Cornell Law Review

Volume 3
Issue 4 *May 1918*

Article 2

Theory of Workmen's Compensation

Arthur B. Honnold

Theory of Workmen's Compensation

By ARTHUR B. HONNOLD[1]

The statement of a definite theory or purpose by which the various Workmen's Compensation Laws may be tested and their adequacies and inadequacies determined, though interesting, presents many difficulties. The state legislatures have generally avoided making any such statement, doubtless realizing their present inability to frame a statute which will measure up to it. The general purpose of these acts, however, has been to remedy existing evils arising out of the relation of employer and employe. With the advance in industrial life, and the increased use of machinery, increasing the hazard to life and limb, the number of injuries to workmen multiplied. The relief afforded by the common law rules proved very inadequate. As said by Governor Hughes in his message to the Legislature of New York, the rules of law governing legal liability prior to the enactment of the Workmen's Compensation Law of that state, could not but "offend the common sense of fairness."

The common law remedy by action involved intolerable delay and great economic waste and proved wholly unsuited to the conditions of modern industry, whether viewed from the standpoint of employer or employe. The injured employe, in order to secure relief, was obliged to resort to long drawn out and expensive litigation wherein the employer had the advantage of numerous technical defenses. The employe, being the plaintiff, had the burden of proving that the employer was negligent and that the injury proximately resulted from such negligence. This, of course, was very difficult. Yet, accidents and injuries to employes, particularly those engaged in hazardous employments, or working about dangerous machinery, were inevitable. In fact, it could approximately be determined in advance what would be the number of accidents in any particular employment. With each succeeding year, the number of these accidents increased. Breakage of the human machine was just as certain to occur as breakage of the machinery used in carrying on industries. The average employe, being without means to maintain an action, fell a prey, in numerous cases, to unscrupulous lawyers; "ambulance chasing" and maintenance became common. Certain lawyers specializing in this class of business even established and maintained hospitals where the injured employe was given care. Their object was not humanitarian, however, but was merely to place

[1]Member of the Oklahoma Bar, Tulsa, Oklahoma. Author of Honnold on Workmen's Compensation.

themselves in a position where they could secure the bigger share of any recovery had by the injured employe against his employer. The employe who did not have assistance of this or like nature had small chance of being able to prosecute a suit to a successful conclusion.

The employer, in all too many cases, succeeded by showing that the employe assumed the risk by entering an employment which he knew to be hazardous, or by working about machinery which he knew to be defective. This occurred although the necessities of the employe and his family had forced him to accept the employment. Another favorite defense was contributory negligence. If an employe, through over-work or failure, from whatever cause, to give that constant attention to his work which would have prevented any accident, was injured, the employer could defcat recovery. Even where death resulted, or where the employe was rendered a total physical wreck, many an employer prevailed on this theory, even though it is preposterous to assume that any employe would be intentionally guilty of contributory negligence where the result must necessarily be so disasterous. Another defense was that based on the fellow servant doctrine whereby the employer was relieved from liability, if the injury was due to the negligence of a fellow servant of the injured employe. In case the employe was able to get through these legal barriers and to the jury under instructions which would permit a finding in his favor, there was grcat likelihood that the verdict would be so excessive that it must be set aside as contrary to law.

On the other hand, the employer was put to great expense by these suits, in the employment of counsel and the expenditures involved in preparing for trial, in many cases more than he would have been obliged to pay had there been some established basis on which he could have settled with the employe in the first instance. This money, instead of going to further the industry out of which the accident arose, was withdrawn from the industry without resulting benefit to either the employer or employe. Some employers came to the conclusion, which may or may not have been erroneous but in either case was reprehensible, that it would be cheaper to run the risk of being held liable for accidents than to install improved machinery and proper safe-guards. It was to remedy these and other evils that the Workmen's Compensation Laws were enacted.

