

1991

# Kenneth Ray Sullivan v. Trackmobile, Inc. : Reply Brief

Utah Supreme Court

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DOCKET NO. 910482

IN THE SUPREME COURT OF THE STATE OF UTAH

KENNETH RAY SULLIVAN, )  
 )  
Plaintiff and Respondent, ) No. 910482  
 )  
v. ) 87-C-330G  
 ) Priority 12  
 )  
TRACKMOBILE, INC., )  
 )  
Defendant and Petitioner. )

REPLY BRIEF OF CERTIFIED RESPONDENT KENNETH SULLIVAN

QUESTION CERTIFIED TO THE UTAH SUPREME COURT  
BY THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

The Honorable Thomas J. Greene, Presiding

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Defendant-Petitioner

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	)	No. 910482
Plaintiff and Respondent,	)	
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	)	
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### ISSUES PRESENTED

As framed by the United States District Court, the issues are as follows:

- (1) Under the Utah Comparative Fault Act, Utah Code Ann. § 78-27-38, [sic] et. seq., can a jury apportion the fault of the plaintiff's employers that caused or contributed to the accident although said employers are immune from suit under Utah Worker's Compensation Act, Utah Code Ann. § 35-1-60 et. seq.
- (2) Under the Utah Comparative Fault Act, Utah Code Ann. § 78-27-38, [sic] et. seq., can a jury apportion the fault of an individual or entity that has been dismissed from the litigation but against whom it is claimed that they have caused or contributed to the accident.

### DETERMINATIVE STATUTES

The trial court has requested this Court to interpret the Utah Comparative Fault Act, Utah Code Ann. §§ 78-27-37 et. seq. Additionally, the provisions of Utah Code Ann. §§ 35-1-60 and 35-1-62 are determinative. (Sullivan has reproduced the text of these statutes in Appendix A to this brief).

### SUMMARY OF ARGUMENT

Trackmobile erroneously equates "fault" to any act proximately causing injury. However, the legislature specifically defined "fault" as an "actionable breach of legal duty, act, or omission." Since the legislature has abrogated any action by an employee against an employer, an employer cannot be at "fault" under the Comparative Fault Act. Hence, the jury may not consider the employers' acts when allocating "fault."

Since Sullivan's employers are by definition not at "fault" and there is nothing for the jury to compare, it really makes no difference whether the employers can be classified as "defendants" or "persons seeking recovery" under the act. Nonetheless, Trackmobile's efforts to so classify the employers are unavailing. The employers cannot be "defendants," since they are not "liable because of fault." They are not "persons seeking recovery," since Ranger Insurance Company (the subrogated carrier under worker's compensation law) is the trustee of Sullivan's cause of action.

This Court's function is to determine the legislature's intent, not to second guess the legislature's wisdom. It makes no difference whether comparative causation may be consistent with the Worker's Compensation Act, feasible, or in accord with decisions of other jurisdictions. The legislature's formulation is determinative.

The legislation is presumptively constitutional, and Trackmobile has failed to carry its burden of demonstrating the statute's unconstitutionality. The statute is not unconstitutional merely because it cured some, but not all, of the ills perceived in the previous comparative system.

As a final matter, if the Court determines that the statute is unconstitutional, Trackmobile is subject to joint and several liability under prior law.

## ARGUMENT

### I. THE JURY MUST APPORTION DAMAGES ON THE BASIS OF "FAULT" RATHER THAN CAUSATION.

#### A. Trackmobile Ignores the Legislature's Definition of "Fault."

Trackmobile insists that the jury must consider the conduct of Sullivan's employers in order to arrive at a correct apportionment of "fault." Although Trackmobile frequently uses the word "fault" in its argument, it never expressly states what it means when it uses the term. Its arguments amply demonstrate, however, that it considers "fault" to include all conduct proximately causing injury. While this may be one method for apportioning damages, it is not the method chosen by the Utah legislature.

The legislature expressly defined "fault" in Utah Code Ann. § 78-27-37(2) (1992):

"Fault" means any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including, but not limited to, negligence in all its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification or abuse of a product. [Emphasis added.]

Trackmobile apparently contends that the word "actionable" modifies only the term "breach of legal duty" and that "fault" additionally includes any act or omission proximately causing injury. However, such a reading of the statute leads to a startling result--the imposition of absolute liability on "defendants" whose conduct would have never been actionable under prior Utah law. Of course, there is simply no evidence that the Utah Legislature intended such a revolutionary result.

This Court has always held that a statute "will be given a reasonable and sensible construction." Curtis v. Harmon Electronics, Inc., 575 P.2d 1044, 1046 (Utah 1978). The only reasonable construction that can be given to the Comparative Fault Act is that the jury is to apportion damages only among those parties whose breaches of legal duty, acts, or omissions are actionable.

B. Neither Sullivan's Employers Nor Denver and Rio Grande Western Railroad Are at "Fault."

1. Sullivan's employers--conduct not actionable.

Sullivan's employers are at "fault" only if they committed an "actionable" breach of legal duty, act or omission which proximately caused injury. There was no actionable breach of legal duty, act, or omission here.

Utah Code Ann. § 35-1-60 (1988), to which Trackmobile has referred, states in relevant part:

The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee . . . shall be in place of any and all other civil liability whatsoever, at common law or otherwise . . . .

Except for intentional torts, this statute abrogates "the employee's common law right to sue the employer for any and all injuries suffered while in the course of his employment." Masich v. United States Smelting Refining & Mining Company, 191 P.2d 612, 616, 113 Ut. 101 (1948); Bryan v. Utah International, 533 P.2d 892 (Utah 1975). Although Trackmobile insists that Sullivan's employers were negligent, the conduct is not actionable under the

Worker's Compensation Act, and the jury cannot consider the employers' conduct in the apportionment process.

2. Denver and Rio Grande Western Railroad--no breach of legal duty.

The trial court has entered summary judgment dismissing Denver and Rio Grande Western Railroad from this action, holding as a matter of law that it owed no duty to Sullivan in the circumstances of this case. Even though Trackmobile may contend that Denver and Rio Grande acted or failed to act and that the act or omission was a proximate cause of Sullivan's injuries, the fact that there was no actionable breach of legal duty precludes the attribution of "fault" to the railroad.

3. Result not joint and several liability.

Trackmobile errs when it asserts that omission of Sullivan's employers from the verdict form results in joint and several liability. Trackmobile is but one of several defendants. If the acts or omissions of all constitute "fault," each of the defendants will pay damages based on its proportionate share of that "fault." Sullivan will not be able to collect the entire amount of his damages from any one of these defendants unless the jury finds only one defendant at "fault."

C. Sullivan's Employers Are Neither "Defendants" Nor "Persons Seeking Recovery" Under the Act.

Since by definition Sullivan's employers cannot be at "fault," it is irrelevant whether they are "defendants" or "persons

seeking recovery." Nevertheless, Trackmobile is in error when it argues that the employers fall in either category.

1. Not "defendants."

Trackmobile maintains that Sullivan's employers are "defendants," because they are not "immune from suit." Even assuming arguendo that Trackmobile is correct, the employers are still not "defendants."

Utah Code Ann. § 78-27-37(1) (1992) defines the term "defendant" as follows:

"Defendant" means any person not immune from suit who is claimed to be liable because of fault to any person seeking recovery.  
[Emphasis added.]

The definition has two elements. Even if the employers are not "immune from suit," they cannot be "defendants" if they are not liable "because of fault." The employers' only liability to Sullivan is the payment of Worker's Compensation benefits, which liability arises solely from the employment relationship. Since the employers' liability is not based on "fault," the employers are not "defendants."

2. Not "Persons Seeking Recovery".

Trackmobile asserts that Sullivan's employers are "persons seeking recovery" under the act. This argument has no basis in fact. While it is true that an employer may be a trustee of the employee's cause of action against third parties under Utah Code Ann. § 35-1-62 (1988), whether the employer is actually the

trustee depends on the circumstances. The statute provides in relevant part:

If compensation is claimed and the employer or insurance carrier becomes obligated to pay compensation, the employer or insurance carrier shall become trustee of the cause of action against the third party and may bring and maintain the action either in its own name or in the name of the injured employee . . . .  
[Emphasis added.]

Under the statute, the entity who pays the benefits becomes the trustee of the cause of action.

Mr. Sullivan testified in his deposition that he received worker's compensation benefits through Ranger Insurance Company. (Sullivan Depo. pp. 185-187, Appendix B) As of December 1990, Ranger Insurance Company had paid over \$275,000 in benefits. (Ranger Insurance Company letter--Appendix C) Hence, the only persons seeking recovery here are Kenneth Sullivan and the insurance company.

II. TRACKMOBILE INVITES THIS COURT TO IMPLEMENT A COMPARATIVE CAUSATION SCHEME UNDER THE GUISE OF INTERPRETING THE COMPARATIVE FAULT ACT.

Trackmobile has designed its arguments to persuade the Court that comparative causation is superior to comparative fault. First, it discusses the compatibility of comparative causation with the purposes and language of the Worker's Compensation Act. Second, it cites Utah cases interpreting the 1973 Comparative Negligence Act, ostensibly illustrating feasibility of the concept and highlighting the Court's prior concerns about fairness. Third, Trackmobile implicitly refers to cases from other jurisdictions, implicitly arguing that "everybody else is doing it." However, the

issue is not whether it is possible to implement a comparative causation system or whether such a system is desirable. This Court's duty is to effectuate the system the legislature chose to enact.

A. The Utah Cases Interpret Facets of the 1973 Utah Comparative Negligence Act.

Trackmobile cites the Court to Godesky v. Provo City Corp., 690 P.2d 541 (Utah 1984) and this Court's comment that the jury had apportioned negligence among various entities including the plaintiff's employer. Presumably, Trackmobile cites the case for the proposition that a jury is capable of apportioning responsibility based on causation. However, feasibility is not the issue here.

