

## Borrowed Servants and the Theory of Enterprise Liability

A third party who hires the regular employee of another to perform temporary services may sometimes be held liable for the torts of his "borrowed servant." Unfortunately the courts have failed to elaborate consistent criteria for determining when the temporary employer is liable and when the general employer may be held as an independent contractor.

The borrowed servant doctrine is most frequently invoked against those who rent machinery or equipment together with an operator.<sup>1</sup> In a typical situation Tinkers, a building contractor constructing a baseball stadium, needs a high-lift device to put in the towering center-field bleachers. He arranges with Evers, owner of a crane rental company, for the services of a crane and operator. Evers dispatches the crane and operator Chance, whom he instructs to take good care of the machine and to follow Tinkers' orders. Employees of the building contractor tell Chance where to operate and give him signals for raising, lowering, and swinging the crane boom and line; he manipulates the controls and observes the crane company's general safety rules. The stadium rises rapidly until the day when Chance, daydreaming of the pleasurable hours he will some day spend in these very bleachers, forgets to wait for a signal—and deposits two tons of steel on the foot of a bystanding spectator.<sup>2</sup>

1. Trucks, cranes, motorcycles, buses, tractors, power hoists, steam shovels, steam-rollers, bulldozers, roadgraders, backloaders, and dragline machines are frequent instruments of damage and death in this field. See Annot., 17 A.L.R.2d 1388 (1951). The machinery rental cases are only one phase of the borrowed servant problem of course, but probably the most important phase.

2. Injuries to the public, to property, to employees of independent contractors, to the employees of the borrower, and to the allegedly borrowed employee all usually require the same determination of whether a second master-servant relation was established. The tests and procedures for attacking the question are the same, though complicated sometimes by contract provisions, liability insurance coverage, and workmen's compensation systems.

Injury to the general contractor's employee by the temporary employee's negligence is an especially common and complex subject of borrowed servant litigation. The injured employee usually collects workmen's compensation insurance from his usual employer, the building contractor. However, he is barred by law from suit to recover actual damages from him, though they may be far more than the insurance plan awards. The victim and the compensation insurer usually have an action against negligent third parties to the accident, nonetheless, so they may attempt to prove that the negligent temporary employee was still in the service of the general employer (crane company here). 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 65, 71 (1961). See note 42 *infra*.

Assuming that the injured party can prove Chance's negligence and his own lack of it, he will have the traditional tort remedy against the unfortunate servant. The victim would naturally prefer to sue the servant's employer, since Chance is probably judgment-proof. But who is the employer in this case? Building contractor Tinkers will argue that Chance is the servant of an independent contractor, while crane company owner Evers will claim that Chance was at the time of the accident the borrowed servant of Tinkers. Except in Pennsylvania, only one employer may be held liable.<sup>3</sup>

Under prevailing law the crane operator is unlikely to be deemed a borrowed servant. Ostensibly applying the tests of "control" and "whose business," together with a presumption that the original employment relation has not been superceded, most courts will assign liability to the crane company as an independent contractor.<sup>4</sup> This outcome is not assured, however, and the tests are flexible enough to justify the opposite result without embarrassment. This note will briefly survey the conventional doctrines, then suggest a revision in accord with emerging theories of enterprise liability.

## I.

Both the borrowed servant and the independent contractor doctrines are variations on *respondeat superior*, and their application is governed by the same tests of the employment relationship. Under a classic formulation of the most important test, "[he] who has the power to control and direct the servants in the performance of their work"<sup>5</sup> is master, and assumes liability for their negligent acts. If this party is the general employer, then he is an independent contractor; if it is the temporary employer, then he has a borrowed servant.

But in almost all borrowed servant cases control seems to be split, and

3. This single liability rule is a surprising deviation from an established pattern in the law of contractors and subcontractors. Generally when a general contractor is held liable for torts of a subcontractor's employee, the subcontractor remains liable as well. When a temporary employee is found to be a borrowed servant, his original master in effect being held not to be an independent contractor, then the same reasoning might apply to make either or both employers liable. This note will argue that there are reasons for preferring recovery from one of the employers, and will describe a method by which that recovery may be guaranteed by the other.

4. Thus the borrowed servant situation is one in which the independent contractor doctrine remains very much alive. This is in contrast to its general decay and near demolition by a growing list of exceptions, 2 RESTATEMENT (SECOND) OF TORTS § 409, comment b (1965). The exceptions might easily be applied to make the temporary employer liable for a rented machinery operator's tort, but they are not.

5. Standard Oil Co. v. Anderson, 212 U.S. 215, 222 (1909).

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one may reasonably say that either or both parties have it.<sup>6</sup> The control test invariably calls for the employer with the right of control, rather than actual control, to be held. Yet the following indicia of the right of control will almost always be divided between the general and temporary employers: power to hire and fire; power to determine hours of work; power to fix wages; duty to pay social security and workmen's compensation insurance premiums; power to train for the job; power to establish operating procedures and safety rules; fact of daily reporting for work at a particular place; power to replace or penalize for misconduct; power to direct for what purpose work should be performed, when it should be performed and the manner of performing it in the particular situation; likelihood of observing and adjusting the operations; ownership of the instrumentality involved; provision for maintenance and service; place of storing the instrumentality when not in use.

