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THE GERMAN AND BRITISH ROOTS OF AMERICAN WORKERS' COMPENSATION SYSTEMS: WHEN IS AN "INTENTIONAL ACT" "INTENTIONAL"?*

Michael L. Perlin**

INTRODUCTION

For nearly three quarters of a century, American courts have declared that the basic purpose of workers' compensation law is "to shoulder on industry the expense incident to the hazards of industry; to lift from the public the burden to support those incapacitated by industry and to ultimately pass on to the consumers of the products of industry such expense."1 It has been universally acknowledged that workers' compensation legislation "is social insurance against a particular hazard of modern life,"2 and a form of strict liability insurance,3 which evolved in response to early case law, which had severely limited the ability of workers to sue their employers for on-the-job injuries.4

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2 Reisenfeld, Forty Years of American Workmen's Compensation, 35 MINN. L. REV. 525, 529 (1951).
4 See id. at 525-30. Historically, American workers' compensation statutes were born of the dual heritage of German and British laws. See J. Boyd, A TREATISE ON THE LAW OF COMPENSATION FOR INJURIES TO WORKMEN § 8, at 16-17 (1913); S. Horovitz, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 5 (1944); I. Larson, THE LAW OF WORKMEN'S COMPENSATION §§ 4.00 to 5.30, at 23-40 (1978); R. Lubove, THE STRUGGLE FOR SOCIAL SECURITY, 1900-1935, at 25-29 (1968); Gordon, INDUSTRIAL INJURIES INSURANCE IN EUROPE AND THE BRITISH COMMONWEALTH BEFORE WORLD WAR II, in OCCUPATIONAL DISABILITY AND PUBLIC POLICY 191, 202 (1963) ("the British law of 1897 played almost as important a role in the history of workmen's compensation legislation as the original German Act") (emphasis ad-
Statutory schemes encompassing workers' compensation reflected certain specific compromises—while injured employees were to receive immediate relief, thereby reducing the potential for strife between management and labor, employees would in turn surrender their right to sue employers for the employers' negligent acts. Indeed, in practice, such compensation laws are normally thought of as substitutes for, rather than supplements to, common law tort actions.

Traditionally, however, one of the exceptions to this so-called "exclusivity ban" has been to allow a civil action in a case where the defendant acted wilfully or maliciously, or where the tort was an intentional act. Notwithstanding the existence of this exception, the leading treatise counsels a severely restrictive and formalistic view of an intentional act. In order to allow for maintenance of a civil suit, the intentional injury must (allegedly) be comparable to "an intentional left jab to the chin." While early exclusivity-exception cases often did involve such assault and battery claims, recent developments involve new workplace...
dangers such as asbestos poisoning.\textsuperscript{12} These situations require new analytic approaches and an overall reconsideration of the applicability of the exclusivity rule to industrial accidents.\textsuperscript{13}

The policy question posed by this issue is, in many ways, a microcosm of the development of workers’ compensation law and theory over the past century and a half. Any inquiry in this area must reflect the unique character of the American workers’

\textsuperscript{12} The hazards to workers from asbestos have been well documented. “Asbestos refers to a combination of mineral dusts found in a fibrous mineral material known primarily for its strength and resistance to heat. It has been characterized as ‘one of the most dangerous of all natural materials.’” Note, The Insurance Problem in Asbestosis Litigation: A Case for the Manifestation Theory, 57 St. John’s L. Rev. 485, 487 n.13 (1983) (quoting Mehaffy, Asbestos Related Lung Disease, 16 Forum 341 (1980)). Asbestos has been used commercially since 1874, and its production increased annually from 50 tons in 1877 to four million tons in 1967. Comment, Asbestos Litigation: The Dust Has Yet to Settle, 7 Fordham Urb. L.J. 55, 57-58 (1979). Exposure to any commercial type of asbestos fiber has been found to cause significant health hazards. \textit{Id.} at 58 n.21. “Diseases associated with asbestos exposure include asbestosis, a non-malignant scarring of the lungs; lung cancer (bronchogenic carcinoma); mesothelioma, a malignant tumor of the chest and lungs or of the abdomen; and cancer of the gastrointestinal tract.” \textit{Id.} at 58. Between 1940 and 1979, 27.5 million people were exposed to asbestos while working in the United States, with approximately 8200 cancer deaths occurring annually among this population. Comment, Issues in Asbestos Litigation, 34 Hastings L.J. 871, 871 (1983) [hereinafter cited as Comment, Asbestos Litigation]. Asbestosis—a pulmonary fibrosis—is frequently fatal, and some studies suggest that seven to ten percent of all workers exposed to asbestos contract the disease. \textit{Id.} at 873-74. Percentages set forth in the studies vary, with some stating that \textit{all} workers who are exposed to asbestos for more than ten years will contract asbestosis. \textit{Id.} at 874.

Of the estimated 650,000 victims of asbestosis and other occupational diseases nationally, only five percent received workers’ compensation benefits. Reutter, Workmen’s Compensation Doesn’t Work or Compensate, 35 Bus. & Soc’y Rev. 39 (1980). See generally Comment, Workers’ Compensation and the Asbestos Industry, 33 Syracuse L. Rev. 1073 (1982). It is estimated that the amount of compensation received by the five percent amounted to only one-eighth of their lost income; as one commentator has concluded, “[w]orker’s [c]ompensation for asbestos-related diseases is, in all states, at best inadequate, at worst a travesty.” Comment, Asbestos Litigation, supra, at 880.

compensation system and must reconcile the competing social forces and tensions that ultimately led to the system's creation.

As previously indicated, the American system is an amalgam of the preexisting systems in Great Britain and Germany; to understand fully the current scheme, it is necessary to (1) review the specific social forces leading to the creation of systems in those countries and elsewhere; (2) consider the political and economic climate at the time the American states adopted their first workers' compensation statutes; and (3) analyze subsequent legal and social developments over the past 75 years. Such an analysis will lead to an inescapable conclusion: there is nothing in the history of the creation of the American systems, in subsequent social developments, or in case law to suggest that the workers' compensation system robs plaintiffs of their right to maintain a common law suit in response to an "intentional act." Suggestions to the contrary reflect an inaccurate reading of both case law and legislative history, and fly squarely in the face of common sense and positive social policy.

I. GERMAN HISTORY

Over a thousand years ago, the basic contours of modern workers' compensation theory were firmly settled in primitive Germanic law. Basically, the master was liable for the *wergeld* of the workman, should he lose his life while actively serving the master, and also for an appropriate sum of money for a work-related injury. This philosophy has been characterized by Larson as perhaps "a more 'modern' social principle for taking care of injured workmen than existed in the United States until the twentieth century." According to Wigmore, it probably stemmed from a combination of Norse mythology and the Frisian chronicles.

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14 See supra note 4.
15 The 1911 New Jersey Act is, in many ways, paradigmatic of the "first generation" of American workers' compensation laws and will be discussed extensively below. See R. Chance, The Employers' Liability Act of New Jersey (1914); infra notes 163-94 and accompanying text.
16 Cf. 2A A. Larson, supra note 4, § 68.13, at 13-27.
18 1 A. Larson, supra note 4, at 24.
19 Wigmore, supra note 17, at 319 (relying on Brunner, *Ueber absichtlose Missethaf*
While there appears to be a large historical gap in the subsequent centuries, there is little doubt that an 1838 Prussian liability law—requiring railroad companies to provide compensation to employees for industrial accidents—was the first "modern" step in "the care of disabled workmen made necessary by the change in conditions brought about by modern industrial methods." That law was followed by other enactments in 1845, 1849, and 1854 encouraging the formation of workingmen's organizations to aid members disabled by sickness or accident. In spite of those apparently prophylactic laws, however, it is generally conceded that prior to the founding of the German Empire in 1871, an injured German workman rarely could secure adequate compensation for his losses. Even if legal action was successful, damages were rarely awarded, so that injured workers and their

im aldeutschen Strafrecht, 35 PROCEEDINGS OF THE ROYAL PRUSSIAN ACADEMY OF SCIENCE (1890). Professor Wigmore noted that: "[I]n the twelfth and thirteenth centuries . . . there can be no doubt on the evidence that there was a general Germanic notion of responsibility for servants." Id. at 336 n.1.

