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intent on his part would defeat the plaintiff. Indeed, the court seems to have overlooked altogether the question of the plaintiff's original state of mind.

In *Thomas v. Thomasville Shooting Club*[20] the North Carolina Supreme Court upheld an instruction that:

> If Thomas did not at the time intend to charge for getting up the leases, and this was known to the defendant, then he could not charge and recover for same, but if it was not known to the defendant that Thomas did not intend to charge, then Thomas could afterwards sue for and recover for his services in getting up the leases.[21]

This appears to be a unique rule, enabling the plaintiff to change his mind in order to recover for a benefit he originally intended as a gift.

Where one bestows benefits gratuitously with full appreciation of the facts it should not be the policy of the law to allow him to be reimbursed,[22] as was done in *Thomas*. But when one has a gratuitous intent because of a misapprehension of attendant circumstances, the principal case should govern and that intent alone should not bar his recovery.

The result of the *Deskovick* case appeals to the layman's rough sense of justice. Should such a case arise in North Carolina,[23] it should be recognized as grounded on quasi-contract, and the donor's original benevolent motives should not defeat him in court, so long as he was misled in the formulation of those motives.

SCOTT N. BROWN, JR.

Workmen's Compensation—Scope of Immunity from Actions at Law—The Question of Borrowed Servants

A landowner, constructing a storage plant for use in its business, employed a crew to lay water and sewer pipe on the construction site.

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[20] 121 N.C. 238, 28 S.E. 293 (1897).

[21] *Id.* at 240, 28 S.E. at 294.

[22] See Meier v. Planer, 107 N.J. Eq. 398, 152 Atl. 246 (Ch. 1930); Everitt v. Walker, 109 N.C. 129, 13 S.E. 860 (1891); Trustees of the University v. McNair's Executors, 37 N.C. 605 (1843).

[23] See Basinger v. Pharr, 225 N.C. 531, 35 S.E.2d 626 (1945). In that case the plaintiff had brought an action to recover money advanced by him on behalf of his father for medical expenses, etc., incurred by the latter during his last illness. In the same action the plaintiff sought recovery of an advance made directly to the decedent. The lower court non-suited the plaintiff as to both items, and he appealed only as to the second, leaving open the precise question presented by *Deskovick*.

Digging the ditches for this pipe was a nineteen-ton "backhoe" rented by the landowner under a written contract whereby the machine was furnished with an operator and fuel at a specified hourly cost. A member of the pipe-laying crew suffered fatal injuries when he was partially crushed under the crawler tracks of the "backhoe." Plaintiff, administratrix of the employee's estate, instituted a wrongful death action against the operator of the machine on the basis of his alleged negligence and the owner of the machine under *respondeat superior*. Defendants, alleging plaintiff's sole remedy to be found under the Workmen's Compensation Act, claimed immunity from action at law.[1] Judgment of involuntary nonsuit was reversed in *Weaver v. Bennett*.[2] The North Carolina Supreme Court held that plaintiff's evidence did not affirmatively show that the operator was conducting the business of intestate's employer within the meaning of General Statutes section 97-9 and therefore immune from suit.[3]

The variety of employment practices in the construction industry presents with increasing regularity[4] the question of the principal case: does coverage under Workmen's Compensation preclude an action at law by an injured employee against the person whose negligence caused the injury? A conflict results between the fault concept of tort liability and the theory of enterprise liability,[5] which is the basis of Workmen's Compensation.[6] The conflict arises be-

[1] "Every employer . . . or *those conducting his business* shall only be liable to any employee who elects to come under this article for personal injury or death by accident to the extent and in the manner herein specified." N.C. GEN. STAT. § 97-9 (1958). (Emphasis added.)

[2] 259 N.C. 16, 129 S.E.2d 610 (1963).

[3] *Id.* at 30, 129 S.E.2d at 620.

[4] Smith v. John B. Kelley, Inc., 275 F.2d 169, 172 (D.C. Cir. 1960) (concurring opinion); Larson, *"Model-T" Compensation Acts in the Atomic Age*, 18 NACCA L.J. 39, 44 (1956).