Cardozo, in a commonly quoted passage, used burden of proof to resolve doubts about control:

The rule now is that as long as the employee is furthering the business of his general employer by the service rendered to another, there will be no inference of a new relation unless command has been surrendered, and no inference of its surrender from the mere fact of its division . . . .<sup>7</sup>

This formulation makes the temporary employer liable only upon proof of a *total* transfer of the right of control. But a rental business would almost never divest itself of all authority over its employees.<sup>8</sup> The Cardozo statement, if taken literally, amounts to abandonment of the borrowed servant doctrine.<sup>9</sup> Most courts do apply the presumption that

6. See Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 MICH. L. REV. 1222, 1228-31 (1940).

7. Charles v. Barrett, 233 N.Y. 127, 129, 135 N.E. 199, 200 (1922).

8. *But see* Welborn v. Dalzell Rigging Co., 181 Cal. App. 2d 268, 5 Cal. Rptr. 195 (1960), where a billing order signed daily by the renter of a crane contained the terms: It is distinctly understood and agreed that the sole function of Owner is to furnish equipment and/or operators for the use of Customer and that such equipment and operators shall be under the exclusive direction, supervision, and control of Customer during performance of this Work Order.

*Id.* at 271-72, 5 Cal. Rptr. at 197. But this transparent facade was disregarded in holding the general employer (Owner) liable; the court noted that the hiring, firing, training, and operational procedures of crane operators remained in the hands of the general employer. Such attention to facts rather than contract provisions is usual in borrowed servant cases. Kirkwood v. Sikorski, 262 Minn. 434, 115 N.W.2d 32 (1962); Rumberger v. Welsh, 131 F.2d 384 (2d Cir. 1942).

9. Wylie-Stewart Mach. Co. v. Thomas, 192 Okla. 505, 507, 137 P.2d 556, 558 (1943) (criticizing and rejecting explicitly the extreme requirement of control shift). Nonetheless shift of all control still seems to be demanded by some courts, as in California, e.g., Doty

the original master-servant relation continues, but they often soften the harsh requirement for rebutting it; they continue to weigh and balance the diverse indicia of control.<sup>10</sup> Predictably, the balancing process is unreasoned and unpredictable.<sup>11</sup>

The purpose of the control test is no more settled than its application. Judicial emphasis on the power of control, rather than the actual exercise of control, opens the test to the criticisms made of control as a basis for *respondeat superior* generally. In a nation of small shopkeepers, with a tort theory dominated by fault, the master's control over his tortious servant was a plausible channel for imputing the servant's guilt to him. When the master actually commanded the wrongful act or missed a clear opportunity to forbid or prevent it, his own culpability was apparent. Even when the wrong of the servant was not directly related to a prior wrong of the master, the feeling still prevailed that the evil might never have come to pass had the master commanded his servant in some other way.<sup>12</sup>

Today hardly anyone believes that the *fault* of the employee can be imputed to his corporate master. Modern commentators have discarded the blameworthiness justification for the control test in favor of a more pragmatic emphasis on the potential for accident prevention.<sup>13</sup> Placing

v. Lacey, 114 Cal. App. 2d 73, 249 P.2d 550 (1952), and cases collected in Comment, *Borrowed Servant Doctrine*, 14 WASH. & LEE L. REV. 40, 44 n. 18 (1957). Cf. Ciejek v. Crane Serv. Co., 351 F.2d 788, 791 (D.C. Cir. 1965) (an "especially strong showing" required to prove operator a borrowed servant) and *Younkers v. Ocean County*, 130 N.J.L. 607, 33 A.2d 898 (1943), which asks whether the general employer would win in a hypothetical conflict of authority over employee's conduct.

10. The problem is what degree of control short of absolute control is sufficient to make the temporary employer liable. 1 RESTATEMENT (SECOND) OF AGENCY § 227, comment a (1957) states the common requirement that the relation at the time of the specific negligent act from which injury results is determinative; but it also lists, *id.* at § 220 (2), ten factors which are relevant to finding that relation, among them some so remote from the specific act as length of time and method of payment in the employment. One judicial approach is to throw all the operative facts about the temporary employment into the hopper and determine the "degree or extent of severance and transfer [of control] in the specific situation," *McFarland v. Dixie Mach. & Equip. Co.*, 348 Mo. 341, 351, 153 S.W.2d 67, 71 (1941), while another is to concentrate on those facts with a close practical relation to the specific act, *McCollum v. Smith*, 339 F.2d 348 (9th Cir. 1964).

