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The General Structure of Law Applicable to Employee Injury and Death

*Ben F. Small**

The author here shows how the failure of the common law to cope with the problem of industrial injury led to the passage of workmen's compensation legislation. After examining the basic structure of that legislation, he turns to an extensive discussion of the problems of federal preemption and the interrelation of workmen's compensation with other wage loss programs (including a comparison with the British system). In conclusion, he catalogues the criticisms of the present system, and suggests that the area is ripe for further action by the federal government.

I. THE THOUSAND-YEAR-OLD TAP ROOTS OF INDUSTRIAL DISABILITY LAW

Compensation for on-the-job injury is not new. Neither is it British in origin. To be sure, it was imported to this country from England in the form of workman's compensation at the turn of the twentieth century; but it was an import in England as well, the 1897 enactment being taken from German legislation of 1884, which in turn was threaded back through more than a thousand years of tap roots. Some might think it a paradox that a jurisprudence so old and sophisticated as the English should have to borrow for its greater maturity from so youthful a source as the Confederation of German States under Bismarck. But the greater paradox is that both started with the same roots, roots extending back into barbarian tribal laws of Charlemagne's time and before.

Long before the common law of England came into being there existed in the old Frankish Empire an intricate system of recompense remarkably similar in many ways to our own compensation laws. Fundamentally, the system contemplated atonement by purchase, allowing a wrongdoer to buy back the peace he had broken in causing

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harm to another. It was an atonement in *wergild* (literally, "man value," or "man worth"). There were no distinctions between criminal and tortious injuries. Whoever hurt another human being had to pay out money. He had to pay the victim (*bot*), or in some cases his kinsman (*wer*), and in addition he had to pay the king (*wite*) for injuring one of his servants.

These money compositions fluctuated in amount according to the victim's station in life. However, within each station there were specific value assignments for every sort of injury ranging from the loss of a tooth all the way to the supreme injury, death. The tariffs looked very much like our modern-day compensation schedules for specific injuries.

This intricate system was adopted in England before Ethelbert's time and continued to operate through the reigns of Alfred and later Anglo-Saxon monarchs. Even with the coming of the Normans it held firm. But a strange thing happened in England during the twelfth century; crime increased at such a rate that almost the entire civil law of wrongs was displaced by a fast-growing penal jurisprudence. We have already noted that as torts and crimes came into being, the objectives of the civil side of personal injury were lost and soon forgotten in England. They thrived across the channel; they lived long enough to form a bridge between the ancient law and the socialistic movements of late nineteenth century Europe. But they died in England with the result that the common law took shape without much system or order in this area.

A. Failures of the English Common Law

It will always remain a curious commentary that the English common law, through all its centuries of trial and error, never succeeded in developing a workable remedy for injured workmen and their dependents. The makings were there, but they were discarded completely during the twelfth century as fault began to grow into the keystone of the liability system, both criminal and civil.

Under the early common law an employee suing his master had only one hope of recovery, in the form of an action in trespass on the case—an action requiring proof of fault on the part of the employer. That form of action continued to be the employee's sole remedy, with few changes, until the time of workmen's compensation. Despite certain reforms, the plaintiff still had to prove negligence or other wrongdoing, often a very difficult assignment. Then even if he could prove fault, any acts smacking of contributory fault on his part would bar a recovery. Worse, if his accident resulted from any of the ordinary perils of employment he might find that he had assumed those risks

and was ineligible to recover. Then, during the nineteenth century, when the employer's defenses were already quite formidable, the fellow-servant rule came into being. *Priestley v. Fowler*,¹ decided in 1837, set the course.

There was a missing element in the *Priestley v. Fowler* reasoning. By 1837 the doctrine of *respondeat superior* had been pretty well crystallized in England, and it should have occurred to Lord Abinger that under that doctrine a master might be liable for the negligence of a servant, whether directed toward an outsider or toward a fellow servant in the same employment. This was not recognized in the *Priestley* case, and it remained for an American court five years later to recognize and explain it in the famous case of *Farwell v. Boston & W.R.R.*² Chief Justice Shaw of the Supreme Court of Massachusetts, one of the ablest judges of his time,³ reasoned that the master-servant relation was exclusively one of contract. Therefore, only the contract of employment could govern the rights and duties of the parties; there could be no duties or liabilities outside the contract. Accordingly, if the contract contained no provision for indemnifying or compensating a man for injury by a fellow servant, none could be implied. In the case of the outsider no contractual relationship existed; consequently the employer's obligations could be found in the law, which, under *respondeat superior* principles, might make him liable for the injury.