[5] See HARPER & JAMES, TORTS §§ 12.1-13.7 (1956).

[6] "The philosophy which supports the Workmen's Compensation Act is 'that the wear and tear of human beings in modern industry should be charged to the industry, just as the wear and tear of machinery has always been charged. And while such compensation is presumably charged to the industry, and consequently to the employer or owner of the industry, eventually it becomes a part of the fair money cost of the industrial product, to be paid for by the general public patronizing such products.'" Vause v. Vause Farm Equipment Co., 233 N.C. 88, 92; 63 S.E.2d 173, 176 (1951). *But see* Whitte, *The Theory of Workmen's Compensation*, 20 AM. LAB. LEG. REV. 411 (1930) indicating that it is the employer and not the consumer who bears the burden of compensation. For discussion of the theory of non-employers' liability in actions at law, see McCoid, *The Third Person in the*

cause of statutory provisions limiting actions at law against those responsible for injuries covered by Workmen's Compensation.[7] In the majority of jurisdictions employers are immune from actions at law.[8] But fellow employees,[9] principal contractors,[10] subcontractors,[11] independent contractors,[12] and their employees[13] may be amenable to suit, depending on the provisions of the statutes involved.[14]

Compensation Picture: A Study of the Liabilities and Rights of Non-Employers, 37 TEXAS L. REV. 389, 395-403 (1959).

[7] See, *e.g.,* FLA. STAT. ANN. § 440.39 (Supp. 1962) (recognizing a right of action against a "third party"); MASS. ANN. LAWS ch. 152, § 15 (1957) (recognizing a right of action against a "person other than the insured"); see generally 2 LARSON, LAW OF WORKMEN'S COMPENSATION §§ 72.00-.70 (1952); 3 SCHNEIDER, WORKMEN'S COMPENSATION TEXT § 842 (perm. ed. 1943).

[8] 1 SCHNEIDER, WORKMEN'S COMPENSATION TEXT § 90 (perm. ed. 1941); see, *e.g.,* McNair v. Ward, 240 N.C. 330, 82 S.E.2d 85 (1954).

[9] For cases granting immunity, see, *e.g.,* Rylander v. Chicago Short Line Ry., 17 Ill. 2d 618, 161 N.E.2d 812 (1959); Bresnahan v. Barre, 286 Mass. 593, 190 N.E. 815 (1934); Feitig v. Chalkley, 185 Va. 96, 38 S.E.2d 106 (1946). For cases allowing action at law, see, *e.g.,* Kimbo v. Holladay, 154 So. 369 (La. App. 1934); Gee v. Horvath, 169 Ohio St. 14, 157 N.E.2d 354 (1959); Zimmer v. Casey, 296 Pa. 529, 146 Atl. 130 (1929).

[10] For cases granting immunity, generally the result where the contractor is directly responsible for the payment of compensation benefits, see, *e.g.,* Adams v. Hercules Powder Co., 180 Tenn. 340, 175 S.W.2d 319 (1943); Sykes v. Stone & Webster Eng'r Corp., 186 Va. 116, 41 S.E.2d 469 (1947). For cases allowing action at law, generally the result in the absence of a direct statutory liability for compensation benefits, see, *e.g.,* Clark v. Monarch Eng'r Co., 248 N.Y. 107, 161 N.E. 436 (1928); Cathey v. Southeastern Constr. Co., 218 N.C. 525, 11 S.E.2d 571 (1940). N.C. GEN. STAT. § 97-19 (1958) extends qualified statutory liability for compensation benefits only to principal contractors, intermediate contractors, and subcontractors. For discussion suggesting inclusion of owners and principal employers, see 35 N.C.L. REV. 569 (1957).

[11] For cases granting immunity, see, *e.g.,* Miami Roofing & Sheet Metal Co. v. Kindt, 48 So.2d 840 (Fla. 1950); Rea v. Ford, 198 Va. 712, 96 S.E.2d 92 (1957). For cases allowing action at law, see, *e.g.,* Davison v. Martin K. Eby Constr. Co., 169 Kan. 256, 218 P.2d 219 (1950); Dillman v. John Diebold & Sons Stone Co., 241 Ky. 631, 44 S.W.2d 581 (1931); Olsen v. Sharpe, 191 Tenn. 503, 235 S.W.2d 11 (1950).

