SECTION 85.20 V. THE DUAL CAPACITY DOCTRINE: SHOULD WORKER'S COMPENSATION ALWAYS BE THE EXCLUSIVE REMEDY IN IOWA?

I. INTRODUCTION

In order to ensure that employees injured during the course of employment would receive at least a minimum recovery from the employer, the Iowa legislature enacted a comprehensive statutory scheme for workers' compensation.[1] The basic tenet upon which all workers' compensation acts are founded is the absolute but limited liability of the employer to the employee, without regard to fault.[2] Section 85.20 of the Iowa Act provides that the benefits recoverable under the statute "shall be the exclusive and only rights and remedies" of the injured employee, as well as his dependents and other personal or legal representatives.[3]

In certain situations, the application of the exclusive remedy provision may potentially be unfair to an injured employee. Critics have argued that, in a situation where the employer has assumed another role or capacity with regard to an injured employee, allowing the employer to shield itself from liability by asserting the exclusivity rule may "be neither reasonable nor equitable."[4] Thus, in order to circumvent the exclusive remedy limitation, a judicially created exception known as the dual capacity doctrine has evolved.[5] This doctrine permits an injured employee to bring a separate tort action against an employer who wears two hats, so to speak; one as an employer and another in a secondary non-employer capacity.[6] This theory has been applied in only a minority of jurisdictions and, to date, has not been recognized in Iowa.

This note will examine the dual capacity doctrine in light of the history

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1. IOWA CODE § 85 (1981). By 1920, similar legislation had been adopted in all but eight states, and the last state adopted its worker's compensation laws in 1963. A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 5.30 (1982).

2. A. LARSON, *supra* note 1, §§ 1.10, 2.20.

3. IOWA CODE § 85.20 (1981). Section 85.20 does not insulate third parties who are not expressly protected by the statute, nor does it preclude an action against a grossly negligent co-worker. *Id. See also* IOWA CODE § 85.22 (1981); A. LARSON, *supra* note 1, § 1.10.

4. Note, *The Dual Capacity Doctrine in Illinois*, 12 LOY. U. CHI. L. J. 705, 705 (1981).

5. A. LARSON, *supra* note 1, §§ 72.80, 72.81. For a worthwhile exposition of other attempts to limit the exclusive remedy provision, see Henry, *The Exclusive Liability Provision in Workmen's Compensation: An Overly Harsh Penalty For Third Parties or A Necessary Shield For Negligent Employers?*, 17 IDAHO L. REV. 583, 589 (1981).

6. A. LARSON, *supra* note 1, § 72.81. *See also* Note, *Dual Capacity Doctrine: Third Party Liability of Employer-Manufacturer in Products Liability Litigation*, 12 IND. L. REV. 553, 554 (1979) [hereinafter cited as Note, *Liability of Employer-Manufacturer*].

and purpose of the exclusive remedy provisions of workers' social legislation and will make suggestions with regard to the possible application of the doctrine in Iowa as an exception to Section 85.20 of the Workers' Compensation Act.

II. Workers' Compensation and The Exclusivity Rule

A. *Policies Underlying Workers' Compensation*

In order to fully understand the potential impact of the dual capacity doctrine, a brief examination of the historical background and theories underlying the scheme of workers' social legislation is in order.

Prior to workers' compensation acts, few injured employees were able to recover damages from negligent employers.[7] The result was that the majority of losses sustained in work related accidents were borne by the injured employees themselves.[8] This was due primarily to the fact that under common law an employer could raise numerous defenses against the employee, including contributory negligence, assumption of the risk and the fellow servant rule.[9] In order to obviate the inequities of the common law system,[10] comprehensive statutory schemes were enacted to provide an expeditious and automatic remedy to injured employees, assuring them of at least a minimum level of compensation.[11]

The "quid pro quo" for this guaranteed recovery was that workers' compensation benefits became the exclusive remedy of the injured employee.[12] The result is a "mutual compromise"[13] whereby the injured employee sacrifices the common law right to maintain a tort action against the employer, which in turn relinquishes its common law defenses and is compelled to

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7. A. Larson, *supra* note 1, § 4.30. Approximately 70-80% of such losses went undressed by the employer. *Id. See also* W. Schneider, Schneider's Workmen's Compensation §§ 1, 3 (1941).

8. A. Larson, *supra* note 1, § 4.30.

9. Comment, *Comments On the Extent of Subrogee's Remedy*, 35 Yale L.J. 618, 619 (1926). *See also* Stevenson, *The Illinois Workmen's Compensation System: A Description and Critique*, 27 DePaul L. Rev. 675, 675 (1978).

10. One commentator has noted that, "[t]he ultimate social policy behind compensation liability is belief in the wisdom of providing, in the most efficient, most dignified, and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obligated to provide in any case in some less satisfactory form . . . ." A. Larson, *supra* note 1, § 2.20.

11. The amount of relief is determined by the use of various compensation schedules. For compensation rates in Iowa see Iowa Code § 85.32 (1981) (when compensation begins); *id.* § 85.33 (temporary total/partial disability); *id.* § 85.34 (permanent disability). With regard to employer liability for professional and hospital services, as well as burial expenses, see *id.* §§ 85.27, 85.28.

12. A. Larson, *supra* note 1, § 65.11. *See also* Comment, *Workmen's Compensation and Employer Suability: The Dual Capacity Doctrine*, 5 St. Mary's L.J. 818, 818 (1974) ([hereinafter cited as Comment, *Employer Suability*].

