CHAPTER 42

Workmen's Compensation

I. THE SUBSTANTIVE LAW

1. Municipal Systems

It has always been recognized that liability of employers for injury to the health of employees could be based on tort, which, however, required either proof, or at least a prima facie showing, of fault. The German Civil Code, § 618, added a contractual duty of employers to protect the employee against dangers to life and health, and this has been adopted in other codes. In the industrial age, however, special institutions have increasingly been found necessary to provide accident compensation not based on tortious and contractual liability of the employer and even despite excusable fault of the injured employee. In

1 Strangely, despite an immense literature, no satisfactory modern comparative work exists.


On Latin America, a short report by Tixier, “The Development of Social Insurance in Argentina, Brazil, Chile, and Uruguay,” 32 Int. Labour Rev. (1935) 610 is mainly concerned with the social and administrative features.

the common law countries, an additional reform was needed to eliminate the defense of common employment. Progressive impulses were most felt in hazardous industries, which still constitute a special class in New York, but the area of "social protection" has constantly expanded, though it varies in the world.

Finally, the legislative idea of the statutes has changed. The great tendency, taken as a whole, has been from improvements on, or substitutes for, the ordinary tort remedies to a theory of the employer's professional risk, and from individual responsibility of the employer to common liability of the employers of a district or industry, often with contributions by the employees and public subsidies.

Four groups of compensation organization are distinguishable:

(a) A group of mere substitutes for tort actions, such as the British Employers' Liability Act, 1880, is represented in the United States by the Federal Employers' Liability Act, 1908. The former Swiss Factory Liability Act, 1881/1887, illustrated an analogous attempt to insert a somewhat stricter liability in the employment contract.

(b) A superior type of individual liability has been adopted in the workmen's compensation acts of most states of the United States (since 1908), the United States Employees' Compensation Act (1916), the Longshoremen's and Harbor Workers' Compensation Act (1927), and the enactments of England (1925) and many other countries. These statutes apply regardless of real or presumed fault on the part of the employer, or the defense of common employment, and other features of the old master and servant doctrine.

The American compensation acts are of two kinds. "Elective" or "optional" acts operate merely if the parties, or either party, declare for the act, or do not reject its applica-
tion. Statutes of the other kind apply irrespective of any disposition by the parties.

(c) To secure the employee's claim, some of the same statutes in the United States and abroad favor, others require, that the employer take out insurance for the compensation risk. The insurer may be a private company, or a public or semipublic institution, at the employer's option.

By another method, the French Law of 1898 created a trust fund to which all employers contribute, for guaranteeing the claim of the injured in case of insolvency of the employer.

(d) The most effective protection of workers is provided by the system of automatic insurance against accident. On the mere ground of occupation in work in a domestic enterprise the worker enters into a corporative, "social" relation with a public or semipublic insurance fund operating as an administrative agency. Germany adopted this system as early as 1885 under Bismarck and was followed by the states of central and northern Europe, and later by others, including certain jurisdictions on the American continent. Great Britain has joined this system by its National Insurance Acts of 1946.2


Great Britain: National Insurance (Industrial Injuries) Act, 1946, and National Insurance Act, 1946, 9, 10, 11, Geo. VI., c. 62 and c. 67. The Employers' Liability Act, 1880, has been repealed by Law Reform (Personal Injuries) Act, 1948, s. 1 (2).

Canada: "Beginning in Ontario in 1914, workmen's compensation laws are now in force in every province except Prince Edward Island. . . . More nearly uniform than any other class of Labour Legislation, the provincial Workmen's Compensation Acts each provide for a system of State insurance . . . the Ontario statute embodies principles adopted from the German system of accident insurance and from a collective liability law enacted in 1911 by the State of Washington." Labour Legislation in Canada. Legislation Branch, Department of Labour of Canada, August 1945, p. 17.

Brazil: Decree No. 85, of March 14, 1935 and following acts, see CESARINO JUNIOR, 2 Dir. Soc. Bras. 321 § 308.

2. International Treaties

International conventions of Geneva established a minimum of unified rules of compensation for the benefit of the workers. Of great influence is another Convention designed to end the frequent discriminations against alien workers in general, or nonresident workers, or nonresident alien dependents of workers, by guaranteeing reciprocity of treatment. This Equality of Treatment (Accidents Compensation) Convention of 1925, was in force in sixty-one states in 1962.

II. NATURE OF CONFLICTS

The nature of conflicts between divergent laws on professional accidents varies according to the systems involved.

On the one hand, statutes represented by those imposing employer's liability for presumed fault move in the sphere of quasi-tortious liability. Their application remains tied to the principle of the *lex loci delicti*.

On the other hand, obligatory social insurance of the workers depends exclusively on territorial public law. The requirements of participation in the scheme by business establishments and insured workers are set out in detail in

---

5 It has been termed "one of the most widely ratified Conventions"; see *International Labour Conference, 45th Session (Geneva 1961)*, Report VIII, Part I p. 25. For the status of ratifications, as of 1962, see *International Labour Conference, 46th Session (Geneva 1962)* Report III, Part I pp. 51, 279.

the statutes, and bind the courts as well as all other agencies. These statutes cannot be applied abroad.