Trackmobile further directs the Court's attention to Bishop v. Nielsen, 632 P.2d 864 (Utah 1981) and Madsen v. Salt Lake City School Board, 645 P.2d 658 (Utah 1982), both cases addressing contribution among tort-feasors. The considerations expressed in those cases have no relevance to the issues here. Under the 1973 Utah Comparative Negligence Act, each defendant was jointly and severally liable to the plaintiff and was entitled to contribution from other joint tort-feasors. Utah Code Ann. §§ 78-27-39 and 78-27-41 (1973 Supp.) Since the tort-feasors in both Bishop and Madsen were jointly and severally liable to the respective plaintiffs, the focus of the Court's attention was fairness among joint tort-feasors. However, considerations of fairness under the Comparative Fault Act relate to the allocations of risk between the injured plaintiff and "defendants" at "fault" for the injury.

Passage of the Utah Comparative Fault Act shifted significant risks from the tort-feasor to the injured plaintiff. Under the 1973 Comparative Negligence Act, a tort-feasor paid all of the plaintiffs' damages without being able to recoup the share of damages attributable to an impecunious joint tort-feasor or the plaintiff's employers. See Utah Code Ann. § 78-27-41(1) (1973 Supp.), Curtis Harmon Electronics, Inc., 552 P.2d 117 (Utah 1976), and Phillips v. Union Pacific Railroad Company, 614 P.2d 153 (Utah 1980). Now, because a "defendant" is responsible to pay damages based only on its share of "fault," the injured plaintiff bears the risk of not obtaining full recovery due to a "defendant's" impecunious. However, contrary to Trackmobile's assertions, the legislature did not shift all of the burdens and risks to the plaintiff. "Defendants" may still pay some damages for injuries proximately caused by parties who, by virtue of public policy, are immune from suit or whose acts do not constitute "fault." While Trackmobile undoubtedly believes that the legislature's allocation of risk is unfair, the allocation provides Trackmobile and other "defendants" significant benefits not provided by prior law.

B. Decisions Interpreting Other States' Statutes Have No Bearing On Utah's Comparative Fault System.

Trackmobile cites numerous cases from other jurisdictions interpreting their respective statutes. Trackmobile candidly acknowledges that, "the language of the comparative fault acts in the other jurisdictions is not identical to Utah's Act." (Trackmobile's Brief, p. 19) These decisions interpreting unique statutes have no bearing on the interpretation of Utah's statute.

In Jensen v. Intermountain Health Care, Inc., 679 P.2d 903 (Utah 1984), this Court addressed the applicability of the "unit rule" to the 1973 Utah Comparative Negligence Act. The Court noted that at least one section of the act was identical to and had been borrowed from the State of Wisconsin. Nonetheless, the Court refused to adopt Wisconsin's interpretation stating:

The best evidence of the true intent and purpose of the Legislature in enacting the Act is the plain language of the Act.

Jensen, 679 P.2d at 906. If the Court is not bound by the decisions of other jurisdictions interpreting statutes identical to Utah's statutes, it is obviously not bound by decisions of state courts interpreting dissimilar statutes. The best evidence of the true intent of the Utah Legislature is the "plain language of the act" itself.

### III. TRACKMOBILE'S CLAIM OF UNCONSTITUTIONALITY IS FRIVOLOUS.

#### A. The Court Need Not Consider Arguments Which Have Been Inadequately Briefed.

This Court has previously observed that "all statutes are presumed to be constitutional and the party challenging a statute bears the burden of proving its invalidity." Blue Cross and Blue Shield v. State, 779 P.2d 634, 637 (Utah 1989). Trackmobile has utterly failed to carry its burden.

In two brief paragraphs and without citation to any case law, Trackmobile asserts that the Utah Comparative Fault Act violates the Fourteenth Amendment to the United States Constitution and Article I, Section 24 of the Utah Constitution. In an addi-

tional two brief paragraphs with citation to only one case, Trackmobile claims that the Utah Comparative Fault Act violates Article I, Section 11 of the Utah Constitution.

The entire constitutional discussion covers two double spaced pages, does not articulate the applicable standards, and does not make an attempt to analyze the constitutional issues in terms of the standards. In similar circumstances, the Utah Court of Appeals refused to even consider the parties' contention:

Appellants' brief contains less than a single page of assertions on this point and no citations to the record, no legal authorities and no analysis whatsoever. Their brief is not in compliance with our rules which require the brief of the appellant to contain an argument. "The argument shall contain the contentions and reasons of the appellant with respect to the issues presented with citations to the authorities, statutes and part of the record relied on." Utah R.App.P. 24(a)(9). Thus, we decline to address this issue and assume the correctness of the judgment below. [Citations omitted.]

Christensen v. Munns, 812 P.2d 69, 72 (Utah App. 1991). Since Trackmobile has not presented an argument, the Court need not address this issue.

B. A Statute Is Not Unconstitutional Merely Because It Does Not Rectify All Perceived Ills.

As discussed in Point II, the Comparative Fault Act shifted some but not all risks to the plaintiff. However, the Utah Comparative Fault Act is not unconstitutional by mere virtue of the fact that the legislature did not address all inequities perceived by Trackmobile in the 1973 legislation. This Court recently stated:

In determining constitutionality, courts are

guided by the familiar principles that a "statute is not invalid under the Constitution because it might have gone further than it did," that a legislature need not "strike at all evils at the same time," and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." [Citations omitted.]

Greenwood v. City of North Salt Lake, 817 P.2d 816, 821 (Utah 1991).

IV. IF THE UTAH COMPARATIVE FAULT ACT IS UNCONSTITUTIONAL, TRACKMOBILE AND THE REMAINDER OF THE DEFENDANTS IN THIS ACTION ARE SUBJECT TO JOINT AND SEVERAL LIABILITY.

The Utah Comparative Fault Act expressly repealed the Utah Comparative Negligence Act of 1973, including Utah Code Ann. § 78-27-41(1) (1973 Supp.) which preserved the common law doctrine of joint and several liability. If, indeed, the Utah Comparative Fault Act is unconstitutional, the repealer is ineffective, and Trackmobile and its co-defendants are subject to joint and several liability under prior law. See Board of Education of Ogden City v. Hunter, 159 P. 1019, 48 Ut. 373 (1916), State v. Barker, 167 P. 262, 50 Ut. 189 (1917), and In re J.P., 648 P.2d 1364, 1378 fn. 14 (Utah 1982).

#### CONCLUSION

The Utah Comparative Fault Act is premised on "fault." Although Trackmobile would have the Court interpret the act as being nothing more than a comparative causation scheme, the Utah Legislature's express language repudiates such a contention and the

Court is bound to enforce the statute as written. Trackmobile has failed to carry its burden of demonstrating that the Comparative Fault Act is unconstitutional. However, if the legislation is unconstitutional, Trackmobile and its co-defendants are subject to joint and several liability.

DATED this \_\_\_\_\_ day of May, 1992.

CHRISTENSEN, JENSEN & POWELL, P.C.

By \_\_\_\_\_  
L. Rich Humpherys  
M. Douglas Bayly  
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CERTIFICATE OF SERVICE

This is to certify that on the \_\_\_\_\_ day of May, 1992, four true and correct copies of the REPLY BRIEF OF CERTIFIED RESPONDENT KENNETH SULLIVAN were mailed, postage prepaid, to each of the following:

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Tab A

## APPENDIX A

Utah Comparative Fault Act  
Utah Code Ann. §§ 78-27-37 et. seq.  
Utah Code Ann. §§ 35-1-60 and 35-1-62

**78-27-35. Release, settlement, or statement by injured person — Notice of rescission or disavowal.**

Notice of cancellation or notice disavowing a statement, if given by mail, is given when it is deposited in a mailbox, properly addressed with postage prepaid. Notice of cancellation given by the injured person need not take a particular form and is sufficient if it indicates by any form of written expression the intention of the injured person not to be bound by the settlement agreement, liability release, or disavowed statement.

**History:** L. 1973, ch. 208, § 4.

**COLLATERAL REFERENCES**

**Am. Jur. 2d.** — 66 Am. Jur. 2d Release § 14 et seq.

**C.J.S.** — 76 C.J.S. Release § 38 et seq.

**78-27-36. Right of rescission or disavowal of release, settlement, or statement by injured person in addition to other provisions.**

The rights provided by this act are intended to be in addition to, and not in lieu of, any rights of rescission, rules of evidence, or provisions otherwise existing in the law.

**History:** L. 1973, ch. 208, § 5.

**Meaning of "this act."** — See note following same catchline in notes to § 78-27-32.

**78-27-37. Definitions.**

As used in Sections 78-27-37 through 78-27-43:

(1) "Defendant" means any person not immune from suit who is claimed to be liable because of fault to any person seeking recovery.

(2) "Fault" means any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including, but not limited to, negligence in all its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification or abuse of a product.

(3) "Person seeking recovery" means any person seeking damages or reimbursement on its own behalf, or on behalf of another for whom it is authorized to act as legal representative.

**History:** C. 1953, 78-27-37, enacted by L. 1986, ch. 199, § 1.

**Repeals and Reenactments.** — Laws 1986, ch. 1989, § 1 repeals former § 78-27-37, as en-

acted by Laws 1973, ch. 209, § 1. relating to diminishment of damages and assumption of risk, and reenacts the above section.

## NOTES TO DECISIONS

Cited in *Deats v. Commercial Sec. Bank*,  
746 P.2d 1191 (Utah Ct. App. 1987).

## COLLATERAL REFERENCES

**Journal of Contemporary Law.** — For comment, "The Liability Reform Act: An Approach to Equitable Application," see 13 J. Contemp. L. 89 (1987).

**A.L.R.** — Liability to one struck by golf ball, 53 A.L.R.4th 282.

**78-27-38. Comparative negligence.**

The fault of a person seeking recovery shall not alone bar recovery by that person. He may recover from any defendant or group of defendants whose fault exceeds his own. However, no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant.

