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David B. Torrey

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Comments

Immunity and Subrogation in Pennsylvania Workmen’s Compensation after *Heckendorn v. Consolidated Rail Corp.*: Too Absolute a Victory for the Employer?*

I. INTRODUCTION

In 1974 the Pennsylvania legislature amended section 303 of the Workmen’s Compensation Act¹ to free the employer from liability to third parties for contribution or indemnity in case of an injured employee’s successful third-party action.

Prior to the amendment of section 303, Pennsylvania courts had held that the employer could be joined by the third party for the purpose of determining the existence of negligence on the employer’s part. If, by way of this joinder, the third party was able to establish negligence on the employer’s part, the employer would be

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1. *Pa. Stat. Ann.* tit. 77, § 481 (Purdon 1983). The amendment constitutes part (b) of the section. Section 303 in its entirety provides as follows:

(a) The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employees, his legal representative, husband or wife, parents, dependents, next of kin or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death as defined in section 301(c)(1) and (2) or occupational disease as defined in section 108.

(b) In the event injury or death to any employee is cause by a third party, then such employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to receive damages by reason thereof, may bring their action at law against such third party, but the employer, his insurance carrier, their servants and agents, employees, representatives acting on their behalf or at their request shall not be liable to a third party for damages, contribution, or indemnity in any action at law, or otherwise, unless liability for such damages, contribution, or indemnity shall be expressly provided for in a written contract entered into by the party alleged to be liable prior to the date of the occurrence which gave rise to the action.

*Id.*

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liable for the pro rata share of the gross damages, though this amount could never exceed the amount of the employer's workmen's compensation liability. Since the suing employee was invariably receiving compensation payments, this reduction of the third party's liability accomplished the equitable result of preventing the employee from achieving a double recovery. At the same time, making the employer liable up to the amount of its statutory liability effectively barred the employer from asserting its subrogation rights. This latter result was thought proper since subrogation was held to be an equitable doctrine, the benefits of which could not be received by a party with unclean—negligent—hands.

By freeing the employer from liability, the 1974 amendment was bound to alter this scheme. Over the past ten years the courts have interpreted section 303(b) to forbid joinder of the employer, and, in the presence of the employer's statutory right to subrogation, a position of considerable advantage has accrued to the employer. This result and the abolition of the former scheme have come under frequent attack.

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3. See Brown, 397 Pa. at 463, 155 A.2d at 840.

4. The employer's right to subrogation is statutorily provided for in section 319 of the Workmen's Compensation Act, PA. STAT. ANN. tit. 77, § 671 (Purdon 1983), which provides in pertinent part, as follows:

Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employee, his personal representative, his estate or his dependents, against such third party to the extent of the compensation payable under this article by the employer; reasonable attorney's fees and other proper disbursements incurred in obtaining a recovery or in effecting a compromise settlement shall be prorated between the employer and employee, his personal representative, his estate or his dependents. The employer shall pay that proportion of the attorney's fees and other proper disbursements that the amount of compensation paid or payable at the time of recovery or settlement bears to the total recovery or settlement. Any recovery against such third person in excess of the compensation theretofore paid by the employer shall be paid forthwith to the employee, his personal representative, his estate or his dependents, and shall be treated as an advance payment by the employer on account of any future installments of compensation.

Id.

5. See Stark v. Posh Const. Co., 192 Pa. Super. 409, 162 A.2d 9 (1960). This scheme was unique among the states and was much vaunted as the "Pennsylvania Rule". For a full explication of the origin and judicial rationale of the rule, see Mitchell, Products Liability, Workmen's Compensation and the Industrial Accident, 14 Duq. L. Rev. 349, 385-89 (1976).

In *Heckendorn v. Consolidated Rail Corp.*, the Pennsylvania Supreme Court issued its most recent reaffirmation of its expansive interpretation of section 303, holding that the introduction of comparative negligence into Pennsylvania law had no effect on the section’s operation. *Heckendorn* also held conclusively that the employer’s right to subrogation had been altered by the 1974 amendment of section 303: full subrogation to employee recoveries is now permitted, the issue of employer negligence being “irrelevant” at the subrogation stage of workmen’s compensation proceedings.

The complaint against the policy conclusively established in *Heckendorn*’s interpretation of sections 303 and 319 is clear: by disallowing joinder of the employer, a third party sued by an injured employee may be forced to pay a full recovery in the presence of a concurrently negligent employer. With the right of the employer to subrogation now firmly established, critics of the policy maintain that this latter inequitable situation is worsened by the employer recouping compensation payments when the employer might, in fact, be negligent. Though an equally inequitable double recovery by the employee is prevented, as under the former scheme, the critics of the policy created in *Heckendorn* charge that the result is “too absolute a victory for the employer.”

This comment will examine the merits of this assertion. It will first examine and criticize the case development which has transpired since the amendment to section 303 and which has culminated with *Heckendorn*. Next, the criticisms of the new Pennsylvania rule will be considered. In connection with this latter consideration, this comment will seek to determine whether, in the balance of the values involved in this issue, “too absolute a victory” is in fact being won.

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8. *Id.* at 612.
9. *Id.* at 613.

II. JUDICIAL INTERPRETATION OF SECTION 303(b)

A. Early Constructions and the Constitutionality Issue

The legislature’s enactment of section 303(b) was accompanied by little legislative history. Because Pennsylvania was so well known as one of the few states which provided some relief to the third-party defendant, however, it was immediately apparent that the new statute was neither an enactment of the pre-existing scheme nor a mere procedural modification.

In Hefferin v. Stempkowski, the Pennsylvania Superior Court attributed the amendment to recommendations of the National Commission on State Workmen’s Compensation Laws, which, the court claimed, had prompted the legislature to undertake a major overhaul of the Workmen’s Compensation Act. In Hefferin the court was faced for the first time with the issue of whether the statute, which provides only that the employer “shall not be liable to a third party,” barred the joinder of the employer as an additional defendant. The court pointed out that the National Commission had characterized as “essential” that workmen’s compensation benefits be the exclusive liability of employers and maintained that the amendment was made directly pursuant to this recommendation. Accordingly, the court held that the legis-

12. See supra notes 3-5 and accompanying text.
15. Id. at 369, 372 A.2d at 870.
16. Id. at 368-69, 372 A.2d at 871. See NATIONAL COMMISSION ON STATE WORKMEN’S COMPENSATION LAWS, REPORT TO THE PRESIDENT AND CONGRESS (July 1972) [hereinafter cited as REPORT]. The court’s attributing of the amendment to the Commission recommendations is no doubt correct, but the actual recommendations, when read in context with the rest of the Report do not conclusively support the contention that the commission would have thought essential that the employer be free of liability in cases of employee third-party actions.

Recommendation 2.18, cited by the Hefferin court, reads as follows: “We recommend that workmen’s compensation benefits be the exclusive liability of an employer when an employee is impaired or dies because of a work-related injury or disease.” REPORT at 52.

This text is preceded, however, by a rejection of damage suits by workers against their employers, indicating that this recommendation stems at least in part from the Commission’s displeasure with the existence of state plans which still allowed workmen’s compensa-
lature intended the amendment to be, as far as the employer is concerned, "a complete substitute for, not a supplement to, common law tort actions," and ruled that the employer was barred from being joined under the statute. The court also stated that the employer's right to subrogation "remained unchanged." A superior court panel was next faced with consideration of section 303(b) in Arnold v. Borbonus. In Arnold the court reaffirmed that the 1974 amendment "manifest[ed] a broad legislative intent to bar the joinder of an employer as an additional defendant," and disallowed such an attempt. The court also expanded on Hef- ferin's language concerning subrogation, making it evident that section 303 worked to bar joinder of the employer for purposes of defeating its subrogation claim. Judge Spaeth, however, dis- sented, alleging that the employer's right to subrogation always being guaranteed would create inequities in cases where there was concurrent negligence. He also charged that constitutional issues

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17. 247 Pa. Super. at 369, 372 A.2d at 871. The decision was followed by a federal court a few months later. See Adamik v. Pullman Standard, 439 F. Supp. 784 (W.D. Pa. 1977). Adamik briefly touches upon the Hefferin court's assertion that the legislature adopted the language of Section 5 of the Longshoremen's and Harbor Workers' Act, 33 U.S.C. 901 et. seq., in its amendment of section 303. The former section grants the employer total immunity from third-party actions and subrogates the employer to the extent of its compensation lien, and was, according to the Hefferin court, specifically on the legislature's mind when making the amendment. 247 Pa. Super. at 368-69, 372 A.2d at 871.
18. Despite this ruling, the issue of whether the employer's right to subrogation to third party recoveries was not conclusively settled until Heckendorn v. Consolidated Rail Corp., 465 A.2d 609 (1983).
20. Id. at 114, 390 A.2d at 273.
21. See id. at 114 n.7, 390 A.2d at 272-73 & n.7.
22. Id. at 115, 390 A.2d at 273 (Spaeth J., concurring and dissenting). The scenario which Judge Spaeth characterized as inequitable illustrates how unsettled the subrogation issue was before Heckendorn. This scenario imagined by Judge Spaeth as ensuing with "the employer's right to subrogation unchanged" (as held by the Hefferin and Arnold majorities),
were raised by the *Hefferin* court's construction of section 303(b), though noting that two federal courts had already rejected contentions that the section was violative of equal protection under the federal constitution.25

*Hefferin* and *Arnold* were approved by the Pennsylvania Supreme Court in *Bell v. Koppers Co.*24 In frequently quoted language the court held that "section 303 . . . more than alters, it obliterates [the third party's] cause of action."25 The court, however, engaged in no analysis of the statute's origins or rationale beyond citing *Hefferin* for the proposition that section 303(b) "foreclose[s] the adjudication of the liability of the employer."26

No sooner had the full import of the amended section 303 become clear when contentions that the section violated constitutional principles began to reach the appellate courts. In *Tsarnas v.*

is as follows:

Since the employer is not—cannot be—a party to the suit, the third party cannot get contribution from the employer commensurate with the employer's fault. The employee, on the other hand, may have the opportunity to recover twice: once by the full judgment against the third party, and once through workmen's compensation; for if the employer comes against the employee for subrogation, the employee may defend on the ground that the employer was at fault and thus disabled from getting reimbursed through subrogation. If the employee fails, or is not permitted to prove the employer's fault, the employer will recoup the workmen's compensation payments and thus in the end pay nothing—despite having been at fault. Either outcome . . . represents an injustice.


