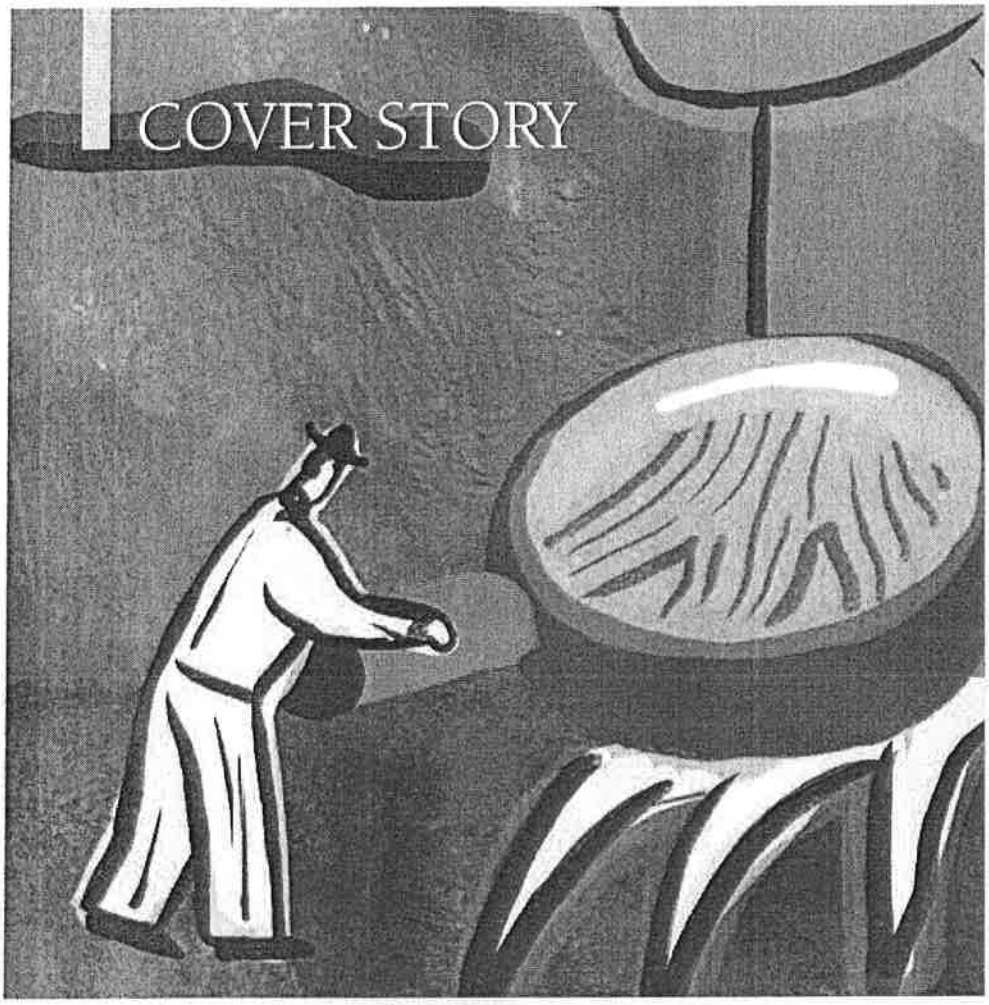

The Deep Roots of Workers' Comp

Pirates, Prussians and Progressives Are All in the Family Tree

By Russell Fowler

With the monumental changes to workers' compensation in Tennessee, it is time we pause and look back on how we got to where we are today, not only in Tennessee but more broadly. As Justice Holmes said, "The life of the law has not been logic: it has been experience."[1] But first, what is workers' compensation? In brief, it is the oldest form of social insurance. It is a "no fault" system for affording financial benefits and medical care for those suffering from work-related injuries in an industrial society where such injuries often occur. Unlike tort or negligence law, the goal of workers' compensation is to help injured workers and prevent poverty, instead of resolving disputes or establishing blame. The cost of the program is ultimately passed on to the consumer through insurance premiums added to the cost of production or of doing business.

The history of workers' compensation is a surprising journey winding through medieval England, piracy in the Caribbean of the 1600s,

Bismarck's Prussia, and the Progressive Era in Pittsburgh and Tennessee. But before we take the historical journey, we will look at how workers' compensation generally works in America today.