The situation created by most American and similar statutes, despite their different theories, results in the same rule of a purely territorial application of workmen’s compensation acts. The American states, with few exceptions, have established administrative boards which by their organization and composition of personnel are intended to administer exclusively the domestic workmen’s compensation law. In this majority of states, the particular local circumstances and policies so completely dominate the spirit of the statutes, and a speedy and inexpensive regulation of claims is so important, that application of another state’s compensation act is commonly thought to be entirely impracticable.\(^6\)

Five jurisdictions, however, expressly permit an employee hired outside the state to enforce rights acquired under the foreign law.\(^7\)

Continental countries, following the system of individual employers’ liability, have usually entrusted the administration of their industrial and agricultural accidents statutes to the labor courts or other segments of the regular judiciary which are regarded as capable of deciding cases according to foreign law. Nevertheless, the arguments and solutions are fairly comparable to those advanced in the United States.

Generally, indeed, the normal conflict arising when a

---

\(^6\) Mosely v. Empire Gas and Fuel Co. (1926) 313 Mo. 225, 245, 281 S. W. 762, quoted by Hancock, Torts 214; Goodrich 244 § 97; Note, 57 Harv. L. Rev. (1943) at 246; Dwan, 20 Minn. L. Rev. (1935) 19.

\(^7\) Arizona, Idaho, Utah, Vermont, Hawaii, see Note, 57 Harv. L. Rev. (1943) at 246; see also Hancock, Torts 215, 216. Thus far, even in these states, no case has been decided under foreign law of workmen’s compensation; and, in fact, application of foreign law can hardly be achieved if the administration of this law is geared to specified tribunals; see 2 Larson, supra n. 1, at 357 § 84.20; Rothman, “Conflict of Laws in Labor Matters in the United States,” 12 Vand. L. Rev. (1959) 997, 1000 n. 10; Note, 6 Vand. L. Rev. (1953) 744, 749 n. 15.
worker employed in one state is injured in another, is a conflict of jurisdictions rather than of substantive laws.\textsuperscript{7a} The intricacies and ramifications of this subject, however, have given it a certain prominence in the treatment of conflicts law.

III. The Theories

An able survey of the territorial delimitation of American workmen's compensation statutes, by their express provisions or court construction, has stated six types of solutions, one of which has five variants.\textsuperscript{8} Arminjon enumerates six different theories in France.\textsuperscript{9} Resorting to historical and comparative points of view, we may distinguish three main theories.\textsuperscript{10}

1. Tort Theory

In the United States, workmen's compensation was first construed as substituting a statutory for a common law tort. Consequently, an act was applied always and only when the injury occurred in the state.\textsuperscript{11} At present, however, only very occasionally does a court retain the idea that the domestic statute does not include injuries outside the state.\textsuperscript{12}

The Restatement (§ 398) forms a presumption to the same effect, viz., that a workman may sue for bodily harm arising out of and in the course of the employment, but restricts this to contracts concluded in the state. Nevertheless, it presumes also (§ 399) the applicability of any

\textsuperscript{7a} Accord, Ehrenzweig, Conflict 604 with reference to cases in n. 1.
\textsuperscript{8} Note, 57 Harv. L. Rev. (1943) 242.
\textsuperscript{9} 2 ARMINJON (ed. 2) 344 § 121.
\textsuperscript{10} See Restatement, Introductory Note before § 398.
\textsuperscript{11} See the cases in 15 Am. Dig. 2d Dec. Ed. 86 and 2 LARSON, supra n. 1, at 379 ff. § 87.20.
\textsuperscript{12} Oklahoma: Utley v. State Industrial Commission (1936) 176 Okla. 255, 55 Pac. (2d) 762. The famous previous decisions in Massachusetts and Illinois were abrogated by statute, see STUMBERG (ed. 2) 213 ns. 2-4. The conclusions regarding the American principle in NEUMEYER, 2 Int. Verwaltungs R. 493 are obsolete.
workmen's compensation act when the harm is sustained in the state—a principle conforming to the tort theory and not corresponding with the actual situation, which, however, may suggest a possible equitable supplement to the main rule.

The English Court of Appeal interpreted the now abolished Workmen's Compensation Act, 1906, to the same effect as the tort theory on the ground that acts of Parliament do not extend beyond the territorial limits of the kingdom, unless they so declare. 13 The Belgian Supreme Court sometimes followed the tort doctrine, 14 which is occasionally also found elsewhere. 15

In France, the tort theory has been developed in a con-


Exceptions were made for seamen and persons employed on certain aircraft, and in the case of reciprocal treaties, see 34 HALSBURY (ed. 2, 1940) 800 § 1134.

According to the decision of the Court of Appeal in Matthews v. Kuwait Bechtel Corporation [1959] 2 Q. B. 57, the employer's liability for an occupational accident of an employee can also be based on contract. But the liability is no longer a statutory one, because the English Workmen's Compensation Act has been repealed by the National Insurance (Industrial Injuries) Act; see supra n. 2 and DICEY (ed. 7) 759 n. 48.

14 Cass. Belg. (Feb. 21, 1907) and (Nov. 26, 1908) Revue 1909, 952, the second also in Clunet 1909, 1178.

Other Belgian courts and some Belgian authors have characterized the employer's liability as contractual; cf. Trib. civ. Antwerp (July 30, 1910) Revue 1911, 725 and Trib. civ. Mons (Dec. 19, 1902) Revue 1912, 429; GRAULICH 65 § 84; SIMONE DAVID, Responsabilité civile et risque professionnel (1957) §§ 64 f. For a discussion, see GAMILSCHEG 259 f. and BINDER, supra n. 1, at 427.

