

Book Review: Workers' Compensation: Foundations For Reform, by Morley Gunderson and Douglas Hyatt (eds)

Terence G. Ison

Osgoode Hall Law School of York University

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>
Book Review

Citation Information

Ison, Terence G.. "Book Review: Workers' Compensation: Foundations For Reform, by Morley Gunderson and Douglas Hyatt (eds)."
Osgoode Hall Law Journal 39.1 (2001) : 229-238.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol39/iss1/8>

This Book Review is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

BOOK REVIEW

Workers' Compensation: Foundations for Reform

EDITED BY MORLEY GUNDERSON & DOUGLAS HYATT
(Toronto: University of Toronto Press, 2000) 336 pages.¹

This book presents ten essays by eleven authors, most of them relatively new to workers' compensation. From backgrounds in other subjects, they bring some interesting insights; but some authors have difficulty in distinguishing recent developments from perennial phenomena.² There are also many mistakes that would not have been made if the authors had longer exposure to the subject.³

Several chapters compare workers' compensation in Canada with systems in the United States. It is unclear why. Since workers' compensation in Canada is a species of social insurance, the United States is not among the countries from which we are most likely to learn anything constructive.

Chapter one summarizes the other chapters. Chapter two discusses "the changing world of work." The chapter has a flowing style that includes several propositions in one sentence. This tends to distract the reader, and may have distracted the writer, from considering the accuracy of each. The chapter is replete with *non sequiturs*.⁴ Much of the discussion is also of unknown significance because of the lack of source citation, or connection with any known evidence.

The chapter explains some of the difficulties of moving to reliance on rehabilitation as a substitute for compensation at a time when the pressures from "free trade" make rehabilitation more difficult.

¹ [hereinafter *Foundations*].

² See, for example, *ibid.* at 38, where latency periods and the difficulties of establishing the etiology of disease are referred to as recent complexities.

³ See, for example, *ibid.* at 45: the author seems unaware that diseases from exposure to toxic substances have been compensable for decades; *ibid.* at 307: it is stated that in Ontario prior to 1935, claims for back injuries were "always denied;" *ibid.* at 303: it is stated that Ontario was the first Canadian jurisdiction to publish workers' compensation decisions; and, *ibid.* at 355: it is indicated that the statutory bar to civil liability precludes actions for defamation by workers against their employers.

⁴ See, for example, *ibid.* at 32: "Job classifications are becoming broader, so that workers do a wider range of tasks ...;" and, *ibid.* at 39: "Pressures to contain costs in the system obviously lead to a focus on the prevention of the problem as a potential cost-effective solution that also has humane consequences."

Chapter three deals with multiple etiology. It is well written, and generally excellent; though the introductory page does not inspire confidence. For example, "We are beginning to understand that disease is multifactorial, emanating from a multitude of possible causes, including work."⁵ Some people may be beginning to understand this; but with regard to diseases for which the statement is true, the multi-factorial etiology of disease has been understood for a century by others.

One focus of this chapter is heart attacks. Based on a synthesis of the evidence, the authors make many interesting points. For example, "occupational status is a greater risk predictor of dying from heart disease than any of the conventional lifestyle risk factors."⁶ Also, individual behaviour plays only a minor role in the etiology of disease, and workplace health programs will not succeed to any large extent if the emphasis is on behavioural modification.⁷ The chapter explains why the bulk of disabilities from diseases caused by occupation are not compensated. It concludes with a mention of some possible system changes; but the strength of the chapter lies in its discussion of the etiology of disease.

Chapter four focuses on bad backs. How to deal with bad back claims has been the greatest dilemma and the greatest cause of complaint in workers' compensation since the early years. Over the last century, a body of knowledge has evolved about low back pain, particularly in the context of compensation. This well-written chapter presents that knowledge, refined by the studies of more recent years to which the author refers. For example, it is said that most compensation systems do not have a process in place to curtail the payment of medical aid for healthcare interventions that have been demonstrated to be useless or worse.⁸ It could have been useful to include a review of what the boards actually do nowadays in the control of treatment. Historically, the prevention of unnecessary and dangerous operations for low back pain has probably been the greatest achievement of compensation board doctors.

The chapter recognizes one of the dilemmas with bad backs. Most bad backs will resolve within about a month regardless of any attention. Therefore it is not worth the substantial allocation of resources that would

⁵ *Ibid.* at 58.

⁶ *Ibid.* at 65.

