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THE NATURE AND ORIGINS OF WORKMEN'S COMPENSATION†

*Arthur Larson**

Workmen's compensation is a mechanism for providing cash wage benefits and medical care to victims of work-connected injuries, and for placing the cost of these injuries ultimately on the consumer, through the medium of insurance, whose premiums are passed on in the cost of the product.

The typical workmen's compensation act has these features: (a) the basic operating principle is that an employee is automatically entitled to certain benefits whenever he suffers a "personal injury by accident arising out of and in the course of employment"; (b) negligence and fault are largely immaterial, both in the sense that the employee's contributory negligence does not lessen his rights and in the sense that the employer's complete freedom from fault does not lessen his liability; (c) coverage is limited to persons having the status of employee, as distinguished from independent contractor; (d) benefits to the employee include cash wage benefits, usually around one-half to two thirds of his average weekly wage, and hospital and medical expenses; in death cases benefits for dependents are provided; arbitrary maximum and minimum limits are ordinarily imposed; (e) the employee and his dependents, in exchange for these modest but assured benefits, give up their common-law right to sue the employer for damages for any injury covered by the act; (f) the right to sue third persons whose negligence caused the injury remains, however, with the proceeds usually being applied first to reimbursement of the employer for the compensation outlay, the balance (or most of it) going to the employee; (g) administration is typically in the hands of administrative commissions; and, as far as possible, rules of procedure, evidence, and conflict of laws are relaxed to facilitate the achievement of the beneficent purposes of the legislation; and (h) the employer is required to secure his liability through private insurance, state fund insurance in some states, or "self-insurance"; thus the burden of compensation liability does not remain upon the employer but passes to the consumer, since compensation premiums, as part of the cost of production, will be reflected in the price of the product.

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* See Contributors' Section, Masthead, p. 256, for biographical data.

The sum total of these ingredients is a unique system which is neither a branch of tort law nor social insurance of the British or continental type, but which has some of the characteristics of each. Like tort, but unlike social insurance, its operative mechanism is unilateral employer liability, with no contribution by the employee or the state; like social insurance, but unlike tort, the right to benefits and amount of benefits are based largely on a social theory of providing support and preventing destitution, rather than settling accounts between two individuals according to their personal deserts or blame.

A correctly balanced underlying concept of the nature of workmen's compensation is indispensable to an understanding of current cases and to a proper drafting and interpretation of compensation acts. Almost every major error that can be observed in the development of compensation law, whether judicial or legislative, can be traced either to the importation of tort ideas, or, less frequently, to the assumption that the right to compensation resembles the right to the proceeds of an insurance policy.

Among common-law trained lawyers and judges, it has naturally been the tort-connection fallacy that has been most prevalent.¹ The effect on day-to-day compensation decisions may be shown in a few widely-assorted examples. One was the attempt, in the early years of compensation development, to read "arising out of the employment" as if it were "proximately caused by the employment,"² with accompanying rules of foreseeability and intervening cause. The most familiar and persistent effect is the difficulty lawyers and judges feel in reconciling themselves to the notion that the employee's misconduct causing his own injury must really be altogether disregarded. So, in various forms such as "added-risk" doctrines, and in various troublesome categories, such as assault and horseplay cases, fault concepts have at times crept into compensation decisions. Failure to make a clean break with tort thinking can be harmful to the employer as well as to the employee. For example, the cases³

¹ See, for example, HARPER, *A TREATISE ON THE LAW OF TORT* 415 (1933): ". . . it seems clear that the legislature has merely substituted for the old remedies a scheme of liability which, in its broad outline, is fundamentally tort in nature, closely resembling in legal principle and social philosophy, that of common-law strict liability."

² See, for example, the former Massachusetts rule as expressed in *Madden's Case*, 222 Mass. 487, 111 N.E. 379 L.R.A. 1916D, 1000 (1916); and HARPER, *LAW OF TORTS* 432.

³ *Stewart v. McLellan's Stores Co.*, 194 S. C. 50, 9 S. E. 2d 35 (1940); *Lavin v. Goldberg Building Material Corp.*, 274 App. Div. 690, 87 N. Y. S. 2d 90 (1949); following *De Coigne v. Ludlum Steel Co.*, 251 App. Div. 662, 297 N. Y. Supp. 636 (1937). Note that the above criticism applies only when the employer does not personally participate in the assault; if he himself commits or directs the assault, the employee should have

which hold that the employer may be personally liable in tort for assaults deliberately committed by his supervisory employees, as against the employer's defense of exclusive compensation coverage, are wrong because they import into the compensation system a concept of employer liability for vice-principal which was developed in the late nineteenth century solely to get around the fellow-servant defense to tort actions against the employer. A less conspicuous example of distortion of compensation law by tort concepts will be seen in the attempt to define an employee, for compensation purposes, by tests which were developed to determine when a master should be liable for the torts of a servant to a third person. And even in such an incidental field as conflict of laws, one encounters confusion caused by early attempts to determine which compensation act applies in an out-of-state injury by the tort rule of *lex loci delicti*.

Since the concept of compensation as a kind of strict-liability tort has had such widespread acceptance among lawyers and such widespread effects on compensation decisions, most of the following discussion of the inherent nature of workmen's compensation has been cast in the form of a demonstration of concrete reasons why compensation cannot properly be so regarded. This discussion is intended to do two things at once: dispel the strict-liability-tort fallacy, and at the same time provide a quick survey of the most distinctive specific characteristics of workmen's compensation. Then, to balance the picture, several features showing contrasts with social insurance will be discussed, with the object of indicating the unique intermediate character of workmen's compensation as it has developed in the United States.

I. COMPENSATION DISTINGUISHED FROM TORT

(a) *The Test of Liability: Work-connection Versus Fault*

The right to compensation benefits depends on one simple test: was there a work-connected injury? Negligence, and, for the most part, fault, are not in issue and cannot affect the result. Let the employer's conduct be flawless in its perfection, and let the employee's be abysmal in its clumsiness, rashness and ineptitude: if the accident arises out of and in the course of the employment, the employee receives his award. Reverse the positions, with a careless and stupid employer and a wholly-innocent employee: the same award issues.

Thus, the test is not the relation of an individual's personal quality (fault) to an event, but the relationship of an event to an employment.

the option to sue at common law, since the defendant employer, having intentionally harmed the employee, cannot be heard to say that the injury was accidental.

The essence of applying the test is not a matter of assessing blame, but of marking out boundaries.

(b) *Underlying Social Philosophy*

The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most efficient, most dignified and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obliged to provide in any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source of payment, the consumer of the product.

Let us approach the abstract question of underlying philosophy by taking a typical concrete example of industrial injury. Suppose claimant has worked for ten years at a drill press, at a salary which is not calculated to enable him to accumulate private annuities to care for him if he should have to stop working. The rules require him to wear a safety harness, and, although it is a hot and uncomfortable appliance, he has worn it faithfully until the day of the injury, when, in a moment of carelessness, he operates the machine without the harness and crushes both his hands.

A system of law based in any degree on individual merit at the instant of the accident can see only one result: non-liability. The employee not only was negligent, but violated a safety rule. The employer, on the other hand, had thoughtfully provided a safety device and had done all he could by enforcing a rule requiring its use. To require the innocent employer to pay the "guilty" employee might seem to flout the entire moral basis of law. In an entirely individualistic moral code, this might be so, but let us see what happens when considerations of social morality are introduced.

The society surrounding the disabled man can do one of three things:

First, it can refuse all aid, and let him starve in the street, or let him squat on the sidewalk with a few yellow pencils and beg for pennies from those who were yesterday his equals. Since the reign of Queen Elizabeth, no Anglo-American community has considered this a morally-acceptable solution.

Second, it can put him on county relief, or some other form of direct hand-out. This, while better than the first, is a poor solution in at least two ways: it stigmatizes the man as a pauper, and it places the cost on the political or geographical subdivision where he happens to have his residence, although that subdivision had no connection with the injury.

Third, it can grant him Workmen's Compensation, thus preserving his dignity and self-respect as an injured veteran of industry, which is psychologically and morally the best of the three solutions, and placing the cost where it rightly belongs, on the consumers of the product whose production was the occasion for the injury.