11. Compare, e.g., *Nepstad v. Lambert*, 235 Minn. 1, 50 N.W.2d 614 (1951), with *Welborn v. Dalzell Rigging Co.*, 181 Cal. App. 2d 268, 5 Cal. Rptr. 195 (1960). In these representative cases a servant or foreman of the temporary employer gave signals for specific movements of the crane to perform the task for which the machine was rented; the negligence of the rented crane operator resulted in injury. In *Nepstad* the court held such evidence of control sufficient to make the operator a servant of the borrower, while in the *Welborn* case the giving of directions was regarded as inadequate evidence of control. The legal effect of such signals inspired sharp majority-minority clashes in *Wylie-Stewart Mach. Co. v. Thomas*, 192 Okla. 505, 137 P.2d 556 (1943), and *McCollum v. Smith*, 339 F.2d 348 (9th Cir. 1964).

12. See generally 2 F. HARPER & F. JAMES, TORTS § 26.3 (1956); Stevens, *The Test of the Employment Relation*, 38 MICH. L. REV. 188, 198 (1939).

13. See generally Douglas, *Vicarious Liability and Administration of Risk*, 38 YALE L.J. 584, 720 (1929); 2 F. HARPER & F. JAMES, TORTS § 26.3 at 1363 (1956).

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costs on those in control will encourage them and their insurance companies to locate hidden dangers and upgrade safety procedures.<sup>14</sup> But this rationale, however sensible, does not explain the way courts use the control test in borrowed servant cases. Courts do not, in fact, look to see which employer could best have prevented the specific accident in question; they openly disregard the real influence of the employers in the job situation in favor of the abstract power over the employee in his whole course of duty.<sup>15</sup> As applied, the control test makes little sense either for the borrowed servant problem or for *respondeat superior*.

In addition to the control test, courts often determine borrowed servant questions by asking "whose business" is being done by the employee.<sup>16</sup> This test is even more ambiguous and sterile than the control criterion. The phrasing of the question "whose business" implies that only one employer is being served; yet for machinery rentals it is clear that the servant operator is participating both in the business of equipment renting and in the business for which the equipment is rented. Clearly both enterprises require the operator's services in order to accomplish their tasks and to make their profits.<sup>17</sup>

14. See generally Douglas, *supra* note 13; 2 F. HARPER & F. JAMES, TORTS § 13.5 (1956). But note the limitations on the validity of this accident prevention rationale: it too is constructed on the partial fiction that employers can find dangers before they cause injury, and it disregards that quota of accidents which is the inevitable cost of any activity, regardless of safeguards. See Harper, *The Basis of the Immunity of an Employer of an Independent Contractor*, 10 IND. L.J. 494, 498-99 (1935); A. EHRENZWEIG, NEGLIGENCE WITHOUT FAULT § 16 (1951).

15. E.g., Kelley v. Summers, 210 F.2d 665 (10th Cir. 1954) (control of dangerous crane operation near exposed electric line held to be in absent general employer); Peters v. United Studios, 98 Cal. App. 373, 277 P. 156 (1929) (driver of tractor under "control" of general employer while performing under borrower's directions on studio set); Standard Oil Co. v. Anderson, 212 U.S. 215 (1909) (winch operator borrowed and directed by stevedore company still under control of ship owner). But see McCollum v. Smith, 339 F.2d 348 (9th Cir. 1964).

The borrowed servant cases often stretch the control test so far that it becomes meaningless; in some fields of *respondeat superior*, moreover, control as a working criterion has been discarded altogether. Smith, *supra* note 6, at 1231-33.

16. The "whose business" terminology was introduced in the earlier cases as a generalization to be proved by evidence of control.

To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work.

Standard Oil Co. v. Anderson, 212 U.S. at 221-22.

The concept was similarly described in the text accompanying note 5 *supra*. The emergence of "whose business" as a separate test may be seen as an end run around the insurmountable control requirement set forth in Charles v. Barrett, 233 N.Y. 127, 135 N.E. 199 (1922). See Smith, *supra* note 6, at 1233-44. The test seems to have declined in popularity since Smith noted an increased emphasis on it.

17. In the realization that "often the elements that normally call for *respondeat superior* liability are so divided that either one of the employers might justifiably be held," Haw v. Liberty Mutual Ins. Co., 180 F.2d 18, 21 (D.C. Cir. 1950), the courts of Pennsyl-

A third possible test, rarely adopted by the courts, is the "scope of the borrower's business" test. This approach, suggested by Talbot Smith in 1940,<sup>18</sup> would extend the liability of the borrower only to activities within his normal sphere of operations, or within the usual range of operation of similar enterprises. If the activity or skill of the temporary servant is not part of the normal range of the borrower's business, then the general employer is held.<sup>19</sup> Normal range of business includes those parts of the operation for which the borrower himself maintains staff, facilities, and equipment.<sup>20</sup> A building contractor who owns and operates no cranes himself would not be held liable for the negligence of a rented crane's rented operator. A law firm would not be held for the torts of a plumber called in to fix the water fountain. Yet a major trucking firm would answer for torts of the driver of an extra truck rented during a period of heavy demand.