The Norse myths are recognized as the root source of early Germanic law. See J. WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS 813-31 (Library ed. 1928). For a general analysis of the impact of the folk myths of German law, see A. HIGGINS, supra note 17, at 8-12.

Larson's characterization of the period between 1000 and 1837 as "a complete blank," 1 A. LARSON, supra note 4, at 24, is probably an overstatement; workingmen's guilds for "the relief of disability" were recognized in Austria by Emperor Ferdinand I as early as 1527, 1 TWENTY-FOURTH ANNUAL REPORT OF THE COMMISSIONER OF LABOR, 1909: WORKMEN'S INSURANCE AND COMPENSATION SYSTEMS IN EUROPE 33 (1911) [hereinafter cited as 24TH REPORT], and provisions for "the relief of disabled miners, seamen, and domestic workers" predated the eighteenth century in Germany. Id. at 977; see also A. HIGGINS, supra note 17, ch. 1.

Prussia's lead was quickly followed by similar enactments of other German states, including Holstein, Mecklenberg, and the Saxon duchies. See L. FRANKEL & M. DAWSON, WORKMEN'S INSURANCE IN EUROPE 91-92 (1910); 1 24TH REPORT, supra note 20, at 983.

L. FRANKEL & M. DAWSON, supra note 21, at 92. The growth of the railroading industry in Prussia "made possible the later Imperial Germany's meteoric industrial development." B. ARMSTRONG, INSURING THE ESSENTIALS 223 (1932).

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L. FRANKEL & M. DAWSON, supra note 21, at 92. The 1854 law has been characterized as "especially significant in that it compelled workers in certain trades to join trade guilds and required employers to contribute half the cost of their management." Id. Subsequently, the states of Brunswick, Mecklenberg, and Saxony enacted legislation demanding that all employers belong to "some kind of mutual sick association." J. BOYD, supra note 4, § 15, at 27.

1 24TH REPORT, supra note 20, at 977. For an historical analysis of the pertinent social forces at play in the German empire at this time, see T. HAMEROW, THE SOCIAL FOUNDATIONS OF GERMAN UNIFICATION 1858-1871: IDEAS AND INSTITUTIONS (1969). For an early literature survey, see E. BORCHARD, GUIDE TO THE LAW AND LEGAL LITERATURE OF GERMANY 121-35 (1912).
families were oft-times forced to seek public assistance.\footnote{Id. For a full history of this period, see W. Dawson, Social Insurance in Germany, 1883-1911, ch. 1 (1912).}

In an attempt to rectify the evils emanating from this freedom from liability, the Empire enacted a heralded employers' liability law in 1871,\footnote{J. Boyd, \textit{supra} note 4, at 28.} which made an employer responsible where workers were injured by an \textit{accident} or through the \textit{negligence} of his agents or representatives.\footnote{Id. at 984.} That act applied to railroads, as well as to industrial and mining concerns.\footnote{Id. at 983.}

Although the enactment was seen as a great advance, the intended benefits were not realized,\footnote{Id. at 983.} resulting in a great deal of bitterness and dissatisfaction on the part of the German workers.\footnote{The law failed to be the expected palliative for many reasons: (1) lack of coverage of accidents caused by (a) the "inherent risks of modern methods of production," and (b) negligence of fellow workers; (2) failure to reallocate the burden of proof (which remained on the worker), \textit{id.}; (3) extreme delays in case settlement, J. Boyd, \textit{supra} note 4, at 28; and (4) "inability of irresponsible employers to pay the indemnity often compelling the applicant to apply for public or private charity." L. Frankel & M. Dawson \textit{supra} note 21, at 93. Under the law, injured workmen received compensation in only 10\% of all ostensibly covered cases. Gordon, \textit{supra} note 4, at 193. This "reduced the rights given the worker by the Liability Law to a nominal rather than actual remedy." B. Armstrong, \textit{supra} note 21, at 225.} Consequently, lengthy Parliamentary debates were held over a nine year period, centering on the need for ameliorative legislation to provide for adequate compensation in order to "protect . . . the weak against the strong."\footnote{J. Boyd, \textit{supra} note 4, \S 22, at 35 (quoting the Swiss socialist theoretician Jean Charles Leonard Simonde de Sismondi).}

Drawing on Zacher, and the report of the International Workingmen's Insurance Congress of Vienna, 1905, and Rome, 1908, Henderson suggests that "workingmen['s] . . . consciousness of their wrongs . . . united [them] in a desperate effort to overthrow a government which seemed indifferent to their sufferings and hostile to their aspirations." C. Henderson, \textit{Industrial Insurance in the United States} 1, 5 (1909).

The significance of this issue in Germany at the time cannot be overstated. According to John Graham Brooks, whose 1893 analysis of the German system spurred the first legislative interest in the United States:

\begin{quote}
In the portentous mass of this insurance literature the thought is constantly expressed that the weaker members of society will be excluded from all that accords with our usual sense of justice and fair dealing until the centers of social influence, of which the first and most powerful is the state, become imbued with the idea that a large proportion of the misfortunes, sickness, accident, and premature age are social in origin rather than individual; that a vast part of these evils spring, not from the fault of the individual, but from sources over which the individual has little or not control. . . .
\end{quote}
There were fierce political battles between, as Larson characterized them, the Marxian socialists and the practical socialists of the school of Lassalle.\textsuperscript{32} Amidst that controversy, Chancellor Otto von Bismarck submitted his first compulsory insurance measure to the Reichstag in 1881.\textsuperscript{33} The plan mandated that all industrial employers, including mines, factories and other enterprises, insure their workmen and other employees against occupational accidents.\textsuperscript{34} The insurance plan was to be administered by a government insurance corporation financed by both employers and employees, and bolstered by governmental subsidies.\textsuperscript{35}

Although the bill failed at first, Emperor William I entered the fray via his famous “Monument to the New Social Era” address to the Reichstag on November 17, 1881. In that speech the Emperor made it clear that the German government was fully committed to the provision of relief for those workers who were disabled.\textsuperscript{36} That address made it clear that the Emperor was going to back his Chancellor’s vision without reservation.

\textit{Id.} § 21, at 34 (quoting J. Brooks, Fourth Special Report of the Commissioner of Labor: Compulsory Insurance in Germany 19 (1893) [hereinafter cited as 4th Report]).

\textsuperscript{32} A. Larson, supra note 4, § 5.10, at 34. The Lassalle “school” drew on Fichte, Hegel, and other philosophers specifically credited by Brooks for applying the following philosophy: the function of the state is “to be filled with Christian concern, especially for the weaker members,” J. Boyd, supra note 4, § 21, at 35, “with such eloquent power... as to result in a distinct practical change of the state’s attitude.”\textit{Id.} at 34 (quoting 4th Report, supra note 31).

\textsuperscript{33} L. Frankel & M. Dawson, supra note 21, at 93.

\textsuperscript{34} Id.

\textsuperscript{35} 1 24th Report, supra note 20, at 988; see B. Armstrong, supra note 21, at 225-26.

\textsuperscript{36} L. Frankel & M. Dawson, supra note 21, at 94.

Our efforts in this direction are certain of the approval of all the Federate Governments, and We confidently rely on the support of the Reichstag, without distinction of parties. In order to realize these views, a Bill for the Insurance of Workmen against Industrial Accidents will first of all be laid before you; after which a supplementary measure will be submitted, providing for a general organization of industrial Sick Relief Insurance. Likewise, those who are disabled in consequence of Old Age or Invalidity possess a well-founded claim to more ample relief on the part of the State than they have hitherto enjoyed. To devise the fittest ways and means for making such provision, however difficult, is one of the highest obligations of every community based on the moral principles of Christianity.

A new, revised bill limited to accidents from the fourteenth week of disability accompanied the Emperor’s address. That bill was in turn accompanied by an elaborate official government report, which set out in detail the extent of economic distress due to industrial injuries, and the public burden resulting therefrom. The bill, and the concomitant report, can be viewed to this day as the foundation of virtually all prophylactic workers’ compensation legislation.

