A BRIEF HISTORY OF WORKERS' COMPENSATION

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The modern system of workers' compensation is so complex and arcane it produces considerable grief to those who must deal with it on a daily basis. Yet these often cumbersome regulations are so ultimately vital to society they appear, in one form or another, in all industrialized nations. A look at workers' law over the years demonstrates the failure of the historical alternatives to formal workers' compensation systems to meet either the goals of social justice or economic efficiency. While the orthopaedic surgeon may often lament the difficult compensation case appearing in clinic, it may add some perspective to review how and why this system became entrenched in the workplace.

WORKERS' COMPENSATION IN ANTIQUITY

The history of compensation for bodily injury begins shortly after the advent of written history itself[1]. The Nippur Tablet No. 3191 from ancient Sumeria in the fertile crescent outlines the law of Ur-Nammu, king of the city-state of Ur. It dates to approximately 2050 B.C.[2]. The law of Ur provided monetary compensation for specific injury to workers' body parts, including fractures. The code of Hammurabi from 1750 B.C. provided a similar set of rewards for specific injuries and their implied permanent impairments. Ancient Greek, Roman, Arab, and Chinese law provided sets of compensation schedules, with precise payments for the loss of a body part. For example, under ancient Arab law, loss of a joint of the thumb was worth one-half the value of a finger. The loss of a penis was compensated by the amount of length lost, and the value an ear was based on its surface area[3]. All the early compensation schemes consisted of "schedules" such as this; specific injuries determined specific rewards. The concept of an "impairment" (the loss of function of a body part) separate from a "disability" (the loss of the ability to perform specific tasks or jobs) had not yet arisen.

Yet the compensation schedules of antiquity were gradually replaced as feudalism of the Middle Ages gradually became the primary structure of government. The often arbitrary benevolence of the feudal lord determined what, if any, injuries garnered recompense. The concept of compensation for the worker was bound up in the doctrine of noblesse oblige; an honorable lord would care for his injured serf.

COMMON LAW AND THE EARLY INDUSTRIAL REVOLUTION

The development of English common law in the late Middle Ages and Renaissance provided a legal framework that persisted into the early Industrial Revolution across Europe and America. Three critical principles gradually developed which determined what injuries were compensable. They were generally so restrictive they became known as the "unholy trinity of defenses[4].

1. Contributory negligence. If the worker was in any way responsible for his injury, the doctrine of contributory negligence held the employer was not at fault. Regardless of how hazardous the exposed machinery of the day was, any worker who slipped and lost an arm or leg was not entitled to any compensation. This was established in the United States through the case of Martin v. the Wabash Railroad, in which a freight conductor fell off his train. Although inspectors subsequently blamed a loose handrail, his injuries did not receive compensation because inspecting the train for faulty equipment was one of his job duties.

2. The "fellow servant" rule. Under the "fellow servant" rule, employers were not held liable if the worker's injuries resulted in any part from the action or negligence of a fellow employee. This was established in Britain through the case of Priestly v. Fowler in 1837, a case of an injured butcher boy. In America, precedent was provided five years later by Farnwell v. The Boston and Worcester Railroad Company.

3. The "assumption of risk." The doctrine of "assumption of risk" was exceptionally far-reaching. It held simply that employees know of the hazards of any particular job when they sign their contracts. Therefore, by agreeing to work in a position they assume any inherent risk it carries. Employers were required to provide such safety measures as were considered appropriate in the industry as a whole. In the nineteenth century, this often left a great deal to be desired. Assumption of risk was often formalized at the beginning of an employee's tenure; many industries required contracts in which workers abdicated their right to sue for injury. These became known as the "worker's right to die," or "death contracts."

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While these common law principles were quite restrictive, it was their method of enforcement that proved most cumbersome. An injured worker's only recourse was through the use of torts. In the nineteenth century as in our own, these were exceptionally expensive legal affairs. Most countries required considerable fees simply to file a personal injury lawsuit. These more often than not were beyond the limited means of the injured worker. It was so uncommon for a working man to win compensation for injury that private organizations such as the English "Friendly Societies" and German "Krankenkassen" were formed that offered more affluent laborers the option of buying various kinds of disability insurance[5]. Nevertheless, the worker did occasionally prevail through tort legislation. As the century wore on, this began to happen frequently enough that employers too became uncomfortable with the capricious nature and high cost of battling civil suits.