**History:** C. 1953, 78-27-38, enacted by L. 1986, ch. 199, § 2.

**Repeals and Reenactments.** — Laws 1986, ch. 199, § 2 repeals former § 78-27-38, as enacted by Laws 1973, ch. 209, § 2, relating to special verdicts, and reenacts the above section.

**Cross-References.** — Product Liability Act, manufacturer or seller not liable if alteration or modification of product after sale is substantial contributing cause of injury, § 78-15-5.

Skiers not to make claim against or recover from ski area operator for injury resulting from any inherent risk of skiing, § 78-27-53.

## NOTES TO DECISIONS

## ANALYSIS

Assumption of risk.  
Bailment.  
Causation.  
Dramshops.  
Jury instructions.  
Last clear chance.  
Open and obvious danger.  
Unit method of determining negligence.  
Wrongful death.  
Cited.

**Assumption of risk.**

"Assumption of risk," i.e., risk of a known danger voluntarily assumed, may amount to a lack of due care constituting negligence; where such is the case and the party assuming the risk is the plaintiff in an action governed by comparative negligence statute, he is chargeable with contributory negligence and is liable to have his recovery reduced or denied in accordance with its provisions. *Rigtrup v. Strawberry Water Users Ass'n*, 563 P.2d 1247 (Utah 1977), overruled on other grounds, *Moore v. Burton Lumber & Hdwe. Co.*, 631 P.2d 865 (Utah 1981).

Assumption of risk language is not appropriate to describe the various concepts previously

dealt with under that terminology but is to be treated, in its secondary sense, as contributory negligence; when the issue is raised attention should be focused on whether a reasonably prudent man in the exercise of due care would have incurred the risk, despite his knowledge of it, and if so, whether he would have conducted himself in the manner in which the person seeking to recover acted in light of all the surrounding circumstances, including the appreciated risk; then, if the unreasonableness of the person seeking to recover is viewed to be less than that of the person from whom recovery is sought, any damages allowed should be diminished in proportion to the amount of negligence attributable to the person recovering. *Jacobsen Constr. Co. v. Structo-Lite Eng'g, Inc.*, 619 P.2d 306 (Utah 1980).

As used in § 78-27-37, "assumption of risk" is a voluntary and unreasonable exposure to a known danger. *Moore v. Burton Lumber & Hdwe. Co.*, 631 P.2d 865 (Utah 1981).

Assumption of risk language is not appropriate in an instruction under comparative negligence statutes. *Stephens v. Henderson*, 741 P.2d 952 (Utah 1987) (applying statute in effect prior to 1986).

The assumption of risk doctrine has been ex-

**Brigham Young Law Review.** — The Merger of Comparative Fault Principles with Strict Liability in Utah: *Mulherin v. Ingersoll-Rand Co.*, 1981 B.Y.U. L. Rev. 964, 966.

**Damage Apportionment in Accounting Malpractice Actions: The Role of Comparative Fault**, 1990 B.Y.U.L. Rev. 949.

**Journal of Contemporary Law.** — For comment, "The Liability Reform Act: An Approach to Equitable Application," 13 J. Contemp. L. 89 (1987).

**Am. Jur. 2d.** — 57B Am. Jur. 2d Negligence § 1128 et seq.

**C.J.S.** — 65A C.J.S. Negligence § 169 et seq.

**A.L.R.** — Comparative negligence rule where misconduct of three or more persons is involved, 8 A.L.R.3d 722.

Retrospective application of state statute substituting rule of comparative negligence for that of contributory negligence, 37 A.L.R.3d 1438.

Indemnity or contribution between joint tortfeasors on basis of relative fault, 53 A.L.R.3d 184.

Modern development of comparative negligence doctrine having applicability to negligence actions generally, 78 A.L.R.3d 339.

Application of comparative negligence doctrine, generally, 86 A.L.R.3d 1206.

Comparative negligence doctrine applied to actions based on strict liability in tort, 9 A.L.R.4th 633.

Effect of adoption of comparative negligence rules on assumption of risk and contributory negligence, 16 A.L.R.4th 700.

Commercial renter's negligence liability for customer's personal injuries, 57 A.L.R.4th 1186.

Liability to one struck by golf club, 63 A.L.R.4th 221.

Liability for injury incurred in operation of power golf cart, 66 A.L.R.4th 622.

Tort liability for window washer's injury or death, 69 A.L.R.4th 207.

Comparative fault: calculation of net recovery by applying percentage of plaintiff's fault before or after subtracting amount of settlement by less than all joint tortfeasors, 71 A.L.R.4th 1108.

Rescue doctrine: applicability and application of comparative negligence principles, 75 A.L.R.4th 875.

**Key Numbers.** — Negligence ⇨ 97 et seq.

## 78-27-39. Separate special verdicts on total damages and proportion of fault.

The trial court may, and when requested by any party shall, direct the jury, if any, to find separate special verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery and to each defendant.

**History:** C. 1953, 78-27-39, enacted by L. 1986, ch. 199, § 3.

**Repeals and Reenactments.** — Laws 1986, ch. 199, § 3 repeals former § 78-27-39, as en-

acted by Laws 1973, ch. 209, § 3, relating to contribution among joint tortfeasors, and reenacts the above section.

### NOTES TO DECISIONS

#### ANALYSIS

**Jury instructions.**  
Cited.

**Jury instructions.**

If requested, a trial court must inform the jury of the legal consequences of apportioning

to the plaintiff 50% or more of the negligence it finds in a comparative negligence case, if the effect of such an instruction will not be to confuse or mislead the jury. *Dixon v. Stewart*, 658 P.2d 591 (Utah 1982).

Cited in *Reeves v. Gentile*, 813 P.2d 111 (Utah 1991).

### 78-27-40. Amount of liability limited to proportion of fault — No contribution.

Subject to Section 78-27-38, the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant. No defendant is entitled to contribution from any other person.

**History:** C. 1953, 78-27-40, enacted by L. 1986, ch. 199, § 4.

**Repeals and Reenactments.** — Laws 1986, ch. 199, § 4 repeals former § 78-27-40, as enacted by Laws 1973, ch. 209, § 4, relating to settlement by a joint tortfeasor, and reenacts the above section.

**Cross-References.** — Enforcement of contribution and reimbursement, Rules of Civil Procedure, Rule 69(h).

Joint obligations, § 15-4-1 et seq.

#### NOTES TO DECISIONS

##### ANALYSIS

Applicability of section.  
Indemnity contract.  
Plaintiff's minor child as joint tortfeasor.  
Workers' compensation.  
Cited.

##### Applicability of section.

A statute, such as this section, eliminating joint and several liability may not be applied to injuries occurring prior to its effective date. Where the injuries occurred on November 8, 1984, and the Liability Reform Act was not effective until April 28, 1986, the trial court was correct in holding that the Liability Reform Act did not apply. *Stephens v. Henderson*, 741 P.2d 952 (Utah 1987).

##### Indemnity contract.

The former comparative negligence provisions did not invalidate an employer's indemnity contract with a third party whereby employer agreed to indemnify the third party against claims arising out of injuries to the em-

ployer's employees. *Shell Oil Co. v. Brinkerhoff-Signal Drilling Co.*, 658 P.2d 1187 (Utah 1983).

##### Plaintiff's minor child as joint tortfeasor.

Where plaintiff was awarded a judgment in action against a defendant to recover the property loss sustained as the result of a collision between automobiles operated by defendant and the minor unemancipated daughter of the plaintiff, and where the daughter's negligence contributed to the property loss sustained by her father, the minor daughter was a joint tortfeasor and liable to the defendant for contribution. *Bishop v. Nielsen*, 632 P.2d 864 (Utah 1981).

##### Workers' compensation.

Employer cannot be a joint tortfeasor as to an injury to his employee covered by the Workmen's Compensation Act. *Curtis v. Harmon Elec., Inc.*, 552 P.2d 117 (Utah 1976); *Phillips v. Union Pac. R.R.*, 614 P.2d 153 (Utah 1980).

Cited in *Warren v. Honda Motor Co.*, 669 F. Supp. 365 (D. Utah 1987).

#### COLLATERAL REFERENCES

**Brigham Young Law Review.** — Utah Allows Contribution Against Cotortfeasor Despite Immunity from Direct Suit: *Bishop v. Nielsen*, 1982 B.Y.U. L. Rev. 429.

**Journal of Contemporary Law.** — Comment, The Liability Reform Act: An Approach to Equitable Application, 13 J. Contemp. L. 89 (1987).

**A.L.R.** — Right of tortfeasor initially causing injury to recover indemnity or contribution from medical attendant aggravating injury or causing new injury in course of treatment, 72 A.L.R.4th 231.

Products liability: seller's right to indemnity from manufacturer, 79 A.L.R.4th 278.

**78-27-41. Joinder of defendants.**

A person seeking recovery, or any defendant who is a party to the litigation, may join as parties any defendants who may have caused or contributed to the injury or damage for which recovery is sought, for the purpose of having determined their respective proportions of fault.

**History:** C. 1953, 78-27-41, enacted by L. 1986, ch. 199, § 5.

**Repeals and Reenactments.** — Laws 1986, ch. 199, § 5 repeals former § 78-27-41, as en-

acted by Laws 1973, ch. 209, § 5, relating to rights of contribution and indemnity, and reenacts the above section.

## COLLATERAL REFERENCES

**A.L.R.** — Products liability: seller's right to indemnity from manufacturer, 79 A.L.R.4th 278.

**78-27-42. Release to one defendant does not discharge other defendants.**

A release given by a person seeking recovery to one or more defendants does not discharge any other defendant unless the release so provides.

**History:** C. 1953, 78-27-42, enacted by L. 1986, ch. 199, § 6.

**Repeals and Reenactments.** — Laws 1986, ch. 199, § 6 repeals former § 78-27-42, as en-

acted by Laws 1973, ch. 209, § 6, relating to release of joint tortfeasors and a reduction of claim, and reenacts the above section.