Any legislative reform that was bottomed on a perpetuation of a proof-of-liability rule was doomed to fail, the report found, as such a scheme “would not alter the fundamental difficulties of the problem.” The only viable alternative was in a system of public accident insurance through which virtually all employment-related injuries would be found compensable.

For this purpose, the proposed system of public insurance would include all accidents occurring in industrial establishments without regard to whether they were due to the negligence of the employer or his representative or to the negligence of the injured workman, or to the risks inherent in the business without being the fault of any one in particular.

With the enactment of such a compulsory insurance system, existing rules of liability would apply only to persons or industries that were not included in the compulsory system; “if, however, an accident was purposely caused by the employer or by a third party, the liability laws would apply.”

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37 B. Armstrong, supra note 21, at 226.
38 Id.
39 1 24TH REPORT, supra note 20, at 987. The report made note of the significant practical problems facing claimants who were forced to prove that the employer had been negligent. See id. It further alluded to the possibility that the benefits of the legislation might remain a “matter of chance,” unless some solution was forthcoming. Id.
40 Id.
41 Id. (emphasis added).
42 Id. at 988.
43 Id. (emphasis added). In such court cases, apparently the employer would have to indemnify the accident insurance association for any damages found up to the amount of coverage. If the court award were greater than the insurance coverage, “the injured person would be entitled to the excess.” Id.

The rule has been phrased another way: “Existing rules regulating employers’ liability . . . would also apply to employers convicted of causing an accident intentionally.” Gordon, supra note 4, at 193. The use of the word “convicted” may be somewhat deceptive. Criminal cases were traditionally under the jurisdiction of the civil courts in Germany. See A. von Mehren, The Civil Law System 86, 92 (1957) (interpreting article 13 of the Gerichtsverfassungsgesetz (“Law on the Constitution of the Courts”)). See generally, 2 E. Cohn, Manual of German Law § 9.9, at 168 (2d ed. 1971); J. Merryman, The Civil Law Tradition 92, 101 (1969). Thus,
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Following receipt of the report and further legislative hearings, the first comprehensive Accident Insurance Bill was enacted in July 1884, to be effective October 1885.\(^4\) The bill, which applied only to the mining and manufacturing industries,\(^4\) insured workmen against all accidents occurring in the course of their employment, which resulted in death or more than thirteen weeks of disability, except for those injuries which were intentionally self-inflicted.\(^4\) It was soon supplemented by a series of enactments, expanding coverage to inland transportation workers and certain government employees in 1885, agriculture and forestry in 1886, building trades and navigation in 1887,\(^4\) prisoners in 1900,\(^4\) and other public officials and soldiers in 1901.\(^4\)

Those measures were revised and partially consolidated in 1900,\(^5\) and were amended again in 1909.\(^5\) Finally, the revisions were incorporated into a relatively uniform system of administration,\(^5\) and codified as Book III of the Insurance Code of 1911.\(^5\) That codification has been characterized by its first English translator\(^5\) as "represent[ing] the experience of a quarter of a century in a "when by a judgment of a criminal court it has been found that the [employer]... caused the [employee's] accident intentionally. ... the injured party... can demand from the entrepreneur the difference between his (private-law) claim for compensation and his (public-law) claim for accident indemnity." 2 Laband, Das Staatsrecht des Deutschen Reiches 264-66 (2d ed. 1890), excerpted in A. von Mehren, supra, at 427 (A. von Mehren trans.). For historical perspectives, see E. Borchard, supra note 22, at 41-52; 1 E. Cohn, supra, § 28, at 20-22; R. Huebner, A History of Germanic Private Law § 67, at 460, § 89, at 576-79 (1918); F. Lawson, Negligence in the Civil Law 29-34 (1950); R. Schlesinger, Comparative Law 245-48 (1959); Deak and Rheinstein, The Development of French and German Law, 24 Geo. L.J. 551 (1936).

\(^4\) W. Dawson, supra note 25, at 18; L. Frankel & M. Dawson, supra note 21, at 95.

\(^5\) B. Armstrong, supra note 21, at 227.
system of compulsory insurance covering practically the whole industrial population of the German Empire.\textsuperscript{55}

The unified code extended coverage to employees of breweries, fisheries, pharmacies, and other such establishments, and to workers earning below 5000 marks (the prior limit had been 3000), and provided three classes of benefits: death, disability, and medical.\textsuperscript{56} Employers were grouped, for insurance purposes, into mutual associations known as Berufsgenossenschaften,\textsuperscript{57} which were subject to the supervision of the Imperial Insurance Office.\textsuperscript{58} The associations were required to classify members as to risk, to fix premiums, and to report all accidents to the General Accident Association.\textsuperscript{59}

Direct suits against employers were disallowed, except for situations where an employer was accused of intentionally causing an accident.\textsuperscript{60} The Insurance Code expressly provided that the employer had to have "purposely" caused the accident; in such instances, the employer's liability was limited to the amount by which the compensation award exceeded the accident insurance.\textsuperscript{61}

This Code has been considered a great social advancement,\textsuperscript{62} in that it assured injured workers that their families would not face stark poverty because of an industrial accident.\textsuperscript{63} Twenty years after the Code's enactment, a leading American scholar noted that the German legislation exceeded similar efforts in the United States.\textsuperscript{64}
Other Civil law countries followed closely on Germany's heels and enacted similar statutes between 1887 and 1907, including Austria, the Scandanavian countries, France, and other European countries.

More recent German enactments have perpetuated the same approach. Under the German Accident Insurance (Reorganization) Act of 1963, a comprehensive scheme was established to insure benefits for employment accidents. That act delineates the full range of cash awards and other benefits available to an injured worker. However, tort liability is preserved if the "owner of an undertaking" willfully caused the accident or if it were caused by "a person working in the same establishment as a member of the staff." Although this liability had once been premised on the employer's prior conviction under the criminal statutes, that requirement has been abandoned.

Germany allows the insurance compensation carrier to be reimbursed from a miscreant employer where the employer's injury-causing act is either intentional or "brought about . . . through . . .

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65 "The country that modeled her system most closely after Germany's was the Austro-Hungarian Empire, whose law became the basis for legislation . . . in . . . Czechoslovakia and Hungary . . . ." Gordon, supra note 4, at 205-06; see also, B. Armstrong, supra note 21, at 234; J. Boyd, supra note 4, § 101, at 207 (intentionally caused injuries excluded in Austria), L. Frankel & M. Dawson, supra note 21, at 115; supra note 21, at 31-36.

66 See Gordon, supra note 4, at 206-07.

67 That act, hereinafter cited as RVO, is a recodification and update of the 1924 version of the Imperial Insurance Act of 1911, also known as The German Workmen's Insurance Code of 1911. See supra note 61. All citations to this Act are to the English translation in International Labour Office, Legislative Series 1963 (1965).

68 RVO, supra note 67, § 547. "Employment accident" is defined as "an accident sustained by an injured person during an activity covered by [other statutory sections]." Id. § 548. Those sections, in turn, list the type of work covered, including, inter alia, that performed by "persons employed under a contract of private or public employment." Id. § 539(1).