And so, by this simple demonstration of alternatives, we see that Workmen's Compensation, far from being a violation of moral principle, is in fact the only morally satisfactory solution of the problem of the injured workman, once you concede that morality has a group as well as an individual aspect. Of course, not every compensable injury is of the severity to present the poorhouse as an alternative to compensation, but the principle for lesser injuries is the same: they all attempt to ensure that the claimant continue to receive the bare minimum income and medical care to keep him from destitution. The ultimate "social philosophy," then, behind non-fault compensation liability is the desirability of providing, in the most efficient, most dignified and most certain form, financial and medical benefits which an enlightened community would feel obliged to provide in any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source of payment.

This statement, of course, is what might be called compensation theory in pure or idealized form. In the actual statutes, and still more in case-law interpretations, a greater or less admixture of the "fault" idea will be found in every jurisdiction. However, the whole story of the development of workmen's compensation is a record of movement in the direction of the "pure theory" stated above, and away from the fault concept.

In the last analysis, it is almost impossible to mix the two theories and get a satisfactory result. For example, in our opening illustration of the claimant injured at a drill press through his own failure to use a safety device, quite a few states still deny compensation altogether, not because of negligence, of course, but because of the violation of a specific safety regulation.⁴ And yet, when the community is confronted with the three alternatives for the ruined man mentioned above, it is difficult to see in what respect its social or moral problem is different by reason of that safety violation. The most "advanced" statutes now penalize this kind

⁴ ALA. CODE tit. 26, § 270 (1940); DEL. REV. CODE c. 175, § 6106 (1935); FLA. STAT. § 440.09(3) (1943); GA. CODE ANN. § 114-105 (1937); IND. STAT. ANN. § 40-1208 (Burns 1933); KAN. GEN. STAT. ANN. § 44-501 (1935); OKLA. STAT. tit. 85, § 11 (1941); S. D. CODE § 64.0202 (1939); TENN. CODE ANN. § 6861 (Williams 1934); VA. CODE ANN. § 65-35 (1950); W. VA. CODE ANN. § 2527 (1949).

of momentary violation of safety rules by percentage deductions rather than complete loss of benefits.⁵

It has sometimes been erroneously said that the policy basis for absolute Workmen's Compensation liability resembles the policy basis which gave rise to strict liability in tort, in *Rylands v. Fletcher*,⁶ wild animal cases, blasting and what the Restatement of Torts calls "ultra-hazardous activities".⁷ The rationale of strict liability in these latter cases is usually put thus: when a man carries on a hazardous undertaking which has sufficient social utility to prevent the law from forbidding it altogether, the law will permit him to carry it on only on condition that he assume liability without fault for any consequent injuries. So, the argument runs, when an employer embarks on an enterprise, there is a strong probability of personal injuries sooner or later, and accordingly he may be made to assume absolute liability for these injuries when they do occur.

The fallacies in this analogy are many, but it will suffice to state the most obvious one: employment generally is not ultra-hazardous in the sense used in strict liability tort cases. It is true that a handful of statutes, for historical and now invalid reasons having to do with attempts to ensure constitutionality, are on their face limited to "hazardous" employments, but most statutes are not so limited.⁸ If employment, regardless of nature, is "hazardous" in this sense (*i.e.*, that accidents will eventually happen), then so is driving a car, operating a household, or perhaps just living at all—and absolute liability should be the rule for all mishaps flowing from these activities. In any case, consistency would demand that an employer's liability to outsiders for all injuries caused by operation of his business be also absolute, for if it is ultrahazardous for the purpose of strict liability to employees, it must be the same for the purpose of liability to strangers.

Of course, some employments are hazardous, but others are not; and when injury does in fact occur, benefits are just as necessary under the social philosophy of compensation in the latter case as in the former.

⁵ N. C. GEN. STAT. ANN. § 97-12 (1950), and S. C. CODE ANN. § 7035-15 (1942) (10% reduction); KY. REV. STAT. § 342-165 (1945), MO. REV. STAT. ANN. § 287-120 (1949), UTAH CODE ANN. § 42-1-11 (1943), WIS. STAT. § 102-58 (1949) (15%); COLO. STAT. ANN. c. 97, § 362 (1935), N. M. STAT. ANN. § 57-906 (1941) (50%).

⁶ [1865] 3 Hurl. & Colt. 774; [1866] L. R. 1 Ex. 265; [1868] L. R. 3 H. L. 330.

⁷ RESTATEMENT, TORTS §§ 519-524 (1938).

⁸ Nine states confine coverage largely to hazardous employments: Kansas, Louisiana, Maryland, Montana, New Mexico, Oklahoma, Oregon, Washington, and Wyoming. In Illinois the classification makes the difference between automatic and elective coverage. In New York it avoids the requirement of having four or more workmen or operatives.

(c) *Significance of Difference in Defenses*

The retention of the defenses of act of God, act of third person and some kinds of contributory negligence in so-called strict tort liability, and their unavailability in compensation law, show that the former is ultimately based on fault, while the latter is not.

While the mistaken grouping of compensation with strict tort liability is due partly to a misunderstanding of compensation, it is also due partly to the erroneous idea that so-called "strict tort liability" is indeed "absolute liability without regard to fault." The simplest way to show the ultimate fault basis of strict tort liability is to examine the significance of the defenses that remain. Not long after *Rylands v. Fletcher* (which was not believed by the court to announce any new principle of liability), it was decided that act of God⁹ and act of third person¹⁰ were good defenses. Consent¹¹ or "default"¹² of the plaintiff were also recognized as defenses. This means that the boundaries of strict liability must still be described in terms based on fault. To relieve the actor of liability in three instances in which he is affirmatively shown to be free of fault in precipitating the harm is to indicate both that you have not set up a true non-fault liability, and that the area in which liability remains probably has some element of fault in it that distinguishes it from the area in which the three defenses create immunity.

So, if an employer, such as a circus, kept a caged tiger, and if lightning, or a stranger, or the plaintiff, caused the release of the tiger, there would under the cases cited be no strict tort liability; but if lightning, a stranger or a circus employee's own negligence caused the release and resulting injury to the employee, there would be compensation liability. The latter is true liability without regard to fault; the former is not.¹³

(d) *Nature of injuries and elements of damage compensated*

In compensation, unlike tort, the only injuries compensated for are

⁹ *Nichols v. Marsland*, [1875] L.R. 2 Ex. D. 1, 259.

¹⁰ *Box v. Jubb*, [1879] L.R. 4 Ex. D. 76.

¹¹ *Atty.-Gen. v. Cory Bros. & Co.*, [1921] 1 A.C. 521, 539.

¹² *Fletcher v. Rylands*, [1866] L.R. 1 Ex. 279, per Blackburn, J. The "default" here referred to is the escape of the dangerous thing or substance due to plaintiff's fault. The RESTATEMENT, TORTS § 524 (1938), bars recovery if plaintiff intentionally or negligently caused the activity to miscarry or, after knowledge of the imminent miscarriage, failed to use reasonable care to avoid harm to himself; it permits recovery if plaintiff's "default" consisted merely of negligent failure to observe that the dangerous activity was being carried on or of intentional coming into the dangerous area. In this state of the law, the broad statement in some Torts texts that contributory negligence is not a defense to strict liability seems to be misleading.

¹³ STALLYBRASS, SALMOND'S LAW OF TORTS 541 (10th ed. 1945).

those which produce disability and thereby presumably affect earning power.

For this reason, some classes of injuries which result in verdicts of thousands of dollars at common law produce no award whatever under a compensation statute.¹⁴ For example, while common-law verdicts of great size are common for facial disfigurement, it is usually held that, in the absence of an express provision making disfigurement compensable, no allowance can be made for it. More than half of the states now have such express provisions, but, significantly, the basis in most instances is still the argument that a repellent appearance may diminish the claimant's chances of obtaining and holding employment. Similarly, impairment or destruction of sexual potency is not in itself a basis for an award, and, presumably the same result would apply to such an injury as destruction of child-bearing capacity in a woman.