15 Italy: App. Roma (Aug. 18, 1935) Foro Ital. 1936.1.159, Rivista 1936, 295, criticized by BALDONI, ibid. and BALLADORE PALLIERI, 3 Giur. Comp. DIP. (1938) 86 No. 36. But the latter author, according to BALDONI, Rivista 1932, 440, also advocated the law of the place of the accident. For a recent survey, see VENTURINI, La disciplina degli infortuni sul lavoro nel diritto internazionale privato, 3 Riv. Dir. Lav. (1951) 17.

In France, 2 ARMINJON (ed. 2) 346 likewise simply concludes for the law of the place of the accident.
struction of the domestic compensation statutes as laws of *securité et police*, involving all professional activity on French soil. Some courts of appeal, taking this theory seriously, have emphasized the fact that the law has not considered where the contract is made or of what nationality the parties are, but only whether the work is done in France.\(^\text{16}\) However, the administrative courts and, following them, the Court of Cassation, have adopted this theory with a singular reservation. They use it to assume jurisdiction over all cases of injury occurring in France but, reversing the lower courts, have also assumed jurisdiction under other theories in case of outside injuries.\(^\text{17}\)

2. Contracts Theory

(a) *Lex loci contractus.* Undoubtedly, the statutes establishing employer’s liability for accidents commonly presuppose a contract of employment. It has frequently been concluded therefrom that the statute covers contracts governed by domestic law; and through the usual influence of the *lex loci actus* principle, the thesis is reached that a workmen’s compensation act has for its domain accidents occurring anywhere to workers hired by a contract within the state. For practical purposes, several jurisdictions of the United States have adopted this proposition in its pure form or with certain qualifications.\(^\text{18}\) Similarly, all contracts of employment made in France were subject to the now


Since the French legislation on industrial accidents has been repealed in 1946, see *infra* n. 2, the earlier cases are merely of historic interest. Under the new act the essential test for the application of French law is whether or not the injured employee was insured with the French social security; see *Gailliescheq* 259 and Cass. soc. (Dec. 9, 1954) Revue Crit. 1956, 462.

\(^{18}\) For details, see 2 *Larson*, *infra* n. 1, at 376 f. § 87.11.
repealed French statute of 1898 according to the Court of Cassation, irrespective of alien nationality of the parties, although at the same time accidents occurring in France formed another ground for application.\textsuperscript{19}

An influential Italian doctrine follows the legal prescription of \textit{lex loci contractus} in the cases where the working place is outside the country, so that the Italian accident statute is applicable, as well when the work is done in Italy as when the contract is made in Italy.\textsuperscript{20}

It is noteworthy, however, that in this matter even the Restatement has felt compelled to concede special treatment to a worker hired through an employment agency in, e.g., Pennsylvania, where the worker is sent to enter his occupation in, e.g., California. In that case, it is agreed, the compensation act of the state where the workman reports for duty governs compensation.\textsuperscript{21} Why not recognize generally that it is not the making of the contract but the starting of the work that is essential?

(b) \textit{Proper law.} In a few cases, American courts have preferred the law of the place of performance.\textsuperscript{22} On the other hand, the Indiana court, in an obviously just denial of compensation to a worker hired in Michigan to cut timber in Michigan, who was injured doing transitory work in Indiana, believed that this case constituted an exception to the rule of \textit{lex loci solutionis}.\textsuperscript{23}

In particular, the argument "that the rights and duties

\textsuperscript{19} See \textit{Gamillscheg} 258 and \textit{Binder}, \textit{supra} n. 1, at 424.

\textsuperscript{20} \textit{Baldoni}, Rivista 1932, 442; Rivista 1936, 298; followed by \textit{Scerni} 128; App. Milano (Dec. 12, 1930) Rivista 1932, 438 applied Italian law to a contract made in Italy between Italian parties for working abroad, but in this case both parties were Italian.

\textsuperscript{21} \S 398 comment a; \textit{cf. Goodrich} 249.

\textsuperscript{22} Thus, Johns-Manville, Inc. v. Thrane (1923) 80 Ind. App. 432, 141 N. E. 229, the court applies its own act to an occupation considered not temporary.

Similarly, Belgium: Trib. civ. Arlon (July 13, 1904) Revue 1905, 539; (July 20, 1904) \textit{id.} 543.

\textsuperscript{23} Elkhart Sawmill Co. v. Skinner (1942) 111 Ind. App. 695, 42 N. E. (2d) 412.
under the Workmen’s Compensation Act are contractual and the provisions of the Act binding only as part of the employment contract,” was invoked in a series of decisions restricted to “optional” acts. That is, since the effect of these acts depends upon election or a presumed agreement, which may be excluded by voluntary act of one or both of the parties, as the case may be, it has been thought that the liability rests upon consent of the parties, whereas a compulsory act applies by operation of the law.24

Thus, in Iowa quite recently the domestic act was applied because it was elective and the contract made in the state, though for work in Oklahoma.25

The contracts theory has been pushed to the farthest point by some French writers and decisions in France and Louisiana (whose act is optional). They directly invoke party autonomy to the effect that the law chosen or presumed to be chosen by the parties for governing the employment contract also includes the respective compensation statute.26 It does not need much argument27 to refute this

25 Haverly v. Union Construction Co. (1945) 236 Iowa 278, 18 N. W. (2d) 629; the criticism in 31 La. L. Rev. (1946) 472 is beside the point.
26 PERRROUD, Clunet 1906, 633; 1910, 668; 1912, 389; RAYNAUD, Clunet 1913, 63; SUMIEN, 1 Répért. 110; Cour Paris (March 16, 1925) Revue 1925, 348, Clunet 1926, 346; cf. J. Donnedieu de Vabres 592; McKane v. New Amsterdam Casualty Co. (La. App. 1940) 199 So. 175; Hunt v. Magnolia Petroleum (La. App. 1942) 10 So. (2d) 109, reversed by the Supreme Court of the United States on the grounds discussed below; cf. Note, 5 La. L. Rev. (1943) at 357.

