Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*

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A

THE BACKGROUND OF THE AMERICAN SYSTEM

The United States of America is a highly industrialized and mechanized society. Its current active civilian labor force totals more than 62,000,000 people. Necessarily the protection of them and their families against the hazards of modern life constitutes a matter of supreme social importance. One of the most dreaded perils that threaten a man's health and thereby his earning capacity (the basis of his standard of living) is the industrial accident. The total annual number of disabling work injuries in the United States fluctuates around 2,100,000; approximately 1,600,000 are sustained by employees. Fortunately only about 11,000 of these injuries to employees are fatalities, but around 70,000 result in permanent total disability.

It is therefore not surprising that not only the prevention of such accidents but also the relief against the economic consequences of such work injuries is a major task of social planning.

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Redress against economic losses sustained by a worker as a result of a work injury is in the United States, as elsewhere,\textsuperscript{3} provided for by a special system of social security,\textsuperscript{4} traditionally called Workmen's Compensation. It is, however, important to note at the outset that in the United States the regulation of workmen's compensation is left entirely to the individual states. There is neither a national social insurance scheme for industrial accidents, such as exists in the field of Old Age and Survivors Insurance,\textsuperscript{5} nor national supervision of the state systems, such as is established in the case of Unemployment Insurance.\textsuperscript{6} The federal government, however, has enacted workmen's compensation laws in certain special fields, \textit{viz.} for the protection of its own employees,\textsuperscript{7} the employees in the District of Columbia\textsuperscript{8} and the longshoremen and harbor workers.\textsuperscript{9} As a result there operate today in the United States 48 state systems, three federal systems, three territorial systems\textsuperscript{10} and one municipal system in the Virgin Islands.\textsuperscript{11} Despite this multiplicity of systems, however, it is possible to isolate and dis-

\textsuperscript{3} For example in France and Germany, as well as in the United Kingdom, industrial accident insurance constitutes an integral, but separate, branch of the existing comprehensive social security systems. In France workmen's compensation was introduced by a statute of April 9, 1898, Sirey, Lois annotées, 1896–1900, 751. At present industrial accident insurance is governed by the statute of October 30, 1946, Sirey, Lois annotées, 1946–1947, 708, which in that respect completed the organization of the great social insurance system initiated with the ordinance Oct. 4, 1945, Sirey, Lois annotées, 1943–1945, 2030. In Germany industrial accident insurance was introduced by the Accident Insurance Act of July 6, 1884, R.G.Bl. I, 69. This act was the second step in a succession of legislative enactments which commenced in 1883 with the passage of a health insurance law and was designed to create a comprehensive social insurance system. The various statutes were subsequently consolidated in the Social Insurance Code of 1911, R.G.Bl. I, 509. In the United Kingdom workmen's compensation was introduced by the Act of August 6, 1897, 60 & 61 Vict., c. 37. At present industrial accident insurance is governed by the National Insurance (Industrial Injuries) Act of July 26, 1946, 9 & 10 Geo. VI, c. 62, which preserves this type of protection as a separate branch in the general National Insurance System established by the National Insurance Act of August 1, 1946, 9 & 10 Geo. VI, c. 67.

\textsuperscript{4} While a noted writer even recently has argued that the American workmen's compensation system, like the original English and French systems, establishes true social security but not social insurance, I Larson, Law of Workmen's Compensation 13, 14 (1952), this distinction seems to be overly refined and American courts have come to speak of workmen's compensation as a special type of social insurance even where primary responsibility rests on the employer. See, \textit{e.g.}, Nagy v. Ford Motor Co., 6 N.J. 341, 350, 78 A.2d 709, 713 (1951).


\textsuperscript{8} 45 Stat. 600 (1928).


\textsuperscript{10} \textit{I.e.}, for Alaska, Hawaii and Puerto Rico.

\textsuperscript{11} "Kean Workmen Compensation Act" of February 11, 1954, enacted by the Municipal Council of St. Thomas and St. John (Bill No. 289).
cuss common basic features and trends in the law of compensation for industrial accidents in the United States. For historical as well as economic reasons the various compensation laws are fundamentally alike and the courts in one jurisdiction look to decisions from other jurisdictions for the solution of controversial issues.

The movement for the enactment of workmen's compensation laws spread to the United States as the result of the pioneer legislation in Germany and Great Britain. President Theodore Roosevelt was one of the early advocates of this type of social legislation and, owing largely to his efforts, Congress passed in 1908 a compensation act for the protection of government employees. New York, in 1910, was the first state to attempt comprehensive legislation for the compensation of industrial accidents, but one of the two acts passed in that year was subsequently declared to be unconstitutional by the highest court in that state. The year 1911 marked the real beginning of workmen's compensation law in the United States. In that year ten states passed more or less general workmen's compensation laws, and from then on this kind of legislation formed an important thread in the fabric of American law. The other states followed the general trend at varying speed. The last jurisdiction to fall in line was Mississippi which held out until 1948.

During the formative period disagreement existed among the American experts whether the English system, which imposed the primary liability for compensation on the employer, or the German system, which imposed the liability for compensation on a public body formed by the employers of a particular trade, was preferable. As a result most of the pioneer states adopted compensation laws modeled after the English act of 1906, while a few created special state funds supported by the covered employers in analogy to the German Berufsgenossenschaften. Subsequently an inter-

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13 He requested Congress to enact the necessary legislation in several messages in 1906, 1907, and 1908. See Riesenfeld and Maxwell, Modern Social Legislation 132 ns. 43, 45 (1950).
15 N.Y. Laws 1910, c. 352 and 674.
18 For details see Riesenfeld and Maxwell, Modern Social Legislation 135 n.65 (1950).
19 See especially Sherman, Can the German Workmen's Insurance Law Be Adapted to American Conditions?, 61 U. of Pa. L. Rev. 67 (1912).
esting rapprochement between the two systems occurred. In all jurisdictions which have no exclusive state funds the law came to require private employers to insure their liability with private casualty insurance companies. At the same time policy terms and premium rates for compensation insurance became standardized and subject to extensive state supervision. In addition, a number of states established so-called "competitive state funds" in which employers may insure their compensation liability if they do not wish to deal with private industry.

A substantial number of American states still refrain from making workmen's compensation the exclusive and compulsory method of redress for industrial injuries and accord employees and employers the right to elect reliance on tort principles. However, these jurisdictions generally provide that acceptance of compensation coverage is presumed, and that the party who wishes to remain outside the compensation system must make a formal declaration to that effect prior to the injury. In addition, an employer who elects non-coverage is usually deprived of the so-called "common law defenses" which exonerate a master where the employee has assumed the risk, is guilty of contributory negligence or has sustained the injury through the act of a fellow servant. In some states the employer in such case is even subject to a presumption of negligence.

The experience of more than forty years has given workmen's compensation an accepted place in the American legal system. The scope of the

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22 Competitive state funds operate in Arizona, California, Colorado, Idaho, Maryland, Michigan, Montana, New York, Oklahoma, Pennsylvania and Utah.


24 See e.g., Iowa Code c.85, § 85.19 (1946).

25 The best barometer for the ever-increasing practical importance of workmen's compensation as an indispensable instrument of social protection is the steadily mounting output of legal and not-so-legal writing on the subject. Older literature is noted by Riezenfeld and Maxwell, Modern Social Legislation (1950), especially at 136 n.69. Of treatises, articles and other studies which have appeared or have been completed since that date the following bibliography might be helpful: Up-to-date, comprehensive general treatises on the law of workmen's compensation are the mammoth work by Schneider, Workmen's Compensation (3d ed., 16 vols., 1939–1953); Larson, Workmen's Compensation Law (2 vols. 1952). New treatises, supplements to treatises or monographs on individual state laws are Hanon, The Law of Employee Injuries & Workmen's Compensation (2 vols. 1953, 1954) concerning the California law; Campbell, California Workmen's Compensation Outline (1951), supplementing the 1935 treatise; Angerstein, Illinois Workmen's Compensation (rev'd. ed. 1952); Malone, Louisiana Workmen's Compensation Law and Practice (1951); Thomas, Workmen's Compensation in New Mexico (U. of N.M., Dept. of Econ. 1950). Of law review articles and other
coverage has undergone a process of progressive liberalization owing to the combined efforts of legislatures, administrative agencies and courts; steady efforts have been made to correct inadequacies and inconsistencies in benefit structures and levels; administration has become increasingly expert and efficient; and the methods of financing have been subject to at least some rationalization.

B

PROGRESSIVE TRENDS IN THE SCOPE OF COVERAGE

The United States possesses neither a universal and uniform nor even a comprehensive and integrated social insurance system. The question of WHO is protected against WHAT arises therefore with accentuated acuteness in each separate branch of social insurance. The coverage formulae of the fifty-five operative American compensation systems vary a great deal.


26 The greatest gap in the American social insurance system consists of the total lack of insurance covering medical care for non-employment connected diseases, and the practically non-existent protection against loss of earnings and earning power resulting from non-employment connected disability. A limited "short term sickness cash benefits insurance" exists in California, New Jersey, New York and Rhode Island. See Riesenfeld and Maxwell, Modern Social Legislation 445 (1950).
in their details. As an approximately accurate generalization, however, it
may be stated that workmen’s compensation covers
(1) employees or dependents of such employees
(2) who are employed in non-exempt or designated employments
(3) against harm which can be classified as
(a) either personal injury by accident, sustained in connection with such employment,
(b) or occupational disease (as defined by the controlling statute), contracted in such employment,
(4) resulting in disability or death.

Each of these constituent elements of coverage has undergone a gratifying process of liberalization in the course of time, as will be shown in the following discussion. Special emphasis, however, will be placed on the most recent manifestations of these trends.

1. The requisite employee, employer and employment status

Employee Status. Generally speaking, the protection of the workmen’s compensation acts is available only to employees and their dependents. Whether or not, however, a person possesses employee status for purposes of coverage is frequently not as easy a question as one might think. The difficulties arise particularly in borderline cases which involve the differentiation between employment and other forms of economic-legal relationships such as leases, sales, independent commission agencies, joint ventures and other forms of independent contracts. It is recognized that no readily applicable all-embracing test is available, but that each case must be determined on its own particular facts with due regard for the particular social purpose of the compensation law and specific statutory provisions.

In making the ultimate determination whole congeries of criteria must be considered among which the so-called control element plays the primary and dominant role. This test turns on the extent to which the purported employer possesses the right of control, not only with respect to the final result of the work but also with respect to the mode and method of its performance, although he may not have exercised it in the particular case.27 While this approach applies the traditional common law criteria,28 most


28 Restatement, Agency § 220 (1933).
courts have advocated and exhibited a particularly liberal attitude, and some jurisdictions, either by legislative or by judicial fiat, have imposed on the purported employer the burden of proof that the services performed on his behalf were rendered under an independent contractor relationship. The courts have frowned upon attempts to disguise employment relationships as leases, participation arrangements or independent contractor relations, but have denied coverage where a business was conducted in such fashion legitimately and have upheld findings of absence of employee status where the injured person pursued an independent calling of his own, especially a skilled trade, or had actually embarked on a joint venture.

Ordinarily the courts have insisted that an employee to be covered must receive an economic benefit in return for his services, although it need not be expressed as a pecuniary compensation. Thus a person who drove a car for another from one location to another in order to save gasoline, oil and wear and tear on his own car was considered to be an employee while a volunteer worker in a servicemen's canteen was not. However, persons drafted into service by law enforcement or fire protection officers have been treated as employees and organized volunteer firemen have been covered.

See statements to that effect in Warren's Case, 326 Mass. 718, 719, 97 N.E.2d 184, 186 (1951) ("The workmen's compensation act is to be construed broadly to include as many employees as its terms will permit."); Aleckson v. Kennedy Motor Sales Co., 55 N.W.2d 696, 700 (Minn. 1952) ("It is not to be overlooked that a liberal interpretation of the compensation act to accomplish its purpose precludes a technical and narrow application of tests used in determining whether an employer-employee relationship exists."); Fitzen v. Cream Top Dairy, 73 Idaho 210, 249 P.2d 806 (1952); Wilson v. Kelleher Motor Freight Lines, Inc., 12 N.J. 261, 265, 96 A.2d 531, 533 (1953).


Gulbrandson v. Midland, 72 S.D. 461, 36 N.W.2d 655 (1949); Tennis v. City of Sturgis, 58 N.W.2d 301 (S.D. 1953); Anderson v. Bituminous Casualty Co., 155 Neb. 590, 52 N.W.2d 814 (1952) and cases cited.
expressly by many statutory amendments. As a sign of an incipient more liberal trend, it has recently been held that a carpenter, who was employed by a church and donated some of his services without pay, was covered even during the "gift" hours.

The coverage of persons occupying proprietary status or performing managerial functions has likewise been subject to gradual liberalization. The traditional view excludes partners absolutely from coverage for any service rendered to the firm. While the courts have persisted in their attitude, a few legislatures have extended protection to so-called "working" partners. With respect to corporate stockholders and officers the courts were slightly less conceptualistic and developed the dual capacity doctrine. According to this approach a corporate officer is covered for services which transcend the regular corporate (executive) functions. In Wyoming this doctrine has found statutory recognition. Minnesota and New York extend the coverage of corporate officers even to the performance of their executive duties, while, conversely, Iowa and Texas have statutes excluding such corporate officers from any coverage.