25. *Id.* at 458, 392 A.2d at 1382.
26. *Id.* The court in *Bell* apparently took for granted that joinder of the employer was prohibited under section 303(b); the actual issue in the case was whether this change was procedural or substantive. *Id.* Thus the court's language in this respect cannot be construed as suggesting that the employer's liability was foreclosed vis-a-vis the employee; though affirming *Hefferin*, *Bell* did not even mention the subrogation issue.
Immunity and Subrogation

Jones & Laughlin Steel Corp., the superior court was faced with allegations that the section operated in violation of article I, section 11 and article III, section 18 of the Pennsylvania Constitution, and of the equal protection clause of the Fourteenth Amendment. The common pleas court had followed Hefferin and refused to allow the joinder of an employer in its injured worker's third party action. Upon review, the superior court was evenly divided (3-3) and thus the lower court ruling was affirmed, but only after Judge Spaeth had issued an extended criticism of the inequitable policy which he thought was produced by the Hefferin and Bell constructions of section 303.

The prevailing judges, however, rejected the assertion that disallowing joinder was violative of any constitutional tenet. The third party had maintained that by disallowing his right to indemnity or contribution from a concurrently negligent employer, section 303 violated its right to a remedy for an injury suffered. The court thought this matter already settled, however, pointing out that the Pennsylvania No-Fault Act, which also had abolished liability in certain cases, survived a similar challenge under article I, section 11. The logic in that controversy, adopted by the superior court in Tsarnas, which works to reject the "open courts" challenge, stems from a belief that changing societal conditions necessitate and justify the modification of the common law, modification

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28. Id. at 421, 396 A.2d at 1242. Article I, section 11 of the Pennsylvania Constitution provides as follows:
   All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

Id.

29. 262 Pa. Super. at 421, 396 A.2d at 1242. Article III, section 18 of the Pennsylvania Constitution provides, in pertinent part, as follows:
   The General Assembly may enact laws requiring the payment by employers, or employers and employees jointly, of reasonable compensation for injuries to employees arising in the course of their employment, and for occupational diseases of employees, whether or not such injuries or diseases result in death, and regardless of fault of employer or employee, and fixing the basis of ascertainment of such compensation and the maximum and minimum limits thereof, and providing special or general remedies for the collection thereof; but in no other cases shall the General Assembly limit the amount to be recovered for injuries . . .

Id.

which may, on occasion, extinguish certain rights. Because it has been held that a "person has no property, no vested interest, in any rule of common law," this conclusion seems correct.

The assertion that section 303(b) contravened article III, section 18 was quickly disposed of, the court pointing out that if a cause of action could be abolished in the presence of article I, section 11, it would be specious to claim that another provision would make such abolition improper. The equal protection claim under the federal constitution was disposed of even more summarily.

Judge Spaeth, as mentioned before, produced the most thoughtful judicial criticism to date of section 303(b) and its interaction with the subrogation provision, in writing in support of reversal. Though agreeing with the prevailing judges that section 303 was not violative of article III, section 18 of the Pennsylvania Constitution, he nonetheless found it violative of article I, section 11. Judge Spaeth undertook to use this section, however, not in response to the third party defendant's assertion that section 303 denied a forum for a claim to be presented, but to assert that the section worked to deny equal protection.

This novel construction of article 1, section 11 originates in Judge Spaeth's assertion that "[o]ur Constitution . . . guarantees that every person shall have a remedy by due course of law." Such guarantee is violated, Judge Spaeth maintained, when the

33. Munn v. Illinois, 94 U.S. 113 (1876).
34. Judge Price, writing in support of reversal, cited Dolan v. Linton's Lunch, 397 Pa. 114, 152 A.2d 887 (1959), for the proposition that in Pennsylvania "common law remedies should not be vitiates by the legislature without concurrently providing for some statutory remedy." 262 Pa. Super. at 431, 396 A.2d at 1248 (Price, J., dissenting). While a state court may, under a state constitutional provision, impose such a requirement on the legislature, the prevailing judges were correct in their dismissing of this language as dicta. Id. at 424, 396 A.2d at 1244. See Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715 (1978). The supreme court has recently affirmed that the language in Dolan was, in fact, extraneous and non-binding. Kline v. Arden Verner Co., ___ Pa. ___, 469 A.2d 158, 160 (1983).
35. 262 Pa. Super. at 426, 396 A.2d at 1245. Judge Price, joined by Judge Van der Voort, however, found both sections were violated by section 303(b). Id. at 427-33, 396 A.2d at 1245-49 (Price, J., dissenting).
37. Id. at 433-43, 396 A.2d at 1249-54 (Spaeth, J., dissenting).
38. Id. at 434, 396 A.2d at 1249.
39. Indeed, Judge Spaeth did not even mention Dolan, considered by the third party and by Judge Price to be dispositive of the section's violation of the Pennsylvania Constitution.
40. 262 Pa. Super. at 434, 396 A.2d at 1249 (Spaeth, J., dissenting) (quoting constitutional language, emphasis in original).
legislature, without any clearly articulated motive, "abolishes a cause of action for a particular group of people while recognizing it for the public at large," with the result that a "culpable tortfeasor is indemnified for his wrongdoing at the expense of a third party."\(^1\) Because the preceding language, put forth ostensibly as a standard of review, is nothing less than a statement of what Judge Spaeth perceived as the *effect* of section 303(b), this entire method of attacking the provision constitutes no more than a novel way by which inequitable results could be explicated: what was perceived in *Arnold* as only an inequitable policy is denounced again in Judge Spaeth's *Tsarnas* dissent as violative of an equal protection guarantee, constructed especially for the occasion in order to be violated.

While doubt thus exists concerning the enduring utility of this analysis, Judge Spaeth's exercise nonetheless elucidated the perceived inequities of the statute's operation. Posed in equal protection terms, the objection was as follows:

In cases where the joint tortfeasor is not the employer of a victim protected by the Workmen's Compensation Act and the general right to contribution therefore obtains, the third party pays only the proportion of the victim's recovery that equals the proportion that his causal negligence has to the total causal negligence involved in the injury. In cases where section 481(b) applies, the third party always pays the entire recovery.\(^2\)

This "discriminatory effect" is even more severe when the subrogation of the employer is considered, according to Judge Spaeth. Where section 303 applies, he pointed out, not only does the third party pay the recovery, but the employer is absolved from any liability whatsoever by way of its reimbursement under section 319 of the Act.\(^3\)

Having identified the unequal treatment, Judge Spaeth continued his constitutional analysis by asserting that social and eco-

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41. *Id.* at 434-35, 396 A.2d at 1249. Judge Spaeth first listed the specific *effect* which he alleged would violate article I, section 11, and then announced that "[b]ecause these circumstances all attended the enactment of § 481(b)," the latter statute was necessarily unconstitutional. *Id.* In constructing this remedy by due course of law—equal protection guarantee in such narrow terms, this novel interpretation of article I, section 11 is clearly constructed especially to strike down only a single statute thought to have an unpalatable result. So constructed and narrowly applied, this opportunity to utilize the Pennsylvania Constitution as an independent source of legal principles must necessarily meet the fate of "seeds which land upon rocky ground."

42. 262 Pa. Super. at 436, 396 A.2d at 1250.

43. *Id.* It is at this point that the equal protection attack on sections 303 and 319 breaks down. The real complaint at the subrogation juncture is one of simple unfairness, rather than disparate treatment.
nomic legislation creating unequal treatment must "substantially further [a] statutory objective" and "must be legitimate and articulated." Predictably, Judge Spaeth maintained that he could discern neither legislative intent nor reasonable basis for the law, an assertion which necessarily involved a denouncing of the Hefferin court's finding that the statute was enacted pursuant to the Workmen's Compensation Commission recommendations. Though Judge Spaeth acknowledged that the employer may have been freed from liability and joinder in the interests of economic efficiency, he was unwilling to allow such "speculation" to provide a legitimate constitutional basis for the statute. He was, however, willing to discuss the matter, admitting that allowing the statute to operate concurrently with the subrogation provision would provide the employer with "greater certainty that [he] will be subrogated to whatever recovery the injured employee obtains from a third party tortfeasor." Though this would vindicate the "economic efficiency" rationale for the statute, Judge Spaeth discounted this explanation as reflecting a plausible legislative motive, apparently in disbelief that the legislature would want to produce any discriminatory effect.

44. Id. at 438-39, 396 A.2d at 1251 (emphasis in original). This test is borrowed from language utilized by the United States Supreme Court. Although Judge Spaeth maintained that this standard is imposed by the Supreme Court in "a closely analogous area of the law," id., the cases cited for the proposition deal, with one exception, with social legislation and semi-suspect class legislation, not with pure economic legislation such as section 303(b). See the cases collected at id., n.1, which include, among others, Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) (disparate treatment of the elderly); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (disparate treatment of women); McGinnis v. Royster, 410 U.S. 263 (1973) (disparate treatment of prisoners); Eisenstadt v. Baird, 405 U.S. 438 (1972) (unequal access to contraceptives).

While Pennsylvania courts are totally free to establish a "heightened scrutiny" standard for examining economic legislation which produces disparate results, recourse to the latter cases as theoretical justification would clearly be inappropriate. In the meantime, the actual Pennsylvania standard applied when considering purely economic equal protection issues consists of posing the requirement that "the distinctions drawn have some rational relationship to a proper state purpose." Baltimore and O.R.R. Co. v. Commonwealth Dept. of Labor and Industry, 461 Pa. 68, 83, 334 A.2d 636, 643 (1975). See also Laudenberger v. Port Authority of Allegheny County, 496 Pa. 52, 70 & n.13, 436 A.2d 147, 156-57 & n.13 (1981); Commonwealth v. Bottchenbaugh, 306 Pa. Super. 406, 410-11, 452 A.2d 789, 791 (1982).

45. 262 Pa. Super. at 439 n.2, 396 A.2d at 1252 n.2.
46. Id. at 440-41, 396 A.2d at 1252 (citing Adamik, 439 F. Supp. at 786).
47. 262 Pa. Super. at 441, 396 A.2d at 1253.
48. Id.
49. Id. By provisionally accepting that a reasonable basis for the discriminatory treatment existed, the suggestion was thus made that the statute was constitutional. The subsequent discarding of the ascertained "reasonable basis"—on the grounds that the statute would produce discrimination—results in reasoning which can only be described as circular.
In completing his equal protection analysis, Judge Spaeth rejected the prevailing judges’ assertion that the third party was not unfairly treated under the statute because of the ability to provide contractually for contribution or indemnification before the occurrence which gives rise to the action. Such an argument, he asserted, was meritless in that “in many, if not in most, instances, the third party and the employer will not be in a contractual relationship; thus it will be impossible for the third party to protect himself.”