Particularly strange, Belgian Trib. civ. Mons (May 30, 1925) Pasicrisie 1925,3.121 applying lex loci contractus in adding that even though lex loci delicti (French law) were applied, a deviation in favor of the lex fori would be assumed according to the presumable intentions of the parties.

27 See GOODRICH 240, 241, and in France, NIBOYET, Recueil 1927 I 21, n. 1.

transformation of a law applicable to a contract into a law selected by the parties. Where an "optional" compensation act is not dependent on adoption by the parties but only permits either party to exclude its application by declaration in contracting, the choice has been said to be usually merely on paper. At any rate, the law does not base its own force, in the absence of a declaration, on the agreement of the parties. Even though both parties may contribute to a fund covering the liability, the law governs as it is at the time of the award, changes of the law not being prevented by constitutional protection of contractual obligations, and the parties are without power to modify its effects.

(c) Contracting and residence required. Certain American statutes restrict the jurisdiction of their boards to the case where, in addition to the making of the employment contract, the residence of employer or employee or both is in the state. A sound instinct has driven these legislators away from purely contractual reasoning. But better formulations have been found in the third group.

3. Law of the Place of Employment

(a) In general. Some American compensation statutes define their territorial sphere with reference to the place where the worker is regularly employed. This is sometimes the only test. In other statutes it is an alternative to the law of the place of contracting, or the working place and the employer's residence must both be in the state.

It may be recalled, moreover, that the employer's place of business or residence is an additional requisite to the

28 STUMBERG (ed. 2) 217.
29 California, Florida, Georgia, Michigan; see 2 LARSON, supra n. 1, at 376 f. § 87.11.
30 North Carolina, South Carolina, Virginia; id. at 377.
31 Arizona, Colorado, New Mexico, Oregon, Utah, West Virginia; id. at 377.
32 Nevada; id. at 377.
33 Delaware, Maryland, Pennsylvania; id. at 377.
domestic place of contracting in some states.34 And more important, when the place of the making of the contract is emphasized, following the beaten path of the doctrine, coincidence with the really important place of work is very largely the rule.35

This slow trend to a method away from the inadequate terms of tort and contract, though not yet carried to a settled conclusion,36 is unmistakable and effective. The resulting localization patently agrees with the European theories converging from the doctrines in older and newer types of liability to practically consonant delimitations. The Canadian laws,37 German38 and Swiss39 courts, the Italian writers,40 and probably many other national systems41 refer to the place where the work is regularly to be done within the employer's business organization.

It is still impossible to extract a precise common idea from these regulations. But two basic concepts have emerged; whether applied alternatively or in combination these con-

34 Supra n. 29.
35 Cf., e.g., for Georgia, McDonald-Haynes v. Minyard (1943) 69 Ga. App. 479, 26 S. E. (2d) 138.
40 GEMMA, Dir. Int. del Lavoro 241 f.; BALDONI, SCERNI, cited supra n. 20.
41 In France, the statute of the normal place of working was advocated by MAHAIM, cited by BALDONI, Rivista 1932, 441, n. 6 at 442.
cepts at any rate mark the main tendency and may lead to a final agreement. One idea is that the employer's business to which the employee is attached must be in the state, the other that the worker must do his regular work in the state.

(b) Place of employment. The localization rule of Minnesota has acquired some repute, whereby the place of the employer's business prevails rather than his main office even though the worker may be hired at the latter place. Where the work, as for instance the construction of an airport, is carried on, there is the decisive location.\(^2\) This, in a frequent expression of New York constitutes a "status of employment," more important than the fact of hiring the worker at a particular place.\(^3\) The localization of the industry justifies application of the police power of the state to regulate that industry; originally aimed at preventing accidents, it has been extended to provide accident compensation.\(^4\)

Illustration. "Where air route between Minnesota and Illinois was operated by a foreign corporation (a Delaware corporation) from Minnesota where all runs were started, business offices maintained, mechanical work done, payrolls distributed, and pilots and copilots lived and received all instructions, copilot injured in crash was subject to Minnesota Workmen's Compensation Act so as to preclude a common-law negligence action, notwithstanding crash occurred in Wisconsin and regardless of whether contract of employment was made in Iowa, on theory employer's business was 'localized' in Minnesota."\(^5\)

\(^2\) De Rosier v. Craig (1944) 217 Minn. 296, 14 N. W. (2d) 286, Note, 28 Minn. L. Rev. (1944) 335.
\(^3\) Note, 10 N. Y. U. L. Q. (1933) 518, 522.
\(^4\) Minnesota: Chambers v. District Court (1918) 139 Minn. 205, 166 N. W. 185; Ginsburg v. Byers (1927) 171 Minn. 366, 214 N. W. 55.
Other statutes approach this conception. But it appears useless to look for an absolutely unequivocal localization. Provided that both the contract is made and the business located in the state, the employment is sure to be considered domestic.

