WORKMEN'S COMPENSATION FOR INJURIES

A SKETCH OF THE PRESENT LAW IN ONTARIO,
AND A COMPARISON OF THE SYSTEMS
OF SOME OTHER COUNTRIES

ISSUED BY
THE CANADIAN MANUFACTURERS ASSOCIATION

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THE following pages have been prepared with no attempt at comprehensiveness, but merely with a view to suggesting in brief space some of the features of the very large problem of compensation for injuries to workmen. The problem has of late commanded a good deal of attention throughout the world, and no study of the question in this country can consistently ignore the results of the investigations and legislative experiments in other countries. In Ontario no substantial change in the law has been made for nearly twenty-five years. A consideration of the systems of other countries should therefore not only prove suggestive, but should assist materially in avoiding their defects and in devising a measure for this Province which shall be economically sound as well as practicable.

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WORKMEN'S COMPENSATION FOR INJURIES

Common Law in Ontario.

Under the old English common law, as introduced in this Province, an employer is not liable for damages for injuries sustained by an employee, unless the latter can prove that such injuries were caused by negligence on the part of the employer. If negligence can be proved there is no limit to the amount of damages which can be recovered, that being for a jury to decide, subject to revision by the courts of Appeal. The difficulty of recovering damages for injuries to a workman by an ordinary action for negligence is increased by two principles of law which may be set up by the employer by way of defence, viz., "contributory negligence" and "common employment." These two principles are a part of the common law of England and most of the British colonies as well as the United States.

Contributory Negligence.

In an action of negligence, the evidence of negligence on the part of the defendant may be met by evidence of negligence on the part of the plaintiff himself which contributed to or was the real cause of the injury. Proof of such contributory negligence will disentitle the plaintiff to any remedy whatever. There is no rule of English law, such as there is in other countries, placing the burden of the accident upon the person *most* at fault or proportioning the amount of damages to the degree of fault.

Doctrine of Common Employment.

Where the injury is caused by a fellow-employee the employer is, under the common law, not liable. This is called the theory or doctrine of "common employment." Under this theory the workman who is injured by the negligence of any other person working under the same employer, even though the other person is in a different grade of employment, or is in the position of superintendent or manager, has no claim against the employer. The theory is based upon the presumption that the workman in engaging in any particular class of employment assumes the risks incident to that employment, one of which risks is that of being injured by a fellow-employee.

Objections to Common Law.

The difficulties in the way of the plaintiff's success at common law frequently induce juries to strain the facts in favor of the plaintiffs and to exaggerate the amount of damages. This occasions appeals to the higher courts, with the result that much money is wasted in useless litigation with comparatively small practical benefit to the workman. It has been estimated that of the money paid out by employers by way of liability insurance only 25 per cent. actually reaches the injured workman or his dependents.

Ontario Workmen's Compensation Act of 1886.

In Ontario the doctrine of common employment has been partly displaced by the Workmen's Compensation Act of 1885. This Act, with its amendments, gives to workmen in certain industrial occupations, a claim for damages for injuries caused by the negligence of fellow-servants who are in a position of superintendence or control, or caused by dangerous machinery, or other dangerous condition of the premises upon which the work is carried on. But the Act leaves intact the doctrine of common employment as to employees of co-ordinate rank; and contributory negligence remains, of course, still a defence.

As an illustration of the working of this present Act, may be cited a case which arose out of the building of the City Hall, Toronto. Two workmen, one older and more experienced than the other, were engaged in hoisting building stone with a derrick. The older man was instructing the younger in the use of the apparatus. The younger man in following these instructions was injured and sued the city. The whole question at issue was whether the older man was in a position of superintendence. It was held that he was not, and the planitiff failed in his action.

Amount of Compensation under Present Act.

The amount recoverable under the present Act in Ontario is the estimated earnings, during the three years preceding the injury, of a person in the same grade of employment, or the sum of $1,500.00, whichever is larger. Since the Act does not take away the common law right to damages where the workman can prove negligence, it has been the practice for workmen to sue both at common law and under the Workmen's Compensation Act. If the workman is able to succeed at common law he is not limited to the amount of damages fixed by the Act, but may obtain such larger amount as the

jury award. If he is not able to prove negligence on the part of the employer he may still be able to succeed under the Act and obtain the limited amount of damages.

