The General Development of Workmen's Compensation Act

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THE GENERAL DEVELOPMENT OF WORKMEN'S COMPENSATION ACTS.*

The common law action to recover damages for employees injured or killed during the course of their employment has been found to be unequal to the demands of centralized industry.¹ These rules were worked out to apply to relationships of comparative simplicity. The employer used but few men; they knew him and in a general sense were acquainted with each other—an individualistic affair.

For such conditions the common law rule that an employer is liable to his injured employee only when the employer is at fault worked comparative justice to all concerned.

But the advent of modern machinery and the erection of large factories has taken away the personal relationship between the employer and his employee. As the relationship distanced, the employee found it increasingly difficult to prove his master's negligence. The worker's task was even more difficult because the three defenses known as (1) the fellow servant rule, (2) the doctrine known as the voluntary assumption of risk, and (3) the rule of contributory negligence had been given to the employer by the courts.

The fellow servant rule of judicial origin, was ingrafted upon the common law for the protection of the master against the consequences of negligence in which he had no part. By degrees it was expanded until under modern industrial conditions it gave opportunity for many harsh and technical defenses.²

It is also urged that the master was liable for injuries caused to strangers by the acts or defaults of his servants in the course of their employment but was not liable to one servant for an act or default of his fellow servant.³

The workman was placed in a worse position than the outsider.

* A study in administrative law submitted to Professor Felix Frankfurter, Harvard Law School, March, 1924.
Under the assumption of risk rule, if the employee knew
the dangers of the employment, he was held to be responsible
for the injury. The workman, who is forced to depend upon
employment for his bread, often willingly enters upon a task
fraught with more than ordinary dangers without additional
arrangements for compensation. His family must be fed. The
common law made no provision in such a case.4

It seems that one, who is to blame for his injuries should
not force the consequences upon another, who has not been
negligent at all or whose negligence would not have caused the
accident but for the servant's negligence. And yet, this rule
of contributory negligence has often been a source of great in-
justice in its administration.

Added to these obstacles, the law itself was "for the most
part too uncertain, too dilatory, and too expensive for the aver-
age workman to embark in."5 Time is of the essence in dealing
with compensation for injuries to working men. They can not
afford to wait for a legal remedy nor pay the expense of obtaining
one.

Compensation of any kind was not given to exceed 12% of
the cases of injuries to employees and even in those cases in
which compensation was paid, it did not average more than one-
fourth of what is considered to be adequate compensation.6

If successful in his action, the workman was awarded a
lump sum. Unused to the care of money, this was squandered
as a rule and his family became an object of concern for the
community.

The situation demanded a remedy. The remedy was pro-
vided by workmen's compensation laws.

The idea of workmen's compensation seems to have origi-
nated in Germany; the fertile brain of Bismark crystallized it
there. From the enactment of a sick insurance statute in 1883,
the great German workmen's insurance plan has been built up.7

The first Act in Great Britain was in 1897, which only pro-
vided compensation for certain designated employments. In

4 Astley v. Evans & Co. (1911), 1 K. B. 1036; Ladd v. New Bedford
5 Cooper v. Wright (1903), App. Cas. 302.
6 Industrial Insurance for Workmen. James H. Boyd. 10 Mich. Law
Review.
1906 Great Britain extended workmen's compensation to all employments. Statutes embracing upwards of twenty-five jurisdictions were in force before any similar Act was passed in the United States.\(^8\)

**THE THEORY OF WORKMEN'S COMPENSATION LAWS.**

Industrial accidents may be put into two classes, the preventible and the inevitable.\(^9\) Preventible accidents are usually the result of the negligence of the employer or of the employee. Inevitable accidents result from the ordinary hazard of the industry and cannot be classed as due to the negligence of either the employer or the employee.