The limitation of compensation to "disability" also runs consistently through all questions of elements of damage. To take a familiar example: there is no place in compensation law for damages on account of pain and suffering, however dreadful they may be. So also in death benefit cases, compensation law refuses to recognize such items as loss of consortium or conscious suffering of the deceased in the interval preceding death.

(e) *Amount of compensation*

A compensation system, unlike a tort recovery, does not pretend to restore to the claimant what he has lost; it gives him a sum which, added to his remaining earning ability, if any, will presumably enable him to exist without being a burden to others. If our compensation theory is correct, then the amount of compensation awarded may be expected to go not much higher than is necessary to keep the worker from destitution. This is indeed so.

Up to a certain point, the amount of compensation for disability depends on the worker's previous earnings level, for most acts award a percentage of average wage, somewhere between half and two-thirds. But practically all acts also set a maximum in terms of dollars per week at a level which can hardly be termed anything but bare subsistence. Most of these maxima for total disability run between \$20 and \$35 a week. Thus, a bricklayer earning \$3 an hour and taking home over a hundred dollars a week may find himself reduced to \$25-a-week level and forced

¹⁴ *Ingle v. Mills*, 204 S. C. 505, 30 S. E. 2d 301 (1944); *Shaw v. Salt River Valley Water Users' Ass'n*, 69 Ariz. 309, 213 P.2d 378 (1950).

to accommodate his previous \$100-a-week standard of living to one-fourth that amount.

It is not intended here to argue the adequacy of the compensation scale;¹⁵ the present point is simply to show one more fundamental point of cleavage between compensation and tort. For this purpose, it is equally significant that, under the dollar minima (mostly in the \$5-\$15 range), it is at least conceivable that an employee, working with sufficient regularity to come under an Act, but yet at a total income far below the minimum, might be awarded a weekly income for total disability which is several times that which he has been earning.

Even among those who contend that the scale of benefits is generally too low, there are few if any who would contend that anything resembling tort principles of amount of recovery should be imported into compensation law. It was never intended that compensation payments should equal actual loss, for the reason, if no other, that such a scale would encourage malingering and trumped-up claims.

(f) *Ownership of the Award*

The recipient of installment payments does not ordinarily "own" the unpaid balance of the award so as to entitle his heirs as such to any interest in it.¹⁶

Not only is the award trimmed on all sides—as to kind of injury, elements of damage, and maximum dollar amount—to ensure that it can never exceed the amount necessary to prevent want during disability; the award itself is completely cut off in most jurisdictions when, through the death of the worker without dependents, for example, there is no further need to worry about anyone's becoming destitute. Thus, if a claimant has been awarded \$20 a week for 300 weeks, and dies without dependents after 100 weeks, his heirs usually have no claim upon the unpaid \$4000. So the making of an award for disability, far from being an adversary recovery of damages by an injured plaintiff from a defendant guilty of some kind of constructive responsibility for the accident, is rather the signal for the setting in motion of a scheme of social protection which goes no further in nature, amount or duration than the necessities of that protection require.¹⁷

¹⁵ For a thorough analysis of this subject, see REEDE, *ADEQUACY OF COMPENSATION* (1947).

¹⁶ *Turner v. Christian Heurich Brewing Co.*, 169 F. 2d 681 (D. C. Cir. 1948).

¹⁷ By special statutory amendment this rule has been altered in some jurisdictions. See, e.g., *Moffat Coal Co. v. McFall*, 117 Col. 191, 186 P. 2d 1021 (1947); *Mt. Oliver & Staunton Coal Co. v. Industrial Commission*, 394 Ill. 377, 68 N. E. 2d 771 (1946); *Vander Heiden v. Industrial Commission*, 246 Wisc. 543, 17 N. W. 2d 898 (1945).

(g) *Significance of insurance*

In compensation theory, liability is not supposed to hurt the employer as it helps the employee, since the loss is normally passed on to the consumer. Of course, insurance of many kinds of tort liability is a familiar feature of modern law, and we do not, in theory, allow the presence of insurance to alter our conception of the rights and liabilities of the actual parties. But compensation insurance is a little different, for it is normally an integral part of the whole scheme. Most insurance, even where semi-compulsory, is exclusively concerned with providing a fund for possible plaintiffs. Compensation insurance too has this primary object, but it is also designed to provide the route whereby the cost of the compensation system is passed on to the consuming public in orderly fashion.

One of the best indications of this distinction is the fact that the impracticability of insuring a particular class of employers, such as private householders, or of employees, such as domestic servants, is usually recognized as reason enough for omitting them from compensation coverage.¹⁸ Of course, under an experience rating system the employer may indirectly feel some impact of frequent or large claims in the form of increased insurance premiums, but apart from this, the American compensation system, unlike the tort system, at the moment of creating the liability also creates the means of relieving the employer of the real burden of that liability.¹⁹

¹⁸ Riesenfeld, who in his brilliant lecture in the Gleason series entitled *Forty Years of Workmen's Compensation*, expressed some disagreement with the view here stated, nevertheless observed later in his lecture, when speaking of the exemption of casual and non-business workers, ". . . there is perhaps some reason for such exemption in view of the difficulty of insurance coverage for occasional work." See 7 N. A. C. C. A. L. J. 15, 20, 26 (1951).

¹⁹ Observe that this question of the theoretical impact of compensation liability on the individual employer is an entirely different matter from the question whether the relative generosity of compensation in a particular jurisdiction subjects the industry of an entire state to a competitive disadvantage. For example, when Wisconsin began to compensate for silicosis before its neighbors did, its granite and monument works had to shut down. See also Horne, N. Y. Times, Sept. 10, 1951, p. 1, col. 2, Sept. 11, 1951, p. 18, col. 1, and Sept. 12, 1951, p. 26, col. 2, on the general theme that "Industry in New York State fears it is losing its competitive standing because of the cost of workmen's compensation." This problem is not of the essence of compensation law as such, since competitive disadvantage would not exist if all states maintained the same level of benefits and followed one theoretically-correct standard of interpretation. But, while the financial aspects of compensation are not within the province of this article, it is well to bear in mind that there is a direct relation between the relative liberality of the competing judicial doctrines herein discussed and the dollars-and-cents cost of compensation insurance in the particular state.

II. AMERICAN SYSTEM DISTINGUISHED FROM SOCIAL INSURANCE

(a) *Private Character of the System*

The emphasis above on the features of compensation which distinguish it from tort, such as its social philosophy, its relation of awards to disability rather than loss, and its distribution of the cost to the consumer, may give the impression that the compensation system is virtually a kind of social security or social insurance plan. To restore a balanced impression of the American system, one must contrast it with the systems that are truly public and socialistic, such as the British and New Zealand plans;²⁰ this done, it becomes apparent that the present American system is neither tort nor socialism, but something between.

Though social in philosophy, the American compensation system is largely private in structure, being a matter between employers, insurance carriers and employees, while under typical socialistic schemes the government becomes the central figure.

A very brief description of the British and New Zealand plans may be given at the outset, with other details to be added as they become relevant. Of the two, the New Zealand system illustrates the final "all out" development of comprehensive social security, while the British plan retains some compromises with the past.

In the New Zealand plan,²¹ the separate identity of workmen's compensation, and of industrial or occupational injury or disease as such, has disappeared. The system is financed by registration fees and income taxes with no special reference to employment, and benefits are paid for sickness, accident, invalidism, and death without distinction between occupational and non-occupational origin, as well as for old age, widowhood, orphans, families, war injuries to civilians, unemployment and other emergencies.

The British plan²² retains the identity of Workmen's Compensation to some extent. Workmen's Compensation becomes a part of the comprehensive security system, along with retirement, unemployment, sickness, maternity, widows', orphans', family and death benefits; it is under the same overall administration by the Ministry of National Insurance; but

²⁰ See MERIAM, RELIEF AND SOCIAL SECURITY, Part II (1946).

²¹ See THE NEW ZEALAND OFFICIAL YEARBOOK, and an official government pamphlet describing the system entitled SOCIAL SECURITY MONETARY BENEFITS AND WAR PENSIONS.