Smith inadequately explained the theoretical justification for his test. His starting point, he claims, is

. . . the undoubted conviction of our people at the present time . . . that a business must pay the reasonable cost of its passage. For acts within the fair scope of the business, its liability should be fixed.<sup>21</sup>

But since he failed to specify the goals served by enterprise liability, courts have usually missed the point of his test.<sup>22</sup> They have dismissed

vania have permitted juries to hold both employees liable when joined as defendants. *Kissell v. Motor Age Transit Lines*, 357 Pa. 204, 53 A.2d 593 (1947); *Siidekum v. Animal Rescue League*, 353 Pa. 408, 45 A.2d 59 (1946); *Grasberger v. Liebert & Obert, Inc.*, 355 Pa. 491, 6 A.2d 925 (1939). This is termed a "sensible result" in 2 F. HARPER & F. JAMES, *Torts* § 26.11n.14 (1956), because it better reflects the ambivalence of authority and of benefit which exists in most cases. It also assures compensation should one party be judgment-proof; but there are strong reasons for rejecting the solution. See note 43 *infra* and accompanying text.

18. Smith, *supra* note 6, at 1248-54.

19. *Id.* at 1248-49.

20. *Id.* at 1249-50.

21. *Id.* at 1248.

22. See, e.g., *McFarland v. Dixie Mach. & Equip. Co.*, 348 Mo. 341, 153 S.W.2d 67 (1941), concerning a bulldozer rented from defendant machinery company by the WPA for use in clearing land. During the operations the machine swerved suddenly, probably through the negligence of the rented operator, injuring a WPA man who was riding the apparatus. The court, attempting to apply Smith's test among others, found that operating the bulldozer for clearing and pulling was within the scope of the WPA's business, and that the machine company was not liable. This result is surely incorrect under Smith's test. Although there was clearing work to be done on the WPA job, the WPA did not itself maintain a force of bulldozers and drivers for the task. The scale of the temporary employer's own equipment ownership and organization are more important for "scope of the business" than the requirements of a specific task; otherwise the temporary employer would *always* bear liability. See Smith, *supra* note 6, at 1249-50. *But see White v. Bye*, 342 Mich. 654, 663, 70 N.W.2d 780, 784 (1955), in which the court applied the "scope of the business" test correctly. Crane and operator rented by building contractor

it as no less confusing than the others,<sup>23</sup> and reduced it to one of several factors to be considered "in determining the degree of severance and transfer" of the original employment relationship.<sup>24</sup> Instead courts hark back to the control and "whose business" tests for determination—or rationalization—of borrowed servant cases.

But if Smith's basic premise that a business must pay the reasonable cost of its passage were more fully elaborated, a better approach to the borrowed servant problem could be developed. The goal of this discussion will be to explain why, after all, it makes any difference *which* employer is held; for if the only point is to pay a victim's hospital bill, a simple rule of joint liability would suffice.<sup>25</sup>

## II.

As an alternative to the much criticized fault system, many commentators have suggested a system of "enterprise liability" under which producers and manufacturers pay for all accidents associated with their products regardless of fault.<sup>26</sup> Enterprise liability, in their theory, is not at all a scheme for raiding deep pockets. Indeed, it counts on the manufacturer's passing on the cost of accidents to the consuming public. By this mechanism, the price of each product will be made to reflect the cost of accidents entailed in its production. Enterprise liability works in service of a rational allocation of resources and meaningful expression of consumer preferences.<sup>27</sup>

Accidents and injuries are part of the costs of any activity, and may

were then borrowed by boiler installing crew. Negligence of the operator injured a construction employee, and the crane rental company sought to prove its operator to be the borrowed servant of the building contractor or the boiler installer. The court concluded that the boiler installer used cranes only occasionally and maintained none of his own; thus crane operation was not within the scope of his business. The test was not applied to the building contractor, but it would have produced the same result—apparently the needs of this sort of construction did not justify maintenance of his own crane fleet by the building contractor.

23. Comment, *Borrowed Servant Doctrine*, 14 WASH. & LEE L. REV. 40, 47 (1957); F. MECHEM, OUTLINES OF AGENCY § 465 (4th ed. 1952). Mechem demonstrates no grasp at all of the economic basis of the proposed test. See text accompanying notes 39-40 *infra*.

24. *McFarland v. Dixie Mach. & Equip. Co.*, 348 Mo. at 351, 153 S.W.2d at 71. The *McFarland* court considered "scope of the business" to be incorporated into 1 RESTATEMENT (SECOND) OF AGENCY § 220(2)(h): "whether or not the work is a part of the regular business of the employer."

25. Note 17 *supra* and text accompanying note 43 *infra*.

26. Douglas, *supra* note 13; A. EHRENZWEIG, *supra* note 14; Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961) [hereinafter cited as Calabresi, *Risk Distribution*]; Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965) [hereinafter cited as Calabresi, *Decision for Accidents*].