In spite of all precautions accidents, which are inevitable, occur in all industries. Powder factories blow up; often the cause is never ascertained. A workman is stricken with a disease which is a result of his occupation. No matter how careful the employer and employee may be or how many laws society may pass for their mutual protection, this type of accident will continue to be present in some degree. At this time, at least, statistics show that nearly 55% of industrial accidents are the result of the natural hazard of the business.\(^10\)

At common law, preventible accidents due to the negligence of the employer were recognized as part of the cost of production. The employer either paid damages and charged it to the cost of production or took out liability insurance and charged the premiums to the cost of operation.

At common law the employee suffered for accidents due to his negligence. He could recover no damages.

Neither the employer nor the employee should suffer for accidents due to the hazard of the industry. Such loss should be borne by the ultimate consumer of the product of the industry.

It was well said in an editorial in the Outlook of March 1, 1913: "When a machine is injured in the course of its use, the owner of the machine bears the cost of the injury and charges it to the expense of production, for which he receives payment

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\(^8\)See the article by Eugene Wambaugh, cited (1), *supra.*

\(^9\)See Second Annual Report, Workmen's Compensation Board of Kentucky.

\(^10\)"Kentucky Workmen's Compensation Law. Dosker. Page 5."
as he sells his goods. When, however, a workman is injured in the course of his employment, the cost of the injury comes upon him, who can ill afford to bear it; and if his injury is serious, resulting in long incapacity for work or in death, he is drafted into that great army of dependents, that is a reproach to our civilization. There is no reason that common sense can accept why the cost in human efficiency and human life of the production of the things that people need should not be charged to the account of that production, just as is charged the cost of injury to machinery."

Workmen's compensation laws proceed on the theory that the "injured workman is entitled to pecuniary relief from the distress caused by his injury, as a matter of right, unless his own willful act is the proximate cause, and that it is wholly immaterial whether the injury can be traced to the negligence of the master, the negligence of the injured employee, or a fellow servant, or whether it results from an act of God, the public enemy, an unavoidable accident, or a mere hazard of the business, which may or may not be subject to more exact classification."11

The economic principle of workmen's compensation laws is that both preventible and enevitable accidents should be borne by the cost of production. Industry has always borne the burden of depreciation and destruction of machinery; it should also bear the burden of repairing the efficiency of the human machinery, which is so necessary to production.

**Progres of the Movement in the United States.**

The agitation for workmen's compensation became active in the United States in the first decade of the Twentieth Century.

In 1902 a limited provision applying compulsory co-operative insurance to a few employments was passed in Maryland but was declared unconstitutional because of improper delegation of judicial functions, in April, 1904, by an inferior court, and no appeal was taken from that decision.12 Another statute applying to limited employment was adopted in 1910.13

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11 Judge Holloway's Opinion in 155 Pac. 268.
13 See Prof. Wambaugh's article (1), supra, at page 132, note 4.
The Federal Employers' Liability Act of 1906 was not a workmen's compensation act but an employers' liability law. Its purpose was the redress of injuries to railroad employees. It was declared unconstitutional as embracing intra-state matters, with which Congress had no power to deal. A new Federal Act was passed in 1908. It excluded injuries due to the negligence or misconduct of the employee as did the act of 1906 and cannot be called for that reason a workmen's compensation act.

In 1903 a commission was appointed by the Governor of Massachusetts under authority of the legislature to study the relations of employers and employees. It recommended a compensation act, fashioned after that of Great Britain, to the legislature in 1904. The act failed to pass. It was a new idea with the public and employers feared that the added burden its passage would entail on industries would hamper them in competition with other states. This latter reason held the passage of workmen's compensation back in more than one instance.

A similar measure was introduced each year without success until a special committee was appointed in 1907, whose majority favored a voluntary law which permitted employers and employees by contract to substitute a plan of compensation for their legal liability. The minority favored a compulsory compensation act. The legislature enacted the report of the majority in 1908. But contracts thus made were only for one year and employers found it too expensive to try to operate under a law sanctioning such frequent changes. It was a failure.

Another commission was appointed; another act was drawn up and enacted in 1911, providing for voluntary, mutual insurance of employees by employers.