This latter assertion on Judge Spaeth’s part is subject to question. Most critics of immunity sections such as section 303 concentrate on the alleged injustice which they cause in product liability actions stemming from industrial accidents. In these cases there is at least the opportunity for such contractual agreement, as exemplified by instances where the employer has purchased a piece of machinery or a work tool from the third party. Where the third party is a total stranger to the employer, on the other hand, the circumstances are often such that the employer is free from negligence. This latter case is illustrated by the driver-employee who is killed or injured in a motor vehicle accident caused by a third party’s negligence.

While Judge Spaeth’s destruction of his equal protection strawman certainly clarified the alleged inequity of the statute’s operation, it failed to impress the supreme court on appeal. The court, in an opinion by Justice Flaherty, did address the equal protection issue surrounding section 303, but did so purely within the context of federal, rather than state, equal protection standards. Identifying the section as affecting neither fundamental rights nor a suspect class, the court thus inquired only “whether the classification [is] patently arbitrary and bears no relationship to a legitimate governmental interest.” Because the court accepted the argument that section 303 was enacted in the interest of economic efficiency, and, implicitly, because of the rationale offered in Hef-
The court's consideration of the section with reference to article 1, section 11 was undertaken only in the latter's "open courts" context, Justice Flaherty finding the provision not to be violated. This portion of the opinion may be said to be rather deficient. While appreciative of the third party's argument that section 303 denied it access to courts to litigate claims, Justice Flaherty's response was not that the legislature could legitimately abolish a cause of action, as explained by the superior court, but merely that the section had to be measured within the context of the Workmen's Compensation Act. This assertion was followed by a reaffirmation of the Hefferin court's explanation of the statute's origins—as stemming from the legislature's resolve to conform to the National Commission's recommendations. While these are, no doubt, crucially valid points, they have little to do with the "open courts" challenge posed under the Pennsylvania Constitution.

The court's review of section 303(b) in relation to article III, section 18 was somewhat more judicious. Rejecting the third party's claim that the statute was unconstitutional "because it has the effect of placing a zero dollar limit on the amount a third party can recover from an employer," the court held that a "limitation" could not be discerned where the legislature had, in fact, abolished the right of contribution completely. This latter holding implicitly recognizes what should have been the court's articulated rationale in holding section 303(b) not violative of article I, section 11—that the legislature may, when thought necessary for purposes of public policy, abolish a cause of action.

The court pointedly avoided a decision with respect to whether the employer remained subrogated to employee recoveries. Justice Larsen, however, in a concurring opinion, stated that he joined the opinion "with the condition that the employer's right to subro-

59. Id.
60. Id. See infra note 138 and accompanying text.
61. See infra note 138.
62. Equally as perplexing is why the court chose this portion of the opinion to foreshadow its ruling in Heckendorn with respect to the subrogation issue. 488 Pa. at 520 n.2, 412 A.2d at 1097 n.2.
63. Id. at 521, 412 A.2d at 1097-98. This explanation is the same as offered by the superior court in its consideration of Tsarnas. See 262 Pa. Super. at 426, 396 A.2d at 1245.
64. 488 Pa. at 520 n.2, 412 A.2d at 1097 n.2.
gation is not automatic," stating further that "[t]he employer must in some judicial proceedings establish its freedom from fault in order to be subrogated." Justice Larsen’s demand, repeated in Heckendorn, was issued without adornment, in the latter case stating only that a separate proceeding was necessary since "subrogation rights are always subject to equitable principles."

B. Heckendorn v. Consolidated Rail: Comparative Negligence and Subrogation

The most recent area of judicial construction of section 303(b), culminating in Heckendorn, involves the statute’s operation in the presence of Pennsylvania’s comparative negligence statute. While

65. Id. at 524, 412 A.2d at 1099 (Larsen, J., concurring). This brief assertion, repudiated conclusively in Heckendorn, 465 A.2d at 613, was to have at least some influence in the intervening period, cited tangentially as the law in at least one case. See Reliance Ins. Co. v. Richmond Mach. Co., 455 A.2d 686, 689-90 (1983).

66. 465 A.2d at 613 (Larsen, J., concurring).

67. Id. One contemporary commentator upon Justice Larsen's concurrence in Tsarnas pointed out that if the demand for a separate proceeding was respected, a result similar to that of the old "Pennsylvania Rule" could be achieved within the confines of the amended section 303 as construed in Tsarnas and Hefferin:

Several jurisdictions have adopted rules which permit reducing the employee's third party's recovery by the amount of the employer's compensation obligation when the employer's negligence has contributed to the injury. Adoption of this practice would not violate the provision of section 303(b) which bars contribution, since the third party would not need to claim contribution from the employer. It would be necessary, of course, to prove the employer's negligence in order to deprive him of his right to subrogation. As Justice Larsen suggested... this would require some judicial proceeding. The employer would inevitably seek subrogation since he could not be bound by an imputation of fault established in a proceeding to which he was not party. Since under Hefferin and Tsarnas, the employer may not be made a party in the employee's action, if the employer is to be precluded from subrogating and recovering his compensation outlay, an additional action would be necessary to provide the employer with an opportunity to defend against the charge of negligence.

Pennsylvania Supreme Court Review, 1980, supra note 10, at 732-34 (citations omitted). For further discussion on the issue of the suggestion for a separate subrogation proceeding, see infra notes 170-75 and accompanying text.


(a) General Rule—In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be dismissed in proportion to the amount of negligence attributed to the plaintiff.

(b) Recovery against joint defendants—Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence at-
Hefferin and its affirmances had made it clear that section 303(b) worked to limit the joinder of the employer in order to impute liability, question continued with regard to whether joinder could be had in order merely to apportion fault and thus reduce the third party's liability.

The first courts to consider the issue arrived at different conclusions. In Flack v. Calbrace,99 a common pleas court maintained that the intent of the Comparative Negligence Act would be subverted if the employer was not made a party to the action, and thus allowed joinder.70 Shortly thereafter another common pleas court reached the same conclusion,71 maintaining, in addition, that to so hold did not conflict with Hefferin's prohibition of joinder under section 303(b), since the latter case was decided before the introduction of comparative negligence.72

Although other lower courts also took the preceding approach,73 several concluded that the Comparative Negligence Act made no inroad upon the employer's freedom from joinder.74 Among the

tributed to all defendants against whom recovery is allowed. The plaintiff may recover the full amount of the allowed recovery from any defendant against whom the plaintiff is not barred from recovery. Any defendant who is so compelled to pay more than his percentage share may seek contribution.

Id.

70. Id. at 140, 15 D. & C.3d at 768-69. The court, however, considered only part (a) and § 7102:

Given the plain meaning of the words "defendant or defendants against whom recovery is sought" in the Pennsylvania Act, it is apparent that the employer and/or employee is a necessary party to the action if the original defendant is to have an accurate determination of his comparative negligence.

62 Westmoreland L.J. at 140, 15 D. & C.3d at 769.
73. See Schaeffer, 504 F. Supp. 613; Prem, 19 D. & C.3d 162.
74. See e.g., Shaner v. Caterpillar Tractor Co., 483 F. Supp. 705 (1980). In Shaner the district court construed Hefferin and Bell to render the employer completely immune from suit as a party for any purpose. Id. at 708. See also Lawless v. Central Engineering, 502 F. Supp. 308 (E.D. Pa. 1980). The Lawless court undertook a more considered examination of § 7102 than did the Flack court, pointing out that "[b]ecause the first clause of subsection (b) does not apply, the defendant cannot base his motion for joinder on the other language of the clause." Id. at 311; see also Ryden v. Johns-Manville Prod., 518 F. Supp. 311, 316 (W.D. Pa. 1981) (comparative negligence statute "merely provides for apportionment among those defendants against whom recovery is allowed.") (emphasis in original); Tookmanian v. Safe Harbor Water Power Corp., 505 F. Supp. 920, 922 (1981) ("clear and plain language" of statutes forbade joinder for purposes of determining pro rata causal negligence among
first of these courts was an Allegheny County Common Pleas court which, in
*Getty v. Ajax Mfg. Corp.*, held that the act neither altered “any of the protections which section 303(b) . . . affords the employer [nor] provide[s] any benefits to the defendant who establishes that a third party immune from liability is also responsible for a plaintiff’s injuries.” This view was ultimately vindicated in *Heckendorn*, but not until significant debate had been carried on in the superior court.

This debate also forced the issue of the employer’s subrogation rights to be fully discussed. In *Hefferin* and *Tsarnas*, the initial landmarks in the construction of section 303(b), the principle issues facing the courts were the statute’s general implications and constitutional legitimacy; thus, while subrogation was commented upon and alluded to, the issue was never conclusively ruled

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76. *Id.* at 56. The court was, in fact, doubtful that any purpose at all would be served by permitting joinder of a totally immune party:

A finding that a party immune from liability was partially at fault will not reduce the liability of the remaining joint tort feasors [sic]. The Act specifically provides that where recovery is allowed against more than one defendant, the plaintiff may recover “the full amount of the allowed recovery from any defendant against whom the plaintiff is not barred from recovery.” Thus if it is found that a defendant was twenty-five percent negligent and that a third party with total immunity was seventy-five percent negligent, the third party defendant would be in no better position than if he were found to be one hundred percent negligent because in both cases he must pay the full amount of the judgment and the immunity provisions bar him from seeking any contribution.

*Id.* at 58.

Although the preceding is true, the defendant in a third party action, from a strategic point of view, still has reason to want the employer joined. Because the third party in such a suit may often have its own liability reduced by demonstrating the employee’s concurrent negligence, the most complete picture available of the accident circumstances will be desired; toward this end, joinder of the employer would allow an enhanced and expanded discovery.

77. The first superior court consideration of the issue was in *Heckendorn v. Consolidated Rail Corp.*, 293 Pa. Super. 474, 439 A.2d 674 (1981), in which it was held that joinder could not be had despite the presence of the comparative negligence statute. *See also infra* note 81 - 88 and accompanying text. The superior court’s treatment of *Heckendorn* was followed immediately thereafter in *Leonard v. Harris*, 290 Pa. Super. 370, 434 A.2d 798 (1981). Though the superior court debate was resolved only in 1983 by the supreme court’s review of *Heckendorn*, no superior court panel in the intervening period ever held that an employer could be joined in order to determine pro rata shares of negligence.

78. *See Hefferin*, 247 Pa. Super. at 370, 372 A.2d at 871 (employer’s right to subrogation remains “unchanged” from that possessed prior to amendment of section 303).
79. *See Tsarnas*, 488 Pa. at 520 n.2, 412 A.2d at 1097 n.2 (issue with respect to whether employer’s right to subrogation “remained unimpaired” left “for another day”).
upon.\textsuperscript{80} In the face of a statutory scheme which apparently allowed a possibly-negligent employer to gain full subrogation to employee recoveries, however, courts considering the issue of joinder in the face of comparative negligence tenets could evidently no longer skirt the issue.