13. Comment, *Employer Suability*, *supra* note 12, at 832.

compensate the employee for all injuries arising out of the employment relationship, without regard to fault.[14] This compromise of fundamenal rights is intended to provide a more "efficient system to compensate all injured employees."[15]

B. *The Iowa Act and Section 85.20*

In order to create a "system for arriving at a just settlement for injuries sustained by an employee,"[16] the first workers' compensation laws were enacted by the Iowa General Assembly in 1912.[17] Perhaps the best summation of the policies underlying the Iowa Act was given by former Iowa Supreme Court Justice DeGraff when he stated:

> The purpose, intent and scheme of workmen's compensation legislation is well understood . . . . The fundamental reason for the enactment of this legislation is to avoid litigation, lessen the expense indident [sic] thereto, minimize appeals, and afford an efficient and speedy tribunal to determine and award compensation under the terms of this act.[18]

The original purpose behind the act has remained unchanged despite the various changes in the legislation that have evolved over the years.[19]

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14. A. LARSON, *supra* note 1, § 1.20, 72.83. The constitutionality of exclusive remedy provisions has often been challenged, usually on due process or equal protection grounds. Courts considering the question have consistently held that exclusive remedy provisions are related to legitimate state interests and do not offend any constitutional guarantees of due process or equal protection. *See, e.g.*, Davidson v. Hobart Corp., 643 F.2d 1386, 1387 (10th Cir. 1981) (upheld constitutionality of Kansas exclusive remedy statute against claim that it violated equal protection); Keller v. Dravco Corp., 441 F.2d 1239 (5th Cir. 1971) (exclusive remedy provision of the Federal Longshoremen's and Harbor Workers' Compensation Act held not unconstitutional); Star v. Industrial Commissioner, 615 P.2d 436, 439 (Utah 1980) (Utah provision did not violate constitutional guarantee that the right to recover death benefits shall never be abrogated); Shwary v. Cranetrol Corp., 88 Mich. App. 264, 266, 276 N.W.2d 882, 884 (1979) (Michigan provision not violative of due process); A. LARSON, *supra* note 1 § 65.20. The constitutionality of section 85.20 has apparently not been challenged.

15. Note, *The Dual Capacity Doctrine in Illinois*, 12 LOY. U. CHI. L.J. 705, 708 (1981).

16. Secrest v. Galloway Co., 239 Iowa 618, ___, 30 N.W.2d 793, 795 (1948). The constitutional validity of the Act was tested on numerous occasions. *See generally* Casey v. Hansen, 238 Iowa 62, ___, 26 N.W.2d 50, 57 (1947) (compensation act was a legitimate exercise of state's power); Hilsinger v. Zimmerman Steel Co., 193 Iowa 708, 713, 187 N.W. 493, 496 (1922) (act held not unconstitutional as depriving the parent of his vested right to the value of the services of his minor child); Op. Att'y Gen. 5 (Iowa 1916) (workmen's compensation act is unconstitutional). The United States Supreme Court has also upheld the validity of the Iowa Act. Hawkins v. Bleakly, 243 U.S. 210, 215, 219 (1917).

17. Dahl, *The Model Iowa Workers' Compensation Act—Time For Change*, 30 DRAKE L. REV. 693, 697 (1981).

18. Flint v. City of Eldon, 191 Iowa 845, 847, 183 N.W. 344, 345 (1921). *Accord* Stufflebean v. City of Fort Dodge, 233 Iowa 438, 440, 9 N.W. 281, 283 (1943).

19. For a scholarly analysis of the Iowa Act, with recommendations for future changes, see Dahl, *supra* note 17. For a more historical analysis, see Merrill, *Fifteen More Years of Workmen's Compensation in Iowa*, 32 IOWA L. REV. 1 (1946).

Section 85.20 of the Iowa Act is the exclusive remedy provision. That section provides, in pertinent part:

> 85.20 Rights of employee exclusive. The rights and remedies provided in this chapter . . . for an employee on account of injury, occupational disease or occupational hearing loss for which benefits under this chapter . . . are recoverable, *shall be the exclusive and only rights and remedies of such employee,* the employee's personal or legal representative, dependents, or next of kin . . . .[20]

Under the Act, an employee may still bring suit for injuries arising out of the course of employment against parties other than the employer, including grossly negligent co-employees.[21]

The Iowa Supreme Court has considered Section 85.20 on numerous occasions and, without exception, has held that an injured employee's exclusive remedy against the employer are those benefits provided by the workers' compensation act.[22] In *Iowa Power & Light Co. v. Abild C onstruction Co.*,[23] the court noted that the Act "deprives the employee of a right to sue

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20. Iowa Code § 85.20 (1981) (emphasis added).

21. Prior to 1974, Iowa courts had held that although the exclusive remedy provision precluded any common law actions against the employer, an injured worker could still bring suit against a negligent co-employee. *See* Craven v. Oggero, 213 N.W.2d 678, 679 (Iowa 1973) (fact that defendant co-employee held supervisory positions did not immunize them under the act); Price v. King, 259 Iowa 921, 923, 146 N.W.2d 328, 330 (1966).

The Iowa legislature imposed greater restrictions on co-employee liability when it amended section 85.20 to immunize fellow employees unless gross negligence was involved. The first case to interpret this gross negligence restriction was *Thompson v. Bohlken,* 312 N.W.2d 501 (Iowa 1981), in which an employee who lost the fingers of his left hand while operating a machine press brought suit against two co-employees alleging gross negligence in failing to provide him with a safe machine. *Id.* at 503. The court noted that section 85.20 was the exclusive remedy against the co-employees, provided that the plaintiff's injury was not caused by the other employee's gross negligence "amounting to such lack of care as to amount to wanton neglect for the safety of another." *Id.* at 504 (citing Iowa Code § 85.20). Recognizing that the term "gross negligence" is nebulous and does not have a generally accepted meaning, the court delineated three definite elements of gross negligence in Iowa. *Id.* at 505.