Meanwhile in 1910, New York had passed a compulsory compensation law applying to certain hazardous occupations. It was declared unconstitutional in the celebrated case of Ives v. South Buffalo Ry. Co. as in conflict with both the federal and

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15 See (1), supra.
state constitutions, the Fourteenth Amendment of the former and Art. 1, section 6 of the latter, which forbids the taking of public property without due process of law.\textsuperscript{17}

New York in 1910 also passed a voluntary compensation act, which the employer and employee could by agreement substitute for the prevailing system. This law was similar to the Massachusetts law but went further in that it prescribed the scale of benefits which should be paid when agreements under it were made.

Montana's act applying to miners only was declared unconstitutional on the ground that it submitted the employer to a double liability. This was because of negligent drafting, which failed to protect the employer from an action at law after paying compensation under the act.

In 1911 ten states—California, Illinois, Kansas, Massachusetts, Nevada, New Hampshire, New Jersey, Ohio, Washington, and Wisconsin—adopted compensation acts. Arizona, Maryland, (with a remodeled act), Michigan, and Rhode Island followed in 1912. Then Connecticut, Iowa, Minnesota, Nebraska, Oregon, Texas, and West Virginia joined the ranks. In 1914 Kentucky and Louisiana passed compensation acts. The Kentucky act was declared unconstitutional and a valid act was passed in 1916. Between the years 1910 and 1920 there had been workmen's compensation and industrial insurance laws enacted in forty-two states.\textsuperscript{18}

As noted above, the 1914 session of the Kentucky General Assembly enacted a workmen's compensation law, which was held unconstitutional by the State Court of Appeals in the case of \textit{Kentucky State Journal} v. \textit{Workmen's Compensation Board}, 161 Ky. 562; 170 S. W. 1166. This act shall be considered in a later section.

The restrictions which the court's construction of the state constitution laid down in that opinion accounts for some of the provisions in the 1916 act.

In April, 1915, after a somewhat informal correspondence between the representatives of the various interests most directly affected, a \textit{Voluntary Investigating Commission} was organ-

\textsuperscript{17} 201 N. Y. 271, 94 N. E. 431 (1911).
This commission consisted of four representatives of the Kentucky State Federation of Labor, three from the Kentucky Manufacturers and Shippers Association, two from the Kentucky Mine Owners Association, and one representative from the Attorney General’s Department.

This commission held monthly sessions in Louisville during 1915 and offered a draft of a compensation bill to the 1916 General Assembly. It was adopted, practically, as offered at that session.

The only substantial changes made by the legislature were the penalty provisions for intentional injury in Section 4882, the scale of benefits to alien dependents in Section 4903, and the method of computing weekly wages in Section 4905.

The requirements of the Kentucky Constitution, as previously construed by the courts, accounted for the unusual provision of Section 4893, allowing a recovery of one hundred dollars by the personal representative and the provision in Section 4957 providing for express written acceptance of the act by individual employees.

Governor Stanley approved the act on March 14, 1916, and by its terms it became effective as to the appointment of the board and their “rights, powers, and duties” on the first day of April, 1916, becoming fully operative as between employer and employee on August 1, 1916.

**The Kentucky Act.**

The Kentucky act provides an elective system of workmen’s compensation for industrial accidents. The act applies to “all employers having three or more employees regularly engaged in the same occupation, except that it does not apply to domestic employment, agriculture, steam railways, or such common carriers other than steam railways for which a rule of liability is provided by the laws of the United States.”

Neither the employer nor the employee is brought under the provisions of the statute until he accepts them in writing. Withdrawal is also in writing.

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19 The discussion follows accounts in the annual reports of the Kentucky Compensation Board.

20 Kentucky Statutes, chapter 137. Carroll's Kentucky Statutes is cited in this paper.
Whenever both employer and employee have accepted the benefits of the act, all liability under the common law is swept away except in the case where there is a penalty for intentional injury in Section 4882.