27. Calabresi, *Risk Distribution* 501-02.

be predicted over the long term with a certain statistical inevitability. The costs of these injuries to society can to some extent be quantified—even the costs of pain or loss of life are often roughly estimated, and expressed in jury awards and death benefits. These accident costs, like the more commonly considered costs of production, must be reflected in the market price of the products which engender them if the consumer is to be able to make meaningful market decisions. For if some of the products vying for his attention do not reflect the costs required to produce them, then the consumer's buying choices will be distorted, the wrong activities will be encouraged, and a misallocation of resources will result.<sup>28</sup>

This resource allocation theory of enterprise liability has been aptly termed "general deterrence."<sup>29</sup> Once the prices of products reflect their accident costs, consumers will seek safer (now cheaper) substitutes and manufacturers will seek safer means of production.

While promoting economic efficiency, enterprise liability also "spreads" the costs of accidents among the many final consumers. This spreading effect is desirable because small regular losses to consumers cause less economic and social dislocation than does a catastrophic loss to the accident victim.<sup>30</sup>

Enterprise analysis suggests that businesses should be held liable regardless of fault.<sup>31</sup> But even if the requirement of a faulty employee is retained, the insights of this theory are useful in solving borrowed servant problems. In borrowed servant cases the question is which of two employers, neither of whom is negligent in the traditional sense, is to be held. As to this question the same answers are indicated whether or not we insist that liability is triggered only by negligent employee conduct.

28. Calabresi, *Decision for Accidents* 716-25; Calabresi, *Risk Distribution* 500-07. The derogation of the individual expression of preference by such distorted pricing is felt to be incompatible with one of the "fundamental ethical postulates" of our society, that "by and large people know what is best for themselves." *Id.* at 502. See also Calabresi, *Fault, Accidents, and the Wonderful World of Blum and Kalven*, 75 *YALE L.J.* 216 (1965).

29. Calabresi, *Decision for Accidents* 742-45.

30. Calabresi, *Risk Distribution* 517-18. The economic dislocations include the elimination of useful factors of production (individuals and small businesses) which might otherwise continue to contribute to the wealth of society. Thus, even spreading of losses serves to some extent a cost-reduction function. Only limited spreading among persons is obtained in enterprise liability, however. If spreading were the only goal, then general social insurance covering all accidents in all activities (and even non-accident losses such as disease) would be in order. *Id.* at 502-03.

31. See note 26 *supra*. The mechanism for allocation of costs in an enterprise system is nonetheless a complex one, because of the frequent conjunction of several businesses or activities in accidents. Professor Calabresi has described an "involvement" approach for distributing costs among possible loss bearers. Calabresi, *Decision for Accidents* 721-45. One aspect of that approach is being applied in this discussion.



Before applying enterprise liability theory directly to the borrowed servant problem, it is useful to show how the theory affirms the conventional doctrine of *respondeat superior* and places liability on one of the two employers rather than the employee.<sup>32</sup> The employer is held liable, first, because he will doubtless be better able to spread the costs of the accident. Second, placing the liability on him will better serve the general deterrence function. This latter conclusion, however, has been challenged and requires some explanation.

Commentators have argued that, from the standpoint of resource allocation, accident costs could as well be placed on employees as on their employers.<sup>33</sup> Because the employer and employee stand in a bargaining relationship, the argument goes, the terms of employment will reflect the parties' predictions of their liabilities. If indemnification clauses are permitted the party that is not initially held liable can, for a price, opt into liability. Even if indemnification clauses are disallowed, however, the results will be essentially the same. If employees are burdened with accident costs they will demand higher wages, presumably to buy liability and accident insurance. These higher wages will force the employer to charge a higher price for his product, exactly as if the employer himself had been made liable for accident costs.

But several practical reasons dictate that costs be placed on the employer.<sup>34</sup> First, the crane driver is likely to underestimate the chances of being personally involved in an accident and may not demand the higher wages needed to cover his costs.<sup>35</sup> Consequently the full cost of accidents will not be shifted back to the employer. But unless this full cost eventually has some impact on market decisions about cranes, efficient allocation of resources will be thwarted. The employer is more likely to appraise realistically the likelihood of accidents involving his workmen, and can raise his price accordingly. Second, it is generally cheaper for the employer to take out a single insurance policy than for all his workers and potential victims to insure. Thus the resource allocation rationale of enterprise liability, as well as the goal of compensa-

32. See generally Calabresi, *Risk Distribution* 543-45; 2 F. HARPER & F. JAMES, TORTS §§ 26.5, 26.7 (1956).

33. The idea that actual or potential bargaining parties will always reach the same final allocation of costs regardless of the initial placement of liability has been given its most cogent theoretical elaboration in Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960). See also Calabresi, *Decision for Accidents* 725-26.