Throughout all the maturing years of the common law, no form of relief ever became available to the injured worker except the standard suit for negligence, circumscribed by the defenses of contributory negligence, assumption of risk, and the fellow-servant rule. Rarely could they all be mastered.

B. Failures of the English Social Insurance Schemes

Social insurance had as dismal a fortune in England as the common law, insofar as the worker was concerned. During the early years of the Norman period the institutions of *frithborh* and *frankpledge* had some utility. These involved a system of collective security in tithing

1. 3 M. & W. 1, 150 Eng. Rep. 1030 (Exch. of Pleas 1837).

2. 4 Met. 49, 38 Am. Dec. 339 (1842).

3. Chief Justice Shaw is often maligned for his contribution to the fellow-servant doctrine, but the fact remains that he was one of the greatest state court judges of his day and certainly held no bias against laboring men. Only a week or so after the fellow-servant pronouncement he deftly brought to an end in Massachusetts the application of the criminal conspiracy doctrine as applied to labor organizations attempting to promote union objectives. See *Commonwealth v. Hunt*, 4 Met. 111, 38 Am. Dec. 346 (1842), noted at length in 32 COLUM. L. REV. 1128 (1932). The ablest judges err on occasion, and it is regrettable that Shaw, one of the best, is now probably remembered better for one of those rare strays than for his other notable contributions to the law. For other appraisals of Shaw, see CHASE, LEMUEL SHAW (1918); 3 LEWIS, GREAT AMERICAN LAWYERS 455 (1907).

groups of ten, which Edward the Confessor called "a guarantee by tens." Each unit was bound as a whole for the security of each of its members. Over the years these bled into religious guilds, and as they grew more prosperous began to merge. Many of them acquired their own guild halls, established schools, and set up social insurance programs which in some cases were all-inclusive, offering old-age, sickness, accident, and unemployment insurance. All this, however, came to an abrupt end when one of the members of the guild of St. Barbara fell into religious differences with his fellow men. He was Henry VIII. In the chaos that followed the guilds were broken up and their properties confiscated by the crown. When the guilds fell, so did their insurance programs. Only the common law was left, and, as we have seen, it was barren of relief for the injured worker.

C. Continental and German Successes

While all this was going on in England, life on the other side of the channel went along about as usual. Barbaric law continued; class stratifications persisted, and central government was unheard of. The old Frankish system of *wergild* continued, and with it there grew a seasoned acceptance of group responsibility for individual misfortunes. As industry developed in the Germanic states, it took on a collectivized form. People with the same skills banded together in trade guild groups, and each group created various forms of mutual protection against old age, sickness, and accident. Conceived primarily for the benefit of the masters who constituted the membership, these guilds eventually extended their insurance plans to journeymen and apprentices, thus including everyone within the group. This was much the same system as existed in England in the socio-religious guilds, but it fared better in Germany because there the guilds were not beset with religious conflicts.

The *Knappschaftkassen*, or miners' societies, are an example. Having been originated around the fourteenth and fifteenth centuries, these societies were able, while absorbing the assaults of the eighteenth century, to perpetuate and broaden their insurance programs to include accident, sickness, and burial insurance, and also to provide pensions for widows, orphans, and invalids. Eventually these societies came to represent the joint effort of both employers and employees, with equal contributions of premiums administered by the employers through a wage withholding system. These *Knappschaftkassen* survived Hitler and still function in Germany today.

The forces of social pressure gathered in Germany during the nineteenth century until the boiling point was reached under Bismarck. The Prussian government put the railroads under an absolute liability

program in 1838. In 1854 the *Knappschaftskassen* were officially recognized as quasi-government agencies. In the same year compulsory insurance was inaugurated for mining. In 1871 an employers' liability law was passed. In 1876 a general workers' insurance law was passed, permitting local units of government to make coverage compulsory in certain dangerous occupations. Germany by this time was fast becoming a socialistic state, and as her industrial might increased, so did the pressures for socialism. By 1887 the goal of overall protection against ill health and economic insecurity had been reached. The German workers had both industrial accident insurance and sick relief insurance, financed by joint contributions of employers and employees and administered by the government. Supplemented by codification in 1900 and in 1911, German workmen's compensation became the world's model.

