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EMPLOYER SUBROGATION: THE EFFECT OF INJURED EMPLOYEE NEGLIGENCE IN WORKERS' COMPENSATION/THIRD PARTY ACTIONS

In 1978, Arbaugh v. Proctor & Gamble Mfg. Co. applied the doctrine of comparative negligence to direct employer negligence in workers' compensation/third party actions. Initially, this Comment examines the rule and the rationale of the Arbaugh holding in light of the competing policies of workers' compensation and comparative negligence. Secondly, this Comment proposes that the Arbaugh rule be applied to injured employee negligence, making the employer responsible for all employment negligence. Employers would thus be prevented from recovering through subrogation provisions until employer contribution exceeds the percentage of employment negligence.

INTRODUCTION

Presently in California there exists a unique triangular relationship in workers' compensation/third party lawsuits. The relationship between employer and employee is governed by the no-fault doctrine of workers' compensation. This allows the employee a guaranteed recovery of compensation benefits regardless of fault. These benefits are his sole remedy against the employer. After the Li v. Yellow Cab Co. decision, the fault concept of comparative negligence governs the relationship between a third party defendant and an injured employee. The injured employee may recover from the third party only those damages which the third party has caused. The employee is not entitled to

1. For the purposes of this Comment, "third party action" will mean an action involving an employer, an injured employee covered by workers' compensation benefits, and a negligent third party tortfeasor. The negligence of the employer or the employee will be stated when appropriate.
3. Id.
a recovery for damages attributable to his own negligence. The remaining relationship between the employer and the negligent third party requires the application of both the doctrine of workers' compensation and the doctrine of comparative negligence through subrogation provisions. The difficulty arises in attempting to apply these two conflicting sets of rules to the same fact situation. This problem is further compounded by the existence of employer or employee negligence.

This Comment will analyze the progress of the California courts in resolving how negligence occurring within the scope of employment affects the employer's right of subrogation. Employment negligence can be found in three ways: 1) direct employer negligence; 2) employer negligence imputed from the negligence of a co-employee of the injured employee; and 3) imputed employer negligence from the negligence of the injured employee himself. Only the third point has not been settled by the California Supreme Court. This Comment will propose a solution which will create employer liability in all areas of employment negligence.

BACKGROUND

The California Labor Code grants a right of subrogation to employers in third party actions. Through subrogation, an employer can recoup the amount of an employee's workers' compensation award from the employee's third party recovery. The code provides three alternative methods to effect an employer's right: 1) he may bring an action directly against the third party; 2) he may join as a party plaintiff or intervene in an ac-

5. The apportionment of damages between a negligent injured employee and a negligent third party continues to be governed by joint and several liability. Therefore, while a negligent employee will never be able to recover damages due to his own negligence, application of joint and several liability may in some cases result in additional liability on the part of the negligent third party. Arbaugh v. Froster & Gamble Mfg. Co., 80 Cal. App. 3d 500, 145 Cal. Rptr. 608 (1978); see text accompanying notes 38-39 infra.


7. CAL. LAB. CODE § 3300 (West 1971).

8. Id. § 2801.

9. The theory of imputed employer negligence from the negligence of the injured employee was first set forth in Witt v. Jackson, 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961). This Comment proposes that the negligence of the injured employee continue to be imputed to the employer under the doctrine of comparative negligence.

10. CAL. LAB. CODE § 3852 (West 1971).

11. Id. § 3856.

12. Id. § 3852.
tion brought by the employee; or 3) he may allow the employee to prosecute the third party action and subsequently apply for a first lien against the amount of the employee's recovery.

Neither the Labor Code nor its legislative history, however, indicate how the employer's statutory right of subrogation might be affected by either the employee's or the employer's contributory negligence.

In 1961, the California Supreme Court decided the landmark case of Witt v. Jackson. Witt clarified ambiguities in the Labor Code by holding that an employer would never be entitled to his right of subrogation if either he or his injured employee were contributorily negligent. The case involved two employees (one negligent, one free of fault), a negligent third party tortfeasor and a non-negligent employer. In determining their respective rights of recovery and reimbursement the court, applying the doctrine of contributory negligence, established two rules.

Initially, the court noted that the lower court, in applying Globe Indemnity Co. v. Hook, had properly imputed the employee negligence to the employer. By imputing the employee negligence the Witt court found that the employer was a concurrently negligent tortfeasor. Applying the theory that, "[n]o one can take advantage of his own wrong," the court denied the employer his statutory right to reimbursement of the workers' compensation funds already paid to the negligent employee.

The court's next holding was more controversial. Using the same approach, the court also denied the employer's claim of reimbursement for the funds expended to the non-negligent employee. The court concluded that once the employer was found to be a concurrent tortfeasor he should be considered negligent with respect to all the parties in the suit. In this manner the negligent third party and the employer were required to share liability for

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13. Id. § 3853.
14. Id. § 3856.
17. Although the employer was actually free from fault, the court found him to be a concurrent tortfeasor by imputing the negligence of the employee to the employer. Witt v. Jackson, 57 Cal. 2d 57, 366 P.2d 641, 650, 17 Cal. Rptr. 369, 380 (1961).
18. 46 Cal. App. 700, 189 P. 797 (1920).
the injuries suffered by the employees. The employer was required to contribute through compensation benefits and the third party to contribute through payment of the civil judgment assessed against him.

