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## ADVOCATING THE RIGHTS OF THE INJURED\*

*Benjamin Marcus†*

WHEN workmen's compensation was first introduced a half century ago, it was felt necessary to cushion the shock in a number of ways. One of these was the idea of a bargain, an exchange, in which the worker, to obtain the new remedy based on liability without fault, gave up his existing remedy, the right to a tort action against his employer for a negligent injury.<sup>1</sup> It is time that the terms of that bargain be re-examined.

The continuing inadequacies of workmen's compensation make clear that the workman has never really received all that he supposedly bargained for. Compensation payments continue to bear little relationship to the actual need of the injured and his family. Coverage as to types of employment, injury and disease, while extended during the years, is not yet sufficiently inclusive.<sup>2</sup> And, notwithstanding the fact that workmen's compensation was a great step forward and has been improved in many respects over its fifty years, its present status does not encourage the view that it will ever constitute a complete and adequate answer to the problem of industrial injuries. This suggests that we should now consider the possibility of retaining compensation, while supplementing it with other remedies.

This has already happened in England, whose laws and poli-

\* This article is taken substantially from a chapter of the forthcoming book entitled *Occupational Disability and Public Policy*, sponsored by the Ford Foundation, edited by Earl F. Cheit and Margaret S. Gordon, and published by John Wiley and Sons, New York. Permission to publish it here is gratefully acknowledged.—Ed.

† Member of the Michigan Bar.—Ed.

<sup>1</sup> See generally PROSSER, *TORTS* 382-83 (2d ed. 1955); Somers, *Myth and Reality in Workmen's Compensation*, U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. No. 192, at 18, 23-26, in INTERNATIONAL ASSOCIATION OF INDUSTRIAL ACCIDENT BOARDS AND COMMISSIONS PROCEEDINGS (1953). [Proceedings of this Association will be cited hereinafter as IAIABC PROCEEDINGS.]

<sup>2</sup> CHEIT, *INJURY AND RECOVERY IN THE COURSE OF EMPLOYMENT* 4-5 (1961); SOMERS & SOMERS, *WORKMEN'S COMPENSATION*, particularly *Coverage and Benefits* 38-92 (1954) [hereinafter cited as SOMERS]; Skolnik, *New Benchmarks in Workmen's Compensation*, 25 SOCIAL SECURITY BULL. No. 6, at 3-18 (1962), in particular: "From the available data, it appears likely that workmen's compensation is leaving unmet, on the average, more than three-fifths of the total wage loss in temporary disability cases. For work injuries that result in death or permanent disability, the proportion of the wage loss compensation is even less, partly because the compensation is more likely to be subject to statutory maximums on duration of benefits or on aggregate payments." *Id.* at 10. See also U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. No. 212, *STATE WORKMEN'S COMPENSATION LAWS: A COMPARISON OF MAJOR PROVISIONS WITH RECOMMENDED STANDARDS* (1961).

cies have always strongly influenced us in this field.<sup>3</sup> Our original remedy of tort liability was adopted from the English common law, as were the defects which ultimately led to its abandonment as a remedial device for injured workmen. Our original workmen's compensation acts, though they drew their inspiration partly from the earlier German model, were largely patterned on the English statutory provisions. Should we now follow the English by restoring the right to sue in tort, as an additional remedy, while at the same time retaining compensation? We may shed some light on this by looking at the role of advocacy and of the advocate as it has developed in our own system.

#### I. EARLY LEGAL PROTECTION OF INDUSTRY AND THE DEVELOPMENT OF A WORKMEN'S COMPENSATION SYSTEM

When the problem of industrial injuries arose in the first half of the nineteenth century, the first reaction of both the English and the American courts was to protect industry through the development of what came to be called the employers' "common-law defenses," specifically, contributory negligence, assumption of risk, and the fellow-servant doctrine. Partly because of this and other forms of legal encouragement, industrial development proceeded rapidly, but at the cost of a tremendous toll in uncompensated human suffering on the part of productive workers and their families and dependents.

By the late nineteenth and the early twentieth centuries, the sheer inhumanity of this system had reached such proportions that it could no longer be borne, especially since it was obvious that industry was no longer so feeble and immature as to require such subsidies, if indeed it ever had been. Reform was demanded with increasing insistence, and it eventually had to come.<sup>4</sup> It proceeded in two stages. The first was the adoption of employers' liability acts, which retained the fault principle of the common law, but modified the employers' common-law defenses.<sup>5</sup> The second, workmen's compensation, abandoned the fault principle and treated

<sup>3</sup> For an excellent exposition of the English experience with workmen's compensation, see SOMER 299-308. See also VESTER & CARTWRIGHT, *INDUSTRIAL INJURIES* (1961) (2 vols.).

<sup>4</sup> See DODD, *ADMINISTRATION OF WORKMEN'S COMPENSATION 19-26* (1936); HARPER & JAMES, *TORTS* xlii-xliii (1956); RIESENFELD & MAXWELL, *MODERN SOCIAL LEGISLATION* 137-38 (1950).