A PRAGMATIC CHAMPION

The watershed events in the development of modern workers' compensation law occurred in the improbable setting of Prussia under the even more improbable leadership of its stern Chancellor, Otto von Bismarck[4,5,6]. The Chancellor was certainly no great humanitarian, but he was the force behind Realpolitik, the school of political pragmatism. Germany at the time had a very active Marxist and socialist movement, and social protection for workers was at the top of their agenda. The active left was a considerable thorn in Bismarck's side, particularly given his need for a stable home front while pursuing foreign empire-building. He resorted to straightforward political oppression, and in 1875, he outlawed the Social Democratic Party.

But Bismarck was shrewd. While suppressing the institutions of his socialist opponents, he maintained the loyalty of the common Prussian by co-opting key features of their agenda. The most important of these was a system of social insurance. His first foray into the field was through the Employers' Liability Law of 1871, providing limited social protection to workers in certain factories, quarries, railroads, and mines. Later, and far more importantly, Bismarck pushed through Workers' Accident Insurance in 1884 creating the first modern system of workers' compensation. This was followed over the next few years by Public Pension Insurance providing a stipend for workers incapacitated due to non-job related illnesses and Public Aid providing a safety net for those who were never able to work due to disability. The system as a whole valued the active worker; the greatest benefits were granted to job-related injuries and medical care and rehabilitation were covered. The state-administered Prussian system also established an important precedent: it was regarded as an "exclusive remedy" to the problem of workers' compensation, employers under the system could not be sued through the civil courts by employees.

The Prussian system has served as a basic model for the social insurance programs of a variety of countries including the United States. It is worth noting that the complex nature of modern workers' compensation law has been present almost from the start. Indeed, the dark writings of Franz Kafka were partly inspired by his job as a minor functionary in the arcane machinery of the workers' compensation board in (then Prussian) Prague just after the turn of the century[10].

WORKERS INSURANCE SPREADS

Other western nations gradually began to accept the notion that modern industrial society required some form of mandated workers' insurance. As early as 1880, the British Prime Minister William Gladstone pushed through the Employer's Liability Act[5]. This abolished the old common-law defenses in theory, but it did not establish a "no-fault" system. A proof of negligence on the part of the employer was necessary for the employee to collect. Most importantly, "right to die" contracts in which workers renounce their right to sue for injury were still legal and widely used by English industry. Thus, the 1880 law had little effect.

The Workers' Compensation Act was proposed in Parliament in 1893 and was largely equivalent to the 1884 Prussian law in establishing a "no-fault" doctrine of compensation. Unlike the German model, it did not fully rely on state administration. Instead the "Friendly Societies" which had organized various forms of private disability insurance for workers for many years were relied upon to provide the insurance itself. Nevertheless, the Act encountered staunch opposition from manufacturing interests in Parliament, and the House of Lords delayed its passage by attempts to add language which would have made "right to die" contracts a permissible means of circumventing the entire system. Finally, the Act was passed in 1897 after a four-year legislative struggle[5].

WORKERS' COMPENSATION IN THE UNITED STATES

The winds of change were slower across the Atlantic. Populist sentiment for organized workers movements began to grow in the first decade of the twentieth century. Social change was heralded by the literary

"muck-rakers" movement, a group of authors who, while often uninspired in their literary craftsmanship, passionately wrote about the plight of the common man in modern industrial society. Most famous among these was Upton Sinclair, socialist author of *The Jungle*, a novel detailing the horrors experienced by a Lithuanian immigrant working in the Chicago slaughterhouses. Critical acclaim was lacking. A *Time Magazine* critic once said of him, "Of the many millions of words Sinclair wrote, few are the right ones in the right order." Despite his limited skills, *The Jungle* proved immensely popular, full of compelling and graphic passages such as:

"(The fertilizer workers') particular trouble was that they fell into the vats; and when they were fished out, there was never enough of them to be worth exhibiting, - sometimes they would be overlooked for days, till all but the bones of them had gone out to the world as Durham's Pure Leaf Lard!"

Mr. Sinclair's immediate goals were not realized. In the short term, the swell of public opinion in the book's wake led not to legislation aimed at improving workers' conditions, but to the Food and Drug Act of 1906 and the Meat Inspection Act of 1906, both primary milestones in the evolution of the Civil War-era Bureau of Chemistry into the modern Food and Drug Administration.

Nevertheless, a reform-minded public did gradually come to demand changes in workers' benefits. As early as 1893, the Department of Labor prepared a report by J. G. Brooks on the topic *Compulsory Insurance in Germany*[7]. Congress passed the Employers' Liability Acts of 1906 and 1908, softening the common-law doctrine of contributory negligence. Failed or limited efforts to pass comprehensive workers' compensation acts were attempted in New York (1898), Maryland (1902), Massachusetts (1908), and Montana (1909). At the federal level, sentiment for modern workers' compensation ranged a few years ahead of the state legislatures, but the matter was generally considered best left to the states. The federal government did regulate interstate commerce, however, and what is arguably the first compensation system in America was proposed by President Taft and put into law in 1908 to cover those workers involved in interstate trade[4].

