**Workers’ Compensation Bar**

**Against Suits Against an Employer**

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**Introduction**

1913 was quite a year. The 16th amendment, allowing the federal income tax was ratified (1%) and the new President, Woodrow Wilson, created Federal Reserve Bank. Oregon passed the first minimum wage law. The US Department of Labor became its own entity. Stainless steel and the all purpose zipper were invented. The first coast to coast paved highway was opened and the first “sedan” went on sale. Ford opened its first moving assembly line and there were many nationwide and local strikes, general labor unrest and industrial and mining disasters. In Minnesota, the legislature passed the Minnesota Workers’ Compensation Act (the “Act”).

 Like similar acts in most states, the Act formed as a result of a “grand compromise” between labor and industry. Prior to the act, an employee injured on the job typically had no safety net. If he could prove that the employer was negligent, he might have a shot at recovering in tort, but the employer had many common law defenses…the employee’s claim was barred if he had any fault in causing the injury (the concept of comparative fault did not exist), or had assumed the risk of the injury, or if a co-employee’s fault caused the injury. If he won, he got to recover the full amount of his damages, including pain and suffering, but in the meantime, he paid his own medical bills and had no source of income. Employers, while somewhat concerned with having to pay tort damages and deal with the effects of litigation on an ongoing business, were more concerned that they would soon be forced to provide significant benefits to all employees as a result of the growing strength of unionized labor and public outcry.

 So was born the idea of a “no-fault” system to compensate employees injured on the job, but to limit that compensation to specifically delineated benefits, funded by insurance programs, in exchange for eliminating the employee’s common law right to sue his employer for injuries. Also eliminated in this compromise were the employer’s common law defenses. Essentially, this system still exists today, 102 years later.[[1]](#footnote-1) However, over a hundred years, as the relationship between labor and capital has changed, opportunities to change the grand compromise and allow “employees” to sue their “employer” for work injuries have arisen and met with varying degrees of success. This article will discuss the various instances where the “workers’ compensation bar” to common law claims against an employer have been challenged.

Minn. Stat. Section 176.031 is the codification of the compromise: “The liability of an employer prescribed by this chapter is exclusive and in the place of any other liability to such employee, personal representative, surviving spouse, parent, any child, dependent, next of kin, or other person entitled to recover damages on account of such injury or death.”

There are, however, certain exceptions to this general rule in Minnesota, and there are other theories that would create exceptions which have not been adopted in Minnesota. [[2]](#footnote-2)

1. **Exceptions to the Workers’ Compensation Bar**
2. Employers Who Do Not Obtain Required Insurance or Self-Insurance.

Employers who do not participate in the workers’ compensation system by buying the mandatory insurance, or appropriately self-insuring against workers’ compensation exposure, lose the benefits of the grand compromise. After setting out the bar, Minn. Stat. 176.031 continues:

“If an employer other than the state or any municipal subdivision thereof fails to insure or self-insure liability for compensation to injured employees and their dependents, an injured employee, or legal representatives or, if death results from the injury, any dependent may elect to claim compensation under this chapter or to maintain an action in the courts for damages on account of such injury or death. In such action it is not necessary to plead or prove freedom from contributory negligence. The defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, that the employee assumed the risk of employment, or that the injury was due to the contributory negligence of the employee, unless it appears that such negligence was willful on the part of the employee. The burden of proof to establish such willful negligence is upon the defendant.”

 There is not much modern case law construing 176.031’s cause of action against uninsured employers, probably because the economic incentives are not present.

Typically, an employer without workers’ compensation coverage has no significant assets and any liability coverage it has will have an exclusion for injuries sustained by employees. Also, the plaintiff still has to prove the fault of the employer. Presumably the employee would be entitled to additional common law damages, but while contributory negligence is not a bar, presumably comparative negligence principles would apply. See generally, Anderson v. Hegna, 212 Minn.147, 2. N.W.2d 820 (1942); Andrews v. Bartholomew, 242 Minn. 46, 64 N.W.2d 7 (1954) and Klemetsen v. Stenberg Const. Co., Inc. 424 N.W.2d 70 (Minn. 1988).