Workers' Compensation Acts in General

Generally, workers' compensation statutes in America have eight common elements:

1) An injured worker is entitled to benefits when suffering from accidental personal injury "arising out of and in the course of employment" or occupational disease. The phrase "arising out of" refers to the origin or cause of the injury and "in the course of" refers to its time and place;

2) Fault or negligence of the worker does not reduce employer liability;

3) Benefits are available only to employees, not independent contractors;

4) Employee's wage benefits are normally one-half to two-thirds the worker's average weekly wage. Additional benefits are medical and rehabilitation expenses and death benefits to dependents with maximum and minimum limits. Only injury causing disability, and hence reducing earning capacity, is compensable. Therefore, pain and suffering are not compensated;

5) When receiving workers' compensation, a worker and dependents forgo their common law right to sue employers for injuries falling under the statute. Accordingly, the amount of wage and death benefits is normally much lower than a court might award in a traditional lawsuit, yet workers' compensation is more certain, predicable, and swift;

6) A worker may still sue third parties causing the injury, but any financial recovery is first used to reimburse the employer for compensation costs;

7) The state administers the workers' compensation system, and, as opposed to traditional judicial proceedings, the procedure is remedial and thus designed to favor awarding benefits, but the expense and risk to employers of litigation, jury trials, and unlimited awards are eliminated; and

8) The employer is required to obtain private or state-funded insurance or meet self-insurance mandates to fund the system without government contribution.[2] Thus, both the employee and the employer are accorded certain benefits and protections.

The Historians' Interpretations

Legal historians have advanced two interpretations of America's workers' compensation acts. Early 20th-century scholars viewed their advent as a dramatic break from the normal and slow development of the common law. Their "social justice theory" contends that the reform is a backlash against callous 19th century law biased toward privileged employers and part of a wider movement recognizing workers' rights. They view workers' compensation as a safety net ameliorating harsh aspects of a modern capitalist and industrial society, where workplace injuries are common and all the more debilitating with mechanization.[3]

King Ethelbert of Kent

By the middle of the century, many historians downplayed the historical significance of workers' compensation. Some even asserted that the acts were a ploy by employers to reduce risk and liability and limit remedies to combat the climbing costs of jury verdicts under the common law. Furthermore, they believed the statutes really represent the capture of the regulatory apparatus by the very industries it was intended to regulate.[4]

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Tennessee's New Workers' Comp Law

Tennessee's workers' compensation system saw a major revamp during the 2013 legislative session. Gov. Bill Haslam made workers' compensation changes his number one priority. The headline change for both the bar and the public was the switch of management of disputed claims from the court system to a set of administrative tribunals.

The bill, which Gov. Haslam signed into law in May, creates a strong administrator responsible for much of the rule-making and many of the decisions in this process. The legislation clearly placed the welfare of the injured workers on the executive branch.

Hidden in the 120-page bill are many changes of the policies that the accompanying article brings to light. The system now will be speedier in paying claimants. It does so by narrowing restricting discretion to fashion individualized remedies. Long-term disability now plays a lesser role.

To learn more about the sweeping changes to the Tennessee workers' comp law, Public Chapter 289, attend the statutory review session Friday afternoon, June 14, at the TBA Annual Meeting in Nashville. The seminar will delve more in-depth into the new law, which takes effect July 1, 2014.

— Allan F. Ramsaur

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Finally, there are those with less politically charged interpretations. They conclude that workers' compensation is an efficient compromise between management and labor, giving speedy relief to the injured and economic protection to business with corresponding benefits to the social and economic order.

Medieval Precursor: The Wergild and Bot System

The principle of fixed compensation for an injury is found in early medieval Teutonic and English custom, but in the traditional context of placing blame. The wergild system developed to replace the legally sanctioned "blood feud" custom, where it was perfectly legal to kill the person who had killed a family member. Nevertheless, it was also legitimate for the family of the killed killer to kill his or her killer in retaliation. Hence, these feuds could rage on between families for generations or until entire families were exterminated. Of the term "wergild," the first syllable "wer" means "man," the second syllable "gild" means "money." A payment was made to a deceased victim's next of kin by the person causing the wrongful death. If only a body part was injured, a payment, called a "bot," was paid to the injured party.

Like a modern insurance schedule, there were specific predetermined amounts depending on the injury. A different bot in shillings was set for the loss of an eye, an ear, an arm, a leg, a hand, a front tooth, and even a toenail. Amounts also varied depending on the rank of the victim. A wergild was even set for the king, but at an unaffordable amount, of course. In the beginning, the wergild/bot system was elective. Therefore, one could still pursue the violent blood feud if desired. But, to promote peace and order, by the late Anglo-Saxon period the wergild and bot options had become compulsory in England.[5] The oldest surviving copy of such a medieval law code is "Ethelbert's Dooms" ("Dooms" means judgments) decreed in 604 by King Ethelbert of Kent (c. 560–616), who was the first English king to convert to Christianity.