(c) Regular work in the state. The bulk of discussion in the American practice concerns the distinction between the case where the employee works regularly and where he does only transitory, "incidental," "occasional," or "temporary" work in a state.

There seems to exist agreement that a claim otherwise founded is not prejudiced by the fact that the injury occurs in transitory work outside the state. This maxim is often applied, since usually the transitory nature of out-of-state work is liberally affirmed.

The cases of multiple claims of employees are thereby even more increased than in the other systems. It would seem logical and equitable to accord optional compensation also when an employee is hired by a firm for out-of-state work but suffers an accident within the state while temporarily employed there.\(^{46}\)

Some statutes have, however, limited the time of outside employment to ninety days\(^ {47}\) or required that the injury should not happen six months or more after leaving the state\(^ {48}\) or set up additional requirements for awarding compensation for outside injuries.\(^ {49}\)


\(^{47}\) Delaware, Pennsylvania; see 2 Larson, supra n. 1, at 378 § 87.12.

\(^{48}\) Colorado, New Mexico, Utah; id., at 378. See also Ontario Rev. Stat. 1960, c. 437 s. 6 (1).

\(^{49}\) Note, 57 Harv. L. Rev. (1943) 244.
WORKMEN’S COMPENSATION

Similar provisions are to be found in the Treaty between France and Great Britain, of July 3, 1909, and many subsequent treaties.

On the other hand, great variety or doubt exists as to work regularly divided between two state territories and work prevailingly done out of the state which, viewed from the standpoint of the employer, is incidental to his business. It has been maintained that the New York courts have reached a system covering the entire ground, as summarized in the footnote.

(d) Self-sufficiency of the test. However the “place of employment” may be understood, it can obviate additional requirements. Considering the strong effort to extend workmen’s compensation to employees in domestic business who are not primarily employed outside the state, it is not strange that § 400 of the Restatement, asserting that “No recovery can be had under the Workmen’s Compensation Act of a state if neither the harm occurred nor the contract of employment was made in the state,” was amended (1948) by adding “unless the Act confers in specific words, or is

51 Mr. William Sprague Barnes, in agreement with the Note, 28 Cornell L. Q. (1943) 206, submits the following statement:
The New York statute contains no provision as to extraterritorial effect. The courts have followed a consistent approach in recent cases. The nature of the work in the course of which the employee was injured is the decisive factor.

If the “employment” is of a fixed or permanent nature at a definite location outside the state, recovery under the New York Act is denied, regardless of such New York contacts as the principal office of the employer, the residence of the employee, or the place of hiring; Copeland v. Foundation Co. (1931) 256 N. Y. 568, 177 N. E. 143; Amaxis v. Vassilaros, Inc. (1932) 258 N. Y. 544, 180 N. E. 325; Zeltoski v. Osborne Drilling Corp. (1934) 264 N. Y. 496, 191 N. E. 532; or compensation insurance in New York, Bagdalik v. Flexlume Corp. (1939) 281 N. Y. 858, 24 N. E. (2d) 499; all these claims were dismissed, reversing the lower court on the ground of the decision in Cameron v. Ellis Construction Co. (1930) 252 N. Y. 394, 169 N. E. 622.

The place of “employment” is located in New York as a matter of law, if the injury-producing work is confined to a definite location in the state regardless of foreign residence or hiring, Bauss v. Consolidated Chimney Co. (1945) 270 App. Div. 70, 58 N. Y. Supp. (2d) 717, even though there is no office in New York and no New York compensation insurance. Adams v.
interpreted to confer, a right of action because of the extent of the activities of the employer or employee within the state." We may take it, just to the contrary of the original rule, that both tests included are undesirable for a main rule and as such antiquated by the current development. As the Wisconsin court said, "Where the employer under the act engages a person to perform services in this state under a contract of hire, express or implied, no matter where or when such contract may have been engendered, such employee is under our act and is entitled to its benefits, and this is so even though he is injured while outside of the state, rendering services incidental to his employment within the state. Whether the employee be a resident of this state is not material. The controlling and decisive factor is whether he had a status as an employee within this state." 52

This is an unusually clear formulation of the modern tendency. 53


52 McKesson-Fuller-Morrisson Co. v. Industrial Commission of Wisconsin (1933) 212 Wis. 507, 512, 250 N. W. 396.
53 See also HANCOCK, Torts 212.
4. Social Insurance System

The German pattern of insurance under public law is based on a network of regulations, including duties of the employer to report on employments, to contribute premiums on his own and the worker’s account, and many other obligations facilitating administrative control. The natural criterion determining the connection with the state in this system is the situation of the employer’s establishment involved, viz., the place where he carries on that independent part of his undertaking to which the worker is attached (Betriebsort). Nationality and domicil of the employer and the employee are immaterial except in a few special situations. The place of the undertaking, thus, is decisive for enrollment of the parties to the insurance as well as for claims for benefits. Consequently, when workers are sent to work in another country, it depends on the nature of the foreign establishment, whether a new undertaking is formed subject to the territorial statute or the occupation of the individual worker is only incidental, temporary, or accessory, a so-called “radiation” of the domestic undertaking. Examples of the latter category have been the sending of employees to install machines, to construct a bridge, to give theatrical performances, to load vehicles, and the various activities of interstate transportation.