²² National Insurance (Industrial Injuries) Act 9 & 10 GEO. 6, c. 62 (1946, effective 1948). Other parts of the over-all legislative scheme are: National Insurance Act, 9 & 10 GEO. 6, c. 67 (1946 effective 1948); Ministry of National Insurance Act, 7 & 8 GEO. 6, c. 46 (1944); Family Allowances Act, 8 & 9 GEO. 6, c. 41 (1945); and the National Health Service Act, 9 & 10 GEO. 6, c. 81 (1946).

there is an Industrial Injuries Fund separate from the National Insurance Funds under which most of the other benefits are financed. The most important difference is the substantially higher benefits for occupational disability than for non-occupational. For example, a married man who is totally and permanently disabled and unemployable will receive eighty-one shillings a week if the disability is under the Workmen's Compensation portion of the plan, but only forty-two shillings a week if the invalidity is non-occupational.²³ Unlike the New Zealand plan, this plan calls for special contributions by the parties: five-twelfths by the employer, five-twelfths by the employee and two-twelfths by the Exchequer; but the fund is, of course, public, and the handling of liability through private insurance or self-insurance is abolished.

By contrast with these plans, which are representative of systems in force on the continent and elsewhere, the American system begins to look conspicuously individualistic. Except in the few states which require insurance in a State Fund, employers are generally free to make private arrangements for the securing of their liability, either by carrying liability insurance or by qualifying as "self-insurers." So far as government participation is concerned, while the whole process is in a sense under administrative supervision, the government's role is confined largely to the settlement of disputed claims.

The real clue to the character of each system is the source of financing: in the American it is typically premiums paid by the employer and passed on to a particular consuming group; in the British it is "premiums" paid equally by employer and employee, with a small addition by the government; in New Zealand it is general taxes. So the American system retains the concept of employer liability, though presumably passed on to the consumer in the price of the product; the British scheme seems to abandon this idea altogether, in favor of the idea that the employee, with the aid of his employer and to a lesser degree of the government, purchases a sort of insurance policy from the government against occupational injury; the New Zealand system rejects both these ideas, and proceeds upon the theory that the state generally has an obligation to provide a certain minimum subsistence to all its members whose earnings are interrupted for any reason.

²³ Another important distinction is that in order to receive this non-occupational benefit for an unlimited period the recipient must have paid in 156 weekly contributions; otherwise the maximum benefit period is one year. The benefits, for occupational injury, however, are in no way dependent on the extent or duration of the employee's contributions. As to hospital and medical benefits, however, as distinguished from cash benefits for wage loss, occupational and non-occupational injuries alike are covered by the national health service program.

(b) *Allocation of burden, and relation of hazard to liability*

Unlike social insurance plans, the American compensation system does not place the cost on the "public" as such, but on a particular class of consumers, and thus retains a relation between the hazardousness of particular industries and the cost of the system to that industry and consumers of its product. It is not quite accurate to say, as is often said, that the "public" ultimately pays the cost of workmen's compensation. Such a statement is literally true in New Zealand, but in America it is more precise to say that the consumer of a particular product ultimately pays the cost of compensation protection for the workers engaged in its manufacture. Between these two apparently similar methods of distributing the cost of protection there is actually a far-reaching difference. Some employments, like logging and lumbering, are highly dangerous; others, of a clerical and sedentary nature, involve a minimum of hazard. Under the American system, the size of the insurance premiums will vary according to the degree of hazard, while in New Zealand, the safe industry will pay taxes at the same rate as the dangerous. In this respect the British plan resembles New Zealand's, for the amount of contribution is uniform, and does not vary according to the hazardousness of the industry. The Minister's report gives a special reason for this rather surprising feature of its plan: the extra levy for hazardous industries "would fall most heavily on certain important industries which have to meet foreign competition."²⁴

In certain competitive situations, the choice of theory here could assume great importance. For example, suppose that two building materials, like stone and brick, are in close competition; the burden of high compensation premiums because of the prevalence of silicosis in the stone-cutting industry might, if that industry bore the full weight of it, drive that product from the market, while under the New Zealand or British plans there would be no such disadvantage. Where experience rating, *i.e.*, the adjustment of premium on the basis of past accident and liability record, is applied to individual employers, this competitive impact is carried one step further, in that an individual employer with a bad safety record might conceivably in time incur premiums so high that his cost of production would not permit him to compete.

Thus, while by contrast with tort liability, the American compensation system seems to have eliminated all consideration of fault, a comparison with true social insurance reveals that other systems have gone much further along that road, by relieving not only individual employers but

²⁴ MINISTRY OF RECONSTRUCTION, SOCIAL INSURANCE REPORT, Pt. II, ¶ 31(v).

entire industries of all financial responsibility for the extent of injury-producing conditions which, avoidably or unavoidably, they maintain.

(c) *Qualification for and measure of benefits*

The American system does not, like a true security system, make actual need the test and measure of compensation; its measure is a compromise between actual loss of earning capacity and arbitrary presumptions of the amount needed for support. In the sections above contrasting measure of recovery in compensation and tort, the emphasis was on the many ways in which compensation did not compensate for actual loss in the sense that tort recoveries are supposed to do. But when the comparison is with the British or New Zealand plans it becomes clear that the compensation system is still far from being a relief system based on actual need.

In New Zealand, benefits for all sickness or accident claimants temporarily incapacitated for work are uniform, without respect to previous earnings, except that payments cannot be greater than previous earnings. The size of benefits varies only according to the number of dependents; a man gets a pound a week, fifteen shillings for his wife, and ten shillings and sixpence for each dependent child. The Commission has power to reduce these amounts in the light of other income or property of the claimant. For total permanent disability, the claimant receives the standard rate of eighty-four pounds ten shillings per year, with additional amounts for dependents; but here an automatic "means test" comes in. The total allowable income, of benefits plus independent income from other sources, is £162.10.0. This means that if an invalided employee has an income of his own of £162.10.0 a year, he simply receives no benefits at all; if his independent income is less than that, his benefits are so scaled that his total income is still £162.10.0.

Britain, however, has a history of violent opposition to the principle of the "means test," and this is reflected in the present benefit system. The present British scale departs sharply from traditional compensation practice by disregarding previous earnings entirely; as in New Zealand, benefits are uniform for all individuals, and vary only according to number of dependents. But while the measure is thus a sort of presumed need, as distinguished from actual loss of earnings, no inquiry into actual need is permitted as in New Zealand. In fact, in the case of prolonged or permanent disability, the basic "pension" is not affected by subsequent earnings of the claimant.²⁵ In this respect, the British system seems

²⁵ If the recipient is able to earn more than £52 a year, he is not entitled to the

quite inconsistent with any theory of scaling benefits to need, and in fact, goes far beyond American compensation practice which would reopen the case of a compensation claimant who is drawing compensation payments as totally disabled and holding a job at the same time. Another departure from the "need" idea, and a reversion almost toward tort damage concepts, is the statement that the "pension" for prolonged disability is related not to loss of earning capacity but, according to the foreword of the Minister's Report, to "whatever he has lost in health, strength and the power to enjoy life."²⁶

The typical American compensation act relates the award to the disability or loss of earning capacity, in many injuries fixing arbitrary periods of disability for loss of particular members; and, within the maximum and minimum limits, the amount of the award will be a percentage of and therefore will vary according to previous weekly wages. This reference to previous wage level is the significant point of distinction between the American system and the other two, and shows that it is not an outright relief plan, since, within limits, it relates the amount of recovery to the amount of wage loss, makes no inquiry into actual need by any sort of means test, and, with a few statutory exceptions, makes no allowance even for presumed degree of need because of number of dependents.

(d) *Retroactive Unilateral Employer Liability*

While the objective of American workmen's compensation—the protection against wage loss—classes it with other forms of social insurance such as old-age and unemployment insurance, it differs from them in its utilization of the mechanism of employer liability. This distinction has some importance practical consequences. In the typical social insurance scheme, the employer's worries are largely over when he makes his regular contributions to the fund. The employee's status as a member of the scheme is usually fixed in advance, often because the system is contributory and the employee is covered only if his contributions are on record. By contrast, the workmen's compensation claimant's status is determined in retrospect. Many a startled householder has found himself suddenly presented with a workmen's compensation claim by some handy-man who was hired to fix the roof or build a chicken-coop.²⁷

"unemployability supplement" of twenty shillings a week; but the basic pension of forty-five shillings for a single man under total permanent incapacity will not be reduced or reconsidered because of actual earnings.