Unlike Europe, the decentralized nature of labor regulation in the United States provided a key additional obstacle delaying implementation of the laws. As in England, many manufacturers were ready for change provided it included tort relief, but they strongly objected to state-by-state regulation. It would, they appropriately argued, create an uneven playing field for unregulated competitors in neighboring jurisdictions. In the most telling example, phosphorus match manufacturers brazenly testified before Congress that, despite the widespread problem of "phossy jaw" poisoning in their workers, they were unwilling to invest in alternative compounds unless the law in all states mandated it. In 1910, this problem led to a special conference in Chicago attended by representatives of the industrial states to outline a uniform set of guidelines for compensation law[4].

The first comprehensive workers' compensation law was finally passed shortly thereafter in Wisconsin in 1911. Nine other states passed regulations that year, followed by thirty-six others before the decade was out. The final state to pass workers' compensation legislation was Mississippi in 1948.

The response of the medical community was lukewarm at best, particularly from the young but subspecialty of orthopaedics. The noted shoulder specialist Codman decried workers' compensation statutes with their regulated physicians' fees as part of "the great effort which the majority is making to socialize the medical profession." To put his views in some perspective, he also objected to public parks, mass transit, municipal piers, regulation of interstate commerce, and even public hospitals[4].

The attitudes of medical professionals changed dramatically in the 1930's, however, when Social Security Disability Insurance was created to insure those who could not work due to infirmities that were not work-related. This vast expansion of the need for physician involvement and evaluation proved very lucrative. The American Medical Association quickly published the popular *Guides to the Evaluation of Permanent Impairment*, which has been through multiple editions since. As managed care has come to play a greater role in the health care system, many physicians have come to realize that compensation evaluations represent a stable and high-paying source of income.

THE STRUCTURE OF AMERICAN WORKERS' COMPENSATION SYSTEMS

The various workers' compensation statutes in America are all modeled loosely after the original Prussian system[6,8]. The central tenet is that of "no-fault" insurance; industrial accidents are accepted as a fact of life and the system exists to deal with their financial consequences in as expeditious a manner as possible. Employers participating in the system have the notable benefit of tort exemption for injuries covered by workers' compensation. Employees can sue third parties who may be responsible for their on-the-job injuries, but any

proceeds from such suits must first go to reimburse their employer's compensation insurance carrier.

All American workers' compensation schemes are fully employer-funded either by the purchase of commercial insurance or setting up a self-insurance account. In their original form, however, most state compensation acts made employer participation "optional." Because they also often precluded the use of the common-law defenses if participation was declined, the vast majority of employers have historically participated, and approximately eighty percent of the work force is currently covered under compensation schemes. Most states have exclusion criteria for small firms and, most significantly, for domestic and agricultural workers.

As a general rule, claims are handled by legislatively created state compensation boards, although decisions can be appealed to the state court system. In five exceptions, Wyoming, Tennessee, New Mexico, Alabama, and Louisiana, claims are taken directly to the courts, but special state agencies exist to assist the processing of claims. The definition of compensable injury has gradually evolved over the years. Although it was once interpreted to mean a sudden industrial accident, in recent years most states have added language to include occupational exposures and overuse syndromes. The Kentucky law currently defines "injury" as "any work-related harmful change in the human condition.

A distinction is made between "impairment," a medical definition of the degree of loss of anatomy or function of a body part or system, and "disability," a legal definition of the degree to which an employee's impairment limits his ability to perform work. Some states due continue to have "schedules" for certain injuries, however, which directly correlate the loss of certain anatomical parts to amounts of compensation. For instance, the loss of a thumb in South Dakota entitles the worker to fifty weeks of compensation regardless of his disability[6].

In general, compensation is paid both in the form of wage-replacement (usually at about two-thirds salary) for the period of total disability and in the form of lump-sum payments for any residual permanent partial disability. Employers also must pay for the workers' medical and rehabilitation costs. Many employers quite aggressively pursue rehabilitation and pay for services such as work-hardening programs that are not required by the letter of the law. They have found these to be highly cost-effective given that the outcome if the worker fails to return to work could be permanent total disability payments for life.