69 See, e.g., id. §§ 556-635.

70 Id. § 636.

71 Id. § 637 (1).

72 See supra note 43 and accompanying text.

gross negligence."74 Finally, a German employer can be penalized financially by the governing body of the employers' mutual insurance association if he violates certain accident prevention regulations, either wilfully or through gross negligence.75

As previously noted,76 the impact of Germany's compensation law on American legislation is beyond rational dispute.77 Indeed, the Supreme Court of Utah recently noted that some states were more than six decades behind the initial German advances.78

II. BRITISH HISTORY

The development of workers' compensation law in Great Britain is less circuitous than that of its German counterpart. Its path primarily reflects the major changes in economic and social theory of the past century and a half, tracing the shift from *laissez-

74 RVO, supra note 67, § 640(1). See generally Fleming I, supra note 73, § 34 & n.150; Fleming, Collateral Benefits, in 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 11, § 35 (A. Tunc ed. 1978) [hereinafter cited as Fleming II].
76 See supra note 4.
77 See, e.g., Lewis & Clark County v. Industrial Accident Bd., 52 Mont. 6, 10-11, 155 P. 268, 270 (1916). The court in Lewis & Clark stated:
Workingmen's insurance and compensation laws are the products of the development of the social and economic idea that the industry which has always borne the burden of depreciation and destruction of the necessary machinery shall also bear the burden of repairing the efficiency of the human machines without which the industry itself could not exist. The economic loss from vocational disease, industrial accident, invalidity, old age, and unemployment was a subject of serious inquiry among the constituent German states before the days of the empire, but the credit for crystallizing the sentiment into workable laws will always remain with Bismarck. From the enactment of the sick insurance statute in Germany in 1883, and the fundamental law in 1884, the idea of compensation based only upon the risks of the business and the impairment of earning efficiency spread to other European states, and finally penetrated to this country.
Id. (emphasis added); see also Mulhall v. Nashua Mfg. Co., 80 N.H. 194, 196-97, 115 A. 449, 452 (1921) (it began "in Germany in 1884"); In re Carroll v. Knickerbocker Icc Co., 218 N.Y. 435, 443, 113 N.E. 507, 509-10 (1916) (Seabury, J., dissenting) ("Legislation similar in character seems to have been first successfully applied in Germany."); Wick v. Gunn, 66 Okl. 316, 318, 169 P. 1087, 1088 (1917) (stating "it began in Germany").
[By 1884 Germany had adopted the first modern compensation system, and this was 13 years before England, 25 years before the first American jurisdiction, and 65 years before the last American jurisdiction adopted workmen's compensation plans.
Id.
faire economics through the first recognition of the need for social reform, up to the ascendancy of comprehensive compensation systems.

The common wisdom is that the history of employers' liability laws in Great Britain starts in 1837; the prevalent social attitude at that time has been summarized by Dean Prosser, who has noted that employees were forced to accept fully the hazards attendant to their particular mode of employment.

Although the doctrine of respondeat superior was well established at the beginning of the nineteenth century, Lord Abinger's decision in Priestley v. Fowler, which outlined the fellow-servant exception to the general rule of master-servant liability, served to reflect the general laissez-faire attitude that employees had to bear the ultimate responsibility for their personal well-being. In addition to creation of that exception, labeled the "fellow servant doctrine," Priestley was also read to create a second defense: that of assumption of risk, a doctrine soon ex-
panded to vitiate liability for unusual and unforeseeable risks as well.\textsuperscript{86} Finally, the doctrine of contributory negligence—raised first in \textit{Butterfield v. Forrester},\textsuperscript{87} and followed in a line of cases culminating in \textit{Davies v. Mann}\textsuperscript{88}—became an accepted avenue of exculpation within the confines of employment liability law. That doctrine served to defeat recovery in cases where the employee demonstrated \textit{any} degree of negligence;\textsuperscript{89} its practical effect was to render actions by employees virtually useless.\textsuperscript{90}

It is no wonder that this trilogy of defenses has been called the “unholy trinity,”\textsuperscript{91} or the “three wicked sisters of the common law.”\textsuperscript{92} As indicated above, its interposition left the employee remediless in over 83% of all cases.\textsuperscript{93} There can be little dispute that the defenses had a devastating effect on injured workers and the community.\textsuperscript{94} In short, the liability of employers “under the influence of common-law doctrine, was interpreted to mean exemptibility, rather than responsibility.”\textsuperscript{95}

Simultaneously, the impact of the industrial revolution on Great Britain was monumental. The increase in the size and the complexity of industrial and commercial enterprises brought with it a corresponding increase in the number of industrial accidents and an inevitable increase in personal injury lawsuits. The public became aware that the “wicked sisters” were “operating too harshly on the claims of injured workers.”\textsuperscript{96} While several American jurisdictions attempted to mitigate the severity of the

\textsuperscript{86} See Bartonshill Coal Co. v. Reid, 1858 Sess. Cas. 13 (H.L.).
\textsuperscript{87} 103 Eng. Rep. 926 (K.B. 1809).
\textsuperscript{89} See, e.g., W. Dodd, supra note 79, at 8; L. Frankel & M. Dawson, supra note 21, at 42.
\textsuperscript{90} 2 24\textsuperscript{th} Report, supra note 20, at 1499.
\textsuperscript{91} W. Prosser, supra note 3, at 526-27.
\textsuperscript{92} Id. at 531. This characterization has lasted through the present day. See, e.g., Inland Mfg. Div., GMC v. Larson, 14 Ohio Misc. 129, 132, 232 N.E. 2d 657, 659-60 (C.P., Montgomery County 1967); In re McGarrah, 59 Or. App. 448, 455 n.6, 651 P.2d 153, 157 n.6 (1982) (quoting W. Prosser, supra note 3, § 80, at 531).
\textsuperscript{93} 1 A. Larson, supra note 4, § 4.30, at 27. Even this figure is too modest, for it does not include all assumption of risk cases. Id. at 27-28. Armstrong suggests that the doctrines, when read together, precluded the recovery of damages “in practically every case.” B. Armstrong, supra note 21, at 233. To recover, a plaintiff had to show “unquestionable proof that the employer was directly responsible.” L. Frankel & M. Dawson, supra note 21, at 42.
\textsuperscript{94} H. Somers & A. Somers, \textit{Workmen's Compensation} 21 (1954).
\textsuperscript{95} Id. (quoting E. Bowers, \textit{Is It Safe to Work?} 170 (1930)).
\textsuperscript{96} W. Dodd, supra note 79, at 9.
fellow-servant defense by adopting the so-called "vice principal" rule, that palliative was specifically rejected in England. That rejection became the focal point of dissatisfaction with the "wicked sisters"—dissatisfaction which was not confined to those employees most directly affected. The dismay led directly to the appointment of a House of Commons committee in 1877 to investigate the subject matter and the possible need for prophylactic legislation. The committee approved modifications in the law, and the first English Employers' Liability Act was passed in 1880, some three years later.

The 1880 Act modified the common law by elaborating on the "vice principal" concept. A worker who suffered an injury through the negligence of any person acting in the capacity of a supervisor, or any other person to whose orders the worker had to comply, was to have the same right to a cause of action as an individual who was not working for that employer. The statute contained several constrictive provisions, however. A person who had "superintendence" was defined in such terms that only those who were primarily engaged as supervisors, and who did not engage in manual labor, were covered. Thus, if a workman were injured by a fellow employee of the same rank, his cause of action against the employer would fail. In addition,

97 See Little Miami R.R. v. Stevens, 20 Ohio 415 (1851). The Little Miami court permitted recovery by a railway engineer against a railroad for injuries caused by the conductor's negligence, on the theory that the conductor—who directed the movement of the train—was a supervisory employee and thus acted as the alter ego (or "vice principal") of the master, and for whose negligence the master was responsible. This doctrine was followed in several other states. See W. Prosser, supra note 3, at 529. The doctrine was expanded in New Jersey to include any employee, of whatever rank, charged by a master with such common law duties as maintaining a safe place to work. See, e.g., Smith v. Erie R.R., 67 N.J.L. 636, 644, 52 A. 634, 637 (1902).

99 W. Dodd, supra note 79, at 11.
100 24TH REPORT, supra note 20, at 1500.
101 W. Dodd, supra note 79, at 11 (citing 5 C. Labatt, Commentaries on the Law of Master and Servant 5104 (2d ed. 1913)).
102 43 & 44 Vict., ch. 42.
103 Id. § 1(2).
104 Id. § 1(3).
105 Id. § 1. The bill provided that the workman "shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work." Id.
106 Id. § 8. A person who has "superintendence" was defined as "a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour." Id.
107 W. Dodd, supra note 79, at 12.
nothing in the statute spoke to the other defenses—assumption of risk and contributory negligence; only the fellow servant doctrine was at all modified.

Although that enactment was criticized at the time of passage "as being of a revolutionary tendency," the relief it provided was moderate at best, primarily because it provided a partial, unsatisfactory remedy. In fact, then-current empirical evidence revealed that it provided coverage for only seven out of every 100 injured workers.

The failure of the 1880 Act inspired the proposal of several ameliorative amendments over the next two decades, leading up to the ill-fated "Asquith bill," which would have abolished the interposition of the three common law defenses in workers' cases. Most likely a result of the debate and controversy engendered by that bill, the time had come for omnibus legislation in which "the principle of employers' liability was unconditionally accepted."