²⁶ MINISTRY OF RECONSTRUCTION, SOCIAL INSURANCE REPORT, Pt. II, ¶ 31(v).

²⁷ The claims have invariably been unsuccessful. *Coffin v. Hook*, 112 Ind. App. 549, 49

Occasionally an entire category of employees, never thought covered by their employers, are swept retroactively within the compensation act by judicial decision, as when *Gordon v. New York Life Insurance Co.*²⁸ in effect made all full-time commission life insurance salesmen employees in New York. It is in such situations that the employer is made to realize that the essence of his obligation is not merely to make periodic payments into some social insurance system, but to bear any employer liability that any court may impose upon him under the court's current interpretation of compensation law. If the employer has guessed wrong, and has carried no compensation insurance, the liability he bears will not, from his point of view, look much like social insurance.²⁹

The principal practical consequence is that the coverage of an American-type compensation act cannot necessarily be expected to follow wherever the Social Security act, for example, may lead, such as into the area of domestic service, without some thought on whether the domestic employer's liability can be made both predictable and insurable.

III. BACKGROUND OF WORKMEN'S COMPENSATION

In tracing the origins of the Workmen's Compensation idea in Western law, one is tempted to speculate on the significance of a few fragments of ancient law which might be said to represent a crude equivalent of the modern principle. In the Laws of Henry I, dating from about the year 1100, occurs a passage which may be translated as follows:

And in some cases a man cannot legitimately swear that another was not, through himself, further from life and nearer to death; among which cases are these: If anyone, on the mission of another, is the cause of death in the course of the errand; if anyone sends for someone, and the latter is killed in coming; if anyone meets death having been called by another. . . .³⁰

Similarly, Brunner describes the rule in early Germanic law as follows:

The master was liable for the *wergeld* of the workman if the latter lost his life in the service, and for the appropriate money-payment if he was injured,—so far as the injury could not be imputed to some third person

N. E. 2d 369 (1942); *Larson v. Hergert*, 5 N. J. Super. 367, 69 A. 2d 218 (1949); *Craine v. Department of Labor & Industries*, 19 Wash. 2d 75, 141 P. 2d 129 (1943); *Weatherford v. Arter*, 63 S. E. 2d 572 (W. Va. 1951).

²⁸ 300 N. Y. 652, 90 N. E. 2d 898 (1950) (4-3 decision).

²⁹ For an able presentation of a view of compensation insurance at variance with the view here expressed, see Riesenfeld, *Forty Years of Workmen's Compensation*, 7 N. A. C. C. A. L. J. 15, 21 (1951), who holds that the real characteristic of social insurance is that the employee is assured of getting his benefits from someone.

³⁰ *Leges Regis Henrici Primi*, XC, 6.

for whom the master (who had to answer for the misdeeds of his own people) was not responsible. If one who was in the service of another lost his life by misadventure, by reason of a tree or of fire or of water, the accident was imputed to the master as homicidium. If one person sent another away or summoned him on the former's business, and the latter lost his life while executing the order, the former was taken as the *causa mortis*.³¹

This liability was not based on a consciously enlightened social policy, but apparently on the primitive concept of causation. As the first quotation indicates, a person accused of having had some responsibility for a death had to take the oath that the deceased was not, through him, further from life and nearer death. If the accused had sent the deceased on the fatal mission, or had set in motion the employment in which deceased was killed, the accused could not legitimately swear that oath. It was the "but-for" theory of causation in undiluted form.

But perhaps there is more here than the accidental by-product of a causation theory. We are told by sociologists that any settled society eventually works out a conscious or unconscious solution of the problem of the disabled and helpless member; it may be a family system that fills the need, or a clan, or a feudal manor, or a national state. In any case, it is amazing to reflect that a thousand years ago—for whatever reason—there may have been a more "modern" social principle for taking care of injured workmen than existed in the United States until the twentieth century.

So far as law on the subject of master's liability to his injured servant is concerned, the period from 1000-1837 A.D. seems to be a complete blank. Perhaps the primitive rule met the problem for a time, since this basic concept of responsibility survived into the fifteenth century. Beginning about 1700, the principle of vicarious liability of the master for torts of the servant was developed, through a *tour de force* by Lord Holt in such cases as *Jones v. Hart*,³² aided by Lord Raymond, who, in his 1743 reports,³³ converted Holt's hypothetical examples of negligent servants into actual actions brought and decided at Guildhall. Since the statements of the *respondeat superior* rule at this stage were in sweeping, unqualified terms ("the act of a servant is the act of his master"),³⁴

³¹ 2 BRUNNER, DEUTSCHE RECHTSGESCHICHTE 549 (1892) cited in Wigmore, *Responsibility for Tortious Acts*, 7 HARV. L. REV. 315, 383, 442 (1894); 3 WIGMORE, FREUND, MIKELL, SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 474, 481 (1909).

³² *Nisi Prius*, [1698] K.B. 642, 2 Salk. 441. See Holmes, *The History of Agency*, 4 HARV. L. REV. 345, 5 *id.* 1 (1892); 3 WIGMORE ET AL., SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 368 (1909); and Wigmore, *supra* note 31.

³³ 1. Ld. Raym. 739 (K.B. 1743) ("as he heard it from 'Magister Place'").

³⁴ *Jones v. Hart*, *supra* note 32, per Holt, J.

presumably a master would be liable to a servant injured by the negligence of a fellow-servant. There was nothing in the rule as then stated limiting its benefits to strangers.

In 1837, Lord Abinger invented the fellow-servant exception to the general rule of master's vicarious liability, in his famous *Priestley v. Fowler* opinion.³⁵ In that case, the master, a butcher, was held not liable for the negligence of his servant in overloading a van which broke down as a result and injured the plaintiff, another employee. The decision was based largely on what Abinger called "the consequences of a decision the one way or the other," consisting largely of "alariming" examples of possible master's liability for domestic mishaps due to the negligence of the chambermaid, the coachman and the cook. If Abinger realized the unhappy effect of his decision on the injured victims of the industrial age which was violently erupting all around him, the opinion does not show it. But when American courts began to follow his lead, as in *Farwell v. Boston & Worcester R. R.*³⁶ in Massachusetts, holding a railroad immune from liability to one of its locomotive engineers for injury caused by the negligence of one of its switchmen, it became clear that the real implications of the decision involved not butcher-boys and chambermaids, but trainmen, miners and factory workers.

One is often told that the common law is characterized by its resilient adaptability—its capacity for providing a remedy for new kinds of injury as changing conditions make it necessary. How then shall we explain the paradox of ever-increasing industrial injuries and ever-decreasing judicial remedies for them? Downey³⁷ suggests as one explanation the prevalence of laissez-faire in economic thought at this time; Dodd³⁸ points to the individualistic tendency of the common law, and the desire of judges to encourage industrial enterprise by making the burdens as light as possible. Although legalistic arguments are not wanting (such as the line taken in the *Farwell* opinion that the liability of master to servant is governed not by tort rules but by the "implied contract" between them, which implied contract relieves the master of liability), it is quite obvious that the real reason for the rule, as finally stated in the same case, was the prevailing conviction that "considerations of policy and general expediency" required it, since employer liability to employee "would not conduce to the general good."³⁹

³⁵ [1837] 3 M. & W. 1, 150 Eng. Rep. 1030.

³⁶ 4 Metc. 49 (Mass. 1842).

³⁷ E. H. DOWNEY, HISTORY OF WORK ACCIDENT INDEMNITY IN IOWA (1912).

³⁸ WALTER F. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION (1936).

³⁹ *Farwell v. Boston & Worcester R. R.*, 4 Metc. 49, 61 (Mass. 1842).

"Assumption of risk" is the second of the three common-law defenses of the employer. Its seeds may also be found in *Priestley v. Fowler*, where Abinger observed that "the servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master." The implication is that the employee, being free to do as he pleases, and voluntarily undergoing the dangerous conditions of the work, has no standing to complain when injury does occur as a result of these conditions. This idea, based as it is on such phantasms as perfect liquidity of labor, perfect bargaining equality, and perfect knowledge by workmen of employment risks and opportunities, needs no refutation in modern times. However, it too, again with the assistance of Judge Shaw in the *Farwell* case, was well established as a defense by the middle of the nineteenth century.