The court's denial of the employer's right of subrogation led to the second, and perhaps most important rule of Witt: that the amount already paid in workers' compensation must be deducted from the employee's third party damages to prevent a double recovery. In this way the burden of compensating the injured employee was more equitably distributed. The third party was responsible for any damages left uncompensated by workers' compensation, the negligent employer was not allowed to take advantage of his own wrong, and the non-negligent employee was fully compensated but not allowed a double recovery.

The "Witt defense" enjoyed broad application under the doctrine of contributory negligence, and was frequently used by third party defendants to reduce the amount of their liability whenever the employer was a concurrent tortfeasor. In 1975, the "all or nothing" rule of contributory negligence was replaced by the more equitable doctrine of comparative negligence in Li v. Yellow Cab Co. The Li case involved two negligent parties. The Li court held that in negligence cases, the liability of each party should be determined in direct proportion to fault.

Although the application of comparative negligence to workers' compensation/third party actions is not settled, its effect on Witt v. Jackson is clear. The "Witt defense" is not applicable under comparative negligence. The first holding in Witt, which imputed the employee negligence to the employer, was made necessary by the prevailing doctrine of contributory negligence. A contrary holding would have exposed the third party defendant to liability for damages to the employer despite a finding of non-liability for damages to the injured employee. The court recognized the in-

20. Witt v. Jackson, 57 Cal. 2d 57, 360 P.2d 641, 17 Cal. Rptr. 369 (1961). Because this money was determined by the court to be unavailable to the employer because of his negligence, the court allowed the third party to take advantage of the windfall.
21. Id.
24. Id.
27. Under contributory negligence, if the injured party were found to be even 1% negligent he was denied recovery. Thus, in Witt v. Jackson a finding that one
consistency inherent in such an approach and acted to place the employer in the same position with respect to the third party as the employee. Recovery was not allowed either directly or through subrogation if a plaintiff employee was found to be even one percent negligent.28

Similarly, the second holding, which required an automatic reduction in damages equal to the amount of workers’ compensation benefits expended, was also compelled by contributory negligence. The holding was designed to prevent a double recovery certain to occur in all cases prior to Li where the employee was free of fault and the employer and a third party were concurrently negligent. A non-negligent employee would be fully compensated by money received from the third party. Any workers’ compensation benefits received would constitute “double recovery”—a recovery in excess of the plaintiff employee’s damages. The court supported a policy that would prohibit double recovery and yet would not allow a negligent employer29 to recover this amount through subrogation and thus take advantage of his wrong. Consequently, under contributory negligence the only alternative was to allow the third party defendant a windfall by reducing his total liability by the amount of compensation benefits paid to the injured employee.30

Both of the holdings in Witt v. Jackson31 were necessarily decided under the “all or nothing” rule of contributory negligence. When this rule was replaced by the doctrine of comparative negligence the Witt holdings ceased to have any practical applicability. Although the policies set forth in Witt may have continuing vitality after the adoption of comparative negligence,32 the rules them-
selves retain no independent validity. Given the inapplicability of Witt, the courts must now re-examine the rights and liabilities of the parties in workers' compensation/third party actions in light of the new comparative negligence doctrine.

**Apportionment of Damages When Employer Is Negligent**

The problem in applying comparative negligence to workers' compensation/third party actions is twofold. First, the underlying policy in workers' compensation is to guarantee recovery to the injured worker, irrespective of fault. In exchange for this guaranteed recovery, the duty of the employer to pay is statutorily limited, also irrespective of fault. This scheme is in direct opposition to the holding of Li which imposes liability in direct proportion to fault. These conflicting policies must be reconciled to reach an equitable result in workers' compensation/third party actions.

Second, although the Li case involved only two parties, the court recognized that additional problems may arise in cases involving multiple tortfeasors. American Motorcycle Assn. v. Superior Court settled the question of multiple tortfeasors in cases outside the workers' compensation arena by maintaining joint and several liability. Some workable means must be found to preserve the equity of joint and several liability while maintaining the goals of workers' compensation. Application of joint and several liability to workers' compensation/third party actions will be difficult, primarily because an employer, irrespective of his negligence, is liable to his injured employee only up to the compensation benefits level. Furthermore, a third party cannot obtain contribution from an employer, nor can he obtain indemnification, absent a written agreement.

**Adoption of a New Rule**

In 1978, the California Court of Appeal in Arbaugh v. Proctor & Gamble Manufacturing Co. recognized the inconsistencies in applying the fault related doctrine of comparative negligence and the no-fault doctrine of workers' compensation to the same fact

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33. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).
34. Id.
35. CAL. LAB. CODE § 3864 (West 1971).
situation. The court acknowledged that the third party could assert the "Witt defense" of employer negligence and thus reduce his own liability by preventing the employer's recovery under subrogation. The court pointed out, however, that allowing the employer either "all or nothing" was inconsistent with Li and that the "Witt defense" must give way to a more equitable method of apportionment. The court adopted a rule which balanced the conflicting policies of comparative negligence with the underlying policies of workers' compensation law. The new rule stated that the negligent employer was "responsible for either the difference between the employee's total damages and the amount received by him from the third party or the total amount of workers' compensation benefits paid, whichever is less." Under the Arbaugh method of apportionment, the third party defendant was only responsible for his proportional share of the damages. To hold the third party defendant liable for damages he did not cause would be in direct opposition to Li. In those cases, however, where the employer's statutory compensation limits are less than his share of fault, the third party would be responsible for the balance of the employee's damages under joint and several liability. Thus, the third party defendant may be responsible for the injured employee's total damages less any compensation benefits even though he cannot later obtain indemnification from the employer. Although this result may seem unfair to the third party defendant, the inequity is no greater than that which already exists in cases where one joint tortfeasor is insolvent. As the Arbaugh court noted, comparative

37. Arbaugh involved a third party defendant who was 50% at fault, an employer who was also 50% at fault, and a non-negligent employee.