Workmen's Compensation in England.

The present Act of Ontario was copied from an Act introduced by Mr. Chamberlain in England in 1880. There have since been in England two radical changes in the law. In 1897 a new Act was passed. This Act was intended as an experiment and to remain in force for only seven years; though the time was afterwards extended.

"Professional Risk" Theory.

The new Act was based on an entirely different principle from the Act of 1880—a principle which has since been designated by the term "professional risk." This principle rests upon the theory that every workman is entitled to compensation for injuries caused by accident during the course of work quite apart from the question whether the accident was due to the fault of the employer or any fellow-employee. Industrial accidents are regarded as incidental to modern industrial conditions, and the due compensation of workmen as an item of the cost of production, to be reckoned along with the cost of machinery, etc., and added to the price charged to the consumer.

The Act Extended.

The Act of 1897 applied only to certain classes of industrial employment, such as on railways and in workshops, factories, mines, etc. In 1900 it was extended to agricultural laborers. In 1906, after extensive investigation by a Parliamentary Committee, the Act was re-cast and its scope very much extended. It now applies to practically all workpeople, including seamen, clerks, shopmen, professional football and cricket players, organists and domestic servants. The only persons specifically excluded are persons employed otherwise than in manual labor whose remuneration exceeds £250 a year, outworkers, members of a police force, members of the employer's family living in the employer's house, and persons casually employed for some purpose not connected with the employer's trade or business.

Basis of Compensation under English Act.

Under the present Act the amount of compensation is based upon the number of dependents of the workman and the degree of dependence, as well as the extent of the injury.

Where death results from the injury, and there are persons wholly dependent upon the earnings, the sum payable is the amount of earnings for the preceding three years, or £150, whichever is larger, but not exceeding in any case £300. Where there are persons partly dependent, the compensation is proportioned to the degree of dependence. Where there are no dependents the employer is liable only for medical and burial expenses, not exceeding £10. Where total or partial incapacity results from the injury the employer is liable for a weekly payment during incapacity not exceeding 50 per cent. of his average weekly earnings during the previous twelve months, such weekly payments not to exceed £1.

Commutation of Weekly Payments.

After the amount of the weekly payments has been ascertained, either in an action or by arbitration, and they have been regularly paid for six months, the employer may take proceedings to have them commuted for a lump payment. If the incapacity is permanent the sum must be sufficient to purchase from the National Debt Commissioners, through the Post Office Savings Bank, a life annuity equal to seventy-five per cent. of the annual value of the weekly payments; and this lump sum may be ordered to be invested for the benefit of the workman. The Act does not interfere with the power of the employer and the workman to commute the weekly payments by mutual agreement; but such an agreement must be recorded with the Registrar of the County Court.

Alternative Remedies.

The Act leaves unimpaired both the right to sue at common law and the right under the former Act of 1880, so that the workman has his choice of three remedies, though he can obtain only one, and must make his election which one to pursue.

"Contracting Out" under English Act.

The Act of 1880 did not prevent arrangements between the employer and the workman, whereby the latter relinquished, for a consideration, his right to compensation under the Act. A workman might be obliged to contract himself out of the benefit of the Act as a condition of obtaining employment. Under the present Act "contracting out" is permitted only where there is substituted a scheme, approved by the Registrar of Friendly Societies, not less favorable than

the scale of compensation under the Act; and the workman must be perfectly free to adopt this scheme or not, or withdraw from it at will. Very little advantage appears to have been taken of this provision.

Contractor and Sub-Contractor.

Where work is being performed by a sub-contractor who hires his own men, the ordinary course of law would leave the sub-contractor alone liable for any damages for injuries. The English Act, however, places the liability upon the principal for whom the work is being done, though the sub-contractor is also liable, and the principal, if forced to pay, has recourse against the sub-contractor.

Burden of Compensation.

The Act throws the whole burden of compensation upon the employer and there is no guarantee against failure of the employer to meet his obligation, through insolvency or otherwise. It is, of course, the practice of employers to insure their risk of liability under the Act in one of the Employers' Liability Insurance Companies, which sprang up after the passing of the Act of 1880, but the workman has no recourse against any such insurance company in which the employer chooses to place his risk.

