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Compensation for Work Related Injury or Disease: Do Injured Workers Starve to Death?

Brenda Barrett *

Abstract. This paper asserts there can be no situation where a worker is more vulnerable or in a more precarious position than after suffering a work related injury or contracting a work related disease causing incapacity to work. It sets out the British system which imposes liability on employers to pay damages to employees who have suffered injury or disease through their employer's fault. Acknowledging the faults of this system it looks at an International Labour Organisation publication which refers to systems in other states and supplements this by further research. Then it returns to the ILO paper's criteria for a good system and measures the British system against that criteria. Finally, it questions the fate of those whose incapacity is not work related.

Keywords: *Work-related Injuries, Vulnerable Workers, ILO, Injuries to Vulnerable Workers*

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1. Introduction

There can be no situation where a worker is more vulnerable or in a more precarious position than after suffering a work related injury or contracting a work related disease that causes incapacity to work and earn a living. The International Labour Organisation (hereafter ILO) has estimated that, worldwide, more than 2.3 million people die from work-related accidents or diseases each year and that hundreds of millions more people, to a greater or lesser extent, suffer ill-health or disability as a result of their work.¹ There are several ways in which workers may be provided with income support while they are incapacitated by work: the state may provide them with income or, by one means or another, responsibility for maintaining the worker may be placed upon the organisation for whom the victim was working when incapacity occurred. Employers' liability may be income maintenance or possibly damages to compensate for the injury. Whether a country operates a social security scheme or an employers' liability scheme, a good scheme will also provide for rehabilitation to enable the victim to return to work as soon as possible. It has been suggested that worldwide less than 30 per cent of the working-age population, and less than 40 per cent of the economically active are obtaining compensation for work-related injuries. This is noted in the SIDA² report, published by the ILO, and cited extensively in this paper.³ The SIDA report notes employment injury schemes are to be found in 65 countries and proposes that prevention is better than cure⁴:

Employment injury schemes perform three linked functions. Firstly, they help (or should help) to support preventive work, so that fewer workplace accidents take place and fewer workers are affected by occupational diseases. Secondly, where accidents and illness have occurred, they help in the rehabilitation process, so that the individuals affected can if possible return to their original jobs, or if this is not possible to other employment. Thirdly, they offer

¹ ILO *Introductory Report: Global Trends and Challenges in Occupational Safety and Health, XIX World Congress on Safety and Health at Work*, Istanbul 11-15 September 2011.

² Swedish International Development Cooperation Agency.

³ *Strengthening the role of Employment Injury Schemes to Help Prevent Occupational Accidents and Diseases* 2013) ISBN 978-92-2-127090-4 (print) ISBN 978-92-2-127091-1 (web). (The SIDA report).

⁴ SIDA report pp 12-13.

compensation where individual workers have lost out, through illness or disability.

This paper was inspired by consideration of the system in the author's own country, namely Britain⁵ and noting the shortcomings of that system the researcher decided to compare it with arrangements in other countries in an attempt to identify a more satisfactory system. The starting point here is therefore an outline of the British employers' liability scheme. There will then be an exploration of the situation in other countries. Clearly this exploration could not be comprehensively world-wide because there are so many countries and some of the larger ones notably Canada, Australia and USA have federal systems of government where determining the relevant system of compensation may be partially or entirely delegated to the individual provinces. The paper was therefore initially intending to rely on the SIDA report to provide an overview of systems in operation in the 24 states covered by that report. However, that publication was not sufficiently helpful and so further investigation was conducted about four of the 24 states listed by that publication and other states which were formerly British colonies. Finally, to contribute to its conclusions the paper measures the British system against the propositions the SIDA report advances regarding the attributes of a good system, but then questions whether any such system is of itself adequate to support the disabled.

1.1. Relevant Questions

This paper looks for answers to the following questions in respect of the states considered:

- 1) Is the problem of income maintenance of the incapacitated worker addressed at all?
- 2) Where the problem is addressed does the system provide income maintenance or damages, or possibly both?
- 3) Who is to make the payments to the victim – the state or the employer?
- 4) Will the scheme benefit all workers or just employees?

⁵ Britain, rather than UK because there are separate laws for N. Ireland though the system set up there is much the same.