38. Id. at 509, 145 Cal. Rptr. at 614; see also Witt v. Jackson, 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961).


41. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978). Joint and several liability can require the third party defendant to pay more than his proportional share of fault even though he may not in a subsequent action sue the employer for indemnification. The court felt that the policy in favor of plaintiff recoveries should be perpetuated over the policy of liability in direct proportion to fault.
negligence and its companion doctrine, joint and several liability, are designed to allow plaintiffs an equitable recovery, not to protect defendants from the consequences of their tortious acts.\textsuperscript{42}

Application of the new rule to the negligent employer in \textit{Arbaugh} required the employer to contribute, but only up to his statutory compensation limits.\textsuperscript{43} This enabled the employer to recoup the benefits expended to the injured employee to the extent they exceeded the employer's proportional share of fault.\textsuperscript{44} Consistent with comparative negligence, the employer was required to share in the liability but never required to pay more than his statutory obligation\textsuperscript{45} under workers' compensation.

For example, assume that a third party is 50\% at fault, the employer is 50\% at fault and the employee is free of fault. The employee's total civil damages are determined to be $100,000 and the total compensation benefits of $25,000 have been paid. Under the \textit{Arbaugh} rule the third party would be responsible for $75,000 ($100,000 total damages less $25,000 compensation benefits).\textsuperscript{46} In this case the third party's liability exceeds his actual share of fault because the employer can only be held liable up to the statutory compensation level of $25,000. \textit{Arbaugh} held that in these cases the doctrine of joint and several liability automatically operates to hold the third party liable for all damages not recoverable from the employer under workers' compensation.\textsuperscript{47} The employer would not have a subrogation claim because the $25,000 already

\begin{footnotes}
   
  The legislature also favors employee recoveries. California Labor Code section 3852 grants to employees injured in the course of their employment the right to recover "all damages". This right may be satisfied in full against any tortfeasor judgment debtor. The effect is to require the third party defendant to pay the difference between his share of fault and the employer's liability whenever the employer is liable for the monetarily smaller compensation benefits instead of the difference between the employee's total damages and the third party recovery.

  \footnote{43. \textit{Arbaugh v. Procter \\& Gamble Mfg. Co.}, 80 Cal. App. 3d 500, 508, 145 Cal. Rptr. 608, 614-15 (1978). The court's requirement of contribution from the negligent employer injected the concept of fault into the employer's liability. This fault concept will not adversely affect the injured employee's recovery nor will it endanger the workers' compensation trade-off. The employer is simply prevented from taking advantage of his own negligence. The contribution requirement also provides the employer with added incentive to maintain safe working conditions.

  \footnote{44. \textit{Id.}


  \footnote{47. \textit{Id.}}

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paid out in compensation benefits is less than the employer's proportional share of fault which would be $50,000 (50% of $100,000). The employer's liability is limited to the lesser of either his statutory obligation or the difference between the employee's total damages and the amount received by him from the third party. In this case, the $25,000 is the lesser of the two. The employee would receive a total of $100,000 ($75,000 from the third party plus $25,000 from workers' compensation).

Assume now the same facts except that the total amount of workers' compensation benefits paid is $75,000 instead of $25,000. The result is slightly modified. The third party would now be responsible for $50,000 (50% of $100,000). The third party could not be responsible for more than his proportional share under joint and several liability because the employer is required to pay the difference between the third party liability and the employee's total damages. The employer would be responsible for $50,000 (50% of $100,000) of the $75,000 paid in compensation benefits. Application of the rule in Arbaugh results in employer liability for the difference between the employee's total damages ($100,000) and the amount received by the employee from the third party ($50,000) because this amount is less than the compensation benefits paid. Additionally, the employer would have a right of subrogation for $25,000 (the extent to which $75,000

48. Id.
49. Id.
50. The method for determining damages proposed in this Comment is somewhat different from the method suggested by BAJI. BAJI suggests that the amount of compensation benefits received by the injured employee always be deducted from his total damages to arrive at the amount of third party liability to the employee. In effect, the BAJI methodology takes a joint and several liability approach to all cases whether or not they specifically warrant it. When only third party and direct employer negligence is involved, the distinction between the BAJI method of assessing damages and that adopted by this Comment is strictly academic; in all cases the result is the same.