One special case that most states have now come to recognize is that of the "second injury." In Oklahoma in the 1920's, a one-eyed worker lost his remaining eye in an industrial accident. His employer was forced by the compensation board to pay not for the loss of a single eye, but for total permanent disability given the patient's blindness. Immediately, virtually all the one-eyed, one-armed, and one-legged workers in the state were deemed by their employers to represent unnecessary risks and were fired. To solve this dilemma, most states have now created "second injury funds" run by the government which all the private insurers pay into. These are used to make up the difference when a second injury proves incapacitating only because of a prior injury to another body part. Although their cost is relatively minimal and they initially appear to be a minor detail, second injury funds are absolutely critical in maintaining the employability of amputees.

THE CHANGING FACE OF AMERICAN WORKERS' COMPENSATION

The basic structure of the American workers' compensation system has remained unchanged throughout the century and is, overall, a success in the eyes of employers and employees alike. Only in the last five years have major changes in the landscape of workers' compensation law begun to appear.

The primary instrument of change has been the Americans With Disabilities Act of 1990, one of the central pieces of legislation to emerge from the Bush Administration[8]. The ADA actually represents a dramatic expansion of a much earlier law, Section 504 of the Rehabilitation Act of 1973. Section 504 required government programs, contractors, and any entity receiving federal funding to make their facilities accessible to the handicapped. Its language was relatively restrictive, and the law applied only when persons were excluded from a program or employment "solely" because of their disability.

The ADA was the result of a massive campaign to improve the employability of the disabled in America. It met with resounding legislative success; there were only 6 no votes in the Senate and 28 in the House. Unlike Section 504, the ADA encompasses all of the American workplace, not just that fraction associated with the federal government. It also contains language that allows much broader judicial freedom in interpretation.

The ADA requires that employers make "reasonable accommodation" for workers with disabilities, but no legal standards for the definition of "reasonable" are provided. A precedent does exist for accommodating workers' with special needs: a series of rulings has mandated that employers need accommodate employees religious wishes (Sabbath day off, wearing of religious clothing, etc.) only if the cost is minimal and the accommodation would not significantly disrupt the central business enterprise. Some state disability laws

placed specific monetary caps on the amount employers could be required to spend to accommodate individual workers. By avoiding this kind of more specific language, many employers fear the ADA has created an environment in which the costs of employing disabled workers are highly unpredictable[8].

The new law is fuzzy, too, in its definition of disability. Traditional government policy toward the disabled focused on three groups: the legally blind (numbering 400,000), the deaf (numbering 1.7 million), and the absolute wheelchair-bound (numbering 720,000). From these relatively small numbers, to reach the commonly cited figure that one-in-six Americans (approximately 43 million) are disabled requires the inclusion of a large number of less immobilizing physical impairments and mental disabilities. Indeed, mental illness alone creates significant confusion. The DSM as first published contained just over 100 disorders; it now contains three times that number.

For the employer, simply knowing whether or not a potential employee has a disability is often difficult. The ADA severely restricts employers' access to prior medical records before an offer of employment is made. Incidentally, these provisions have been successfully used by physicians to prevent state medical boards and hospitals from obtaining records indicating prior drug or alcohol addiction.

These gray areas of the ADA have been used by entrepreneurial lawyers to apply the law to areas removed from its original intended scope. Relatively few suits under the ADA have related to hiring discrimination. A substantial number allege discrimination against those who are already employed, and many allege disabilities acquired on the job. Thus, by a subtle shift in wording and emphasis, the ADA is seen by some lawyers as an opportunity to circumvent or augment the settlements their clients would reach through traditional workers' compensation. The most commonly cited disability in employment-related suits filed under the ADA is back pain (19% of the total), followed by compressive neuropathy and similar neurologic disorders (12%), and mental illness (12%). Only 8% of complaints have come from the wheelchair-bound and 3% from the deaf or blind[8].

In one celebrated Texas case, a worker for the Santa Fe Railroad was awarded a $305,000 workers' compensation settlement for permanent total disability based on physicians' testimony that he would never be able to work again after his work-related back injury. Eight days after his settlement, he filed suit under the ADA claiming he was wrongfully terminated due to a disability and should be rehired with accommodation. Although the case was thrown out, this apparent legal double jeopardy highlights the legitimate fear of employers that the tort relief that is such a central feature of workers' compensation law is in danger of slowly being eroded.

CONCLUSION

Although excessively intricate and burdened by separate implementation schemes for each of the fifty states, workers' compensation law remains one of the relative success stories of American legislation. Its three critical benefits remain. First, the employer gets tort relief. Second the employee gets a relatively quick, equitable, and predictable no-fault compensation scheme. Finally, the system carries an intrinsic incentive toward rehabilitation of the injured worker. The subjective nature of defining impairment and disability themselves will almost certainly allow creative personal injury lawyers to find new ways to collect for their clients and themselves whether through the ADA or other legislation. The survival of a viable workers' compensation system will require continued vigilance by both federal and state governments.

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