That section contains an ambiguity. One part specifies that “if injury or death result to an employee through the deliberate intention of his employer to produce such injury or death, the employee or his dependants ... shall receive the amount provided in this act in a lump sum to be used, if they so desire to prosecute the employer, and said dependants shall be permitted to bring suit against said employer for any amount they may desire.” This part of the section manifestly gives both compensation as provided by the statute though in a lump sum and in addition the employee may pursue his common law action.

And yet, the employee is forced to an election to take under the statute or bring suit at law by the following words of the same section: “if injury or death results to an employee through the deliberate intention of his employer to produce such injury or death, the employee or his dependants, .... shall have the privilege to take under this act, or in lieu thereof to have a cause of action at law against such employer, as if this act had not been passed, for such damages so sustained by the employee, his dependents, or personal representative, as may be recoverable at law.”

It is said that the first part of the section quoted was hastily constructed and placed in the section as an amendment, while the act was being argued on the floor of the senate.21

Doubtless the courts will construe the section in the light that the “spirit of the law and not the letter should control its construction, and in considering the object to be accomplished decide that an election of one remedy will preclude the other being followed.”22

If the employer does not elect to operate under the provisions of the act and he is sued at law to recover for injuries or death to an employee by accident arising out of and in the course of the employment, the employer cannot defend on the

21 See (10), supra, page 86.
22 128 Ky. 324.
usual grounds of contributory negligence, negligence of a fellow servant, or assumption of risk. 23

If the employer elects to come under the act and the employee does not, such defenses are available to the employer in case of action by the employee.

Exceptional employments may be brought under the act by the joint application of the employer and the employee. 24 The acceptance is binding for the period stated in the application and until written revocation is filed with the board.

Under the act employers accepting its provisions must insure and keep insured their liability for compensation in some corporation, association, or organization authorized to transact the business of workmen's compensation in Kentucky or furnish to the board proof of financial ability to pay compensation direct. 25

In addition to the authorization of insurance in stock companies, mutuals, and reciprocals, state insurance was provided by the act. 26

But through the power of the board to regulate rates 27 no disposition was shown to organize the state mutual until the initial result of the board in fixing rates could be ascertained. 28

It developed that the larger stock companies did not submit rates to the board individually but delegated the matter to the Workmen's Compensation Service Bureau of New York of which they were members, so it became a question to be determined between the board and this bureau. Feeling their inability to cope with the technicalities of the subject, the board employed Dr. I. M. Rubinow of New York, who has a national reputation in this field. Dr. Rubinow recommended a rate substantially lower than that originally submitted to the board by the bureau. The Kentucky rate of compensation is 65% of the average weekly wage and the board's approval of a law-differential of 144 and a multiplier of 252 plus one cent gives Kentucky, considering its rate of compensation, very low insurance rates. The

23 West Kentucky Coal Co. v. Smithers, 184 Ky. 211; Lombery v. Central Consumers' Co., 184 Ky. 234.
24 McCune v. William B. Pell, 192 Ky. 22.
25 Kentucky Statutes, section 4946, et seq.
26 Kentucky Statutes, section 4969 to section 4986, incl.
27 Kentucky Statutes, section 4955.
Workmen's Compensation Service Bureau refused to accept the board's rate and left it to the various insurance companies to act independently.

Only twenty-seven insurance companies wrote insurance at the rate fixed the first year. But the low rate and the liberal own-risk policy adopted by the board had the effect of causing no interest to be manifested in the organization of the state mutual.

The low rate continued to prove so attractive that only 123 out of 4007 employers accepting the act were carrying their own risk at the end of the first fiscal year. Later figures are not available to the writer but the number of own-risk carriers continues to be low, made up largely of large concerns employing a sufficient number of men to equalize the risk.

The act provides for a merit rating schedule so that due allowance may be made for the hazard of the business, the installation and care of safety devices and the accident record of the particular employer. From the standpoint of cold dollars and cents, as well as from a humanitarian viewpoint the employer can well afford to install safety devices in order to decrease his rate as well as to minimize accidents.29

The benefits under the act may be classified as follows:

A. Death Benefits.30

(a) If death results within two years, burial expenses not to exceed $75.