Employer Status. Situations exist not infrequently where, though it is clear that the victim of an injury was not an independent contractor but an employee, nevertheless there are serious doubts on the question as to which of several persons or firms was the responsible employer of the worker at the time he suffered the harm. A typical case of this character occurs when a skilled craftsman procures other workers to help him in performing a job for a third party. If one of these employees gets hurt, it must often be decided whether the middleman was an independent contractor and conse-

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38 See, e.g., CAL. LABOR CODE §§ 3361, 4458; IOWA CODE c.85, §§ 85.1(4), 85.61(4) (1946); MICH. COMP. LAWS § 411.7 (Supp. 1952); MINN. STAT. §§ 176.011(3) and (4) (1949), as amended by MINN. LAWS 1953 c.755, § 1; N.Y. WORKMEN'S COMP. LAW § 2(5) and (9); WIS. STAT. §§ 102.07(7), 102.11(1)(c) (1949).
40 Rasmussen v. Trico Feed Mills, 148 Neb. 855, 29 N.W.2d 641 (1947) and authorities cited; Harper v. Ragus, 62 So.2d 167 (La. App. 1952); Fink v. Fink, 64 So.2d 770 (Fla. 1953); Brinkley Heavy Hauling Co. v. Youngman, 264 S.W.2d 409 (Ark. 1954).
41 California, Michigan, Mississippi, Nevada; see RIESENFELD AND MAXWELL, MODERN SOCIAL LEGISLATION 179 (1950).
42 Hirsch v. Hirsch Bros., 97 N.H. 480, 92 A.2d 402 (1952) (vice-president and minority stockholder of family contracting corporation killed on flight undertaken to purchase equipment); Fruit Boat Market v. Industrial Commission, 264 Wis. 304, 58 N.W.2d 689 (1953) (president and general manager of family grocery corporation in which he held majority of stock, injured while studying marketing conditions).
44 MINN. STAT. § 176.011 subd. 8(3) (1949), construed in Cosgriff v. Duluth Firemen's Relief Assn., 233 Minn. 233, 46 N.W.2d 250 (1951); N.Y. WORKMEN'S COMPENSATION LAW § 54(6).
sequently the employer of the victim or whether he was merely an agent or "conduit" in the hiring and otherwise occupied the position of a fellow-worker. Again the right of control is the primary criterion for the determination. Closely allied to, and perhaps overlapping, this category of cases are the so-called "loaned employee" situations. In cases of the latter type a "general" employer designates one or more of his regular employees to render services for another party, frequently in connection with some leased equipment. The third party may or may not thereby become a "special" employer toward whom the loaned employee may look for compensation. A number of courts have felt that the compensation liabilities of the general and the special employers are mutually exclusive and have held the special employer or his insurance carrier responsible for compensation only if the special employer obtained the right of exclusive control with the assent of the employee. However, some jurisdictions have liberalized their approach and have held that a special employer may be liable even without the right of exclusive control and that in cases of loaned employees the general and the special employer or their insurance carriers are jointly and severally liable for compensation.

In order to prevent contractors from impairing the right to, or the security of, compensation payments by parceling out work to subcontractors forty-one states have inserted into their acts so-called subcontractor clauses which make the principal contractor the statutory employer of the employees of the subcontractor. These clauses, which are patterned after an analogous provision in the English Workmen's Compensation Act of 1906, vary a great deal as to the detailed conditions under which the principal contractor becomes the statutory employer. Generally speaking, the pertinent sections in the different state acts can be classified into two

46 For illustrative recent cases see Brietigam v. Industrial Acc. Comm., 37 Cal.2d 849, 236 P.2d 582 (1951); Henry v. Industrial Comm., 412 Ill. 279, 106 N.E.2d 185 (1953); Edwards v. Harvey, 194 Tenn. 603, 253 S.W.2d 766 (1952).

47 For recent illustrations and judicial discussions see Carnes v. Industrial Comm., 73 Ariz. 264, 240 P.2d 536 (1952); American Stevedores Co. v. Indus. Comm., 408 Ill. 449, 97 N.E.2d 325 (1951); Langevin's Case, 326 Mass. 43, 91 N.E.2d 920 (1950); Sargentelli's Case, 117 N.E.2d 827 (Mass. 1954); Darvell v. Paul A. Lawrence Co., 57 N.W.2d 831 (Minn. 1953); Rantis v. Michigan Motor Express, 333 Mich. 73, 52 N.W.2d 602 (1952). It may be of interest to note that German case law has developed similar principles with respect to the compensation status of loaned workers. See the leading cases I. G. Farbenindustrie W. G., 171 R.G.Z. 393 (1943); Fa. S. v. B., 8 B.G.H.Z. 330 (1953), 6 N.J.W. 458 (1953).


groups: One type provides for liability of the principal contractor only if the subcontractor has failed to procure compensation insurance, while the other does not contain such condition. Practically all of these clauses, either by express or by implied limitation, apply only if the work which is subcontracted constitutes part of the principal's ordinary trade or business, a qualification which has given rise to considerable uncertainties.

**Covered and Excluded Employment.** No American workmen's compensation act covers all employees. Not only is the coverage of public employment subject to a great variety of rules and exceptions, but even with respect to private employment the coverage is by no means universal. The majority of states predicates coverage on the number of regular employees of the enterprise, a requirement which ranges from two to fifteen. This type of coverage condition is, of course, apt to create not infrequent doubts. In addition, the preponderant majority of jurisdictions excludes agricultural, domestic and casual employment at least from their compulsory or automatic "elective" coverage. Again the application of the exemptions is beset with difficulties. Finally, a number of states provide compulsory or elective coverage only for enumerated hazardous or extra-hazardous employments, though in some of them the list is quite comprehensive.

60 Prototype of a subcontractor clause which operates regardless of compensation insurance by the subcontractor is Mass. Ann. Laws c.152, § 18 (1949), while the other category is represented by N. Y. Workmen's Compensation Law § 56. California is one of the jurisdictions which has no subcontractor clause in its act.


54 For a survey of the coverage provisions relating to public employment see U. S. Department of Labor, Bureau of Labor Standards, Bulletin No. 125, State Workmen's Compensation Laws as of Sept. 1950, Table 6 (1952).

65 At present, the coverage provisions of thirty state acts contain numerical restrictions. In New York, however, which is one of these jurisdictions, the limitation is without practical significance, since it does not apply to the very broadly defined "hazardous" employments.

56 Nevada, Oklahoma.


59 See Riesenfeld and Maxwell, Modern Social Legislation 185, 190, 194 (1950).

60 Illinois, Kansas, Louisiana, Maryland, Montana, New Mexico, New York, Oklahoma, Oregon, Washington, Wyoming.
Generally speaking, there has been a marked trend toward universal coverage. In view of the above-mentioned exemptions, however, and of the possibility, existing in a great number of states, to elect noncoverage, it is difficult to ascertain the numerical scope of compensation protection in the United States. According to the best available estimates, actual workmen's compensation coverage under state laws protects approximately thirty-three million workers, i.e., approximately 77 per cent of the state civilian labor force, not counting seamen or persons employed by the railroads or the federal government. Federal employees have a system of their own. Seamen and railroad workers are not covered, as their spokesmen have always objected to legislation of this type.

2.

Requisite type of compensable harm

The English Workmen's Compensation Act of 1906 did not compensate every disability or death resulting from an employment-connected cause but specified that compensable harm must be either a personal injury by accident or one of the six industrial diseases listed in a special schedule. American compensation law was greatly influenced by this English dichotomy. Most of the early American statutes restricted compensable harm to "injury by accident" or "accidental injury" and did not cover any occupational disease. Even in states where the controlling statutory language did not contain the qualifying expressions "by accident" or "accidental" the courts were inclined to read them into their acts. There were,

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61 See text at note 23 supra.
63 Railroad workers are indemnified for personal injuries and death resulting from their employment according to modernized tort principles under the Federal Employers' Liability Act, 45 U.S.C. §§ 51ff. (1952); seamen are indemnified according to the same rules under the Jones Act, 46 U.S.C. § 688 (1952) and, in addition, enjoy supplementary protection under general admiralty law. For the resistance of the unions against attempts to extend workmen's compensation principles to railroad workers and seamen see Richter and Forer, Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers, 36 Cornell L.Q. 203 (1951); Kossoris and Zisman, Workmen's Compensation for Seamen, 62 Monthly Labor Rev. 851 (1946).
64 Workmen's Compensation Act, 6 Edw. 7, c.58, § 1 (1906).
65 Workmen's Compensation Act, 6 Edw. 7, c.58, § 8 and Schedule III (1906). The schedule specified not only the categories of covered industrial diseases but also the types of employment in which they must be contracted to be compensable.
however, some noteworthy exceptions. The Federal Employees’ Compensation Acts of 1908 and 1916 extended from the beginning to all types of personal injuries sustained by a federal employee in the performance of his duties.\(^67\) Massachusetts likewise extended its original act of 1911 to all “personal injuries sustained by an employee” without restrictive qualifications.\(^68\) California dropped the limiting words “by accident” from its statute of 1913 as early as 1915\(^69\) and Wisconsin took a similar step in 1919.\(^70\) Iowa’s compensation act of 1913 likewise did not confine compensability to accidental injuries, but it limited the statutory term “personal injury” in a slightly different manner by providing that it “shall not include a disease except as it shall result from the injury.”\(^71\) As a result occupational diseases were not covered in that state until legislation to that effect was passed in 1947.\(^72\)

Gradually, American workmen’s compensation coverage was extended to encompass occupational diseases. Most of the early amendments to that effect followed the English pattern and used the so-called *schedule system* which specified the particular occupational diseases covered, and frequently also the types of work in which they must be contracted.\(^73\) In the course of time, however, the so-called *blanket system* came to prevail. This system provides for a general coverage of occupational diseases either by specifying that the term “personal injury” shall not exclude diseases traceable to the employment,\(^74\) or by inserting a special generic definition of the term “occupational disease” into the acts.\(^75\) Today the blanket system governs in thirty-one out of the fifty-five American systems,\(^76\) the schedule system

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\(^67\) 35 Stat. 556 (1908); 39 Stat. 742 (1916). The broad interpretation was given by the Attorney General. For details see Riesenfeld and Maxwell, *supra* note 66 at 227.


\(^69\) Cal. Stats. 1915, c.607.

\(^70\) Wis. Laws 1919, c.457.

\(^71\) Iowa Laws 1913, c.147 §§ 1, 17(g).

\(^72\) Iowa Laws 1947, c.71.


\(^74\) This method was in effect employed by the Federal Employees’ Compensation Acts of 1908 and 1916 and the early acts of Massachusetts, California and Wisconsin, *supra* notes 67, 68, 69, 70. Connecticut followed in 1921 by passing the so-called occupational disease amendment, Conn. Pub. Acts 1921, c.306 § 11, which obviated expressly the holding of the *Miller* case, 90 Conn. 349, 97 Atl. 345 (1916); see Kovaliski v. Collins Co., 102 Conn. 6, 128 Atl. 288 (1925).


is followed in twenty-two systems,77 and only two states have no occupational disease compensation.78 It might be mentioned that American statutes are even more liberal in this respect than the law of the country which originated the idea of social insurance against work injuries; for Germany still clings to the schedule system.79

The original restriction of coverage to injuries by accident or of accidental character produced a great deal of perplexity and confusion about the type of harm embraced in this term. Since all compensation acts required that personal injury to be compensable must be employment-connected, the courts concluded that the further statutory qualification denoted some additional limitation and excluded certain employment-connected causes of disability, especially non-traumatic and occupational diseases. Following and combining language of two leading English cases50 the American courts defined an accident within the meaning of the compensation act as an occurrence which is (a) "an unlooked-for mishap or untoward event which is not expected or designed" and (b) "traceable, within reasonable limits, to a definite time, place and occasion or cause." Naturally this self-imposed limitation, which was reiterated ad nauseam,81 came to haunt its originators. In a way the statutory recognition of occupational diseases—especially in "schedule" jurisdictions—has produced the deplorable effect of perpetuating and accentuating the difficulties in the uncovered cases.

To be sure, the courts quickly invented many stratagems to extricate themselves from the worst entanglements flowing from their artificial definition of accident. Noteworthy in this connection are the "repeated trauma" and "final physiological change" doctrines which allow compensation where the disability is the cumulative effect of injurious working conditions. Illustrative of this trend are cases sustaining benefits for a knee injury produced by repeated bruises from a defective gear shift;82 loss of hearing caused by exposure to repeated sounds of shots in the employment

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78 Mississippi, Wyoming.

79 German law at present grants compensation for forty categories of occupational diseases specifying that the majority of them shall be covered regardless of the type of employment in which they are contracted, but making such requirement for certain types of occupational diseases. To the latter class belong infectious diseases which are occupational for employees of hospitals, sanitariums, public health services, etc., Decree of July 26th, 1952, R.G.Bl. I, 395.


82 Aldrich v. Dole, 43 Idaho 30, 249 Pac. 87 (1926).
as instructor for plant guards,\(^83\) and a slipped disc deemed to be the culmination of a series of jars occasioned by the operation of a tractor.\(^84\) A few jurisdictions have reached similar results by refusing to subscribe to a definition of accident which requires traceability to one definite event.\(^85\) Actually, under a broad definition of covered occupational disease, many of these cases could preferably be allocated to the latter category of compensable harm.\(^86\)

The conceptual contortions in which the courts felt constrained to engage for the purpose of distinguishing compensable "accident" from non-compensable "disease" can only be recorded with marvel, if not with shock, by a student of the evolution of workmen's compensation who is not legalistically inclined. Even as great a jurist as Justice Cardozo succumbed to the sinister spell of the magic word "accident." In allowing compensation for an embalmer's helper who contracted blood-poisoning by scratching a pimple with a hand soiled by embalming fluid the judge drew a dividing line between infections which penetrated the body through normal channels and those which entered through abnormal or traumatic passages.\(^87\) In the course of time the courts abandoned all attempts at a generic differentiation between accident and disease. They settled on the comfortable formula that a personal injury was accidental when it arose from some catastrophic, or at least extraordinary, condition in the employment and not merely from the performance of the usual work in the usual manner.\(^88\) This test was frequently invoked in cases involving pneumonia and other respiratory ailments resulting from exposure to cold and dampness, heart attacks in various forms resulting from heat or exertion, or back injuries incurred through lifting or twisting.