## COLLATERAL REFERENCES

**Am. Jur. 2d.** — 66 Am. Jur. 2d Release § 35 et seq.

**C.J.S.** — 76 C.J.S. Release § 38 et seq.

**A.L.R.** — Tortfeasor's general release of cotortfeasor as affecting former's right of contribution against cotortfeasor, 34 A.L.R.3d 1374.

Release of one responsible for injury as affecting liability of physician or surgeon for negligent treatment of injury, 39 A.L.R.3d 260.

Voluntary payment into court of judgment

against one joint tortfeasor as release of others, 40 A.L.R.3d 1181.

Release of one negligently treating injury as affecting liability of one originally responsible for injury, 64 A.L.R.3d 839.

Validity and effect of agreement with one cotortfeasor setting aside his maximum liability and providing for reduction or extinguishment thereof relative to recovery against non-agreeing cotortfeasor, 65 A.L.R.3d 602.

**78-27-43. Effect on immunity, exclusive remedy, indemnity, contribution.**

Nothing in Sections 78-27-37 through 78-27-42 affects or impairs any common law or statutory immunity from liability, including, but not limited to, governmental immunity as provided in Title 63, Chapter 30, and the exclusive remedy provisions of Title 35, Chapter 1. Nothing in Sections 78-27-37 through 78-27-42 affects or impairs any right to indemnity or contribution arising from statute, contract, or agreement.

## NOTES TO DECISIONS

**Notice and opportunity to be heard.**

This section inferentially at least provides that the commission shall give notice and an opportunity to be heard to all persons whose rights may be affected by its award. Therefore,

commission, whose award has been annulled, cannot amend its findings of facts without giving employer notice and an opportunity to be heard. *Denver & R.G.W.R.R. v. Industrial Comm'n*, 74 Utah 316, 279 P. 612 (1929).

## COLLATERAL REFERENCES

C.J.S. — 100 C.J.S. Workmen's Compensation § 638.

Key Numbers. — Workers' Compensation ☞ 1765.

### 35-1-60. Exclusive remedy against employer, or officer, agent or employee — Occupational disease excepted.

The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer and shall be the exclusive remedy against any officer, agent or employee of the employer and the liabilities of the employer imposed by this act shall be in place of any and all other civil liability whatsoever, at common law or otherwise, to such employee or to his spouse, widow, children, parents, dependents, next of kin, heirs, personal representatives, guardian, or any other person whomsoever, on account of any accident or injury or death, in any way contracted, sustained, aggravated or incurred by such employee in the course of or because of or arising out of his employment, and no action at law may be maintained against an employer or against any officer, agent or employee of the employer based upon any accident, injury or death of an employee. Nothing in this section, however, shall prevent an employee (or his dependents) from filing a claim with the industrial commission of Utah for compensation in those cases within the provisions of the Utah Occupational Disease Disability Act, as amended.

**History:** L. 1917, ch. 100, § 76; C.L. 1917, § 3132; L. 1921, ch. 67, § 1; R.S. 1933 & C. 1943, 42-1-57; L. 1949, ch. 52, § 1.

**Cross-References.** — Employment of children, § 34-23-1 et seq.

Utah Occupational Disease Disability Law, § 35-2-1 et seq.

**Meaning of "this act".** — See the note under the same catchline following § 35-1-46.

## NOTES TO DECISIONS

## ANALYSIS

Compulsory.  
Effect of no-fault insurance.  
Employer.  
Exclusiveness of remedy.  
— Minor engaged in hazardous employment.  
Farmers and domestics.  
Hospital charges.  
Indemnification agreement between employer and third party.  
Indemnity agreement.  
Intentional tort.  
Joint venture.

Liability to third party.  
Nature and adequacy of.  
Negligent injury by employer.  
Occupational disease.  
Statutory employer.  
— "Sufficient control."  
Subcontractor's employment.  
Tort liability of employer.  
— "Dual capacity" doctrine.  
Cited.

**Compulsory.**

Utah Workmen's Compensation Act, compulsory and not elective. *Foods*, 22 Utah 2d 371.

**Effect of no-fault insurance.**

The No-Fault Insurance Act, § 31-41-1 et seq., did not repeal the Workmen's Compensation Act remedy provision as a motor vehicle accident or employment. *IML*, 538 P.2d 296 (Utah 1976).

**Employer.**

Worker was employed by a company, its subsidiary, for purposes of the provisions of the Utah Workmen's Compensation Act where the cable part of its management employees together under where the worker's employees were managed by the company. *Freund v. Utah*, Supp. 272 (D. Utah 1976).

**Exclusiveness of remedy.**

Under this section, an employee who is injured by the negligent act or misconduct being claimed by the employee or, when the dependents, must be compensated provided by the Industrial Commission, 71 (1927).

Since the enactment of the Workmen's Compensation Act in 1917, an employee who is injured in employment is the right of action provided for in *Murray v. Wasatch C*, 274 P. 940 (1929); *Wash Laundry*, 108 (1945).

Employee of railroad filing claim for compensation under Federal Employers' Liability Act on ground of election have two remedies but incurred while he was in commerce, his remedy is under Federal Employers' Liability Act.

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Workers' Compensation

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Occupational disease.  
Statutory employer.  
—"Sufficient control."  
Subcontractor's employee.  
Joint liability of employer.  
—"Dual capacity" doctrine.  
Cited.

#### Compulsory.

Utah Workmen's Compensation Act is compulsory and not elective. *Lovato v. Beatrice Foods*, 22 Utah 2d 371, 453 P.2d 692 (1969).

#### Effect of no-fault insurance.

The No-Fault Insurance Act, former § 31-41-1 et seq., did not supersede or nullify the Workmen's Compensation Act's exclusive remedy provision as applied to injuries from motor vehicle accidents suffered in the course of employment. *IML Freight, Inc. v. Ottosen*, 538 P.2d 296 (Utah 1975).

#### Employer.

Worker was employee of cable television company, its subsidiary, and its limited partner for purposes of the exclusive remedy provisions of the Utah Workmen's Compensation Act where the cable television company, as part of its management style, grouped all employees together under its direct control and where the worker's time sheets and checks were managed by the cable television company. *Freund v. Utah Power & Light*, 625 F. Supp. 272 (D. Utah 1985).

#### Exclusiveness of remedy.

Under this section when the injury is caused by the negligent act of the employer, no willful misconduct being claimed, the injured employee or, when the injury causes death, his dependents, must be content to accept the compensation provided by the act. *Halling v. Industrial Comm'n*, 71 Utah 112, 263 P. 78 (1927).

Since the enactment of the Workmen's Compensation Act in 1917, the exclusive remedy of an employee who is injured in the course of his employment is the right to recover the compensation provided for in the act (§ 35-1-1 et seq.). *Murray v. Wasatch Grading Co.*, 73 Utah 430, 274 P. 940 (1929); *Ortega v. Salt Lake Wet Wash Laundry*, 108 Utah 1, 156 P.2d 885 (1945).

Employee of railroad was not precluded from filing claim for compensation by application filed under Federal Employers' Liability Act on ground of election since employee did not have two remedies but only one; if injury was incurred while he was engaged in interstate commerce, his remedy was under Federal Employers' Liability Act and if not, it was under

state act. *Utah Idaho Cent. R.R. v. Industrial Comm'n*, 84 Utah 364, 35 P.2d 842, 94 A.L.R. 1423 (1934).

This section abrogates employee's common-law right to sue employer for injuries suffered while in course of employment, except where employer is not subject to this act or common-law remedy of employee is expressly reserved. *Masich v. United States Smelting, Ref. & Mining Co.*, 113 Utah 101, 191 P.2d 612, appeal dismissed, 335 U.S. 866, 69 S. Ct. 138, 93 L. Ed. 411 (1948).

This section makes it clear that this chapter is the exclusive vehicle for recovery of compensation for injury or death, against the employer and other employees to the exclusion of any and all other civil liability whatsoever, at common law or otherwise, and that it bars all next of kin or dependents, or anyone else, from using any other means of recovery against employers and others named in and covered by the Act, than the Act itself. *Morrill v. J & M Constr. Co.*, 635 P.2d 88 (Utah 1981).

#### — Minor engaged in hazardous employment.

Even if a minor employee is injured while engaged in hazardous employment in violation of § 34-23-2, prohibiting the employment of minors in hazardous occupations, the minor's exclusive remedy is through this chapter, and the minor cannot void her employment contract and sue in tort. *Bingham v. Lagoon Corp.*, 707 P.2d 678 (Utah 1985).

#### Farmers and domestics.

Farm laborers and domestic servants, in the event of an accident or injury, are entitled to pursue their common-law remedies in an action against the employer because they are excepted from the act by §§ 35-1-42 and 35-1-43. *Murray v. Strike*, 76 Utah 118, 287 P. 922 (1930).

#### Hospital charges.

The only power given the Industrial Commission by the workers' compensation statutes over hospital charges for services rendered to injured employees is the right to refuse to pay that part of them which is excessive in amount or for care which was not reasonably necessary; Industrial Commission does not have the power and authority to set maximum rates

which hospitals may charge for services rendered injured employees, and hospitals are not prohibited from holding an injured employee liable for any amounts not paid by the commission. *Intermountain Health Care, Inc. v. Industrial Comm'n*, 657 P.2d 1289 (Utah 1982).

#### **Indemnification agreement between employer and third party.**

Where employer and third party voluntarily enter into a written indemnification agreement whereby the employer agrees to indemnify the third party against claims arising out of injuries to the employer's employees, and where an employee is injured and is compensated by the employer in accordance with the workers' compensation law, the exclusive remedy provision of this section does not preclude the enforcement of the indemnification agreement by the third party against the employer for amounts paid by the third party to the employee as a result of the injury. *Shell Oil Co. v. Brinkerhoff-Signal Drilling Co.*, 658 P.2d 1187 (Utah 1983).