II. THE AMERICAN COMMON LAW

If the American common law had been left to run its course, it might have worked clear of the difficulties imposed on employee actions by the English precedents. The common law showed great strength, versatility, and flexibility in the latter part of the last century, and the doctrines developed during the late 1880's and 1890's held much promise which might have been realized if they could have had a little more time in which to mature.

A. *Vice-Principal and Non-Delegable Duties Doctrines*

Shortly after the *Farwell* decision had implanted the fellow-servant defense, a few courts began to depart from it in cases where the fellow servant causing the harm was a superior officer or came from a different department from the one in which the injured man worked. In 1851 Ohio became the first jurisdiction to adopt the so-called vice-principal exception to the fellow-servant defense.⁴ Several other jurisdictions followed suit in one manner or another.⁵ Starting with the proposition that a master would be liable for his own wrongful acts, these courts found that the superior servant, or vice-principal as he was sometimes called, was not actually a fellow servant, but instead stood in the place of the master. This was accomplished either through the fiction of the alter ego, or under a theory that the superior servant was merely carrying out the master's actual or implied order.

4. *Little Miami R.R. v. Stevens*, 20 Ohio 415 (1851).

5. Early Tennessee cases were *Chattanooga Elec. Ry. v. Lawson*, 101 Tenn. 406, 47 S.W. 489 (1898); *Illinois Cent. R.R. v. Spence*, 93 Tenn. 173, 23 S.W. 211 (1893).

Other cases found an exception to the fellow-servant rule by designating certain duties of the master as non-assignable or non-delegable. Examples are the duties to hire competent workmen, furnish reasonably safe instrumentalities and places of work, and provide certain inspections and supervisions.

B. Statutory Violations

Having raised the vice-principal and non-delegable duty doctrines to a level of respectability, some courts began taking the position that employers might take on non-delegable duties other than those imposed by the common law. For example, what about an employer who violated a safety statute? These statutes had never caused much concern before, because of their rarity, but by 1900 American industry was beginning to come alive; state after state was passing statutes for the safety of those employed in mining, manufacturing, railroading and other activities in which danger was a constant companion. Yet these statutes had no meaning if a recalcitrant employer could violate them at will and then avail himself of the defense of assumption of risk to defeat a claim for injuries growing out of the violation. So, with a few early exceptions, courts began to hold that injured employees did not assume the risk of harm resulting from a violation by the employer of a safety statute.

C. Employers' Liability Laws and Their Background

The progress in reforming case law was slow, too slow to appease those who believed it never would come around to the employee's side. So, as a stopgap, nearly every state enacted, between 1880 and 1910, an employers' liability law, patterned somewhat after the British act of 1880. Although these statutes differed widely in form, they had a common objective—to limit or abrogate the common law trinity of defenses, at least in the cases of the more dangerous kinds of employment.

These acts were not to be the answer. There were too many gaps in their coverage. Moreover, the statutes seemed only to encourage litigation, costly to employers and wasteful to employees. After a few years' experience with the new laws various commissions throughout the more industrialized states found that the incentive for litigation inherent in the system bred antagonism in labor relations, caused claims to stagnate on crowded court dockets, and hiked employers' insurance premiums to prohibitive levels. With all this, it did very little for the injured worker and his dependents. At the time of their greatest need they had but two alternatives: (1) accept a quick settlement; or (2) face the dreary prospect of months, even years, of court pro-

ceedings, with unpredictable results. Estimates on the proportion of cases lost by the employee run upwards of eighty per cent. And for either side there was little victory in victory after the expenses of litigation were deducted. The state employers' liability laws failed so far as the principal participants were concerned. The only benefit went to attorneys, physicians, and insurers, the sideliners, who lost nothing and gained all. Workmen's compensation had to come.