- 5) What, if any steps are taken to provide a secure fund from which payments may be drawn?
- 6) Will the intended beneficiary have any remedy if the scheme is not honoured?
- 7) Is the system accompanied by an effort to prevent occupational accidents and diseases?
- 8) Is there any focus on rehabilitating the victim?

2. The British Scheme

Primary responsibility for providing compensation to the injured employee has always rested with the employer. The liability of the negligent employer to pay damages to an injured employee can be traced back to 1837, but was not meaningful for many years because in practice there were so many situations⁶ where there would be no liability.

2.1. Income Maintenance

After The Workmen's Compensation Act 1897, which copied the then German scheme, employers were required to make weekly payments towards maintaining the income of workmen during their work-related incapacity.⁷ Many employers insured to meet their liabilities, and until about the 1930s, it was apparently deemed more prudent for a worker to claim income maintenance than to go to court to claim damages by proving the employer's negligence⁸. It has been suggested⁹ that the success

⁶ E.g. the injury was not due to the negligence of the employer but to the conduct of a worker in 'common employment' with the victim (and managers could be in 'common employment with the victim) or the victim knew of the risk but continued to work so that he was held to have 'assumed the risk'.

⁷ 'Workmen' were not the same as 'employees'; workmen were labourers rather than clerical or professional workers.

⁸ Holman Gregory Report on Workmen's Compensation (1920) Cmd. 816 A 3858.

⁹ It was suggested the reluctance to sue for damages may have been due to touting by insurance companies. A. Russell Jones (1944) 7 M.L.R 13 at pp.20/21.

of the victims of road accidents in obtaining damages inspired workers to litigate to claim damages from their employers.

2.2. The Employers' Liability Compulsory Insurance Act 1969

In 1968 there was a serious factory fire in which many workers were killed due to being trapped in the burning building. The employer was not insured. This incident led to the Employers' Liability Compulsory Insurance Act 1969 (hereafter the 1969 Act) and this short Act remains in force today. It requires every employer to have insurance cover with a recognised insurer and provides that employers must compensate, in the form of damages, any employee who suffers work related injury or disease, where that injury is due to the employer's negligence.¹⁰

The Health and Safety at Work Act 1974 (hereafter the 1974 Act) set up a system for creation and enforcement of regulations aiming to ensure that no one affected by activities at the workplace is injured. Failure to comply with regulations is a criminal offence. The Executive (HSE) set up under the 1974 Act is also charged with ensuring that employers have the cover that the 1969 Act requires and an employer who is not insured¹¹ commits a criminal offence. Recorded prosecutions suggest defaulters are likely to be SMEs.¹²

2.3. Shortcomings in the British Scheme

- Soon after the 1969 Act came into force it was described as a 'broken reed'¹³ largely because the scheme lacked anything comparable to the Motor Insurers' Bureau to provide for situations where the victim's employer was not insured. Thus it failed to address the very situation that prompted Parliament to legislate. This remains the case today except that The Mesothelioma Act 2014 enabled setting up a scheme for a levy on

¹⁰ Until recently employers were liable under the 1969 Act for breach of a strict statutory duty, but s.69 of the Enterprise and Regulatory Reform Act 2013 relieved employers from liability to compensate where they are not negligent.

¹¹ The criminal sanction is provided in the 1969 Act.

¹² E.g. Gumus Takeaway Limited, of Eastgate Street, Gloucester was fined a total of £2,000, with costs of £2,360, for offence under Section 4(2)(b) of the Employers Liability Compulsory Insurance Act 1969 <http://press.hse.gov.uk/2016/takeaway-shop-fined-for-failure-to-produce-elci/>

¹³ R. .A. Hanson, *The Employers' Liability (Compulsory Insurance) Act 1969 – A Broken Reed* 1974 ILJ pp.79-86.

insurers in order to fund the compensation of victims of this disease.¹⁴

- The 1969 Act provides only for employees and thus it does not cover other ‘workers’ as now statutorily defined.¹⁵ It is not always easy to identify whether a person is within the statutory definition of worker although not an employee,¹⁶ but in one case a court considered the test was whether the individual though lacking a contract of employment was nevertheless ‘integrated’ into the employer’s organisation.¹⁷ Interestingly insurers may cover volunteers, although in some cases, the number engaged as volunteers may exceed the number of employees¹⁸. The self-employed are not covered: they are expected to carry their own insurance.¹⁹ Employees who are members of a TU may be assisted by it in lodging a claim.