\(^84\) Caddy v. R. Maturi & Co., 217 Minn. 207, 14 N.W.2d 393 (1944); followed in Manthe v. Employers Mut. Cas. Co., 58 N.W.2d 758 (Minn. 1953) (prolapsed disk caused by jars occasioned by defective automobile seat). For further examples see Riesenfeld, Forty Years of American Workmen's Compensation, 35 Minn. L. Rev. 525, 537 (1951).
\(^85\) See, especially, Webb v. New Mexico Pub. Co., 47 N.M. 279, 141 P.2d 333 (1943), 148 A.L.R. 1002 (1946) (dermatitis from allergy to employer's soap); Hardin's Bakeries v. Ranger, 217 Miss. 463, 65 So.2d 461 (1953) (dermatitis from allergy to gloves furnished by employer); Christopher v. City Grill, 67 So.2d 694 (Miss. 1953) (dermatitis); Tate v. Dr. Pepper Bottling Co., 70 So.2d 602 (Miss. 1954) ("jeep disease" from driving truck); but cf. Aranbula v. Banner Min. Co., 49 N.M. 253, 161 P.2d 867 (1945) (silicosis not covered as accidental injury).
\(^86\) See, e.g., Bondar v. Simmons Co., 23 N.J. Super. 109, 92 A.2d 642 (1952), aff'd, 12 N.J. 361, 96 A.2d 795 (1953) (bursitis of the shoulder contracted from necessity of pulling a lever 500 to 700 times a day held to be an occupational disease under applicable generic definition).
\(^88\) The leading case announcing this test was Matter of Lerner v. Rump Bros., 241 N.Y. 153, 149 N.E. 334 (1925), denying compensation to the dependents of an employee who suffered an ultimately fatal respiratory disease as a result of work requiring sudden transition from super-heated outside atmosphere to the chilly temperature of a refrigerator.
Gradually, however, many courts have become satisfied with less and less dramatic and unusual circumstances and have left little more than a shadow of the old hurdle on the path to compensation. Illustrative of this trend is the development in New York. There the highest court once announced emphatically that while a disease might be an accident, its inception "must be assignable to a determinate or single act identified in space or time" and "must also be assignable to something catastrophic or extraordinary." But today the trickle of adjudications in that state has accomplished a deep erosion of this latter requirement, especially in "heart cases." In the wake of a momentous decision by the Court of Appeals concerning a heart attack case the Appellate Division of the Supreme Court has recently concluded that the "semantic snarl" caused by the "usual work" test has now been cut away and that this test "has lost most, if not all its former significance." Nevertheless the same court still pays at least lip service to the old cliché in other exposure cases, although a concomitant trend to broaden the notion of occupational disease alleviates some of the rigors of this approach.

Other jurisdictions apparently have even gone beyond the present status of New York law in discarding the requirement of the presence of some unusual exposure or condition in the employment and consider an injury to be accidental whenever there is sufficient proof that the employment was substantially contributory to the inception or a definite aggravation or acceleration of the disease. Conversely, there is a substantial number of jurisdictions which still insist on the traditional restrictive approach.

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94 See e.g., M. E. Peace Lumber Co. v. Wyrick, 262 S.W.2d 894 (Ark. 1953) (compensability of heat stroke "whether due to unusual or extraordinary condition or not"); Peterson v. Safeway Stores, 158 Kan. 271, 146 P.2d 657 (1944) (coronary attack); State Highway Department v. Powell, 258 P.2d 1189 (Okla. 1953) (heart attack); Patterson Transfer Co. v. Lewis, 260 S.W.2d 183 (Tenn. 1953) (heart attack).
at least two jurisdictions the highest courts have expressly reserved the
question whether usual work performed in the usual manner can be the
cause of an accidental injury while in one important state the supreme
court has discarded the unusual exertion test for "orthopedic" injuries,
but has as yet not marshalled a majority for a similar approach in the "heart
cases." Minnesota and Rhode Island finally have resolved the issue by
recent legislative action which eliminated the qualification "by accident"
from the respective statutes.

Supplementary to the trend of liberalizing coverage through eliminat-
ing restrictions flowing from the notion of accident is a growing tendency
of the courts to broaden the definition of occupational disease which is
especially effective in instances where precedent precludes the finding of
an accidental injury.

3.

Requisite employment connection

Since workmen's compensation is based on the idea that industry and
its consumers should shoulder the financial burden of work injuries, the
necessity arises for drawing a line between employment-connected and
non-employment-connected injuries. As in all other countries where the
law requires such differentiation the tribunals in the United States have
been confronted with a staggering volume of controversies involving this
issue.

Most American jurisdictions have couched the definition of the requisite

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96 In Phila. Dairy Prod. Co. v. Farran, 44 Del. 437, 61 A.2d 400 (1948) the Supreme Court
delaware left the question undecided whether injury as result of the performance of usual
work in the usual manner could be an injury by accident, but it was answered affirmatively
by the superior court of that state in Gray's Hatchery v. Stevens, 46 Del. 191, 81 A.2d 322
(1950). In New Mexico the question is still open on the authority of Stevenson v. Lee Moor
Contracting Co., 45 N.M. 354, 115 P.2d 342 (1941), quoted in Hathaway v. New Mexico State
Police, 57 N.M. 747, 263 P.2d 690 (1953).


98 Seiler v. Robinson, 24 N.J. Super. 559, 95 A.2d 153 (1953), aff'd by divided court,
583 (1953); but see the concurring opinion in Mergel v. New Jersey Conveyors Corp., 103 A.2d

99 Minn. Laws 1953, c.755, § 1 subd. 16; R.I. Laws 1949, c.2282.

(heart trouble as occupational disease); Bondar v. Simmons Co., 23 N.J. Super. 109, 92 A.2d
642 (1952), aff'd, 12 N.J. 361, 96 A.2d 795 (1953) (see supra note 86); Griffin v. Griffin &
Webster Co., 283 App. Div. 145, 126 N.Y.S.2d 672 (1953) (supra note 93). See also the careful
625 (Alaska 1953).

101 About theory and nature of workmen's compensation, see especially RIESENFELD AND
MAXWELL, MODERN SOCIAL LEGISLATION 137 (1950); Riesenfeld, Forty Years of American
Workmen's Compensation, 35 MINN. L. REV. 525, 529 (1951).
employment connection in a formula borrowed from the English acts of 1897 and 1906, viz. the famous words:

arising out of and in the course of employment.

Only nine states have adopted a different phraseology, four being satisfied if the injury was sustained in the course of the employment, one requiring that it arose in the course of or out of the employment and the others employing an entirely different wording.

In analyzing the meaning of the clause "arising out of and in the course of employment," American courts, following English precedent, have generally interpreted the words "in the course" as relating to the time, place and circumstances of the accidental injury, while the other branch of the formula has been understood as referring to its cause and origin. But actually it is recognized that the two parts of the phrase are so closely interrelated and mutually dependent that any sharp conceptual distinction is headed for failure. In some instances a decisive factor in considering an injury as arising in the course of the employment will be the fact that it was caused by the employment. Vice versa, an injury might be deemed to arise out of the employment, principally because it arose in the course of the employment.

Generally speaking, it can be said that the interpretation of the clause "in the course and out of the employment" has undergone a continuous process of expansion which has equally affected both of its branches. It is recognized with increasing liberality that the course of employment embraces all activities which are reasonably incident to the job and that an injury is sustained out of the employment, if the latter can reasonably be considered as substantially contributory to such harm. The courts have

103 Utah. A similar formula applies in some of the Australian states; see Ford, Worker's Compensation—"Injury by Accident," 4 Res Judicatae 160 (1950).
104 West Virginia, Wisconsin, Wyoming, and Puerto Rico.
105 For detailed references see Riesenfeld and Maxwell, Modern Social Legislation 234 (1950); Riesenfeld, Forty Years of American Workmen's Compensation, 35 Minn. L. Rev. 525, 540 (1951). For a recent example of this two-pronged analysis see Seger v. Keating Implement Co., 157 Neb. 560, 60 N.W.2d 598 (1953) (denying compensation to a mechanic killed at employer's shop while repairing his own truck).
106 Illustrative are the cases where an employee is attacked by an irate rejected job applicant, fellow employee, or customer of his employer after working hours in renewal of a previous altercation either while still on the premises, Gardner v. Industrial Acc. Comm., 73 Cal. App.2d 361, 166 P.2d 362 (1946), or on his way home or even later; see the leading cases of Matter of Field v. Charmette K. F. Co., 245 N.Y. 139, 156 N.E. 642 (1927); Scholl v. Industrial Comm., 366 Ill. 585, 10 N.E.2d 360 (1937), 112 A.L.R. 1254 (1938); but see Dicks v. Brooklyn Cooperage Co., 208 S.C. 139, 37 S.E.2d 286 (1946) (injury resulting from attack by fellow employee on employee while on his way home and a half mile from employer's premises not compensable, though in renewal of an altercation during employment).
107 The main illustrations are the so-called positional risk cases, discussed infra.
repeatedly and justly insisted that (except where there is an express statutory mandate) questions of compensability are not governed by traditional tort notions and doctrines, such as "scope of employment," "frolic and detour," "act of God," and proximate or intervening causes, but are to be decided on their own policies of attributability, although perhaps, conversely, compensation ideas have come to affect the scope of tort liability.

Without purporting to be exhaustive, a discussion of the most recent cases dealing with certain of the more typical situations might illustrate the current state of the evolution.

It has long been recognized that the course of employment is not strictly confined to the assigned job, but also covers activities which are reasonably necessary for the personal comfort and convenience of the employee while at work, such as getting fresh air, pausing for a smoke or a drink of water, or using toilet facilities. Lunch periods, especially on the premises of the employer, are likewise covered, although an employee might lose his protection if he chose to eat his lunch in unorthodox and dangerous places. There is an increasing tendency to consider participation in recreational activities or competitive sports as part of the employment, especially if the employer insists on such cooperation, or at least sponsors such activities primarily for economic reasons and provides for substantial financial support. Acts for the accommodation of employer's customers will usually be part of the employment, but there is a conflict of authority as to whether and how far the pursuit of a third person who attempted to rob a customer of the employer on the premises of such emp-

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108 See, e.g., the recent statements to that effect in O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504, 506 (1951) (rescue attempt under L. & H. Workers Act); Voris v. Texas Employers Ins. Ass'n, 190 F.2d 929, 934 (5th Cir. 1951) (suicide as result of shock under L. & H. Workers Comp. Act); Corcoran v. Fitzgerald Bros., 58 N.W.2d 744, 745 (Minn. 1951); Matter of Glickman v. Greater N.Y. Taxpayers, 305 N.Y. 431, 113 N.E.2d 548 (1953); Village of Butler v. Industrial Commission, 265 Wis. 380, 61 N.W.2d 490 (1953) (sheriff performing emergency duties outside his own territory).


111 Robertson v. Express Container Corp., 13 N.J. 342, 99 A.2d 649 (1953) (female employee eating lunch on roof injured in fall through glass section of roof while making an exploratory trip to other roof level).

ployer is still covered by this rule. The Supreme Court of the United States has upheld an award granting compensation to the dependents of an employee who, while waiting for home transportation after the end of his work, saw a third person drowning in the ocean and met death in the attempt to rescue him; also there is substantial authority for the proposition that the course of the employment is not broken if a peace officer orders an employee to assist in the arrest of a fleeing criminal.

Unlike German and French law, American compensation statutes do not establish general coverage for an employee while on his way to and from work. But this rule is subject to an increasing number of exceptions under which a traveling employee is covered. In a famous opinion the Supreme Court of the United States summed up these exceptions under four main categories: "(1) where the employment requires the employee to travel on the highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls, as in the case of firemen; (4) where the employee uses the highway to do something incidental to his employment, with the knowledge and approval of the employer. These categories are supported by abundant authorities from practically all jurisdictions.

Most recent controversies concern the applicability of the various types of exceptions to individual cases and the effect on travel otherwise covered of detours undertaken either to run a personal errand or for pleasure. Even where travel to and from work is not covered, the protection of the employee extends to injuries sustained in the usual zones of ingress and


Egan's Case, 116 N.E.2d 844 (Mass. 1954) and authorities cited.

German Reichsversicherungsordnung 1911 (in the currently applicable version) § 543(1). French Loi sur la prévention et la réparation des accidents du travail et des maladies professionnelles, 1946, § 2, par. 2.


egress appertaining to the employer's premises, which include employer-provided parking lots.\textsuperscript{110}

Perhaps the most marked liberalization in the ideas concerning attributability to the employment can be observed in that great class of cases in which the question of compensability is usually discussed with reference to the "out of" branch in the coverage clause. Two great trends are evident: One is the rapid withering away of the "common hazard" doctrine. The other is the extension of compensability to injuries resulting from horseplay and fights with customers, fellow-employees or persons using common facilities.

The common hazard doctrine was borrowed by the American courts from some early English and Irish cases in an attempt to find a readily applicable exclusionary test for coverage questions.\textsuperscript{120} This doctrine denies compensation if injuries suffered at work are not the result of perils, different or more intensive than those to which members of the public are exposed in general. Gradually the courts fell into the habit of finding special exposure in certain typical situations. The first recognized class of this character comprised the so-called "street risk" cases which awarded compensation to employees suffering street accidents, such as collisions, being run over, falling or tripping in travel that is part of employment.\textsuperscript{121} Occurrences other than regular traffic accidents were soon included in the street risks, sometimes by over-dramatizing the perils of street life in a crowded city.\textsuperscript{122} An analogous development took place in cases of injuries on places other than streets due to inanimate forces of nature, such as lightning and tornadoes, or to insects and animals. The judges are usually prone to find "special" exposure in such situations\textsuperscript{123} although occasionally they take a curiously reluctant attitude.\textsuperscript{124} Most recently the courts have come to

\textsuperscript{110} For details and authorities see Riesenfeld, \textit{Forty Years of American Workmen's Compensation}, 35 Minn. L. Rev. 525, 545, text to ns. 112 and 113 (1951); and Riesenfeld and Maxwell, \textit{Modern Social Legislation} 244 (1950). For a recent illustration, see Hughes v. American Brass Co., 104 A.2d 896 (Conn. 1954).