III. WORKMEN'S COMPENSATION LEGISLATION

After feeble attempts in Maryland and Montana, New York pioneered the way to modern workmen's compensation legislation by enacting two statutes, one calling for compulsory coverage in certain dangerous employments, and the other for elective coverage in other kinds of employment. The compulsory act was held unconstitutional almost immediately in *Ives v. South Buffalo Ry.*⁶ Still, the blow in New York did little to blunt the demand for compensation in other states. Experience under the common law and employers' liability acts had convinced most thinkers that the time for compromise had passed, and that something like the British workmen's compensation system was the only alternative. The demand for action had been so great that by the time the *Ives* decision came down in New York ten other states were adopting workmen's compensation statutes. Only one alteration had to be made to meet constitutionality—the coverage had to be made elective. Clever little clauses were carefully drafted to bring down penalties upon one who dared to elect himself out of coverage, but at least in form the statutes were elective, and that seemed enough to satisfy constitutionality. The rest is history. By the end of 1915, only five years after the first statute, more than half the states had similar legislation. All the remaining states fell into line sooner or later.

A. *The Nature of the Remedy*

Physical harm and the economic tragedy it creates make a hard burden for the victim and his dependents to bear. Of all those who may have had a connection with its occurrence, these people are the ones least able to carry the costs. Therefore, the basic theory and purpose of workmen's compensation is to incorporate into the operating overhead of an employing enterprise the risks of personal injury and death which may be occasioned by that enterprise, regardless of anyone's fault, or lack of it. The system is not punitive against the employer; neither is it compensatory in the true sense for the employee.

6. 201 N.Y. 271, 94 N.E. 431 (1911).

One is never compensated for a serious and disabling injury. The workmen's compensation scheme simply alleviates the tragedy by shifting its cost to the employer's ledger book as another item of operating overhead, usually represented in the form of insurance premiums, and treated the same as other costs of production, to be passed on to the consumer. Since the system displaces the common law, it displaces at the same time all consideration of blame and fault, as well as the common law's concepts of *liability* which, beyond connoting fault, imply that a defendant should pay damages proportionate in amount to the degree of harm for which he is responsible. Actually, the terms *damages* and *liability* have no place in workmen's compensation. Compensation awards are rarely equal to the harm for which they are paid, just as a defendant's obligation to pay is rarely dependent upon anything he has done or failed to do. In the place of liability, then, these statutes have attached to the employment enterprise an *obligation*. This obligation is conditioned upon the relationship of the harm to the employment, and calls for weekly payments of a fixed or determinable amount, geared, supposedly, to general subsistence levels of need.

B. *Differences Between the American and British Systems*

In this respect, the American system differs from the English, which always permitted something of an alternative remedy against the employer. The old British act permitted a straight action against any employer guilty of negligence or willful wrong. After the 1946 change-over to broad-range socialization, the alternative remedies against a negligent employer were preserved, subject to a right of set-off.

C. *Basic Coverages and Exclusions*

Being intended originally to alleviate the needs of injured workers in the employments where injuries were most common, nearly all states exempted farm labor, domestic servants and casual labor. Within the exemptions too, are all employments which might be covered by an applicable federal statute.

D. *Conflict of Laws*

One of the great trouble spots in our patchwork system of state laws is the conflict of laws problem of coverage. Various states use various coverage tests. Some states use the place of injury. Yet the place of injury may not be known, as in the case in which an Indiana pilot took off across Lake Michigan for Cudahy, Wisconsin, and was never heard from again.⁷ Other states use the place of hiring. Yet it

7. *Indiana Steel Prods. Co. v. Leonard*, 126 Ind. App. 669, 131 N.E.2d 162 (1956).

may be impossible to learn where the hiring did occur. There are five states which will not accept as a basis for coverage the mere fact of injury within the state, where the hiring is done outside the state, unless some regular degree of employment was carried on within the state.⁸ New York reaches the same result by denying application of the local law to outsiders who are hurt while on a transitory mission in New York.⁹ There are six states, then, where the door at the place of injury may be closed to the claimant. This might not be too bad were it not that when he turns to the place of hiring he may find the door closed there too because he was hurt in another state in some unapproved manner. Then, some southern and western states tie a time limitation on any out-of-state injury coverage.¹⁰ Nine states require a showing of residence and/or business situs in the state in addition to the contract.¹¹ Most of these nine, along with three more,¹² require some degree of regularity, or fixation, of the employment within the state before they will extend coverage to an out-of-state injury. The Oklahoma law, simplicity itself, covers no injuries occurring out of the state.¹³