<sup>5</sup> See 1 LARSON, *WORKMEN'S COMPENSATION* 29-32 (1952).

employment-connected disability, like the breakdown of the machines themselves, as part of the costs of production which ought to be borne by the enterprise—and ultimately by the consumers of its products.<sup>6</sup> To make sure that the enterprise would be able to meet this cost, some of the laws required employers to insure against it, or to qualify as self-insurers.

The new system of workmen's compensation was shaped in many ways by the reaction against the defects of the system which it displaced. The common law had failed to handle the problem. The obvious requirements of humaneness toward the injured workman and his family had been frustrated by technical and often artificial legal doctrines. The expense of litigation had been a hardship on the injured worker and often a deterrent against his seeking any relief. The inability of the common-law tort action to produce any relief (except in the form of a possible compromise settlement) until a judgment had been reached, after months or years of delay, made it altogether ill-suited to meet the injured workman's immediate need, which was for the prompt receipt of money to make up for a sudden loss of income accompanied almost immediately by medical expenses. This put the injured employee or his dependents under considerable pressure to accept an unfavorable and unfair compromise settlement, merely because it was the only way in which immediate cash needs could be met.

The new workmen's compensation system, it was hoped, would cure each of these defects. It would be simple and commonsense in its provisions, devoid of legalisms. It would provide relief which, though not generous, would be certain and immediate.<sup>7</sup> And it was hoped that, through such devices as injury schedules and benefits fixed by statute, it could be made largely automatic, so that there would be few occasions for adversary proceedings and little need for the intervention of lawyers.

Some of these hopes were realized, or partially realized, but others were in considerable degree disappointed. The promptness

<sup>6</sup> The old slogan, "The cost of the product should bear the blood of the workmen," succinctly describes the underlying philosophy of workmen's compensation. See PROSSER, *op. cit. supra* note 1, at 383.

<sup>7</sup> See 1 LARSON, *op. cit. supra* note 5, at 4-6, particularly: "The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most efficient, most dignified and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obliged to provide in any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source of payment, the consumer of the product." *Id.* at 5.

of initial payments provided a striking contrast to the old system. And, while relief did not prove to be certain, it was, of course, available in a much higher proportion of cases than formerly. But the adversary element inhered in the new system as it had in the old. And the chief result of the effort to eliminate lawyers, in the early years, was simply to eliminate lawyers on one side, but not on the other.<sup>8</sup>

## II. EFFECTS OF UNILATERAL ADVOCACY

As an industry of insurance carriers grew up to underwrite the new risk, an expert, specialized, full-time defendants' bar grew up with it to defend the legal interests of such carriers and to oppose compensation claims. The first two decades of workmen's compensation were thus largely a period of unilateral advocacy, the results of which were, of course, one-sided, as might have been expected.<sup>9</sup>

The effect was to weaken the new system and to incorporate into it many elements of the old system that it was designed to replace. There was a tendency to inject into the administrative hearing, designed to be informal, common-law rules of evidence and procedure.<sup>10</sup> Restrictive definitions of "employee" were sometimes imported into the new statutes in disregard of the fact that such constructions had originated in cases dealing with the employer's liability to third persons for the torts of those working for him, and thus rested on considerations entirely irrelevant to the

<sup>8</sup> See DODD, *op. cit. supra* note 4, at 23-26. See also Marcus, *NACCA Bar Association*, U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. No. 213, at 196-98, in IAIABC PROCEEDINGS (1959).

<sup>9</sup> See ROBSON, *JUSTICE AND ADMINISTRATIVE LAW* 211 (1951), particularly: "Money, time and professional skill were squandered for more than half a century in a scandalously wasteful manner in settling these claims. The fundamental reason was that, instead of a claim for compensation being determined on the grounds of public interest, it was opposed and obstructed at every stage by the adverse interest of the employer or his insurance company. The resources of numerous legal and medical practitioners were devoted to resisting the payment of compensation to an injured workman or the dependents of one who had been killed, regardless of the human and social issues involved. . . ."

"These were the considerations which led me to conclude in 1942, that 'the system of workmen's compensation as it now exists is indefensible, and such it will remain until the adverse interest of the employer or his insurance company or mutual trade association is removed, and the determination of the claim carried out by an administrative tribunal or commission having regard only to the public interest in the injured man or his dependents.'" *Id.* at 211-12.

<sup>10</sup> See DODD, *op. cit. supra* note 4, at 225-26, 232-33; Ross, *The Applicability of Common Law Rules of Evidence in Proceedings Before Workmen's Compensation Commission*, 36 HARV. L. REV. 263 (1923). See also 2 LARSON, *op. cit. supra* note 5, at 287-88, 296-97.

proper scope of compensation coverage.<sup>11</sup> Also, doctrines regarding "scope of employment," similarly developed in vicarious liability cases, were read into the statutory language "arising out of and in the course of" employment. Among these were the "going and coming rule"<sup>12</sup> and the rules as to deviations from the strict work pattern.<sup>13</sup> In applying the concept of accidental injury to the problem of injuries produced by stress and strain, the courts tended to exclude cases where the stress was "normal to the job,"<sup>14</sup> thus producing, in the workmen's compensation context, something very like the old doctrine of assumption of risk. And part of the old defense of contributory negligence was, in substance, reinstated by calling it "willful and intentional misconduct," including therein deviations from safety rules.<sup>15</sup>