[12] For cases granting immunity, see, *e.g.,* Doane v. E. I. DuPont de Nemours & Co., 209 F.2d 921 (4th Cir. 1954); Williams v. E. T. Gresham Co., 201 Va. 457, 111 S.E.2d 498 (1959). For cases allowing action at law, see, *e.g.,* Haw v. Liberty Mut. Ins. Co., 180 F.2d 18 (D.C. Cir. 1950); Kramer v. Kramer, 199 Va. 409, 100 S.E.2d 37 (1957).

[13] For cases granting immunity, see, *e.g.,* Doane v. E. I. DuPont de Nemours & Co., *supra* note 12; Miami Roofing & Sheet Metal Co. v. Kindt, 48 So.2d 840 (Fla. 1950); Williams v. E. T. Gresham Co., *supra* note 12. For cases allowing action at law, see, *e.g.,* Haw v. Liberty Mut. Ins. Co., *supra* note 12; Olsen v. Sharpe, 191 Tenn. 503, 235 S.W.2d 11 (1950); Kramer v. Kramer, *supra* note 12.

[14] See 2 LARSON, *op. cit. supra* note 7, §§ 72.00-.70; 3 SCHNEIDER, *op. cit. supra* note 7, § 842.

Section 97-9 of the General Statutes confers immunity on the employer and *"those conducting his business."*[15] When first interpreting that phrase, the North Carolina Supreme Court included fellow employees within its meaning[16] and called for its liberal construction.[17] Early interpretations arose in actions by or on behalf of employees where the defendants unsuccessfully sought to join the employees' employers, superiors,[18] and fellow employees.[19] Later the court held that an employee could not maintain an action at law against a fellow employee responsible for his compensable injury.[20] Immunity for fellow employees and superiors receives support as a furtherance of the purpose of Workmen's Compensation, because without it the cost of injury shifts from the enterprise to its individual workers.[21]

In the principal case, the court concluded that the operator of the "backhoe" was not conducting the landowner's business because he had not become the landowner's borrowed servant.[22] Thus, application of the borrowed servant doctrine[23] apparently limits the scope of the phrase, *"those conducting his business,"* to employees, yet it is an imprecise phase adaptable to broader interpretation. The

[15] "Every employer . . . or *those conducting his business* shall only be liable to any employee who elects to come under this article for personal injury or death by accident to the extent and in the manner herein specified." N.C. GEN. STAT. § 97-9 (1958). (Emphasis added.)

[16] Essick v. Lexington, 232 N.C. 200, 60 S.E.2d 106 (1950).

[17] "We have no space to call attention to the contradictions and fantastic situations that must arise under the application of G.S. 97-10 unless 97-9 is given its weight in an *in pari materia* interpretation of both sections, and the immunity given in Section 97-9 to 'those conducting the [*sic*] business' be given a liberal construction and its definitions and intendments carried through the provisions of 97-10." *Id.* at 210, 60 S.E.2d at 113. N.C. GEN. STAT. §§ 97-10.1, 97-10.2, as amended, N.C. SESS. LAWS 1963, ch. 450, § 1, 97-10.3 (Supp. 1961), replaces N.C. SESS. LAWS 1929, ch. 120, § 11, as amended, N.C. SESS. LAWS 1933, ch. 449, § 1, as amended, N.C. SESS. LAWS 1943, ch. 662, repealed by N.C. SESS. LAWS 1959, ch. 1324. For discussion of the change, see *Comments on North Carolina 1959 Session Laws,* 38 N.C.L. REV. 154, 242 (1960).

[18] Essick v. Lexington, 232 N.C. 200, 60 S.E.2d 106 (1950).

[19] Bass v. Ingold, 232 N.C. 295, 60 S.E.2d 114 (1950).