\textsuperscript{120} For details see Riesenfeld and Maxwell, \textit{Modern Social Legislation} 262 (1950).

\textsuperscript{121} For a good illustration and discussion see City of Chicago v. Ind. Com., 389 Ill. 592, 60 N.E.2d 212 (1945).


\textsuperscript{123} See, e.g., Bales v. Covington, 312 Ky. 551, 228 S.W.2d 446 (1950) (lightning); Stokely Foods Inc. v. Industrial Commission, 264 Wis. 102, 58 N.W.2d 285 (1953) (lightning); for further references see Riesenfeld and Maxwell, \textit{Modern Social Legislation} 270 (1950).

\textsuperscript{124} See, e.g., Kroon v. Kalamazoo County Road Commission, 339 Mich. 1, 62 N.W.2d 641 (1954) (carrying of metal shovel not sufficient to sustain finding of special exposure to lightning); Traders & General Ins. Co. v. Ross, 263 S.W.2d 673 (Tex. Civ. App. 1953) (heat stroke not compensable because carpenter working outside on hot day was not exposed to a greater hazard from an act of God than the general public).
realize that the whole common hazard doctrine, with the attending necessity of finding special exposure in deserving circumstances, was merely a judicial atavism, inconsistent with the basic policies of compensation, and have recognized the so-called “positional risk” doctrine. In the language of the Chief Justice of the Supreme Court of Wisconsin,\textsuperscript{125} under this doctrine “an injury is compensable if it would not have happened but for the fact that the conditions of the employment put the claimant in the position where he was injured; ... [i]n other words, there is causal connection between the employment and the injury where the employee is obligated by his employment to be present at the place where he encounters injury through the instrumentality of a third person or outside force.” Accordingly, an employee who in the course of his employment is hit by a stray missile,\textsuperscript{126} or attacked by an insane intruder,\textsuperscript{127} or irate customer\textsuperscript{128} is covered, so long as the attack was not precipitated by a purely personal grudge against the employee.\textsuperscript{129}

The reversal of the previously adamant attitude is especially noticeable in the so-called “horseplay” and “assault” cases. The courts have become increasingly inclined to consider horseplay as a risk incidental to the employment and have granted compensation not only where the victim was the entirely innocent bystander in a dangerous pastime of his fellow-employees or the object of a prank or practical joke,\textsuperscript{130} but even where he was the participant in a friendly scuffle or other playful activity, at least where the victim had not instigated the activities\textsuperscript{131} or where such horseplay had

\textsuperscript{125} Nash–Kelvinator Corp. v. Industrial Commission, 266 Wis. 81, 62 N.W.2d 567, 570 (1954). For similar expressions in other opinions see Riesenberg and Maxwell, Modern Social Legislation 264 n. 17 (1950). For judicial disapproval of the common hazard test, see Olsen v. Trinity Lodge No. 282, A.F.&A.M., 226 Minn. 141, 32 N.W.2d 255 (1948).


\textsuperscript{129} See, e.g., Brookhaven Steam Laundry v. Watts, 214 Miss. 569, 59 So.2d 294 (1952) (death of laundryman killed by jealous husband held not to be compensable); Foster v. Ames Farm Dairy Co., 263 S.W.2d 421 (Mo. 1953) (milk delivery man killed in patron’s store because of family squabble).


\textsuperscript{131} Petrelli v. The Kimball Tyler Co., 186 Md. 604, 48 A.2d 169 (1946) (victim injured by throw of bottle following an exchange of throws of a board, court holding that victim was not a participant); Miles et al. v. Myatt, 215 Miss. 589, 61 So.2d 390 (1952) (injury in scuffle instigated by fellow-employee). \textit{Contra:} Tyler–Couch Const. Co. v. Elmore, 264 S.W.2d 56 (Ky. 1954) (participant in, though not instigator of, rough play denied compensation); \textit{seemle}, Gory v. Monarch Mills et al., 208 S.C. 86, 37 S.E.2d 291 (1946) (victim injured as result of attack following attempt to bum a cigaret held to be “instigator” of scuffle).
been previously indulged in.\textsuperscript{132} In cases involving intentional attacks on employees by fellow workers there is likewise a strong trend towards extension of protection. Courts have come to grant compensation even where the victim was not entirely "innocent" because he had participated in preliminary horseplay\textsuperscript{133} or even where he was the aggressor, provided the fight arose over a matter connected with the employment.\textsuperscript{134} While the courts still cling to the view that even the innocent victim of an assault committed during his employment by a fellow-employee is not entitled to compensation if the attack was prompted by a purely personal grudge, they now seem to be inclined not to invoke this exception where the attack by a fellow-worker was prompted by political or racial animosity.\textsuperscript{135}

Finally, the positional risk doctrine has induced some courts to permit compensation where an employee fell as the result of an epileptic seizure or other idiopathic cause and injured himself by reason of such fall, not only where the surroundings involved special hazards,\textsuperscript{136} but also without such conditions.\textsuperscript{137}

All in all it can be said that American courts in a liberal spirit have steadily extended the scope of protection under workmen's compensation. It is, however, reasonable to assume that they will reach the same cut-off point as the Supreme Court of France, which recently denied compensation for a street accident to a striker sustained on his return from a strikers' meeting since it had not been called by the employer in a place subject to his authority and supervision.\textsuperscript{138}


\textsuperscript{133}Mut. Imp. & H. Ins. Co. v. Pfitz, 214 Miss. 823, 59 So.2d 547 (1952).


\textsuperscript{135}See, \textit{e.g.}, Nash-Kelvinator Corp. v. Industrial Comm., 266 Wis. 81, 62 N.W.2d 567 (1954) (forceful ejection of injured worker by co-employees, because victim signed Communist-inspired peace petition and added union affiliation to name).

\textsuperscript{136}See, \textit{e.g.}, Garcia v. Texas Indem. Ins. Co., 146 Tex. 413, 209 S.W.2d 333 (1948) (idiopathic fall against post with sharp edges).


4.

Requisite disability

An employment-connected work injury sustained by an employee in covered employment is compensable only if it results in death or in disability "within the intendment of the controlling statute." Unfortunately the concept of disability as employed in the American acts is neither simple nor uniform and possesses rather complex and varying features.\(^{138}\) Most courts have construed their acts as proceeding upon a socio-economic notion of disability acquiring \textit{loss in earning capacity}. Consequently physiological or functional impairment, though always a necessary "ingredient" of disability, is normally in itself not determinative of either the existence or the proportion of such disability.\(^{140}\) New Jersey, however, at an early date departed from this so-called English doctrine and took a different approach by considering disability as a primarily physical concept expressing reduction in functional efficiency of the body.\(^{141}\) Increasingly other states have followed this idea at least with respect to some or all types of permanent \textit{partial} disability. With the exception of California, all jurisdictions have more or less elaborate catalogues of "schedule injuries" that fix compensation rates for loss or loss of use of various members of the body. In these cases compensation depends purely upon the physiological effect of the injury and no longer upon the actual loss of wage earning capacity in the specific case.\(^{142}\) Recently other types of partial disability than those resulting from injuries to members have been added, as e.g., back injuries and particularly—though with wide variations as to details—serious disfigurements.\(^{143}\) Perhaps the most interesting development in this area is the in-

\(^{138}\) For details see Riesenfeld, \textit{Basic Problems in the Administration of Workmen's Compensation}, 36 MINN. L. REV. 119, 122 (1952).

\(^{140}\) For recent judicial statements to that effect, see Brannon v. Zurich General Accident and Liability Ins. Co., 224 La. 61, 69 So.2d 1, 3 (1953); Elliot v. Ross Carrier Co., 70 So.2d 75 (Miss. 1954); Shaffer v. Midland Empire Packing Co., 259 P.2d 340 (Mont. 1953); Unora v. Glen Alden Coal Co., 377 Pa. 7, 104 A.2d 104 (1954); J. A. Foust Coal Co. v. Messer, 80 S.E.2d 533, 535 (Va. 1954).


\(^{142}\) For interesting recent judicial discussions of this apparent anomaly, see Virginia Oak Flooring Co. v. Chrisley, 80 S.E.2d 537 (Va. 1954) (considering compensation for schedule injuries to be "arbitrarily fixed" and in the nature of an "indemnity"); Green Bay Drop Forge Co. v. Wojcik, 265 Wis. 38, 61 N.W.2d 847 (1953). For other authorities see Riesenfeld, \textit{Basic Problems in the Administration of Workmen's Compensation}, 35 MINN. L. REV. 119, 125 n. 29 (1952).

\(^{143}\) See, e.g., Peerless Rock Co. v. Bowers, 267 P.2d 556 (Okla. 1954) (construing the broad provision in the governing statute).
creasing legislative trend which requires the determination of the compensation rates in most or all non-schedule cases of partial disability to be made by comparison with the compensation rates governing the most analogous schedule injury without regard to the actual loss of earning capacity.\(^{144}\)

When the degree of disability depends on the extent of the actual loss of earning capacity, it is recognized that actual post-injury wages or absence thereof are merely of evidentiary value but not decisive.\(^{145}\) Accordingly, the receipt of the same or higher wages after the injury, especially from the same employer, does not necessarily bar the finding of disability\(^{146}\) any more than continued lack of employment is conclusive of disability.\(^{147}\)

The concept of total—as contrasted with partial—permanent disability has likewise proved to be fraught with difficulties. Most jurisdictions consider a worker as totally disabled only if he is unable to obtain any reasonable permanent full-time employment on the open and normal labor market.\(^{148}\) A few jurisdictions, however, have been more generous and deemed disability to be total if it prevents the employee from pursuing his customary or a reasonably similar calling.\(^{149}\) Ordinarily the presence of a schedule

\(^{144}\) For cases construing and applying statutes of this type, see Robinson v. Beatrice Foods Co., 260 S.W.2d 346 (Mo. App. 1953); Ford v. Nellie B. Mining Co., 208 Okla. 265, 255 P.2d 504 (1953) (loss of taste and smell); Beane v. Vermont Marble Co., 115 Vt. 142, 52 A.2d 784 (1947); Franks v. Dept. Lab. & Ind., 35 Wash.2d 763, 215 P.2d 416 (1950); see Riesenfeld, Basic Problems in the Administration of Workmen's Compensation, 35 Minn. L. Rev. 119, 127 n.34 (1952).


injury prevents finding of total disability but courts have been prone to find additional physical impairments in deserving cases. Compensable disability includes not only the immediate effects of the injury but also subsequent aggravations due to further accidents, such as errors in treatment or falls in hospitals, as long as they are reasonably attributable to the original work injury.

C IMPROVEMENT OF COMPENSATION BENEFITS
(STRUCTURES, LEVELS AND TYPES)

While the extension and liberalization of compensation coverage has been steady and far-reaching, the same cannot be said in regard to the benefits obtainable under the system. With a few notable exceptions progress has been slow and lagging and the voices of dissatisfaction and complaint have grown in frequency and strength. Unfortunately the accusations leveled are usually tendentious and supported by misleading, distorted or inconclusive data: a reliable, comprehensive and objective study faces tremendous difficulties and has yet to be made.

Like the French act which differentiates neatly between "prevention," "physical and vocational readaptation" and "reparation," American workmen's compensation has, apart from measures designed to enhance industrial safety, made provision for wage-loss benefits, medical and burial benefits and special rehabilitation benefits.

Wage-loss benefits are usually predicated upon the worker's previous earnings. Only Washington, Wyoming and, in the cases of permanent disability, Alaska and Oregon have adopted a system of flat rates similar to

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150 See, e.g., Nowlin v. Mississippi Chemical Corp., 70 So.2d 48 (Miss. 1954).
151 See Riesenfeld, Basic Problems in the Administration of Workmen's Compensation, 35 Minn. L. Rev. 119, 126 (1952).
153 For studies concerning the adequacy of compensation benefits in general or in particular jurisdictions see Reed, Adequacy of Workmen's Compensation (1947); Katz and Wirpel, Workmen's Compensation 1910-1952: Are Present Benefits Adequate, 4 Lab. L.J. 167 (1953); McCammon and Skolnik, Workmen's Compensation: Measures of Accomplishment, 17 Social Sec. Bull. No. 3 at 3 (1954). Valuable information can be found in the various annual reports of the different state agencies administering the programs and in reports by legislative committees studying reforms. See, e.g., Report of the Minnesota Interim Commission on Workmen's Compensation (1953) which was compiled under the technical directorship of the author.
155 Washington, Rev. Code §§ 51.32.050, 51.32.060, 51.32.080, 51.32.090 (1951); Wyoming Laws 1951, c. 143, §§ 40, 41, Laws 1953, c. 52, §§ 1, 2; Alaska, Laws 1953, c. 60, § 1; Ore. Rev. Stats. §§ 656.206, 656.212, 656.214 (1953).
that now prevailing in the United Kingdom. Apart from these exceptions, the benefits are generally computed as percentages of prior earnings, subject to ceilings upon the weekly or monthly amounts and often also upon the duration or aggregate amounts payable. It is mainly the effect of these ceilings and limitations which has caused compensation payments to fall so sadly behind the rise in wages and living costs and has brought the whole system into disrepute. The Illinois Industrial Commission, which has given the greatest attention to these matters, estimated, for example, that, in the cases closed in that state during 1951, 87% of the wage losses actually sustained by the workers remained uncompensated. Of course, the inadequacy is particularly pathetic in the case of young workers incurring either total or severe partial permanent disability.