- Reports by the Department of Work and Pensions²⁰ considered more needed to be done to ensure the rehabilitation of injured workers. The amount of compensation awarded under the 1969 Act will largely be determined by medical evidence which should address prospects for recovery and make allowances for rehabilitation costs and less than complete recovery.²¹ Possibly the criticism is aimed at a scarcity of rehabilitation programmes.

¹⁴ The problem this Act addressed was that these were so called ‘long tail’ claims: i.e. the illness did not manifest until long after exposure to asbestos and the claimant may have worked for a number of organisations so attaching liability was difficult and also the organisations might no longer exist.

¹⁵ Employment Rights Act 1996 s.230 (3)(b) ‘... the individual undertakes to do or perform personally any work or services ... for another party ... whose status is not ... that of a client or customer...’

¹⁶ HSE has acknowledged this problem and suggested the employer may need legal advice <http://www.hse.gov.uk/pubns/hse40.pdf>

¹⁷ *Hospital Medical Group Ltd v Westwood* [2012] EWCA Civ. 1005.

¹⁸ E.g. sales personnel in charity shops or museums or wildlife trusts: to the authors knowledge in the case of wildlife trusts volunteers are frequently at risk by doing manual work in the countryside.

¹⁹ If they are providing services for an employer they may be able to claim under that organisation’s public liability insurance, but the law does not make public liability insurance compulsory.

²⁰ Unfortunately DWP has now archived these relatively recent reports.

²¹ The ILO paper notes that employers’ liability schemes are found in countries with an ‘Anglo-Saxon’ background which would appear to mean countries with a tradition of paying damages to victims.

- Relatively little is done to ensure that employers carry the insurance that the 1969 Act requires. HSE inspectors are encouraged to ask to see the insurance policy when inspecting a workplace.²² However much inspection is delegated to local authority inspectors²³ and they are not empowered to prosecute in respect of the 1969 Act. Nevertheless a postal survey²⁴ suggested only about 0.53% of those employed were without the cover the law required.

- There are indications that failure to insure may be attributable either to ignorance of the legal requirement or to the high cost of insurance. In addition some insurers will not cover high risk enterprises; in the postal survey a few respondents gave rejection by insurers as the reason for their failure to carry insurance. This raises questions why such situations are deemed too risky; is it the accident record of the particular enterprise or the reputation of the industry? In either case it would appear more needs to be done to prevent workplace injuries.

3. Systems in Other Countries

3.1. Systems in Other Countries

This report was submitted to ILO by a Swedish organisation known as SIDA²⁵ as an outcome of its project *Linking Safety and Health at Work to Sustainable Economic Development: From Theory and Platitudes to Conviction and Action*²⁶. It had been compiled by building on a report prepared by Dr. Sven Timm²⁷ of the German Social Accident Insurance Organisation who had benefited from the experience and insights of many contributors. The SIDA report incorporated the outcome of additional telephone interviews in order to develop recommendations for the establishment of new, or the improvement of existing schemes with a focus on prevention of injury. The report considers 24 countries and includes: the type of employment injury scheme operating in each country; the coverage; the supervisory and administrative arrangements; services and benefits, including

²² <http://www.hse.gov.uk/foi/internalops/og/og-00042.htm>

²³ Health and Safety (Enforcing Authority) Regulations 1998 (SI 1998/494).

²⁴ <http://www.hse.gov.uk/research/rrpdf/rr188.pdf>

²⁵ Swedish International Development Cooperation Agency.

²⁶ Undertaken 2009–2012.

²⁷ Deutsche Gesetzliche Unfallversicherung.

prevention services. The very title of the report suggests SIDA's focus is less on the type and content of the schemes than on their contribution to workplace safety.