I now call to mind four state laws, which contain declarations of their purposes. In one it is

> "declared and determined to be contrary to public policy that any employer conducting any especially dangerous industry * * * shall fail to exercise due care, or fail to comply with any law affecting such employment, in such manner as to

> endanger the lives and safety of employes thereof, without assuming the burden of the financial loss through disability entailed upon such employes, or their dependents, through such failure;"

and is further declared to be contrary to public policy

> "that the burden of financial loss to employes in such dangerous employments, or of their dependents, due to injuries * * * shall be borne by said employes without due compensation paid * * * by the employer."[2]

The conditions calling for the enactment of another state law are declared to be a recognition

> "that the prosecution of the various industrial enterprises, which must be relied upon to create and preserve the wealth and the prosperity of the State involves the injury of large numbers of workmen, resulting in their partial or total incapacity or death, and that under the rules of the common law and the provisions of the statutes now in force an unequal burden is cast upon its citizens, and that in determining the responsibility of the employer on account of injuries sustained by his workmen, a great and unnecessary cost is now incurred in litigation, which cost is divided between the workmen, the employers and the taxpayers, who provide the public funds, without any corresponding benefit, to maintain courts and juries to determine the question of responsibility under the law as it now exists, and that the State and its taxpayers are subjected to a heavy burden in providing care and support for such injured workmen and their dependents, and that this burden should, in so far as may be consistent with the rights and obligations of the people of the State, be more fairly distributed as in this Act provided."[3]

This particular Act provides for a state insurance fund, to which employers coming under the law are required to contribute.

Another state law declares that the common law system "is inconsistent with modern industrial conditions," and that in practice it proves to be economically unwise and unfair. It further states, relative to this system,

> "Its administration has produced the result that little of the cost of the employer has reached the workman and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage-worker. The state * * * declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen,

[2] Workmen's Compensation Act of Arizona, Section 5.
[3] Workmen's Compensation Act of Oregon, Section 1.

injured in extra hazardous work, and their families and dependents is hereby provided, regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this Act."[4]

But what is probably the most complete declaration of purpose is contained in the Workmen's Compensation Act of Maryland. The enacting clause of this act reads as follows:

"*Whereas*, the State of Maryland recognizes that the prosecution of various industrial enterprises which must be relied upon to create and preserve the wealth and prosperity of the State involves injury to large numbers of workmen, resulting in their partial or total incapacity or death, and that under the rules of the common law and the provisions of the statutes now in force an unequal burden is cast upon its citizens, and that in determining the responsibility of the employer on account of injuries sustained by his workmen, great and unnecessary cost is now incurred in litigation, which cost is borne by the workmen, the employers and the taxpayers, in part, in the maintenance of courts and juries to determine the question of responsibility under the law as it now exists; and

"*Whereas*, in addition thereto, the State and its taxpayers are subjected to a heavy burden in providing care and support for such injured workmen and their dependents, which burden should, in so far as may be consistent with the rights and obligations of the people of the State, be more fairly distributed as in this Act provided; and

"*Whereas*, the common law system governing the remedy of workmen against employers for injuries received in extra-hazardous work is inconsistent with modern industrial conditions; and injuries in such work, formerly occasional, have now become frequent and inevitable.

"Now, Therefore, The State of Maryland, exercising herein its police and sovereign power, declares that all phases of extra-hazardous employments be, and they are hereby withdrawn from private controversy, and sure and certain relief for workmen injured in extra-hazardous employments and their families and dependents are hereby provided for, regardless of questions of fault and to the exclusion of every other remedy, except as provided in this Act."

While these statutes attempt a declaration of purposes, there is no doubt but that the same purposes actuated the legislatures in the enactment of similar laws in other states. In fact, as complete a declaration may be arrived at from a study of decisions rendered by the courts of some of these other states. These decisions, covering generally the purposes above stated, have declared the purpose to be to abolish the common law system because inadequate to meet

[4]Workmen's Compensation Act of Washington, Section 1.