Fortunately the same criticism need not be repeated with respect to medical benefits. Thirty-six out of the fifty-five compensation systems in the United States now grant full medical aid. As a result in the course of time the relation between wage-loss and medical benefit payments has

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156 The greatest number of compensation laws fix the percentage at 66 2/3% in all cases of disability, but a number of jurisdictions go below that for all types of disability, Georgia and Vermont with 50% representing the lower limit. Some jurisdictions differentiate the applicable percentage according to whether the disability is permanent or temporary, or according to the number of dependents. The most liberal percentage applies in Illinois, varying in all cases of disability between 75 and 97 1/2%, according to the number of dependents.

157 The jurisdictions show great variation in the maximum weekly benefits allowed; the upper end of the scale is represented by Arizona ($150) and the United States Civil Employees' system ($121.15); on the lower end are Puerto Rico ($15), Alabama ($23) and Georgia ($24).

158 An increasing number of jurisdictions has abolished limits as to duration or aggregate amount of the benefits payable in case of permanent total disability, although some of them decrease the applicable percentage after a certain time interval. These jurisdictions are Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Massachusetts, Minnesota, Nebraska, Nevada, New York, North Dakota, Ohio, Oregon, Washington, West Virginia, Wisconsin, and the federal system for the Civil Employees and Longshoremen and Harbor Workers.

159 For details, see McCanman and Skolnik, Workmen's Compensation: Measures of Accomplishment, 17 Social Security Bull. No. 3 at 3, 6 (1954). In Minnesota, for instance, the maximum wage-loss benefits have sunk within the decennium 1940-1950 from 74.93% of the actual average wages to 56.63% of such wages; see Report of the Minnesota Interim Commission on Workmen's Compensation, table at 45 (1953).


161 Using the standard time charges developed by the American Standards Association, actual compensation for wage loss in cases of permanent disability is less than half that for temporary disability; see the statistics given for Minnesota in Report of Minnesota Interim Commission on Workmen's Compensation, p. 48 (1953); and for Illinois, Illinois Department of Labor, Annual Report on Industrial Accidents 1951, Part II, p.x, and 11 (1952).

162 Limited medical benefits only are still accorded by the laws of Alabama, Alaska, Colorado, Georgia, Iowa, Kansas, Kentucky, Louisiana, Michigan, Montana, Nevada, Pennsylvania, South Dakota, Texas, Vermont, Virginia, West Virginia and of the municipalities of St. Thomas and St. John in the Virgin Islands.
shifted markedly and medical benefits now average from one-third to one-half of the total compensation payments.\textsuperscript{103}

Finally, important progress has been made in the field of \textit{rehabilitation}. After years of stagnation new emphasis has been placed on this most important phase of effective relief from the effects of work injuries\textsuperscript{104} and a number of states have taken promising legislative measures to improve the existing conditions.\textsuperscript{105}

\section*{D RATIONALIZING FINANCING METHODS}

As society has a vital interest in the dependability and efficiency of the compensation systems, all American jurisdictions have enacted provisions designed to assure the payment of compensation benefits. As stated before,\textsuperscript{106} a minority of jurisdictions has established so-called monopolistic state insurance funds which are liable for the benefits and to which all non-exempt employers must contribute the amount estimated to cover their risk. This system resembles in many respects the methods pursued in the European countries.\textsuperscript{107} The majority of American jurisdictions, however, considers the payment of benefits to be properly safeguarded if the covered employer insures his compensation liability with a private casualty insurance company writing workmen's compensation insurance. In addition, a number of these jurisdictions has established special competitive state compensation insurance funds, giving the employers the option of procuring insurance either with such funds or a private carrier.

Since workmen's compensation insurance with a private carrier is an


\textsuperscript{105}See the summary of the pertinent provisions in twenty-two state, territorial and other federal acts, in \textit{State Workmen's Compensation Laws, U.S. Department of Labor, Bureau of Labor Standards, Bulletin No. 125, Supplementary Table 9 (1953)}. Unfortunately, California is not within this group; see section on rehabilitation and restoration in \textit{Senate Interim Committee on Workmen's Compensation Benefits, Part One of Report, 161 (1953)}.

\textsuperscript{106}Text to notes 20 and 21 supra.

\textsuperscript{107}There are, however, important differences between the American monopolistic state funds and the public bodies by means of which benefits are financed in Germany and France. While the American jurisdictions in question have only one special central fund for the whole covered industry in the state, Germany has established separate Berufsgenossenschaften for the different branches of industry and France has placed industrial accident insurance in the charge of the general regional social insurance funds, the caisses régionales de sécurité sociale.
ordinary business transaction, but one which is required by law, all jurisdic-
tions have made detailed provisions for the regulation of the insurance
rates as well as of the policy terms and effects. As a result the legal rela-
tions between employer, employee and insurance carrier have a character of
their own which differs markedly from that created by ordinary contracts
for the benefit of third parties, and which is governed more by statutory
mandate than by the intent of the parties. The most important feature is
the direct relationship between employee and insurance carrier which is not
necessarily controlled by the relative rights between carrier and employer
_inter se._

One of the most outstanding features of the workmen's compensation
insurance industry in the United States is the standardization of policy
terms and of insurance rates and rate-making methods. This standardiza-
tion was produced by the fact that the state authorities charged with the
supervision of the insurance business in their respective states gained the
conviction that they dealt with problems necessitating a uniform and
nation-wide approach and that the insurance industry itself recognized at
an early date that cooperation in underwriting terms and the development
of common actuarial experience and practice was to their mutual advan-
tage. As a result all companies writing compensation insurance now use a
Standard Workmen's Compensation and Employers' Liability Policy which
is approved by all insurance commissioners and, within the same jurisdic-
tion, employ identical classifications and rates that are fixed by rate-
making procedures which, with some variations in details, are followed by
all state rate regulatory authorities. Improvements and refinements in this
standard rate-making procedure are worked out jointly by the National
Association of Insurance Commissioners through its Workmen's Compen-
sation Committee and the casualty insurance industry through a special
statistical organization established for that purpose, the National Council
on Compensation Insurance.

Without going into the complex details of the rate-making process, it
may be mentioned that rates are annually fixed by state authorities for
the ensuing year and that any divergence between statistical prediction
and actual experience works to the advantage or disadvantage of the car-
rrier, without opportunity for a deficiency assessment on the insured em-

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168 For details see RIESENFELD AND MAXWELL, MODERN SOCIAL LEGISLATION 381 (1950).
169 For steps and computations see RIESENFELD AND MAXWELL, id. at 375; Riesenfeld, Basic
Problems in the Administration of Workmen's Compensation, 36 Minn. L. Rev. 119, 138
(1952). See also REPORT OF THE MINNESOTA INTERIM COMMISSION ON WORKMEN'S COMPE-
SSION 12 (1953) and SEMIFINAL REPORT OF THE CALIFORNIA ASSEMBLY INTERIM COMMITTEE
ON FINANCE AND INSURANCE, SECTION NO. 4, GROUP WORKMEN'S COMPENSATION INSURANCE,
10 (1953). A recent lengthy judicial discussion of the rating process can be found in State ex rel.
Minnesota Employers' Ass'n v. Faricy, 236 Minn. 468, 53 N.W.2d 457 (1952).
ployers. Since compensation insurance is a regulated but private business enterprise, ordinary insurance business practices as to acquisition and management are pursued. As a result American workmen's compensation is burdened with a rather heavy expense overhead as to costs and only approximately 60% of the premium dollar collected is destined for the payment of benefits. If the rates are set too high, the percentage paid for benefits is even less. Carriers which operate as mutuals, of course, will redistribute excess premium income as dividends to the employers, but in the case of stock companies profits go, either in toto or at least partially, to the stockholders. Yet while sometimes charges of excessive gains have been leveled against the industry, careful study has proved that the system, while perhaps not very economical, has not enriched stockholders at the expense of the injured worker.\footnote{Report of the Minnesota Interim Commission on Workmen's Compensation, 9-37 (1953). See also McCamman and Skolnik, Workmen's Compensation: Measures of Accomplishment, 17 Soc. Sec. Bull. No. 3, 3, 10 (1954).}

Actually the total average cost for workmen's compensation in the United States is only about 1% of the payroll, which is considerably less than the average charge made for that purpose in other industrial countries.\footnote{Since in most industrial nations the charges on employers for industrial accident insurance are graduated according to risk classifications it is almost impossible to obtain reliable data for the average charge on the insured payroll. The Social Security Administration estimated in 1949 that for France the average charge on the employer was 3.5% of his payroll, Social Security Legislation Throughout the World, Fed. Security Agency, Social Security Admin., Division of Research and Statistics Report No. 16, 118 (1949). In the Third Supplement to this report the average contribution rate for Germany was estimated at 2.3%, U.S. Department of Health, Education and Welfare, Social Security Admin., Division of Research and Statistics, 3 Supp. to Report No. 16, 36 (1953). French estimates are approximately of similar magnitude, see e.g., Devaux, Comparaison des charges sociales dans quelques Pays d'Europe occidentale, 14 Droit Social 329, 335 (1951). Another French writer, in a recent study on the financing of social security, concluded that, to assure decent standards in systems where benefits are entirely financed by payroll charges, the average contribution rate for social insurance against industrial accidents and industrial diseases should lie around 3% of the covered wages; Gallas, Le Financement de la Sécurité sociale, 13 Droit Social 430 (1950), 14 Droit Social 61, 129, at 129 (1951).}

DOVETAILING COMMON LAW RIGHTS WITH COMPENSATION PROTECTION

The establishment of a system of protection based on the idea of social insurance must of necessity exert a far-reaching impact upon the common law base on which it is superimposed. In contrast to English law,\footnote{Law Reform (Personal Injuries) Act, 1948, 11 & 12 Geo. VI, c. 41. See Lenshoff, Social Insurance Replacing Workmen's Compensation in England, 5 N.A.C.C.A.J. 49, 53 (1950).} but in conformity with the French\footnote{Loi sur la prévention et la réparation des accidents du travail et des maladies professionnelles, 1946, § 66.} and German\footnote{Reichsversicherungsdung 1911, §§ 898, 899 as amended by act of Dec. 7, 1943, R.G.B.I.674. According to German law the employer remains liable at common law in case
statutes without exception are exclusive and normally bar any common law liability of the employer for negligence. Third parties on the other hand remain subject to their common law tort liability. The employee’s right to enforce the liability, however, is subject to statutory equities in favor of the insurance carrier which is obligated to pay compensation. While the controlling principles, abstractly speaking, are thus easy to state, forewarning must be given at the outset that the details of application involve considerable complexities.

1.

Tort liability of the employer to the employee or employee’s dependents

An employer may still be liable to the employee or the employee’s dependents on tort principles in a number of cases. Such responsibility exists, of course, under the elective systems if the parties entitled to election have properly excluded coverage. In addition, most states impose common law liability upon an employer who has failed to subscribe to a state fund or to procure the required compensation insurance. A substantial number of statutes deprive the employer of the celebrated so-called common law defenses (i.e., contributory negligence, assumption of risk and negligence of a fellow-servant) if the tort liability is operative because of the employer’s election of non-coverage and practically all acts contain such provision in case of non-insurance. A few states add a presumption of negligence to the abrogation of the common law defenses. In Massachusetts, where the employer has a right of election only in a very limited number of cases, the exercise of this privilege will not curtail the availability of the common law defenses, but failure to secure the payment of compensation will subject the employer even to an absolute liability for injuries suffered by his employees.

of accidents “suffered while participating in general traffic.” The interpretation of this exception has formed the subject of the interesting decision by the new German Supreme Court in S.H.v.N. 3 B.G.H.Z.298 (1951), in which the court denied the applicability of the exemption from the immunity in a case in which a twelve-year-old employee was injured while tampering with a parked vehicle belonging to his employer.

175 See, e.g., Fitch v. Mayer, 258 S.W.2d 923 (Ky. 1953); Kansas City Stockyards Co. of Maine v. Anderson, 199 F.2d 91 (8th Cir. 1952) (Mo. act); Muldrow v. Weinstein, 234 N.C. 587, 68 S.E.2d 249 (1951); Baldassarre v. West Oregon Lbr. Co., 193 Ore. 556, 239 P.2d 839 (1952); Soucy v. Alix, 90 A.2d 722 (R.L.1952); Peyatte v. International Harvester Co., 208 F.2d 261 (4th Cir. 1953) (W.Va.act).


177 See, e.g., CAL. LAB. CODE § 3708.

178 MASS. ANN. LAWS c.152, §§ 66, 67 (1950 and 1953 Supps.).
The most difficult questions arise in the cases of injuries sustained in covered employment where no compensation is payable because the injury is neither accidental within the meaning of the law nor a covered occupational disease, or because the injury does not produce the requisite loss of wage earning capacity, as in the case of disfigurement or injuries to procreative organs. Most jurisdictions have permitted recovery at common law in the cases of non-covered diseases resulting from the employer's failure to secure a safe place of work. But the courts have been hesitant to reach the same conclusion in the case of non-disabling accidental injuries or a covered occupational disease not producing the required degree of incapacity.

2.

Common law liability of employer to third persons by reason of compensable injury to employee

Frequently the courts are confronted with the problem as to the extent to which the exclusionary character of the employer's obligations under the compensation acts shields him from claims by third persons, based on common law or other statutes, by reason of compensable injury or death sustained by an employee of his. Some compensation statutes contain fairly elaborate provisions to the effect that the liability under the act shall be exclusive of all other liability of the employer not only to the employee but also to his legal representative, husband or wife, parents, dependents or next of kin or anyone else entitled to damages, at common law or otherwise, on account of compensable injury or death. Other acts are less explicit.

The overwhelming weight of authority has held that the exclusive character of the liability under the compensation acts bars not only the employee's own common law rights, but also tort claims of spouses for loss of consortium, parents' claims for loss of services or reimbursement for medical expenses or claims by next of kin under wrongful death statutes. In

170 See, e.g., McDaniel v. Kerr, 258 S.W.2d 629 (Mo. 1953) (contraction of lung disease from plaster dust not compensable because not accidental may be ground for tort liability); Quicksilver Co. v. Thiers, 62 Nev. 382, 152 P.2d 432 (1944) (inhalation of injurious fumes). For other references consult Riesenberg and Maxwell, Modern Social Legislation 396 (1950); but see Estelle v. Board of Education of Borough of Red Bank, 14 N.J. 256, 102 A.2d 44 (1954) (lung disease erroneously held to be non-compensable does not sustain common law cause of action).