⁷ *Ibid.* at 70.

⁸ *Ibid.* at 101.

be required to achieve precision in diagnosis, to prescribe the optimum treatment, and to determine the suitability of modified work. After about a month, the cases that need such attention become apparent; but the prospect of successful rehabilitation in these cases is undermined by the fact that they did not receive that kind of attention in the first place. A useful supplement to this chapter could be a historical review of the measures that compensation boards have adopted in the past to resolve this dilemma. The author suggests that modified work could be selected by an exchange of forms between physicians and management people at the place of employment,⁹ but any adoption of that suggestion would be counter-productive.

Chapter five deals with the effects of workers' compensation and other payroll taxes on the macro economies of Canada and Ontario. It explains how "the immediate short-run incidence of a payroll tax change falls on employers, but ... all or most of the eventual long-run incidence falls on employees ..."¹⁰ Given that workers' compensation assessments are fairly stable, with changes in the rates usually being marginal, this means that most of the cost of assessments is borne by labour. Any increase in assessments will tend to dampen demand, and therefore employment, though only marginally, and only in the short-run. The chapter includes some models, that have partly theoretical and partly empirical bases, in a gallant effort to estimate the impact of workers' compensation on rates of employment. The extent to which these models illustrate reality is uncertain.

Further, the chapter does not discuss the most significant positive influence of workers' compensation on job creation; i.e., the use to which the assessments are put. Workers' compensation is, for the most part, a system in which income is redistributed from people who are working to people who have a compensable disability. Given that the average income of the former group is higher than the average income of the latter, one would expect that the working group might save some portion of its income, while those on compensation need to spend all that they receive. It is surely a credible hypothesis that this redistribution of income tends to increase demand, and thereby increase jobs. If this is correct, it would mean that any negative influence of workers' compensation on jobs is temporary and

⁹ *Ibid.* at 111.

¹⁰ *Ibid.* at 120; but see *ibid.* at 124, where the author appreciates the difficulty of having this recognized on the political scene.

marginal, while the positive influence not only offsets that negative influence, but also extends to the ongoing total assessments.

Chapter six deals with unfunded liabilities. The opening paragraph asserts that unfunded liabilities need to be addressed in one of the ways that the authors mention; but it is not really explained why. In particular, the chapter does not distinguish between: (a) an unfunded liability that results from a recalculation of reserve requirements following a rise in interest rates in a jurisdiction in which benefits are fully indexed; and, (b) an unfunded liability that results from persistent deficits in annual operating accounts. The former will be self-correcting when interest rates fall. The latter may well need to be addressed.

The chapter sets out the arguments in support of full-funding, but not the arguments in support of current cost financing. Nor does it set out the arguments in favour of the position recommended in the *Meredith Report*, and which became the traditional position in Ontario; ie., partial funding. A possible explanation is that the chapter concentrates on the arguments derived from abstract economic theory. It does not canvass the arguments that might be derived from pragmatic, political, or social policy considerations, or from real economic considerations.

A surprising absence from a chapter on unfunded liabilities is any discussion of the merits of the annual recalculation of the adequacy of reserves. This annual recalculation has significant implications.

The chapter includes the usual contemporary expression of concern about the aging population; as if the problems confronting us were problems of wealth creation, or inter-generational distribution.

Chapter seven deals with occupational health and safety. The opening paragraph refers to “market failures,” as if markets would protect the health and safety of workers if only they did not fail. Rather than beginning with market theory and then allowing for failure, it would be more realistic to recognize that it is not in the nature of markets to protect non-market values, including the health and safety of workers. Indeed, markets often create an economic pressure to take risks with other peoples’ lives (and sometimes also with one’s own).

The goal of the chapter is to summarize the empirical evidence on the effectiveness, in the promotion of occupational health and safety, of experience rating compared with regulatory regimes. A portion of the chapter relates to each area. There is a striking contrast between the two portions in the use of statistics. The portion on regulatory regimes reads like a review of articles mostly written by people who work in offices, taking published statistics at face value, analysing data of unknown credibility and

unknown comparability, and then relying almost exclusively on those data to reach conclusions. Sophistication in the mathematical phase of statistical analysis can be an instrument of misinformation if the prerequisites for data validity have not been met, and the language of the chapter leaves doubt that they were.