Another result of unilateral advocacy was the one-sided role of medical testimony. Since in most states the employer selected the doctor (especially during the early history of workmen's compensation), and since his testimony was crucial in most compensation disputes, it is not surprising that doctors likely to be sympathetic to the employer's point of view on such questions tended to be chosen. Nor is it surprising that doctors were sometimes selected more for their agility on the witness stand than for their skill in healing injuries. And even doctors selected purely for professional competency may have had a tendency, not at all unnatural, to see things from the point of view of the side which was paying their fees and from which they hoped future fees would be forthcoming. When all these factors were added to what seems to be the inherent conservatism of the medical profession, it is no wonder that the doctor as a witness tended to become, not an impartial expert, but a medical advocate for the defense.<sup>16</sup>

<sup>11</sup> See 1 LARSON, *op. cit. supra* note 5, at 623-25, 630-31.

<sup>12</sup> *Id.* at 195-96.

<sup>13</sup> See, e.g., *Wither's Case*, 252 Mass. 415, 147 N.E. 831 (1925).

<sup>14</sup> See, e.g., *DeLille v. Holton-Seelye Co.*, 334 Mo. 464, 66 S.W.2d 834 (1933).

<sup>15</sup> See 1 LARSON, *op. cit. supra* note 5, at 474-80.

<sup>16</sup> See BREND, *TRAUMATIC MENTAL DISORDERS IN COURTS OF LAW* 63 (1938); ROBSON, *op. cit. supra* note 9, at 210-12; 2 WILSON & LEVY, *WORKMEN'S COMPENSATION* 185, 193, 280-83, 289 (1941), especially: "The doctor on the other side is generally the representative of an insurance company and is fully alive to the fact that his interest and those of the company are identical." BREND, *op. cit. supra*, at 63-64. See also DODD, *op. cit. supra* note 4, stating: "It was found that there was an extremely high correlation between the opinions of the insurers' physicians and the conclusion best adapted to limiting the compensation claim. . . ." *Id.* at 460-61. "The specialists to whom an insurance company sends its claimants may be able in their field and capable of rendering a high type of professional service, but if too great a proportion of their findings are favorable to the

The role of unilateral advocacy was not limited to claim proceedings. It also tended to mold the attitudes of the system's administrators. Some of these were chosen from the personnel of industry or of the insurance carriers. Others retired from administrative posts to positions with industry or insurance companies, thus stimulating an "identity of interest." The administration of workmen's compensation tended to remain weak for a variety of reasons: political appointments and control, frequent changes of personnel, underpaid and overworked staffs, inadequate budgets. And weak administration was all the more vulnerable to the pressures and influence implicit in unilateral advocacy.<sup>17</sup>

In the legislative field, the one-sidedness of the pressures exerted was perhaps even more marked. An instance has been cited in which a proposed amendment to a compensation law was summarily tabled in an unnamed southern state because it did not have the approval of the manufacturers' association.<sup>18</sup> This is representative of the general, but not invariable, rule that amendments to workmen's compensation laws have not received legislative approval unless they had the sanction of the spokesmen for employers and insurance carriers. In some jurisdictions this sanction was obtained as a result of bargaining between organized labor and management. Unfortunately the plight of the injured worker has often had, for organized labor, a low rating at the bargaining table, although sometimes useful as a counter in obtaining concessions from management in regard to other types of fringe benefits. In contrast, the presentation of the employers' and carriers' point of view has been vigorous, well-organized and effective. It has repeatedly been backed by the threat that industry would flee the state in search of a cheaper environment if a single

claimants these specialists will no longer receive the patronage of the insurance companies. . . . The reports . . . afford convincing proof that insurance company practice in the chief industrial centers of each jurisdiction studied is, on the whole, restricted to a relatively small group of doctors whose written reports and findings and verbal testimony favor their employers, the insurance companies, with monotonous regularity. The conclusion is inescapable that most of these doctors are selected or retained for their legal ability in defeating employees' claims rather than for their medical skill in healing their injuries." *Id.* at 491.

<sup>17</sup> SOMERS 143-48; Reid, *President's Address*, U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. NO. 192, at 4, in IAIABC PROCEEDINGS (1956), stating in pertinent part: "It is of course more often true than not that State boards and commissions and staff are not insulated from great pressures, political, economic, and other, brought to bear upon them in the carrying out of their duties." *Id.* at 12. See also DODD, *op. cit. supra* note 4, at 798-803.

<sup>18</sup> SOMERS 145.

additional straw was added to its burden. During the first two decades of workmen's compensation, this effort was seldom balanced by any comparably effective effort on the other side. Accordingly, amendment to legislation in the compensation field was largely the creation of the employers.<sup>19</sup>

### III. ROLE OF THE PLAINTIFFS' BAR

Why was the defendants' bar substantially unchallenged in its complete possession of the field for so long? There were many reasons. Compensation work was so novel and specialized in its methods and (despite early hopes to the contrary) so complex and technical that the skill and experience of the lawyer in general practice were not readily transferable to this field.<sup>20</sup> Yet the practice was not, from the claimants' side, sufficiently lucrative to attract its own corps of specialists as readily as other highly technical fields, such as tax law, have been able to do. Furthermore, representing the rich and powerful has always tended to give lawyers greater professional prestige, as well as greater emoluments.