Thus, the Workmen's Compensation Act of 1897 (1897 Act), presented by Lord Salisbury and probably drafted by Lord Chamberlain, provided for recovery so long as the injury was the result of an "accident arising out of and in the course of the employment." The bill's sponsors had cited two principles in support of its passage. First, that a worker should be entitled

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108 2 24TH REPORT, supra note 20, at 1500.
109 J. Boyd, supra note 4, § 18, at 30; see C. Henderson, supra note 25, at 28.
110 J. Munkman, supra note 79, at 14. Munkman suggests that the limited scope of the Act reflected "the extreme nervousness of nineteenth century legislators in imposing burdens which, in their view, might have weakened the stability of industry."
111 L. Frankel & M. Dawson, supra note 21, at 42. The Act was also "undermined," W. Dodd, supra note 79, at 13, by decisions such as Griffiths v. Earl of Dudley, 9 Q.B.D. 357 (1882), wherein the court held that a worker-employer contract, in which the worker agreed not to claim compensation for injuries under the Act, was not against public policy.
112 See B. Armstrong, supra note 21, at 234; 2 24TH REPORT, supra note 20, at 1500-01.
113 So named for its champion, future Premier Herbert Henry Asquith.
114 The bill passed in the House of Commons, but was defeated in the House of Lords. L. Frankel & M. Dawson, supra note 21, at 42.
115 Id. The House of Commons report noted the inadequacy of the current legislation, primarily the high cost of litigation and inadequate coverage under its provisions. See REPORT OF THE EMPLOYERS' LIABILITY AND WORKMEN'S COMPENSATION COMMISSION, S. Doc. No. 338 62d CONG., 2d sess. 98 (1912) [hereinafter cited as SENATE REPORT], quoted in W. Dodd, supra note 79, at 16-17.
116 60 & 61 Vict., ch. 37.
117 L. Frankel & M. Dawson, supra note 21, at 42.
118 60 & 61 Vict., ch. 37, § 1(1).
to reasonable compensation for every industrial accident, and second, that such compensation should be considered as part and parcel of the costs of production. Advocates of the legislation hoped that the measure would coerce employers into expanding accident prevention programs.

Under the Act, liability no longer depended upon negligence of the employer or his servants; rather, compensation became payable automatically following an incapacitating accident arising out of and in the course of employment. A weekly payment amounting to about half the workman's wages would be made during the period of incapacity; in case of death, a specific lump sum payment would be made to the worker's dependents. The Act applied only to certain dangerous occupations, including factory labor, mine and quarry activities, and engineering.

Compensation would not be allowed if the injury in question were caused by the willful misconduct of the employee. Where an injury was caused by either the personal negligence or willful act of an employer or his agent, however, the Act expressly provided that nothing "shall affect any civil liability of the employer." In such instances, the workman had the option either to accept compensation under the Act or to take the route available to him before its enactment. The worker was not, however, allowed to bring actions both under and independent of the Act. This latter proviso is noted by the commentators but is not analyzed at any length, save the self-evident observation that it left other avenues of redress open to the injured employee and thus allowed the employee an attractive option in such cases.

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119 W. Dodd, supra note 79, at 17 (quoting Senate Report, supra note 115, at 99).
120 Id.
121 Cf. supra notes 102-111 and accompanying text.
122 60 & 61 Vict., ch. 37, § 1(1).
123 Id. sched. 1, § 1(b).
124 Id. sched. 1, § 1(a)(i)-(iii).
125 Id. § 7.
126 Id. § 1(2)(c).
127 Id. § 1(2)(b).
128 Id.
129 Id.
130 See, e.g., J. Boyd, supra note 4, § 575, at 1135; 2 24th Report, supra note 20, at 1503.
131 See 2 24th Report, supra note 20, at 1503.
132 Epstein, supra note 83, at 799.
133 To the contrary, contemporary British courts gave varying interpretations to
Nearly a decade later, a far broader piece of legislation was enacted, the Workmen's Compensation Act of 1906. That legislative initiative covered virtually all forms of employment, expanded the definition of "workman," added certain industrial diseases to the compensable list, and generally added a degree of clarity to the law while making its terms more favorable to workmen. Importantly, the provision retaining the right to bring a civil action in the case of an injury caused by the personal negligence or willful act of an employer was retained verbatim.

Although the statutory scheme has been subjected to probative criticism, there is no doubt that it had a significant impact internationally. It strongly influenced legislation in the Australian states, New Zealand, the Southern African territories, Ireland, the Canadian provinces, and elsewhere in the British Commonwealth.

In similar fashion to the German legislation, the modern British legislative endeavors have tended to reflect the tenor of earlier enactments. For example, the Social Security Benefits Act of 1975 provides that when a worker suffers an employment related injury, he will be entitled to a certain sum in compensation. Since 1948, however, it has been clear that an injured

the phrase willful. See Tennant v. Broxburn Oil Co., 1907 Sess. Cas. 581 (Scot.) (willful signifies "moral blame"); Johnson v. Marshall, Sons & Co., 1906 A.C. 405 (H.L.) (willful construed as deliberate misconduct); George v. Glasgow Coal Co., 1909 A.C. 123 (Scot.) (willful is "knowing the quality of the act").

134 6 Edw. 7, ch. 58.
135 J. Boyd, supra note 4, §§ 572-573, at 1131-34; 2 24TH REPORT, supra note 20, at 1504-08; Gordon, supra note 4, at 203.
136 L. Frankel & M. Dawson, supra note 21, at 43.
137 6 Edw. 7, ch. 58, § 1(2)(b).
138 See B. Armstrong, supra note 21, at 236-39 (criticizing limited death and medical benefits, and inadequate arbitration provisions); L. Frankel & M. Dawson, supra note 21, at 44 (insurance not compulsory); id. at 46 (compensation schedules might encourage malingering by certain employees).
139 Gordon, supra note 4, at 206.
140 Id. at 207. For a compendium of all foreign statutes, see B. Armstrong, supra note 21, app. B, at 568-97, charts I-IV.

In many of these statutes, the exclusivity exception in cases of an employer's willful act was retained. See ILO Studies, supra note 51, at 53, 57 (Western Austl.; identical to English Act); id. at 99, 101 (Cyprus; same); 2 24TH REPORT, supra note 20, at 2435-36 (Alberta, Canada; same); id. at 2473 (Cape of Good Hope; compensation scheme limited to cases of "accidental injury").

141 ch. 11.
142 Id. § 50. The Act expressly provides that, "[w]here an employed earner suffers personal injury . . . by accident arising out of and in the course of his employment . . . there shall be payable to . . . him [specified] industrial injuries benefits." This statute restates the general principles expressed in earlier, now-repealed, formulations, including the National Insurance (Industrial Injuries) Act, 1965, ch. 52,
employee may elect to file a personal injuries damages action, and that, if he or she is successful, there will be a deduction from the amount of damages awarded of "one half of the value of any rights which have accrued or probably will accrue to him therefrom [from] industrial injury benefits . . . for the five years beginning with the time when the cause of action accrued."\(^{143}\) This "cumulative benefits" system, which allows for subsequent tort recovery reduced in part by the value of the compensation benefits, provides the worker with the fullest benefit of both systems, in that the use of one in no way impairs his right to resort also to the other.\(^{144}\)

As to the burden on the judiciary of these additional tort actions, it is estimated that, under New Zealand's comparable statute,\(^{145}\) only 0.9% of all reported industrial injuries result in claims that are settled either on a tort basis or pursued to trial.\(^{146}\) It has been similarly suggested that some tort damages are recovered by not more than 10 1/2% of all industrial accident victims in Great Britain.\(^{147}\) The burden has thus proven to be a minimal one.

Also, along with the German acts discussed previously, the British laws served as the model for statutes in most American jurisdictions,\(^{148}\) circumstances noted by American courts, which have characterized the first state acts as having been "borrowed" from the 1906 British law.\(^{149}\) In sum, the impact of the British law

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\(^{143}\) Law Reform (Personal Injuries) Act of 1948 11 & 12 Geo. 6, ch. 41, § 2(1); see J. CHARLESWORTH, THE LAW OF NEGLIGENCE § 1442, at 888 (6th ed. 1977). A full explanation of the countervailing political forces that brought about the deduction in question can be found in P. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW 443-50 (3d ed. 1980). Other countries with similar sets of provisions include Ireland, see (Social Welfare (Occupational Injuries) Act of 1966, § 39, and Israel, National Insurance (Amendment No. 11) Law of 1965, 19 LSI 126 § 49.