The list of countries appears to be somewhat random and closer investigation indicates these countries were chosen on the basis that information about them was available because they had been the subject of other research. The list comprises:

- **Africa:** Kenya, Togo, Tunisia
- **Asia:** Australia, Indonesia, Japan, Korea, Singapore, Saudi Arabia
- **North America:** Canada (Ontario), Mexico, Panama
- **South America:** Brazil, Columbia, Costa Rica
- **Europe:** Austria, Belarus, France, Germany, Former Yugoslav Republic of Macedonia, Poland, Russia, Spain, Switzerland

Notably the UK is not included.

The report remarks the coverage will have varied greatly, particularly between developed and developing countries. In general, workers who are on casual contracts or are working on a self-employed basis, as well as domestic workers, and those working in the informal economy are most at risk of not being covered. (These groups comprise, arguably, some of the workers most at risk of accident and disease). It is noted that actual coverage of workers, by any scheme may be far from comprehensive, but the report gives little indication as to the extent of coverage in the schemes in each of the 24 addressed in its report.

There is virtually no discussion in respect of the individual countries covered in the report. The systems in these countries is set out in graphs and tables of which the most relevant here are:

Table 1: types of employment injury insurance, selected countries;

This shows that the majority have social insurance and relatively few have employers' liability schemes, but the table fails to take into account all of the 24 countries; notably Australia is omitted.

Table 2: Coverage of employment schemes: selected countries;

This looks at 10 of the 24 countries and demonstrates that all of these countries have schemes covering a wider range of the categories of the workforce than is the case under the 1969 Act in Britain.

Table 4: Services and benefits concerning rehabilitation; 22 of the 24 countries (not Poland and Tunisia) provide medical rehabilitation.

The analysis of the situation in the 24 countries considered is not of itself very helpful but comments and conclusions put forward in the report are more interesting in the present context. However at this point an attempt will be made to investigate in greater depth the systems in a selection of the 24 countries addressed by SIDA.

4. Supplementing the SIDA Report

Given that the SIDA report suggests that employers' liability schemes are found in countries with an 'Anglo-Saxon' inheritance those countries in the report which were originally British colonies will be addressed because the primary purpose of this paper is to compare the British system with other employers' liability schemes. Therefore the six systems investigated are Australia, Canada, Singapore and Kenya which were in the SIDA list of states and two others, namely New Zealand and India which were British colonies but not mentioned by SIDA.

Australia: The state of New South Wales (NSW) has been chosen because comprehensive information about the system in this state is provided in a book gifted by the author to this researcher.²⁸ Chapter 11 explains workmen's compensation is not an area that has been statutorily 'harmonised' by federal government, so each state and territory has its own legislation. Nevertheless in NSW the Workers Compensation Act 1987 followed the federal lead and abolished completely the right to recover common law damages for workplace injury and dealt solely with the liability to pay income maintenance, following the model of the British Act of 1897.

However there was public pressure for the reintroduction of common law rights so NSW exercised its prerogative and it now has a scheme which provides employers' liability alongside social security providing periodic payments the level of which are set at a common income support amount unrelated to earnings.

²⁸ See chapters 5 and 11 of N. Foster, *Workplace Health and Safety Law in Australia* (2012) Lexis Nexis (Butterworths).

Common law damages are recoverable for injury due to the employer's negligence or breach of statutory duty and are usually a 'once for all' lump sum. Insurance premiums are calculated according to an 'Insurance Premium Order' and take into account the wage paid by the employer, the type of industry and an 'experience factor' according to the number of claims made by the employer in the previous two years.²⁹ An emphasis on rehabilitation is covered in the Workplace Injury Management and Workers Compensation Act 1998 which requires that insurers develop 'injury management programmes'; that is an overall policy on assisting workers to return to work. For each worker who has suffered a significant injury insurers are required to develop an injury management plan. The common law scheme covers 'workers'. Worker is defined as 'a person who works under a contract of service or a training contract with an employer i.e. the common law contract of employment but case law has extended this to some other people.'³⁰

Canada. The Canadian system of providing support for workers who are victims of work-related injury is one of income maintenance. How the system operates is set out in *Brief Summary of Canadian Workers' Compensation System*³¹ which provides:

Workers' compensation in Canada had its beginnings in the province of Ontario. In 1910, Mr. Justice William Meredith was appointed to a Royal Commission to study workers' compensation. His final report, known as the Meredith Report, was produced in 1913. The Meredith Report outlined a trade off in which workers' relinquish their right to sue in exchange for compensation benefits. Meredith advocated for no-fault insurance, collective liability, independent administration, and exclusive jurisdiction. The system exists at arms-length from the government and is shielded from

²⁹ The Act sets up an Uninsured Liability and Indemnity scheme allowing the worker to make a claim under the scheme if the employer is either uninsured or missing and unable to be located.