180 See especially Morgan v. Ray L. Smith & Son, 79 F. Supp. 971 (D. Kan. 1948) and authorities cited. Contra: Frank v. Anderson Brothers, 236 Minn. 81, 51 N.W.2d 805 (1952) semble (where the court intimated that the workmen's compensation act might not preclude a tort action for disfigurement unless the injury entitles the worker at least to medical benefits).


182 See, e.g., Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. § 905 (1952); Minn. Stat. § 176.04 (1949); N.Y. Workmen's Comp. Law § 11.

1950 the Court of Appeals for the District of Columbia Circuit, in *Hitaffer v. Argonne Co.*, a decision which attracted attention in all common law countries, held that a wife had a common law right to sue for damages where an accident had incapacitated her husband and thereby affected her sexual relations with him, and that such right was not precluded by the Longshoremen's & Harbor Workers' Compensation Act even though the action was against her husband's employer who was liable for compensation by reason of such accident. But the courts, whether state or federal, which have subsequently passed on the scope of exclusiveness of compensation statutes other than the Longshoremen's and Harbor Workers' Compensation Act, have justly considered the holding of the *Hitaffer* case as inimical to the spirit of the compensation acts and refused to reach a result which might seriously impair the general benefit level. Even in litigations involving the Longshoremen's and Harbor Workers' Compensation Act the *Hitaffer* rule has not been extended to death cases.

Still more perplexing is the problem as to whether and under what conditions a third party who has become liable in tort to an employee or his next of kin on account of a compensable injury sustained by such employee is entitled to seek contribution or indemnity from the employer despite the exclusiveness of his compensation obligations. The majority of the courts faced with the problem has held that the exclusionary character of the compensation responsibility bars such claims, not only where they are based on a statute providing for rights of contribution or reimbursement between joint tort-feasors but also where they are grounded on common law,

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184 183 F.2d 811 (D.C. Cir. 1950).
including the widely accepted\textsuperscript{191} doctrine which accords a right of indemnity to parties merely passively negligent and only secondarily liable against parties guilty of active negligence.\textsuperscript{192} Conversely, it is undisputed that a right to indemnity against the employer will be enforced if it is the object of an express contractual stipulation. A number of recent cases, however, especially such involving the Longshoremen's and Harbor Workers' Compensation Act, have extended this rule to situations where a right of indemnity merely "may be raised from the circumstances surrounding the contractual relationships between the employer and the third party"\textsuperscript{193} or where it is implied by a special statute as incident of a contractual agreement.\textsuperscript{194} It must be admitted that the judicial opinions abound with conflicting language and that an attempt to reconcile the cases on their facts seems to be doomed to failure. On policy grounds indemnity should be permitted only if there are special circumstances creating a reliance interest in the third party.

3. 

\textit{Extension of immunity from tort liability to other persons: Who is a third party?}

Frequently it must be determined whether persons other than the employer of the injured or killed employee also partake of the immunity from

in District of Columbia barred by compensation act). A similar rule was reached with respect to a right to contribution claimed to exist under admiralty law by reason of the exclusive nature of the compensation liability under the Longshoremen's and Harbor Workers' Act in American Mut. Liability Ins. Co. v. Matthews, 182 F.2d 322 (2d Cir. 1950). But the decision has lost its direct applicability since the Supreme Court has ruled that admiralty grants no right of contribution except in collision cases, Halcyon Lines v. Haenn Ship Corp., 342 U.S. 282 (1952).

\textsuperscript{191} See Restatement, Restitution §§ 94, 95, 96, 98 (1937).

\textsuperscript{192} For recent cases denying recovery against covered employers under such conditions, see Hunsucker v. Chair Co., 237 N.C. 559, 75 S.E.2d 768 (1953) (with exhaustive survey of authorities); Slattery v. Marra Bros., 186 F.2d 134 (2d Cir. 1951) (construing N.Y. act); Peak Drilling Co. v. Halliburton Co., 215 F.2d 368 (10th Cir. 1954) (construing Oklahoma act); Ward v. Denver & R.G.W. R.R. Co., 119 F. Supp. 112 (D. Colo. 1954) (construing Colorado act). \textit{Contra}: American District Telegraph Co. v. Kittleson, 179 F.2d 946 (8th Cir. 1950) (applying Iowa law).

\textsuperscript{193} This approach has been taken most often in cases involving injuries sustained on vessels by employees of stevedoring companies. Crawford v. Pope & Talbot, Inc., 206 F.2d 784 (3d Cir. 1953); States S.S. Co. v. Rothschild International Steve. Co., 205 F.2d 253 (9th Cir. 1953); Read v. United States, 201 F.2d 758 (3d Cir. 1953); Lo Bue v. United States, 188 F.2d 800 (2d Cir. 1951); United States v. Rothschild International Steve. Co., 183 F.2d 181 (9th Cir. 1950); Rich v. United States, 177 F.2d 688 (2d Cir. 1949); McFall v. Compagnie Maritime Belge, 304 N.Y. 314, 107 N.E.2d 463 (1952); see also Westchester Lighting Co. v. Westchester C.S.E. Corp., 278 N.Y. 175, 15 N.E.2d 567 (1938) (applying New York law); Whitmarsh v. Durastone Co., 122 F. Supp. 806 (D. R.I. 1954) (applying R.I. law).

\textsuperscript{194} Baugh v. Rogers, 24 Cal.2d 200, 148 P.2d 633 (1944), 152 A.L.R. 1043 (1944) (where employee, injured through the negligent operation by his employer of a borrowed car, had held the owner thereof liable under the financial responsibility statute, the latter could assert statutory right of indemnity against employer despite coverage under the state compensation act); followed in Lunderberg v. Bierman, 63 N.W.2d 355 (Minn. 1954).
tort liability for negligence. Since generally the American compensation laws recognize such liability of "third parties," the question may be couched in the form: Who is a third party within the meaning of the acts? The problem is particularly important in case of injury to an employee occasioned by co-workers employed by his own employer or by contractors engaged in a common project with such employer and by employees of such contractors.

A substantial number of jurisdictions has special statutory provisions of greatly varying content dealing with one or the other phase of the matter. Thus in some states the acts specify that third party actions are excluded against "employees of the employer" or persons "in the same employ." Others have clauses which extend the immunity of the employer to "those conducting his business." At least three jurisdictions have provisions which either limit the damages recoverable from other employers who are covered by, and have complied with, the compensation act to the compensation scale or extend immunity to such employers. Thus Alabama limits the tort liability of other employers who are subject to the act to the amounts specified in the compensation act. Minnesota accords a similar advantage to employers who are properly insured or self-insured, provided they and the injured worker's employer are "engaged in the furtherance of a common enterprise or in the accomplishment of the same or related purposes in operation on the premises where the injury was received and at the time thereof." Washington, finally, immunizes all employers who are engaged in a business subject to compulsory coverage, provided that they have complied with the act and that the injury was occasioned in connection with such business. In addition, the Alabama and Washington statutes grant similar limitation of, or immunity from, liability to the employees of such employers.

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197 Illinois formerly belonged to this group. But the pertinent provision was repealed in 1953 as the result of the decision in Grasse v. Dealer's Transport Co., 412 Ill. 179, 106 N.E.2d 124 (1952), which declared such differentiation in liability to be unconstitutional.


199 Minn. Stat. § 176.035 (1949) as amended by Minn. Laws 1953, c. 755 § 6. The application of the section has been puzzling to the state supreme court. For recent cases involving it, consult Crawford v. Woodrich Const. Co., 57 N.W.2d 648 (Minn. 1953); Urbanski v. Merchants Motor Freight, 57 N.W.2d 686 (Minn. 1953); Monson v. Arcand, 58 N.W.2d 753 (Minn. 1953).


In the absence of such special provisions, the majority of courts has held that the immunity applies only to the employer and not to fellow-employees.202 A few jurisdictions, however, have reached an opposite result and extended the immunity from liability to co-employees.203 Minnesota seems to bar the liability of fellow-workers by a broad interpretation of its peculiar third party provisions restricting the liability of insured persons engaged in the same project.204 South Carolina, Virginia and apparently North Carolina have finally shielded all co-employees from liability on the strength of the above-mentioned statutory clause which immunizes persons “conducting the employer’s business.”205

The so-called statutory employer clauses which, under specified conditions, impose compensation liability on an owner or primary contractor with respect to the employees of a subcontractor206 have been held to operate as a shield of such employers against tort liability to these statutory employees, although the decisions are neither uniform nor without important qualifications. Where the applicable statute does not condition the compensation liability of the prime contractor upon lack of compensation insurance by the immediate employer, the courts have uniformly held that the prime contractor is not a third person and therefore not liable at common law to employees of a subcontractor.207 But where, under the controlling act, compensation liability of the primary contractor depends on failure of the subcontractor to provide compensation insurance, the courts have taken varying approaches. At least in one jurisdiction it has been held that the employer is immune from tort liability if the subcon-


203 Ohio extends immunity to employees acting as alter ego of the employer, as, for example, a foreman operating the employer’s machinery, Landrum v. Middaugh, 117 Ohio St. 608, 160 N.E. 691 (1927). See also Morrow v. Hume Admx., 131 Ohio St. 319, 3 N.E.2d 39 (1936). In Massachusetts the immunity extends to all employees in “common employment” which includes not only workers employed by the same employer, Bresnahan v. Barre, 286 Mass. 593, 190 N.E. 815 (1934), but all employees of all employers engaged in a common project as long as there exists an insured prime contractor and the work is part of or process in his trade and business and performed on the premises where the main project is carried out, Clark v. M. W. Leahy Co. Inc., 300 Mass. 565, 16 N.E.2d 57 (1938).

204 See note 199, 201 supra.


206 See text at notes 49-52 supra.

tractor was actually uninsured, but not if he was covered by insurance. In other jurisdictions the primary contractor has been held subject to tort liability regardless of whether or not he was also liable for compensation. A third view, conversely, bars tort liability of the primary contractor as long as the other statutory conditions are present even though, in the particular case, he is not liable for compensation because of insurance by the subcontractor. Where there are several levels of subcontractors, the immunity works all the way down. Even where prime contractors are immune from tort actions by employees of the subcontractor, the majority of courts has held that the reverse is not true and that subcontractors are third parties vis-a-vis the employees of the prime contractor or of subcontractors of the same level. Recently, however, the opposite view has found increasing support. Borrowed employees who are entitled to compensation from a special employer are barred from tort claims against him or fellow employees to the same extent as his regular employees.

It is perhaps worth noting that foreign laws have posed similar problems in determining the extent of the exclusiveness of the compensation rights. Thus the French Supreme Court held recently that the term "third party" used by the governing act did not include fellow-employees and that therefore no damage action would lie against them. German law provides expressly that the immunity of the employer extends to the employer's representatives, agents, supervisors and foremen. While ordinary employees thus remain liable according to general principles, the German Supreme Court has invoked the section in question to shield the

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208 Anderson v. Sanderson & Porter, 46 F.2d 58 (8th Cir. 1945) (involving Arkansas law); Huffstetter v. Lion Oil Co., 208 F.2d 549 (8th Cir. 1953) (Arkansas law).
216 Reichsversicherungsordnung § 899.
217 For the reasons of this differentiation, see K. w. Frau Schl., 136 R.G.Z. 346 (1926).
borrower of a worker from tort liability although he was not technically
the employer of such worker. 218

4.
Adjustment of the relative rights between injured employee (or his
dependents), employer, insurance carrier and third party tort-feasor.

The apparently simple principle that coverage of the victim by work-
men's compensation does not relieve the third party tort-feasor from his
liability, whether based on common law or statutory grounds, unfortunately
does not forestall the emergence of extremely complex problems concern-
ing the adjustment of the relative rights of the various interested parties,
i.e., the victim or his next of kin or dependents, the third party tort-feasor,
the employer and the latter's insurance carrier.