\(^{144}\) See Fleming I, supra note 73, at 9-39 & 9-40. Fleming asks rhetorically, in response to the argument that cumulative recovery as a result of tort actions might have a "disruptive effect on industrial relations," whether "industrial harmony [is] not liable to be undermined more by the denial of tort protection than promoted by eliminating adversary proceedings?" Id. at 9-40.


\(^{146}\) Fleming I, supra note 73, § 41 n.179 (citing REPORT OF SELECT COMMITTEE ON COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND § 134 (1970)).

\(^{147}\) P. ATIYAH, supra note 143, at 242.

\(^{148}\) See J. BOYD, supra note 4, § 8, at 16-17; 1 A. LARSON, supra note 4, § 4.50, at 90; W. PROSSER, supra note 3, at 530; Epstein, supra note 83, at 787.

\(^{149}\) See, e.g., Bollinger v. Wagaraw Bldg. Supply Co., 122 N.J.L. 512, 519, 6 A.2d 396, 401 (1939) (English workers' compensation statute "identical with" New Jersey's on question of meaning of accidental injury).
on the compensation laws in the United States cannot be seriously disputed.

III. Early American Developments

Workmen's compensation legislation was promulgated in response to the tangible needs of American workers. As in England, the use of the "unholy trinity" of employer's defenses alleviated the industrialists from bearing fiscal responsibility in most cases. As a result, the loss of a wage earner through death or disability left many families impoverished and thus reliant upon public and private charity. Although there were certain attempts to abolish the defenses, it became apparent that a system based on litigation and the need to show "fault" was inherently inadequate.

It is agreed that the question of how an equitable system of workers' compensation could be structured was first considered in this country, in depth, with the publication of John Graham Brooks's massive study. In a letter of transmittal accompanying Brooks's report, Commissioner of Labor Carroll D. Wright told President Benjamin Harrison that the issue of "economic insecurity" was of the utmost importance. Commissioner Wright noted the tremendous strides made by the German government, characterizing their advances as both ethical and economical. In his voluminous study, Brooks asserted that the principle of insurance was vital and complex; while applauding the German legislation, he simultaneously asserted that a simplistic adoption of similar legislation might prove to be unwise.

150 See H. Somers & A. Somers, supra note 94, at 17. "Workmen's compensation was not invented; it evolved. It developed out of a series of social adjustments to meet a social need." Id.
151 See supra notes 82-95 and accompanying text.
152 B. Armstrong, supra note 21, at 251.
153 Id. at 252.
154 See, e.g., W. Prosser, supra note 3, at 530 ("Some slow progress toward the imposition of liability upon the employer may be traced through the common law cases . . . .").
155 Id. It had been estimated that over 80% of all work-related injuries traditionally went uncompensated. See J. Boyd, supra note 4, § 3, at 8; S. Horowitz, supra note 4, at 3; I W. Schneider, supra note 5, at 1.
156 See 4th Report, supra note 31.
157 Id. at 9.
158 Id. at 286. After analyzing the German laws in depth, Brooks concluded:

The principle of insurance is distinctly ethical in its nature, and has been so conceived by many of the ablest thinkers upon social affairs. It assumes such redistribution of burdens and misfortunes as far more nearly to satisfy our sense of social justice. The only question is the
The publication of that report inspired a flurry of other governmental studies on liability and compensation issues in employer/employee relations, including a study and report by the Commissioner of Labor of New York in 1900 and an in depth committee report to the Massachusetts Legislature in 1904. No legislative action, however, resulted from those studies.

IV. The New Jersey Experience

Following the passage of the first Federal employers liability law in 1908, the legislatures of eleven states authorized the creation of commissions to investigate employers' liability laws and to study the differing compensation plans. The preamble to the New Jersey legislative resolution stated the issue clearly, particularly where it noted the general demand for modification of the common law rules dealing with actions concerning employers and employees:

WHEREAS, The Governor in his Second Annual Message,

practical one. Can the state so manage this ethical principle as really to help the weaker classes, or will the machinery prove so expensive that the cost of living among such classes will not be lessened? An attempt that we must pronounce magnificent is being made in Germany to reach this difficult end. Especially in the sickness law, and to some extent in the accident law, there are indications that important concrete results have already been secured. It seems, however, to the writer, that no mere material or strictly economic test can be applied to this legislation without omitting what promises to be of greater value, viz., values that are essentially moral and educational.

Id. See, e.g., sources cited in B. Armstrong, supra note 21, at 251-53; C. Henderson, supra note 25, at 128, n.1. Armstrong further suggests that the "pressure upon [available] relief funds," helped spur on this new governmental interest. B. Armstrong, supra note 21, at 252.


C. Henderson, supra note 25, at 139.

W. Dodd, supra note 79, at 18. The new legislation was opposed vigorously by commercial insurance companies, which issued "sweeping condemnations of German social insurance, which had allegedly produced simulation and fraud . . . combined with a decided lowering in the moral standards of the working classes." R. Lubove, supra note 4, at 51; see also S. Horowitz, supra note 4, at 7.


R. Lubove, supra note 4, at 53. The first Federal law has been characterized as establishing the "worst [benefit scale for serious injury] ever known." Id.

See supra note 15.
recommended that a commission be appointed to consider the provisions of the employers' liability acts of Great Britain, Germany and other foreign countries, and to report to the next session of the Legislature a draft of an act with relation to compensation for accidents to employes; and
WHEREAS, There appears to be a general demand for reasonable statutory regulation as to employes and the modification of certain common law rules applicable to suits between employers and employes; and
WHEREAS, Both the employer and employe, as well as the State, are interested in the determination of these important questions.\footnote{J. Res. 2, 134th Leg., 1910 N.J. Laws 608, 608. The resolution authorized the Governor to appoint representatives of labor and employers' interests and state legislators to constitute a commission to make inquiry "into the subject matter recited in the preamble of this resolution, and generally as to the legal relations now existing in this State between the employer and employe." Id. ¶ 1, at 609. It was approved April 9, 1910. Id.}

Six months following the passage of this resolution, the members of the commission traveled to Chicago to attend the epochal Conference of Commissioners on Compensation for Industrial Accidents.\footnote{J. Boyd, supra note 4, § 9, at 17-20.} The Conference's work focused on thirteen propositions relating to workmen's compensation.\footnote{Id. § 10, at 20-21.} During the fifth session, the commissioners debated issue number 12—to what extent common law liabilities and remedies need be repealed in conjunction with the passage of a model workers' compensation statute.\footnote{Id.} That debate sheds some light on a central issue of this article: was full exclusivity

\footnote{166} These included:

1. What employments shall the act cover?
2. Shall all injuries be covered, irrespective of negligence?
3. Shall all persons engaged in such employments be included?
4. Shall compensation be paid in a lump sum or in installments?
5. Amount and duration of compensation?
6. Length of waiting period?
7. Shall dependents include aliens and illegitimate relations?
8. Shall employees contribute?
9. Shall it be permissible for employers to substitute voluntary schemes?
10. Method of determination of controversies?
11. Nature of scheme: Compensation, insurance, or State insurance, (a) Voluntary, (b) Compulsory?
12. Repeal of other laws?
13. Constitutionality?

\footnote{167} \footnote{168} \footnote{169} \footnote{Id.; see also PROCEEDINGS OF CONFERENCE OF COMMISSIONS ON COMPENSATION FOR INDUSTRIAL ACCIDENTS 28-29 (A. Saunders ed. 1910) (held in Chicago, Ill., Nov. 10-12, 1910) [hereinafter cited as INDUSTRIAL ACCIDENTS PROCEEDINGS].}
of remedy ever contemplated in the “first generation” of American jurisdiction workers’ compensation statutes?