Contributory negligence, recognized as a defense since *Butterfield v. Forrester*⁴⁰ in 1809, became the third employer defense, so that even where direct negligence of the employer could be shown, recovery would be defeated by the negligence—even much smaller in degree—of the employee.

What then remained of employer's liability? Let us analyze the grounds of liability statistically, using German figures for 1907,⁴¹ since the German statistics of the period are unusually full and detailed.

Classification of Causes of Accidents:

1. Negligence or fault of employer	16.81%
2. Joint negligence of employer and injured employee	4.66
3. Negligence of fellow-servant	5.28
4. Acts of God	2.31
5. Fault or negligence of injured employee	28.89
6. Inevitable accidents connected with the employment	42.05

It is at once apparent that, with no. 2 and no. 3 barred by common-law defenses, and with no. 4, 5 and 6 incapable of supporting a cause of

⁴⁰ 11 East 60 (K. B. 1809).

⁴¹ These German statistics have been used partly because they contain the most relevant breakdown by "fault" causes of accidents and partly because they cover a rather broad base both as to number of employees and as to duration. While only the 1907 figures are here cited, there are similar figures for 1887 and 1897 which vary only slightly in the percentage summaries. (ZACHER, INTRODUCTION TO WORKMEN'S INSURANCE IN GERMANY 14). The calculation thus covers from four to twenty-one million workers in all kinds of employment over a period of twenty years.

action, only under no. 1 is there any possibility of employer liability; accordingly, the employee at common law was remediless without question in 83% of all cases.

What of the remaining 16.81%? The defense of assumption of risk might still apply, for even where the employer was at fault, many cases⁴² held that the employee, by continuing to work in spite of the defects or dangers created by the employer, consented to waive the employer's obligation.

Moreover, there is quite a difference between classifying an accident as attributable to employer's fault for statistical purposes, and carrying through a fruitful lawsuit based on that fault. The common-law duties of the employer to the employee were of a kind not always easy to assert in court: to provide and maintain a reasonably safe place to work and safe appliances, tools and equipment; to provide a sufficient number of suitable and competent fellow-servants to permit safe performance of the work; to warn employees of unusual hazards; and to make and enforce safety rules. Even these duties were sometimes weakened by the common-law defenses, for if the unsafe condition of the premises, for example, was due to the negligence of a fellow-servant, the master in some jurisdictions would not be liable.⁴³ The employer had only to exercise the care of a reasonably prudent master,⁴⁴ and if the consequences of his breach of duty should have been obvious to the workman, then it was for the workman to look out for himself.⁴⁵ One need only add that the usual witnesses of the accident, being co-employees, would naturally be reluctant to testify against the employer, to complete the picture of helplessness which characterized the position of the injured workman of the pre-compensation era.

It is not surprising that some courts eventually began to try to swing the pendulum in the other direction, and, although the total effect of their efforts was small, this was partly because the task of reform was taken over by legislation. The principal modification of the common-law defenses was the adoption of the "vice-principal" exception to the fellow-servant rule. In some of the jurisdictions⁴⁶ adopting this exception,

⁴² *Russell v. Minneapolis & St. Louis R.R.*, 32 Minn. 230, 20 N.W. 147 (1884); *Davidson v. Cornell*, 132 N.Y. 228, 30 N.E. 573 (1892).

⁴³ *Henry v. Hudson & M.R.R.*, 201 N.Y. 140, 94 N.E. 623 (1911); *Armour v. Hahn*, 111 U.S. 313 (1884).

⁴⁴ *Omaha Bottling Co. v. Theiler*, 59 Neb. 257, 80 N.W. 821 (1899).

⁴⁵ *Ragon v. Toledo, A.A. & N.M.R.R.*, 97 Mich. 265, 56 N.W. 612, 37 Am. St. Rep. 336 (1893); *Vanderpool v. Partridge*, 79 Neb. 165, 112 N.W. 318, 13 L.R.A. (N.S.) 668 (1908); *McCarthy v. Mulgrew*, 107 Iowa 76, 77 N.W. 527 (1898).

⁴⁶ *Berea Stone Co. v. Kraft*, 31 Ohio St. 287, 27 Am. Rep. 510 (1877); *Lamb v. Littman*, 132 N.C. 978, 44 S.E. 646 (1903).

it took the form of excluding from the fellow-servant category all employees in supervisory capacities, such as foremen; in most jurisdictions,⁴⁷ however, it took the broader form of excluding from the fellow-servant category all employees charged with carrying out the common-law duties of the employer. This was, in effect, to say that these duties—of providing a safe place, safe tools, and so on—were non-delegable. The only other instances of softening the common-law defenses by judicial action were the holdings in some, but not all, states that the employee did not assume the risk of his employer's violation of a safety statute,⁴⁸ and the modification of the contributory negligence rule in three states to confine the effect of contributory negligence to the mitigation of damages.⁴⁹

It is important to observe that all legislation prior to the Workmen's Compensation Acts accepted the basic common-law idea that the employer was liable to the employee only for the negligence or fault of himself or, at most, of someone for whom he is generally responsible under the *respondeat superior* doctrine. These so-called "Employers' Liability Statutes" did not aspire to create any new principle of liability applicable to the employment relation as such. The most they ever set out to accomplish was the restoration of the employee to a position no worse than that of a stranger injured by the negligence of the employer or his servants.

The first such acts,⁵⁰ beginning with the Georgia Act of 1855, abrogated the fellow-servant defense for railway companies only. In 1880, England, which had judicially rejected the vice-principal rule, legislatively adopted something like it in the Employers' Liability Act,⁵¹ but, what with the exceptions, qualifications and pitfalls in the Act itself, and the prompt judicial holding that a contract waiving an employee's rights under the Act was not against public policy,⁵² this first legislative effort was largely abortive. However, it did serve as a model for a number of state statutes, and by the time compensation legislation began to take

⁴⁷ Northern Pac. R.R. v. Herbert, 116 U.S. 642; Tedford v. Los Angeles Electric Co., 134 Cal. 76, 66 Pac. 76, 54 L.R.A. 85 (1901); Smith v. Erie R.R., 38 Vroom 636, 67 N.J.L. 636, 52 Atl. 634, 49 L.R.A. 302 (1902); Filke v. Boston & A.R.R., 53 N.Y. 549, 13 Am. Rep. 545 (1873).

⁴⁸ Fitzwater v. Warren, 206 N.Y. 355, 99 N.E. 1042, 42 L.R.A. (N.S.) 1229 (1912).

⁴⁹ Augusta & S.R.R. v. McElmurry, 24 Ga. 75 (1858); Galena & C.R.R. v. Jacobs, 20 Ill. 478 (1858); L.N. & S.R.R. v. Fleming, 82 Tenn. 128 (1884).

⁵⁰ Ga. Laws 1855, p. 155; IA. LAWS 1852, c. 169, § 7; KAN. STAT. 1874, c. 93, § 1; WIS. LAWS 1875, c. 173; WYO. TERR. ACT 1869.

⁵¹ 43 & 44 VICT., c. 42 (1880).

⁵² Griffiths v. Earl of Dudley, 9 Q.B.D. 357 (1882).

over the field in 1911, twenty-five states had some kind of Employers' Liability Statute.⁵³ Many of them abrogated the fellow-servant defense as to railroads only; some abrogated it more generally or altogether; some modified it. As to contributory negligence, some adopted instead the comparative negligence principle, some shifted the burden of proof on the issue of contributory negligence from the plaintiff to the defendant in certain jurisdictions where the plaintiff had had the burden of proving his own freedom from negligence, and some withdrew the defense in case of violation of a safety statute by the employer. As to assumption of risk, some destroyed the defense whenever the risk was caused by the fault of the employer; some destroyed it as to violations of safety statutes; and some modified it so as to make it inapplicable to extraordinary risks, or known defects in plant or machinery, especially in the case of railroads. The Federal Employers' Liability Act of 1908, applicable to those employees of common carriers who are engaged in interstate or foreign commerce, may be regarded as the high point in this phase of the development of employee protection, for it embodied all the most advanced features of the state acts up to that time. It provided that contributory negligence should only mitigate damages, and that neither this defense nor assumption of risk should apply in case of safety statute violation; and it made the railroad employer liable for the negligence of all its officers, agents and employees, and for defects due to negligence in track, equipment, engines, and cars, resulting in injury to employees.