In order to establish gross negligence by a co-employee and therefore not be restricted by section 85.20, it must be shown that: (1) the defendant had actual knowledge of the danger to be apprehended; (2) that the defendant had actual knowledge that the injury was a probable, rather than merely possible, result of danger; and (3) that there was a conscious failure by the defendant to avoid that danger. *Id.* The *Thompson* court applied these criteria and found that although the evidence indicated a want of ordinary care, it fell short of establishing wantonness or gross negligence. *Id.* at 505-06. *Thompson* is the only Iowa case dealing with the elements of gross negligence in relation to section 85.20.

22. *See* Bolinger v. Kiburz, 270 N.W.2d 603, 606-07 (Iowa 1978); Moose v. Rich, 253 N.W.2d 565, 568 (Iowa 1977); Craven v. Oggero, 213 N.W.2d 678, 680 (Iowa 1973); Groves v. Donahue, 254 Iowa 412, 118 N.W.2d 65, 69 (1962); Pierce v. Bekins Van and Storage Co., 185 Iowa 1346, 172 N.W. 191, 194 (1919); Stricklen v. Pearson Construction Co., 185 Iowa 95, 169 N.W. 628, 629 (1918).

23. 259 Iowa 314, 144 N.W.2d 303 (1966).

. . . for damages" for injury sustained in the employment relationship.[24] In *Price v King*,[25] the court commented that it was "satisfied [that] the rights and remedies of an injured employee against the employer . . . are exclusive of all other rights and remedies of such employee against his employer."[26] There has been a reaffirmation of the exclusivity of remedies under the Iowa Act in the recent case of *Harned v. Farmland Foods, Inc.*[27] Thus, the exclusive remedy rule has always been the subject of rigid application in Iowa.

Critics of such exclusive remedy provisions have argued that unrestricted application of the rule may have the result of placing the injured employee in a situation not contemplated by the framers of such acts.[28] Indeed, rigid application of Section 85.20 may sometimes be inconsistent with the policy of the Iowa courts to construe the workers' compensation laws in a broad and liberal manner in furtherance of the humanitarian objectives of such laws.[29]

In light of the potential unfairness that may result from strict application of exclusivity rules, courts in several jurisdictions have adopted exceptions to the general rule in order to provide what they consider to be a more equitable remedy to an injured worker.[30] An examination of one of the more controversial of those exceptions follows.

III. The Dual Capacity Doctrine: A Judicially Created Exception to the Exclusive Remedy Rule

The United States Supreme Court has characterized the theory of workers' compensation in terms of the status of the employer-employee relationship.[31] In *Cudahy Packing Co. v. Parramore*,[32] the nation's highest Court observed:

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24. *Id.* at ___, 144 N.W.2d at 306.

25. 259 Iowa 921, 146 N.W.2d 328 (Iowa 1966).

26. *Id.* at ___, 146 N.W.2d at 331.

27. 331 N.W.2d 98, 101 (Iowa 1983). In *Harned*, an employee injured during the course of his employment requested the employer and its insurance carrier to provide chiropractic care, but that request was refused. *Id.* at 99. The employee argued that the denial of such care caused him to undergo unnecessary surgery, pain and disability and that accordingly he should be permitted to maintain a common law action. *Id.* The Iowa Supreme Court rejected the attempt to "escape the confines of the statutory scheme" and held that workers' compensation would be the exclusive remedy. *Id.* at 100, 101.

28. Note, *The Dual Capacity Doctrine in Illinois*, 12 Loy. U. Chi. L.J. 705, 708 (1981).

29. Halstead v. Johnson's Texaco, 264 N.W.2d 757, 759 (Iowa 1978).

30. Several jurisdictions provide an additional remedy for non-physical torts, such as fraud, deceit, defamation and false imprisonment. In other words, if the essence of the tort is non-physical, compensation is not the exclusive remedy. *See generally* A. Larson, *supra* note 1, § 68.30. Additionally, workers' compensation may not be the exclusive remedy where there has been some type of intentional injury inflicted by the employer. *Id.* § 68.11.

31. Cudahy Packing Co. v. Parramore, 263 U.S. 418, 423 (1923).

32. *Id.*

> Workmen's Compensation legislation rests upon the idea of status, not upon that of implied contract; that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes his capital—the one for the sake of the wages and the other for the sake of the profits. The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured.[33]

Apparently, therefore, the determination of whether an injured worker will be able to recover benefits is governed by the status of the employment relationship at the time the injury occurs.[34] In the employment situation, the employee's status is such that he will be entitled to recover the statutory benefits predicated upon the employer's absolute but limited liability.[35]

A problem arises, however, when the employee is injured as the result of the negligence of an employer who occupies a second status or capacity with regard to the employee. Take for example the situation where an employee is injured during the course of his employment by a product that is manufactured by the employer.[36] Had the product been manufactured by a third party other than the employer, there seems little doubt that the employee could sue the third party and premise his action on a products liability theory. But, in the situation where the manufacturer is also the employer of the injured party, the outcome would be controlled by the exclusive remedy rule.[37]

Some courts have held that an employer should not be permitted to hide behind the veil of the exclusive remedy rule in order to avoid liability for injuries that arose during employment, but were caused by the negligence of an employer acting in a second capacity. Accordingly, those courts have developed a judicial exception to the exclusive remedy rule.[38] The exception, known as the dual capacity doctrine, has been the subject of both praise and criticism.[39]

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33. *Id.*

34. *Employer Suability*, *supra* note 12, at 819.

35. A. LARSON, *supra* note 1, § 72.83.

36. For a detailed comment on this particular situation, see Comment, *Manufacturer's Liability As A Dual Capacity Of An Employer*, 12 AKRON L. REV. 747 (1979).

37. In *Billy v. Consolidated Machine Tool Corp.*, 51 N.Y.2d 152, 412 N.E.2d 934, 432 N.Y.S.2d 878 (1980), the New York court held that an employee injured by a product manufactured by his employer was precluded by the exclusive remedy rule from maintaining a products liability action against the employer. *Id.* at ___, 412 N.E.2d at 939, 432 N.Y.S.2d at 884.