Yet there was a crying need to be met, and in time this was accomplished. In the depression years of the 1930's a plaintiffs' bar sprang into existence. In part this occurred because the rising tide of claims had reached a point at which a claimant's lawyer, notwithstanding the smallness of individual fees, could make a living through sheer volume of business—though of course a better living was still to be had by working the other side of the street. In part it occurred also because some lawyers, influenced by the social idealism of the time, were attracted by the idea of becoming defenders of the underdog, devoting their professional careers to the

<sup>19</sup> In the early 1940's, the writer was on the legal staff of one of the largest unions in the country. Until then there was little, if any, organized activity or interest by labor unions in behalf of the injured employee. A reading of the reports of the workmen's compensation study commissions of the various states, which reports led to the enactment of compensation laws, indicate little participation by labor in such formulation, and even opposition to the enactment of such laws. The writer stimulated the organization of workmen's compensation departments and committees for international unions and local unions, all of which led to the establishment, about six years ago, of a workmen's compensation department at the AFL-CIO headquarters in Washington, D.C.

The statements in this article are based not only upon the writer's experience, but upon information received from many other attorneys representing labor unions throughout the country, many of whom have drafted proposed legislation, appeared before legislative committees and have participated in negotiations with management.

<sup>20</sup> DAWSON, *THE DEVELOPMENT OF WORKMEN'S COMPENSATION CLAIMS ADMINISTRATION IN THE UNITED STATES AND CANADA* 3 (IALABC 1951), stating that "workmen's compensation is now considered the most difficult specialty in the entire field of labor legislation."



amelioration of social and economic injustice. Moreover, some lawyers had been introduced to this work through their service for unions or legal aid societies and had become fascinated with it, or had been type-cast to continue the work for which their previous experience peculiarly fitted them.

Whatever the reasons, a plaintiffs' bar did spring up and, once in existence, grew rapidly in numbers and influence. Later, in the 1940's, Samuel Horovitz's book on workmen's compensation,<sup>21</sup> scholarly and well-documented, was in effect the "cry to battle" for the furtherance of the rights of the injured worker. In 1946, at the Portland, Oregon, convention of the International Association of Industrial Accident Boards and Commissions, a handful of members of the new plaintiffs' bar founded their own association, the National Association of Claimants' Compensation Attorneys, which came to be known simply as "NACCA." Two years later the *NACCA Law Journal* began publication. This became both the voice of the plaintiffs' bar and its internal system of communication. Through it the representatives of injured workers, not only in the workmen's compensation field, but also in the fields of railroad and admiralty law—and later in tort law generally as well—were able to exchange ideas and to keep up with the latest decisions and other developments of importance to their professional work.<sup>22</sup>

From the beginning, this plaintiffs' bar group has been a partisan one, dedicated to advocating the rights of the injured, especially injured workers. In the compensation field, it has sought to establish broader and more reasonable definitions of personal injury or accidental injury, to extend the scope of the employment covered, to eliminate extraneous fault elements (such as assault, horseplay and "willful misconduct") from the system, and to controvert the employers' assumed right to determine medical bases of causation and disability through company doctors or experts for hire.<sup>23</sup>

<sup>21</sup> HOROVITZ, *WORKMEN'S COMPENSATION* (1944).

<sup>22</sup> For a discussion of the history and aims of NACCA, see SOMERS 180-82; Lambert, *NACCA-Rumor and Reflection*, 18 *NACCA L.J.* 24 (1956). See also Green, *The Thrust of Tort Law: Part 1, The Influence of Environment*, 64 *W. VA. L. REV.* 1 (1961), stating that: "The National Association of Claimants' Counsel of America has tremendously broadened the understanding of the profession, including the judges, of the significance of tort litigation and has advanced the proficiency of advocacy immeasurably. Its efforts have been widely supported and advanced by numerous institutes sponsored by bar associations and law schools." *Id.* at 19 n.67.

<sup>23</sup> See, e.g., Horovitz, *Assaults and Horseplay Under Workmen's Compensation Laws*, 41 *ILL. L. REV.* 311 (1946); Horovitz, *Rehabilitation of Injured Workers—Its Legal and*

### A. *The Causation Dispute*

The plaintiffs' bar has been accused of trying to convert workmen's compensation into a general scheme for compensating employee disabilities without regard to whether they are work-connected. Doubtless, claims which are unjustified in this sense are sometimes filed, but it is believed that the plaintiffs' bar generally has been attempting to correct the distortions inherited from twenty years of unilateral advocacy and to restore a sensible and humane social security approach. Such an approach is both more appropriate to the function of workmen's compensation and more in line with the intention of the movement which gave rise to the original statutes.