Pirates' flags, called "jolly rogers," and their codes were revered by pirates and gave them a sense of unity and community. When it came to their injured brethren, there was honor among these swashbuckling thieves.

Pirate Law: Worker Justice Under the Jolly Roger

Caribbean pirates agreed to codes or articles whereby crew members received extra payment from captured treasure in set amounts for the loss of specified body parts in furtherance of their buccaneering on the high seas. Since this scheme awarded payment based on injuries obtained during the performance of work, albeit illegal work, pirate codes are workers' compensation statutes. A typical pirate code of the 1600s, part of the so-called "Golden Age of Piracy," allotted payment of 600 pieces of eight for the loss of a right arm, 500 for the left arm, 500 for the right leg, 400 for the left leg, and 100 for the loss of a finger or eye. Only after these injury payments were made was the plunder divided among the crew also according to the dictates of the code.[6] At least when it came to their injured brethren, there was honor among these swashbuckling thieves. However, it is not the medieval bot system or the pirate codes that is the direct root of modern workers' compensation. State statutes are traceable to Prussia during the Industrial Revolution.

Otto von Bismarck

The Prussian Precedent: Bismarck's Social Security System

As early as 1838, Prussia enacted measures providing aid to injured railroad workers and passengers and in 1854 required that certain industrial employers donate to local funds to assist ill employees. Chancellor Otto von Bismarck (1815–1898) engineered a remarkable array of reforms that constituted the first social security system. These included the Sickness Insurance Act of 1883, the Accident Insurance Act of 1884, and the Old Age and Disability Act of 1889. The Accident Insurance Act was the original governmental workers' compensation program and became a model for the world. However, unlike later American enactments, Bismarck's plan provided more expansive coverage, required worker contributions, and offered old-age benefits. But like the subsequent British compensation plans, the Prussian system was administered jointly by workers and employers with government oversight.[7] Bismarck saw his reforms as a way to forestall socialist revolution, unify his fragmented country, forge an alliance between the state and workers against the capitalists,

and build loyalty by workers to the nation. He funded his system with taxes on wages instead of taxation of the landed aristocracy. These reforms helped the nation weather the turmoil of the early 20th century and served as a persuasive example to other countries.

Common Law Barriers and the Progressive Movement

With the advent of the Industrial Revolution in Great Britain and the United States, industrial injuries increased at an alarming rate, but courts were reluctant to provide remedies. Moreover, reflecting the dominant laissez-faire economic philosophy of the day, British and American judges often strove to give greater protections to factory owners to encourage economic development. Hence, judges forged pro-business exceptions to the common law. These novel judicial rules included the "fellow-servant" doctrine, which was a shield to employer liability for injuries caused by a fellow worker. Another judicially crafted doctrine was that a worker had "assumed the risk" by agreeing to work in a hazardous situation. Furthermore, financial recovery was denied if the employee was contributory negligent in any manner or degree. Sometimes, judges even held that the injury resulted from an act of God and thus was not the responsibility of the employer.[8]

Although some courts attempted to provide workers with relief from harsh legal barriers, the reform effort was spearheaded by state legislatures. For example, early measures were enacted preventing the application of the fellow-servant doctrine when the employee causing injury worked in a supervisory capacity, and making the doctrine inapplicable when an employee was injured while fulfilling the legal obligation of the employer. Legislatures also passed laws mandating that there was no assumption of the risk by a worker when the employer failed to adhere to safety regulations.[9] These were baby steps, but then came the whirlwind of the Progressive Era.

The Progressive Era (1901–1920), which arrived with the elevation of Theodore Roosevelt (1858–1919) to the presidency upon the assassination of President William McKinley, was a remarkable time of political, social and economic reform, but it neither consisted of an organized movement nor had one leader. Its forerunner was rural populist displeasure with the economy, and it contained many diverse supporters, but its epicenter was the urban middle class.

Both the Republican and Democratic parties had powerful progressive wings and the movement was responsible for the election of three presidents: Theodore Roosevelt, William Howard Taft and Woodrow Wilson. It also won ratification of four constitutional amendments: the 16th (permitting the income tax), the 17th (direct election of U.S. senators), the 18th (prohibition) and the 19th (women's suffrage).

The progressive agenda was long. It sought to break political machines, fight corruption, instill efficiency and expertise in government, and achieve regulation and public ownership of transportation and utilities. It advocated the secret ballot, party primaries, election of judges, and specialized juvenile courts. Furthermore, progressives won federal and state victories such as creation of the Federal Reserve System and the Federal Trade Commission, improved enforcement of anti-trust law, regulation of railroads, civil service extension, a lower tariff, conservation measures, food and drug safety regulations, and better working conditions. And a major item on the agenda was workers' compensation.