The Canadian pattern exemplified by the Ontario statute includes temporary work outside Ontario for less than six months where the residence and usual place of employment of the workman are in Ontario; temporary work, if only his residence is out of Ontario; and work for some casual or incidental purpose outside the province, if the employer’s place of business or chief place of business is outside, but

54 For Germany, see Neumeyer, 2 Int. Verwaltungs R. 514 ff.; Stier-Somlo, 2 Kommentar zur Reichsversicherungsordnung (1916) 31 ff., 988.
the worker's place of employment is within Ontario. The text underlines the rule that no compensation shall be payable where the accident to the workman happens while he is employed elsewhere than in Ontario.

The present Italian view is not known to me. But in 1939 it was agreed that application of the workmen's compensation statute, having territorial character, should be based either on the place of the accident, or that of the enterprise, or that where the work is done, with the accent on the last test. It would seem that the German doctrine eliminates this doubt.

5. International Treaties

Article 2 of the above-mentioned Equality of Treatment (Accident Compensation) Convention, 1925, expressed the following recommendation:

"Special agreements may be made between the members concerned to provide that compensation for industrial accidents happening to workers whilst temporarily or intermittently employed in the territory of one Member on behalf of an undertaking situated in the territory of another Member shall be governed by the laws and regulations of the latter Member."

The influential Treaty between Germany and Austria, of 1926/1930 decided that the law of the state where the head office of an employer is situated is applicable to a temporary employment in the other state for a period of one year. The provisions of the same law relating to other claims on account of the same accident are also applied.
Another model Treaty, concluded between Denmark and the Netherlands, of October 23, 1926,\(^{59}\) follows the general rule that the insurance law of the country in which the work is performed shall apply. But the legislation of the state where the undertaking carries on its main operation extends to work of short duration and performed in a subsidiary manner in the other country by workers not permanently domiciled there. It is likewise applicable when workers are sent out to perform inspection or supervision or any other special duties.

In the absence of such treaty agreements, the International Labour Office is of opinion that according to Article 1 of the Convention, the laws and regulations of the country in which the accident occurred should be applied.\(^{60}\)

IV. Concurrence of Claims

We shall first deal with the conflicts rules irrespective of the United States Constitution.

1. Compensation and Tort Actions

It seems settled in this country that if the state of injury in its compensation act has barred alternative remedies based on common law tort no other state will allow the employee to avail himself of such remedies.\(^{61}\) Since the \textit{lex loci delicti} refuses a tort action, there is none anywhere,

\(^{59}\) League of Nations, Leg. Ser. 1926—Int. 6; Int. Labour Code \textit{ibid.} notes that it contains the fullest provisions of date subsequent to 1925 which are not based on the Austro-German model.


\(^{61}\) Mr. Justice Brandeis in Bradford Elec. Light Co. v. Clapper (1932) 286 U. S. 145, 154 takes this for granted.

The 1948 Supplement to the Restatement § 401 confines this doctrine to the place of injury recognizing that the place of contracting cannot deprive a victim of his right of action if the place of injury finds such a provision obnoxious to its public policy.
whether at the court of the place of contracting\textsuperscript{62} or at the court of the place of employment.\textsuperscript{63} This thesis thus disregards the possibility that these latter courts interpret their own compensation statutes as not exclusive. On the other hand, it is regarded as settled that replacement of common law suits by the statute of the state where suit is brought, does not bar tort actions flowing from injuries received in another jurisdiction.\textsuperscript{64} The latter theory acknowledges that the substitution of statutory workmen's compensation for tort has exclusive effect only for the awards made in the state, whereas extraterritorial effect is given to the similar foreign provision of another state. Apparent logic has once more misled the lawyers. Both propositions are mistaken. The reason why in many jurisdictions liability without fault, though with a limited measure of damage, exclusively replaces unlimited tort liability based on intentional, or at least unintentional fault,\textsuperscript{65} is simply that a broader scope of liability is balanced by a milder compensation standard. Additionally, the employer, in the thought of some legislators, should not be sued twice. A state reasoning thus within its own compensation system does a strange thing in allowing suits for foreign tort beyond its domestic awards of workmen's compensation, although it has no interest in restricting cumulations of claims in the case of foreign awards. The result, hence, should be just opposite to that commonly accepted. Whether an award of accident compensation without fault may be supplemented by other remedies ought to be determined by the


\textsuperscript{63} Restatement § 401; Goodrich 244 and n. 90.

\textsuperscript{64} Reynolds v. Day (1914) 79 Wash. 499, 140 Pac. 681.

\textsuperscript{65} The German Versicherungs O. § 636, as amended, leaves standing the ordinary action in excess of the compensation award when the employer has caused the accident intentionally.
legal system of which the workmen’s compensation is a part. Exactly to the analogous effect, the prementioned Austro-German Treaty provides that the law of the state whose insurance statute is applied has to decide whether additional rights arise out of the same accident.\textsuperscript{65a} It is inconsistent with the policy of a workmen’s compensation act, barring common law suits, that a common law suit should be brought under a foreign tort law in respect of the same injury. Where, on the other hand, workmen’s compensation is granted pursuant to a statute combining statutory restricted liability without fault and full liability under common law for fault, there is no reason why the tort law of the place of injury should not be applied, although it would not be available to increase workmen’s compensation of the state of injury. Objections to these claims until they are satisfied or waived, should only arise insofar as the employer is subrogated into the claim against the tortfeasor, or his liability is reduced by the latter’s payment. The North Carolina court in a case involving injury in Tennessee, finding the common law action forbidden by the Tennessee Workmen’s Compensation Act, allowed recovery in tort under the common law of North Carolina.\textsuperscript{66} The court should have applied the Tennessee tort law, abrogated in workmen’s compensation cases only for the use of Tennessee, not North Carolina courts.