So long as the requirement of legal and medical causation is retained—as it still is—there is no danger that the distinction between occupational and non-occupational disability will suffer a general breakdown. Of course, there will be cases where the question of whether a disability is work-connected cannot be answered with scientific certainty. We must be content to answer those on the basis of reasonable probability in the light of current medical knowledge.<sup>24</sup>

### B. *Equalizing the Contest*

Experience seems to indicate plainly that the role of claimants' attorneys in workmen's compensation is neither a luxury nor a parasitic growth, but a necessity. Of course, there are justifiable criticisms which may be made of the plaintiffs' bar. For example, claimants' attorneys have, it is urged, given entirely too much encouragement to the practice of lump-sum settlements. Lump-sum settlements are convenient and attractive to claimants' attorneys, as they are to the insurance carriers, but are seldom consistent with the goals and purposes of the workmen's compensation system.<sup>25</sup>

The indispensability of the plaintiffs' bar is perhaps most obvious where an ignorant, confused, preoccupied, and possibly frightened layman would otherwise be pitted against an experi-

*Administrative Problems*, 31 ROCKY MT. L. REV. 485 (1959); Marcus, *Compensability of Heart Disease—Legal Aspects*, 1962 INS. L.J. 341; Page, *Comments on Recent Important Workmen's Compensation Cases*, 28 NACCA L.J. 313 (1961-1962).

<sup>24</sup> For a leading decision dealing with causation in workmen's compensation, see *Dwyer v. Ford Motor Co.*, 36 N.J. 487, 178 A.2d 161 (1962).

<sup>25</sup> See CHEIT, *op. cit. supra* note 2, at 274-79; MORGAN, SNIDER & SOBOL, *LUMP-SUM REDEMPTION SETTLEMENTS AND REHABILITATION* (1959).

enced and skillful professional advocate for the employer or the carrier in a most unfair and unequal contest. Yet it seems that the normal desire of industry and insurance companies to minimize costs and maximize profits is not the only element responsible for the problem. The New York Moreland Commission reported in 1944:

"There is ample evidence that many . . . appeals have been taken by carriers and employers not in good faith, but evidently for purposes of delay and bargaining. . . . About 70 per cent of all appeals taken by carriers or employers were withdrawn. . . . The record of the State Insurance Fund is of special interest. In the three-year period in question, it withdrew 340 out of 366 appeals taken. . . . It thus appears that the Fund alone has taken hundreds of appeals with no serious intent of carrying them through."<sup>26</sup>

So it seems that not only private, but also public, bodies administering compensation funds can be litigious, indeed, abusively litigious.

Furthermore, not only is it clear that the adversary element is inherent in the system as it is presently financed, but we should be wary of the assumption that it can, or should, be wholly eliminated.

This is not to say that there is not too much litigation, since plainly there is. As Professor Davis has pointed out, it results from excessive carrier resistance to claims and is a wasteful drain on the resources of the present system.<sup>27</sup> Indeed, unless some private insurance carriers can adjust themselves to the idea that these are not tort claims, but insured losses which they have been paid to carry, and adjust their practices accordingly, the role of the private carrier will continue to be diminished in value, or may even be eliminated, as it has been in England.<sup>28</sup>

### C. *Advantages of an Adversary System*

However, though far fewer claims should be resisted, it does not follow that a wholly non-adversary system should be the goal. Workmen's compensation will always involve the determination

<sup>26</sup> RIESENFELD & MAXWELL, *op. cit. supra* note 4, at 342.

<sup>27</sup> Davis, *Standing To Challenge and Enforce Administrative Action*, 49 COLUM. L. REV. 759, 788-89 (1949). See also ROBSON, *op. cit. supra* note 9, at 210-12.

<sup>28</sup> SOMERS 299-308.

of questions of fact which are both disputed and fairly disputable. We have never evolved any method for their settlement which is as fair and reliable as having the two sides prepared and presented by opposing advocates for judgment by an impartial tribunal.<sup>29</sup>

The most ambitious attempt to eliminate the adversary element seems to be that made by the English in 1946, when they eliminated judicial review and barred lawyers from all steps in the proceeding except the final appeal to the commissioner.<sup>30</sup> The result was not the creation of a non-litigious administrative utopia. One effect was a series of decisions by the commissioner which were far more restrictive and illiberal than previous English or contemporary American court decisions on the same questions—and also far more technical, legalistic and hair-splitting.<sup>31</sup> Even administrators seemingly needed the assistance of a claimant's advocate. In 1958, the English readmitted the lawyers to compensation proceedings, after twelve years of experience with an almost lawyerless system.<sup>32</sup>

Certainly the claimant, even if not confronted with an adverse litigant, would be facing powerful adversaries in the form of the complexity of the statute, his ignorance of his rights and of how to assert them, and the bureaucratic rigidity which sets in when administrative power is not tempered by adversary proceedings. He needs to have someone on his side with expertise, devoted to his interests, and able to give his problems personal attention. A theory that the board, commission, or referee will double as his advocate does not answer the problem. Its quasi-judicial function precludes it from effectively playing that role. And, even if it could be trusted to argue the claimant's case, it still could not do other things which must be done, such as going out and digging up the evidence necessary to prove the claim.