[20] Warner v. Leder, 234 N.C. 727, 69 S.E.2d 6 (1952), 30 N.C.L. REV. 474.

[21] See 43 IOWA L. REV. 352 (1958); 30 N.C.L. REV. 474 (1952); 39 VA. L. REV. 951 (1953); 17 WASH. & LEE L. REV. 315 (1960); *But see* 1 WILL. & MARY L. REV. 123 (1957).

[22] Weaver v. Bennett, 259 N.C. 16, 30, 129 S.E.2d 610, 620 (1963).

[23] "A person, natural or corporate, may lend or let a servant to another in such a way as to be relieved from liability arising out of injury to another through the negligence of the servant." Leonard v. Tatum & Dalton Transfer Co., 218 N.C. 667, 671, 12 S.E.2d 729, 731 (1940) (dictum).

borrowed servant doctrine, itself imprecise and chaotic,[24] has been applied by the courts to determine liability under *respondeat superior* through various tests, generally falling into three classifications.[25] The first is the "control" test, which may mean either "broad"[26] or "spot"[27] control. Second is the "whose business" test,[28] and finally is that test which is a combination of the two.[29]

North Carolina decisions relieving lending masters of liability under *respondeat superior* are based on the supervision, control, and direction exercised by the borrowing masters in situations where the lending masters relinguished authority to direct the servants' manner or method of performance.[30] Thus, having the power of immediate direction and control brings liability to a borrowing master.[31] But

[24] "The law that defines or seeks to define the distinction between general and special employers is beset with distinctions so delicate that chaos is the consequence. No lawyer can say with assurance in any given situation where one employment ends and the other begins. The wrong choice of defendants is often made, with instances, all too many, in which justice has miscarried." Cardozo, *A Ministry of Justice,* 35 HARV. L. REV. 113, 121 (1921). See Annot., 17 A.L.R.2d 1388 (1951).

[25] See Haw v. Liberty Mut. Ins. Co., 180 F.2d 18 (D.C. Cir. 1950) (dictum); Nepstad v. Lambert, 235 Minn. 1, 50 N.W.2d 614 (1951) (dictum); Smith, *Scope of the Business: The Borrowed Servant Problem,* 38 MICH. L. REV. 1222, 1230-34 (1940).

[26] See, *e.g.,* Haw v. Liberty Mut. Ins. Co., *supra* note 25; Hodge v. McGuire, 235 N.C. 132, 69 S.E.2d 227 (1952). This test relies on "control in the broad sense of hiring, training, and firing." Smith, *supra* note 25, at 1230.

[27] See, *e.g.,* Nepstad v. Lambert, 235 Minn. 1, 50 N.W.2d 614 (1951); Wadford v. Gregory Chandler Co., 213 N.C. 802, 196 S.E. 815 (1938). This test relies on "control exercised by the man on the spot, the man who says when and where to go and how fast." Smith, *supra* note 25, at 1230. "The control test . . . in principle is medieval, inextricably mixed with the now-discredited 'command' rationale of vicarious liability. In application it is uncertain and ambiguous." Smith, *supra* note 25, at 1233.

[28] See, *e.g.,* Devaney v. Lawler Corp., 101 Mont. 579, 56 P.2d 746 (1936); Jones v. Henderson Tobacco Co., 231 N.C. 336, 56 S.E.2d 598 (1949). This test relies on "Whose business is being done by the borrowed servant?" Smith, *supra* note 25, at 1233. "The only trouble with the whose business test is that, in difficulty of application, it is as bad as the control test. The results are unpredictable, uncertain, and in many cases probably unjust." Smith, *supra* note 25, at 1234.

[29] See, *e.g.,* Denton v. Yazoo & Mississippi Valley R.R., 284 U.S. 305 (1932); Standard Oil Co. v. Anderson, 212 U.S. 215 (1905). "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." *Id.* at 221.

[30] Wadford v. Gregory Chandler Co., 213 N.C. 802, 196 S.E. 815 (1938); Shapiro v. Winston-Salem, 212 N.C. 751, 194 S.E. 479 (1938).