 Rather, most employees end up making a claim against the employer and the Special Compensation Fund (a branch of the Department of Labor and Industry that provides workers’ compensation coverage for uninsured employers). See MSA 176.183. The Special Compensation Fund is entitled to collect all benefits paid to the employee plus a 65% penalty from the employer, using the procedures for collecting unpaid taxes. It is best to be insured.

1. Employers and Co-Employees Who Commit Intentional Torts.
2. The Assault Exception.

Minn. Stat. Sec. 176.011, subd. 16 contains an exception for cases of certain intentional injuries by excluding them from the definition of personal injury:

“Personal injury does not include an injury caused by the act of a third person or fellow employee intended to injure the employee because of personal reasons, and not directed against the employee as an employee, or because of the employment.”

This exception is known as the assault exception and “usually fall[s] into one of three categories: ‘ (1) those that are noncompensable under the Act because the assailant was motivated by personal animosity toward his victim, arising from circumstances wholly unconnected with the employment; (2) those that are compensable under the Act because the provocation or motivation for the assault arises solely out of the activity of the victim as an employee; and (3) those that are compensable under the Act because they are neither directed against the victim as an employee nor for reasons personal to the employee.’” Meintsma, 684 N.W.2d at 439, quoting McGowan v. Our Savior’s Lutheran Church, 527 N.W.2d 830,834 (Minn. 1985). See Foley v. Honeywell, Inc., 488 N.W. 2d 268 (Minn. 1992) and Bear v. Honeywell, Inc., 468 N.W.2d 546 (Minn. 1991).

In situations involving sexual assault or harassment, the Court of Appeals has ruled that there is at least a fact issue regarding the personal animosity issue. See [Stengel v. E. Side Beverage, 690 N.W.2d 380 (Minn.Ct.App.2004)](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2005844722&pubNum=595&originatingDoc=Iad91a540d14b11dfb5fdfcf739be147c&refType=RP&fi=co_pp_sp_595_386&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_sp_595_386). Presumably, cases that do not actually involve personal injury are not covered by the workers compensation bar either. See Kopet v. General Mills, Inc., 2005 WL 1021651 n. (Minn. App. 2005)( citing [Egeland v. City of Minneapolis, 344 N.W.2d 597, 604-05 (Minn.1984)](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984105973&pubNum=595&originatingDoc=I82688a5a2ed211da9bcc85e7f8e2f4cd&refType=RP&fi=co_pp_sp_595_604&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)#co_pp_sp_595_604) and [Hollen v. USCO Distribution Servs., Inc., No. Civ. 02-1119, 2004 WL 234408, at \*11 (D.Minn. Feb. 3, 2004)](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=999&cite=2004WESTLAW234408&originatingDoc=I82688a5a2ed211da9bcc85e7f8e2f4cd&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)).

Of course, once an assault is found to be personal, the employer faces liability for failure to properly supervise, negligent hiring, negligent security and other similar claims.

1. The Common Law Employer Intentional Injury Exception to the Exclusive Remedy Provision of the WCA.

In 1930, the court, in Boek v. Wong Hing, 180 Minn. 470, 440 N.W. 233 (1930), recognized an exception to the exclusive remedy provisions of the WCA when it allowed a tort claim to proceed against an employer who “willfully assaults and injures a workman” because “it would be a perversion of the purpose of the act to so hold.” Id. at 471, 231 N.W. at 233-34. In addressing the employer intentional injury exception, the Meintsma court noted that “the employee must demonstrate that the employer harbored a conscious and deliberate intent to injury him or her….[which] may not be inferred from mere negligence, though it be gross…[and is not triggered by the] employer’s knowledge of a substantial certainty of injury to an employee.” 684 N.W.2d at 440 (internal citations and quotations omitted). The employers’ “knowledge and inaction” to prevent the assault is insufficient to meet the “conscious and deliberate intent to injure” test so as to take the claim outside of the exclusive remedy provision. Id. at 440.