Furthermore, what happens in the administrative claim proceeding is not the whole story of the role of the plaintiffs' bar. Larson, for example, points to "a marked increase in the generosity with which courts have interpreted the statutes," and adds that "it

<sup>29</sup> "[A] system of controversy, by having both sides presented by persons competent to present them and threshed out in a way that, on the whole, experience has shown is the surest way of arriving at facts." Pound, *The Challenge of Occupational Disability*, in PROCEEDINGS OF THE AMERICAN MEDICAL ASSOCIATION COUNCIL ON INDUSTRIAL HEALTH (1955).

<sup>30</sup> POTTER & STANSFELD, NATIONAL INSURANCE (2d ed. 1949).

<sup>31</sup> LARSON, *The Myth of Administrative Generosity: A Lesson from British Experience*, 40 A.B.A.J. 195 (1954).

<sup>32</sup> CHEIT, *op. cit. supra* note 2, at 273.

would be an interesting speculation to inquire whether the courts or the legislatures have done more to bring workmen's compensation from its comparatively narrow beginnings to the place where we find it today."<sup>33</sup> Wherever a court has broadened and strengthened a statute, it means that a claimant's lawyer has successfully resisted a narrower construction. Usually it also means that the claimant's lawyer has first worked out, documented, and persuaded the court to adopt the line of thought which eventually became a judicial liberalization. The development of a plaintiffs' bar has also created a body of experts who can speak for the claimant's point of view in proposing legislative changes, defending them before legislative committees, and opposing legislative changes which might harm the workers' interests.

#### D. *Attorneys' Fees*

If the claimant's advocate plays a necessary role in workmen's compensation, it follows that the system should allow for his reasonable compensation. The anti-litigation and even anti-lawyer bias which marked the earlier stages in the development of the system resulted in controlling the claimant's attorney's fee at an unreasonably low figure in many jurisdictions.<sup>34</sup> Yet no attempt was ever made to limit the fees which might be paid to the carrier's attorney, notwithstanding the fact that these came out of premiums and were therefore necessarily capable of having a long-run depressant effect on the benefit level. The control and limitation of fees in connection with workmen's compensation is appropriate and necessary, but this misguided and one-sided application of the principle has not so much protected the claimant against the greed of attorneys as put him at a disadvantage by making it difficult for him to get equally competent representation. Furthermore, where the defense attorney is assured of additional pay for additional work, but his opponent is not, the defense attorney can take advantage of the situation by bringing unfair pressure for a compromise settlement—for example, by repeated petitions to reopen an award.

<sup>33</sup> Larson's chapter in *Occupational Disability and Public Policy*, about to be published by the University of California. See also Larson, *Foreword*, 19 OHIO ST. L.J. 539-40 (1958).

<sup>34</sup> For a compilation of statutes and regulations governing attorneys' fees in all jurisdictions, see BROOKS, ATTORNEY'S FEES IN WORKMEN'S COMPENSATION; A REPORT OF THE STANDARDS AND PROCEDURES IN STATE LEGISLATION, U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. No. 220 (1960).

Whatever its amount, the claimant's attorney's fee should be added to the award, not subtracted from it.<sup>35</sup> The statutory benefit is already scaled down to the minimum on which the injured worker can be expected to get by (in practice, it is often less) and should not be subject to any deductions. The cost of presenting the claimant's case should be insured as part of the system, just as the corresponding cost to the defendant already is. But until this is done, at least there should be a provision, as there already is in some states, permitting claimants' attorneys' fees to be imposed on the carrier where a defense, review, or appeal is undertaken without reasonable ground.<sup>36</sup>

#### IV. AN ADDITIONAL TORT REMEDY PROPOSED

Since the theory of eliminating lawyers from the compensation system has not worked out, and since the present system, after fifty years, concededly remains inadequate, should we not now restore the right of a negligently injured worker to bring a damage action, without requiring the surrender of his right to compensation payments? I would not propose that the employer should be compelled to pay a second time for any loss against which he has been compelled to insure, but merely that an injured worker who can prove that his injury was caused by his employer's negligence should have the right to a judgment restoring the full amount of his loss (which compensation does not cover and does not purport to cover), less whatever he may be entitled to under the compensation system. This would be a less stringent standard than that which already prevails in England, where the injured worker retains his right to a negligence action as a cumulative remedy—and only half of the amount to which he is entitled under compensation is deducted.<sup>37</sup> Such an added remedy would be humane, equitable, and logical for a number of reasons.

First, if the employer negligently damages another's property, he is required to restore the full amount of loss; why should his responsibility be less for negligent injury to a human being? The rise in jury awards in personal injury cases in recent years reflects (in addition to rising living standards) an increased awareness that the injured plaintiff must be valued as a human being. Compensa-

<sup>35</sup> CHEIT, *op. cit. supra* note 2, at 268; Larson, "Model-T" Compensation Acts in the Atomic Age, 18 NACCA L.J. 39, 47 (1956).

<sup>36</sup> See BROOKS, *op. cit. supra* note 34.

<sup>37</sup> SOMERS 307.

tion values him as an instrument of production—and it is proper that it should, since compensation is a wage-loss insurance system. But, for that very reason, it is improper that a system which cannot take into account his value as a human being should be his exclusive remedy.