Legislation in other Countries.

While these changes have taken place in England, corresponding changes have taken place in other countries, and legislation, involving the recognition of the theory of "professional risk" has been adopted in some form or other, by most of the leading countries in the world.

European Countries.

The older law in all the [redacted] European countries held the employer responsible only where he was in fault. The following is a list of the countries of Europe in which the theory of professional risk has been adopted, with the date of the new law: Germany (1884), Austria (1887), Hungary (1907), Norway (1894), France (1898), Denmark (1898), Luxemburg (1902), Italy (1898), Belgium (1903), Switzerland (1899), Spain (1900), Holland (1901), Sweden (1901), Greece (1901), Finland (1898), Russia (1903).

The German System.

Of all the European systems, the most highly developed is that of Germany. The introduction of the German Act by Bismark in 1884 had been preceded by many years of theo-

retical discussion, but the adoption of the system was accelerated by the passing of Mr. Chamberlain's Act of 1880 in England. The influence of the German Act was again very largely reflected in the English Act of 1897.

The German system of Workmen's Compensation is part of a comprehensive scheme of insurance against (*a*) sickness, (*b*) accident, and (*c*) old age. The essential feature of the system, so far as accident insurance is concerned, is that employers in each main branch of industry are organized in associations to maintain and administer an accident insurance fund. The actual working out of the scheme of accident insurance is complicated by local conditions, and by its relation to the other branches of insurance mentioned, but it operates to throw upon the workman a part of the cost of insurance (1).

To comprehend fully the methods of the German law for indemnifying workmen injured at their work it is necessary to consider an analagous law enacted two years earlier (1882), namely, the sickness-insurance law. This Act requires the establishment of sick funds in all industries, *one-third of the contributions to come from employers and two-thirds from the working people.* Any employee injured while at work is cared for by the sick funds *for the first three months* after the accident; but if at the end of these thirteen weeks he is still incapacitated he is entitled to an allowance equal to two-thirds of his wages, besides the medical expenses, out of a fund maintained by the *employers.* If he dies at any time as a result of his injuries, his family is entitled to a yearly pension not exceeding 60 per cent. of his wages.

Provision is made for the collective responsibility of employers; that is, all employers are grouped together into associations by industries (Berufsgenossenschaften) and each association pays the claims of workingmen employed by its own members. The members of each association are annually assessed, according to the size of their pay-rolls and the hazard of their business, at a rate sufficient to pay the death claims, the benefits to temporarily disabled workmen, and the pensions to entirely incapacitated workmen and the families of employees killed by accident. The assessments must also cover the administrative expenses of the association, which include the salaries of a large number of engineering and mechanical experts employed by the associations to inspect the factories of members and see that the best appliances are bought and used for safeguarding dangerous

(1) The proportion borne by the workman has been estimated variously from one-eighth to one-third.

machinery. Briefly put, the German law requires every employer to join a mutual insurance company, which indemnifies the employees for all personal injuries sustained in the course of their employment, the question of negligence on one side or the other having nothing to do with the amount of such indemnification (1), which is fixed by the amount of the employee's wages, and, in case of his death, the number of surviving dependents. The administrative machinery for determining the compensation is prescribed by the law and appears to be simple and economical in its operation (2).

This system is claimed by many writers to be quite satisfactory in its operation and results; and the reports of various committees who have investigated the whole subject for the British Parliament and for colonial legislatures appear to anticipate the ultimate adoption of some such scheme of compulsory insurance in place of the present English system of employers' liability. On the other hand it is claimed that the system constitutes a heavy incubus upon German industry, resulting in lower wages to the workman and disadvantage to the German employer in meeting foreign competition.

United States.