1. The Statutory Exception to Co-Employee Tort Liability for Intentional Injuries.

Minn Stat. Sec. 176.061 Subd. 5 (e) [[3]](#footnote-3)states: “A coemployee working for the same employer is not liable for a personal injury incurred by another employee unless the injury resulted from the gross negligence of the coemployee or was intentionally inflicted by the coemployee.” We will address the gross negligence exception in the following section of the paper. Meintsma addressed this exception as well. The issue in Meintsma was whether the statute applied if the co-employee intended to commit the act causing the injury, or whether the injured employee had to prove that the co-employee intended to cause the injury in order to avoid the workers’ compensation bar and sue the co-employee in tort. Meintsma construing the language of the statute to be consistent with the requirements of the common law intentional injury exception, found that the injured employee must prove that the defendant “consciously and deliberately intend[ed] to cause an injury, not just intend[ed] to do the act.” 684 N. W. at 441. The Meintsma court determined that fact issues existed regarding whether the co-employees intended to inflict injury. It did not reach the question of whether the employer could be vicariously liable.

1. Co-Employees Who are Grossly Negligent and Breach a “Personal Duty” to the Injured Employee.

As quoted above, Minn. Stat. Sec. 176.061 subd. 5(e) allows an injured employee to sue a co-employee who causes his injury as a result of gross negligence. However the courts have put a significant gloss on this exception that makes recovering against an employer for injuries sustained at the hands of a grossly negligent co-employee in tort virtually impossible, and makes claims against even grossly negligent co-employees very difficult. This gloss is known as the “personal duty rule” and since its adoption in Dawley v. Thisius, 304 Minn. 453, 231 N.W.2d 555 (Minn. 1975), the Supreme Court has consistently resisted the temptation to find co-employee liability outside the context of intentional injury. [[4]](#footnote-4) In Dawley the court applied the personal duty test to prevent an employee from suing the general manager of a plant for breaching his duty to provide for the overall safety of the plant and found that a co-employee will have no personal liability “because of his general administrative responsibility for some function of his employment without more.” 304 Minn. at 456, 231 N.W.2d at 557.

20 years later, in Wicken v. Morris, 527 N.W.2d 95 (Minn. 1995) the defendant manager was accused of fraud in creating the conditions that resulted in the plaintiffs getting blown up. Again, however, the Supreme Court found that as the manager’s fraud was not directed toward the employees, it too was merely an administrative activity required as an integral part of the manager’s employment obligations. Id. at 99. The Wicken court added, “to hold otherwise, permitting co-employee liability when harm results however indirectly from the carrying out of administrative obligations incident to work responsibilities would eviscerate the fundamental purpose of the workers’ compensation laws. Id.

10 years after Wicken, following the tragic heat stroke death of Minnesota Viking Cory Stringer, the court again addressed the meaning of the personal duty rule, this time in the context of a suit against the trainers who ministered to Stringer on the day of his death. Stringer v. Minnesota Vikings Football Club, LLC., 705 N.W.2d 746 (2005). The plaintiff asserted that direct personal actions one employee takes with respect to another employee would satisfy the personal duty test. The respondents argued that a personal duty exists only where the co-employee departs from his employment responsibilities and voluntarily assumes additional duties that put another at risk. Id. at 757. Instead, the court adopted a 2 part personal duty test: “the co-employee must have (1) taken direct action toward or have directed another to have taken direct action toward the injured employee, and (2) acted outside the course and scope of employment.” Id. (citations omitted).

As the dissent in Stringer points out, there are no cases establishing the standard for gross negligence for co-employee liability under the workers’ compensation act. Justice Hanson rejects the concept that to prove gross negligence under the compensation act, a plaintiff would have to prove the tougher standard of “want of even scant care” used in the context of criminal cases, and says that it should be described as “negligence of a high degree, great negligence, [or] more than ordinary negligence but less than wanton and willful conduct.” Id at 768. Under Justice Hanson’s standard a fact issue on gross negligence would have existed. Neither the majority in Stringer nor Wicken reached the issue.