34. Calabresi, *Decision for Accidents* 726-29.

35. Even if the employee did not underestimate, he might lack market power to bargain effectively. The rise of strong unions weakens both the lack of knowledge and lack of power arguments. Calabresi, *Risk Distribution* 506 n.25.

tion, would require that accident costs be placed on the employer rather than the employee.

Under either the fault doctrine of *respondeat superior* or under a system of enterprise liability, the question now becomes whether to hold liable the crane company or the building contractor. From the standpoint of cost spreading we will usually be indifferent, since in most instances both potential loss bearers will be going businesses capable of spreading their losses.<sup>36</sup> The goal of general deterrence, however, indicates on which employer accident costs should be placed.

It is true once again that the crane company and the building contractor are in a bargaining relationship, so that in theory the initial allocation of the loss is immaterial. If the crane company were charged, then it would demand higher rental rates to cover the cost of insurance and, at the same time, would be under pressure to reduce accident costs lest the building contractor turn to safer crane companies. The cost of crane accidents would be passed on by the crane company to the builder, and by the builder to the final consumer. Similarly, if the builder had to pay for crane accident costs, he would search for less accident-prone substitutes and thereby apply pressure on the crane company to reduce accidents. The accident costs of cranes or their substitutes would be reflected in the builder's insurance rates. Alternatively, the parties could use indemnification clauses to decide who would finally bear accident costs, regardless of whom the courts held initially liable. In any event, the accident costs of crane use would be reflected in the price of the builder's end product.

But as in the case of employer and employee, practical problems upset this theoretical equilibrium. Businesses differ in their ability to evaluate particular risks<sup>37</sup> and to reflect risk evaluation in pricing;<sup>38</sup> hence one or the other party may be the more efficient risk-bearer.

The average administrative costs of procuring insurance will prob-

36. The extent to which accident losses are shifted forward to consumers, backward to production factors, or absorbed by the enterprises themselves, depends on such factors as the nature of their competitive situation and the availability of less accident-prone substitutes. *Id.* at 517-20.

37. Quite probably the risk evaluation will in fact be done by insurance companies rather than the businesses themselves. Although insurance companies may be more methodical in their evaluation, they will presumably work from the same accident histories that the businesses would use were they self-insuring. In this discussion it has been assumed for the purpose of clarity that the businessmen themselves are doing the evaluating.

38. Should one of the businesses be in a monopoly position and be maximizing profit at the current price, then it will continue to charge that monopoly price regardless of increasing accident costs. To further increase prices would reduce the firm's profits. In cases where its pricing decisions would not be affected, placing the cost on the monopoly would not serve the resource allocation function. Calabresi, *Risk Distribution* 507-14.

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ably be the same for crane companies and building contractors. A crane company, however, generally has a better statistical background for estimating the likelihood of crane accidents, and thus can make more accurate insurance and pricing decisions. In contrast the building contractor will probably lump all the potential accident costs of his project together and use a broad insurance policy. He is unlikely to isolate the costs of accidents involving cranes, for the purpose either of demanding safer practices from the crane company or of considering safer and cheaper substitutes.<sup>39</sup> There will be, in other words, too little pressure on the contractor for reduction of crane accident costs, or on the crane company for safer operation. Finally, even if the builder attempted to evaluate crane accident costs, the task would be more expensive for him than for the crane owner. Thus general deterrence is achieved more cheaply by imposing accident costs directly on the crane owner.

In some cases, however, the building contractor may be a better predictor of accidents—for example, if he rents a machine and operator to perform the same services that a whole fleet of his own machines and employees perform regularly. The contractor in this situation may well have made a close evaluation of the accident costs associated with the equipment. Moreover, his estimate should more closely reflect the accident costs of the equipment in the particular use he contemplates. Whether the use is extraordinarily risky or especially safe, his experience should enable him to make even more accurate pricing and insurance decisions than the general employer. Thus he should be held liable. The same result would be dictated by Smith's "scope of the borrower's business" test; general deterrence serves simply to explain his result.

There is another condition which may reduce the crane company's advantage in predicting accidents. If the builder's demands on the use of the crane are unusually severe, the crane company's ability to predict may be impaired. If, for instance, the building materials to be lifted are extra-fragile, the statistical record of crane accidents, based on more nearly average conditions, will not accurately reflect probable accident costs on this particular project. If the temporary employer has engaged in this particular dangerous crane operation more frequently than the crane company, the relative abilities to predict may shift. Perhaps on this account the builder should be held liable, since he could

39. The liability insurer may well be unwilling to issue separate policies to the contractor for crane operation or other categories of his enterprise.

price on the basis of more accurate estimates. But the resulting uncertainty would sacrifice the advantages of our rule of general employer liability. If the parties themselves recognize the special predictive capacity of the temporary employer, they can shift the risk to him through an indemnification agreement.

There may be cases, however, in which our building contractor uses the crane for some particularly exotic and dangerous purpose which he did not disclose to the crane company beforehand. The crane owner might then have insufficient or inappropriate insurance coverage. Perhaps he would not have agreed to rent his machine for such a job at all had he known of the risk. Certainly he had no informed opportunity to demand an indemnification agreement. It is likely, then, that the initial failure to disclose the danger will result in underpricing and underinsuring throughout the operation.