38. The leading case is *Duprey v. Shane*, 39 Cal. 2d 781, 789, 249 P.2d 8, 15 (Cal. Dist. Ct. App. 1951). *See also* Bright v. Reynolds Metal Co., 490 S.W.2d 474, 477 (Ky. 1973).

39. *See* A. LARSON, *supra* note 1, § 72.83; *Employer Suability*, *supra* note 12; Comment, *Tort—Workmen's Compensation—The Dual Capacity Doctrine Rejected*, 8 MEM. ST. V.L. REV. 163 (1977).

A. *Evolution of the Doctrine*

According to the dual capacity doctrine, "an employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second capacity that generates obligations which are distinct from those normally generated in the employment relationship."[40] The doctrine is best illustrated by examining some of the leading cases.

In *Duprey v. Shane*,[41] the employee was injured during the course and in the scope of her employment.[42] The employer was a chiropracter who aggravated the employee's work related injury through negligent treatment.[43] In addition to worker's compensation benefits, the employee sought to recover against the employer in a common-law tort action.[44] Using dual capacity language, the California court differentiated the employer's capacity as chiropracter from the ordinary employment relationship of the parties and held that the employee could maintain the independent tort action, despite the exclusivity rule in the workers' compensation law.[45] The court justified its holding by stating:

> It is true that the law is opposed to the creation of a dual personality, where to do so is unrealistic and purely legalistic. But where, as here, it is perfectly apparent that the person involved . . . bore towards his employee two relationships—that of employer and that of doctor—there should be no hesitancy in recognizing this fact as a fact. Such a conclusion . . . is in precise accord with the facts and is realistic and not legalistic.[46]

In a more recent California case, a driver-salesman was injured in a fire that developed while he was transferring propane from his truck to holding tanks.[47] The plaintiff employee was permitted to bring an action against the employer under the dual capacity theory, alleging that he had been injured as a proximate result of defects in the tank truck and other equipment that had been modified by the employer.[48] Numerous other California cases have applied the doctrine in a variety of factual situations including one where the employer, while occupying one capacity as the proprietor of a produce business, supplied defective products from a separate legal entity of which

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40. A. LARSON, *supra* note 1, § 72.83.
41. 39 Cal. 2d 781, 249 P.2d 8 (Cal. Dist. Ct. App. 1951).
42. *Id.* at 784, 249 P.2d at 11.
43. *Id.*
44. *Id.*
45. *Id.* at 790, 249 P.2d at 17.
46. *Id.* at 789, 249 P.2d at 15.
47. Bell v. Industrial Vangas, Inc., 30 Cal. 3d 268, 270, 637 P.2d 266, 267, 179 Cal. Rptr. 30, 31 (1981).
48. *Id.* at 283, 637 P.2d at 275, 179 Cal. Rptr. at 39.

the employer was a general partner.[49]

Although California was apparently the leading jurisdiction in promoting the dual capacity theory,[50] other states have also applied the doctrine. In *McCormick v. Caterpillar Tractor Co.*,[51] an Illinois court upheld the immunity of medical employees who had rendered treatment, but found the employer liable to suit on a dual capacity basis.[52]

In *Volk v. City of New York*,[53] a nurse lost her arm due to an adulterated injection that was given after she became ill while eating food on duty. The plaintiff nurse was able to exercise her common law rights and bring an action against her employer.[54] Likewise, an employee who contracted mercury poisoning was able to sue an employer hospital for the negligent failure to diagnose the condition.[55]

The dual capacity doctrine has been applied in landowner-contractor cases where the employer-contractor also wears a second hat as owner of the premises. In the Florida case of *State v. Luckie*,[56] an injured employee of a subcontractor was permitted, on a dual capacity theory, to bring suit against the general contractor in his capacity as landowner, despite the fact that he was barred from bringing an action against the general contractor in his capacity as statutory employer.[57] Other courts have found the contractor-owner liable in his capacity as landowner,[58] but the exclusive remedy provision has prevailed over the dual capacity doctrine in several states under facts

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49. Dorado v. Knudsen Corp., 103 Cal. App. 3d 605, 612, 163 Cal. Rptr. 477, 483 (1980). Other California cases have applied the dual capacity theory. *See, e.g., D'Angona v. County of Los Angeles, 27 Cal. 3d 666, 613 P.2d 238, 166 Cal. Rptr. 177 (1980)* (plaintiff who contracted a disease in the course of her hospital employment was permitted to sue hospital doctors, on a dual capacity theory, for negligent treatment that aggravated the disease); *Johns-Manville Products Corp. v. Superior Court*, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980) (allegations that employer fraudulently concealed from the employee the fact that he was suffering from a disease caused by ingestion of asbestos were sufficient to allow an independent action for aggravation of the disease); *Unruh v. Truck Ins. Exch.*, 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972) (employee who allegedly suffered physical and mental breakdown caused by employer was permitted to bring a claim for intentional infliction of emotional distress).

50. The California legislature has recently enacted legislation which has effectively abolished dual capacity in that state. *See infra* note 123 and accompanying text.

51. 82 Ill. App. 3d 77, 402 N.E.2d 412 (1980).

52. *Id.* at ___, 402 N.E.2d at 415.

53. 284 N.Y. 279, 30 N.E.2d 596 (1940).

54. *Id.* at ___, 30 N.E.2d at 597-99. The court stated that "[i]t was a risk to which anyone receiving like treatment at the hospital could have been subjected. The occurrence of the injury was not made more likely by the fact of her employment. Consequently, the injury did not arise out of and in the course thereof." *Id.* at 597.