1. Employers Who are Negligent and Owe Contribution to a Third Party Tortfeasor.

Minn. Stat. Section 176.061, subd. 5 allows an employee who’s injury arose out of and in the course of their employment to sue a negligent or otherwise at fault party, so long as the at fault party is a third party to the employment relationship. The same section allows the employer to assert a subrogation or indemnification claim against the third party tortfeasor, and to recover the increased cost of worker’s compensation coverage caused by the injury to the employee, thereby allowing the employer, in theory, to be made whole if the accident was wholly the fault of the third party. Prior to the Supreme Court’s decision in Lambertson v. Cincinnati Corp., 257 N.W.2nd 679 (Minn. 1977), the common law rules of contribution and the workers’ compensation bar worked to shield an at fault employer from claims that the employers fault contributed to the injury. Lambertson held that a third party tortfeasor was entitled to assert a claim of equitable contribution measured by the lessor of the employer’s percentage of fault or the amount of workers’ compensation benefits paid or payable. In this way, the employer, in theory, still never paid more than its workers’ compensation liability, and the third party tortfeasor had an opportunity to mitigate its exposure. In practice, however, there were disputes regarding how workers’ compensation payments aligned with common law tort damages, and the operation of the distribution formula at Minn. Stat. Sec. 176.061 resulted in the employer funding the employee’s cost of recovery (attorneys fees and costs attributable to the subrogation amount) but still being potential liable to the third party tortfeasor for the full amount paid and payable. Additionally, an employer with significant fault would be forced to assume significant costs of defense and impositions on its employee’s and management with no potential recovery.

In 2000, the legislature made significant changes to the Minn. Stat. Sec. 176.061 which in large part have eliminated those issues. First, Subd. 5b was amended to clarify that the employers’ subrogation rights included all benefits paid and payable “regardless of whether such benefits are recoverable by the employee or the employee's dependents at common law or by statute.” The remaining problems were solved by a new section, Minn. Stat. Sec. 176.11 which limited the tortfeasor’s “lambertson contribution” right to the amount recoverable by the employer under the 176.061, subd. 6 formula, and by giving an at fault employer the option to waive its right to subrogation in exchange for a dismissal of the third party tortfeasor’s contribution claim. The statute then provides a mechanism for the damages assessed by the jury to be reduced by the amounts that are duplicative of those paid by workers’ compensation.

An open question is how a contractual indemnification agreement between the at fault employer and the third party tortfeasor would apply, especially where the employer’s fault exceeds the amount of worker’s compensation benefits paid, or where the employer has agreed to indemnify the third party tortfeasor for all damages arising out of the subject matter of the agreement. Nothing in the statute appears to prohibit such contractual indemnification agreements, and if they are otherwise enforceable, it seems that the third party tortfeasor should be entitled to recover under whichever theory provides it with the greatest recovery. The effect of a waive and walk election under 176.061 subd. 11 is also undecided in these circumstances.

Another open question under this scenario is the effect of the Minnesota’s joint and several liability statute on an employee’s claim against a third party tortfeasor. In Staab v. Diocese of St. Cloud, 853 N.W. 2d 713 (Minn. 2014) the Supreme Court held that a tortfeasor who was not more than 50% at fault was not jointly liable for the fault of a party who was not sued, but was placed on the verdict form. However, the plaintiff in Staab was not prevented from suing the other at fault party, her husband, by law as is the case where an employee is prevented from suing her employer by the workers’ compensation bar.

The Minnesota Supreme Court has not addressed this issue under the new comparative fault statute or the 2000 revisions to Minn. Stat. Sec. 176.061 subd. 6. Under a prior version of the comparative fault act, the court, in Hudson v. Snyder Auto Body, 326 N.W.2d 149 (Minn. 1982), the court held that the procedural mechanism for payment of the various awards under Lambertson, as set out in Johnson v. Raske Building Systems, 276 N.W.2d 79 (Minn. 1979) applied and held “The comparative-fault statute does not affect the apportionment procedure set out in *Johnson.”* 326 N.W. 2d at 157*.* Under the Johnson procedure, the at fault tortfeasor pays the total amount of the judgment in favor of the plaintiff to the plaintiff (damages less plaintiff’s fault), and then the employer pays the tortfeasor for the employer’s Lamberston contribution liability and the employer recovers its subrogation claim from the employee.