If all goes well the claimant may dodge these entanglements and recover his compensation in one place or the other (or maybe both). But the limitations of six "place of injury" states, arrayed against twenty "place of hiring" states, make quite a formidable course. Standing as the monument to that course and to all who have fallen on it is the Oregon case of *House v. State Industrial Accident Commission*.¹⁴ The deceased was hired in Oregon by an Oregon employer to work in California. The job entailed occasional transitory functions back in Oregon. He was killed in Oregon on one of those transitory missions. Since he was killed outside the state, he was not covered by the California statute, which did not at that time cover out-of-state acci-

8. See COLO. REV. STAT. ANN. § 81-16-1 (1953); N.M. STAT. ANN. § 59-10-34 (1953); OHIO REV. CODE ANN. § 4123.54 (Baldwin 1958); R.I. GEN. LAWS ANN. § 28-29-15 (1956); UTAH CODE ANN. § 35-1-55 (1953).

9. See *Cameron v. Ellis Constr. Co.*, 252 N.Y. 394, 169 N.E. 622 (1930); *Short v. U-Wan-Na Wash Frocks*, 284 App. Div. 778, 135 N.Y.S.2d 143 (1954).

10. COLO. REV. STAT. ANN. § 81-16-3 (1953); MISS. CODE ANN. § 6998-55 (1952); N.M. STAT. ANN. § 59-10-33 (1953); TEX. REV. CIV. STAT. ANN. art. 8306, § 19 (1956); WYO. STAT. ANN. § 27-146 (1957).

11. DEL. CODE ANN. tit. 19, § 2303 (1953); FLA. STAT. ANN. § 440.09 (1952); GA. CODE ANN. § 114-412 (1956); MICH. STAT. ANN. § 17.193 (1960); N.H. REV. STAT. ANN. § 281:14 (1955); N.C. GEN. STAT. § 97-36 (1958); PA. STAT. ANN. tit. 77, § 1 (1952); S.C. CODE § 72-169 (1962); VA. CODE ANN. § 65-58 (1950).

12. NEV. REV. STAT. § 616.520 (Supp. 1957); ORE. REV. STAT. § 656.126 (1961); W. VA. CODE § 2511 (1961).

13. See *Battiest v. State Industrial Comm'n*, 197 Okla. 618, 173 P.2d 922 (1946); *Continental Oil Co. v. Pitts*, 158 Okla. 200, 13 P.2d 180 (1932); *Sheehan Pipe Line Constr. Co. v. State Industrial Comm'n*, 151 Okla. 272, 3 P.2d 199 (1931) (with strong dissent).

14. 167 Ore. 257, 117 P.2d 611 (1941).

dents unless the victim was hired in California.¹⁵ He also fell outside the coverage of the Oregon statute because it did not cover accidents within the state which stemmed from principal employment in another state.

On the other hand, plural coverage and multiple recovery is just as possible. In *Gehring v. Nottingham Lace Works, Inc.*,¹⁶ we find a claimant's lawyer's bonanza and a defense attorney's nightmare. Edward Gehring was a two-continent sales promoter in the lace industry, working simultaneously for several companies in both the United States and England. In the course of this simultaneous employment he was killed in a plane crash in the Azores, and his widow began a round-robin course of litigation that netted three recoveries of workmen's compensation. The first was under the New York act, which covered one of his employments. After pocketing that award, the litigation moved on to Rhode Island, where two of his other employments were carried on. The Rhode Island court rejected entirely any suggestion of contribution among employers, rejected any deduction of the amount of the New York award, and held that the plaintiff could recover, without deduction or contribution, full death benefits against each employer. So, the widow recovered three times under two acts for the death of one man, and then lunged out against the airline for the Warsaw Convention limit of liability for its alleged negligence in the crash.

IV. FEDERAL PREEMPTION

The federal-versus-state problems of coverage are perhaps simpler to resolve than the state-versus-state problems. In the federal area we are not confronted with multiple applicability, except indirectly perhaps in the twilight zones of maritime employment. Instead we have simply the problem of determining whether federal law is applicable. If it is, then the state law cannot apply and the question is settled. Actually, the areas in which the federal government has acted are few, consisting mainly of interstate railroad employment, maritime employment, and government employment. Nevertheless, these areas cover many millions of American workmen.

In contrast to state laws, the federal remedies are a polyglot lot, including a little workmen's compensation here, a little common law there, and for flavor, a sprinkle of salty old admiralty law. The reasons are plain. Certain needs were met as they arose, separately and without integration, so that the federal remedies, like Topsy, just grew,

15. The California statute was later amended to cover hiring or regular employment within the state. See CAL. LAB. CODE § 3600.5.