In speaking on behalf of retaining common law remedies, James Lowell, Chairman of the Massachusetts Commission on Compensation for Industrial Accidents, argued: “If you leave your common law, you will leave a chance of punishing the employer, if he really is grossly careless in something that he should have been careful about,” 170 “if you leave that in the law, you give a chance which, I believe, ought to be left in to punish the employer, where he is wilfully negligent.” 171 In response, session chairman H.V. Mercer, a member of the Minnesota Employees’ Compensation Commission, suggested: “[I]f you leave [proof of fault] off of both sides [employee and employer], you will find that the insurance rate will regulate the employer better than any criminal law will do under these circumstances, unless it be a case of wilful injury, which the criminal law will take care of.” 172 Lowell replied: “To have compensation that will cover everything [including gross negligence]. . . can’t [be done] without providing for a very much higher compensation in such a case . . . than you can possibly bring into a general compensation law.” 173

W.E. McEwen, another Minnesota delegate, picked up the theme of criminal culpability: “I believe in just a single liability and criminal punishment to the employer, who is wilfully negligent, criminally negligent.” 174 Following extensive debate, the committee approved the following resolution: “[I]f it is possible, the common law, what we call employers’ liability or statutory penalty laws, would be suspended during the existence of a compensation law, which means repeal if it is constitutional.” 175 Immediately upon passage, James H. Boyd, Chairman of the Employers’ Liability Commission of Ohio, 176 offered some clarification: “We are not taking away the proposition that the employer is to be penalized under the criminal law for malicious negligence;” 177 William B. Dickson, President of the New Jersey Employers’ Liability Commission and head of the New Jersey delegation to the conference responded, “That goes

170 Id.
171 Id. at 210-11.
172 Id. at 217.
173 Id.
174 Id. at 219 (emphasis added).
175 Id. at 227.
176 And the author of J. Boyd, supra note 4.
177 INDUSTRIAL ACCIDENTS PROCEEDINGS, supra note 168, at 227.
without saying.”

Following the Conference, the New Jersey Commission members returned to hold additional public hearings. They drafted a bill, which was submitted to the Legislature in January 1911 by outgoing Governor John Franklin Fort. In his accompanying message, Governor Fort stressed “not only the injustice but the absolute cruelty of the present rules of the common law with relation to master and servant under existing business conditions.” Soon thereafter, in his inaugural address, Governor Woodrow Wilson struck precisely the same chord. After noting the profound changes in society which industrialization had wrought, the Governor noted the need for a legal vehicle through which employees could obtain their rights by direct operation of law, without resort to the judicial system. The bill, which had been introduced in January 16, 1911,

178 Id.


180 GOVERNOR'S MESSAGE, supra note 179, quoted in Sexton v. Newark Dist. Tel. Co., 34 N.J.L.J. 368, 374-75 (C.P. Essex County 1911).

181 Inaugural address of Governor Woodrow Wilson, quoted in Sexton v. Newark Dist. Tel. Co., 34 N.J.L.J. 368, 375 (C.P. Essex County), reprinted in 1911 SENATE J. 60. The Governor stated:

We call these questions of employers' liability, questions of workingmen's compensation, but those terms do not suggest quite the whole matter. There is something very new and very big and very complex about these new relations and capital and labor. A new economic society has sprung up, and we must effect a new set of adjustments. We must not pit power against weakness. The employer is generally in our day, as I have said, not an individual, but a powerful group of individuals, and yet the workingman is still, under our existing law, an individual when dealing with his employer, in case of accident, for example, or of loss or of illness, as well as in every contractual relationship. We have a workingmen's compensation act which will not put upon him the burden of fighting powerful composite employers to obtain his rights, but will give him his rights without suit, directly, and without contest, by automatic operation of law, as of a law of insurance. This is the first adjust-
passed the Senate on March 15, 1911, and the Assembly on April 3, 1911. Upon enactment, the constitutionality of the Employer's Liability Act of 1911 was sustained immediately.

Within its historical context, the New Jersey statute is of significance for at least four reasons with respect to comparative law. First, in similar fashion to its German and British antecedents, the New Jersey enactment focused on industrial "accidents," not "intentional" injuries. This purpose of the Act was emphasized repeatedly, subsequent to the Act's passage.

Second, the courts of New Jersey drew heavily from the experience of Great Britain, and derivatively from that of Germany, in construing the scope of coverage under the workmen's compensation act. Thus, section 7 of the original Act tracked the language of the British statute directly. As the language was identical to the

commend needed, because it affects the rights, the happiness, the lives and fortunes of the largest number, and because it is the adjustment for which justice cries loudest and with the most direct appeal, to our hearts as well as to our consciences.


The act was construed liberally, as being remedial in nature. See Mayor of Jersey City v. Borst, 90 N.J.L. 454, 456, 101 A. 1033, 1034 (Sup. Ct. 1917).

184 The 1911 statute made the adoption of the statute's compensation schedule optional, as between the employer and the employee, as part of the contract of employment. See 1911 N.J. Laws ch. 95, § II (codified as amended at N.J. STAT. ANN. § 34:15-7 (West Cum. Supp. 1984-1985)). If the employer elected the provisions of section I (codified as amended at N.J. STAT. ANN. § 34:15-1 to -6 (West 1959)), employees were required to take industrial accident cases to the common law courts; however, the employer was denied the use of the three common law obstacles, which usually denied recovery to employees: the defenses of contributory negligence, assumption of risk, and the fellow-servant doctrine. See id. § I. Section II, which covered all employers unless they had sought exemption in writing in the employment contract, was the workmen's compensation scheme with a designated schedule of payments for certain disabilities. See id. § II.

185 For example, in the REPORT OF THE EMPLOYERS' LIABILITY COMMISSION FOR THE YEAR 1914 (1915), the New Jersey Commissioner of Labor pointed out that "primarily the object of workmen's compensation is accident prevention . . . [with] the entire machinery of the compensation law tend[ing] toward the correction of conditions which produce the injury it is designed to meet . . . ." Id. at 11 (emphasis added). Thus, the original design of the Act was to address only the negligent acts of an employer; all other employer actions were assumed to be outside the Act's scope.

186 Employers Liability Act, 1911 N.J. Laws ch. 95. The Act set forth that "compensation for personal injuries to or for the death of such employe by accident
British act, British cases were to be looked at in order to construe the phrase in question. Contemporaneously, the British courts construed that section of the law as holding that an assault by an employer upon an employee is not an "accident arising out of and in the course of employment." Third, the original statute and succeeding versions reflect a strong public policy concern that employers should be assessed "a measure of the losses that naturally flow from accidents which befall workmen in the course of their employment, rather than [allowing] them [to] become objects of charity." In short, the New Jersey statute fulfilled the anonymous campaign promise often attributed to Lloyd George, that "the cost of the product should bear the blood of the workman." Fourth, the original New Jersey act has been cited—both favorably and with disapproval—as a prototype for subsequent enactments by other jurisdictions. The act closely paralleled laws of New York and Arizona, which were upheld in the face of constitutional attack in *New York Central Railroad v. White* and *Arizona* arising out of and in the course of his employment shall be made by the employer without regard to the negligence of the employer." *Id.* at § 11(7).


188 Blake v. Head, 106 L.T.R. 822 (C.A. 1912). This is consistent with the development of the case law in other jurisdictions. See Boek v. Wong Hing, 180 Minn. 470, 231 N.W. 233 (1930); Lavin v. Goldberg Bldg. Material Corp., 274 A.D. 690, 87 N.Y.S.2d 90, 93-94 (1949) ("It would be abhorrent to our sense of justice to hold that an employer may assault his employee and then compel the injured workman to accept the meager allowance provided by the Workmen's Compensation Law"); Stewart v. McLellan's Stores Co., 194 S.C. 50, 9 S.E.2d 35, 37 (1940); see also Epstein, *supra* note 83, at 814 ("Unlike ordinary negligence, intentional harms introduce an element of moral hazard that is very difficult to control by a set of rules designed for accidents."); Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641, 1650 (1983) (courts deem worker's compensation not "a license for employers to abuse employees").