Curiously, in a recent Ontario decision, the court found it against public policy that the dependents of a Michigan

\textsuperscript{65a} The same result has rightly been reached in Stacy v. Greenberg (1952) 9 N. J. 390, 88 Atl. (2d) 619. In Ohlhaver v. Narron (C. C. A. 4th 1952) 195 F. (2d) 676 the court also seems to approve the principle advocated above, but the law of the forum barred the action as well as the law under which compensation had been awarded; hence, no real conflict existed. For a discussion, see Ford, “The Liability of Nonemployer Tortfeasors Under State (1958) 54.


\textsuperscript{66} Johnson v. C. C. & O. R. Co. (1926) 191 N. C. 75, 131 S. E. 390; Hancock, Torts 218 n. 3 cites a similar decision of a Quebec court, Johansdotter v. Canadian Pac. R. Co. (1914) 47 Que. S. C. 76.
employee killed as a passenger in an airplane crash near St. Thomas, Ontario, could have a remedy against the wrongdoer in one state, and workmen's compensation against his employer in another.  

2. Several Compensation Acts

Before the Supreme Court of the United States committed itself to a novel application of the Full Faith and Credit Clause with regard to workmen's compensation, the Constitution did not preclude a workman from obtaining compensation in two states up to the higher amount granted by either statute where the statutes made this possible. The Restatement, § 403, maintains this proposition, which has been adopted by the courts with very few exceptions, although rarely confirmed by statutes. The plaintiff may choose freely which statute seems proper and according to some of the authority, he may switch even after an award. But apart from the constitutional issues, some courts denied compensation proceedings when an award was given in another state.

3. American Constitution

(a) Legislative power. The Supreme Court of the United States, in a decision formulated by Mr. Justice Brandeis,

67 Scott v. American Airlines Inc. (Ont. High Ct.) [1944] 3 D. L. R. 27. The decision should have been based on the fact that all rights were terminated by release. Compare the recent decision in Texas Indemnity Ins. Co. v. Henson (Tex. 1943) 172 S. W. (2d) 113, stating that the claim of an injured person in one state and that of his dependents after his death in another state are two separate actions. Cf. Note, 22 Tex. L. Rev. (1944) 246.

68 Goodrich 243 n. 88; Restatement §§ 398, 399.

69 See Note, 57 Harv. L. Rev. (1943) 246.


70 Goodrich 238.

71 Hancock, Torts 228 n. 5.
extended the Full Faith and Credit Clause of the Constitution to legislative state acts, and applied this thesis to workmen's compensation statutes. The decision is generally understood as recognizing the power of only one state to regulate compensation for accidents in the case of a specific contract of employment. The contract was made between residents in Vermont, which has an optional statute; the employee was killed while working temporarily in New Hampshire. On these facts it was held that the statute of New Hampshire was excluded by the statute of Vermont. 72

Opinions may be divided on the problem whether for humanitarian reasons an injured worker should have free option among compensation statutes offering him redress, or whether the parties should have foreknowledge of the applicable statute, so as to be able to ascertain the risks to be covered or the fund to which contributions should be made. The above-mentioned decision, in its effect rather than its reasoning, favors the latter view and joins the modern efforts to give the main employment place preference over an accidental work assignment. Nevertheless, the circumstances of employment and the policies of the different states are too heterogeneous for efficient regulation of power from the standpoint of a superstate. Although a federal compensation law, of course, would be feasible in its sphere and with its own policy, it is inconvenient to weigh critically the legitimacy of territorial connections which state legislatures may find sufficient. In addition, Mr. Justice Brandeis borrowed the test of legitimate power from the mechanical conflicts rule of *lex loci contractus* instead of emphasizing mainly the work in Vermont.

This decision was too radical to stand. The theory of an exclusively controlling workmen’s compensation statute was

72 Bradford Electric Light Co. v. Clapper (1932) 286 U. S. 145. The optional character of the Vermont Act emphasized by the defendant was not urged.
soon “tactfully explained away,” and the criterion was radically changed by Supreme Court decisions influenced by Mr. Justice Stone. The ancient conflicts rule was replaced by an appraisal of the legitimate public interest which a state has in granting workmen’s compensation. In a leading case, California was approved for having applied its act, although the parties had stipulated for Alaskan law and all facts except the place of hiring pointed to Alaska. The main ground was equitable; it would have been a great hardship for the worker to seek compensation in the far-away territory, and he might have become a public charge to California.

The California statute was again permitted to operate in the inverse case where the injury happened in that state, though the work was temporary and Massachusetts law governed the employment. Furthermore, the legitimate interest has been declared not to turn on the fortuitous circumstance of the place of work or injury. “Rather it depends upon some substantial connection” between the jurisdiction and the particular employment relationship. Finally, the state of injury has been allowed to disregard a bar to common-law actions against general contractors embodied in the law under which the injured employee has received compensation, if the law of the state of injury does not immunize general contractors.