The superior court decisions which were rendered on this issue before the supreme court's consideration of \textit{Heckendorn} are, consistent with that opinion, premised upon a principled reading of the comparative negligence statute. As recognized by several lower courts,\textsuperscript{81} section (b) of the statute contains limiting language which proved pivotal in ensuring the continued freedom of the employer even for purposes of apportioning fault. In the superior court's consideration of \textit{Heckendorn},\textsuperscript{82} it was pointed out that since the supreme court had already ruled that section 303(b) "foreclosed the adjudication of the liability of the employer," the latter party could not, in the words of the comparative negligence statute, be considered one against whom recovery is allowed.\textsuperscript{83} The defendant in \textit{Heckendorn} had, however, conceded that the employer could not be made liable for damages in the action,\textsuperscript{84} and merely sought joinder in order to apportion fault and improve the prospects of a reduced verdict for which it was responsible. In response to this assertion, the court claimed that the employer had "no stake in the outcome of the action"\textsuperscript{85} and could not be considered—for any purpose—a party joinable under Pennsylvania Rule of Civil Procedure 2252(a), which permits the joinder as additional defendants only . . . those persons "who may be alone liable or liable over . . . or jointly and severally liable . . . or who may be liable to the joining party on any cause of action which he may have against the joined party . . . ." An employer fits into none of the categories envisioned by the rule, for the employer cannot be made liable either to the plaintiff employee or to a defendant, third party tortfeasor.\textsuperscript{86}

The defendant had also argued that failure to include the employer in the comparative negligence calculus could allow the employer to be made whole by way of subrogation, though the em-

\textsuperscript{80} See supra note 18.
\textsuperscript{81} See supra note 74.
\textsuperscript{83} \textit{Id.} at 480-81, 439 A.2d at 677 (citing \textit{Bell v. Koppers Co.}, 481 Pa. 454, 392 A.2d 1380).
\textsuperscript{84} 293 Pa. Super. at 478, 439 A.2d at 676.
\textsuperscript{85} \textit{Id.} at 481, 439 A.2d at 677.
\textsuperscript{86} \textit{Id.}
ployee’s loss may have been due to negligence on the employer’s part. With respect to this matter, however, the court washed its hands, claiming as did the Tsarnas court that the matter was best left for another day.

Subsequent superior court panels, however, faced with precisely the same comparative negligence arguments, did not dispose of the subrogation issue so glibly. In Kelly v. Carborundum Corp. the court followed Heckendorn and held that the prior appellate decisions—Hefferin and its progeny—had not been “deprived of their efficacy” in prohibiting joinder by passage of the Comparative Negligence Act. The court further asserted that joinder of the employer as an involuntary plaintiff, as sought by the defendant, would be improper, as compulsory joinder is available only where “an interest is joint and the holder of such interest refuses to join.” In explaining that the employer has no joint interest with the employee, however, the court denied that the statutory subrogation right possessed by the employer was in any way “joint” with the employee’s claim, stating enigmatically that “[t]he interests of the subrogee, if necessary, can be determined in a separate action.”

This latter statement is open to two interpretations. First, it may be construed as adopting Justice Larsen’s assertion in Tsarnas that there is no automatic right to subrogation, a separate judicial proceeding being required in order for the employer to establish its freedom from fault. In the alternative, it may simply

87. Id. at 481, 439 A.2d at 678.
88. Id. at 482, 439 A.2d at 678.
91. 307 Pa. Super. at 369, 453 A.2d at 628. Joinder of an involuntary plaintiff under the Pennsylvania Rules of Civil Procedure is provided for in Pa. R.C.P. 2227, which reads as follows:

(a) Persons having only a joint interest in the subject matter of an action must be joined on the same side as plaintiffs or defendants.
(b) If a person who must be joined as a plaintiff refuses to join, he shall, in a proper case, be made a defendant or an involuntary plaintiff when the substantive law permits such involuntary joinder.

Pa. R.C.P. 2227.
93. 488 Pa. at 524, 412 A.2d at 1099 (Larsen, J., concurring).
be construed as describing the situation which transpires when an employee enjoying a successful third party recovery resists the employer’s subrogation claim. In such instances it becomes necessary for the employer, in a separate action before the workmen’s compensation referee, to present evidence of workmen’s compensation payments and of the employee’s recovery. In such a forum, obviously, there is never consideration of negligence on the part of either party. Regardless of the construction adopted, the court’s language must be dismissed as dicta, since the court also held that joinder for purposes of apportioning fault was improper substantively.\textsuperscript{4} Still, the fact that the ambiguity existed at all demonstrated the need for the supreme court to make a definitive ruling.

In \textit{Reliance Insurance Co. v. Richmond Machine Co.},\textsuperscript{95} another pre-\textit{Heckendorn} decision, the ambiguity with respect to subrogation was even more evident. The plaintiff in \textit{Richmond Machine} was the insurance carrier of an employer whose employee had been injured and had received workmen’s compensation benefits from the plaintiff.\textsuperscript{96} The employee had allegedly been injured due to a defectively functioning machine, but brought no action against its manufacturer. When the employee so demurred, the insurance carrier brought an assumpsit action alleging the manufacturer’s negligence and seeking indemnification and contribution in the amount of its workmen’s compensation payments.\textsuperscript{97} The court agreed with the defendant that this claim was in fact one for subrogation, pointing out further that it had been settled earlier that the insurer, in his own right, had no cause of action against a third party. The carrier’s action was therefore unsuccessful.\textsuperscript{98}

In justifying the rule that the insurer has no independent right to pursue such a cause of action, the court provided a history of both theoretical and pragmatic considerations. In earlier cases, the theoretical consideration was stressed, with courts holding that employer and insurer can vindicate their subrogation rights only through an action brought in the name of the injured employee.\textsuperscript{99} This requirement was explained as follows:

The right of action is for one indivisible wrong, and this abides in the insured, through whom the insurer must work out his rights upon payment of

\textsuperscript{94} 307 Pa. Super. at 370, 453 A.2d at 629.
\textsuperscript{96} \textit{Id.} at 687.
\textsuperscript{97} \textit{Id.} at 688.
\textsuperscript{98} \textit{Id.} at 690.
\textsuperscript{99} \textit{Id.} at 689.
the insurance, the insurer being subrogated to the rights of the insured upon payment being made. . . . This right of the insurer against such other person is derived from the assured alone, and can be enforced in his right only . . . . 100

More recent cases, according to the Richmond Machine court, have restated this more pragmatically, the assertion being made that the employer can be subrogated only after it is demonstrated that the third party actually caused the injury and that a recovery or settlement has been achieved. 101 This, in turn, can never be

100. Id. at 689. See Moltz v. Sherwood, 116 Pa. Super. 231, 234, 176 A. 842, 843 (1935). See also Hall v. Nashville & Chatanooga R.R. Co., 80 U.S. 367 (1872) (doctrine of insurer subrogation is “dependant not at all upon privity of contract, but worked out through the right of the creditor or owner” who is “considered but one person” with the insurer).

101. See, e.g., Olin Corp. v. Workmen's Compensation Appeal Board, 14 Pa. Commw. 603, 609, 324 A.2d 813, 817 (1974). See also Travelers Ins. Co. v. Hartford Accident and Indem. Co., 222 Pa. Super. 546, 294 A.2d 913 (1972); Broderick v. Great Lakes Casualty Co., 152 Pa. Super. 449, 33 A.2d 653 (1943). Travelers Insurance and Broderick raise important questions concerning the employer's burden of proof in establishing its subrogation claim. Both cases seem to suggest that the employer must, in order to be subrogated, establish not only that a recovery has been had against a third party, but also that negligence on the latter's part has been conclusively proven. Though the Richmond Machine court cites, in dicta, these cases for such a proposition, this cannot be the law. Broderick, which provided the basis for the decision in Travelers Insurance, was decided before the 1945 amendment to section 319 which changed the language of the subrogation provision. As evident in the Broderick opinion, 152 Pa. Super. at 451, 33 A.2d at 653, the pre-1945 statute provided, in relevant portion, as follows:

Where a third person is liable to the employee or the dependents for the injury or death, the employer shall be subrogated to the right of the employee or the dependents against such third person . . . .

Section 319 of the Workmen's Compensation Law as reenacted June 21, 1939, P.L. 520. The 1945 amendment caused the statute to read, as it does currently, in relevant portion, as follows:

Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employee . . . against such third party . . . .


This change lessens the burden upon the employer; whereas before 1945 the employer arguably had to prove negligence on the part of the third party, after the amendment subrogation could be obtained under a “but for” the act-of-the-third party standard.

The logic in Travelers Insurance is thus especially infirm. In the latter case, an insurer was denied subrogation after an employee, who had received workmen's compensation payments, won a consent judgment in another state against a third party. The court ruled that consent judgments were contractual in nature and thus did not establish negligence on the third party payee's part. Citing Broderick, the court refused to allow subrogation in spite of the employee's recovery.

The infirmity of the Travelers opinion, however, stems not only from its reliance upon a case gutted of significance. If Travelers Insurance is ever to be considered correct, it is doubtful that subrogation could be achieved against any settlement arrived at between the
demonstrated without an action having been brought by the employee himself.