modern conditions and conceptions of moral obligations and substitute therefor a system based on a high conception of man's obligation to his fellow man, a system recognizing every injury to an employe which is not self-inflicted as an element of the cost of production to be charged to the industry, rather than to the individual employer, and liquidated in the steps ending with consumption, so that the burden is finally borne by the community in general. In other words, they declare that the workmen's compensation legislation is based on the economic principle of trade risk in that personal injury losses incident to industrial pursuits are, like wages and breakage of machinery, a part of the cost of production.[5] These laws are humane remedial enactments intended to give vitality to the idea that personal injury losses incident to an employe's services are as much a part of the labor cost of such services as wages paid, and should in some practicable way be so treated.[6] In New York, it has been declared that the theory of the law, and of the underlying constitutional authorization, is that the accidents growing out of the operation of industrial enterprises become a legitimate part of what is known in commercial life as the "overhead cost."[7]

Probably one of the best statements of the reason for the departure from long-established custom, in the enactment of workmen's compensation laws, is the summary contained in the report of the Wainwright Commission to the New York Legislature, which reads, as follows:

> "First, that the present system in New York rests on a basis that is economically unwise and unfair, and that in operation it is wasteful, uncertain, and productive of antagonism between workmen and employers. Second, that it is satisfactory to none, and tolerable only to those employers and workmen who practically disregard their legal rights and obligations, and fairly share the burden of accidents in industries. Third, that the evils of the system are most marked in hazardous employments, where the trade risk is high and serious accidents frequent. Fourth, that, as matter of fact, workmen in the dangerous trades do not, and practically cannot, provide for themselves adequate accident insurance, and therefore the burden of serious accidents falls on the workmen least able to bear it, and brings many of them and their families to want * * * These results can, we think, be best avoided by compelling the employer to share the accident burden in intrinsically dangerous trades, since by fixing the price of his product the shock of the accident may be borne by the community. In those employments which have not so great an

[5]Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8 (1915).
[6]Village of Kiel v. Industrial Commission of Wisconsin, 158 N. W., (Wis.) 68 (1916); Western Indemnity v. Pillsbury, 170 Cal. 686 (1915); State v. Clausen, 65 Wash. 156 (1911).
[7]Allen v. State, 160 N. Y. Supp. 85 (1916).

element of danger, in which, speaking generally, there is no such imperative demand for the exercise of the police power of the state for the safeguarding of its workers from destitution and its consequences, we recommend, as the first step in this change of system, such amendment of the present law as will do away with some of its unfairness in theory and practice, and increase the workmen's chance of recovery under the law. With such changes in the law we couple an elective plan of compensation, which, if generally adopted, will do away with many of the evils of the present system. Its adoption will, we believe, be profitable to both employer and employe, and prove to be the simplest way for the state to change its system of liability without disturbance of industrial conditions. Not the least of the motives moving us is the hope that by these means a source of antagonism between employer and employed, pregnant with danger for the state, may be eliminated."

The legislation by which it has been sought to remedy the evils in the old system by substituting a new system in place thereof, has followed one general course. Some of the first laws were compulsory. That is, employer and employe came within their terms and were governed by them, whether they willed it or not, but doubt as to the constitutionality of a compulsory system of compensation brought about the enactment of elective Acts by which employer and employe were given a right to elect whether or not they would come under the Acts. These Acts, however, are made to partake as much as possible of the compulsory feature. Election to come under them results as a rule from silence or failure to give notice of an election to the contrary. This was very proper as to an employe, particularly since one seeking employment cannot at that instant be expected to dictate to his employer the law which shall govern their relations. In many instances, such dictation would no doubt result in failure to secure the employment sought. Election to come under the Act is also encouraged by a sort of a mild coercion whereby the employer who does not so elect, is deprived of his common law defenses,—assumption of risk, contributory negligence and fellow servant doctrine,—in case action be brought against him for injuries to an employe.

In proceedings under a Workmen's Compensation Act, these defenses, not being given by the Act, do not exist. Compensation is awarded regardless of any question as to whether the injury resulted from the employer's fault and regardless of any contributory negligence of the employe, unless such negligence be serious and wilful.

The expensive procedure and technicalities of the ordinary law suit are avoided by establishing simple methods by which compensation may be recovered. In many states, special boards are provided for, and in others it is provided that the court shall act summarily, free

from the technicalities of the ordinary lawsuit in passing upon a claim for compensation.