³⁰ E.g. in *QBE Workers Compensation Ltd v Simaru Pty Ltd* [2005] NSWCA 464 a woman selling products on a commission basis and called a 'distributor' was deemed to be covered. Similarly in a case where a labour hire firm was supplying labour to a host firm, the host was regarded as an employer of the individual hired out and this will be the rule provided that the individual is not running his own business. *Building Workers Industrial Union of Australia v Odco Pty Ltd* (1991) 99 ALR 735

³¹ Prepared by the Office of the Chief Actuary, January 2010. http://www.actuaries.org/CTTEES_SOCSEC/Documents/Canada_Workers_Comp.pdf

political influence, allowing only limited powers to the Minister responsible.

The five cornerstones to the original workers' compensation laws have survived:

1. Workplace injuries are compensated regardless of fault. The worker and employer waive the right to sue.
2. Collective liability: The total cost of the system is shared by all employers.
3. Security of payment: A fund is established to guarantee that compensation monies will be available.
4. Exclusive jurisdiction: All compensation claims are directed solely to the compensation board.
5. Independent board: The governing board is both autonomous and non-political.

Each province and territory in Canada has its own exclusive Workers' Compensation Board/Commission.

Nevertheless it appears that common law claims against employers are theoretically possible if the workers' compensation board refuses a claim. An advertisement by an insurance company is illustrated by an example of a work-related injury where the victim had been denied statutory compensation, and urges employers to take out a policy to provide cover for such a situation.³² This advertisement points out that under the Commercial General Liability policy there is a specific exclusion relating to employees covered by workers compensation. However, in the event cover or benefits have been denied by any Canadian Workers' Compensation Authority, the standard wording can offer coverage under an extension called Contingent Employers Liability.'

Singapore. Singapore operates an employers' liability scheme to provide compensation for employees injured in the course of their employment. It

³² *Not Required to Carry Workers Compensation? Consider purchasing Employers Liability Coverage.*
<http://businessinsurancecalgary.com/not-required-carry-workers-compensation-consider-purchasing-employers-liability-coverage/>.

is spelt out in the Work Injury Compensation Act.³³ The Act sets out exactly how the sum due to the injured employee is to be calculated, how claims are to be made and stipulates the form in which an employee's claim must be made. The scheme is solely concerned with income maintenance.

Kenya. The system in Kenya is spelt out in the Work Injury Benefits Act as revised in 2012 and is solely concerned with income maintenance. Every employer is required both to register with the Director of Occupational Health and Safety Services and to keep a record of the earnings and other prescribed particulars of all employees and when required produce it to the Director for inspection. An employer is liable to pay compensation to an employee injured while at work unless the injury is caused by the deliberate and wilful misconduct of the employee. Apart from exceptions every employer must obtain and maintain an insurance policy, with an approved insurer in respect of any liability that the employer may incur under the Act.

An employee who suffers temporary total disablement due to an accident that incapacitates for three days or longer is entitled to receive a periodical payment equivalent to the employee's earnings, subject to the minimum and maximum amounts. Compensation for temporary partial disablement consists of a proportionate amount of the periodical payment. Compensation for permanent disablement is calculated on the basis of ninety-six months earnings. The Act also covers specified diseases.

Other countries not considered in the SIDA report but worthy of mention here are New Zealand and India.

New Zealand. In the 1970s New Zealand abolished its fault liability system of compensation for personal injury in favour of a social security system only to find this created problems of its own including high administrative costs and the blunting of deterrence effects. Return to fault based liability for accidents was achieved by The Accident Compensation Act 2001. The purposes of the Act are very comprehensive; they include providing for a fair and sustainable scheme for managing personal injury³⁴ that has, as its overriding goals, minimising both the overall incidence of

³³ The current version being (CHAPTER 354) (Original Enactment: Act 25 of 1975). REVISED EDITION 2009 (31st July 2009).