 However, in Gaudreault v. Elite Line Services, LLC, 2014 WL 2117211 (D. Minn. 2014), Judge Ericksen applied the reasoning in Staab and held that the comparative fault act applied to a special verdict form where the third party tortfeasor sought contribution from the employer, and the third party tortfeasor was less than 50% at fault. In other words, the court did not apply the Johnson method approved by Hudson. Rather, the court held that since Johnson was decided before Minn. Stat. Sec. 176.061 subd. 11 was enacted, and since the employer had waived and walked, the Johnson plan was not applicable. The Federal court did not directly address the language of Hudson. It did however refuse to follow Decker v. Brunkow, 557 N.W.2d 360 (Minn. App. 1996) which addressed this issue in light of the 4x15% joint liability rule then in effect and found that even where the third party tortfeasor’s fault was only 5% and the employers fault was 95%, the third party tortfeasor owed employee the full amount of its damages. The Federal court also failed to appreciate that while Minn. Stat. Sec. 176.061 subd. 11 codified the waive and walk procedure, Lambertson itself created the framework for that procedure, and it was used prior to the new statute. Finally, it should be noted that the court’s discussion in Gaudreault was not a holding, but was an advisory opinion that the court itself recognized it did not have the power to make. It did so only as an accommodation to the parties.

1. **Theories that have not been adopted in Minnesota**
2. Dual Capacity Doctrine

The “dual capacity” doctrine was advocated by many scholars in the 1970s and early 1980s. It proposed that:

 “[A]n employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent of those imposed on him as employer.

2A A. Larson, *The Law of Workmen's Compensation* § 72.80 (1976 & Cum. Supp. 1980), quoted in Note, *Workers' Compensation: The Dual-Capacity Doctrine,* 6 Wm. Mitchell L.Rev. 813, 814 (1980); Kaess v. Armstrong Cork, 403 N.W. 2d 643, 645 (Minn.1987).

However, as the Kaess court noted, “Larson has abandoned the "dual capacity" doctrine, explaining that it has been overextended and misapplied and that because of the many possible different relationships of an employer-landowner, product manufacturer, installer, modifier, doctor, insurer, etc. the ‘dual capacity’ doctrine would go far toward abolishing the exclusive remedy principle. 2A A. Larson, *The Law of Workmen's Compensation* § 72.81, at 14-230 (1983).” To date, although no published Minnesota cases have adopted the Dual Capacity doctrine, neither has the Supreme Court flat out held that the Dual Capacity doctrine does not apply in Minnesota. Id. (“Thus even if the "dual capacity" doctrine were to be recognized in Minnesota, it would not in this case permit a suit against MacArthur”), see also, Terveer v. Norling Bros. Silo Co., 365 N.W.2d 279 (Minn. App 1985), and Egeland v. State, 408 N.W. 2d 848 (Minn. 1987).[[5]](#footnote-5) Perhaps a creative plaintiff’s lawyer can find a path through the existing case law, but as Kaess and Egelund indicate, the path would be very narrow and hard to navigate.

1. Dual Persona Doctrine

As the Court in Kaess pointed out, Professor Larson has refined the Dual Capacity doctrine to the doctrine known as the “Dual Persona” doctrine. This doctrine provides:

“An employer may become a third person, vulnerable to tort suit by an employee, if and only if  he possesses a second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal person.” 2A A. Larson, *supra,* § 72.81, at 14-229.” Kaess, 403 N.W. 2d at 645.

However, even this narrow route around the workers’ compensation bar has met with hostility from Minnesota’s courts. In Kaess, the court found that the dual persona test was not met where the plaintiff worked for one division of his employer installing asbestos containing products and was injured by asbestos containing products manufactured by a different division of the same employer. In Egeland, the court found that the plaintiff, a county district court judge employed by the state of Minnesota could not sue the Minnesota Department of Transportation because they are not separate legal entities. See also Ytuarte v. Gruner +Jahr Printing and Publishing Co., 935 F.2d 971 (8th Cir. 1991) (employer, as division of owner of building that collapsed, was not separate and distinct for purposes of Dual Persona doctrine).