The 1948 Supplement amends § 401 of the Restatement by omitting the power of the place of making the contract of employment to abolish tort actions extraterritorially.
76a Carroll v. Lanza (1955) 349 U. S. 408; see Note, 23 U. of Chi. L. Rev. (1956) 515. This, of course, does not imply that by disregarding the foreign bar the forum follows a sound conflict-of-laws rule; for a discussion of this problem, see supra pp. 229-232 and Note, Harv. L. Rev. (1962) 355.
Much effort has been spent in the American literature to evolve fragments of a legal system out of these incoherent pieces. Perhaps it will be finally conceded that Stone's idea is no more conclusive than that of Brandeis.

In no event, however, should we be influenced by the numerous authors who seem to hope for better conflicts rules to be gained from these decisions. From the point of view of conflicts law, it is a plainly illusory proposition to hold that the state where a worker is injured in temporary business, as in the case of New Hampshire, has no "interest" sufficient to apply its own law, while California has an interest sufficient to exclude the Alaskan law. It is also immaterial that in the first case, New Hampshire seemed not necessarily to refuse giving effect to the Vermont act under conflicts principles, and that in the other case, Massachusetts assumed exclusive applicability of its own law.

When two states make their administrative or judicial machineries available to an injured workman, this may be done for different reasons, but never really without some reasonable consideration. Apart from the nature of a federal state, there is neither occasion in such cases to supervise their judgment in taking jurisdiction nor, much less, to select a contact and impose it on all states.

Co-ordination and equitable treatment of the employer must be secured through interstate, if not federal, arrangement. Models are contained in the numerous international treaties. That an employer should have to pay the same damages twice, as happened once in European practice, is a rare occurrence also in this country.

77 Mr. Justice Stone based his concurrent vote on this fact; see Freund, "Chief Justice Stone and the Conflict of Laws," 59 Harv. L. Rev. (1946) 1210, 1220.
78 This Mr. Justice Stone himself declines to consider for conflicts law, see Cheatham, supra n. 73, 722, 723 n. 16.
79 See Neumeyer, 2 Int. Verwaltungs R. 726.
80 See Schneider's Workmen's Compensation, supra n. 1, 470.
(b) **Force of awards.** In the Magnolia decision, rendered by a five to four majority,\(^{81}\) it was held that a final award of Texas, equivalent by statute to the judgment of a court of competent jurisdiction, is under the protection of the Full Faith and Credit Clause, irrespective of any "interest" of other states. The state in which the contract was concluded was forced to give the award of the state of injury exclusive force, and to reject the claim of the employee for additional compensation. This theory treated workmen's compensation on the footing of a transitory tort action, and failed to evaluate precisely the particulars of the Texas procedure.\(^{82}\) Although this decision has sometimes been praised, the Supreme Court itself has recently reduced its bearing to the least possible scope. It has been stated recently that to be exclusive the award must be final and conclusive, intended to preclude another judgment not only in the state but also under the laws of other states; and such an interpretation was held not readily to be reached.\(^{83}\)

V. **Conclusions**

The development of conflicts law in workmen's compensation cases has amply demonstrated that the tests borrowed from the general rules regarding tort and contracts are equally impracticable. The choice of the applicable law lies among the places with which the work rather than the

---

\(^{81}\) Magnolia Petroleum Co. v. Hunt (1943) 320 U. S. 430.

\(^{82}\) Cheatham, "Res Judicata and the Full Faith and Credit Clause etc.," 44 Col. L. Rev. (1944) 330; Freund, supra n. 77, 1229.

\(^{83}\) Industrial Commission of Wisconsin v. McCartin (1947) 330 U. S. 622. In this case, the first awards under the Illinois workmen's compensation statute stipulated that "this settlement does not affect any rights that applicant may have [in] Wisconsin." But the majority of the Supreme Court seems to have modified its general proposition, cf. Dean, in 1947 Annual Survey of American Law 61 f. However, in Buccheri v. Montgomery Ward & Co. (1955) 19 N. J. 594, 118 Atl. (2d) 21 the Supreme Court of New Jersey has given full faith and credit to a New York award, although this was considered to be not exclusive. The rules of the Magnolia case and the McCartin case are profoundly discussed by 2 Larson, supra n. 1, at 358-367 § 85.
conclusion of the contract or the accident is connected. Further­more, European and international efforts suggest that decisive influence should be accorded the place of the em­ployer's business supervising the employee's work. This result entirely agrees with the most desirable principle gov­erning labor contracts.

If the contract is made at the headquarters of the firm, it has been claimed in the United States that with respect to optional compensation statutes the parties are presumed to agree on the law of that place. In Europe, a similar preference for the law of the headquarters has been based on the integration of the worker into the employer's organi­zation. It would seem that the more closely the state takes the indemnization of the workers in hand, especially by making it a public or semipublic institution of social insur­ance, the more distinctly attention is turned to the mere territorial connection of the business place to which the workman is attached.

In the United States, this leading idea, more or less con­sciously living, might well be generalized and achieve uni­formity. Even so, competition among the state laws would remain unchecked in the various cases of temporary employ­ment in a state other than where the controlling business place is situated. Whether a total elimination of such an overlapping jurisdiction is desirable, except in the interest of the employer, is uncertain. If complete unification is wanted, the agreements made on the basis of the Geneva Conven­tion would be a natural model. So long, however, as no uni­form statute or agreements among the states with federal support are in existence, past experience eventually ought to teach that judicial interference in order to define the proper spheres of state legislation on this subject has not proved helpful.