[31] Jackson v. Joyner, 236 N.C. 259, 72 S.E.2d 589 (1952).

a lending master who retains the right to control is held liable for the servant's torts.[32] On one occasion the court applied the "whose business" test in holding that a servant was not loaned to the party sought to be held,[33] but "control" generally determines liability under *respondeat superior* in North Carolina.[34]

Therefore, in the principal case the court correctly spoke of control as decisive had the issue been solely whether or not the lessor of the "backhoe" was liable for the operator's negligence. The issue under the Workmen's Compensation Act immunity provision, however, is whether or not the operator was *conducting the lessee's business.* Thus, regardless of the North Carolina criteria for determining borrowed servants, the language of section 97-9[35] suggests application of a test analogous to the "whose business" test.

Virginia, like North Carolina, has a provision in its Workmen's Compensation Act granting immunity to the employer and *"those conducting his business."*[36] Construction of the phrase began there

[32] Hodge v. McGuire, 235 N.C. 132, 69 S.E.2d 227 (1952); *accord,* Leonard v. Tatum & Dalton Transfer Co., 218 N.C. 667, 12 S.E.2d 729 (1940) where defendant retained the right to control because he had not "so completely surrendered as to virtually suspend, temporarily, at least, any responsibility which might reasonably be associated with control." *Id.* at 671, 12 S.E.2d at 731. "To us, when the principle is tested by the elements stated above [complete surrender of control by the master, renunciation of all obedience to the master by the servant], the result is the destruction of the principle. When a master turns an employee to another's service under the tests outlined, it is not a loan of the servant, it is a complete giving up of the servant, a termination of any relationship between the hiring master and the servant. It would be an out and out change of employment. It would be a discharge from one master and a hiring by another." Wylie-Stewart Mach. Co. v. Thomas, 192 Okla. 505, 507, 137 P.2d 556, 558 (1943) (dictum).

[33] See Jones v. Henderson Tobacco Co., 231 N.C. 336, 56 S.E.2d 598 (1949); see also Liverman v. Cline, 212 N.C. 43, 192 S.E. 849 (1937).

[34] The control test has also been applied to distinguish independent contractors from servants. Harris v. White Constr. Co., 240 N.C. 556, 82 S.E.2d 689 (1954); Hinkle v. Lexington, 239 N.C. 105, 79 S.E.2d 220 (1953); Hayes v. Elon College, 224 N.C. 11, 29 S.E.2d 137 (1944); Lassiter v. Cline, 222 N.C. 271, 22 S.E.2d 558 (1942). Compare Liverman v. Cline, *supra* note 33.

[35] "Every employer . . . or *those conducting his business* shall only be liable to any employee who elects to come under this article for personal injury or death by accident to the extent and in the manner herein specified." N.C. GEN. STAT. § 97-9 (1958). (Emphasis added.)

[36] "While such insurance remains in force he [the employer] or *those conducting his business* shall be liable to an employee for personal injury or death by accident to the extent and in the manner herein specified." VA. CODE ANN. § 65-99 (1949). (Emphasis added.)

as in North Carolina when its meaning was held to encompass fellow employees.[37] In a later application of Virginia law, the Circuit Court of Appeals for the District of Columbia reached a result similar to that of the principal case when it held that an employee of a landowner could maintain an action at law against the operator of a bulldozer leased by the landowner, notwithstanding coverage by Workmen's Compensation.[38] The Virginia court refused to follow that decision when faced with this problem. The principal contractor on a school project leased a crane and operator at a specified hourly rate. An employee of the principal contractor was injured and brought action against the operator and the owner of the crane. Basing its decision on prior interpretations of the Virginia act's immunity provision,[39] the court upheld immunity as a complete defense.[40] Expressly excluded from consideration was the borrowed servant doctrine.[41]

In a later Virginia case,[42] the court again granted immunity to the lessor of a crane without considering whether the operator had become the borrowed servant of the lessee. Action at law was not allowed because the defendant was engaged in work which was part of the *trade, business,* or *occupation* of the lessee, plaintiff's employer, and was therefore *conducting his business.*[43] This test

[37] Fetig v. Chalkley, 185 Va. 96, 38 S.E.2d 73 (1946).