³⁴ Thus it appears that there is no limitation on the situations in which the injury may have occurred always provided the claimant has insurance sufficiently comprehensive to cover the situation.

injury in the community, and the impact of injury on the community (including economic, social, and personal costs).

The Act is very detailed and sets out every aspect of claims to which it applies. It specifically covers injury or disease caused by work. The victim claims from the employer. The employer has to establish a funding account to enable it to meet claims made upon it; in practice this means employers will need to have appropriate liability insurance to meet sums claimed. The Act requires the employer to meet relevant claims by providing, according to the circumstances, weekly compensation, and a lump sum for permanent impairment.³⁵ Rehabilitation must be considered where it is reasonably practicable for the employee to return to the same employment.³⁶

India. It is difficult to find any guidance to the post-colonial law on compensation for work related personal injuries in India. A document described as ‘A Guide for Activists’³⁷ gives an account of the Workmen’s Compensation Acts 1923³⁸ and 1948 as amended in 2000. This legislation makes the employer of more than twenty ‘workers’ liable to insure to provide a percentage of income maintenance during incapacity for work. The guide is published by Alternative Law Forum, Bangalore, 2005 but appears to be intended to explain legislation relating to the whole of India. The suggestion that it is needed by ‘activists’ may indicate that the law is not well understood and actively enforced.

While it is doubtful whether many workers in India receive any compensation for worker-related injury or disease it is clear the legislation intends only income maintenance rather than damages.

4.1. Summary

The majority of the former British colonies considered in the account above appear to impose on employers a duty to provide income maintenance broadly as envisaged in the nineteenth century Workmen’s Compensation legislation. Only NSW and New Zealand impose on employers a duty to pay damages and, interestingly even in these two

³⁵ Section 69.

³⁶ Section 71.

³⁷ <http://www.ngosindia.com/resources/wcact.pdf>.

³⁸

<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/32077/76827/F336348694/IND32077.pdf>.

states there was an albeit brief period towards the end of the twentieth century when employers' liability was reduced to paying income maintenance. However in both cases employers' liability to pay compensation in the form of damages was re-introduced by popular demand. The current system in NSW addresses some at least of the defects in the British system.

5. SIDA Recommendations

The SIDA report made recommendations about factors which it believed were likely to provide the most satisfactory workers' injury compensation arrangement together with reasons for this belief:

5.1. Preference for Social Security Schemes

The reasons for this preference may be summarised:

- Social insurance is likely to prove a more flexible and more satisfactory way of providing employment injury insurance than employer-liability insurance arrangements.
- Evidence suggests social insurance schemes are better able to encourage preventive practices by employers.
- Social insurance for employment injury naturally forms a part of an overall social security system.

5.2. Potential weaknesses with employers' liability schemes

These may be summarised:

- Claims processing may be so bureaucratic or opaque that workers may have to struggle to obtain compensation.
- Claims can be held up pending the formal acceptance by an employer that an incident has occurred.
- Schemes may lack the procedures for reporting of occupational accidents and diseases that are needed in order to identify their causes and enable preventive measures to be taken.

- It is an essential precondition that schemes are financially sustainable.

5.3. Preventive Strategies

The ideas set out in the paper concerning prevention include:

- Regulatory measures – generic terms such as ‘safe and healthy workplaces’ do not help with the practical details needed for good practices.
- Experience rating - charge higher or lower employer contributions, depending on past claims records.
- Engage with workers’ organizations, works councils or safety and health committees established by the social partners.
- Provide appropriate training and expert advice.
- Combine the support work of an adviser with the powers of inspection, provided inspectors fashion their services to the needs of the enterprise.
- Make risk assessments of work place activities.
- Investigation after an incident can help identify better practices and procedures for the future.
- Personnel appointed as inspectors should have high educational qualifications and have other appropriate work experience.
- To ensure the impartiality of inspectors and to retain experienced staff, adequate salaries are necessary.
- Employers should seek expert advice from other than inspectorates (e.g. professional associations).
- Employers should ensure that articles and substances produced for, and used at the workplace are safe and workers are instructed in how to use them.

- Employers should use medical personnel to ensure workers are protected from work related injury.