16. 82 R.I. 190, 106 A.2d 923 (1954).

and now their various purposes are extremely hard to reconcile.

The railroaders' problem came first, and was met with the Federal Employers' Liability Act,¹⁷ really a common law remedy featuring a sky's-the-limit jury verdict for negligence. Then came the maritime workers. For the real jack tar sailor the ancient law of admiralty, going back more years than anyone can say, was polished up for application, so as to give a seaman, among other things, a right to indemnity for injury due to the unseaworthiness of a vessel or its gear, regardless of negligence. But that was not enough, so the Federal Employers' Liability Act, which had proven satisfactory for railroad employees, was made expressly applicable to seamen as well in the 1920 Jones Act,¹⁸ thus giving them a fine, double-barrelled, no-ceiling remedy for both negligence and innocence. Then, since no one could be quite sure what it took to be a Jones Act sailor, and since so many waterfront workers fall right in the middle, between land and sea, something had to be done to take care of them. This time Congress borrowed the New York Workmen's Compensation Act and extended it to longshoremen and harbor workers.¹⁹ Next came the population of the District of Columbia, who had no remedy of any sort. They weren't railroaders and they weren't seamen, so the FELA and the Jones Act seemed out of place. They weren't longshoremen and they weren't harbor workers, but since they were workers, the Longshoremen's and Harbor Workers' Compensation Act (in essence, the New York Workmen's Compensation Act) was made applicable to workmen within the District.²⁰ That law, however, did not cover government workers as such, either in the District or outside. The next step, then, had to be a Federal Employees' Compensation Act.²¹ Here again it was a workmen's compensation-like remedy, and for supposed economy of administration a single administrative body, the Bureau of Employees' Compensation, was given responsibility for administration of both the Employees' Compensation Act and the Longshoremen's and Harbor Workers' Compensation Act.

A. *Evaluation of Federal Protection*

The Federal Employers' Liability Act, as amended in 1939, covers any employee of a railroad carrier, if any part of the employee's duties are in furtherance of interstate or foreign commerce, or affect, "in any way directly or closely and substantially," such commerce. This, to all

17. 35 Stat. 65 (1908), 45 U.S.C. §§ 51-60 (1958).

18. 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958).

19. 44 Stat. 1424 (1927), 33 U.S.C. §§ 901-950 (1958).

20. 2 D.C. CODE ANN. § 36-501 (1940).

21. 39 Stat. 742 (1916), 5 U.S.C. §§ 751-803 (1958).

intents and purposes, includes all railroad workers and provides them with a reasonably adequate remedy.

Maritime employment is not so simple. A real seaman is in a good position. He is protected by admiralty law, under which he was originally entitled to maintenance and cure, and could claim damages resulting from the unseaworthiness of the vessel or its equipment, regardless of fault, even though death and injury by negligence were not originally compensated. In addition, some state courts, not impressed with the importance of admiralty law, extended their state workmen's compensation laws to seaman. This the Supreme Court stopped in the *Jensen* case in 1917.²² Under this decision thousands of waterfront workers were plunged into a pit of uncertainty as to their remedy in case of injury. The compensation statutes might not apply to them because their work fringed over into admiralty; yet it might not fringe over enough to do them any good in admiralty.

Ultimately Congress, after several unsuccessful attempts, cleared the air. In 1920 it passed the Jones Act,²³ spelling out greater advantages—on FELA principles—for seamen. Then in 1927 it undertook to provide for those waterfront employees who could not qualify as seamen by passing the Longshoremen's and Harbor Workers' Act.²⁴ It might seem that this would settle the problem of coverage, but it was only made worse. When the Longshoremen's Act was wedged in between the standard remedy for sailors and the standard remedy for landlubbers, borderlines began to appear on each side, and when a particular fact situation fell astraddle one of these borderlines it became extremely difficult to determine which remedy should apply. A couple of examples indicate how intricate all this can become. Two cases went to the Supreme Court of the United States on almost identical fact situations. In each case, the workman was a longshoreman. In each case, the man was toppled over by a blow from a crane. Yet, because one was hit while standing on a dock, "deemed an extension of the land," he was held to come under the state workmen's compensation law,²⁵ while the other came under the exclusive maritime jurisdiction of the federal government because he was standing on a ship when the crane hit him.²⁶ In both cases, the Court considered the point of initial impact, that is, the point where steel first struck meat, as controlling in determining where the injury occurred. Had the court adopted instead the rule that the injury occurred at the point where it became fully projected, the results in both cases might have

22. *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917).