#### **Indemnity agreement.**

An indemnity agreement is a separate undertaking by the employer that will be enforceable despite workers' compensation if the indemnity provision expressly covers the indemnitor's employees, but the phrase "person or persons" does not cover indemnitor's own employees given the dramatic consequences of such an interpretation. *Wollam v. Kennecott Corp.*, 663 F. Supp. 268 (D. Utah 1987).

#### **Intentional tort.**

Provision prohibiting action for damages against fellow employee does not prohibit maintenance of action for premeditated and intentional act of fellow employee. *Bryan v. Utah Int'l*, 533 P.2d 892 (Utah 1975).

#### **Joint venture.**

Construction company obtained contract to construct diversion tunnel at dam and entered into agreement with corporation by which the two organizations would unite their efforts to complete such construction and share in profits or losses from the enterprise. Miner, hired by the construction company, who was injured while working on the tunnel and who obtained workmen's compensation benefits, could not sue corporation for alleged negligence of corporate employees since the two companies were regarded as the employing unit. The employees of both companies were engaged in the same employment. *Cook v. Peter Kiewit Sons Co.*, 15 Utah 2d 20, 386 P.2d 616 (1963).

This section barred suit by workmen against joint venturer which was his employer for injuries sustained in use of machine furnished by a second joint venturer, where machine was furnished pursuant to contract creating the joint

venture. *Hammer v. Gibbons & Reed Co.*, 29 Utah 2d 415, 510 P.2d 1104 (1973).

#### **Liability to third parties.**

Where plaintiff employee was injured when a fellow employee drove the truck in which they were riding into the side of a train, and brought an action against the railroad and the manufacturer of the crossing signal, alleging negligent upkeep and product defect, respectively, neither defendant could join plaintiff's employer as a third-party defendant in order to assert a claim for contribution from it under the joint tort-feasor statute. *Curtis v. Harmon Elec., Inc.*, 552 P.2d 117 (Utah 1976); *Phillips v. Union Pac. R.R.*, 614 P.2d 153 (Utah 1980) (decided under prior law).

#### **Nature and adequacy of act.**

The workers' compensation scheme is purely statutory, and the act (§ 35-1-1 et seq.) provides a plain, speedy, and adequate method of review. *Woldberg v. Industrial Comm'n*, 74 Utah 309, 279 P. 609 (1929).

#### **Negligent injury by employee of same employer.**

Where subcontractor was an "employee" of contractor, other employee of contractor could not maintain negligence action against subcontractor but must look to workers' compensation insurance. *Gallegos v. Stringham*, 21 Utah 2d 139, 442 P.2d 31 (1968).

#### **Occupational disease.**

Administratrix of deceased city employee, who died from inhalation of paint he was ordered to spray on trucks, could bring an action at law against the employer, since such was not an accidental injury compensable under this act (§ 35-1-1 et seq.), but was an "occupational disease." *Young v. Salt Lake City*, 97 Utah 123, 90 P.2d 174 (1939).

#### **Statutory employer.**

##### **—"Sufficient control."**

Where joint owners of interests in oil and gas leases provided for construction of a gas processing plant located in Utah, to be operated as a "mutually profitable venture" for the purpose of extracting liquid hydrocarbons, and under the operating agreement the owners reserved the power of ultimate control over the project and over the operator thereof, the owners retained "sufficient control" to qualify as statutory employers of an employee of the operator pursuant to § 35-1-42(2) and the exclusive remedy provision of this section applied. *Lamb v. W-Energy, Inc.*, 663 F. Supp. 395 (D. Utah 1987).

#### **Subcontractor's employee.**

Subcontractor's employee could not recover from general contractor in civil action for injuries on theory that subcontractor was his em-

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is section does not forbid or render invalid  
a clause in a construction subcontract by which  
a subcontractor agreed to indemnify the  
prime contractor and save him harmless for all  
liability arising out of the injury or death of an  
employee of subcontractor, where such clause  
sued and decedent workman's administra-  
tion sued prime contractor for wrongful death  
of decedent and recovered; therefore, deced-  
ent's employer is required to reimburse prime  
contractor covered by workmen's compensation  
provided in such indemnity clause. *Titan*  
*Corp. v. Walton*, 365 F.2d 542 (10th Cir.  
1955).

Tort liability of employer.

"Dual capacity" doctrine.

Utah law does not recognize as an exception  
to the exclusive remedy provisions of the  
Worker's Compensation Act, the so-called  
"dual capacity" doctrine under which an em-  
ployer, shielded from tort liability by the act,  
may become liable in tort if he occupies, in ad-  
dition to his capacity as employer, a second ca-

capacity that confers on him an obligation inde-  
pendent of those imposed on him as an em-  
ployer. *Worthen v. Kennecott Corp.*, 780 F.2d  
856 (10th Cir. 1985).

An employee cannot hold his employer liable  
in tort for injuries resulting from the em-  
ployer's maintenance of unsafe premises, on  
the reasoning that the employer occupies a sep-  
arate capacity and owes separate duties to his  
employees as an owner of the premises, since  
the employer's duty to maintain a safe work-  
place is inseparable from the employer's gen-  
eral duties as an employer toward his em-  
ployees. *Bingham v. Lagoon Corp.*, 707 P.2d  
678 (Utah 1985).

The dual capacity doctrine did not apply to a  
products liability claim brought on behalf of a  
decedent who was killed when he was pulled  
into a large screw-auger manufactured by de-  
fendant while decedent was working on his em-  
ployer's premises, where the employer had not  
assumed a separate and distinct obligation to-  
ward his employee other than as employer.  
*Stewart v. CMI Corp.*, 740 P.2d 1340 (Utah  
1987).

Cited in *Smith v. Atlantic Richfield Co.*, 814  
F.2d 1481 (10th Cir. 1987).

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lows Contribution Against Co-tortfeasor De-  
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*Nielsen*, 1982 B.Y.U.L. Rev. 429.

**C.J.S.** — 101 C.J.S. Workmen's Compensa-  
tion § 918.

**A.L.R.** — Insured's receipt of or right to  
workmen's compensation benefits as affecting  
recovery under accident, hospital, or medical  
expense policy, 40 A.L.R.3d 1012.

Workers' compensation law as precluding

employee's suit against employer for third per-  
son's criminal attack, 49 A.L.R.4th 926.

Workers' compensation act as precluding  
tort action for injury to or death of employee's  
unborn child, 55 A.L.R.4th 792.

Willful, wanton, or reckless conduct of coem-  
ployee as ground of liability despite bar of  
workers' compensation law, 57 A.L.R.4th 888.

**Key Numbers.** — Workers' Compensation  
⇒ 2084.

#### 35-1-61. Repealed.

**Repeals.** — Section 35-1-61 (C. 1943, Supp.,  
42-1-57-10, enacted by L. 1945, ch. 65, § 2),  
relating to injuries to or death of illegally em-

ployed minor, was repealed by Laws 1971, ch.  
76, § 11.

**35-1-62. Injuries or death caused by wrongful acts of persons other than employer, officer, agent, or employee of said employer — Rights of employer or insurance carrier in cause of action — Maintenance of action — Notice of intention to proceed against third party — Right to maintain action not involving employee-employer relationship — Disbursement of proceeds of recovery.**

When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of a person other than an employer, officer, agent, or employee of said employer, the injured employee, or in case of death his dependents, may claim compensation and the injured employee or his heirs or personal representative may also have an action for damages against such third person. If compensation is claimed and the employer or insurance carrier becomes obligated to pay compensation, the employer or insurance carrier shall become trustee of the cause of action against the third party and may bring and maintain the action either in its own name or in the name of the injured employee, or his heirs or the personal representative of the deceased, provided the employer or carrier may not settle and release the cause of action without the consent of the commission. Before proceeding against the third party, the injured employee, or, in case of death, his heirs, shall give written notice of such intention to the carrier or other person obligated for the compensation payments, in order to give such person a reasonable opportunity to enter an appearance in the proceeding.

For the purposes of this section and notwithstanding the provisions of Section 35-1-42, the injured employee or his heirs or personal representative may also maintain an action for damages against subcontractors, general contractors, independent contractors, property owners or their lessees or assigns, not occupying an employee-employer relationship with the injured or deceased employee at the time of his injury or death.

If any recovery is obtained against such third person it shall be disbursed as follows:

(1) The reasonable expense of the action, including attorneys' fees, shall be paid and charged proportionately against the parties as their interests may appear. Any such fee chargeable to the employer or carrier is to be a credit upon any fee payable by the injured employee or, in the case of death, by the dependents, for any recovery had against the third party.

(2) The person liable for compensation payments shall be reimbursed in full for all payments made less the proportionate share of costs and attorneys' fees provided for in Subsection (1).

(3) The balance shall be paid to the injured employee or his heirs in case of death, to be applied to reduce or satisfy in full any obligation thereafter accruing against the person liable for compensation.

**History:** L. 1917, ch. 100, § 72; C.L. 1917, L. 1945, ch. 65, § 1; 1971, ch. 76, § 3; 1973, ch. 3133; L. 1921, ch. 100, § 1; R.S. 1933, ch. 67, § 7; 1975, ch. 101, § 3.  
12-1-58; L. 1939, ch. 51, § 1; C. 1943, 42-1-58;

**35-1-62. Injuries or death caused by wrongful acts of persons other than employer, officer, agent, or employee of said employer — Rights of employer or insurance carrier in cause of action — Maintenance of action — Notice of intention to proceed against third party — Right to maintain action not involving employee-employer relationship — Disbursement of proceeds of recovery.**

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For the purposes of this section and notwithstanding the provisions of Section 35-1-42, the injured employee or his heirs or personal representative may also maintain an action for damages against subcontractors, general contractors, independent contractors, property owners or their lessees or assigns, not occupying an employee-employer relationship with the injured or deceased employee at the time of his injury or death.