Second, if the employer negligently injures a third person, he is required to restore the full loss. And the employee can claim damages on the same principle, notwithstanding his entitlement to compensation, if the negligence of a third party is the source of his injury.<sup>38</sup> When full restoration for negligently caused injuries is the general rule—and exceptions such as charitable and governmental immunities are currently being eliminated<sup>39</sup>—why should a negligently injured person be discriminated against merely because the wrongdoer happened to be his own employer?

Third, the added tort remedy would involve principally those cases, such as death and serious permanent disability, in which workmen's compensation has proved most chronically, stubbornly, and cruelly inadequate.<sup>40</sup>

Fourth, the added tort remedy would make it possible to compensate, in many cases, damage elements which compensation often does not reach (and is not intended to reach), such as pain and suffering, and injuries producing permanent disfigurement, impotence, or sterility, which may be of tragic severity yet still fail to fit into the compensation picture because they result in little or no wage loss.<sup>41</sup> Doubtless it would be extending compensation beyond its intended function to impose liability without fault for such losses. But when they are the result of negligence, and would be fully compensable in tort if the victim were a non-employee, why should they go uncompensated merely because a loss of a different kind has been insured against?<sup>42</sup>

<sup>38</sup> See generally McCoid, *The Third Person in the Compensation Picture: A Study of the Liabilities and Rights of Non-Employers*, 37 TEXAS L. REV. 389 (1959).

<sup>39</sup> See, e.g., *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (governmental immunity); *Mullikin v. Jewish Hosp. Ass'n*, 348 S.W.2d 930 (Ky. 1961) (charitable immunity).

<sup>40</sup> See generally CHEIT, *op. cit. supra* note 2, at 61-185. See also Larson, *The Future of Workmen's Compensation*, U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. No. 180, at 5, in IAIABC PROCEEDINGS (1954); Katz & Wirpel, *Workmen's Compensation 1910-1952: Are Present Benefits Adequate?*, 1953 INS. L.J. 164.

<sup>41</sup> See 2 LARSON, *op. cit. supra* note 5, at 160-62.

<sup>42</sup> In using the phrase "fully compensable," the author suggests its fulfillment by the abolition of the common-law defenses of contributory negligence, the fellow-servant doctrine and assumption of risk. This was substantially accomplished in England when

Fifth, the fact that avoidable injuries would cost the employer more than unavoidable ones would create an effective economic motive for safety and prevention—much more so than the relatively slight pressures brought about by differential premiums resulting from experience ratings.<sup>43</sup>

It will be objected that industry cannot afford it. Of course, there has always been that complaint. It was made when employers' liability acts were first proposed. It was repeated when workmen's compensation was first proposed and has been heard since on every occasion when an effort has been made to improve the system. Added remedies have been available in England, and apparently in other countries as well, and seem not to have brought industry to a halt. Something similar has long been available in admiralty law in this country. Under the automobile compensation system in Saskatchewan, the right to a tort remedy is retained, and the compensation award is deducted from the damage judgment. The total costs for both compensation and liability coverage is far less than the average motor vehicle insurance coverage costs the American motorists.<sup>44</sup>

#### A. *Effect on Compensation Benefit Levels*

Pollack argues that "to obtain workmen's compensation (or social insurance) and tort liability as concurrent remedies would probably be at the expense of the workmen's compensation component, which would tend to remain at a low level as a 'floor of protection.'" <sup>45</sup> However, he does not tell us *why* this would be probable. And what little evidence we have seems not to bear this out. No documented decision is herein made as to the adequacy of English compensation levels, but it is at least clear that they have been raised repeatedly in recent years, and thus the availability of a tort remedy does not seem to have stabilized them as a "floor

workmen's compensation was incorporated (but not absorbed) into the social security system (Beveridge Plan). See SOMERS 307.

The term "fully compensable" is already applicable to injured railroad and maritime employees in this country by virtue of the Federal Employer's Liability Act (FELA), the Jones Act, the Boiler Inspection Act, as well as the non-statutory doctrines of admiralty law, *i.e.*, seaworthiness.

<sup>43</sup> SOMERS 106-09.

<sup>44</sup> Malone, *Damage Suits and the Contagious Principle of Workmen's Compensation*, 10 NACCA L.J. 44 (1952).

<sup>45</sup> Pollack, *A Policy Decision for Workmen's Compensation*, 7 IND. & LAB. REL. REV. 51, 61 (1953).



of protection."<sup>46</sup> In this country, we have seen the dollar amounts of maintenance and cure allotments expand in recent years, notwithstanding the fact that seamen have two additional remedies, one in negligence and one in strict liability for breach of the warranty of seaworthiness.<sup>47</sup>

Pollack also suggests that it is "more likely" that the employee would have to waive his compensation rights in order to sue.<sup>48</sup> This undoubtedly would be most undesirable. But why should any such requirement be accepted? The availability of immediate compensation payments would cure the tort action of one of its principal defects—slowness of recovery, with its resulting hardship and pressure for a compromise settlement—which caused its original abandonment. And if one is regarded as a form of social insurance and the other as an action to right a wrong, then why should either have to be waived in order to pursue the other?