However, the BAJI methodology is somewhat shortsighted. If the Arbaugh approach is extended to employee negligence, the method adopted by BAJI will result in a windfall to the third party defendant in cases where all three parties are negligent. The method of determining liability proposed in this Comment prevents such a windfall. Joint and several liability is applied only in those cases where it is needed, in all other cases comparative negligence is applied. In this way a windfall to the third party is prevented and the equity of loss distribution among the parties is retained. Book of Approved Jury Instructions Committee, CALIFORNIA JURY INSTRUCTIONS CIVIL [BAJI] § 15.14 (Supp. 1979).

52. Id.
ceeded his $50,000 share of the liability) of the third party recovery in order to prevent the injured employee from receiving a double recovery. The injured employee would receive his full amount of damages, $50,000 from the third party and $50,000 from the employer in compensation benefits. The result is a full recovery of $100,000, not a double recovery in excess of $100,000.

Policy Considerations

This method of apportionment has allowed for a new means to perpetuate the policies enunciated in Witt v. Jackson as well as the policies of workers' compensation and comparative negligence. After Arbaugh, the employer cannot "take advantage of his own wrongdoing" because he will be liable for his proportional share of the damages up to his compensation limits. In all cases, the employer will be required to pay if he is negligent. Thus, there remains a monetary incentive to be more careful towards his employees in the future.

The Arbaugh decision also balances the conflicting policies of workers' compensation and comparative negligence. As stated in Li, the doctrine of comparative negligence is based on liability in direct proportion to fault. The essence of workers' compensation law is a trade-off. The covered employee gives up the right to sue and accepts instead his employer's guaranteed limited liability. The employer accepts liability regardless of fault in exchange for statutory liability limits. While each party loses some traditional tort rights, the loss is offset by the advantages of

53. Id.
54. Id. Practically, only $25,000 would be received by the injured employee directly from the third party because $25,000 of the third party recovery would go to the employer through subrogation and the employee would keep the $75,000 compensation benefits. See generally CAL. LAB. CODE §§ 3852, 3853, 3856(b) (West 1971).
55. 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961). The court was primarily concerned with preventing the employer from taking advantage of his own negligence and with preventing an employee from receiving a double recovery. The resulting rule required the negligent employer and third party defendant to share in liability for the employee's damages.
57. CAL. LAB. CODE § 3601(a) (West Supp. 1980).
59. The trade-off in workers' compensation results in two situations under the Arbaugh approach which may at first appear inequitable. In the first, a non-negligent employee will occasionally not be compensated for his full civil damages. This will occur whenever the employer is liable for the lesser amount of compensation benefits instead of the difference between the employee's total damages and the third party recovery. (This is assuming the third party could not be held responsible for damages in excess of his share of fault through joint and several liability.) The employee's diminished recovery reflects the workers' compensation
guaranteed quick recovery to the employee and limited liability to
the employer.

The rule adopted in *Arbaugh* preserves the workers’ compensa-
tion trade-off between employer and employee.\(^6\) The employee
continues to be guaranteed speedy recovery of his compensation
benefits regardless of fault. The employer, though required to
contribute, is likewise guaranteed that he will never pay more
than his statutory compensation limits. In accordance with com-
parative negligence principles the third party’s liability is limited
to his share of fault.\(^6\) The employer cannot take advantage of his
own wrongdoing because he too must contribute either the differ-
ence between the employee’s total damages and the third party
recovery or his total compensation liability. Employer reimbur-
sement is allowed to the extent his statutory liability exceeds his
share of fault. Finally, the tort policy against double recovery is
upheld. Employer reimbursement automatically prevents a
double recovery due to contribution by the employer which ex-
ceeds his share of fault. At most, the plaintiff employee can re-
ceive full damages.

Preservation of these policies has resulted in a fair and equita-
ble outcome for all parties. The interest of the third party is
maintained by relieving him of the heavy burden of full liability.
The employer, although required to contribute, maintains his sub-
rogation right and his statutory limits on liability. The employee
benefits by receipt of full damages.\(^6\)

**Arbaugh Approach Followed**

In *Associated Construction v. Workers’ Compensation*,\(^6\) the
California Supreme Court adopted and expanded the *Arbaugh*
trade-off whereby employees agree to accept the employers’ limited liability in ex-
change for a prompt guaranteed recovery regardless of negligence.

The second trade-off situation occurs when a negligent employee recovers his
full civil damages. Such a result seems to be inconsistent with *Li*. But the com-
parative fault doctrine does not govern the employee/employer relationship. The
employee is guaranteed compensation benefits regardless of his own negligence.
His full recovery results from employer contribution, not from an assessment of
fault under *Li*.

602 (1978).


See text accompanying notes 38-39 supra.

\(^6\) See generally Note, supra note 6.

rule for apportionment of damages, applying it to an employer credit situation. As in *Arbaugh*, the court recognized that the "development and application of comparative negligence principles has undermined the conceptual basis for the rule of *Witt*. The court ruled that the concurrently negligent employer is entitled to either a credit or reimbursement to the extent his statutory compensation liability exceeds his share of fault. Thus, the employer's claim will be denied until the ratio of his contribution to the employee's damages corresponds to his share of fault.

The Supreme Court's adoption of the *Arbaugh* rule in *Associated Construction* necessarily required the court to reject the method of apportionment proposed by the employer. The employer's proposal requested that the percentage of employer negligence be determined, followed by a reduction in the amount of employer credit or reimbursement by his percentage of fault. The employer could then take the reduced amount through subrogation without regard to the extent of prior contribution to the employee's damages.