To preserve a due sense of proportion when analyzing the over-all effect of these legislative and judicial efforts to ameliorate the common law, one must glance again at the German statistics on causes of accidents. Under that table, even if both the fellow-servant defense and contributory negligence were abolished, the effect would be to add only another ten percent to the cases in which the employer is liable, making a total of about twenty-seven percent of all industrial accidents which could even theoretically form the basis of a recovery. That was the best a common-law system based on fault could possibly hope to do. To give the employee protection from the inevitable accidents due to no one's fault which accounted for forty-two percent of all accidents,⁵⁴ some entirely new principle was needed; and to grant him benefits for the twenty-nine percent of all injuries which resulted from his own fault

⁵³ See BOYD, COMPENSATION FOR INJURIES TO WORKMEN 8 (1913); DODD, *op. cit. supra* note 38.

⁵⁴ This proportion of accidents due to inevitable risks is confirmed by studies made by the Minnesota and Wisconsin Labor Departments.

required even more obviously a fundamental departure from the common law.

The studies made in America leading up to compensation legislation usually took the form of calculating what injured employees actually received under the old system. The conclusions were invariably shocking. The Illinois Commission⁵⁵ investigated 5000 industrial accidents, and found that of 614 death cases, the families received nothing in 214 cases, and were engaged in pending litigation in 111. The other cases were settled for small sums averaging a few hundred dollars. The report of the New York Commission⁵⁶ contains a number of similar tabulations, of which the table on fatal industrial accidents in New York City in 1908 is typical: of 74 cases whose disposition was known, there was no compensation in 43.2 per cent, and compensation under \$500 in 40.5 per cent, with only 16.3 per cent receiving between \$500 and \$5,000. Even these figures do not tell the whole story, since attorneys' fees had to come out of these meagre sums and averaged a fourth to a third of the amount recovered, according to the New York Commission's study. When funeral and other expenses were also deducted, it became clear enough that the pre-compensation loss-adjustment system for industrial accidents was a complete failure and in most serious cases left the worker's family destitute.⁵⁷

IV. ORIGINS OF WORKMEN'S COMPENSATION

(a) *History and characteristics of German insurance legislation*

The story of English and American common law and legislation up to this point has done no more than set the stage for the entrance of the new compensation principle. It explains how an intolerable situation developed which impelled the English and American jurisdictions, steeped as they were in individualistic traditions, one by one to accept what must at the time have seemed a radical, indeed alien, and even socialistic, innovation. But the story so far does not explain where the compensation principle itself came from; for that, it is necessary to interrupt our chronological sequence and take a fresh start in nineteenth-century Prussia.

In 1838, one year after Lord Abinger announced the fellow-servant rule,⁵⁸ and four years before Judge Shaw of Massachusetts popularized

⁵⁵ REPORT OF ILLINOIS COMMISSION, Edwin R. Wright, Secretary.

⁵⁶ 25 N. Y. SEN. DOC. NO. 38, Appendix III (1910).

⁵⁷ See summary of other studies in BOYD, COMPENSATION FOR INJURIES TO WORKMEN, c. 5 (1913).

⁵⁸ See note 35 *supra*.

the defense of assumption of risk,⁵⁹ Prussia enacted a law making railroads liable to their employees (as well as passengers) for accidents from all causes except act of God and negligence of the plaintiff. In 1854, Prussia required employers in certain industries to contribute one-half to the sickness association funds formed under various local statutes. In 1876 an unsuccessful voluntary insurance act was passed, and finally in 1884 Germany adopted the first modern compensation system, thirteen years before England, twenty-five years before the first American jurisdiction, and sixty-five years before the last American state.

It is interesting to inquire into the conditions which gave birth to the compensation idea. As to the intellectual origins: both philosophers and politicians played a part. Frederick the Great contributed both a profound conviction that "it is the duty of the state to provide sustenance and support of those of its citizens who cannot provide sustenance for themselves,"⁶⁰ and a completely uninhibited view of the state's power and right to bring this protection about by any means. Among the philosophers, probably Fichte was most responsible for propounding the idea that many of the misfortunes, disabilities and accidents of individuals are ultimately social and not individual in origin, and that the state is therefore "not to be negative nor to have a mere police function, but to be filled with Christian concern, especially for the weaker members."⁶¹ Lassalle, Sismondi, Winkelblech, Wagner and Schaeffle developed this general conception into insistent and eloquent arguments for the only mechanism which could effectively implement this ideal: industrial insurance.⁶² At the same time, especially during the years following the war of 1870-71, Bismarck began to be concerned about the increasing strength shown in elections by the Marxian type of socialists as against the practical socialists of the school of Lassalle, who favored the cooperative association type of development. Accordingly, in 1881 he met the situation by laying before the Reichstag his far-reaching plan for compulsory insurance, which was enacted in various measures between 1883 and 1887.⁶³ Thus, while Workmen's Compensation has a "socialistic" origin in the philosophical sense of the term associated with the views of Fichte and Hegel, it also has an anti-socialistic origin if the term is used in the Marxian sense.

⁵⁹ See note 36 *supra*.

⁶⁰ FOURTH SPECIAL REPORT OF THE COMMISSIONER OF LABOR 25-26 (1893).

⁶¹ *Id.* at 20.

⁶² *Id.* at 20-26.

⁶³ Fundamental Law of 1884 (Industry, Transport, Trades, Telegraph, Army and Navy); Agricultural Law, 1886; Building Law, 1887; Marine Law, 1887.

The exact form taken by the German system should be specially noted, because it was significantly different from the English and American systems, and because it is continuing to exert a strong influence on the form taken by social legislation of all kinds. The distinguishing feature of German insurance (apart from its much greater comprehensiveness) was that contributions by the workman himself were an integral part of the system. Broadly, the German plan fell into three parts: the Sickness Fund (workers contributing two-thirds, employer one-third) paid benefits for the first thirteen weeks of either sickness or disability due to accident; the Accident Fund (contributions by employers only) paid for disability after the first thirteen weeks; and Disability Insurance (workers contribute one-half) provided for disability due to old age or other causes not specifically covered elsewhere. The plan, though compulsory, was thus essentially based on mutual association. The administration was placed in the hands of representatives of employers and employees under government supervision. The striking resemblance of this plan to the present British system is at once apparent.

It seems paradoxical on the surface that Germany, with its more socialistic philosophical tradition, should produce a system which is more individualistic in the sense that the workman in effect purchases in his own right an insurance policy against sickness and disability, with the employer sharing the premium; while America followed what might appear to be a more radical line by imposing unilateral liability without fault upon the employer, and by making him bear the entire burden of any insurance against that liability. There are several reasons for this. The choice of this mechanism in Germany was dictated largely by the existence of already successful schemes on this pattern within the German guilds (*Knappschaftskassen*). For hundreds of years these guilds had sponsored benefit societies and associations which provided disability, sickness and death benefits. In a highly developed system, such as the miners' societies, there were benefits on the insurance principle for sickness, accident, and burial, and pensions for orphans, widows and invalids.⁶⁴ The system was administered by a committee made up half of employers and half of employees, and contributions were in the same proportion, with the employer paying the "premium" and deducting the employee's half from his next wage payment.

The New York Commission, whose report of March, 1910, was the basis for New York's Compensation Act, studied the German plan, and made the following report:⁶⁵

⁶⁴ FOURTH SPECIAL REPORT OF THE COMMISSIONER OF LABOR 37 (1893).

⁶⁵ See 25 N. Y. SEN. DOC. NO. 38, p. 67 (1910).

Could we see a practical way to put a scheme of compensation in force in which the employer's share will be the 50 per cent. of earnings recommended in our bills, and the workmen's contribution say 25 per cent. above that, and the benefits insured to him thereby changed to three-fourths earnings during disability, we would recommend it. The German system on some such lines seems admirable. But practically we see no way to accomplish this by force of compulsory law.