The principle of professional risk has made less headway in the United States than in most other civilized countries. This may be partly attributed to constitutional difficulties; and perhaps also partly to the generally freer industrial conditions obtaining in America under which the workman is more willing and perhaps more able to carry his own risk or insure it at his own cost. Some of the States have, however, adopted a modified form of the English Employers' Liability Act of 1880, and in some States the amendments have been along the line of abolishing the employers' defences or shifting the burden of proof from the employee to the employer. In a number of the States commissions are now engaged in a study of the subject. The Federal Government is also making investigations with a view to enacting a law that will be applicable to employees within its jurisdiction, such as, for instance, those engaged in interstate commerce. Two States, Maryland and New York, have adopted compensation laws embodying the principle of professional risk.

(1) With the qualification that no compensation is paid when the injury is due to the victim's wilful misconduct—which in practice has proved unimportant—and that the victim may sue for damages when the employer has been grossly negligent.

(2) Commons, Trade Unionism and Labor Problems—p. 553.

Maryland.

The first State to apply the principle of professional risk was Maryland. An Act of 1902 provided a uniform compensation of $1,000 in cases of accidents which should occasion death within a year. This compensation was to be secured by State insurance and one-half of the premium to be deducted from the workman's wages. In 1904 the Act was declared unconstitutional by the Courts. On 1st May, 1910, a new Act came into force providing a relief fund for injured employees in certain industries in certain counties by a tax of twenty-seven cents per month for each employee, and an equal amount from the employer for each employee. Compensation is provided for specified accidents, as for example, the loss of both hands, $750.00; one hand, $375.00; and in addition $6.00 a week for twenty-six weeks. Injuries resulting in death within one year are compensated by $1,500.00. Substantial proof is required that the injury or death was due to the employment, and a detailed method of procedure and administration is outlined. The money is deposited with the County treasurer and the fund is administered by the County Board of Commissioners.

New York.

By an Act of the State of New York, which came into force on the 1st September, 1909, special provision is made for compensation in cases of accidents in the more dangerous classes of employment, such as construction of bridges and buildings, construction and operation of electrical apparatus, operation of railways, operations involving the use of explosives, etc. In these classes of occupation if injury or death is caused by (a) a necessary risk or danger inherent in the nature of the employment, or (b) failure of the employer or his agents or employees to comply with any law affecting such employment, the employer is liable to pay compensation unless the injury has been caused, in whole or in part, by the serious and wilful misconduct of the workman. The scale of compensation in case of death is based upon the number of dependents and degree of dependence, the maximum being twelve hundred times the daily average earnings at the time of the injury, but not more than $3,000. In case of total incapacity the compensation is a weekly payment of 50 per cent. of the average weekly earnings, but not more than $10 per week. In case of partial incapacity the amount of compensation is proportioned to the extent to which the earning power of the workman is diminished. The compensation is

made a preferential claim against the assets of the employer and is not assignable or subject to attachment. While in receipt of such weekly payments the workman may be required to submit to medical examination at intervals of six weeks. The compensation is recoverable in an ordinary action at law. The right of action at common law and under the general Employers' Liability Act is not taken away, but the workman must exercise his option at the time of the trial as to which remedy he will pursue.

A novel and interesting feature of the Act is the provision for voluntary acceptance by employers and employees of the plan of compensation, laid down by the Act. In the dangerous classes of occupations specially provided for, the scheme of compensation under the Act is compulsory upon the employer if the workman elects to take advantage of it. But in all other occupations, as well as these specially mentioned, the employer and employee *may, by a joint consent,* filed with the clerk of the county court, adopt the scheme of the Act. Such a consent bars the workman's right at common law, unless the employer has been guilty of serious and wilful misconduct or failure to observe legal regulations as to safeguards. The consent may be cancelled on sixty days' notice. This provision not only allows but encourages the formation of schemes of mutual insurance, whereby the employer will relinquish such defences as still remain under the Act in return for the concession from the workman of his rights at common law.

Canada.

Most of the Provinces of Canada have within recent years passed laws embodying the principle of professional risk. In British Columbia where an Act had been in force similar to the present Act in Ontario, an Act along the lines of the English Act of 1897 was passed in 1902. In Alberta a similar Act was passed in 1908. In New Brunswick in 1908 a modified form of the English Act of 1897 was adopted. In Manitoba during the past session (1910) an Act was passed following the lines of the present English Act, and it is announced that at the coming session of the Legislature of Saskatchewan, a Workmen's Compensation Act will be introduced.

Quebec—Common Law.