The Richmond Machine court, in reaffirming the prohibition against the independent cause of action, buttressed its holding by pointing to Justice Larsen's insistence in Tsarnas that the right to subrogation was "not automatic" but, rather, required a judicial proceeding in order for the employer to establish its freedom from fault.\textsuperscript{102} Because the language was offered in support of the assertion that the subrogation right had to be "worked out" through the employer, however, this portion of the court's opinion cannot be construed as central to the decision.\textsuperscript{103}

Any suggestion, therefore, that the court cited Justice Larsen's concurrence for the proposition that the employer's negligence must be determined in a later proceeding seems wholly unwarranted. This conclusion is supported by the language of the court's holding, which states:

We therefore hold that section 319 is an exclusive remedy, and that for an employer or its insurer to enforce its subrogation rights, it must proceed in an action brought on behalf of the injured employee in order to determine the liability of the third party to the employee. If such liability is determined, then the employer or its insurer may recover, out of an award to the injured employee, the amount it has paid in worker's compensation benefits.\textsuperscript{104} (emphasis added)

In addition, the Richmond Machine court also claimed that to so
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hold was consistent with its holdings in *Heckendorn* and *Kelly* which prohibited joinder of the employer,\(^{105}\) and thus, arguably, any consideration of employer negligence. The court’s use of Justice Larsen’s *Tsarnas* concurrence, however, again demonstrated that the issue of the employer’s subrogation had not been resolved.\(^{106}\)

As indicated before, the matter has been put to rest by the supreme court. In its consideration of *Heckendorn*,\(^{107}\) the court affirmed the superior court’s ruling that no joinder of the employer could be had in order to apportion fault under the Comparative Negligence Act, but, unlike the lower court, also addressed directly the issue of the employer’s subrogation.\(^{108}\)

In affirming the superior court, Chief Justice Roberts engaged in the same principled reading of the comparative negligence statute which had been undertaken by the lower courts.\(^{109}\) Justice Roberts pointedly emphasized that the statute plainly allowed liability to be apportioned only among “defendants against whom recovery is allowed.”\(^{110}\) Proceeding on to examine the exclusivity feature of section 303, Justice Roberts claimed that the latter provision could “be read in full and complete harmony” with the comparative negligence statute,\(^{111}\) since section 303(b) disallows any employer liability and the comparative negligence statute, in turn, prohibits apportionment of negligence with respect to the liability-free employer.\(^{112}\)

Nor did Justice Roberts think that the employer could be joined merely for purposes of apportioning fault. Adopting the reasoning

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105. *Id.*
106. For additional evidence of uncertainty with regard to what rights the employer had to subrogation, see *Hamme* v. Dreis & Krump Mfg. Co., 716 F.2d 152 (3d Cir. 1982). In *Hamme* the court, citing *Heckendorn*, affirmed a district court ruling forbidding joinder of the employer in order to adjudicate its comparative fault. *Id. See* 512 F. Supp. 944 (M.D. Pa. 1981). Judge Rosenn, in an extended dissent, claimed that “the [comparative negligence] statute does not alter the equitable considerations that affect the liability of third parties to injured employees,” and insisted that the employer could be joined under Pennsylvania procedural rules in order for comparative fault to be determined. 716 F.2d at 165 (Rosenn, J., dissenting). Citing the landmark cases of the old “Pennsylvania Rule,” Judge Rosenn also maintained that the “extent of the employer’s recovery turns . . . on both the plaintiff’s ability to establish the liability of the third party and the employer’s freedom from negligence.” *Id.* at 164-65 & n.22.
108. *Id.* at 613.
109. See supra note 74 and accompanying text.
110. 465 A.2d at 612 (emphasis omitted).
111. *Id.* (citing *Heckendorn*, 293 Pa. Super. at 480-81, 439 A.2d at 677).
112. 465 A.2d at 612 (citing 42 PA. CONS. STAT. § 7102 (Purdon 1983)).
of the superior court, he ruled that such joining, either as an additional defendant or as an involuntary plaintiff, would be improper under procedural rules.

Turning to the subrogation issue, Justice Roberts squarely denied that the employer's statutory right under section 319 could be challenged by an allegation that the employer was in any way responsible for the employee's injury. Maintaining that recoveries made by employees were subject to the employer's right to reimbursement for compensation payments made, Justice Roberts made it clear that the possibility of employer negligence was not to be considered, stating that "[t]he issue of the employer's negligence is as irrelevant at the subrogation stage of the proceedings as it is at trial, and as it is in every case of employee injury in which no third party tortfeasor is involved." 116

Justice Roberts also specifically repudiated *Stark v. Posh Construction Co.*, a principle case exponent of the old "Pennsylvania Rule", stating that the "dictum" therein to the effect that employer negligence would forbid subrogation was not persuasive, observing that:

*Stark* was decided when joinder of the employer at trial was still permitted, long before the legislature's decision in 1974 to triple the amount of workers' compensation payable to injured employees and at the same time to foreclose, through the enactment of section 303(b), the adjudication of employer negligence in all cases of employee injury. 119

Justice Larsen joined in the court's opinion, but was totally at

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113. *Id.* at n.2. See *supra* notes 85-86 and accompanying text.

114. 465 A.2d at 612 n.2. See *supra* note 91 and accompanying text. This ruling cannot be considered merely formalistic; as the *Kelly* court pointed out, Pa. R.C.P. No. 2227 (forbidding joinder unless a "joint interest" exists and substantive law so permits) is "not predicated upon some administrative benefit to be gained by joinder but upon the unity and identity of the interest of the co-owners who are to be joined." 307 Pa. Super. at 368-69, 453 A.2d at 628 (quoting 7 *GOODRICH-AMRAM 2d* § 2227(a):1). But see *Hamme v. Dreis & Krump Mfg. Co.*, 716 F.2d 152, 165-66 & n.24 (3d Cir. 1982) (Rosenn, J., dissenting). Judge Rosenn argued that the employer should be treated as a party whose joinder may be had under the Pennsylvania rules. *Id.* His assertion is, apparently, premised on the belief that the employer does in fact have a joint interest with the employee: "In fact, the employer is actually bringing the lawsuit every time that the employee sues a third party. The employer is always present with its hand out to take its share of the money recovered by the employee against the third party." *Id.* (quoting *Leford v. Central Medical Pavilion, Inc.*, 90 F.R.D. 445, 447 (W.D. Pa. 1981)).

115. 465 A.2d at 613.

116. *Id.*


118. See *supra* notes 3-5 and accompanying text.

119. 465 A.2d at 613 n.3.
odds with Justice Robert’s ruling with respect to subrogation. Citing his own concurrence in *Tsarnas*, Justice Larsen maintained that “the employer’s right to subrogation is not automatic and some judicial proceeding *must be had* in order for the employer’s lack or degree of fault to be established.”

Because Justice Larsen’s brief comments are diametrically in opposition to a principle holding of the majority, it is difficult and indeed improper to consider such comments as constituting a “concurrence”: a more accurate characterization would be “concurring in part and dissenting in part.” While at first blush this distinction may seem petty, the point sought to be made is that Justice Larsen’s affirmative demand for a separate judicial proceeding whereat, one imagines, the employer and employee engage in negligence litigation, is not part of the law. In *Heckendorn* Pennsylvania has conclusively aligned itself with the “majority rule,” and the employer is subrogated under section 319 regardless of allegations of negligence.

### III. Criticisms and Justification of the New Pennsylvania Rule

Because Pennsylvania has joined the traditional majority position with respect to joinder of the employer and the latter’s subrogation rights, the coextensive, traditional criticisms of the policy are now applicable in Pennsylvania. With *Maio v. Fahs* and *Brown v. Dickey* now clearly deprived of any practical significance, Professor Larson can no longer praise Pennsylvania as possessing “the fairest available compromise in the light of all the conflicting policy interests.”

However, it is unclear whether Pennsylvania’s alignment with the majority position creates as inequitable a situation as is so often alleged. Having withstood attacks brought under general

120. 488 Pa. at 524, 412 A.2d at 1099 (Larsen, J., concurring).
121. 465 A.2d at 613.
122. See supra note 10.
123. 339 Pa. 180, 14 A.2d 105 (1940).
125. Larson, supra note 10, at 360 n.22, 363.
126. See Hamme, 716 F.2d at 167 (Rosenn, J., dissenting). Judge Rosenn, quoting Pulliam, *Comparative Loss Allocation*, 31 Fed’n Ins. Cons. 80, 87 (1980), maintained that to make the third party bear the full cost of successful employee suits is “illogical, doctrinally unsound, and aesthetically unpleasant and would be inconsequential if the result were economically efficient, particularly humane, or an effective deterrent to tortious conduct. The result produced by current law is none of these things.” Id.
notions of equity, under constitutional pretexts, and finally under the Comparative Negligence Act, the inference that the Pennsylvania judiciary's construction of sections 303 and 319 has merit is compelling. Whether the courts' construction of the sections in fact creates such an inequitable situation as to render it “too great a victory for the employer,” however, requires an examination of the arguments brought by the Heckendorn policy's critics.

A. The Liability-Free Employer and the Third Party

The policy conclusively established in Heckendorn—that the employer shall be free from liability and joinder, and shall enjoy full subrogation—has been the target of attack on a number of specific equitable grounds. The argument against the first element of the Heckendorn policy, alluded to earlier,\(^\text{127}\) is that it is inherently unfair to make a third party defendant totally liable to an injured plaintiff-employee where there is the possibility of concurrent negligence on the part of the employer. This argument, advanced in Arnold v. Borbonus in equitable terms\(^\text{128}\) and in Tsarnas v. Jones and Laughlin Steel Corporation in equal protection language,\(^\text{129}\) clearly has some initial appeal, but upon closer consideration imposition of such liability on the third party cannot be considered prohibitively inequitable.

Although there may be some question with respect to whether the legislature fully considered the issue of subrogation when it enacted the amendment to section 303, it was quite clear that the legislature intended that the employer was to be free from any liability beyond workmen's compensation. As the Hefferin court pointed out, the Pennsylvania legislature had undertaken a major overhaul of the workmen's compensation act pursuant to recommendations made by a federal commission, two of which emphasized the importance of employer immunity and the exclusiveness of the employer's liability.\(^\text{130}\) The Hefferin court thus came to the conclusion that the amendment to section 303 could be attributed to the general overhauling of the Act. However, the court only hinted that the motive for prohibiting the employer's liability to

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127. See supra note 10 and accompanying text.
128. See 257 Pa. Super. at 120, 390 A.2d at 276 (Spaeth, J., dissenting) (questioning "the propriety of assessing the full cost . . . against the third party, who is forced to pay for the negligence of another."). See also infra notes 153-76 and accompanying text (discussing inequity of allowing unrestricted subrogation).
130. See supra note 16 and accompanying text.
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the third party was the great increase in compensation rates that had accompanied the overhaul, and which was enacted in response to federal pressure.\textsuperscript{131} Frankly put, the decision to make the third party bear by itself the financial brunt of employee suits may be said to reflect a determination that the employer had to be given something in return for the increase in mandatory workmen's compensation liability which had been imposed upon it.\textsuperscript{133}

Whether this economic play-off works a prohibitive inequity against the third party has been addressed in various ways by the courts. The court in \textit{Kelly v. Carborundum Co.},\textsuperscript{133} dismissed this equitable attack by claiming that "[t]he law does not now and never has required that all possible tortfeasors be made parties to an action."\textsuperscript{134} In a concurring opinion in the same case, Judge Montemuro explained this assertion:

The common law has always permitted a plaintiff to recover his entire claim in damages from any tortfeasor he could reach, leaving that party to recover, if possible, from his fellow defendants. If the joint tortfeasors were judgment-proof, that was not considered to be the plaintiff's problem. If the "legislatively created bar to contribution" is viewed as analogous to the long-tolerated situation in which one tortfeasor is unfairly "stuck" with an entire recovery, the conscience of the court cannot be shocked by the result.\textsuperscript{135}