In these circumstances the law of contracts protects the crane company and ensures that the builder will be held liable. An undisclosed extrahazardous use would not be within the reasonable contemplation of the parties.<sup>40</sup> Similarly, any agreement of the crane company to indemnify the building contractor would not be applied to damages resulting from such undisclosed use. Thus in order to avoid liability the builder must fully inform the crane company of the nature of the expected operation.<sup>41</sup>

Thus, with these two exceptions, general deterrence theory calls for placing accident costs on the general employer. This rule, however, has certain dangers. If the crane companies, truck owners, and other general employers are small, marginal businesses, they may be willing to gamble against accidents by failing to insure. If accidents do occur, they will be unable to pay heavy judgments, and will dissolve in bankruptcy. The very ease of dissolution may lead these marginal general employers to offer lower prices, which ignore their potential accident costs. If this happens, two harmful results will follow. First, the whole cost of accidents will fall on the victims, defeating the compensation goal of accident law. Second, economic efficiency will suffer since the

40. See generally 1 & 3 A. CORBIN, CONTRACTS §§ 107, 538 (2d ed. 1963). Several courts have been influenced by unanticipated risk in the operation of rented machinery in holding the temporary employer liable for resulting accidents. *E.g.*, *B & G Crane Serv., Inc. v. Thomas W. Hooley & Sons*, 227 La. 677, 80 So. 2d 369 (1955) (twelve ton blocks raised by crane rigged for eight ton blocks) and *Famous Players Lasky Corp. v. Industrial Accident Comm'n*, 194 Cal. 134, 228 P. 5 (1924) (rented plane and pilot crashed while flying as directed at hazardous low altitude).

41. The parties cannot be absolutely certain when contracting that adequate disclosure has been made. But the response to this sort of uncertainty will probably be greater efforts toward good faith negotiation rather than expensive hedging of prices and insurance.

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price of the final product will understate the accident cost of its production.<sup>42</sup>

An obvious way to guarantee compensation to victims in such circumstances is joint and several liability for general and temporary employers.<sup>43</sup> Were this allowed, the victim could sue the more solvent employer, or join both employers as defendants with the option of collecting from either.<sup>44</sup> Such a course would not only avoid the problem of the judgment-proof employer, but would also eliminate the need for judicial determination of the better risk evaluator. The joint and several liability solution, however, threatens seriously to distort the allocation of resources. The employers can only guess whom the victim will choose to sue. The parties will be forced to bargain in a context of substantial uncertainty—each party will have to estimate, first, the risk of accidents, and second, how often the victim will collect from him rather than the other employer. The poorer as well as the better risk evaluator will have to make the first estimate, while neither party will be competent to make the second. Thus the two parties together may grossly over- or under-insure. The parties might attempt to reduce the cost of uncertainty through indemnification agreements; but if each party feels that the other is more likely to be sued no agreement will be reached.<sup>45</sup>

If state law allowed contribution between the liable parties, then

42. At this point it is necessary to point out an anomaly in the argument thus far presented. If, as in note 2 *supra*, the victim is an employee of the building contractor, a serious problem is posed for the general deterrence rationale. Full compensation and full reflection of costs in prices can never result if the negligent operator is held to be a borrowed servant instead of the employee of a third party (the crane company). Should the crane company *always* be held in such circumstances, in order to improve compensation and resource allocation?

Arguably not; meager but certain recovery under workmen's compensation laws is a clear declaration of public policy, a conscious interference with the workings of free market and open court in the name of administrative efficiency and employee welfare. To allow the additional recovery against the general employer of the negligent temporary servant in *all* cases would be to thwart the workmen's compensation scheme. The additional recovery should be allowed only where recovery against third parties is allowed and where the general employer is an independent contractor under the criteria discussed above.

43. See note 17 *supra*.

44. A victim could also, of course, collect part of the judgment from both parties held jointly and severally liable. Such a pattern of liability with regard to the victim, however, does not necessarily determine the ultimate obligations of the two employers between themselves; there might be a primary liability based on the usual control test. But in Pennsylvania joint and several liability with regard to the victim seems in the first instance to be allowed only on a finding that control is split or joint. *Siidekum v. Animal Rescue League*, 357 Pa. 204, 53 A.2d 593 (1947). Where control is found to be in one employer, the conventional single recovery is allowed. *Funk v. Hawthorne*, 133 F.2d 636 (3d Cir. 1943). Therefore, when joint and several liability is applied, the employer may expect to share the ultimate burden equally through contribution (in the absence of a prior indemnity agreement).

45. See also note 52 and p. 821 *infra*.

an ultimate burden of half the accident cost could be anticipated by each employer.<sup>46</sup> But this added certainty does not eliminate the resource allocation distortion. First, contribution means that two suits may be needed. Second, the poorer risk evaluator is required to bear half the loss.