The American pattern, then, became that of unilateral employer liability, with no contribution by employees. The issue is by no means dead, however, what with the contributory principle appearing in the British comprehensive system, in the state non-occupational disability plans that have been adopted,⁶⁶ and, of course, in old age and unemployment legislation. It is most significant, therefore, to note that the New York Commission rejected the employee-contribution system only because of doubt that compulsory contributions could constitutionally be exacted, and that but for this doubt they would have recommended it. No doubt the American pattern was also influenced by the fact that such recovery for industrial injury as the employee had obtained in the past had always taken the form of an adversary imposition of liability upon the employer, so that it was perhaps natural to conceive of even this totally new principle of employee protection in terms of the old mechanism of employer liability.

(b) *Development of Workmen's Compensation in the United States*

By the end of the nineteenth century, as shown above, the coincidence of increasing industrial injuries and decreasing remedies had produced in the United States a situation ripe for radical change, and when, in 1893, a full account of the German system written by John Graham Brooks was published,⁶⁷ legislators all over the country seized upon it as a clue to the direction which efforts at reform might take. Another stimulus was provided by the enactment of the first British Compensation Act in 1897⁶⁸ which later became the model of state acts in many respects.

A period of intensive investigation ensued, carried on by various state commissions, beginning with Massachusetts in 1904, Illinois in 1907, Connecticut in 1908 and a legislatively-created commission of representatives, industrialists and other experts in New York in 1909. By 1910 the movement was in full swing, with commissions being created by Congress and the legislatures of Massachusetts, Minnesota, New

⁶⁶ California, CAL. GEN. LAWS, 3780d, § 1 et seq. (Deering 1944); New Jersey, N. J. STAT. ANN. §§ 43:21-25 to 43:21-56 (1937); New York Laws of 1949, c. 600; Rhode Island, Acts and Resolves of R. I. c. 1200 (1942).

⁶⁷ FOURTH SPECIAL REPORT OF THE COMMISSIONER OF LABOR 25-26 (1893).

⁶⁸ 60 and 61 Vict. c. 37 (1897).

Jersey, Connecticut, Ohio, Illinois, Wisconsin, Montana and Washington. In 1910 also there occurred a conference in Chicago attended by representatives of all these commissions, at which a Uniform Workmen's Compensation Law was drafted.⁶⁹ Although the state acts which followed were anything but uniform, the discussions at this conference did much to set the fundamental pattern of legislation.

As to actual enactments, the story begins modestly with a rather narrow co-operative Accident Fund for miners passed by Maryland in 1902,⁷⁰ which quietly expired when held unconstitutional in an unappealed lower court decision.⁷¹ In 1909 another miners' compensation act was passed in Montana,⁷² and suffered the same fate.⁷³ In 1908 Congress passed a compensation Act covering certain federal employees.⁷⁴

In 1910 the first New York Act⁷⁵ was passed, with compulsory coverage of certain "hazardous employments". It was held unconstitutional in 1911 by the Court of Appeals in *Ives v. South Buffalo Railway Co.*,⁷⁶ on the ground that the imposition of liability without fault upon the employer was a taking of property without due process of law under the state and federal constitutions. At the present time, with the constitutionality of all types of compensation acts firmly established, there is no practical purpose to be served by tracing out the elaborate and violent constitutional law arguments provoked by the early acts.⁷⁷ One important practical result did, however, flow from these preliminary constitutional setbacks: the very fear of unconstitutionality impelled the legislatures to pass over the ideal type of coverage, which would be both comprehensive and compulsory, in favor of more awkward and fragmentary plans whose very weakness and incompleteness might ensure their constitutional validity. And so, beginning with New Jersey, "elective" or "optional" statutes became common, under which employers could choose whether or not they would be bound by the compensation plan, with the alternative of being subject to common-law actions without benefit of the three common-law defenses. Similarly, a number of states limited their coverage to "hazardous" employments because of doubt as

⁶⁹ See account of this conference in BOYD, COMPENSATION FOR INJURIES TO WORKMEN 17-22 (1913).

⁷⁰ Md. Laws 1902, c. 139.

⁷¹ *Franklin v. United R. R. & Electric Co. of Baltimore*, 2 Baltimore City Rep. 390 (1904).

⁷² Mont. Laws 1909, c. 67.

⁷³ *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, 119 Pac. 554 (1911).

⁷⁴ 35 STAT. 556 (1908).

⁷⁵ N. Y. Laws 1910, c. 674.

⁷⁶ 201 N. Y. 271, 94 N. E. 431 (1911).

⁷⁷ See, for example, BOYD, COMPENSATION FOR INJURIES TO WORKMEN 153-204 (1913).

to the extent of the police power, and while several have since broadened their scope,⁷⁸ there remain nine states with this limitation.⁷⁹

In New York, the *Ives* decision was answered by the adoption in 1913 of a constitutional amendment permitting a compulsory law, and such a law was passed in the same year. In 1917 this compulsory law,⁸⁰ together with the Iowa elective-type⁸¹ and the Washington exclusive-state-fund-type law,⁸² was held constitutional by the United States Supreme Court, and, with fears of constitutional impediments virtually removed, the compensation system grew and expanded with a rapidity that probably has no parallel in any comparable field of law.

By 1920 all but eight states had adopted Compensation Acts, and on January 1, 1949, the last state, Mississippi, came under the system.

Extension of coverage has taken the form, not only of adding jurisdictions, but of broadening the boundaries of individual acts, as to persons, employments, and kinds of injury (particularly occupational disease) covered. At the same time, where election is permissible, the percentage of employers choosing compensation coverage has constantly increased until in most states the non-electing employer is exceptional. Arthur H. Reede, in his detailed study of compensation coverage entitled "Adequacy of Workmen's Compensation", concludes, after an analysis of coverage by states, that in 1915 the percentage of all gainful employees (excluding unemployed and self-employed) covered by compensation acts was 41.2; in 1920, 67.4; in 1930, 75.2; and in 1940, 81.5.⁸³

The principal occupational groups not yet brought within compensation acts are domestic and agricultural workers, who are excluded from almost all acts. Other exclusions are accounted for by small firms (since most acts exempt employers with less than a stated minimum number of employees), "casual workers", and workers who do not come within the classes of hazardous employment in states containing that limitation. The percentage of coverage looks slightly better if interstate rail employees, considered excluded in the above calculation, are included, since they have the protection of the Employers' Liability Act, which is

⁷⁸ Arizona, Illinois, New Hampshire, and New York.

⁷⁹ Maryland, New Mexico, Washington, Wyoming ("extra-hazardous"); Louisiana, Oklahoma, Oregon ("hazardous"); Kansas ("especially dangerous"); and Montana ("inherently hazardous").

⁸⁰ *New York Central R.R. v. White*, 243 U.S. 188, L.R.A. 1917D, 1 Ann. Cas. 1917D, 629 (1917).

⁸¹ *Hawkins v. Bleakley*, 243 U.S. 210 (1917).

⁸² *Mountain Timber Co. v. State of Washington*, 243 U.S. 219, Ann. Cas. 1917D, 642 (1917).

⁸³ REEDE, ADEQUACY OF WORKMEN'S COMPENSATION 17.

regarded by some segments of railway labor as preferable to Workmen's Compensation Acts.⁸⁴ The enactment of the Mississippi act also improves the coverage figure somewhat.

CONCLUSION

This summary of the history and nature of the American workmen's compensation system is intended to show that, although it has left behind most traces of tort law, and although its philosophy stems from continental industrial insurance, it is a unique system which is neither delictual nor socialistic in principle. If this analysis has succeeded, it will aid in preventing the two erroneous extremes of interpretation that run throughout all compensation law: on the one hand, the extreme of thwarting the social purposes of the legislation by the importation of common-law restrictions, and, on the other hand, the equally-unjustified extreme of indiscriminately resolving difficult questions in favor of the claimant on the theory that his position is the same as that of the beneficiary of a personal insurance policy or of a comprehensive public social security system.

⁸⁴ See Richter and Forer, *The Federal Employers' Liability Act*, 36 CORNELL L.Q. 203 (1951).