedure is consistent with the proposition that the actual participation in the negligent causation of an injury—not legal responsibility to compensate—is the criterion by which the statutory proportion of the plaintiff's contribution to his own injury should be determined.

150. 292 Minn. 91, 193 N.W.2d 305 (1971).
151. 293 Minn. 201, 197 N.W.2d 656 (1972).
152. 21 Wis. 2d 182, 124 N.W.2d 106 (1963).
153. Id. at 183, 124 N.W.2d at 108.
This reasoning requires that the negligence of the employer be submitted to the jury, since he is a person whose negligence may have contributed to the employee's injury. The fact that he may not be a sueable tortfeasor is immaterial. His culpability in causing the employee's injury is material, however, since he should not be permitted to benefit from his own wrong.155 Therefore, if the question of his negligence is submitted to the jury, the share of the employee's overall recovery to which he would otherwise be entitled by reason of his subrogation rights can be reduced in direct proportion to the percentage of negligence attributable to him. Moreover, a finding that the employer was causally negligent will reduce proportionately the credits otherwise available to him with respect to future benefits due to the employee.156

In practice, these results could easily be accomplished by permitting the third-party tortfeasor to join the employer or his insurer as an involuntary plaintiff in the employee's suit. Such a procedure, although rejected in dicta in one Minnesota case,157 is in accord with the applicable rules of court158 and was expressly sanctioned in a federal case dealing with an employer's subrogation rights under Minnesota compensation laws.159

It might be noted that the procedure suggested here is identical to the minority rule on the subject of contribution actions followed in Pennsyl-

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155. See note 71 supra and accompanying text.
156. Assume that employee brings an action against third party and that third party, in turn, joins employer as an involuntary plaintiff. Employer has paid benefits under the compensation statute in the amount of $3,000.00. The jury returns a verdict in the amount of $21,000.00 and finds that 80 percent of the total fault was attributable to the employer and 20 percent was attributable to the third party. Under the proposed system, the proceeds of the judgment would be distributed as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judgment</td>
<td>$21,000.00</td>
</tr>
<tr>
<td>Attorneys' fees</td>
<td>$7,000.00</td>
</tr>
<tr>
<td>Employee's 1/3</td>
<td>$4,666.66</td>
</tr>
<tr>
<td>Employer</td>
<td>$600.00</td>
</tr>
<tr>
<td>Balance (to employee)</td>
<td>$6,333.34</td>
</tr>
</tbody>
</table>

If the employee were otherwise entitled to additional payments after the date of judgment, the third party would, in effect, be subrogated to the employee's rights and would receive payment directly from the employer on the basis of 80 percent of the employee's weekly benefits. Payments to the third party would continue until a total of $4,877.20 had been paid (80 percent of $6,333.34). Then, payments would be made to employee. Of course, the third party would be entitled to no reimbursement from employer unless the employee were entitled to benefits under the various provisions of the compensation laws.

157. Froysland v. Leef Bros., 293 Minn. 201, 205-06, 197 N.W.2d 656, 660 (1972). The holding in Froysland appears to stand for the proposition that a third-party tortfeasor's rights are not prejudiced in a subrogation action brought by a workmen's compensation carrier merely because the court excludes evidence tending to show concurrent negligence on the part of the employer. However, this must be regarded as dicta, since the court's refusal to name the employer as an involuntary plaintiff was based on the workmen's compensation carrier's agreement to be bound by the results of the employee's suit. Therefore, there was no possibility that the third-party tortfeasor would be subjected to a multiplicity of suits.

158. MINN. R. CIV. P. 17, 19.
vania. It requires the third party to pay the entire damage award, less the compensation benefits for which the employer is liable under the statute, in the event that both the employer and the third party are found to be at fault in causing the employee's injuries.

The procedure outlined here would provide only partial relief for the third-party tortfeasor. He would continue to bear the burden of satisfying in full that portion of the negligence award recoverable by the injured employee rather than by the subrogated employer or insurer, notwithstanding the fact that the causal negligence of the employer far exceeded that of the third party. This result is justifiable on the theory that the injured employee's rights are primary under the compensation scheme and must be protected even at the cost of inequity to other involved parties. The positive feature of the plan, however, is that the negligent employer and his insurer could no longer compel the third party to reimburse them where, but for the compensation laws, the negligence of the employer would defeat the recovery against the third party. This improvement in the position of the third party may be achieved without sacrificing the goals of the compensation system, since the rights of injured employees are in no way impaired by an adjustment of the employer's subrogation rights.

VII. CONCLUSION

The task of equitably allocating the cost of industrial accidents between the injured employee, his employer, and the third-party tortfeasor is not a simple one. The difficulty arises, in large part, from the necessity of reconciling two essentially divergent accident reparation systems: workmen's compensation, in which the fault of the employer and employee is irrelevant, and the tort system, in which liability is intricately intertwined with culpability. These differing bases of liability give rise to practical problems at the juncture of the two systems, and the consequent subsidy of the compensation system by third-party tortfeasors undermines the goals of reducing the costs of accidents and achieving justice. Not only is the subsidy intuitively unjust, but it also conflicts with a basic premise of the workmen's compensation scheme, that the employer, due to his degree of control over on-the-job safety, is the most efficient bearer of the costs of industrial accidents.

Unfortunately, the third party's dilemma is not susceptible of easy resolution. The alternatives of permitting unlimited contribution and indemnity claims by third-party tortfeasors against negligent employers and of limiting

160. See note 43 supra and accompanying text.
161. See Comment The Right of a Third Party to Contribution or Indemnity From a Louisiana Workmen's Compensation Employer, supra note 52 at 557.
163. See note 68 supra and accompanying text.
164. See note 2 supra.
the injured employee's right to recover against a negligent third party may meet the cost allocation goal but fall far short of achieving the justice goal. The solution recommended here attempts no more than a rough accommodation of the two systems. It seeks modest advancements toward the achievement of both goals without sacrifice of either.

The premise underlying the proposed solution is a simple one. If the third party is to incur liability on account of his negligent conduct, all negligent conduct going to cause the injury, including that of the employer, should be presented to the jury for assessment and comparison. By this means a larger portion of the costs of industrial accidents may be placed upon compensation employers through proportionate reduction of their subrogation recoveries, resulting, at least in theory, in a more efficient allocation of costs. On the other hand, the extent of the third-party tortfeasor's subsidy of the compensation system is reduced.

While the solution recommended here can be reconciled with both the workmen's compensation and tort systems, a more comprehensive rearrangement of the compensation scheme is required to resolve fully the third party's dilemma, if, indeed, a complete resolution can ever be effected without unduly prejudicing the other involved parties. At the very least, such fundamental change can be undertaken only after a legislative determination of priorities. Only a reassessment of the purposes of the workmen's compensation and tort systems and an evaluation of the purposes they are designed to serve can form the basis for their eventual reconciliation.

165. See text accompanying notes 141, 142, and 149 supra.