A better solution, accomplishing both compensation and general deterrence, would first grant the victim recovery against the party better able to evaluate the risk of accidents. Only if that party were judgment-proof would recovery be allowed against the other employer.<sup>47</sup> This system of priorities of liability would depend, of course, on the ability of the victim to join both employers in the same action, seeking alternative remedies;<sup>48</sup> efficiency would be sacrificed if two trials were a frequent necessity. Priority liability, like joint and several liability, would discourage temporary employers from dealing with fly-by-night rental companies whose unconcern for law suits allowed them to offer rental prices which did not reflect accident costs.

A priority of liabilities system will ensure considerable certainty for the parties. But because the rule of initial liability for the general employer does not apply when similar machine operation is within the "scope of the borrower's business," the parties may fear that their prediction of liability will be upset in court. Uncertainty will be no more severe than under current law, but it will nonetheless result in some double insurance, added costs of investigation, and superfluous litigation. These problems can be mitigated by the parties themselves through indemnification agreements.

Wherever indemnification is allowed, the party who estimates the accident cost to be lower will wish to indemnify the other in order to get a better price for himself.<sup>49</sup> Suppose, for instance, that a crane is rented to be used in an especially dangerous situation, more familiar to the builder than to the crane company. The crane company may feel so insecure as to require \$70 worth of insurance, while the more

46. Under most contribution statutes the damages are shared equally by the tortfeasors. 1 F. HARPER & F. JAMES, TORTS § 10.2 (1956).

47. The relation is thus in effect that of principal to guarantor, rather than that of principal to technical surety.

48. Such joinder for relief in the alternative is available under Fed. R. Civ. P. 20(a) and derivative state rules; it might be impossible under some of the older state codes. See 3 J. MOORE, FEDERAL PRACTICE § 20.04 (2d ed. 1963). Should the plaintiff victim sue only one employer, that defendant could usually be relied upon to join the other as co-defendant.

49. A "better price" for the general employer would be a rental charge reduced by less than the anticipated accident costs; for the temporary employer a better price would be a rental price reduced by more than the accident costs he anticipates.

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knowledgeable building contractor would need to spend only \$50. The parties should have little trouble agreeing to place the accident risk on the builder, with the crane rental reduced accordingly.

Appellate case reports suggest that parties who rent and parties who operate often make informal oral contracts with no particular consideration of the details of accident liability.<sup>50</sup> Thus, indemnification seems likely only where significant prediction disparities make it worthwhile for the parties to pause, reason together, and redistribute the insurance burden.<sup>51</sup> In such cases, the considered judgments reflected in indemnification agreements may improve resource allocation.<sup>52</sup>

The suggested approach, then, usually holds the general employer primarily liable, with recovery against the temporary employer if the general employer cannot pay. The priority of liabilities is reversed when the “scope of the borrower’s business” exception applies, or when the injury arises from activities outside the scope of the contract. The parties may redistribute losses if they explicitly agree to do so, subject to the requirement of disclosure. This system would seem to achieve maximum general deterrence and adequate spreading, with minimal administrative costs.

50. *E.g.*, *Parlow v. Dan Hamm Drayage Co.*, 391 S.W.2d 315 (Mo. Sup. Ct. 1965); *Alabama Power Co. v. Smith*, 273 Ala. 509, 142 So. 2d 228 (1962). Indemnity contracts are strictly construed against the indemnitee claimant, and must be extremely precise and unequivocal before courts will recognize them. *Halliburton Oil Well Cementing Co. v. Paulk*, 180 F.2d 79 (5th Cir. 1950).

51. Indemnification should not be allowed, however, for accidents attributable to undisclosed risks. See text at p. 818 *supra*. There may also be situations where indemnification should be disallowed because one party has used superior bargaining power to force a poor risk evaluator to agree to indemnify him. Often this situation may be viewed as just a variation on failure to disclose, since poor bargaining position is often accompanied by ignorance of dangers.

52. Because indemnification can alter any initial allocation of loss, there is some danger to general deterrence from its misuse. When under the pressure of competition or from ignorance a party undervalues the probable cost of accidents, he will attempt to assume liability in return for a better price. The crane company, for example, may reveal that \$70 of its rental price is for insurance at the normal level. The building contractor, although he has little basis for prediction, may balk at this figure and think that less insurance—say \$50 worth—would be adequate. The crane company will usually be willing to reduce its price \$70 in return for indemnification by the building contractor, who will take out only \$50 of insurance. When this pattern occurs, and the true accident costs approach the better prediction of \$70, a misallocation will result; the true cost will not be reflected in price of the end product. A party who undervalues and is burned by a large judgment will either learn to make more accurate evaluations or stop indemnifying. In any event, perhaps a party aware of his incapacity for prediction would not accept liability unless he could charge enough to overinsure, to be on the safe side. Thus the degree of misallocation due to indemnification will be limited.