1. **Non-Employers who are Beneficiaries of the Workers’ Compensation Bar**
2. Common Enterprise

Minn. Stat. Sec. 176.061 subd. 1 and 4 work together to bar an employee of one participant in a common enterprise from suing the other participant in the common enterprise for negligence. The question is, when does a common enterprise exist. In McCourtie v. US Steel Corp, 253 N. W. 2d 501, 93 N.W.2d 552 (1958) the Minnesota Supreme Court “explained that a common enterprise exists if all of the following three factors are met:

 1. The employers must be engaged on the same project;

 2. The employees must be *working together* (common activity); and

 3. In such fashion that they are subject to the same or similar hazards.”

McCourtie, [253 Minn. at 506](https://casetext.com/case/anderson-v-commissioner-of-taxation?page=506), [93 N.W.2d at 556](https://casetext.com/case/anderson-v-commissioner-of-taxation?page=556); Kaiser v. Northern States Power Co*.*, [353 N.W.2d 899, 906](https://casetext.com/case/kaiser-v-northern-states-power-co?page=906) (Minn. 1984).” O’Malley v. Ulland Bros., 549 N.W.2d 889 (Minn. 1995). The O’Malley court held that whether or not the employers were part of a common enterprise was a question of law for the court, and determined that in this case, the employers were in a common enterprise, and therefore dismissed the employee’s claim. The O’Malley court indicated that its opinion was informed by the 1983 statutory change in 176.001 requiring the WCA be applied in an even handed way, not as before 1983, in favor of recovery as a remedial statute.

The dissent in O’Malley argued that whether the common enterprise test was met was a mixed question of fact and law, and noted with disdain that this was the first case in 50 years to find a common enterprise in a contested case, and predicted the resurgence of the common enterprise doctrine and its resurrection from near death. Since O’Malloy, however, the common enterprise exception to third party liability continues to be a difficult defense for the third party tortfeasor to succeed on. See Sorenson v. Visser, 558 N.W.2d 773 (Minn. App 1997), Carstens v. Mayers, Inc., 574 N.W.2d 733 (Minn. App. 1998), LeDoux v. M.A. Mortenson Co., 835 N.W.2d 20, 22 (Minn. App. 2013. But See, Teska v. Potlach Corp., 184 F.Supp. 2d 913(D. Minn. 2002).

The rule exists for the protection of employers who have joined forces and in effect have put their forces in a common pool. LeDoux, 835 N.W. 2d at 22. In order to prevail, the tortfeasor must put together significant evidence showing that all three elements of the McCourtie test have been met. In spite of the result in O’Malley, this remains a tough row to hoe.

There is one additional element of the common enterprise defense….both the employer and the tortfeasor seeking to use the defense must be insured or self-insured for workers’ compensation under the Minnesota Act.

1. Borrowed/Loaned Servants

Employers of all kinds use temporary agencies to staff their operations. Typically, the plaintiff is an employee of the temporary agency (general employer) who is seconded to another employer to actually perform work (special employer). Under Minnesota’s Workers’ Compensation Act, both the general employer and the special employer are liable for workers’ compensation benefits if a three part test is met. Danek v. Meldrum Manufacturing & Engineering Co., 252 N.W.2d 255 (Minn.1977). The test is:

“When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if:

 a. the employee has made a contract of hire, express or implied, with the special employer;

 b. the work being done is essentially that of the special employer; and

 c. the special employer has the right to control the details of the work.

When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workmen's compensation.” Id at 258.

The general employer and the special employer are allowed to “arrange for a different distribution of payment of the compensation for which they are liable.” Minn. Stat. Sec. 176.071.

Usually, the labor broker/general employer pays the workers’ compensation benefits. It is not unusual therefore, for the plaintiff to assert a claim against the special employer. Under the Danek analysis, the first element includes an inquiry regarding whether the employee consented to an employment relationship with the special employer. In the labor broker context, consent is inferred. Consent may also be implied, for example in a temp to hire scenario. Dukes v. Northern Metal Fab., Inc., 2015 WL XXX (D. Minn) [Case No. 13-cv-03647 (SRN/FLN)](https://ecf.mnd.uscourts.gov/doc1/10115673571).