To a certain extent the above response is formalistic; but seeks to quash the allegation of unfairness on purely historical rather than upon legitimate policy grounds.\textsuperscript{136} In order to adequately justify the third party bearing the entire burden of the employee's

\textsuperscript{131} See 247 Pa. Super. at 368, 372 A.2d at 870.
\textsuperscript{132} This has been implicitly acknowledged by several courts. See Heckendorf, 465 A.2d at 613 n.3; Tsarnas, 488 Pa. at 523, 412 A.2d at 1099; Hefferin, 247 Pa. Super. at 368, 372 A.2d at 870-71. For the benefit level provisions before and after the 1974 amendment, see 1974 Pa. Laws Act No. 263, at 791-96 (amending Section 306 of the Workmen's Compensation Act). The current schedule of compensation is found in 77 Pa. Stat. Ann. tit. 77, § 582 (Purdon 1983). See also infra note 136.
\textsuperscript{134} Id. at 367, 453 A.2d at 627-28.
\textsuperscript{135} Id. at 373, 453 A.2d at 630-31.
\textsuperscript{136} But see Brozzetti v. Hempt Bros., 456 A.2d 595, 597 (1983). In \textit{Brozzetti} Judge Brosky used this same argument, but linked it directly to the policy underlying workmen's compensation:

In reaching our conclusion in \textit{Kelly} . . . we rejected the argument, also made in this case, that injustice will result if only the third party remains a defendant, since he may have to pay more than his proportionate share of the loss:[;] "This argument is not persuasive. The law does not now and never has required that all tortfeasors be made parties to an action." If an employer accepts the responsibility of paying workmen's compensation benefits, his negligence is no longer a factor.

\textit{Id.} (citations omitted) (emphasis added).
action, one must return to the legislature's concern for the gross liability of the employer in the workmen's compensation scheme. By relieving the employer of liability to third parties sued by employees, the legislature has mitigated the increased burden placed upon employers by the considerable increases in compensation rates enacted. This mitigation is not illusory. In the words of one court, "elimination of third party actions against employers permits employers to better estimate compensation costs [and] . . . prevents the uncertain drain on the benefit fund cause by the employer contribution costs and legal defense expenses that had resulted from third party actions in the past."

Disallowing employer liability in third party actions, then, constitutes a loss-spreading move calculated to enhance the economic viability of employers who have already been encumbered with substantial compensation liability. The value at stake, clearly, is a healthy benefit system providing meaningful compensation rates. In bearing the financial brunt of employee suits, the third


One commentator has suggested other mitigation in the compensation burden worked by the Heckendorf decision, pointing out that since the increase in benefit levels was approved by the legislature in 1973, the number of claims filed in Pennsylvania has tripled, rising from 42,567 in 1972 to 127,658 in 1982. When coupled with the tripling of the maximum payment involved—$94 per week in 1972 to $284 in 1982—the conclusion is compelled that the elimination of third-party actions against the employer brings to the latter greater relief than simply enhancing ease in estimating costs. See A. Barbieri, Workmen's Compensation and Occupational Disease 62 (1983 Supp.). Judge Barbieri also alludes to the perception on the part of business commentators that the increased burden of compensation benefits constitutes "a major cost factor affecting the competitive ability of Pennsylvania to remain a major industrial state." Id. When viewed in light of this anxiety, the decision to free the employer from at least some potential liability seems even more judicious.


138. As discussed before, the Hefferin court, among others, ascribed the legislature's amendment of section 303 to recommendations of a National Commission convened specifically to address the efficacy of state workmen's compensation systems. A principle objective of the Commission was to encourage the states to raise compensation rates, having found that those currently being paid were inadequate. See Report, supra note 16, at 53-75.

Although Judge Spaeth questioned whether section 303(b) could be attributed to the rec-
party is merely accepting a portion of the responsibility for the achievement of this goal, and its inability to seek contribution from the employer cannot be considered inherently inequitable.

While the added burden placed upon the third party is thus justifiable in terms of economic policy, the perceived inequity is also mitigated by other factors. The third party defendant is still at liberty to prove that the employer was negligent and thus escape or reduce its own liability. The third party defendant does lose "the procedural advantage of discovery against the employer as a party litigant," but this by no means forecloses consideration by the jury of aspects of alleged employer acts or omissions.

In addition, the statute itself specifically allows contribution or indemnification to the third party who has contracted therefor before the occurrence which gives rise to the action. Obviously this provision does not extend protection to the third party who is a total stranger to the employee-employer relationship, but as noted above, in such instances the question of negligence on the employer's part is often not at issue. In the industrial accident, on the other hand, the third party defendant is often a seller of machinery or a subcontractor who has the opportunity, before the accident or injury takes place, to contractually provide for contribution or indemnity from the employer.

Numerous commentators have pointed out that the advent of strict liability concepts places a great burden on the equipment manufacturer and seller who is prevented, in light of section...
303(b), from mitigating his damages, which are often considerable in product liability actions.\textsuperscript{148} The provision in section 303(b) permitting contractual indemnification provides the mechanism by which this burden can be alleviated. The ability of an equipment manufacturer, supplier, or subcontractor to obtain such a clause in its contract with the employer turns, admittedly, on the bargaining power which it possesses.\textsuperscript{148} It has been noted, however, that this may be only an illusory problem.\textsuperscript{144}

B. Joinder for Purposes of Apportioning Fault and the Policy of Section 303(b)

It was established in \textit{Tsarnas v. Jones and Laughlin} that section 303(b) worked to prevent contribution from the employer. Not until \textit{Heckendorn}, however, was it conclusively established that the section worked also to prohibit joinder merely for the purpose of apportioning fault and thus, conceivably, reducing the defendant's liability.

The most impelling justification for prohibiting such limited joinder finds its basis in the same economic trade-off discussed above; the burden of vastly increased compensation payments should relieve the employer from the cost of litigating actions, even if the employer is not ultimately liable for its share of apportioned fault.

There is, however, no basis in the first place for believing that the legislature, in overhauling the Workmen's Compensation Act, sought to disturb the independent relationship between the plaintiff-employee and the third party. This would be the effect of allowing joinder of the employer for purposes of apportioning fault,


\textsuperscript{143} See O'Connell, \textit{supra} note 141, at 440. Professor O'Connell, however, does not therefore advocate employer liability over to the third party. Characterizing what has become the current policy situation in Pennsylvania after \textit{Heckendorn} as a "mess", \textit{id.} at 441, Professor O'Connell has a different proposal:

Employers should contract with their employees, pursuant to collective bargaining, to have employees waive their common law rights, not only against their employer . . . but against any suppliers to the employer whom the employer and the union designate. Why would unions representing employees agree to that? Because the money manufacturers currently pay for products liability insurance, covering them for the machinery they sell to employers, overwhelmingly goes to lawyers and insurance overhead. These sums can more efficiently be made available to compensate employees in other ways.

\textit{Id.} at 441-42.

\textsuperscript{144} See infra notes 166-168 and accompanying text.
since the employee's verdict would, conceivably, be reduced pro rata in the amount of the employer's negligence. While section 303 does not on its face forbid joinder for purposes of apportioning fault, to so allow would thus effect an unintended intrusion upon the rights of the employee as an injured plaintiff to recover for the full amount of his injury.

The *Kelly* and *Heckendorn* courts' refusal to allow joinder under the rules of procedure, on the grounds that there was no "unity of interest" between the employer and the employee,\(^1\) may thus be considered less an exercise in formalism that it perhaps appeared. Compulsory joinder, designed to ensure that all indispensable parties are present so that actions can proceed, was properly denied in these instances where the plaintiff's action is totally independent and where the party sought to be joined would actually cause injury to the plaintiff's cause.\(^2\)

Still, the enactment of the Comparative Negligence Act added fury to the argument that the employer should be joined solely for the purpose of apportioning fault. As has been discussed,\(^3\) no such argument ever survived an appellate court review—a result which appears proper.

As the *Heckendorn* court noted, the comparative negligence statute specifically guarantees a full recovery for the plaintiff "from any defendant against whom the plaintiff is not barred from recovery." Joining the employer, as discussed above, would operate only to decrease the plaintiff's recovery, a result intended by neither section 303(b) nor the comparative negligence statute. In response it has been argued that it "exalts form over substance to pretend that the employer is not a party from whom recovery is

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145. See *Kelly*, 453 A.2d at 628-29; *Heckendorn*, 465 A.2d at 612 n.2.

146. Several courts have claimed that to allow joinder of the employer merely for the purposes of apportioning fault would have another detrimental effect on the employee-plaintiff:

There is no justification, practically, for the employer vigorously to defend itself when there is no possibility that damages can be awarded. The joinder of the employer with no exposure to liability could very well result in an acquiescence by the joined employer in the allocation of liability proposed by other defendants. This could only result in a reduction of plaintiff's award of damages, possibly unrelated to the true proportion of liability.


This scenario would only transpire, however, if the employer had absolutely no subrogation rights. If the employer had the opportunity to gain subrogation to recovery and was also a joined party, it would have every conceivable interest in demonstrating that the third party was the negligent actor. Because Pennsylvania has always had a subrogation statute, the court's worry seems unmerited.

147. See *supra* notes 68 - 120 and accompanying text.
allowed," since the employer's subrogation right was believed by some, before Heckendorn, to be contingent upon a showing that the employer was free from negligence. Were such the case, as under the old Pennsylvania rule, the third party's liability would be reduced in the amount of the employer's workmen's compensation liability. With the right to subrogation now firmly established, however, the "form over substance" argument has no compelling force, since the employer can no longer in any sense be considered a party against whom recovery is allowed.

What becomes evident, in fact, after examining the arguments of those advocating joinder merely for the purpose of apportioning fault, is that there was a great reluctance to believe that the amendment to section 303 worked any change in the Pennsylvania scheme at all. Whether advancing the argument before or after the introduction of comparative negligence, the net result sought was precisely the same as that produced by the "Pennsylvania Rule." Such advocates must necessarily agree with the early trial court decisions holding that section 303(b) merely enacted existing law.

With overwhelming evidence available that the legislature was acting to modify the Workmen's Compensation Act, however, the above conclusion is untenable. Much more impelling is the conclusion that the court in Heckendorn has vindicated the legislative motive behind section 303(b), and has come to the only logical conclusion possible. If, under the old Pennsylvania Rule, the employer was never liable for more than its workmen's compensation liability, then the legislature's new mandate that the employer "shall not be liable" would be meaningless if not construed to mean that the only liability the employer ever possessed was now to be eliminated. In repudiating Stark v. Posh and holding that the employer's negligence is irrelevant at the stage of the proceedings whereat those workmen's compensation payments are retrieved, the court has achieved this proper construction.