The court recognized that such a rule would exaggerate the employer's already limited liability in many credit circumstances. In a reimbursement situation the third party defendant would get an unwarranted windfall. Both are undesirable results which are avoided under the method of apportionment adopted in *Associated Construction*.

The *Associated Construction* and the *Arbaugh* decisions dealt with employer negligence and how it affected the employer's right of subrogation. The next logical application of the principles

64. Although the court in *Associated Construction* dealt with the issue of employer credit instead of employer reimbursement the California Supreme Court later specifically applied the *Arbaugh* rule to reimbursement, in *Aceves v. Regal Pale Brewing Co.*, 24 Cal. 3d 502, 595 P.2d 619, 156 Cal. Rptr. 41 (1979). The employer credit situation arises in those cases in which the full amount of compensation liability has not yet been determined because of the possibility of further employee damage expenses. The employer generally pays through monthly installments up to his share of the liability. To the extent the employer might have paid beyond this amount prior to the trial determination of his share of negligence, he is entitled to a credit. This credit would be applied against any further compensation claims the employee might make to defray subsequent expenses related to his injury.


66. *Id.*

67. *Id.*, Note, supra note 6. This Note discussed the inequitable result which will occur when the method of apportionment proposed by the employer is applied to this area of law. The Note also stressed that the policies of workers' compensation and comparative negligence are not maintained under this method of apportionment.

enunciated in these cases is to the area of injured employee negligence, thus creating employer liability for all employment negligence.

**APPORTIONMENT OF DAMAGES WHEN AN EMPLOYEE IS NEGLIGENT**

Recently, the issue of employee negligence was taken up by a California Appellate Court in *Kemerer v. Challenge Milk Co.* In *Challenge Milk*, the employee, Mrs. Kemerer, was injured in the course and scope of her employment. Mrs. Kemerer's injuries were determined to be caused 30% by her own negligence and 70% by the negligence of the third party defendant. The third party defendant sought to introduce a "Witt type" defense and thus reduce his liability to the employer's compensation carrier. If the third party had been successful, his liability on the employer's subrogation claim would have been reduced by the percentage of negligence imputed to the employer. The result would have been a windfall to the third party defendant. But the court refused to allow the employee's negligence to affect the employer's right of subrogation. The employer was reimbursed the full compensation benefits expended to the injured employee. The court began by properly rejecting the defendant's *Witt* argument that the employee's negligence must be imputed to the employer. As stated previously, the *Witt* decision was based on the doctrine of contributory negligence. Adoption of comparative negligence, while not destroying the underlying *Witt* policy, invalidated the rule imputing employee negligence to the employer.

The court next addressed the “strict apportionment” method of damages. Strict apportionment was previously rejected by the California Supreme Court in *Associated Construction* as yielding an inequitable result. The court relied solely on the inappropriateness of this method to reject the argument in favor of a new method of apportionment. There was no discussion of the appor-

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70. Id.
71. See text accompanying notes 19-20 supra.
72. Note, supra note 6. The strict apportionment method would reduce an employer's liability for compensation benefits in proportion with his negligence. This injects fault into the otherwise no-fault concept of workers' compensation simply because a third party's negligence has contributed to the employee's injuries. Strict apportionment would also reduce a third party's liability by both the employee's and the employer's negligence. The result is a reduction in the employee's recovery to the benefit of the employer and third party.
tionment rule adopted in *Arbaugh* and how it might affect the question of employee negligence.

Furthermore, the court in *Challenge Milk* seemed overly concerned with the policies of comparative negligence. Workers' compensation principles were never mentioned in the decision. Also, the triangular relationship between third party defendants, employers, and employees was ignored. The court in *Challenge Milk* discussed only the doctrine of comparative negligence in the employer/third party relationship. By limiting the discussion of subrogation rights to the pertinent comparative negligence policies, the court disregarded the basis for subrogation—the workers' compensation statutes. Consideration of these statutes and the reason they were enacted should have led to a decision and rule similar to that in *Arbaugh*.

If the *Arbaugh* rule of apportionment had been applied in *Challenge Milk*, the court's objection to altering the employer's right of subrogation would have been eliminated. The court was primarily concerned with the possibility of windfall to the third party defendant. The windfall would occur when the employer's right of subrogation is reduced by his percentage of the negligence under the strict apportionment method. No third party windfall could occur under the *Arbaugh* method of apportionment because liability for all parties is linked directly to fault.

Finally, the *Challenge Milk* court erroneously relied on *Witt v. Jackson*. The holding that compensation benefits must be deducted automatically from the plaintiff's damages to prevent a double recovery is as unsound as the *Witt* imputation holding. The *Challenge Milk* court should have rejected automatic deduction of compensation benefits as it earlier rejected the *Witt* imputation argument. Under comparative negligence there is no longer a risk of double recovery in every case. In those instances when a double recovery is possible the *Arbaugh* rule provides a preferable solution. Under *Arbaugh* the employer's right

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73. See text accompanying notes 1-5 supra.
74. CAL LAB. CODE §§ 3852, 3853, 3856(b) (West 1971).
75. Kemerer v. Challenge Milk Co., 105 Cal. App. 3d 334, 164 Cal. Rptr. 397 (1980). The "Witt defense" under contributory negligence allowed for a windfall to the third party for the full amount of compensation benefits. In that case, the court was not concerned with granting the third party a windfall.
76. Under the *Arbaugh* method of apportionment the third party is always liable for his proportional share of damages. Although he may at times be subject to greater responsibility under joint and several liability, he may never pay less.
77. See notes 19-22 and accompanying text supra.
of subrogation automatically prevents a double recovery by allowing the employer a right of reimbursement for the excess funds.