**Conclusion**

 Minnesota has, despite numerous challenges, fairly rigorously upheld the elements of the Grand Compromise. The bar against tort claims by an employee against his employer continues to have the support of the courts. Understanding the relationship between the plaintiff, his employer and the alleged third party tortfeasor in the context of purposes of the Workers’ Compensation Act will make navigating this often confusing legal landscape easier for defense lawyers involved in these cases.[[6]](#footnote-6)

1. Minn. Stat. Sec. 176.001, enacted in 1981, in part to reverse a reference to the workers’ compensation act as a “remedial” law to be interpreted in favor of employees, specifically calls out this compromise as the basis for the act: “The workers' compensation system in Minnesota is based on a mutual renunciation of common law rights and defenses by employers and employees alike. Employees' rights to sue for damages over and above medical and health care benefits and wage loss benefits are to a certain degree limited by the provisions of this chapter, and employers' rights to raise common law defenses such as lack of negligence, contributory negligence on the part of the employee, and others, are curtailed as well.” Meintsma v. Lorman Maintenance of Way, Inc., 684 N.W.2d 434, 438 (Minn. 2004). [↑](#footnote-ref-1)
2. In order for the act to apply, the injured person needs to be an employee and the injury needs to arise out of and in the course of his/her employment. Minn. Stat. Sec. 176.021 (Every employer is liable for compensation according to the provisions of this chapter and is liable to pay compensation in every case of personal injury or death of an employee arising out of and in the course of employment without regard to the question of negligence.) Employee is a defined term (see MSA 176. 011 subd. 9 and 9a), as is employer, MSA176.011 subd. 10, and personal injury, MSA 176.011 subd. 16. “ Arising out of and in the course of” can be a very complex analysis, and is the subject of a body of case law much too broad to include in this article. While this article will assume that case involves a covered employee’s injury arising out of and in the course of his/her employment, unless otherwise discussed, that preliminary issue should be addressed first. [↑](#footnote-ref-2)
3. The numbering of the sections of Minn. Stat. Sec. 176.061 subd. 5 have changed. In earlier versions of the statute, this was Minn. Stat. Sec. 176.061 subd. 5 (c), not (e). [↑](#footnote-ref-3)
4. Actually, Dawley was decided before the 1979 amendments to the workers compensation statute added the gross negligence language to the statute. [↑](#footnote-ref-4)
5. “With respect to the "dual capacity" doctrine, Judge Egeland was injured in an accident involving another state employee; in cases involving government employees, whether local, state, or federal, the "dual capacity" doctrine has been rejected by virtually every court which has addressed the issue. *See* 2A A. Larson, *The Law of Workmen's Compensation,* § 72.85(b)  (d), at 14-255  14-258 (1986 & Cum.Supp.). For example, in rejecting the doctrine in a case involving an attempted suit against the state by an injured state employee, the Alaska Supreme Court stated:

‘Whatever frail vitality the dual capacity doctrine has in other jurisdictions, we do not think that it warrants adoption here. To do so might undermine extensively the policy sought to be achieved by the workmen's compensation act. There are endlessly imaginable situations in which an employer might owe duties to the general public, or to non-employees, the breach of which would be asserted to avoid the exclusive liability provision of our statute. It would be an enormous, and perhaps illusory, task to draw a principled line of distinction between those situations in which the employee could sue and those in which he could not. The exclusive liability provision would, in any event, lose much of its effectiveness, and the workmen's compensation system as a whole might be destabilized. For these reasons, and because of the persuasiveness of case law from other jurisdictions rejecting it, we reject the dual capacity doctrine as the law of this state.’” Id at 851, quoting *State v. Purdy,* 601 P.2d 258, 260 (Alaska 1979) (footnote omitted). [↑](#footnote-ref-5)
6. There is an entire jurisprudence surrounding claims and settlements in cases involving true third party tortfeasors. That discussion is outside of the scope of this article, but the author is happy to discuss it with you. [↑](#footnote-ref-6)