190 W. PROSSER, *supra* note 3, at 530.


192 243 U.S. 188 (1916). The *White* court used the following language to explain why the statute in question could pass constitutional muster: [1]In our opinion, laws regulating the responsibility of employers for the injury or death of employees, arising out of the employment, bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations. . . .
Cooper Co. v. Hammer.193

The New Jersey statute can thus be seen as coming squarely within what historians have termed the “progressive” movement and as having had the effect of ameliorating some of the most egregious abuses of industrialism.194 In this regard, it is a true outgrowth of its British sources, and reflects the fin de siecle social forces that led to the need for remedial and protective legislation. In neither the British nor the German scheme was workers’ compensation the exclusive remedy in the case of an intentional tort on the part of an employer; all of the evidence surrounding the passage of the paradigmatic New Jersey statute indicates that such “exclusivity” was never meant to bar recovery in an intentional tort case.

V. RECENT DEVELOPMENTS

As the focus on industrial accidents has changed in recent decades,195 states have amended their statutes to bring occupational diseases, caused by employers’ negligent acts, within the coverage of workers’ compensation acts.196 Recent case law, when analyzing such statutes, has attempted to reconcile the traditional concerns of workers’ compensation laws197 with the complexities of the “new” occupational diseases. One of the critical issues, to be dealt with as part of this reconciliation attempt, has been how to clarify the concept of “intentional tort” or “intentional act” in compensation statutes, where the action complained of did not involve an actual assault and battery, the prerequisite suggested by Larson.198

Thus, in the first significant decision rejecting the “exclusivity doctrine,” the California Supreme Court permitted a tort action against an employer for the improper provision of medical inspection and treatment after the original exposure to asbestos,

Id. at 207.
193 250 U.S. 400 (1919).
195 See supra note 12.
196 For example, New Jersey first included such diseases in 1924, see 1924 N.J. Laws ch. 124, specifically adding asbestosis in 1944, see 1944 N.J. Laws ch. 88. A contemporaneous legislative committee report articulates the understanding that those amendments were limited to employers’ negligent acts. See Legislative Committee Report to the New Jersey Legislature, Session of 1943, at 4 (1944) (available at Seton Hall Law Review offices). Further, court decisions agreed that actions based on negligence were given valid status by the act. See, e.g., Downing v. Oxweld Acetylene, 112 N.J.L. 25, 30, 169 A. 709, 711 (Sup. Ct. 1933), aff’d, 113 N.J.L. 399, 174 A. 900 (1934).
197 See supra notes 4 & 11-13 and accompanying text.
198 See supra text accompanying note 10.
viewing this as deliberate and intentional conduct, aggravating the original injury.\textsuperscript{199} The court defined the employer’s deliberate conduct in terms that rendered the conclusion that the employer had acted unconscionably virtually inescapable.\textsuperscript{200} The exclusivity is not undermined, the court reasoned, because it cannot be assumed that many employers will aggravate the effects of an injury by deliberately concealing the injury and its connection with the employment; in enacting a workers’ compensation scheme, the Legislature did not intend to shield “such flagrant conduct from tort liability.”\textsuperscript{201}

The same conclusion has been reached in Ohio, where a court was confronted with the issue of whether a common law intentional tort action could be maintained against an employer who had fraudulently withheld medical reports showing that the employee had contracted an occupational disease.\textsuperscript{202} There, the court reasoned that the plaintiff’s allegation did not describe an injury “received or contracted by any employee in the course of or arising out of his employment”; therefore, it held that the employer’s fraudulent action would constitute an intentional tort.\textsuperscript{203}

That doctrine was ultimately expanded in \textit{Blankenship v. Cincinnati Milacron Chemicals, Inc.},\textsuperscript{204} which held that no intentional conduct committed by an employer came within the risks “incidental to employment,” and that such intentional conduct therefore fell outside the scope of the Workers’ Compensation Act.


\textsuperscript{200} \textit{Id.} at 477, 612 P.2d at 955, 165 Cal. Rptr. at 865. The court noted that [the employer] . . . fraudulently concealed from [the employee], and from doctors retained to treat him, as well as from the state, that he was suffering from a disease caused by ingestion of asbestos, thereby preventing him from receiving treatment for the disease and inducing him to continue to work under hazardous conditions.

\textit{Id.}

\textsuperscript{201} \textit{Id.} at 478, 612 P.2d at 956, 165 Cal. Rptr. at 866.

\textsuperscript{202} Delamotte \textit{v.} Midland Ross Corp., 64 Ohio App. 2d 159, 411 N.E. 2d 814 (1978).

\textsuperscript{203} \textit{Id.} at 161-64, 411 N.E. 2d at 816-18.

The state supreme court thus ruled that a common law tort action could be maintained against an employer for his failure (1) to correct noxious fumes in the work environment, (2) to warn employees of the dangers existing in the workplace, and (3) to provide medical examinations as required by law. As there was no express provision in the Ohio Act discussing intentional employer misconduct, the court reasoned that it could interpret the Act in a liberal manner in accordance with the general purposes of workers' compensation schemes.

The trickle of litigation represented by these first cases has grown, within the past several years, to a near torrent; primarily, the decisions reflect an idiosyncratic and nonhistorical approach to the problem at hand. While the reasoning of the courts has often been ingenious and creative, most of the post-

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205 See id. at 612-16, 433 N.E.2d at 576-78. The court's Chief Justice, in his concurring opinion, strongly expressed the basis for labelling such conduct an intentional tort:

I am troubled by the language in the dissenting opinions that workers who are intentionally chemically poisoned on-the-job should not be able to recover damages from their employers because the elimination of health risks would cost too much money, thus decreasing the profits of corporations. I submit that anyone who believes that injuries or death from gases, fumes, impure air or dust should not be eliminated because a manufacturer will suffer a competitive disadvantage is an enemy of all workers. The dissenters' position is one that I would expect to be championed by a 19th century "robber baron," not a justice of this court who is duty-bound to serve all the people of Ohio.

Id. at 616, 433 N.E.2d at 578 (Celebrezze, C.J., concurring).


207 See Blankenship, 69 Ohio St.2d at 612-13, 433 N.E.2d at 576 (interpreting Ohio Rev. Code Ann. § 4123.74 (Page 1980)).


Blankenship decisions have merely either calibrated the degree of recklessness or wilfulness needed to make an act “intentional,”\textsuperscript{211} or considered whether the object of the “intent” is the precipitating act or the actual harm.\textsuperscript{212}

While several of these cases reflect the modern legal trend of focusing on the intentional actions of employers in failing to advise employees of the health risks posed by their work environment or failing to disclose information establishing that they had contracted a life threatening disease through their exposure to chemicals, none has considered the problem from an historical perspective. While such cases are fully consistent with the original purposes and goals of workers’ compensation acts, in that they afford a separate remedy for employees forced to work under hazardous conditions by employers who are fully aware of the risks involved, they do not articulate the traditional and historic underpinnings of those purposes.

An examination of the German and British roots of the compensation system reveals that the law has reflected an unmistakable intent for almost 150 years: that workers should not be deprived of the right to maintain a common law suit where an injury was purposely caused by the employer. Although the type of workplace accident has changed over the centuries, and although the type of miscreant employer behavior may differ, contemporary concerns continue to reflect the historical, social, and economic forces that originally led to the creation of a work-


\textsuperscript{212} Nedley v. Consolidation Coal Co., 578 F. Supp. 1528, 1531 n.5, 1533 (“actual knowledge” of exposure to “unreasonable, recognized risk of serious harm” required; injury must be deliberately intended).
ers' compensation system. An expansive interpretation of "intentional act," for the purpose of escaping the "exclusivity bar," is consonant with this history and facilitates the fulfillment of the "highest obligations of every community," as proclaimed by Emperor William I over a century ago.

213 See 1 A. Larson, supra note 4, § 4.10, at 24. That section states:

But perhaps there is more here than the accidental byproduct of a causation theory. We are told by sociologists that any settled society eventually works out a conscious or unconscious solution of the problem of the disabled and helpless member; it may be a family system that fills the need, or a clan or a feudal manor or a national state. In any case, it is amazing to reflect that a thousand years ago—for whatever reason—there may have been a more "modern" social principle for taking care of injured workmen than existed in the United States until the twentieth century.

Id.

214 L. Frankel & M. Dawson, supra note 21, at 94.