**Employer Liability for Employment Negligence**

Before the *Arbaugh* apportionment method can be applied to the area of employee negligence, it is necessary to impute the employee negligence to the employer. The rationale for imputing employee negligence is that the employer should bear the burden of all employment negligence. Given that the injury in these cases occurs within the scope of employment, the employee should be entitled to a full recovery regardless of his negligence. The nature of the workers' compensation trade-off guarantees employee recovery regardless of fault in return for limited employer liability. Imputing employee negligence to the employer will not disrupt this trade-off. In all cases the employer will still be guaranteed that his liability will not exceed his compensation limits. Neither will imputing employee negligence to the employer adversely affect the third party. His liability will remain as it was, in direct proportion to fault, subject to joint and several liability.

There are various methods for imputing the employee's negligence to the employer. In California, respondeat superior imputes employee negligence and fault to the employer, whether or not there is an independent basis for employer negligence. The test for application of respondeat superior is essentially whether the employee was acting within the scope of his employment. This test is remarkably similar to the test for workers' compensation benefits. In both areas the employer's liability arises from an injury which results from a risk inherent to the business. By

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80. *Arbaugh v. Procter & Gamble Mfg. Co.*, 80 Cal. App. 3d 500, 145 Cal. Rptr. 608 (1978). *CAL. LAB. CODE § 3852* (West 1971) provides "the claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other than the employer."


placing the ultimate loss on the business through respondeat superior an incentive is provided for the employer to prevent negligence and accidents. The employer has control over the selection of employees, equipment, and various other factors contributing to accidents. Consequently, the employer should bear the responsibility for all employment negligence.

Traditionally, respondeat superior has been invoked to protect third parties, not injured employees. The injured employee is protected by his workers' compensation benefits, the very nature of which provides some employer incentive to protect the employee. A stronger, direct incentive to the employer to protect his employees would result from imputation of negligence through respondeat superior. This would not allow the employee to sue his employer for his own negligence; rather it would insure that the employer's rights against a third party are no greater than the employee's rights. This proportional reduction in the employer's subrogation rights would necessarily instill in him an additional incentive to prevent negligence in the workplace.

An alternative method for imputing employee negligence to the employer is subrogation. Labor Code section 3852 is the legislative recognition of an employer's equitable right of subrogation. Subrogation is defined as, “the substitution of one for another as a creditor, so that the new creditor succeeds to the formers' rights.” In workers' compensation this means that the employer succeeds to the rights of his employee to the extent the employer has paid compensation benefits. For recovery of this portion of the employee's special damages, the employer “stands in the shoes” of the employee. The subrogation scheme for reimbursement of compensation benefits is derivative, in the words of the California Supreme Court, “essentially the same action.”

Under the theory of subrogation, the employer must take responsibility for the employee's negligence because his claim liable to third parties under respondeat superior because the negligence of his agent/employee has injured a third party. It is an inherent risk in doing business that employees may be negligent and as a result injure a third party. The employer impliedly accepts responsibility for this risk under respondeat superior. The employer is liable to the injured employee under workers' compensation because employment injuries necessarily involve a risk inherent to the business.

89. Brief for Appellee at 19, Garner v. Sagee, No. 47719 (California First Appellate District May 1, 1980).
against the third party is derived from the rights of his employee. This assures the injured employee that the employer's rights against his recovery are no greater than the employee's rights against the third party, both are reduced by the employee's negligence.

**APPLICATION OF ARBAUGH TO EMPLOYMENT NEGLIGENCE**

Once the employer is responsible for all employment negligence, application of the *Arbaugh* method of apportionment is relatively simple. The negligent third party remains liable to the injured employee for all damages that he proximately causes. Joint and several liability may expose the third party to liability for the full amount of damages minus the employee's workers' compensation recovery. The employer will be liable for his and his employee's negligence whenever the employer must pay the difference between total damages and third party recovery. The employer's statutory limits will continue to insulate him from payment beyond his compensation coverage level. The result is that the employee will enjoy a full recovery in more cases because he will be compensated before the employer will be entitled to reimbursement.

For example, assume the third party is 50% at fault, the employer is 25% at fault and the employee is 25% at fault. Assume further that employee's civil damages are determined to be $100,000 and the total compensation benefits of $25,000 have been paid. Under the *Arbaugh* rule the third party is responsible for $75,000. The employer would be liable for the $25,000 already paid.

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91. It is significant to note that the *Arbaugh* rule did not differentiate between employer and employee negligence. *Arbaugh* did refrain from limiting the apportionment rule to employer negligence. The court did not require the employer to pay "his proportional share of the damages". Rather, he was required to pay the difference between the employee's total damages and the employee's third party recovery. From this language the rule may be interpreted to hold the employer responsible for all employment negligence, in other words, because the accident occurred within the scope of employment, the employee recovers his total damages irrespective of fault. See generally *Arbaugh v. Procter & Gamble Mfg. Co.*, 80 Cal. App. 3d 500, 145 Cal. Rptr. 608 (1978).