55. Guy v. Arthur H. Thomas Co., 55 Ohio St. 2d 183, 378 N.E.2d 488 (1978).

56. 145 So. 2d 239 (Fla. 1962).

57. *Id.* at 243.

58. *See, e.g.*, Bright v. Reynolds Metal Co., 490 S.W.2d 474 (Ky. 1973).

similar to those in *Luckie*.[59]

The United States Supreme Court has also applied a dual capacity theory in *Reed v. The Yaka*.[60] In that case, the plaintiff was a longshoreman who was injured while loading a vessel that had been leased under a bareboat charter by the defendant employer.[61] In addition to being entitled to compensation benefits, the employee was also permitted to bring an action against the employer stevedoring company, as charterer, alleging unseaworthiness of the vessel.[62] The Supreme Court ruled that the defendant employer owed a "traditional, absolute and non-delegable" duty to the employee that could not be circumvented by the exclusive remedy provision of the Longshoreman's Act.[63] The holding in *Reed* was followed by the Fifth Circuit in a case which arose after the 1972 amendments to the Longshoreman's Act.[64]

B. *The Underlying Rationale*

The rationale of all dual capacity cases was probably best stated by the dissenting justice in *Lewis v. Gardner Engineering Corp.*,[65] where the injured employee brought a products liability action against his employer, who was also the manufacturer of the defective pile driver that allegedly caused the injuries.[66] The Arkansas Supreme Court held that the exclusive remedy provision of the state workers' compensation statute applied and rejected the plaintiff's dual capacity assertions.[67] Justice Fogleman, in his dissent,

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59. *See, e.g., Minsky v. Baiteman*, 281 A.D. 910, 120 N.Y.S.2d 86 (1953); *Dintleman v. Granite City Steel Co.*, 35 Ill. App. 3d 509, 341 N.E.2d 425 (1976); *Frith v. Harrah South Shore Corp.*, 92 Nev. 447, 552 P.2d 337 (1970).

60. 373 U.S. 410 (1963).

61. *Id.* at 412.

62. *Id.*

63. *Id.* at 415. The Court stated: We think it would produce a harsh and incongruous result . . . to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a ship owner and others from a stevedoring company doing the ship's service. Petitioner's need for protection from unseaworthiness was neither more nor less than that of a longshoreman working for a stevedoring company.

Id. Accord Hertel v. American Export Lines, Inc., 225 F. Supp. 703 (S.D.N.Y. 1964) (employer bareboat charterer was held personally liable to employee on a similar unseaworthiness claim).

64. *See* Smith v. M/Va Captain Fred, 546 F.2d 119, 123 (5th Cir. 1977). The *Reed* holding has been followed in subsequent United States Supreme Court cases, as well as several appellate court decisions. *See* Jackson v. Lykes Bros. Steamship Co., 386 U.S. 731, 733 (1967); Napoli v. Transpacific Carriers, 536 F.2d 505, 506 (3rd Cir. 1976); Griffith v. Wheeling Pittsburg Steel Corp., 521 F.2d 31, 41-42 (3rd Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); Longmire v. Sea Drilling Corp., 610 F.2d 1342, 1351-52 (5th Cir. 1980).

65. 254 Ark. 17, 491 S.W.2d 778 (1973).

66. *Id.* at 18, 491 S.W.2d at 779 (Fogleman, J., dissenting).

67. *Id.* at 20, 491 S.W.2d at 780 (Fogleman, J., dissenting). The court found that the defendant did not occupy a second capacity, since it was considered to be an employer within the contemplation of the workers' compensation act. *Id.* at 18, 491 S.W.2d at 779. The court

criticized the court's determination that the dual capacity doctrine was inconsistent with the statutory scheme of workers' compensation, contending that "[i]t was never intended that our workmen's compensation statutes should immunize one who happens to be an employer from any and all liability to one who happens to be his employee."[68] The dissenting opinion concluded that the exclusive remedy provision "applies only to liabilities arising out of the employer-employee relationship. . . . [T]he purpose of the act is to compensate only for losses resulting from the risks to which the fact of engaging in the industry exposes the employee."[69]

Thus, in arguing in favor of dual capacity, proponents of the doctrine contend that it would be grossly unfair to penalize the injured employee by exonerating culpable negligence outside of the employer-employee relationship through rigid application of the statutory exclusive remedy rules.[70] Therefore, where an "injury arises from a relationship which is distinct from that of employer and employee and invokes a different set of obligations than the employer's duties to its employee, there is no justification for shielding the employer from liability at common law."[71]

C. *The Dual Capacity Test: Requirement of More Than Mere Separateness*

As previously mentioned, the question of dual capacity is generally regarded as one of status.[72] Professor Larson has suggested the following criterion as a test for dual capacity: "The decisive dual-capacity test is not concerned with how separate or different the second function of the employer is from the first, but with whether the second function generates obligations unrelated to those flowing from the first, that of employer."[73]

This requirement of "more than mere separateness" becomes important in a situation where the employee works for an employer which operates

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stated that "[i]t [was] nothing more than a coincidence that [the] [employer] . . . happens to have manufactured the hoist." *Id.* at 20, 491 S.W.2d at 780 (Fogleman, J., dissenting).

Contrary results have been reached in other cases. *See, e.g.*, Yale & Towne Mfg. Co. v. J. Ray McDermott Co., 347 F.2d 371, 372 (5th Cir. 1965) (defective hoist); Swaney v. Peden Steel Co., 259 N.C. 531, ___, 131 S.E.2d 601, 611 (1963) (defective steel truss).

68. Lewis v. Gardner Engineering Corp., 254 Ark. 17, 22, 491 S.W.2d 778, 783 (Fogleman, J., dissenting).

69. *Id.* at 23, 491 S.W.2d at 784.

70. *Id.* at 22, 491 S.W.2d at 783.