"State statutes are traceable to Prussia during the Industrial Revolution."

The impetus for workers' compensation came as American states were influenced by the first British Compensation Act of 1897, but unlike American programs, Britain's worker's compensation was fully funded by government. An interest in the states eventually became a national movement as legislatures, beginning with Massachusetts in 1904, formed commissions to investigate proposals. In 1910, a Uniform Workmen's Compensation Law was drafted by representatives from various state commissions to serve as a model.[10]

Massachusetts enacted a law authorizing the creation of a private workers' compensation plan in 1908. The same year, at the insistence of President Roosevelt, Congress approved the

President Theodore Roosevelt

Federal Employers' Liability Act. This act covered federal employees in dangerous occupations and, even more broadly, workers of common carriers (railroads) operating in interstate and foreign commerce and, in doing so, abolished the fellow-servant rule for these workers. Other federal laws targeting certain industries and activities in interstate commerce followed.[11]

Progressive Persuasion: The Work of Crystal Eastman

Crystal Eastman (1881–1928), a young powerhouse of a lawyer and progressive who graduated from New York University Law School in 1904, arrived in

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Pittsburgh in the autumn of 1907 to study industrial accidents in the steel mills, railroad yards and coal mines of western Pennsylvania. In 1910, she published her brilliant book, *Work-Accidents and the Law,* which was a volume of a wider study known as "The Pittsburgh Survey" cataloging the region's social ills. Eastman documented the failure to address industrial accidents since the Civil War and argued that the common law's fault-finding process ignored "actual fact" of modern industry and business structures. She further reviewed the cost and delay of tort litigation when dealing with workplace injury. Eastman noted the lack of adequate insurance for workers in hazardous jobs, observing not only that few large employers purchased sufficient insurance for their employees, but that the forces of competition drive down the coverage of the few polices offered.[12]

Eastman's urged solution was the adoption of the comprehensive compensation system existing in Germany and Great Britain, where fault is irrelevant unless the worker's injury was intentionally self-inflicted, and compensation is awarded when the injury "arises out of and in the course" of employment. Compensation would be at one-half to two-thirds of the employee's weekly wage and medical expenses would be paid in her ideal plan. Courts in these cases would be replaced by administrative boards, thereby idealistically envisioning the elimination of litigation, delay and lawyers. Eastman would subsequently be appointed to the Wainwright Commission of New York to design the first mandatory state compensation statute and would tirelessly travel across the nation as an eloquent advocate for workers' compensation.[13]

Workers' Compensation Triumphant

In 1910, because of the leadership of progressive Republican Governor Charles Evans Hughes (1862–1948),

Crystal Eastman

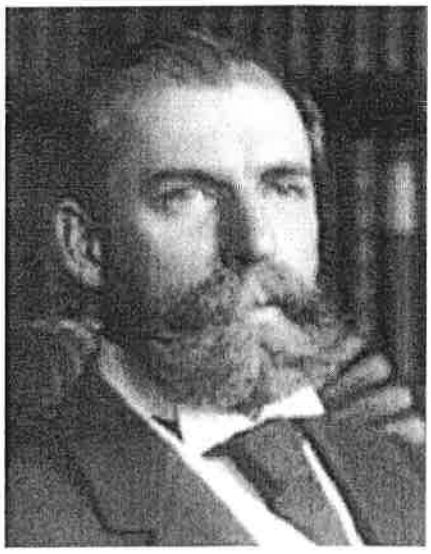
New York's assembly adopted the first compulsory workers' compensation act requiring participation by hazardous industries, but this measure was declared unconstitutional by the state's highest appellate court in 1911 as a violation of due process. Gov. Hughes, whom many considered the greatest lawyer of the time, went on to serve as associate justice of the U.S. Supreme Court, 1916 Republican presidential nominee, secretary of state and U.S. chief justice.