94. *Arbaugh v. Procter & Gamble Mfg. Co.*, 80 Cal. App. 3d 500, 145 Cal. Rptr. 608 (1978). This is an example where the employer is liable statutorily for less
paid in compensation benefits because this amount is less than the difference between the employee's total damages and the third party recovery. 95 The employer cannot be required to pay more because the workers' compensation policy incorporated into Arbaugh guarantees his liability will not exceed his statutory limits. 96 The employer would receive nothing on his subrogation claim because the $25,000 paid is less than the percentage of employment negligence 97 (25% employee plus 25% employer equals 50% or $50,000). The employee would receive $100,000 ($75,000 from the third party and $25,000 from the employer). 98

Assume now that the facts are unchanged except that the workers' compensation benefits are $75,000, all of which are paid. In this situation, the third party is responsible for $50,000 (50% of $100,000). The third party cannot be responsible for an additional amount under joint and several liability because the employer will be liable for the difference between the third party liability and the total employee damages. 99 The employer will be liable for $50,000 of the $75,000 paid in compensation benefits. In this instance, the $50,000 difference between total damages and third party recovery is less than the $75,000 statutory liability. The employer, therefore has a right of subrogation for $25,000 (the extent to which $75,000 exceeds $50,000 in employment negligence) in order to prevent a double recovery. The injured employee will receive a full recovery of $100,000. The employer's subrogation lien against the third party acts to prevent an employee double recov-

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95. Id.
96. Id.
97. Theoretically, the employer, if liable for all employment negligence, would also be responsible for the negligence of a co-employee. Where the negligence of two employees combines with the negligence of a third party to cause injury to one employee, the employer will be responsible for all employment negligence (the negligence of both employees as well as himself, if his negligence contributed to the injury).
98. This would not constitute a double recovery by the employee. The damages collected by him on the basis of fault are $75,000. He has not recovered an amount beyond that afforded him under comparative negligence and joint and several liability. The additional $25,000 recovery is based on the no-fault doctrine of workers' compensation. It is awarded because the accident occurred within the scope of employment. The $75,000 received under comparative negligence from the third party and the $25,000 received under workers' compensation from the employer therefore do not constitute a double recovery.
The preceding examples have assumed the third party has sufficient assets to pay his judgment debts. The fairness in application of the Arbaugh apportionment method is emphasized in cases where the third party has limited assets or insurance to pay his judgment debts. For example, assume the third party is 50% at fault, the employer is 25% at fault and the employee 25% at fault. Assume that total damages are $100,000, full compensation benefits of $25,000 have been paid, and the third party has insurance policy liability limits of $25,000 and no personal assets. The result would be a third party liability of $25,000. The employer would be responsible for the $25,000 compensation benefits already paid. His liability would not exceed this amount because $25,000 is less than the difference between total employee damages and the third party recovery. The employer could recover nothing under a subrogation claim because $25,000 is less than the amount attributable to employment negligence.

The employee would recover $50,000 ($25,000 from the third party, $25,000 from compensation benefits). Although this sum is substantially less than the employee's total damages, the Arbaugh apportionment allows for the most equitable employee recovery. In this case, if the employer were allowed to subrogate all or part of the third party recovery the employee would receive substantially less money. The employer would be made

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101. The occurrence of low policy limits in insurance policies held by negligent third parties is not uncommon. The effect is to reduce the injured plaintiff employee's recovery. This recovery should not be further reduced by employer subrogation lien until the employer has paid benefits in excess of the percentage of employment negligence. See text accompanying notes 10-14 supra.

102. See CAL. LAB. CODE § 3600 (West 1971). This is an example of the workers' compensation trade-off preserved by application of Arbaugh to the issue of employee negligence. The employee cannot be fully compensated for his damages. Although the employer has paid only $25,000, an amount less than the $50,000 attributable to employment negligence, the employee can recover no further from the employer. In exchange for guaranteed prompt receipt of $25,000 compensation benefits, the employee gives up his right to sue the employer. Id.

103. Note, supra note 6.

104. Arbaugh v. Procter & Gamble Mfg. Co., 80 Cal. App. 3d 500, 145 Cal. Rptr. 608 (1978). Other methods of apportionment do not balance the competing policies of workers' compensation and comparative negligence. The result is that one or the other of these doctrines is emphasized. This creates a distorted relationship between the three parties; one will benefit at the expense of the others.

105. If the employer were to receive any amount on his subrogation lien, that
"whole," at the expense of his injured employee. Such a result is unconscionable. The purpose of workers' compensation is to compensate and protect employees without exposing employers to unbearable liabilities. Subrogation has been allowed to reimburse the compensation fund to the extent third party liability would create a double recovery. Yet, subrogation should not be allowed to reimburse the compensation fund until the injured employee is fully compensated.

The Arbaugh method of apportionment recognizes that the presence of a third party should not destroy the no-fault nature of workers' compensation benefits. These benefits should be paid irrespective of fault. Under the Arbaugh rule the employer is granted a right of subrogation whenever the ratio of his contribution exceeds the percentage of employment negligence. This method does not deprive the employee of full compensation; rather, the compensation fund is reimbursed from excess dollars which would otherwise result in a double recovery to the employee.