71. D'Angona v. County of Los Angeles, 27 Cal. 3d 661, 666, 613 P.2d 238, 242, 166 Cal. Rptr. 177, 181 (1980). More detailed expositions of the theoretical and societal justifications of the dual capacity doctrine are found in the following: Comment, *Manufacturer's Liability As A Dual Capacity Of An Employer*, 12 AKRON L. REV. 747 (1979); Note, *Liability of Employer-Manufacturer*, *supra* note 6; Note, *The Third Party's Right To Contribution From An Employer Covered By Workmen's Compensation*, 56 N.D.L. REV. 373 (1980); Comment, *Employer Suability*, *supra* note 12.

72. *See infra* note 30 and accompanying text.

73. A. LARSON, *supra* note 1, § 72.83.

distinct divisons or departments.[74] Courts have held that municipal governments will not be liable to an employee injured as a result of negligence of an employee in another division.[75] As illustrated by the Larson test, in order for the dual capacity doctrine to apply in a situation where an employer operates separate divisions or departments, there must be a duty generated by the second capacity that is different from those which are inherent duties of an employer. When distinct duties are generated from this second capacity, "the employer's status in that second capacity [becomes] that of a third party."[76] Several commentators have noted, however, that many courts have had difficulty in applying this seemingly simple and logical test.[77]

D. *The Dual Capacity Theory in Iowa*

The dual capacity doctrine has never been expressly adopted by the Iowa Supreme Court, and previous attempts to assert the dual capacity theory have in fact been rejected by the court. In *Jansen v. Harmon*,[78] an employee of an auto parts store was injured when his employer directed him to pick up items at another building that was owned by the employer.[79] While unloading various items from a loading dock at this building, the plaintiff was injured when a wood post fell and struck him in the head.[80] There was no connection between the employer's auto parts company, of which the plaintiff was an employee, and the operation and maintenance of the other building.[81]

After receiving workers' compensation benefits, the plaintiff brought a separate action based on the "defendant's negligence as owner of a building unrelated to plaintiff's employment, not as an employer."[82] The Iowa Supreme Court rejected the theory that the employer wore a second hat as a property owner of the premises and held that workers' compensation provided the exclusive remedy for the plaintiff and his dependents.[83] In so holding, the court stated:

> Regardless of his status as owner of the premises where the injury occurred, an employer remains an employer in his relation with his employ-

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74. Comment, *Employer Suability*, *supra* note 12, at 824.

75. *Id. See also* DeGiuseppe v. City of New York, 188 Misc. 897, ___, 66 N.Y.S.2d 866, 869 (Sup. Ct. 1946), *aff'd*, 273 A.D. 1010, 79 N.Y.S.2d 163 (1948). *Accord* Bross v. City of Detroit, 262 Mich. 447, 448, 247 N.W. 714, 715 (1933); Walker v. City of San Francisco, 97 Cal. App. 2d 901, 903, 219 P.2d 487, 491 (1950).

76. Comment, *Employer Suability*, *supra* note 12, at 825.

77. *Id. Accord* Note, *The Dual Capacity Doctrine in Illinois*, 12 Loy. U. Chi. L.J. 705, 716-23 (1981).

78. 164 N.W.2d 323 (Iowa 1969).

79. *Id.* at 325.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 330.

> ees as to all matters arising from and connected with their employment. He may not be treated as a dual legal personality, "a sort of Dr. Jekyl and Mr. Hyde."[84]

Additionally, the court cited numerous cases that had rejected the dual capacity theory on similar grounds.[85]

In *Steffens v. Proehl*,[86] an injured employee sought to recover damages in addition to workers' compensation from his employer on the theory that the employer occupied a second capacity as the owner of an automobile in which the plaintiff was injured.[87] The Iowa Supreme Court rejected this assertion and again held that workers' compensation would be the employee's exclusive remedy.[88] The court cited Larson in support of its holding: " 'once a workmen's compensation act has become applicable either through compulsion or election, it affords the exclusive remedy for the injury. This is part of the quid pro quo in which the sacrifices and gains of the employees and employers are to some extent put in balance . . . .' "[89]

The *Steffens* court acknowledged the existence of the dual capacity exception in other jurisdictions, but held that the clear language of Iowa Code Section 85.20 would necessarily prevail.[90]

In both of these Iowa cases, it seems that the logic of the dual capacity doctrine could have been applied to produce what may be considered a more just result. In each case the employer had a second capacity that arguably generated a legal obligation distinct from that obligation which normally arises from the employment relationship. The distinction is that the Iowa court has determined that such a judicially created exception cannot supersede the clear and unambiguous language of the Section 85.20 exclusivity rule.[91]

IV. Rejection of the Dual Capacity Doctrine

Courts in the majority of jurisdictions have refused to adopt the dual capacity doctrine because of the sanctity of the statutory language of exlusive remedy provisions. In *Mott v. Mitsubishi International Corp.*,[92] an injured employee had brought an action against his employer alleging the dual capacity of the employer as manufacturer of chemical products.[93] The Fifth Circuit Court of Appeals rejected the dual capacity theory and held that

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84. *Id.* at 328 (citing Williams v. Hartshorn, 296 N.Y. 49, 50, 69 N.E.2d 557, 558 (1946)).
85. Jansen v. Harmon, 164 N.W.2d at 328-29.
86. 171 N.W.2d 297 (Iowa 1969).
87. *Id.* at 299.
88. *Id.* at 300.
89. *Id.* (citing A. Larson, *supra* note 1, § 65.10).
90. *Id.*
91. *See id.*
92. 636 F.2d 1073 (5th Cir. 1981).
93. *Id.* at 1074.