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(2) The person liable for compensation payments shall be reimbursed in full for all payments made less the proportionate share of costs and attorneys' fees provided for in Subsection (1).

(3) The balance shall be paid to the injured employee or his heirs in case of death, to be applied to reduce or satisfy in full any obligation thereafter accruing against the person liable for compensation.

History: L. 1917, ch. 100, § 72; C.L. 1917, § 3133; L. 1921, ch. 100, § 1; R.S. 1933, ch. 67, § 7; 1971, ch. 76, § 3; 1973, ch. 67, § 7; 1975, ch. 101, § 3.  
42-1-58; L. 1939, ch. 51, § 1; C. 1943, 42-1-58;

## NOTES TO DECISIONS

## ANALYSIS

Action against tort-feasor prior to compensation award.  
 Applicability of section.  
 Assignment of cause of action.  
 Construction of statute.  
 Costs and attorney fees.  
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 Election of remedies.  
 Intentional injury by fellow employee.  
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 Same employment.  
 Settlements.  
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 Third-party liability.  
 Tired.

#### Action against tort-feasor prior to compensation award.

Fact that workmen's compensation claimant settled with third-party tort-feasor for sum larger than any compensation award she could have received, before filing compensation claim, did not relieve compensation insurer of duty to pay claimant award reflecting its proportionate share of attorney's fees. *Graham v. Industrial Comm'n*, 26 Utah 2d 424, 491 P.2d 223 (1971).

#### Applicability of section.

This section applies only to suits against tortfeasors who are not employers or deemed to be statutory employers. *Lamb v. W-Energy, Inc.*, 663 F. Supp. 395 (D. Utah 1987).

#### Assignment of cause of action.

If action had been commenced against a third person to recover for the injuries or death of applicant, such action must first have been assigned to state insurance fund as a condition precedent to application under Workmen's Compensation Act. *Robinson v. Industrial Comm'n*, 72 Utah 203, 269 P. 513 (1928).

Where employee was killed in course of his employment by wrongful act of third person, and widow chose to claim compensation under the Workmen's Compensation Act, but her minor child chose to sue under former section, in which action widow declined to join, as assignment of cause of action by widow to employer was sufficient; an assignment by the minor was not necessary. An assignment was necessary only when compensation was

claimed from the employer or his insurance carrier. *Brainard's Cottonwood Dairy v. Industrial Comm'n*, 80 Utah 159, 14 P.2d 212, 88 A.L.R. 659 (1935).

It was a condition precedent to the employee's right to claim compensation from his employer, where he was injured by negligence of someone not his employer, that he should assign his action for damages against the wrongdoer. *Industrial Comm'n v. Wasatch Grading Co.*, 80 Utah 223, 14 P.2d 988 (1932).

#### Construction of statute.

This section covers both active and passive negligence. *Johanson v. Cudahy Packing Co.*, 107 Utah 114, 152 P.2d 98 (1944).

Where state insurance fund paid compensation to injured person, the insurance carrier has a cause of action where the injury was caused by third person; but this does not mean that it had the only cause of action since this section also gives the injured person a cause of action against the third person. *Rogalski v. Phillips Petroleum Co.*, 3 Utah 2d 203, 282 P.2d 304 (1955).

#### Costs and attorney fees.

State supreme court decisions that permit reasonable attorney fees to be deducted from that portion of recovery gained to reimburse state insurance fund do not apply retroactively to fees determined in reliance on the former rule. *Draper v. Travelers Ins. Co.*, 429 F.2d 44 (10th Cir. 1970); *Williams v. Utah State Dep't of Fin.*, 23 Utah 2d 438, 464 P.2d 596 (1970).

Although insurer was entitled to reimburse-

ment of payment made to injured employee who subsequently recovered from third party, equitable considerations required it to pay its proportionate share of attorney's fees incurred by injured employee in obtaining judgment against third party. *Worthen v. Shurtleff & Andrews, Inc.*, 19 Utah 2d 80, 426 P.2d 223 (1967).

State insurance fund (Workers' Compensation Fund) was required to bear its pro rata share of reasonable attorney fees incurred by claimant in obtaining settlement with third party inasmuch as defendant insurance fund was relieved from burden of paying award to claimant. *Prettyman v. Utah State Dep't of Fin.*, 27 Utah 2d 333, 496 P.2d 89 (1972).

Where an injured person who has collected workmen's compensation sues third-party tortfeasor, both the injured person and the subrogated insurance carrier bear their proportionate share of costs and attorney fees incurred in obtaining recovery in tort suit. Language added to Subdivision (2) by the 1971 amendment was intended to eliminate prior uncertainty and make it clear that insurer should bear its proportionate share, and insurer cannot avoid its share of expenses by hiring its own counsel and notifying injured person of that fact. *Lanier v. Pyne*, 29 Utah 2d 249, 508 P.2d 38 (1973).

#### Disbursement of recovery.

##### —Medical expenses.

Commission properly interpreted the phrase "any obligation" in Subsection (3) to include medical expenses. *Taylor v. Industrial Comm'n*, 743 P.2d 1183 (Utah 1987).

##### "Dual capacity" doctrine.

Utah law does not recognize as an exception to the exclusive remedy provisions of the Workers' Compensation Act the so-called "dual capacity" doctrine under which an employer, shielded from tort liability by the act, may become liable in tort if he occupies, in addition to his capacity as employer, a second capacity that confers on him an obligation independent of those imposed on him as an employer. *Worthen v. Kennecott Corp.*, 780 F.2d 856 (10th Cir. 1985).

An employee cannot hold his employer liable in tort for injuries resulting from the employer's maintenance of unsafe premises, on the reasoning that the employer occupies a separate capacity and owes separate duties to his employees as an owner of the premises, since the employer's duty to maintain a safe work place is inseparable from the employer's general duties as an employer toward his employees. *Bingham v. Lagoon Corp.*, 707 P.2d 678 (Utah 1985).

#### Election of remedies.

Where city policeman was injured by third

person, and city paid policeman compensation in form of wages, action by policeman against third person which was dismissed without prejudice, commenced prior to assignment of cause of action to city, was not an election so as to bar policeman's subsequent claim for compensation from city. *Salt Lake City v. Industrial Comm'n*, 81 Utah 213, 17 P.2d 239 (1932).

Employee of railroad was not precluded from filing claim for compensation by application filed under Federal Employers' Liability Act on ground of election since employee did not have two remedies but only one; if injury was incurred while he was engaged in interstate commerce his remedy was under Federal Employers' Liability Act; if not, it was under state act. *Utah Idaho Cent. R.R. v. Industrial Comm'n*, 84 Utah 364, 35 P.2d 842, 94 A.L.R. 1423 (1933).

In a case in which fireman was killed by collapse of a ladder while in the performance of his duty, his dependents could exercise their right to elect under terms of this section to pursue their remedy against third-party wrongdoer. *Hamilton v. Commission of Fin.*, 108 Utah 574, 162 P.2d 758 (1945).

#### Intentional injury by fellow employee.

One who is injured by the intentional act of a fellow employee may seek recovery for damages as provided for in this section. *Bryan v. Utah Int'l*, 533 P.2d 892 (Utah 1975).

#### Joint venture.

Construction company obtained contract to construct diversion tunnel at dam and entered into agreement with corporation by which the two organizations would unite their efforts to complete such construction and share in profits or losses from the enterprise. Miner, hired by the construction company, who was injured while working on the tunnel, and who obtained workmen's compensation benefits, could not sue corporation for alleged negligence of corporate employees since the two companies were regarded as the employing unit. The employees of both companies were engaged in the same employment. *Cook v. Peter Kiewit Sons Co.*, 15 Utah 2d 20, 386 P.2d 616 (1963).

#### Nondependent heirs.

Legislature did not intend to divest the right of heirs to damages under the wrongful death statute if they are nondependents and received no compensation benefits. *Oliveras v. Caribou-Four Corners, Inc.*, 598 P.2d 1320 (Utah 1979).

#### Pleadings.

Complaint by assignee should allege payment of the award. *Johanson v. Cudahy Packing Co.*, 101 Utah 219, 120 P.2d 281 (1941).

Complaint was sufficient to state a cause of action for negligence in action by dependents of a truck driver who was killed when he backed a truck into some high tension electric wires

while delivering a load to a packing company, who was killed from deceased's negligence. *Cudahy Packing Co.*, 101 Utah 219, 120 P.2d 281 (1941).

#### Reimbursement.

State insurance fund (Workers' Compensation Fund) is entitled to reimbursement for what has been paid by third party at the time of the trial judgment sum that it was awarded. *Industrial Comm'n v. Utah*, 223, 14 P.2d 9 (1932).

Injured employee's right to recover from his private insurer for motorist coverage was not barred by state insurance fund (Workers' Compensation Fund) against third-party tortfeasor. *Industrial Comm'n v. Utah*, 223, 14 P.2d 9 (1932).

Third party was not liable for judgment awarded by amount of workmen's compensation paid to employee; if that employer also was liable, company stood consequently that it was not liable for amount of compensation awarded. *Texaco, Inc.*, 10th Cir. 1968).

The purpose of this section is to establish by this double recovery by the dependents. *Allstate v. Utah*, 1230 (Utah 1986).

#### —Compensation.

"Compensation", as defined in this section, is limited to the amount paid to employee or the dependents. *Bliss*, 725 P.2d 1 (1986).

The fixed payment of 35-1-68(2)(a), which was paid to deceased employee, was not "compensation" within the meaning of this section, and where the tortfeasor and its insurer could neither invade nor pursue a separate order to recover the amount of the award from the Injured Fund. *Allstate v. Utah*, 1230 (Utah 1986).

#### Same employment.

Neither subcontractor nor employee of large building company employing scaffolding tending engaged "in the same employment" as employee of general building company building within me

the delivering a load of salt to defendant packing company, which salt defendant had ordered from deceased's employer. *Johanson v. Army Packing Co.*, 107 Utah 114, 152 P.2d 914 (1944).