Application of Arbaugh Does Not Create a Double Recovery

Application of the Arbaugh approach to the area of employee negligence has fostered criticism that an injured employee frequently receives a double recovery. However, a careful examination of the nature of the award will reveal that no such double recovery exists. The triangular aspect of the employee, employer, third party situation is unique. Each of the three relationships is governed by a different set of rules and principles. The relationship between employee and employer is based on a no-fault theory. Compensation benefits are paid to employees regardless of fault. This is true even if the employee is totally at fault. The presence of a negligent third party should not alter this no-fault relationship.

In contrast, the employee's third party recovery is based on

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106. See CAL. LAB. CODE § 3600 (West 1971).
107. Id. § 3852.
108. Id. § 3600.
111. Note, supra note 6, at 1051.
112. Id.
comparative fault. Joint and several liability may, however, subject the third party to liability over and above his percentage of fault whenever the employer's statutory liability is less than his actual share of fault.

The injured employee's recovery is a combination of employer and third party liability. Although the sum of these two figures may exceed the amount the employee would recover under the tort system, this does not constitute a double recovery. Injured employee recovery is not based on the tort system alone. Compensation benefits are an additional, no-fault, employee recovery that arises from the nature of the accident and the employment relationship. Practically, if these funds were treated as creating a double recovery, fault would be injected into the no-fault system of workers' compensation. The employee would be deprived of these benefits whenever his negligence combined with third party negligence to cause him harm. The employer would be entitled to reimbursement of these excess workers' compensation funds. This would allow the employer to rely on his employee's negligence to avoid contribution, a result never before permitted under workers' compensation.

Under the Arbaugh approach, a full recovery is not necessarily a double recovery. A double recovery is risked in those cases where employer and third party contribution exceeds the employee's total damages. When this occurs, the employer is granted an equitable right of subrogation which restores the balance of rights and liabilities between employee, employer and third party.

113. Id.
114. A double recovery occurs only when there is a recovery in excess of damages. This could only occur when one of the parties has contributed more than his proportional share. A double recovery is prevented under the Arbaugh method of apportionment by the employer's subrogation lien.
POLICY CONSIDERATIONS

The *Arbaugh* method of apportionment not only preserves the equities between parties, it perpetuates social policy as well. Society favors a strong employer incentive to protect employees and the public. This incentive is incorporated in the *Arbaugh* rule. The employer is encouraged to refrain from personal negligence because his subrogation rights will be decreased proportionally.\(^{118}\) He will only be entitled to reimbursement to the extent he has paid compensation benefits beyond his share of negligence.\(^{119}\) Additionally, the employer is responsible for the negligence of his employees when they or third parties are injured. Liability for all employment negligence provides employer incentive to choose employees carefully, to supervise diligently, and to urge employees to be conscientious.\(^{120}\)

Application of the *Arbaugh* rule to cases involving employee negligence will also further the policies of loss distribution and compensation of victims. The losses are more equitably distributed to the public under the *Arbaugh* rule than under other methods of apportionment.\(^{121}\) The employer is best able to bear the burden of employment negligence.\(^{122}\) His decrease in subrogation rights in proportion to employment negligence will be indirectly distributed to the public through his workers' compensation insurance.\(^{123}\) This avoids placing the burden on an injured employee with only limited means to spread losses.

The social policy for compensation of victims is strongly supported under the *Arbaugh* apportionment of damages. The injured employee is fully compensated in more situations than under other methods of apportionment.\(^{124}\) The third party recovery is not subrogated to the employee's third party recovery until the employer has paid compensation benefits exceeding the total employment negligence.\(^{125}\) The rule favors injured employee recoveries over employment reimbursement through subrogation.

CONCLUSION

The adoption of comparative negligence in *Li v. Yellow Cab*

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119. Id.
121. Note, *supra* note 6, at 1050-1051.
122. Id.
125. Id.
created uncertainty as to the employer's subrogation rights when either the employer or the employee is negligent. The case of Arbaugh v. Procter & Gamble Manufacturing Co. has solved this problem with respect to directly negligent employers. The court held the employer liable for either the difference in the employee's total damages and his third party recovery or the total compensation benefits paid, whichever is less. This requires the employer to contribute, but not beyond his statutory compensation liability. Consistent with comparative negligence, the employer cannot take advantage of his own wrong. Subrogation is allowed only when the employer has paid compensation benefits exceeding his share of fault.

The method of apportionment adopted by the court in Arbaugh should be applied in cases where the injured employee was negligent. Employee negligence would be imputed to the employer making him responsible for all employment negligence. The employer's subrogation lien on employee recoveries from third parties would then be denied until his contribution through workers' compensation benefits exceeds the total employment negligence.

This approach is consistent with the objective of both workers' compensation and comparative negligence. The employer is required to contribute, yet would pay no more than his workers' compensation liability. The negligent third party is liable in direct proportion to fault, subject to joint and several liability in some instances. The employee receives compensation benefits regardless of fault and a third party recovery reduced by his share of fault. The result is an increased incidence of full employee recovery with the risk of double recovery removed by the employer's right of subrogation.

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128. Id.