In contrast to the English Workmen's Compensation Act of 1906,
which expressly provided against recovery of both compensation and dam-
geages by the injured employee and entitled the person who paid compensa-
tion to be indemnified by the tort-feasor, 219 a number of the early Ameri-
can compensation acts contained no specific regulation of the situation.
American cases decided under these statutes held that the employer or in-
urance carrier which had paid benefits had no redress against the tort-
feasor on equitable or quasi-contractual principles and that the injured
employee was not barred from a "double recovery." 220 Gradually, however,
all jurisdictions except Ohio and West Virginia 221 enacted statutes for the
purpose of avoiding double recovery by the victim or his survivors and of
enabling the employer or insurance carrier to get reimbursement for pay-
ments. Although the United Kingdom now pursues a different policy, 222

219 6 Edw. VII, c. 58 § 6(1) and (2) (1906).
220 Leading cases of this type are Steel Co. v. Furnace Co., 120 Ohio St. 394, 166 N.E. 368
(1929); Fox v. Dallas Hotel Co., 111 Tex. 461, 240 S.W. 517 (1922); Merrill v. Torpedo Co.,
79 W.Va. 669, 92 S.E. 112 (1917); Mercer v. Ott, 78 W.Va. 629, 89 S.E. 952 (1916). For further
cases see RIESENFIELD AND MAXWELL, MODERN SOCIAL LEGISLATION 417 n.4
(1950).
221 The different policy in Ohio and West Virginia might be explainable with the existence
of a monopolistic state fund system in these jurisdictions. While West Virginia courts in general
have clung to their original view that, in the absence of a statutory provision to that effect, the
employer cannot obtain indemnity from a third party tort-feasor for payments which he was
compelled to make under the compensation act, Crab Orchard Imp. Co. v. Chesapeake & O.
Ry. Co., 115 F.2d 277 (4th Cir. 1940), the supreme court of that state has recently cast some
doubt on the double recovery rule in a case in which the third party was joined with the em-
ployer in a damage action for joint tort, Brewer v. Appalachian Const., 135 W.Va. 739, 65
S.E.2d 87 (1951).
222 Law Reform (Personal Injuries) Act, 1948, 11 & 12 Geo. VI, c. 41, discussed in Fried-
American law is still in accord with the ideas of other European systems in that respect.\(^2\)

In view of the history of these third party action provisions it is no surprise that there is solid and recent judicial authority to the effect that the statutory regulation is exclusive and controls the rights and remedies of the employer or insurance carrier vis-a-vis the third party.\(^2\) Nevertheless there is growing authority for the proposition that the employer or insurance carrier may recover from the third party tort-feasor on equitable or quasi-contractual principles where the state statute, for constitutional or other reasons, becomes inapplicable\(^2\) or even in addition to the statutory remedy.\(^2\)

The statutory regulation in the various states varies greatly as to the details and presents difficult problems of interpretation. The reason for this situation lies in the fact that the implementation of the policy against double recovery and of shifting the ultimate burden on the tort-feasor requires the reconciliation of rather divergent interests.\(^2\) The tort-feasor should not be subjected to more than one suit; the employee or his survivors ought not to depend on the willingness and diligence of the employer or his insurance carrier with respect to the recovery of the excess of his common law damages over the compensation benefits; finally, the employer’s right or that

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\(^2\) French law, in the Act concerning Work Injuries and Occupational Diseases, Oct. 16, 1946, art. 68, provides specifically for the right of the public insurance funds to reimbursement in the cases where compensable harm was produced either by reason of the sole fault of a third party or through the concurrent fault of a third party and of the victim or his employer. The scope of this right has created a host of controversial questions and necessitated a number of interpretations by the Court of Cassation; see for instance the decisions barring recovery for subsequent legislative increases in pensions, Bec C. Sécurité sociale de Toulouse (Crim., March 3, 1953), S. 1954, 14; Caisse régionale de sécurité sociale de Nantes C. Etablissements Brehms (Civ., Sect. Soc., Dec. 10, 1953); D. 1954, 171; and the decision permitting recovery from the third person to the full limit of his liability; Bloc et. Dumondin C. Caisse de sécurité sociale (Crim., March 10, 1953), D. 1954, s.29. German law likewise provides in detail for the subrogation of the public insurance carrier to the tort claim of the employee, Social Insurance Code of 1911, § 1542.

\(^2\) See especially Maryland Casualty Co. v. Paton, 194 F.2d 765 (9th Cir. 1952) (applying Oregon law); Brinson v. Southeastern Utilities Service Co., 72 So.2d 37 (Fla. 1954); United States Casualty Co. v. Hercules Powder Co., 4 N.J. 157, 72 A.2d 190 (1950).


\(^2\) For details consult RIESENFELD AND MAXWELL, MODERN SOCIAL LEGISLATION 416ff. (1950).
of his insurance carrier to reimbursement should not be prejudiced by poor, uninterested or dishonest employees or their survivors.

Early American subrogation statutes suffered from the twofold defect that the employee was compelled to make a cumbersome and frequently inequitable election and that if he elected compensation, he was left at the mercy of the employer or insurance carrier with respect to the enforcement of his common law rights. Gradually, therefore, the majority of the states has abandoned the election system and where it still obtains, legislatures and courts have attempted to soften its rigors. In place of the early regulation legislative draftsmen have tried to develop some "coupling devices" by leaving the right to prosecute the third party action with the injured employee and giving the employer or insurance carrier a subsidiary right to enforce the claim if the employee does not exercise his right within a certain period; or vice versa by subrogating the employer or insurance carrier to the tort-claim but revesting it in the victim or his survivors if the subrogee does not timely prosecute the same; or, finally, by placing the enforcement of the tort claim in the joint control of the interested parties, frequently adding certain liens for the benefit of the employer or insurance carrier. An accurate classification of the various types of statutes seems almost impossible in view of the many existing variations.

While each statute presents its own peculiar problems, it can, however,

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228 See RIESENFIELD AND MAXWELL, id. at 418 n.9. Since the date of this survey, Florida and Michigan have abolished the election rule; Fla. Laws 1951, 130; MICH. COMP. LAWS § 413.15 (Supp. 1952). The changes in the Florida law are discussed in Arex Indemnity Co. v. Radin, 72 So.2d 393 (Fla. 1954); Brinson v. Southeastern Utilities Service Co., 72 So.2d 37 (Fla. 1954); Fidelity & Cas. Co. of New York v. Bedingfield, 60 So.2d 489 (Fla. 1952). The changes in Michigan law are set forth in Foster v. Buckner, 203 F.2d 527 (6th Cir. 1953). Texas still adheres to the rule that the institution of a third party suit by the employee bars subsequent compensation proceedings, although the converse is not true; Fort Worth Lloyds v. Haygood, 151 Tex. 149, 246 S.W.2d 865 (1952); Fort Worth Lloyds v. Essley, 235 S.W.2d 700 (Tex. Civ. App. 1951); but cf. Texas Employers' Ins. Ass'n v. Fish, 266 S.W.2d 435 (Tex. Civ. App. 1954), holding that the institution of a third party action by the employee does not abate pending compensation proceedings.


231 See, e.g., Fla. Laws 1951, 130; ILL. REV. STAT. c. 48 § 138.5 (1953); KAN. GEN. STAT. §§ 44–504, 44–532 (1949); MICH. COMP. LAWS § 413.15 (Supp. 1952); N. H. LAWS 1949, c. 160; N. Y. WORKMEN'S COMP. LAW § 29 (as amended in 1951).

232 See, e.g., MASS. ANN. LAWS c. 152 § 15 (1949); ME. REV. STAT. c. 26 § 22 (1944); N. C. GEN. STAT. § 97–10 (1950); S. C. CODE § 72–126 (1952).

233 See especially CAL. LABOR CODE §§ 3850–3863.

234 Classifications under varying points of view are attempted in 2 LARSON, LAW OF WORKMEN'S COMPENSATION § 74.10 (1952) and Note, 35 MINN. L. REV. 684 (1951).

In particular, they have reiterated the principle that the tort-feasor should not invoke the statutory internal adjustment between victim and insurer to gain undeserved protection.\footnote{See, e.g., Bay State Milling Co. v. Izak, 310 Mich. 601, 17 N.W.2d 769 (1945); Acc. & Indem. Co. v. P. & G. Co., 91 Ohio App. 573, 109 N.E.2d 287 (1952) and authorities cited in RIESENFELD AND MAXWELL, MODERN SOCIAL LEGISLATION 425 (1950); see also Broderick's Case, 320 Mass. 149, 67 N.E.2d 897 (1946); Grossman v. Consolidated Edison Co., 294 N.Y. 39, 60 N.E.2d 199 (1945).} Conversely, the courts generally have tried to avoid extra burdens on him. Thus the third party action, even if vested in the employer or insurance carrier, remains subject to its original limitation period,\footnote{In a number of jurisdictions, however, it has been held that the third party action-subrogation provisions in the workmen's compensation laws modify the wrongful death statutes, especially when the dependents entitled to compensation differ from the next of kin entitled to damages under the wrongful death provisions; see the authorities listed in RIESENFELD AND MAXWELL, MODERN SOCIAL LEGISLATION 430 (1950). Conversely, a number of jurisdictions have held that the procedural provisions of the wrongful death statutes limit the operation of the subrogation or assignment clauses in the compensation laws. See RIESENFELD AND MAXWELL, id. at 429. A recent noteworthy example of the former approach is Board of Com'r's v. City of New Orleans, 223 La. 199, 65 So.2d 313 (1953), holding that the employer may sue a third party responsible for the death of employee for death in order to recover benefits payable to deceased's illegitimate child, although the latter was not included as beneficiary in the controlling survival provisions. Vice versa, a startling illustration of the latter type of cases is Komlos v. Compagnie Nationale Air France, 206 F.2d 436 (2d Cir. 1953) holding that the assignment provided by the New York compensation law did not operate where it would lead to a splitting of the cause of action accrued in favor of the survivor.} unless the applicable statute specifies otherwise, and to all other regular incidents.\footnote{In a number of jurisdictions, however, it has been held that the third party action-subrogation provisions in the workmen's compensation laws modify the wrongful death statutes, especially when the dependents entitled to compensation differ from the next of kin entitled to damages under the wrongful death provisions; see the authorities listed in RIESENFELD AND MAXWELL, MODERN SOCIAL LEGISLATION 430 (1950). Conversely, a number of jurisdictions have held that the procedural provisions of the wrongful death statutes limit the operation of the subrogation or assignment clauses in the compensation laws. See RIESENFELD AND MAXWELL, id. at 429. A recent noteworthy example of the former approach is Board of Com'r's v. City of New Orleans, 223 La. 199, 65 So.2d 313 (1953), holding that the employer may sue a third party responsible for the death of employee for death in order to recover benefits payable to deceased's illegitimate child, although the latter was not included as beneficiary in the controlling survival provisions. Vice versa, a startling illustration of the latter type of cases is Komlos v. Compagnie Nationale Air France, 206 F.2d 436 (2d Cir. 1953) holding that the assignment provided by the New York compensation law did not operate where it would lead to a splitting of the cause of action accrued in favor of the survivor.} As a result where contributory negligence of the injured employee would bar him or his survivors from recovery, this defense has been held to be likewise available vis-a-vis the employer or the insurance carrier.\footnote{239 Lather v. Michigan Pub. Service Co., 332 Mich. 683, 52 N.W.2d 551 (1952); Poindexter v. Motor Lines, 235 N.C. 286, 69 S.E.2d 495 (1952). For other references see RIESENFELD AND MAXWELL, MODERN SOCIAL LEGISLATION 425 (1950).} On the other hand, in cases where negligence attributable to the employer was a contributing cause of the injury or death of the employee, most jurisdictions have held that the insurance carrier, or any other party suing for the use of such carrier, as
well as the employee, might nevertheless recover damages from a third party who likewise was responsible in tort for the accident.\(^{240}\)

5. **Third party liability—subrogation statutes and the federal system.**

The administration and application of the local third party and subrogation provisions are subject to special complications that flow from the intricacies of the federal system. These added difficulties may be encountered in two great categories of controversies: In the first and comparatively simple class are the cases where the plaintiff resorts to the federal court under the diversity clause but where *all* pertinent contacts are with the state of the forum and no question of resort to the law of a sister state arises. In the second class true conflict of laws situations are present and the question of whether the federal or state court is seized with the matter is only of subordinate significance.

*Federal improvised v. settled state law.* The first group of cases presents what the late Justice Jackson has dubbed “issues between federal improvised and settled state laws.”\(^{241}\) In these controversies the accident occurred in the state of the forum and the incidents of the employment were such that the compensation law of the forum, and *only* that of the forum, is applicable. There exists, however, diversity of citizenship between the plaintiff (whether he be the employee or his personal representative, the employer or the insurance carrier) and the defendant, *i.e.*, the third party tort-feasor. Since under the present interpretation of the *Erie* doctrine the federal court must apply state rules with respect to “matters more seriously affecting the enforcement of the right” while it must follow the rules of federal practice with respect to mere “forms and mode of enforcing [such] right,”\(^{242}\) the task of the federal judge consists in isolating the *attributive and distributive core* of the local third party liability and subrogation provisions and splicing onto it the federal rules regarding “parties.” What is “substance” and what is “procedure” in the local subrogation statute is a matter of federal “categorization,” but the federal judge must arrive at


the proper classification by a careful study of all effects of the state statute as interpreted and applied by the state courts.\textsuperscript{243} A good illustration of the complexities of this task is the recent case of Hayhurst v. Henry,\textsuperscript{244} in which the judge was faced with a formidable array of state cases for the purpose of determining whether a compensated employee, despite the subrogation of the carrier under the controlling Texas statute, retained a sufficient interest to bring suit alone against the tort-feasor. In that case a joinder of the insurance carrier would have been impossible without destroying the diversity jurisdiction as the corporation operated under a domestic charter. The court overruled defendant's motion to dismiss the action for failure to join an indispensable party.

\textit{True conflicts situations.} The second group of cases in which the impact of the federal system complicates the decision involves situations where the relations of the parties have relevant contacts with jurisdictions other than the forum. While at first blush the decisions dealing with these controversies appear like an impenetrable jungle, a more systematic preliminary analysis and classification will furnish the tools to chart the area.

In the first place it must be realized that the third party liability and subrogation rules of a jurisdiction might be invoked for one of three different reasons—(a) because they govern the forum, (b) because they apply in the relevant\textsuperscript{245} place of the injury, or (c) because they are part of a compensation act under which compensation is awarded or paid. Of course, the last reason, especially, might apply to several jurisdictions in the picture and a particular third party subrogation statute might be invoked for more than only one of these reasons.

In the second place it must be recognized that the divergence in the third party liability and subrogation statutes relates to two different types of issues. The first class of conflicts is produced by the fact that the person responsible for the injury might be a "third party" under one workmen's compensation law while he is not within this category under the law of a sister state. The cases concerning co-employees and contractors on the same job, discussed before, are the typical examples. The second class comprises the conflict issues produced by the diversity of the state provisions regarding entitlement to, and other incidents of, the enforcement of such liability, including the right of the carrier to assert an independent claim to indemnification.