With this observation, arguments for joinder posed pursuant to the enactment of the comparative negligence statute seem particu-

149. See, e.g., id. at 164 n.22.
150. See supra notes 3-5.
151. See, e.g., George v. Chestnut Ridge R.R. Co., 1 D. & C.3d 154 (1976) (holding that amendment to section 303 "applies to limit joinder only where injury is caused solely by a third party."). See also supra note 13 and accompanying text.
152. See supra note 13, note 138 and accompanying text.
larly meritless. If the principle motive for allowing joinder under the old rule was to ensure that the employer not achieve an inequitable subrogation, to suddenly argue for joinder under comparative negligence on the grounds that the third party is bearing too great a burden of liability, is to allege legislative motives of more generous liability-sharing than the courts were ever willing to acknowledge, at the very time that the legislature had expressly limited employer liability.

C. Subrogation and Employer Fault

As reflected in Tsarnas and in the Heckendorn superior court opinion, the prohibition of joinder of the employer was much easier to rule upon than was the issue of the extent of employer subrogation. It is, after all, not difficult to accept that the legislature has chosen to burden one party more than another in the course of making a policy decision. It was more difficult to rule, as was finally done by the supreme court in Heckendorn, that the employer was to be subrogated regardless of the possibility that negligence may have been present on the part of the employer.

As discussed above, the supreme court, in guaranteeing subrogation, came to the only logical interpretive conclusion; if the employer was to be free of liability in the context of an employee’s third party action, this necessarily had to mean that the employer’s claim for workmen’s compensation reimbursement be preserved. The Heckendorn decision with respect to subrogation is thus correct from an interpretive standpoint.

It is, however, this element of the policy arrangement achieved by sections 303, 319 and Heckendorn, which is most susceptible to attack as being inequitable. Most frequently heard is the allegation that allowing the employer to recoup his workmen’s compensation payments results in an unjust enrichment or that the employer is being rewarded for his own wrongdoing. Allowing “automatic” subrogation is also subject to the criticism that it will discourage employer efforts toward achieving safety in the workplace by removing economic incentive; if the employer knows that he will be

153. See Tsarnas, 488 Pa. at 520 n.2, 412 A.2d at 1097 n.2; Heckendorn, 293 Pa. Super. at 482, 439 A.2d at 678.
154. See supra text accompanying note 151.
reimbursed for his accident costs, the argument alleges, there will be no interest in trying to avoid them. There is, then, both an equitable and an economic argument against permitting unrestricted subrogation. Before considering whether the arguments are of merit, however, it is important to acknowledge the role which subrogation is meant to play in the workmen’s compensation scheme.

As originally conceived, holding the employer liable for employee injuries regardless of fault was meant to make compensation for work-related accidents a “cost of production.” Without repeating the full history of how this social policy came about, one may generalize that workmen’s compensation assumes an employment environment where, to a certain extent, accidents are inevitable. This assumption having been made, it becomes sensible to spread the cost of accidents across the public by way of increased prices representing the cost of insurance premiums.

It is not difficult to perceive that if a party foreign to the employment environment intrudes upon the work relationship and causes injury to the employee, this injury’s compensation will not fall within the cost-of-production model. This is so because the employee’s injury will automatically generate workmen’s compensation payments, creating a new cost of production which may have no source in the employment relationship. Because the employee is free, however, to sue this intruder, to allow the employer to recoup his workmen’s compensation payments by way of subrogation to any recovery the employee achieves will restore integrity to the cost-of-production model. At the same time, of course, the

157. See infra notes 177-182 and accompanying text.
158. See Rudy v. McCloskey & Co., 152 Pa. Super. 101, 107, 30 A.2d 805, 808 (1943) (purpose of Workmen’s Compensation Act “to relieve to some extent the employee . . . from the economic consequences of his injury and make them part of the cost of operation of business, to be paid ultimately by the consuming public . . . .”). See also Report, supra note 16, at 34 (workmen’s compensation acts allocated costs of injuries to employer because of “inherent hazards of industrial employment. Compensation for work-related accidents was therefore accepted as a cost of production.”).
160. In many cases, however, it is difficult to consider the third party an “intruder”. The third party, for example, who is the manufacturer and/or supplier of industrial equipment is very much an actor in the industrial process. Allowing an employer to be subrogated to a recovery made against such a third party, when the employer has indeed been negligent, does not immediately seem to be justified as fulfilling the cost-of-production paradigm. But see infra notes 166-68 and accompanying text.
employer's subrogation to the extent of his payments prevents the employee from achieving a double recovery—once from the strictly liable employer in the form of workmen's compensation and again from the third party in the form of a civil verdict.

The argument that it is unfair for the employer to recoup benefits inevitably originates, however, in situations where the third party is not a bona fide intruder, that is, in circumstances where there has been opportunity for the employer to have acted negligently itself. In such instances disallowing subrogation does not seem to violate the cost-of-production model; the model incurs obvious violation only when a total stranger is the intruder upon the relationship.161 While few critics would maintain that subrogation should be denied in the latter situation,162 there are other counter-vailing values besides the integrity of the cost-of-production model and the prevention of employee double recovery, which militate toward allowing the employer to be subrogated to employee recoveries automatically.

As a preliminary comment, it must be questioned whether the instinctively appealing equitable notions of unjust enrichment or reward can be applied to this policy decision concerning the loss-allocation to be maintained in the context of industrial and workplace accidents. As one court has pointed out, a notion such as “rewarding the wrongdoer” via subrogation “is out of place in the industrial scene where human negligence by corporate agents and employees is commonplace and . . . carries no moral connotations.”163 This claim finds support in the fact that the causes of industrial accidents have been shown to be especially complex,164 and determination of fault as between employer, employee and

161. Cf. Comment, Indemnity Clauses and Workers' Compensation: A Proposal for Preserving the Employer's Limited Liability, 70 CALIF. L. REV. 1421 (1982). The writer, in arguing for limited liability of certain third parties sued by injured employees, premises his argument on the view that the employee has “accepted the quid pro quo of guaranteed recovery through the workers' compensation system . . . .” Id. at 1439. This limitation, however, is advocated only to the extent of injuries suffered which are closely related to the actual job performance. The writer thus concludes: “there is no reason to believe that an employee ever intended to agree to a limited recovery when, for example, he is injured on the jobsite by a negligent automobile driver not involved with the job.” Id. (citation omitted).

162. But see Epstein, supra note 51, at 466, 469-70 (advocating abolition of all employer subrogation liens); Comment, supra note 161, at 1440-45. Neither of the preceding commentators, however, propose abolition of the employer's subrogation lien without other modifications to the third-party recovery scheme.

163. Schweizer, 70 N.J. at 287, 359 A.2d at 861.

third parties is difficult; to quickly condemn unrestricted subrogation in hyperbolic equitable terms thus does not seem merited.

There is also question as to whether in the typical industrial accident there is much "unjust enrichment" going on in the first place, even if there has been some negligence on the employer's part. Professor Jeffrey O'Connell has made the following observation:

[When the manufacturer cannot obtain an indemnification contract from the employer-vendee] the manufacturer will attempt, most often successfully, to load the cost of his product liability insurance onto the price the employer must pay for the machinery. As a result, the essential bargain mandated by worker's compensation has arguably been broken; originally, in other words, the employer was compelled to pay for all employee injuries on a no-fault basis up to limited amounts . . . . But now, in addition to paying worker's compensation benefits, the employer increasingly pays the equivalent of common law liability reflected in increased costs of machinery or indemnity agreements with his capital goods suppliers.

Professor O'Connell continues on to point out that while subrogation statutes might work to help the employer retrieve some of this added liability, the employer is still at a disadvantage:

[As] legal and insurance scholars have been pointing out for years, these so-called subrogation claims, whereby insured losses are shifted and reshifted in multiple insurance arrangements, always shortchange insureds in the end, since multiple and expensive layers of insurance are thereby required of everyone.

The employer is thus by way of subrogation recouping no more than the increased costs which it has paid in other forms by virtue of third party suits—the institution of which has greatly increased—brought by injured employees. The employer is entitled to this recoupment, further, whether partially negligent or not, under Professor O'Connell's analysis. This can be safely said, for the loading of the cost of product liability insurance onto the price of machinery is undertaken in acknowledgement that in general the employer cannot be made jointly liable. Because the predominating case situations arising under sections 303(a) and 319 are ex-

165. Cf. Petersen, supra note 164, at 17-18. The author, in advocating a new approach to achieving optimal industrial safety, rejects a method of accident analysis traditionally referred to as the "Domino Theory" as too narrow; the author alleges that "behind every accident there lie many contributing factors, causes, and subcauses. The theory of multiple causation is that these factors combine together in random fashion causing accidents." Id. at 17.

166. O'Connell, supra note 141, at 440-41.

167. Id. at 441.
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Accordingly as discussed by Professor O'Connell, to disallow subrogation to any employer, negligent or not, would apparently work to make it pay twice. If one accepts Professor O'Connell's assertions, the result in Heckendorn—that the issue of the employer's negligence is "irrelevant" at the subrogation stage of the proceedings—is correct and cannot be characterized as inequitable.

Professor O'Connell's theory effectively puts the equities on the other side of the table. If it is found, however, that the assertions made therein are absolutely unsupported by future Pennsylvania economic realities, there are still other issues which must be faced by those arguing that subrogation by the concurrently negligent employer be forbidden.

Justice Larsen's concurrences in Tsarnas and Heckendorn call such issues to attention. Because apparently willing to accept that the legislature could legitimately make the policy decision to exempt the employer from liability and make third parties bear the brunt of employee actions, Justice Larsen found section 303(b) both constitutional and operative to prevent joinder for purposes of apportioning fault. As discussed, however, he demanded, and continues to demand, that a separate proceeding be carried out "in order for the employer's lack or degree of fault to be established."

This demand, of course, directly conflicts with Justice Roberts' holding that "the issue of the employer's negligence is as irrelevant at the subrogation stage of the proceedings as it is at trial. . . ." Justice Roberts' statement is logically interpreted to mean that after the successful employee verdict or settlement, the employer appears before the workmen's compensation referee—who, as always, has no interest in negligence on the part of either party—and presents evidence of its workmen's compensation payments and of

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169. Similarly, if one accepts Professor O'Connell's theory, the "cost-of-production" model may be of limited analytic utility.