23. 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958).

24. 44 Stat. 1424 (1927), 33 U.S.C. §§ 901-950 (1958).

25. *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928).

26. *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935).

been just the opposite, since in the first case the man standing on the dock was knocked into navigable water and drowned in it, and in the second case the man standing aboard the ship lying in navigable water was knocked off onto the land.

A word must be added about the Federal Employees' Compensation Act of 1916.²⁷ With its amendments, it provides a compensation-like system of liability and death benefits for government employees who suffer harm in the performance of their duties. Sometimes called the mailmen's statute, it covers all civil employees of all branches of the federal government and the District of Columbia except policemen and firemen.²⁸ The act is not very satisfactory from the standpoint of administration. It is administered under the Office of the Secretary of Labor by the Director of the Bureau of Employees' Compensation; the Bureau maintains thirteen branch offices throughout the country for the handling of claims. It is not a very efficient system. The procedures consist mainly of the writing of letters and the filling out of forms, so that the record, such as it is, is made up of correspondence, often as not handwritten on the claimant's side. Due to the lack of proper legal representation, the whole set-up is often quite vague and illusory. An appeal procedure is provided, but if anything it is more inefficient than the system for hearing original claims. The Employee's Compensation Appeals Board, a three-man quasi-judicial body, was created in 1946 to serve as a supreme court of federal employees' compensation appeals. There is no review beyond that point.

V. INTERRELATION OF WORKMEN'S COMPENSATION WITH OTHER WAGE LOSS PROGRAMS

The major causes for wage loss can be broken into five categories:

1. scarcity of jobs;
2. old age;
3. death of the breadwinner;
4. physical injury; and
5. sickness or other physical infirmity.

The means of relief supplied for these misfortunes are far from complete, but they do serve to alleviate the situation. Unemployment is eased by unemployment compensation. Old age and death are within the federal old age and survivors' insurance programs. Then, helping to round out the wage picture, workmen's compensation and occupational disease statutes help tide the victim and his dependents over in the

27. 39 Stat. 742 (1916), 5 U.S.C. §§ 751-803 (1958).

28. 41 Stat. 104 (1921), 5 U.S.C. § 794 (1958).

last three categories, if the injury or death is sufficiently related to the employment.

The one man who is out of luck on all programs is the man under sixty-five who is sick or disabled due to some non-occupational cause. Being alive and under sixty-five, he and his family are outside social security coverage. Being physically unable to qualify for the available labor market, he is outside the state unemployment compensation statutes. And, being unable to show an employment connection for his condition, he falls outside the conventional workmen's compensation and occupational disease statutes. So while all others within his acquaintance may be covered by some form of wage loss protection, the man who is doubly plagued by loss of wages and loss of health gets nothing.

A. Defects in the Present System

The 1952 Report to the President by the Commission on the Health Needs of the Nation is now eleven years old. It reports that of the one billion man-days per year lost because of disability, only ten per cent are lost due to work-connected accidents and illnesses. Nine-tenths of all sickness absenteeism is due to non-occupational causes. There is no adequate national or state plan meeting this problem.

B. The English Solution

England has already faced the same problems we are grappling with now, and their solution was a radical one. Following the famous Beveridge Report, made in 1942, the British parliament began in 1944 to dismantle and reshape its entire health and welfare program. Under the present program almost universal compulsory coverage is extended to accident, sickness, maternity, unemployment, and old age. Pensions are provided for widows, orphans, and the aged; and provision is made for the health and medical needs of all. The medical and rehabilitation services, embracing all age groups, include every type of preventive, curative, and restorative measure, even to the point of providing wigs and hearing aids for those who need them. The program contemplates using whatever wealth may be available for relieving all want and need, whatever its nature. It is administered through a national Ministry of Social Security, and it would be misleading to say anything other than that the program represents a completely socialized general health and welfare program for the whole society. To that extent, workmen's compensation as a private system is gone.