[38] Haw v. Liberty Mut. Ins. Co., 180 F.2d 18 (D.C. Cir. 1950).

[39] Immunity was granted in Doane v. E. I. DuPont de Nemours & Co., 209 F.2d 921 (4th Cir. 1954) (independent contractor); Sykes v. Stone & Webster Eng'r Corp., 186 Va. 116, 41 S.E.2d 469 (1947) (general contractor); Feitig v. Chalkley, 185 Va. 96, 38 S.E.2d 73 (1946) (fellow employee). "The purpose of the Virginia statute as interpreted by its highest court is to limit the recovery of all persons engaged in the business under consideration to compensation under the act, and to deny an injured person the right of recovery against any other person *unless he be a stranger to the business.*" Doane v. E. I. DuPont de Nemours & Co., *supra* at 926 (dictum). (Emphasis added.)

[40] Rea v. Ford, 198 Va. 712, 96 S.E.2d 92 (1957), 43 VA. L. REV. 619.

[41] "The view we have taken of the matter makes it unnecessary to consider whether in the present case at the time of the accident the crane operator was the loaned employee of the principal contractor, Daniel, and the fellow servant of Rea, and if so, what effect that had upon the right of the plaintiff administratrix to maintain the present action at law." *Id.* at 718, 96 S.E.2d at 96.

[42] Williams v. E. T. Gresham Co., 201 Va. 457, 111 S.E.2d 498 (1959).

[43] The application of the "trade, business, or occupation" test does not always result in immunity. See Sears, Roebuck & Co. v. Wallace, 172 F.2d 802 (4th Cir. 1949). *Compare* Anderson v. Thorington Constr. Co., 201 Va. 266, 110 S.E.2d 396 (1959), *appeal dismissed,* 363 U.S. 719 (1960), *with* Kramer v. Kramer, 199 Va. 409, 100 S.E.2d 37 (1957). See generally King v. Palmer, 129 Conn. 636, 30 A.2d 549 (1943).

conforms to the statutory language.[44] Moreover, it places the cost of injury on the single enterprise in which the parties were engaged.

If the industry in which an injury arises is to bear the burden of that injury, it is insignificant that a machine necessary to that industry is not operated by an employee or a borrowed servant. When the question for determination is whether a machine operator is conducting the business of the machine's lessee, an inquiry as to the right to control the operator answers little.[45] Perhaps the decision of the principal case reflects doubt over the adequacy of Workmen's Compensation benefits. If so, it joins leading writers who call for a complete re-evaluation of Workmen's Compensation Acts.[46] Discussion of the manifold problems of the acts is beyond the scope of this note. Nevertheless, it is submitted that the legislature should examine the immunity question in light of present employment practices and effect changes manifesting its intent in definitive language.

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[44] See notes 35 & 36 *supra.*

[45] "The earlier cases tested this relationship [employer-employee] through application of the 'control' factor, originally a test for tortious liability, having its roots in the relationship of the apprentice to his master in early English industrial society. As applied to today's complex economy of the assembly line, of dispersed industrial operations, of concentrated operations but with semi-autonomous 'departments' or branches, and of general contractors who, in turn, employ subcontractors and sub-subcontractors, the 'control' test is often meaningless, usually ambiguous, and always susceptible of paperwriting evasions. Consequently we have abandoned it." Schulte v. American Box Board Co., 358 Mich. 21, 32, 99 N.W.2d 367, 372 (1959) (concurring opinion).

[46] See Brodie, *The Adequacy of Workmen's Compensation As Social Insurance: A Review of Developments and Proposals,* 1963 WIS. L. REV. 57; Larson, *"Model-T" Compensation Acts in the Atomic Age,* 18 NACCA L.J. 39 (1956); Riesenfeld, *Efficacy and Costs of Workmen's Compensation,* 49 CALIF. L. REV. 631 (1961). For suggestion of the abolition of employers' immunity, see Marcus, *Advocating the Rights of the Injured,* 61 MICH. L. REV. 921 (1963).