6. How Does the British System Measure Up?

In order to respond to the SIDA propositions factors taken into account will include matters not set out in the opening account of the British employers' liability scheme.

6.1. The British Social Insurance System

While the British employers' liability scheme assumes compensation in the form of damages will be provided through the 1969 Act this scheme has to be seen in the context of a very comprehensive social insurance system that largely operates to deal with need without reference to the claimant's nationality or status. Foremost in this system is the National Health Service which provides medical care for any person attending a hospital emergency service, regardless of the cause of incapacity. Before the patient leaves the hospital the social work department addresses any need for further support. For patients not normally resident in the UK arrangements may be made for returning to their country of domicile. For those domiciled in the UK where necessary arrangements will be made for the patient to go into residential care and other sources of support both in the nature of rehabilitation and income will be reviewed. Many of the needs of the patient will be met through social services.³⁹

Under the Social Security Contribution and Benefits Act 1992 the burden of ensuring a degree of income maintenance to an employee off work due to sickness was transferred from the social security system to the employer. This sick pay scheme requires the employer to make a weekly payment to an employee who earns more than the minimum each week, after the employee has been off work for 3 days, for up to 28 weeks, subject to medical certification that the employee is unfit for work. To be entitled to receive this statutory sick pay the employee does not need to have suffered an industrial injury or have an industrial disease. The criteria

³⁹ As part of the recent negotiations relating to the referendum on EU membership it was proposed to restrict the NHS from providing free treatment of those who had not been resident in the UK long enough to have 'earned' an entitlement to free treatment. It is not clear how NHS was intended to respond when faced with a patient needing emergency treatment.

is simply unfit for work. The worker who suffers a lasting disability as the result of an industrial disease or accident is entitled to claim from the industrial disability benefit scheme. Payments made under this scheme are drawn from the National Insurance Fund in part provided by payments made by employers and 'earners'.

6.2. Are there Serious Weaknesses in the British Employers' Liability Insurance Scheme?

- This scheme only provides cover for people who work under a contract of employment, though part time and even casual employees will be covered. Length of service is not a prerequisite of entitlement. Volunteers, being persons who are not paid for the services they provide to a willing organisation will often be covered.

- Insurers are not likely to go into liquidation because s.1 of the 1969 Act stipulates only 'authorised' organisations are eligible to offer cover; however insurers may refuse cover to enterprises deemed by to be too risky.

- If the employer denies liability then the victim may be forced into litigation to prove the entitlement. Similarly those who were not employees will need to sue if they are to attach any liability to the employer and they will have to prove the injury was attributable to the employer's negligence, whereas the employers' liability scheme may also provide cover for injury resulting from breach of a statutory duty⁴⁰. Additionally the employee may not be aware of the employer's duty to insure; employees are much more likely to be unaware of rights if they are not members of a trade union.

6.3. Prevention of Work-related Injuries

The primary purpose of HSE is the prevention of work-related injury. It is responsible for drafting health and safety regulations and when these drafts have been approved by Parliament it is HSE's task to ensure that they are complied with. It is responsible for the inspection of workplaces,

⁴⁰ Some such duties are strict e.g. failure to guard a machine. Recent legislation has removed this strict liability meaning claimants will need to litigate to establish that the breach was in fact negligent or due to defective equipment.

investigation of accidents and the prosecution of those who do not observe health and safety legislation. Legislation places great responsibilities on employers and the British Act of 1974 requires an employer ‘to ensure, so far as is reasonably practicable the health, safety and welfare at work of all his employees.’⁴¹ While the SIDA paper might regard this as a vague requirement the expression ‘reasonably practicable’ has a long history in British compensation law. It is frequently used successfully as the ground for prosecution. It is almost strict liability and its very generality means it is very difficult for an accused to avoid liability. Another arduous duty stemming this time from Europe is the requirement that organisations carry out risk assessments.⁴² Risk assessments have to be carried out for the purpose of identifying the measures that need to be taken to comply with legislation. Given the generality of the ‘reasonably practicable’ duty this means that safe systems are necessary throughout workplace operations.