Good illustrations for the first class of these conflict issues are the recent

\textsuperscript{244} 102 F. Supp. 306 (N.D. Tex. 1951).
\textsuperscript{245} The word "relevant" is added since the place of the injury is itself a complex notion; see Ehrenzweig, \textit{The Place of Acting in Intentional Multistate Torts}, 36 MINN. L. REV. 1 (1951).
cases of Stacy v. Greenberg\textsuperscript{240} and Jonathan Woodner Co. v. Mather.\textsuperscript{247} In the former case employees of the Marlene Blouse Corporation, a New York corporation, had suffered an automobile accident in New Jersey when returning to New York, which was their residence, from Pennsylvania where they had gone on company business. The employment was under contracts entered into in New York. At the time of the accident the ill-fated car was driven by defendant Greenberg, the sales manager of the corporation. Plaintiffs, who had neither claimed nor accepted compensation, instituted a tort action against the driver in New Jersey. Defendant pleaded immunity from tort liability, because under New York law fellow employees are not liable as third parties although they are so under New Jersey law. The Supreme Court of New Jersey held that New York law and not New Jersey law controlled in the instant case. New Jersey's act as such was deemed to be inapplicable because the employees were "merely . . . transients en route" and their contact with the state was "purely casual." Plaintiffs as New York residents under New York employment contracts had subjected themselves to the restrictions of that law. There was nothing in the public policy of New Jersey which required a paramount force to be given to the local law either as the \textit{lex fori} or the \textit{lex loci delicti}.

In the Jonathan Woodner case the plaintiff, a resident of the District of Columbia, was employed there as electrician by the Colonial Electric


\textsuperscript{247} 210 F.2d 868 (1954), cert. denied, Oct. 14, 1954; noted 67 HARV. L. REV. 1281 (1954). Other noteworthy cases of this type are Bagnel v. Springfield Sand & Tile Co., 144 F.2d 65 (1st Cir. 1944), on remand, 64 F. Supp. 768 (D. Mass. 1946) holding that the employee of a New York contractor who was injured while working on a temporary assignment to a construction job in Massachusetts was not deprived of his third party action against another contractor working on the same job under Massachusetts' common employ rule, for the reason that there was no election to come under the Massachusetts act because the employer had become a subscriber only subsequent to the employment and had failed to give the requisite notice; Tucker v. Texas Co., 203 F.2d 918 (5th Cir. 1953) holding that a Texas employee assigned to construction job in Louisiana, pursuant to a contract entered in Texas between plaintiff's employer and defendant corporation, was precluded from bringing tort action in Texas court, if Louisiana law barred such action, especially in view of the fact that he drew compensation payment under the law of Louisiana; Carroll v. Lanza, 116 F. Supp. 491 (W.D. Ark. 1953) holding that Missouri employee who was injured in Arkansas while working on a construction job there and covered by both Missouri and Arkansas compensation law could bring common law action against principal contractor, who was not his immediate employer, where Missouri barred and Arkansas permitted such action, since "the public policy of Arkansas favoring common law actions for damages to persons and property and favoring the application of the law of the place" controlled the Arkansas forum; apparently the Court of Appeals, 8th Cir., reversed; cert. granted. But see also Liberty Mut. Ins. Co. v. Goode Const. Co., 97 F. Supp. 316 (E.D. Va. 1951) permitting a common law action in Virginia by employee of sub-contractor against general contractor for injury sustained in Virginia despite the abrogation of such action by the local compensation act where employee had been employed in the District of Columbia and worked only temporarily in the forum and where no Virginia compensation proceedings had been instituted.
Company. This corporation undertook a job in Maryland connected with an apartment construction project. The defendant Jonathan Woodner Company was the principal contractor. While engaged in the Maryland work, plaintiff was injured through the alleged negligence of the defendant. Although both the subcontractor and the contractor carried compensation insurance under the Maryland statute and the subcontractor also carried such insurance covering plaintiff under the District of Columbia act, the latter did not claim benefits under either law, but sued defendant as a third party for common law damages in the District of Columbia. In Maryland a principal contractor who carries compensation insurance for the benefit of the employees of the subcontractor is relieved from common law liability. In the District of Columbia, however, it is not yet settled with finality whether an employee who is covered by a compensation policy of the immediate employer may nevertheless assert a third party damage action against the principal contractor. The court held that, even if it were the rule in the District of Columbia that an employee of and insured by the subcontractor could bring a negligence action against the principal contractor, the plaintiff in the instant case could still not recover. Judge Washington pointed out, in his opinion, that he did not rest his result on the simple rule that Maryland law was controlling because the tort was committed in that state. Rather he preferred to base the decision on the principle that "in an employee-employer suit, if some workmen's compensation act purports to bar the action, that bar will be applied in the forum." The court felt only slightly embarrassed by the fact that in the District of Columbia the defendant was not a statutory "employer." It jumped this hurdle by pointing to the fact that defendant "was required by the law of the state where the work was done and where the injury occurred to provide compensation insurance." It is submitted that this latter reason contains the key to the true ratio decidendi. The forum, though being the state of contracting, was in fairness bound to accept the immunity from tort liability granted by the law of that jurisdiction which figured not only as the place of the injury, but was also as a more than merely transitory location of the work and which, as a consequence thereof, had subjected the defendant to a special duty; at least the forum was thus bound so long as there existed no definite and articulate local policy opposed to such result. The two cases therefore demonstrate that the modern solutions of the cases regarding the existence or non-existence of third party liability do not depend on a choice between three rigid and over-simplified rules, i.e., lex fori, lex loci contractus and lex loci delicti, but on a consideration of the relative importance of the contacts with the jurisdictions in question, a balance of the equities of the parties in the light of their burdens and benefits, and a consideration of the social importance of the conflicting policies involved and of the general effects of subordinating one or the other of these policies.
The cases in which not the existence of common law rights but the entitlement to, and other incidents of, the assertion of third party liability are in question require a similar approach. Again oversimplification in the applicable principles produces contradictory results and inequitable solutions. As pointed out before, the subrogation provisions are statutory schemes aiming at the accommodation of the conflicting interests of three, or possibly four, parties. As a result the contacts of the various jurisdictions with each of the parties involved have to be analyzed for the purpose of ascertaining what relative weight has to be given to the different local policies regarding the protection of these interests in the composite judicial balancing of the interests of the parties involved in the litigation. Thus the interest of the tort-feasor against an extension of his liability and against a subjection to stale claims or multiplicity of suits might become of particular weight if the forum is also the place of the injury and the residence of the tort-feasor. A good illustration of this type of situation is the recent case of *Maryland Casualty Co. v. Paton*. In that case a traveling salesman employed in California by an employer of that state was killed in Oregon in a collision with a vehicle of the defendant. The plaintiff, a Maryland corporation, was the compensation insurer and paid the award rendered under California law. It brought an action for the recovery of its payments in the United States District Court for the District of Oregon at a time when the statute of limitations applicable to Oregon wrongful death actions had expired. The trial court gave judgment for defendant, which was affirmed on appeal. The Circuit Court of Appeals held that the California third party liability provisions, although construed by some California courts as creating a “separate and distinct” cause of action in favor of the insurance carrier, could not operate extra-territorially so as to impose additional liability on defendant, and that, in the absence of any Oregon ruling to the contrary, it felt that an insurance carrier under Oregon law had no independent right against the tort-feasor based on principles of equity or quasi-contract. However, it is interesting to note that in another recent case, where the forum was the place of the residence of the defendant but not the place of the accident, the court permitted some intensification of the liability of the tort-feasor created by the law of a jurisdiction which was both the place of the accident and the state under the law of which compensation was claimed and paid. In that case the injured employee commenced a third party action in Tennessee for a personal injury sustained in Texas more than one year after the occurrence of the accident, but less than one year after the assumption of compensation liability under Texas law by the compensation insurance carrier. The Texas

248 194 F.2d 765 (9th Cir. 1952), noted 37 MINN. L. REV. 77 (1952).
249 Hutto v. Benson, 212 F.2d 349 (6th Cir. 1954).
statute of limitation for the type of action in question provided for a limitation period of two years, while the corresponding Tennessee statute established a period of only one year. The Tennessee provision had been construed to commence running only after the "complete accrual" of the action. The court held that even if the Tennessee statute controlled, it had not run in the instant case for the reason that the Texas third party statute, as construed by Texas decisions, postponed the accrual of the employee's action until assumption of liability by the compensation carrier and controlled the date of accrual material under Tennessee law to that extent. While the court did not stress the fact that the third party liability was brought about by a Texas accident, it may be questioned whether the same result would have been reached if the accident had occurred in Tennessee, though compensable under Texas law.

The conflicts issues in cases involving the actual entitlement to, or distributive rights affecting, the assertion of third party tort claims have presented problems of gradually diminishing complexity in consequence of the fact (already pointed out) that the courts have shown a tendency to deny the third party a defense based upon the internal adjustment between employee and carrier and that the legislatures have pursued a trend providing only limited and partial subrogation. Generally speaking, the courts have been inclined to decide the issue of entitlement to bringing third party tort actions with proper regard for the subrogation provisions in that statute under which compensation was accepted or awarded. This rule applies not only in cases where the forum for the third party claim is also the state under the law of which compensation was accepted or awarded, although the compensable injury had occurred in another jurisdiction, but it like-

250 The court stated, however, that "the Texas legislature by its treatment of the action against the third party tort-feasor qualifying and abridging the common law right of action incorporated it and made it a part of the local law." (Italics added.) Hutto v. Benson, 212 F.2d 349, 352 (6th Cir. 1954).

251 It has been held either expressly or sub silentio that the subrogation provisions in a compensation act become operative only if compensation was paid or awarded under that act; see e.g., Van Wie v. United States, 77 F.Supp. 22 (N.D. Iowa 1948); Bagnel v. Springfield Land & Title Co., 64 F.Supp. 768 (D. Mass. 1946); Alexander v. Creel, 54 F.Supp. 652 (E.D. Mich. 1944); Solomon v. Call, 159 Va. 625, 166 S.E. 467 (1932). On the other hand, there is ample authority for the proposition that the subrogation provisions in such case apply also to tort actions for out-of-state though compensable injuries; see, e.g., Liberty Mut. Ins. Co. v. Hudson & Manhattan R. Co., 123 N.Y.S.2d 696 (Sup. Ct. 1953); Breitwieser v. State, 62 N.W.2d 900 (N.D. 1954). Contra: Apparently only Bernard v. Jennings, 209 Wis. 116, 244 N.W. 589 (1932); note, however, the explanation of that case in Carlson v. Glenn L. Martin Co., 103 F.Supp. 153 (N.D. Ohio 1952) and the practice following from that case in Travelers Ins. Co. v. Northwest Airlines, 94 F.Supp. 620 (W.D. Wis. 1950).

252 Betts v. Southern Ry. Co., 71 F.2d 787 (4th Cir. 1934) (action in N.C. court under Virginia wrongful death statute, brought by widow as administrator. After payment of compensation under N.C. law carrier filed notice of subrogation and prosecution of pending action in the name of administrator. On plea of abatement by defendant, lower court dismissed the action. The appellate court reversed, holding that Virginia law was not opposed to an assignment under the circumstances of the case and that therefore N.C. law governed as to subrogation and proper procedure for asserting rights).
wise holds true in cases in which the forum is the jurisdiction in which the accident occurred, although compensation was awarded or paid under the law of another jurisdiction, and in cases where the forum is neither the state where the accident happened nor the jurisdiction under the law of which compensation was paid or awarded. In the majority of these cases the foreign subrogation statute was not so applied as to defeat the employee's or administrator's right to continue an action commenced by him, and the courts at the most allowed intervention by, or required joinder of, the insurance carrier. Only a few of these cases have entailed a dismissal of an employee's action because of the subrogation of the employer or the insurance carrier. Of the small number of decisions which have refused effect to the subrogation provisions in a foreign act under which compensation was paid, at least one proceeded upon the ground that the foreign subrogation statute had authoritatively been held not to apply to claims for out-of-state torts, while two others rested upon a public policy against the assignment of tort actions or against having the injured workmen de-
prived of their common law rights by any rule not stemming from the *lex loci delicti commissi*.

Without going into a detailed discussion of the controlling Supreme Court adjudications, it might be added in conclusion that the full faith and credit which is due to sister state statutes under the Federal Constitution and the implementing Congressional mandate has not been given such rigidity as to hamstring the courts in their subtle and intricate task of balancing divergent local and foreign policies in this field of third party recovery.

**CONCLUSION**

The foregoing survey shows that American courts have succeeded in covering the broad, diversified and frequently inartistic formulae of the various compensation statutes with a sturdy web of judicial common law of an amazingly uniform texture and consistency. After initial hesitancy to leave the accustomed groove of 19th century thinking, they have more or less resolutely embarked on the task of accommodating the new interests of a modern industrial society. The case law demonstrates that the judicial branch of the government has become increasingly conscious of the peculiar character and the special importance of workmen's compensation as a major branch of social insurance and that the scope of protection has expanded steadily.

It must, however, be realized that the power of the courts is inherently limited and that the main responsibility for adequate social security lies with the legislatures. There seems to be widespread agreement that the compensation benefits under most laws are woefully inadequate, especially in the cases of serious and permanent disability. In addition, the benefit formulae are erratic and frequently overly rigid. In view of the past experience of more than forty years it must seriously be doubted whether the needed relief will come from the lawmakers on the state level. There is urgent cause for an "agonizing reappraisal" whether the time has not come for the establishment of *national* social insurance against industrial accidents and diseases.

258 Personius v. Asbury Transportation Co., 152 Ore. 286, 53 P.2d 1065 (1936) (holding that award of compensation under Idaho law and the election provisions in the third party liability section of the Idaho act did not and could not curtail the right of an injured employee to sue in Oregon for a personal injury sustained there); Henricksen v. Crandic States, 216 Iowa 643, 246 N.W. 913 (1933); Rorvik v. North Pac. Lumber Co., 99 Ore. 58, 190 Pac. 331 (1920), 195 Pac. 163 (1921); see also Magee v. McMany, 10 F.R.D. 5 (W.D. Pa. 1950). The case of Solomon v. Call, 159 Va. 625, 165 S.E. 467 (1932), which is occasionally cited as supporting the minority view, actually held that the Virginia election provisions did not bar a common law action by an employee for an injury sustained in Virginia where such employee had received payments under a foreign compensation act which did not contain an election clause.