The general law of the Province of Quebec is different from that of the rest of Canada, being based on the old French civil law. The position of workmen was much better under the law of Quebec than in Ontario even before the Act

of 1909, but it was necessary for the workman to prove fault on the part of the employer before he could succeed in an action for damages. Neither the defence of common employment, nor that of contributory negligence, however, was available to the employer, though the damages might be reduced by showing that the employee was also in fault.

Act of 1909.

The Act which came into force on the 1st January, 1910, is largely copied from the law in force in France. It applies practically to all industrial occupations, except agriculture and navigation by means of sails. Recognition is accorded to the theory of professional risk and compensation is awarded, without reference to the question of fault or negligence, except that the court may reduce or increase the compensation according as the accident is due to the "inexcusable fault" of either the workman or the employer, and no compensation is granted where the accident was brought about intentionally by the person injured. But the amount of compensation is based upon the theory that the loss incidental to industrial accidents should be borne by the workman and the employer *in equal shares*. The effort has, therefore, been to fix the amount of compensation at one-half the actual loss. In case of death from injuries the compensation is fixed at four times the average yearly wages, but is not to be less than $1,000, nor more than $2,000. In case of permanent injury the compensation is in the form of a "rent" or annuity, based upon the extent to which the earning capacity of the workman is reduced. Where the yearly wages are $600 or less, the annuity is one-half the reduction in earning capacity. On any surplus over $600 up to $1,000 the proportion is one-fourth. Where the yearly wages are over $1,000 the Act does not apply. This annuity is payable quarterly by the employer and is inalienable and exempt from seizure. It also ranks amongst the preferential claims upon the assets of the employer. But there is nothing to guarantee the payment of the compensation in case of death, or the continuance of the annuity in case of failure by the employer through insolvency or otherwise. In case of temporary incapacity the amount is one-half the daily wages, beginning on the eighth day, payable at the same time as the wages of the other employees and at intervals not to exceed sixteen days. The compensation is entirely at the charge of the employer and he cannot deduct any part of the workman's wages for insurance purposes, even with the workman's consent. A workman permanently injured thus becomes a pensioner for life upon the employer.

No Commutation of Payments.

The periodical payments cannot apparently be commuted for a lump sum, even if the employer and workman should so agree. The employer, may, however, be required *by the workman* to pay to any insurance company authorized by the Government for the purpose, a lump sum sufficient to satisfy the annuity, and so relieve the employer from further liability.

Common Law Right Abolished.

The Act takes away the workman's right to sue at common law and his only claim is under the Act.

Procedure.

An effort is made to afford an informal and inexpensive mode of settling claims by providing that before having recourse to an action the workman must obtain the leave of a judge, who may, without hearing any evidence "use such means as he may think useful to bring about an understanding between the parties." There is, however, a good deal of skepticism as to the efficacy of this provision.

General Effect of Quebec Statute.

In its ultimate effect it will be seen that the Quebec law is similar to the system in England in throwing the burden of such compensation as is awarded entirely upon the employer, without invoking the co-operation of the workman or the assistance of the State. Though the Quebec Act is largely copied from the laws of France, there is this essential difference, that under the French law the Government guarantees the payment of the compensation in case of default by the employer, while under the Quebec Act the recourse is only against the employer.

Experience under the Act has extended over only a short period, but notwithstanding that the previous law was comparatively favorable to the workman, there has been a decided increase in the rates for employers' liability insurance, ranging in the different classes of employment from 10 to 300 per cent.

Insurance.

An inevitable accompaniment of any liability on the part of the employers for injuries to workmen is a system of insurance against losses resulting from accidents. The general tendency of European legislation has been in the direction of government control or administration of this insurance, while

in England the tendency has been to fix the liability entirely upon the employer and leave him to insure his own risk if he so desires. In England and those jurisdictions where the English type of legislation has been adopted, investigating commissions have uniformly recommended government participation as an element in the ultimate solution of the problem. In this connection it is important to distinguish clearly between two radically different kinds of insurance evoked by the different types of compensation legislation:

Accident Insurance.