Texas workers' compensation laws provided that workers' compensation must be the exclusive remedy of the injured employee.[94] In a factually similar case, the Federal District Court for the Western District of Virginia, interpreting Virginia law, also rejected the doctrine[95] by simply reasoning that the language of the exclusivity remedy provision of the applicable workers' compensation statute dictated that such an action be barred.[96]

In those jurisdictions that have rejected the doctrine, the rationale is usually that the clear language of exclusive remedy provisions of workers' compensation statutes preclude any recovery beyond the prescribed statutory benefits. Such reasoning has prevailed[97] in Alaska,[98] Arizona,[99] Indiana,[100] Iowa,[101] Kentucky,[102] Louisiana,[103] Maine,[104] Massachusetts,[105] Nevada,[106] New York,[107] Pennsylvania,[108] Tennessee,[109] Texas,[110] and Wisconsin.[111]

Proponents of the doctrine condemn this "clear language" rationale as being "disappointingly simplistic" in light of the complexities that may often exist in the relationship between the injured employee and the responsible party.[112] Nevertheless, the argument in favor of legislative intent prevailing over judicially created exceptions is quite persuasive. "[C]ourts have cautioned that it is not a proper judicial function . . . to violate the express intent of the legislature by creating a new ground of recovery for employees

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94. *Id.*

95. White v. E.I. du Pont, 523 F. Supp. 302, 303 (W.D. Va. 1981). This case also concerned personal injuries to an employee, wherein it was alleged that the employer had a separate status as the manufacturer of a chemical plant. *Id.* at 303-04.

96. *Id.*

97. *But see Johns-Manville Products Corp. v. Superior Court: The Not-So-Exclusive Remedy Rule*, 33 HASTINGS L.J. 263, 265-67 (1981); Johns-Manville Products Corp. v. Superior Court, 27 Cal. 3d 465, 478, 612 P.2d 948, 960, 165 Cal. Rptr. 858, 861 (1980).

98. State v. Purdy, 601 P.2d 258, 261 (Alaska 1979).

99. Sneed v. Belt, 130 Ariz. 229, ___, 635 P.2d 517, 523 (1981).

100. Needham v. Fred's Frozen Foods, Inc., 171 Ind. App. 671, 672, 359 N.E.2d 544, 545 (1977).

101. *See infra* note 90 and accompanying text.

102. Borman v. Interlake Inc., 623 S.W.2d 912, 914 (Ky. Ct. App. 1981).

103. Curole v. Ebasco Services, Inc., 397 So. 2d 853, 856 (La. Ct. App. 1981).

104. Austin v. Johns-Manville Sales Corp., 508 F. Supp. 313, 315 (D. Maine 1981).

105. Longever v. Revere Copper & Brass Inc., 381 Mass. 221, ___, 408 N.E.2d 857, 859 (1980).

106. Noland v. Westinghouse, 97 Nev. 268, ___, 628 P.2d 1123, 1126 (1981).

107. Billy v. Consol. Mach. Tool Corp., 51 N.Y.2d 152, 155, 412 N.E.2d 934, 936, 432 N.Y.S.2d 878, 881 (1980).

108. *See, e.g.*, Kohr v. Raybestos-Manhattan Inc., 522 F. Supp. 1070, 1075 (E.D. Pa. 1981); Tysenn v. Johns-Manville Corp., 517 F. Supp. 1290, 1293 (E.D. Pa. 1981).

109. Billings v. Dugger, 50 Tenn. App. 403, ___, 362 S.W.2d 49, 51 (1962); McAlister v. Methodist Hospital, 550 S.W.2d 240, 243 (Tenn. 1977).

110. Gore v. Amoco Production Co., 616 S.W.2d 289, 290 (Tex. Civ. App. 1981).

111. Jenkins v. Sabourin, 104 Wis. 2d 309, ___, 311 N.W.2d 600, 603 (1981).

112. Comment, *Employer Suability*, *supra* note 12, at 833.

covered by workers' compensation."[113]

V. Legislative or Judicial Determination?

The application of the dual capacity doctrine without legislative approval would be "fundamentally unsound".[114] As one court stated, "[w]e would be seriously undermining the statutory social purposes underlying the existing workers' compensation scheme if we were to permit common-law recovery outside of that scheme on the basis of such illusory distinctions."[115] The Delaware Supreme Court has upheld the exclusivity of workers' compensation, although not in a dual capacity context.[116] That court refused to engraft a judicially created exception to the statute, reasoning that any changes in state law would have to come from the legislature.[117]

In his dissenting opinion in *Bell v. Industrial Vangas, Inc.*,[118] Justice Richardson made some acute observations regarding the inappropriateness of ignoring the "plain, specific, unambiguous language . . . statutorily mandating the exclusive remedy rule."[119] Richardson noted the social policies favoring a more adequate recovery by injured employees in a dual capacity relationship, but cogently stated that "[t]here is no reason to believe that the Legislature is insensitive to these policies."[120] The dissent went on to say:

> It is not our function to tinker with these laws for the purpose of "improving" them. Moreover, if policy considerations were relevant here, surely the exclusivity rule is founded upon a sound policy of reciprocal concessions, "a policy which has been recognized historically as underlying the entire workers' compensation scheme."[121]

In the "delicate balance" of employer immunity from common-law liability against the employees' guarantee of a certain and expeditious remedy, inequities are inevitable on both sides.[122] If this balance is to be disturbed by

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113. Birnbaum & Wiubel, *California Supreme Court Adopts a "Manufacturer" Liability Exception to the Exclusive Remedy Provision of Workmen's Compensation*, 17 Forum 939, 946 (1982) (citing *Cohn v. Spinks Indus., Inc.*, 602 S.W.2d 102 (Tex. Civ. App. 1980)).

114. *See* Billy v. Consol. Mach. Tool Corp., 51 N.Y.2d 152, 160, 412 N.E.2d 934, 939, 432 N.Y.S.2d 879, 884 (1980).