It has as yet been possible, however, only to lessen litigation on this subject, not to abolish it. The construction and application of the terms used in these Acts have given rise to new controversies, many of which cannot be definitely settled for all cases, but must be determined under the facts of each particular case. For example, what constitutes "an accident," has proven a difficult question, and in answering it, the courts at various times have lost sight of the purpose of the law. In one case, a workman, whose toe was frozen, while he was engaged for several hours in shoveling snow from the side walk, was held by the lower court not to have been injured by an accident, since there was no force involved, in the technical sense of that term; but I am pleased to say that the reviewing court reversed this decision. Diseases which are compensable, because due to accident, have with difficulty been distinguished from diseases not compensable. But the question presenting the greatest difficulty has been whether the injury "arose out of and in the course of the employment." One act, at least, avoided using this phrase because (as declared by the Supreme Court of that State) of the controversies which had arisen from its use in other states, but I doubt if this served to better the situation. The substitute phrase used in that state has likewise given rise to controversy which must be determined without the aid of those precedents established by decisions construing and applying the phrase quoted.

Numerous decisions in this country and in England have drawn a careful distinction between the phrases "in course of" and "out of." The Ohio Act uses only the first of these phrases, and if the decisions by the courts of other states were applied to its construction, the conclusion would be that an accident is compensable where it arises in the course of, though it does not arise out of, the employment; but the Supreme Court of that State held otherwise. It held that this law did not cover any injury which had its cause outside of and disconnected with the employment, although the employe may at the time have been engaged in the work of his employer in the usual way.[8]

The compensation authorized by the various Workmen's Compensation Laws is based on the average earnings of the employe. The object has been to fix a definite amount to be allowed for each injury and remove from the field of controversy all question in respect thereto. To attain this object has presented a dilemma. Too large an allowance might lead to malingering, since it cannot be denied that there are employes who would prefer to remain idle on approxim-

[8]Fassig v. State, 95 Oh. St. 232 (1917).

ately full pay than to be at work. To guard against this evil, and possibly for other reasons, the various legislatures have fixed the compensation for temporary total disability at from fifty to sixty-six and two-thirds per cent. of the average earning power of the employe. It occurs to me that fifty per cent. is entirely too small an allowance. It is too much like penalizing the employe in advance for malingering, which he may or may not be guilty of. I make mention only of the allowance for temporary disability, but these remarks are equally applicable to permanent disabilities and scheduled injuries. Too low an award tends, it is true, to lessen litigation, inasmuch as the amount involved is scarcely worth going into court for. It is also true that if the compensation recoverable is small, the employe would rather sacrifice his right to the same than lose his employment as a result of antagonizing his employer. A statutory regulation of attorney fees at a maximum at which competent counsel cannot be secured operates against the interests of the employe and marks an extreme due to the above mentioned form of abuse in this respect. Two remedies, in addition to the allowance of reasonably adequate fees in contested cases, suggest themselves in this connection: first,—an allowance of adequate compensation which approaches as nearly one hundred per cent. of the loss as is possible without actually inviting malingering; second,—to require employers to report all accidents and injuries therefrom to the tribunal vested with power of administering the Workmen's Compensation Law, and make it the duty of this tribunal to take the initiative in protecting the employe for whose protection the law was designed. Some states have already taken advanced steps in this direction. I know of instances where employers, having a regard for the welfare and best interest of their employes, have adopted the practice of paying full wages to their employes during temporary disability, even though the Workmen's Compensation Law of the state requires the payment of only fifty per cent. They, of course, realize that the compensation allowed by the law is inadequate.

Employers will welcome changes to the advantage of the employe when there has been time for such readjustment of industries that the cost of compensation is in reality added to the price of the finished product and the burden borne by the ultimate consumer. I do not doubt but that eventually all these laws will have been so framed or modified as to truly conform to the theory on which they are based and effectuate to the greatest possible extent the purpose for which they were enacted. In so far as they operate justly and equitably, giving to the injured employe no more and no less than he is entitled to, they will engender that much desired good will and spirit of co-operation between the two classes directly affected by their operation.