On the one hand there is simple accident insurance for the benefit of the workman injured, or the family of the workman killed. Such insurance may cover the risk of injury in the course of employment only, or may be extended to any accidents of the workman regardless of the occasion. The essential feature is that it is the *workman* who is insured.

Employers' Liability Insurance.

On the other hand there is employers' liability insurance for the purpose of insuring the employer against legal liability to compensate the workman. The law fastens upon the employer a certain liability which the insurance company, for a consideration, assumes. The insurance is entirely for the benefit of the *employer*. The workman has no claim upon the insurance, which may, in fact, be a detriment to him, for not infrequently the insurance company assumes the defence of actions against the employer and by means of its superior facilities for conducting such cases, defeats the claim of the workman. Employers' Liability Insurance Companies also frequently stand in the way of settlements between employers and workmen by refusing to pay claims which the employer is willing to concede, on the ground that the employer is not legally liable. And where a settlement is arrived at between the employer and the workman, it frequently happens that the insurance company repudiates the claim on the ground that the workman could not have recovered in an action.

The Margin of Risk.

There is always and necessarily a margin of risk of accident which is not covered by the employer's liability, and therefore not covered by the insurance. This margin is the battle-ground for litigation both between the employer and employee, and between the employer and the insurance company. The only practicable method of eliminating this

source of litigation is to have the margin covered by insurance—in other words, to have *accident* insurance.

A scheme of insurance which has found favor in Ontario is for the employer to insure his "pay roll" for a certain amount against accidents happening in the course of employment. This insurance is gratuitous and without reference to the employer's liability under the present law in Ontario. For a small additional sum, to be deducted from the wages, the workman may have the amount increased or the insurance extended to cover all accidents whether in the course of employment or not. Such a co-operation on the part of the employee practically eliminates the possibility of litigation over the margin of risk not covered by the employer's legal liability or the insurance.

Government Participation.

Under a system where the burden of compensation is fixed directly upon the individual employer the active participation of the government is not necessary, the administration of the law being left to judicial tribunals whether regular courts or special tribunals created for the purpose. But where there is any sharing of the burden of compensation between employer and workman or any organized scheme of accident insurance in place of the direct responsibility of the employer, the intervention of the government is practically inevitable. The English Act, as we have seen, admits of the formation of "schemes" of accident insurance to take the place of the liability under the Act. This feature has been copied in the Acts of British Columbia, Alberta and Manitoba, but in each of these provinces the matter of approving schemes is left in the hands of the Attorney-General. In England the evident intention of the provision is nullified by the requirement that any scheme of accident insurance shall be *at least as favourable* as the compensation provided by the Act. It is manifest that many schemes which, though in their legal aspect not "at least as favourable" to the workman, would be of much greater practical benefit are excluded by this provision. It is scarcely to be expected that this provision will be productive of better results in this country than in England, though doubtless much will depend upon the disposition of the official or body on whom is placed the responsibility of approving of any "schemes" that may be presented.

Comparison of English and German Systems.

The English system gives rise to *employers' liability insurance* for the protection of the employer only. The German system compels *accident insurance* to relieve both employer and workman of the risk.

Under the German system the injured workman or the dependents of a workman killed in the course of his employment become pensioners upon a fund; in the English system they become pensioners directly upon the employer unless the latter chooses to commute the periodical payments for a lump sum.

The German system affords facilities for a greater degree of co-operation between employer and workman, with a view to prevention of accidents and minimizing their results. Under the English system it is left entirely to the employer, apart from the Factory Acts to take active measures for prevention of accidents, and the workman is left to his own resources or those of voluntary benefit societies in the matter of treatment of injuries.

The German system *compels* the formation of workmen's benefit societies. The English Act has had the effect of discouraging the formation of such associations.

In the English system in case of accident the employee and employer meet face to face over the question of liability and the amount of damages. In the German system an organized fund intervenes.

The English Act is alleged to have had the effect of inducing a considerable amount of self-inflicted incapacity and malingering. This condition appears to be less prevalent under the German system.

The English Act has given rise to a difficulty in finding employment for aged or partially incapacitated workmen, owing to the effect of such employment upon the rates for employers' liability insurance. Under the German system this condition does not arise.

The German system involves, to a much larger degree than the English the active intervention of the State.