115. *Id. See also* Winkler v. Hyster Co., 54 Ill. App. 3d 282, ___, 369 N.E.2d 606, 609 (1977); Needham v. Fred's Frozen Foods, Inc., 171 Ind. App. 671, 672, 359 N.E.2d 544, 545 (1977); Latendresse v. Preskey, 290 N.W.2d 267, 268 (N.D. 1980).

116. Kofron v. Amoco Chem. Corp., No. 139, slip op. at 288 (Del. Sup. Ct. Jan. 6, 1982). The Delaware court affirmed the exclusivity rule despite allegations that the defendant's employers, who were also manufacturers, engaged in intentionally tortious conduct. *Id.*

117. *Id.*

118. 30 Cal. 3d 268, 637 P.2d 266, 179 Cal. Rptr. 30 (1981).

119. *Id.* at 289, 637 P.2d at 278, 179 Cal. Rptr. at 42 (Richardson, J., dissenting).

120. *Id.*

121. *Id.*

122. *Id.* at 289-90, 637 P.2d at 279, 179 Cal. Rptr. at 43.

abolishing the exclusive remedy rule, "it is the . . . Legislature, and not the courts which should do the erasing."[123]

Indeed, the California Legislature has recently acted on the issue of dual capacity. By an almost unanimous vote the legislature rejected the dual capacity doctrine by enacting Assembly Bill No. 684, which was signed into law on September 10, 1982.[124] The enactment of the new law resulted in major changes to the California workers' compensation laws. Specifically, Section 6 of the bill, which amends Section 3602 of the California Labor Code, states in pertinent part:

> [T]he right to recover [workers'] compensation is, except as specifically provided in this section . . . the sole and exclusive remedy of the employee or his or her dependents against the employer and the fact that either the employee or the employer also occupied *another or dual capacity* prior to, or at the time of, the employee's industrial injury *shall not* permit the employee or his or her dependents to bring an action at law for damages against the employer.[125]

The result of this new law is that the California legislature has effectively abolished the dual capacity doctrine as a judicially created exception to the exclusive remedy rule in that state.

Courts in several other states have refused to adopt dual capacity by judicial decision, holding that the decision to adopt the doctrine rests with the legislature.[126] In one case the court remarked; "The clear and unambiguous language of the Act precludes our adoption of the dual capacity doctrine. . . . If such a change in the law is to be made in this respect, such change must be by Act, or at least authorization, of the General Assembly."[127]

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123. *Id.*

124. The voting record indicates that the bill was passed by the Assembly by a 70-3 vote on July 6, 1981, and by the Senate by a vote of 22-0 on September 10, 1981. *See* CALIF. ASSEMBLY CONF. COMM. REP. No. 013307 (1982).

125. Cal. Labor Code § 3602(a) (West 1982). The bill provides that an injured employee may bring a common-law action in the following instances:

> (1) where the employee's injury or death is proximately caused by a willful physical assault by the employer. (2) where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment . . . . (3) where the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person.

Id. CAL. LABOR CODE § 3602(b) (West 1982).

126. *See, e.g.*, Trotter v. Litton Sys., Inc., 370 So. 2d 244, 247 (Miss. 1979); Needham v. Fred's Frozen Foods, Inc., 171 Ind. App. 671, 672, 359 N.E.2d 544, 545 (1977).

127. Needham, 171 Ind. App. at 672, 359 N.E.2d at 545.

VI. Conclusion

The purpose of workers' social legislation is to provide an injured worker with a sure and expeditious recovery, without regard to the fault of either the employee or the employer. In exchange for this statutory recovery, the injured employee is required to relinquish his or her common law right to maintain a tort action against the employer and accept the workers' compensation benefits as the exclusive remedy for his injuries.

The exclusive remedy limitation embodied in Section 85.20 is both clear and unambiguous. Unfortunately, situations can arise where the operation of this exclusive remedy provision may cause seemingly undue hardship to an employee who, for example, is injured by a defective product that was manufactured by the employer. Although these potentially inequitable results are not desirable, they are necessarily incident to the "quid pro quo" theory underlying workers' compensation laws. It must be remembered that compensation benefits are just that; they are not intended to be the same as common law damages. The compensation scheme under the Iowa statute provides benefits that are among the highest in the country,[128] and, on balance, the overwhelming majority of injured employees receive a sure, speedy and equitable remedy to compensate them for their injuries.

Without question, however, injured workers will continue to challenge the propriety of Section 85.20 by asserting that the dual capacity theory is a viable method of protecting against inequities and providing more fair results. The Iowa statute is recognized as one of the more progressive workers' compensation laws, and in furtherance of that reputation, and in order to protect against judicial alteration of the statute in response to dual capacity challenges, the Iowa legislature would be well advised to at least consider whether certain statutory exceptions to Section 85.20 are in order. Any such exceptions should be carefully delineated and limited to circumstances such as those defined in the California law, where the employee's injury is the result of a willful, physical assault by the employer; or where there is fraudulent concealment of the work connected injury by the emloyer; or where the employee is injured by a defective product that was manufactured by the employer, and is provided for the employee's use by a third party. Such statutory exceptions would be a logical method of protecting against grossly unfair treatment of an employee injured in certain dual capacity situations, while at the same time maintaining harmony with the legislative intent and policies which provide the foundations of the workers' compensation laws.

Until such time as the legislature may act, however, the Iowa courts should not depart from the present exclusivity rule. While strict application of Section 85.20 may sometimes produce a harsh result, the underlying con-

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128. According to a United States Chamber of Commerce study, Iowa ranks second only to Alaska in possible maximum benefits. An Analysis of Workers' Compensation Laws, 15 (1983).

sideration is that it is simply not within the province of the judiciary to alter legislative intent by creating exceptions to clear statutory language.

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