(b) If there are no dependents, the further sum of $100 to the personal representative of the deceased employee.

(c) To persons wholly dependent, 65% of the average weekly earnings of the deceased, but not less than $5 per week nor more than $12 shall be paid for 33½ weeks but in no case to exceed the maximum sum of $4,000.

(d) If there are only partial dependents, who survive the deceased, the payments shall be proportional to total dependency.

29 Kentucky Statutes, section 4955.
30 Kentucky Statutes, section 4893, et seq.
B. Compensation for Total Disability.

(a) Weekly compensation equal to 65% of the average weekly earnings, not to exceed $15 nor less than $5 per week for a period not longer than eight years, nor to exceed a maximum sum of $6,000, including partial disability payments, if any. Certain injuries are deemed to constitute permanent total disability.

C. Compensation for Partial Disability.

(a) If temporary, 65% of the difference between the employee’s average weekly earnings after the accident and his average weekly earnings before the accident, not to exceed 333 weeks; not exceeding the sum of $15 per week nor the maximum total of $4,000.

(b) If an injured employee refused employment reasonably suited to his capacity and physical condition, he shall not be entitled to compensation during the period of such refusal, unless, in the opinion of the board, such refusal was justified.

(c) Lump sum awards may be made after six months if approved by the board.

Following the lead and policy incorporated in the compensation acts of many of the states, the Kentucky act originally provided for a two weeks’ waiting period, during which the injured employee received no compensation. This waiting period was reduced to seven days upon the recommendation of the board, the amendment taking effect August 1, 1918.31

An appropriation of $7,500 was recommended by the Voluntary Commission in their draft of the bill which they presented to the legislature and that amount was accordingly appropriated by the legislature to defray the initial expense of getting the commission going until the first income should accrue from the premium tax.32

This premium tax was a 4% tax on net premiums of insurance carried by employers and was collected from insurance carriers to pay the salaries and necessary expenses of the board and to provide a general maintenance fund for carrying out the

32 See (28), supra, page 13.
provisions of the act.\textsuperscript{33} It was augmented by an assessment of 4\% of what the Basic Manual insurance premiums would have been upon the payroll of those employers who elected to carry their own risk.

The income derived from this source proved to be more than enough to satisfy the financial needs of carrying on the duties of the board, so an amendment was passed by the 1920 session of the legislature, requiring insurance carriers to pay a 2\% tax, but the board is not authorized to make an assessment against the own-risk employers unless the maintenance fund at the end of any fiscal year is below $60,000. This amendment became effective June 16, 1920.\textsuperscript{34}

One amendment to the act shows the favorable impression created by the act, both among employers and employees in Kentucky. The act as originally passed applied to "all employers having five or more employees regularly engaged in the same occupation or business and to their employees" unless within the excepted employments. This section was amended by the legislature in 1918 by reducing the minimum number of employees from "five" to "three."

This legislative act was urged by capital and labor alike and mirrors the "favorable sentiment in Kentucky towards the entire system of workmen's compensation as a substitute for the old common law liability of master and servant.\textsuperscript{35}

In June, 1922, 9718 employers were operating under the act. Withdrawals have been few in number, resulting largely from cessation of operations or mere change of name.

During the year 1921-1922, 18,611 accidents were reported to the board. Agreements in the case of 10,000 of these were approved by the board. The others were adjusted by rendering formal awards, adjusting formal claims upon recommendation of the board, or dismissal.\textsuperscript{36}

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(To be continued.)

\textsuperscript{33} Kentucky Statutes, section 4968.
\textsuperscript{34} Annual Report of Kentucky Compensation Board, 1919-20, page 5.
\textsuperscript{35} See (31), supra, page 22.
\textsuperscript{36} During the fiscal year of 1920-21, 561 formal claims were filed with the board. The board rendered 120 formal awards, adjusted 291 claims by recommendation and dismissed 134 claims. A few cases were not disposed of.