Wisconsin became the first state to approve the first comprehensive workmen's compensation program in 1911. Under Wisconsin's act, a totally disabled worker would recover for the length of his or her disability 65 percent of the average weekly wage, up to four times the worker's average annual earnings. Reminiscent of the pirate codes, states usually set a fixed amount for "permanent partial disability": so many weeks' compensation for an eye, a foot, an arm, a toe or a finger. The worker could get no less and no more.[14]

Learning how to avoid the constitutional problems encountered in New York's act, 22 other states had enacted plans similar to Wisconsin's statute by 1913. And although the progressive movement was suffocated by World War I, the march of workers' compensation continued across the nation state by state for the next three decades. All states had some form of compensation by 1948, with Mississippi being the last to join the fold.[15] And, in contrast to courts' previous pro-business, anti-labor stance, they slowly extended coverage through expansion of the meaning of "arising out of and in the course of employment." For example, on-the-job heart attacks, white collar and service workplace injuries, and injuries sustained at company social events were found compensable. Yet, even though appellate courts have widened coverage, in recent times, many legislatures have reduced benefits in order to please and attract business and industry.[16]

Tennessee's Workers' Compensation Act

1919 was a time of great labor unrest in Tennessee. Progressive Democratic Governor Albert H. Roberts of Overton County (1868–1946), who had been a distinguished Tennessee chancellor prior to winning the governorship in 1918, swiftly lost the support of fellow progressives when he used the state guard to suppress strikes at the Carter Shoe Company in Nashville and at the Knoxville Railway and Light Company. However, the same year, amid celebration of Tennessee's industrial workers, the beleaguered governor supported and signed into law the state's comprehensive workers' compensation act passed by the General Assembly.



Gov. Charles Evans Hughes

Unfortunately for Gov. Roberts, the achievement did him little political good. The following year, and with the opposition of organized labor, he was defeated in his bid for re-election by Republican Alfred A. Taylor of Carter County. Roberts went on to practice law in Nashville until his death in 1946.

Gov. Albert H. Roberts

Tennessee's act required employers with 10 or more workers to carry compensation insurance, but exempted coal mine operations, farm workers, independent contractors and common carriers in interstate commerce. For the worker, it was elective, but, if an employee failed to take part, the defenses of assumption of the risk, the fellow-servant rule, and contributory negligence were once again available to the employer.

Since no commission was established as in most states, Tennessee's Chancery and Circuit Courts approved claims and resolved disputes under the act with direct appeals from these courts to the Tennessee Supreme Court.[17] Eventually, Tennessee would be only one of two states with trial courts handling initial claims.

Soon after adoption, workers' compensation cases crowded the Supreme Court's docket.[18] These appeals ranged from statutory interpretation to applicability of common law principles and constitutional challenges. The court held that the act did not unconstitutionally discriminate by excluding the coal industry since it was so heavily regulated in other ways as a hazardous industry, and it held that the act did not unconstitutionally deprive the right to a jury since it was elective.[19]

Yet Tennessee's act did not always pass constitutional scrutiny and avoid revision. With the great changes in society by 1980, the court held that the act's different treatment of widows and widowers was unconstitutional, for the law afforded a widow with a conclusive presumption of dependency on her spouse's wages, but a widower had to prove his dependency.[20] In 1984, the Court recognized the tenability of a retaliatory discharge action when the employee was fired for filing a compensation claim.[21] In 1992, the Tennessee act underwent change concerning the handling of claims in litigation and mediation and a case management system was created to aid workers with claims and resolve disputes.

Controversial reforms in 2004, spearheaded by Gov. Phil Bredesen, sought to attract and retain business. These changes substantially limited liability for permanent injuries, but also set significant fines for employers who delayed benefit payments.

In April 2013, Gov. Bill Haslam won removal of claims from trial courts and placed them before an administrative agency. His proposal also narrowed the definition of work-related injury, restricted the method of calculation of benefits, set treatment guidelines, and has sought to reduce lawyer involvement and speed the process. Furthermore, the measure forbids a pro-claimant or remedial interpretation of the statute. Ironically, when states first adopted workers' compensation systems, a goal of most was to remove these matters from courts because they were seen as favoring industry over the rights of injured workers. Today, pro-worker advocates condemn and business interests applaud removal of these claims from Tennessee's Chancery and Circuit Courts and lodging them with a new state agency because they view elected judges as too generous to employees.

Conclusion

We return where we began with the great Justice Holmes. He said: "The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."

The history of workers' compensation confirms Holmes' conclusion. Worker's compensation, despite all its fixed standards and tables, is much more than a mathematical formulation of economic efficiencies. The state of the law, and more particularly for our purpose, the state of workers' compensation law, reflects the decency of our society at any given moment. How we treat our fellow citizens injured while striving to earn a living says much about us as a people. So far, we have rejected the notion of "survival of the fittest" when it comes to workplace injury. Time will only tell if we will remain, at the very least, as decent as pirates.

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Notes

1. Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881).

2. See Russell Fowler, *Workers' Compensation*, in *Encyclopedia of World Poverty* 1176-77 (Mehmet Odekon ed., 2006).

3. See John H. Langbein et al., *History of the*

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