170. See Tsarnas, 488 Pa. at 524, 412 A.2d at 1099 (Larsen, J., concurring) (stating that the "[m]ajority's limitation [bar of a third party's joinder of the employer] is within the scope of the Workmen's Compensation Act . . . ").


172. 465 A.2d at 613.
the employee recovery. Justice Larsen, on the other hand, is effectively arguing for a new civil proceeding at which, one imagines, the issue of employer negligence is very relevant.173

If one takes the latter suggestion seriously, several questions with regard to the parameters of the proceeding are raised. Presuming first that some employer negligence has been established at the trial between the employee and the third party, it is questionable whether the employee could take advantage of such finding, any attempt to collaterally estop the employer from denying negligence probably being frowned upon. The perplexing question of whether the employer may allege contributory negligence on the employee’s part (a concept until recently forgotten) is also raised. Finally, the issue is created of whether the use of comparative negligence principles in this context would be sensible, since the apparent purpose of the proceeding is only to establish the basis of a subrogation claim—not to affect a loss-sharing as intended by the Pennsylvania comparative negligence statute. Regardless of the nature and parameters of the undefined “separate proceeding” suggested by Justice Larsen, the one certain thing it would accomplish would be to bring “the employer squarely back into the courtroom, even though one purpose of the workers’ compensation law . . . is to keep him out of it.”174

173. See Hamme v. Dreis & Krump Mfg. Co., 716 F.2d at 166 (Rosenn, J., dissenting) (if no joinder allowed, “a separate subrogation action between employer and employee . . . would result in two trials instead of one.”). See also Tsarnaes, 262 Pa. Super. at 441 n.4, 396 A.2d at 1253 n.4. (Spaeth, J., dissenting) (if there is held to be no automatic subrogation and no joinder, “the injured employee would have a financial incentive to resist the employer’s subrogation claim at a second trial at which the employer’s negligence would be in issue.”). See also Pennsylvania Supreme Court Review, supra note 10 at 732-33.

174. See Epstein, supra note 51, at 472. Besides pointing out how inconsistent the demand for a separate judicial proceeding is with the purpose behind workmen’s compensation, Professor Epstein seems wary of systems which would try to apportion employer fault on a comparative negligence basis:

[T]he principles needed to determine the employer’s degree of negligence and its causal effects are, at best, difficult to define and apply. Many products liability cases involve the use of strict liability theories, and it is difficult to know how the strict liability of the third party is to be “compared” with the negligence of the employer. Again, the case patterns in which these issues are apt to be raised resist the easy definition and classification that might permit the cheap and effective disposition of claims. How do we compare the employer’s failure to repair and maintain a product, with the manufacturer’s responsibility for its defective design? Or how do we compare the manufacturer’s failure to provide adequate warnings to the workers with the employer’s modification of the product? There are no good, predictable answers . . .

Id. at 471-72.

The judicial waste that would be incurred by requiring a separate, litigated subrogation


As Judge Spaeth has pointed out, there could be no conceivable economic benefit achieved from the passage of section 303(b) unless the employer's right to subrogation is held to be automatic. Since Justice Larsen was evidently convinced of the underlying economic rationale of the statute, it is inconsistent for the argument to appear that a whole new form of litigation is required thereunder. To successfully advocate a separate proceeding would, in the words of Judge Spaeth, effectively remove "even the possibility of any cost-savings from the passage of § 481(b)."

D. Subrogation and Safety Incentives

Although the Pennsylvania courts in their criticism of the policy created in Heckendorn rarely broached the subject, the allowing of the employer to subrogation without a determination of fault has been attacked from the standpoint of workplace safety and employer incentives. Professor Epstein, in the course of proposing a statute which includes the abolition of all employer subrogation, states the problem as follows:

\[E\]ven when there is arguably no employer negligence, the statute will have the beneficial effect of inducing greater investment in accident protection on the employer's part. The point here is quite crucial because one of the unfortunate effects of the workers' compensation law is that its relatively low benefit structure tends to encourage an underinvestment in safety by employers who are insulated from the full cost of work injury.

This proposal, of course, is premised on the assumption that if the employer knows that he can be reimbursed for the cost of accidents by way of subrogation, no motive will be possess to maintain a safe workplace. If true, this exception to subrogation is well taken, since an essential purpose of workmen's compensation, with its no-fault employer liability, is to encourage industrial and work-

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Judicial resources are [thereby] used more effectively. The alternative, a separate subrogation action between employer and employee, would result in two trials instead of one. . . . A just result is more likely to be produced if all of the parties are forced to present their versions of the incident in a single action before the same factfinders. And finally, potential problems resulting from inconsistent verdicts, or from attempts to assert collateral estoppel offensively, are avoided.

Hamme, 716 F.2d at 166 (Rosenn, J., dissenting).

175. Tsarnas, 262 Pa. Super. at 441 n.4, 396 A.2d at 1253 n.4 (Spaeth, J., dissenting).

176. Id.

177. Epstein, supra note 51, at 467.
place safety.\textsuperscript{178}

Current Pennsylvania compensation rates, however, are not so low as to impel the conclusion that employers take a frivolous view towards workplace safety. One commentator, in arguing against joinder of the employer in products liability 402A actions, has asserted that the best way to encourage industrial safety is not to reduce the manufacturer or supplier's liability, but to raise workmen's compensation rates, precisely as Pennsylvania has done:

Substantially enlarged workmen's compensation benefits would tend to stimulate all employers toward greater sensitivity to employee safety. Economics would dictate that greater care toward assuring a safe working place would be good business practice for all employers, whether or not employee tort actions growing out of work-connected injuries seemed likely.\textsuperscript{179}

Even if one accepts the assertion that workmen's compensation rates are so low that they cause an underinvestment in safety, however, it must still be questioned whether the employer truly feels any benefit from his ability to be subrogated that would influence its behavior in the direction of diminished safety. There is enough transaction cost in obtaining subrogation to employee recoveries that the employer cannot be imagined to take such a simple view as Professor Epstein suggests.

The share of attorneys' fees which the employer must bear in the employee's third party action is the most striking transaction cost which works to undercut Professor Epstein's "indifference model."\textsuperscript{180} Where, for example, the employee's recovery is not greater than the amount of workmen's compensation payments theretofore made—or for which the employer will be liable in the future—the employer bears the total amount of its employee's at-

\textsuperscript{178} See Epstein, supra note 159, at 801. Although one normally associates the safety incentive utility of workmen's compensation systems with the employer's behavior, Professor Epstein makes the interesting observation that, at least historically, "[t]he low awards [of compensation benefits] create additional incentives upon the worker for self-protection . . . ." Id. (emphasis added).

\textsuperscript{179} Seidelson, supra note 142, at 389. The National Commission, though advocating that the safety objective of workmen's compensation should be achieved by way of affording attractive insurance rates to employers with good safety records, was not in disagreement with Professor Seidelson's proposal:

Because of the interrelationships among the objectives of workmen's compensation, our recommendations [concerning the income maintenance and effective delivery goals of the system], if adopted, will automatically strengthen incentives to safety inherent in merit-rating. As noted before, if our recommendations for adequate benefits are adopted, the stimulus to safety for many employers will significantly increase.

REPORT, supra note 16, at 98.

\textsuperscript{180} See PA. STAT. ANN tit. 77 § 671 (Purdon 1983), cited in full, supra note 4.
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torneys’ fees. When this statutorily required cost is coupled with those which the employer (or its insurance carrier) must incur in its own behalf in pursuing the subrogation claim, it is difficult to accept that subrogation plays an active role in cultivating indifference to safety considerations.

Applying such a purely economic analysis to the incentives to industrial safety, additionally, ignores the considerable governmental intervention in the field, most evident in the broad range of activities carried on by the federal Occupational Safety and Health Administration.

In sum, if subrogation is to be limited or eliminated, it must be accomplished pursuant to equitable arguments, although shown to be flawed, because the safety incentive objection appears unmerited.

IV. Conclusion

Justice Roberts' holding in Heckendorn that the negligence of the employer is irrelevant at both the subrogation stage of workmens' compensation proceedings and in the course of the third-party action, issued on top of the previous legislative prohibition of employer joinder, securely grounds the argument that the employer is achieving “too absolute a victory” in employee third-party actions. Beyond providing a basis for this complaint, however, the argument is fraught with infirmity: when viewed in the broad context of workmen’s compensation policy, strict liability theory, and the current perilous economic health of Pennsylvania, the “too absolute a victory” cry loses its attraction.

Whether the employer is conclusively free from liability, either to the extent of its compensation lien or to the extent of its de facto negligence, should no longer be at issue after Heckendorn. Still, the persistence of Justice Larsen’s anomalous concurrences at least raises the question of how the lower courts will rule in the future. In the presence of Justice Roberts’ mandatory language,


183. Without citing any of Justice Larsen’s concurrences, one superior court panel has recently produced language concerning the liability of the employer which seems oblivious
however, there can be no proper judicial conclusion reached but that the employer is free from liability and is affirmatively entitled to subrogation.

In consideration of whether freeing the employer from liability produced an "unjust victory", the courts all too often washed their hands of the matter and directed the critics of the rule to the legislature. As a matter of judicial treatment of statutes, this behavior was entirely proper, but such an approach has left the legal community without an adequately articulated rationale for both the promulgatory motive of section 303(b), and the continued propriety of the statute as interpreted in *Heckendorn*. In declaring that the employer has won only a *justifiable* victory (while in the midst of losing other battles), the writer hopes that this comment has provided such a rationale.

David B. Torrey

to the import of *Heckendorn* as interpreted herein. See Fidler v. Workmen's Compensation Appeal Board (United Cable Corp.), No. 186 C.D: 1983 (Pa. Commw. June 11, 1984). In *Fidler*, the claimant asserted that the referee had erred in not considering the issue of employer negligence, since the latter "could have been held responsible to the third-party for an amount equal to the employer's liability under the Act if the fact-finder determined that its negligence contributed to the Claimant's injury . . . " *Id.* (citing Maio v. Fahs, 339 Pa. 180, 14 A.2d 105 (1940)). In denying this allegation of error, the court first correctly stated that the issue of negligence was outside the referee's jurisdiction, but then made the startling statement that "[o]bviously, the time for claimant to have raised the issue of the employer's negligence was in the trial court proceeding before, or as a part of, the third-party settlement." *Id.* Following as it does the claimant's assertion of employer liability, the inference is inescapable that the court is passively recognizing that the employer may in some way still be liable—that is, the old "Pennsylvania Rule" is alive and well. Such a conclusion, of course, is prohibited by *Heckendorn*.

184. See infra note 137.