#### Reimbursement.

State insurance fund (Workers' Compensation Fund) is entitled to be reimbursed not only what has been paid to the injured employee at the time of the trial, but also for any additional sum that it was legally obligated to pay. *Industrial Comm'n v. Wasatch Grading Co.*, 80 Utah 223, 14 P.2d 988 (1932).

Injured employee's settlement and release from his private insurance carrier, under uninsured motorist coverage, did not affect claim of the insurance fund (Workers' Compensation Fund) against third-party tort-feasor and injured employee was not required to reimburse and for workmen's compensation benefits paid to him. *Southeast Furn. Co. v. Barrett*, 24 Utah 2d 24, 465 P.2d 346 (1970).

Third party was not entitled to have amount of judgment awarded injured employee reduced by amount of workmen's compensation benefits paid to employee; third party's contentions that employer also was negligent, that insurance company stood in shoes of employer and consequently that insurer should not recover amount of compensation paid injured employee rejected. *Texaco, Inc. v. Pruitt*, 396 F.2d 237 (10th Cir. 1968).

The purpose of the right of reimbursement established by this section is only to prevent double recovery by the employee or his or her dependents. *Allstate Ins. Co. v. Bliss*, 725 P.2d 1330 (Utah 1986).

#### —Compensation.

"Compensation", within the meaning of this section, is limited to amounts claimed by the employee or the dependents. *Allstate Ins. Co. v. Bliss*, 725 P.2d 1330 (Utah 1986).

The fixed payment made under § 35-1-68(2)(a), when it is determined that a deceased employee had no dependents, is not "compensation" within the meaning of this section, and where the decedent's parents sued the tort-feasor and its insurer, the insurance fund could neither invade the parents' recovery nor pursue a separate claim against the insurer in order to recover the amount paid into the Second Injury Fund. *Allstate Ins. Co. v. Bliss*, 725 P.2d 1330 (Utah 1986).

#### Same employment.

Neither subcontractor placing timbers in dome of large building nor materialmen supplying scaffolding for use in construction was engaged "in the same employment" as employee of general construction contractor for building within meaning of this section. *Peter-*

*son v. Fowler*, 27 Utah 2d 159, 493 P.2d 997 (1972).

Employee of electrical subcontractor was "in the same employment" as general contractor and not entitled to maintain action under this section where general contractor maintained right to supervision or control over subcontractor by supervising overall continuity and integration of work among various subcontractors, directing the sequence of work by the subcontractors, making changes in the work done by them and ordering work stoppages; decedent's only remedy was under Workmen's Compensation Act. *Adamson v. Okland Constr. Co.*, 29 Utah 2d 286, 508 P.2d 805 (1973).

Where decedent employee of general contractor was electrocuted, allegedly through negligence of subcontractor, in accident occurring prior to 1975 amendment of this section, subcontractor was in same employment as decedent under § 35-1-42, and heirs were precluded from maintaining wrongful death action against it by provisions of § 35-1-60. *Shupe v. Wasatch Elec. Co.*, 546 P.2d 896 (Utah 1976).

Where plaintiff's decedent and another were fellow employees at time of accident, this section prohibited action by plaintiff against the fellow employee and similarly prohibited the defendant from joining the fellow employee as a joint tort-feasor for purposes of contribution. *Phillips v. Union Pac. R.R.*, 614 P.2d 153 (Utah 1980).

#### Settlements.

##### —Approval of commission.

This section does not require that the commission approve employee-initiated settlements. The commission is required to approve employer-initiated settlements in order to protect the interest of the employee and prevent the employer from entering into a settlement that places the employer's welfare above that of the employee. That concern is not present when it is the employee who settles the suit. *Taylor v. Industrial Comm'n*, 743 P.2d 1183 (Utah 1987).

#### State insurance fund.

State insurance fund (Workers' Compensation Fund) had no right to recover for compensation benefits paid out of that part of a wrongful death recovery due to heirs who had received no workmen's compensation benefits. *Oliveras v. Caribou-Four Corners, Inc.*, 598 P.2d 1320 (Utah 1979).

#### Subrogation.

Where employee's original injury was aggravated by physician's malpractice, insurance carrier was subrogated to employee's action against the physician; but if a greater amount was recovered than that paid employee in compensation, the employee was entitled to it.

Baker v. Wycoff, 95 Utah 199, 79 P.2d 77 (1938).

#### Third-party liability.

Fact that defendant owned ore stockpile did not make defendant a possessor of the land and thereby liable as third party under this section for death of contractor's employee caused by unsafe condition of stockpile. Stevens v. Colorado Fuel & Iron, 24 Utah 2d 214, 469 P.2d 3 (1970).

Employee of a masonry subcontractor whose work was subject to the control of the general contractor was an employee of general contractor for purposes of this section and was not entitled to recover in tort against the general contractor. Smith v. Alfred Brown Co., 27 Utah 2d 155, 493 P.2d 994 (1972).

Cited in Smith v. Atlantic Richfield Co., 814 F.2d 1481 (10th Cir. 1987).

History: L. 1917, ch. 100, § 3136; L. 1919, ch. 100, § 3136.

C.J.S. — 99  
tion § 296.

35-1-65.

#### COLLATERAL REFERENCES

C.J.S. — 101 C.J.S. Workmen's Compensation § 983 et seq.

A.L.R. — Uninsured motorist coverage: validity and effect of policy provision purporting to reduce coverage by amount paid under workmen's compensation law, 24 A.L.R.3d 1369.

Right to maintain malpractice suit against injured employee's attending physician notwithstanding receipt of workmen's compensation award, 28 A.L.R.3d 1066.

Key Numbers. — Workers' Compensation § 2158.

#### 35-1-63. Judgments in favor of commission — Preference.

All judgments obtained in any action prosecuted by the commission or by the state under the authority of this title shall have the same preference against the assets of the employer as claims for taxes.

History: L. 1917, ch. 100, § 74; C.L. 1917, § 3135; R.S. 1933 & C. 1943, 42-1-59.

#### NOTES TO DECISIONS

##### Extent of preference.

Judgment meeting requirements of this section is only given a preference equal to the preference of tax claims in distribution of assets and is not given same status as a tax lien; accordingly, judgment of Industrial Commission for insurance premium is not entitled to be paid out of proceeds of sale of mortgaged real estate ahead of prior mortgagee. Local Realty Co. v. Steele, 90 Utah 468, 62 P.2d 558 (1936).

Judgment meeting requirements of this section is only given a preference equal to the preference of tax claims in distribution of assets and is not given same status as a tax lien; accordingly, judgment of Industrial Commission for insurance premium is not entitled to be paid out of proceeds of sale of mortgaged real estate ahead of prior mortgagee. Local Realty Co. v. Steele, 90 Utah 468, 62 P.2d 558 (1936).

#### COLLATERAL REFERENCES

C.J.S. — 100 C.J.S. Workmen's Compensation § 638.

Key Numbers. — Workers' Compensation § 1765.

#### 35-1-64. Compensation — None for first three days after injury unless disability extended.

No compensation shall be allowed for the first three days after the injury is received, except the disbursements hereinafter authorized for medical, nurse and hospital services, and for medicines and funeral expenses, provided, however, if the period of total temporary disability lasts more than fourteen days, compensation shall also be payable for the first three days after the injury is received.

(1) In case that employee's disability is total, the weekly wage of \$45 per week child under the injury, but the time of the exceed 312 weeks of the time of the

In the event reaching a final award shall continue

(2) The "average" of this title shall be 1 of each year of employment of employee's year shall be determined year by two 52, and the dollar. The basis for compensation arising month period death result

History: L. 1917, ch. 100, § 3137; L. 1919, ch. 100, § 3137; R.S. 1933, 42-1-59; C. 1943, ch. 100, § 3137; L. 1949, ch. 100, § 3137.

aid period does not remedy such de-  
vided in this section and the court is  
and a temporary injunction restrain-  
er's business.

ent, effective April 24, 1989, substituted "30  
ays" for "90 days" in Subsections (1)(a), (b),  
and (c); substituted "chapter" for "act" in the  
first sentence of Subsection (2); designated the  
former second paragraph in Subsection (2) as  
subsection (3); and made minor stylistic  
changes.

#### CISIONS

insurance agent absconded with the employer's  
premium and failed to arrange for a policy.  
Thomas A. Paulsen Co. v. Industrial Comm'n,  
770 P.2d 125 (Utah 1989).

#### REFERENCES

Pre-emption by Longshore and Harbor  
Workers' Compensation Act (33 USCS §§ 901  
seq.) of state law claims for bad-faith dealing  
with insurer or agent of insurer, 90 A.L.R. Fed.  
13.

for violation — Notice of  
proof required — Admissible  
prosecution.

#### REFERENCES

16, relating to payments out of the Workers'  
Compensation Fund, effective April 23, 1990.

### 35-1-59. Docketing awards in district court — Enforcing judgment.

#### NOTES TO DECISIONS

#### Uninsured Employers' Fund.

Commission's order finding an uninsured  
employer liable for benefits paid to an injured  
employee by the Uninsured Employers' Fund  
was affirmed with the direction that the fund

would have to seek satisfaction of the em-  
ployer's obligation through proceedings in the  
district court under this section. Thomas A.  
Paulsen Co. v. Industrial Comm'n, 770 P.2d  
125 (Utah 1989).

### 35-1-60. Exclusive remedy against employer, or officer, agent or employee — Occupational disease excepted.

#### NOTES TO DECISIONS

#### ANALYSIS

Exclusiveness of remedy.  
Federal law.

Indemnification agreement between employer  
and third party.  
Intentional tort.  
Statutory employer.