An official report published on the eve of the 1974 Act stated that in 1970 there were 985 fatal accidents at work and a total of 472,746 accidents.⁴³ The most recent annual report states 142 workers were killed and 76,000 other injuries were reported.⁴⁴ The demise of the heavy industries may account for some of this improvement but some credit must also go to legislative system. Moreover fatalities would nowadays be much lower if it were not for deaths resulting from historical exposure to asbestos.

Amongst its other work the inspectorate provides much advice. Most of this is readily available on its website and includes guidance notes and research reports, some of which have been produced by other organisations⁴⁵. In addition Regulations made in 1977 which apply to unionised workplaces expect employers to consult with union appointed safety representatives. These representatives are empowered to inspect the workplace and also to ask for a safety committee.⁴⁶ When trade union membership became less general a further set of regulations required

⁴¹ S.2(2). Incidentally s.6 addresses the safety of articles and substances used at work.

⁴² Made law in Britain by the Management of Health and Safety at Work Regulations 1992 (SI 1992/2051) Regulation 4. Subsequently revised and reissued.

⁴³ Report of the Robens Committee on *Safety and Health at Work* 1970-1972 Cmnd 5034.

⁴⁴ Key figures for Great Britain 9014-15. <http://www.hse.gov.uk/statistics/>. There is a duty resting principally on employers to report accidents to HSE (Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (SI 2013/1471)). In the case of a fatality the police are involved, which ensures that in these cases HSE is informed.

⁴⁵ Quite often such reports have been produced by other organisations, possibly universities under contract with HSE.

⁴⁶ Safety Representatives and Safety Committees Regulations 1977 (SI 1977/500).

employers to consult with their employees and empowered elected safety representatives to make representations to their employers about potential hazards and dangerous occurrences at the workplace.⁴⁷ Unfortunately safety representatives are not so widely appointed nowadays and it is not clear that the protection now given to whistle blowers⁴⁸ has the same persuasive influence upon employers.

7. Conclusion

This account has more than addressed the questions posed at its outset. It is always difficult to compare aspects of the regulatory systems of one state with those of another and systems of compensation for incapacitating work-related injuries are no exception to this general rule.

The paper began by admitting that there were imperfections in the British Act of 1969. Evaluating this system by the criteria suggested in the SIDA paper, confirms the 1969 Act is comparatively narrow in scope in that it applies only to those within the statutory definition of ‘employee’ but it operates in a state which has both a comprehensive social security system and a strong culture of requiring organisations to operate to safe systems in order to minimise workplace injuries. Comparing the British system with that of countries that were formerly British colonies has been interesting because all show some indications of their inheritance, but only two, NSW and New Zealand have schemes which are similar to the British one and these may be superior to the British scheme in that they have greater legislative control over insurers, provide for cover when the employer is not covered and apply to a wider range of victims. Canada, Singapore, Kenya and India provide only for income maintenance, and in India this intention may not be honoured. All of the states considered, (that is the 24 in the SIDA report, and those with the common law inheritance) have schemes that aim to protect incapacitated worker from starvation.

However it is noteworthy that ILO estimated that, worldwide, more than 2.3 million people die from work-related accidents or diseases each year and that hundreds of millions more people, to a greater or lesser extent, suffer ill-health or disability as a result of their work. It has been suggested that legal coverage worldwide is less than 30 per cent of the working-age population, and less than 40 per cent of the economically active. Finally

⁴⁷ Health and Safety (Consultation with Employees) Regulations 1996 (SI 1996/1513).

⁴⁸ Ss. 43A, 44 and 103A of the Employment Rights Act 1996.

even where a country purports to have a comprehensive scheme of income maintenance that scheme may not be honoured.

Analysis of the British system of employers' liability in the context of the national social security system revealed that there is a comprehensive system of at least providing income maintenance for all who are too incapacitated to work. This comprehensive provision means that not only those whose injury was caused by work are provided for but that provision is made for those whose injury is unrelated to work; thus for example those who suffer a sports related injury, or undergo amputation of a limb due to diabetes are covered, as are those who suffer a genetic incapacity. This paper did not set out even to produce a comprehensive world-wide review of provision for those who suffered work related injury or disease; it completely overlooked those whose incapacity was not work related. Had it undertaken this wider investigation it would surely be clear that there is no reason to be complacent that the incapacitated will receive sufficient support to ensure they do not starve.

ADAPT International Network



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