### B. *Renegotiating the Bargain*

This brings us back to the question of the "quid pro quo," the original agreement in which the workers' tort rights were supposedly bargained away in order to obtain a workmen's compensation system. This, it seems to me, was merely part of the hesitant and apologetic manner in which the compensation principle originally had to be introduced, in order to soften opposition and to mollify courts which, it was feared, might hold (as indeed the New York Court of Appeals once did)<sup>49</sup> that the imposition of liability without fault deprived the employer of property without due process of law. Exclusiveness of remedy was thus—like elective coverage or confining the act to "hazardous" industries—one of the compromises by which the initial blow was softened. Today it is generally recognized that coverage should be compulsory and that all industries should be included.<sup>50</sup>

Does exclusiveness of remedy have a better case? Probably not. If workmen's compensation were a substitute tort remedy,

<sup>46</sup> SOMERS 299-311; MUNKMAN, *EMPLOYERS LIABILITY AT COMMON LAW* (1950), reviewed in 11 *NACCA L.J.* 314 (1953).

<sup>47</sup> Stumberg, *The Jones Act, Remedies of Seamen*, 17 *OHIO ST. L.J.* 484-86 (1956). The rising costs of living and medical care govern the rising costs of maintenance and cure.

<sup>48</sup> See Pollack, *supra* note 45.

<sup>49</sup> *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 94 N.E. 431 (1911).

<sup>50</sup> Parsekian, *Report*, U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. No. 213, at 96-98, in *IAIABC PROCEEDINGS* (1959); U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. No. 212, *op. cit. supra* note 2.

then there would be reason to say that the worker cannot have both: he cannot have his new right and yet keep the old one for which it was substituted. But most authorities now agree that viewing compensation as a substitute tort remedy is unsound. Compensation, instead, is regarded as a type of insurance, the cost of which ought to be borne by the enterprise. Thus, it follows that installing the system did not deprive the employer of anything for which he has to be paid, nor bestow anything on the worker that he ought to be required to buy by surrendering rights to which he would otherwise be entitled.

We are already chipping away at the exclusiveness of compensation and experimenting with tort remedy restorations. Many jurisdictions allow third-party actions against co-employees,<sup>51</sup> and New Hampshire has gone so far as to permit a tort action against the employer's compensation insurance carrier for failing to discover defects in a compressed air tank, after the carrier had undertaken to conduct monthly inspections of the plant.<sup>52</sup> Employers have been held liable to their employees at common law for intentional torts such as assault and battery,<sup>53</sup> false imprisonment,<sup>54</sup> slander,<sup>55</sup> and conspiracy in submitting a false medical report.<sup>56</sup>

This chipping away cannot be attributed to greed on the part of plaintiffs and their attorneys, but to the fact that injured workmen and their dependents have serious needs which are not being met by the workmen's compensation system. It would be better for the future of that system, as well as for the victims of industrial injuries, if the need and propriety of restoring tort actions as a conjunctive, and cumulative, remedy were frankly recognized.

Compensation-covered employees cannot be expected to put up indefinitely with recoveries of one-fifth to one-tenth of the amounts which courts would award, and are awarding, for the same injuries in negligence cases. Unless the exclusive-remedy principle is abandoned, the inequities which have already caused railroad workers and seamen to resist extension of compensation to their industries may force others to press for its abolition. This would be

<sup>51</sup> See, e.g., *Allman v. Hanley*, 302 F.2d 559 (5th Cir. 1962) (FECA); *Ransom v. Haner*, 362 P.2d 282 (Alaska 1961); *Hockett v. Chapman*, 69 N.M. 324, 366 P.2d 850 (1961).

<sup>52</sup> *Smith v. American Employers' Ins. Co.*, 102 N.H. 530, 163 A.2d 564 (1960).

<sup>53</sup> *Bock v. Wong Hing*, 180 Minn. 470, 231 N.W. 233 (1930).

<sup>54</sup> *Powers v. Middlesboro Hosp.*, 258 Ky. 20, 79 S.W.2d 391 (1935).

<sup>55</sup> *Braman v. Walthall*, 215 Ark. 582, 225 S.W.2d 342 (1949).

<sup>56</sup> *Flamm v. Bethlehem Steel Co.*, 18 Misc. 2d 154, 185 N.Y.S.2d 136 (Sup. Ct. 1959), *aff'd*, 10 App. Div. 2d 885, 202 N.Y.S.2d 222 (1960).

tragic, as compensation will always be needed to cover wage losses which are part of the unavoidable risks of modern technology and are thus not compensable by any fault-oriented remedy. It would also be unnecessary, since experience in England and elsewhere shows that exclusiveness of remedy is not an intrinsic requirement of a sound compensation system, but merely one of the lasting birthmarks the system bears in this country as a result of the struggles and compromises by which it was brought into being.

But whether or not workmen's compensation solves its problems by the method here proposed, the claimants' advocate has been and is likely to remain a constant stimulus for the improvement of the system to the end that it will adequately and justly serve the injured worker.