C. Mid-Century American Germinations for Broader Protection

What are we doing in America for the millions of wage loss victims

who, through no fault of their own, cannot qualify for social security, unemployment compensation, or workmen's compensation? There are several answers. The industrial partnership of management and labor many years ago became aware of its obligations in the field of industrial hygiene and occupational health, and some really remarkable gains have been made. At the present time substantial effort is being put forward to bridge the non-occupational wage loss gap by providing appropriate insurance protection as a part of employment policy. About nine and a half million people are covered by private retirement plans. About twenty-five million people, or about a third of the whole labor force, are protected by some kind of group life insurance plan, many of them providing twenty-four hour accidental death and dismemberment coverage. About eighteen million have group insurance against wage loss from injury or sickness, while about four million are covered by company sick-leave plans. The labor unions themselves have been most helpful to their membership. The President's Commission on Health Needs of the Nation reported eleven years ago that about ten million union members, and in some instances their dependents as well, were eligible for some type of pre-paid medical or hospital services under collective bargaining agreements with their employers.

D. Federal Programs, Including Extension of Social Security

From the very first days of social security, there have been strong pressures for an all-inclusive social security system which, in the words of President Roosevelt in his June 8, 1934, message to Congress, would include virtually "all the hazards and vicissitudes of life." The Social Security Act did not go as far as its backers would have liked. President Roosevelt was never satisfied with it. Neither was President Truman. It will be recalled that one of the principal planks in the Truman campaign of 1948 was support of the Wagner-Murray-Dingel Bill calling for a national social insurance system of an all-inclusive nature. The drive continued under President Eisenhower. A part of the 1952 Republican platform called for increased coverage under the social security law. The coverage was extended. The Eighty-Third Congress boasted of bringing some fourteen million additional people within the existing federal and state programs. The social security amendments of 1954 extended OASI to almost universal coverage by including approximately ten million additional workers, and providing, among other things, for a "freeze" of social security status during periods of total disability. In 1956 the act was amended to extend benefits for total and permanent disability to those over fifty, as opposed to the age requirement of sixty-five for retirement under the

prior law. In 1960 the age limit of fifty was taken off so that any qualified invalid, regardless of age, can claim disability benefits under the Social Security Act—and without deduction of workmen's compensation benefits. In some instances a man may draw social security *and* workmen's compensation in a tax-free amount which combined would be greater than his former taxable income as a wage earner.

VI. TOMORROW

All this has prompted some people to criticism. The International Association of Insurance Counsel has expressed itself as being violently opposed to any further expansions of the Social Security Act on the ground that this would threaten the total collapse of our present workmen's compensation system.

Every day must have its noon and then its evening. The compensation day may have reached its noon at about the time of the last state's adoption in 1949. Most of the states retained over the years the same compact little acts with which they started, making few adjustments as the problems of industrial disability multiplied with the nation's expanding industrial economy. Coverages remained gappy; defenses were overworked; benefits lagged behind subsistence levels; medical and hospitalization allowances remained minimal as the actual costs of those services skyrocketed; and over the years the whole system has gotten increasingly litigious and cumbersome. No one is very happy about it. Those on the receiving end complain of its inadequacy, while those on the paying end complain that the cost is prohibitive. All the while the numbers of those industrially unemployable because of age or infirmity is on the increase. Many people are saying the system is less efficient after fifty years than when it was begun, and further that if it is not doing the job for which it was conceived, it can never begin to satisfy the newer needs of a more complex society.

In the earlier years whatever may have been wrong with the system went unnoticed because it was so much better than anything before. Today, however, other comparisons may be made, and those who make them do not hesitate to pry into every crack and crumble of the compensation scheme looking for defects. The attacks come from every side. Those of collectivist mind point to the "free" and "automatic" benefits of other systems, and, taking strength from the British experiment, urge the immediate end of the private anomaly of compensation in favor of broad range public social insurance. From the opposite direction come the attacks of those who are finding a neo-common law more to their liking than the straight and narrow compensation remedy.

In the middle stands Big Government, ready to lend a hand wher-

ever there is a vote. Whenever any statistic on a particular social or economic ill begins to run above the million mark, that ill takes on the appearance of a national ill. The invalids and the unfit become the *nation's* invalids and the *nation's* unfit, and because of their numbers, they become the *nation's* responsibility. In speculating on the future, it cannot be otherwise than significant that present wage loss programs, including compensation, permit a leave-out figure running into the millions—a very attractive market for federal treatment.