#### Exclusiveness of remedy.

Former county employee's claims against the  
county or against individual co-employees  
based on negligent infliction of emotional dis-  
tress or otherwise based upon negligence were  
barred by the exclusive remedy provision of  
this section. Sauers v. Salt Lake County, 735  
F. Supp. 381 (D. Utah 1990).

#### Federal law.

Federal government employee was barred  
from bringing negligence suit against a fellow  
employee where, under federal law, the em-  
ployee's exclusive remedy was against the  
United States and she had filed for and re-  
ceived benefits from the United States govern-  
ment. Hope v. Berrett, 756 P.2d 102 (Utah Ct.  
App. 1988).

#### Indemnification agreement between em- ployer and third party.

The exclusive remedy provision of this sec-  
tion bars a claim by a third party that a statu-  
tory employer impliedly agreed to indemnify  
the third party against claims for injuries sus-  
tained by an employee. Freund v. Utah Power  
& Light Co., 793 P.2d 362 (Utah 1990).

#### Intentional tort.

An employee who, in the course and scope of  
his or her employment, intentionally acts to  
injure a co-worker is not protected by the ex-  
clusivity provision from a separate action at  
law for damages. But, in such a case, the em-  
ployer is liable only to the extent of workers'  
compensation benefits unless the injurious act  
was directed or intended by the employer. 795

P.2d 1138 (Utah 1990), cert. granted.  
Munteer v. Utah Power & Light Co., 773 P.2d  
405 (Utah Ct. App. 1989).

Requiring an injured employee to show that  
his employer or fellow employee manifested a  
deliberate intent to injure him before allowing  
an exception to the statute for an intentional  
tort is fully consistent with the purpose of the  
workers' compensation act. Knowledge to a  
substantial certainty that injury will follow is  
not sufficient to invoke the exception. Lantz v.  
National Semiconductor Corp., 775 P.2d 937  
(Utah Ct. App. 1989).

#### Statutory employer.

The legislature has, in clear and unmis-  
takable language, evinced an intention to allow  
suits by an injured worker against those per-  
sons who might be his or her statutory em-  
ployers as defined in § 35-1-42. The immedi-  
ate, or common-law, employer, who actually  
pays compensation, and its officers, agents,  
and employees are shielded by the exclusive  
remedy immunity conferred by this section.  
Pate v. Marathon Steel Co., 777 P.2d 428  
(Utah 1989).

The decision in Pate v. Marathon Steel Co.,  
777 P.2d 428 (Utah 1989), holding that the  
state Workers' Compensation Act should no  
longer be construed to provide tort immunity  
to statutory employers who have not been re-  
quired to pay benefits thereunder to the in-  
jured worker, should be given retroactive ef-  
fect. Lamb v. W-Energy, Inc., 884 F.2d 1349  
(10th Cir. 1989) (reversing Lamb v. W-Energy,  
Inc., 663 F. Supp. 395 (D. Utah 1987), which  
appears under this catchline in bound volume).

A worker can sue a statutory employer who  
has not been required to pay workers' compen-  
sation benefits, and the latter is not protected  
by the immunity afforded by this section.  
Bosch v. Busch Development, Inc., 777 P.2d  
431 (Utah 1989).

## COLLATERAL REFERENCES

A.L.R. — "Dual capacity doctrine" as basis for employee's recovery for medical malpractice from company medical personnel, 73 A.L.R.4th 115.

Workers' compensation: third-party tort lia-

bility of corporate officer to injured workers, 76 A.L.R.4th 365.

Workers' compensation statute as barring illegally employed minor's tort action, 77 A.L.R.4th 844.

**35-1-62. Injuries or death caused by wrongful acts of persons other than employer, officer, agent, or employee of said employer — Rights of employer or insurance carrier in cause of action — Maintenance of action — Notice of intention to proceed against third party — Right to maintain action not involving employee-employer relationship — Disbursement of proceeds of recovery.**

## NOTES TO DECISIONS

**Statutory employers.**

The legislature has, in clear and unmistakable language, evinced an intention to allow suits by an injured worker against those persons who might be his or her statutory employers as defined in § 35-1-42. The immediate, or common-law, employer, who actually pays compensation, and its officers, agents, and employees are shielded by the exclusive remedy immunity conferred by § 35-1-60. *Pate v. Marathon Steel Co.*, 777 P.2d 428 (Utah 1989).

The decision in *Pate v. Marathon Steel Co.*, 777 P.2d 428 (Utah 1989), holding that the state Workers' Compensation Act should no

longer be construed to provide tort immunity to statutory employers who have not been required to pay benefits thereunder to the injured worker, should be given retroactive effect. *Lamb v. W-Energy, Inc.*, 884 F.2d 1349 (10th Cir. 1989) (reversing *Lamb v. W-Energy, Inc.*, 663 F. Supp. 395 (D. Utah 1987), which appears under "Applicability of section" catchline in bound volume).

A worker can sue a statutory employer who has not been required to pay workers' compensation benefits, and the latter is not protected by the immunity afforded by § 35-1-60. *Bosch v. Busch Development, Inc.*, 777 P.2d 431 (Utah 1989).

## COLLATERAL REFERENCES

A.L.R. — Prejudicial effect of bringing to jury's attention fact that plaintiff in personal injury or death action is entitled to workers' compensation benefits, 69 A.L.R.4th 131.

Workers' compensation: third-party tort liability of corporate officer to injured workers, 76 A.L.R.4th 365.

Workers' compensation: compensability of injuries incurred traveling to or from medical treatment of earlier compensable injury, 83 A.L.R.4th 110.

35-1-65. Ten Sta

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History: C. 1953  
1981, ch. 287, § 2  
ch. 69, § 2.  
Amendment No

Tab B

## APPENDIX B

1 by Scouler and Union Pacific Railroad. Do you have any facts  
2 that-- you've already told us that you were employed by  
3 Scouler. Do you have any facts that substantiate the alle-  
4 gation made by your attorneys that you were employed by Union  
5 Pacific Railroad?

6 A. No, I don't.

7 Q. Paragraph 8 of the complaint, your attorneys allege  
8 that your accident was caused by Scouler and Union Pacific's  
9 negligence. What facts are you aware of which would support  
10 that allegation?

11 A. I don't know about Union Pacific, but Scouler, what  
12 I've said before about the way of kicking the trains, possibly  
13 the lighting. I think that was it.

14 Q. And you excluded Union Pacific, you don't know of  
15 any way that--

16 A. I don't know. No, I don't.

17 Q. You indicated to Mr. Williams that you were  
18 receiving workman's compensation benefits as a result of this  
19 accident. That's correct?

20 A. Yes.

21 Q. Do you still receive those?

22 A. Yes.

23 Q. How much do you receive?

24 A. \$280 a week.

25 Q. How long have you been receiving those payments?

1 A. Since the accident.

2 Q. Do you know how many more weeks those payments will  
3 continue?

4 A. No, I don't.

5 Q. Do you understand that they will be cut off at some  
6 point in time?

7 A. Yes.

8 Q. You just don't know when?

9 A. I'm not sure when.

10 Q. Do you know what your expenses, medical expenses are  
11 as a result of this accident?

12 A. No.

13 Q. Paragraph 6 of your complaint, your attorneys allege  
14 medical expenses in excess of \$300,000. Do you have any  
15 information to in any way support or substantiate that claim  
16 of \$300,000?

17 A. I would just have to check the medical records. I  
18 don't know. I don't know how much.

19 Q. You are receiving those workman's compensation  
20 benefits through your employer, Scouler Grain Company,  
21 correct?

22 A. I think it's--Ranger Insurance is who's doing it.

23 Q. Right. I represent to you that they are the insurer  
24 for Scouler Grain.

25 A. Okay, yes.

1 Q. But it is Ranger insurance that is providing you the  
2 workman's compensation benefits?

3 A. Yes.

4 Q. You actually get a check that says Ranger Insurance?

5 A. Yes.

6 Q. Well, what I'd like you to do is take me through  
7 everything you can remember, from the time you were laying  
8 there after the train stopped until the time you got to the  
9 hospital.

10 A. I just remember that Wassim found me and he ran to  
11 get an ambulance, and then just before the ambulance arrived a  
12 bunch of other people, other Scouler employees, I think, ran  
13 up to see if they could help. Then the ambulance arrived and  
14 they took me out of there. And then--but then they had to fly  
15 me with the helicopter once they got me to the hospital, they  
16 flew me to another hospital.

17 Q. Do you remember making any statements to anyone  
18 about how the accident occurred during that time period that  
19 you just described?

20 A. I don't remember what I said.

21 Q. Do you remember talking at all to Wassim?

22 A. I remember him being there, but I don't remember if  
23 I said anything to him.

24 Q. We directed some interrogatories, questions to you,  
25 and I assume you helped answer those. Do you remember a

Tab C

## APPENDIX C

Letter from Ranger Insurance Company



P.O. Box 2807 Houston, Texas 77252-2807  
713 354-8100

December 17, 1989

Christensen, Jensen and Powell  
510 Clark Leaming Building  
175 SW Temple  
Salt Lake City, UT 84101

Attention: L. Rich Humpherys

Re: Claim No.: 488841  
Style: Sullivan vs Scoular, et al  
Date of Accident: 10-17-86

Dear Mr. Humpherys:

This file came through on routine diary, and it is noticed that we have not been appraised of developments since approximately September of 1989.

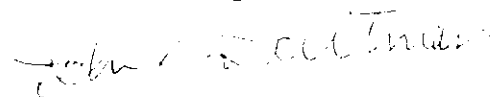
Please provide us with a short status report covering whether or not this case is presently set for trial and/or recent developments.

The Ranger Insurance Company is still providing Workers' Compensation benefits to Mr. Sullivan and have paid approximately \$215,201 in medical with \$60,369 in weekly indemnity payments.

Should you need anything from our Workers' Compensation file, please advise.

We are looking forward to this short status report.

Yours truly,

  
John B. Gartman  
Claims Adjuster

JBG/rd