There is no mention in this portion of the chapter that the data relied upon were screened to ensure that they had been gathered according to acceptable standards of scholarly rigour. There is no mention of the researchers having undertaken the fieldwork required to check for bias and other aspects of credibility and comparability at data sources; or that when verbal inputs were being coded, the researchers sat with the coding clerks to see how this was being done; or that other comparability checks were made. Also, it does not appear that care was taken to ensure that data were correctly labelled. If data relating to one thing are being used as a proxy for something else, the data should still be labelled as what they are. Otherwise, the ordinary reader is being misled, and even the sophisticated reader is distracted from considering the validity of the proxy. In particular, if claims statistics are being used as a proxy for the occurrence of injuries or diseases, they should still be called claims statistics.

Confidence in data validity in the regulatory portion of the chapter is undermined by the references to aggregated "injury rates." There is no such thing as aggregated "injury rates." There are only aggregated claims data, and they can be very misleading as a proxy for comparative injury rates. Consider the example of a regulatory agency that had unqualified staff, and that was totally lethargic, performing its functions like rituals without purpose. Suppose that it was suddenly upgraded to have qualified staff, enthusiastically performing their duties, and guided by a sense of purpose. One would surely expect two consequences to follow: (1) an increase in the proportion of occupational disabilities that are reported as claims; and, (2) a decrease in the occurrence of occupational disabilities. Using claims data to measure the significance of the change in the agency would be absurd. Claims data are conditioned by both the occurrence of disabilities and the incentives and disincentives to reporting. Yet this portion of the chapter appears to rely on studies that have used claims data as a proxy for the occurrence of disabilities. In that way, it concludes that regulation has a beneficial effect in reducing certain types of injuries, but does not affect the (non-existent) "global injury rate."

When the author referred to "plant-level data," a different conclusion emerged. "[A] plant that is inspected and penalized in any given

year will record a 22 per cent reduction in lost-workday injuries in the following three-year period.”¹¹

The portion of the chapter that deals with experience rating recognizes these problems in the use of statistics, particularly the problem of using claims data as a proxy for occurrence data. This portion of the chapter recognizes that experience rating causes under-reporting of occupational disabilities.

The chapter concludes “that economic or market incentives through experience rating of workers’ compensation have a more pronounced effect on improving workplace health and safety, since employers have a monetary incentive to reduce accidents and hence their premiums.”¹² That proclamation of faith accords with the political pressures of the age, but it is not supported by evidence presented in the chapter. Indeed, the author had earlier recognized that “[a]n empirical linkage between experience rating and workplace safety has proved to be elusive.”¹³

Chapter eight discusses whether workers’ compensation in Canada should be administered by insurance companies. It is unclear why that question should be reopened. That question was considered in the *Meredith Report*¹⁴ and answered in the negative. Unions, employers and the Commission recognized that insurance companies were part of the problem, and administration by a government agency was chosen for valid reasons. Nothing of any relevance has since changed, except that a few American insurance companies have been aggressive in recent years in pursuing workers’ compensation in Canada as a profit opportunity. This has been facilitated by the revival and elevation of simplistic market theory, resulting from the political ascendancy of the Chicago School.

Market theory is portrayed in the chapter as if it should be the paramount determinant of public policy, rather than (as it used to be seen) simply one perspective to be considered among others, including public health, stability, family life, the prevention of crime, and the promotion of small business, as well as social and individual justice. The almost exclusive

¹¹ *Ibid.* at 191.

¹² *Ibid.* at 213.

¹³ *Ibid.* at 203.

¹⁴ W.R. Meredith, *Final Report on Laws Relating to the Liability of Employers to Make Compensation to Their Employees for Injuries Received in the Course of Their Employment Which Are in Force in Other Countries, and as to How Far Such Laws Are Found to Work Satisfactorily* (Toronto: King’s Printer, 1913).

focus on market theory leads to the expected conclusion that, "in theory, public-sector enterprises are likely to be less efficient and less innovative than their private-sector equivalent."¹⁵ It is not adequately explained how a workers' compensation board and an insurance company can be considered equivalent.

The chapter recognizes some of the limitations of insurance companies in this context; for example, that the employer selects the insurer while the workers are the consumers.¹⁶ It also recognizes the risk of health care costs being externalized to the health care system.¹⁷ More could be mentioned, however, on this theme. Insurance companies would have a greater economic incentive to externalize costs in a myriad of ways. In workers' compensation, the externalized costs can include costs borne directly by employers through their participation in claims processing, costs borne by workers in legal fees and in other aspects of claims processing, the costs to unions, costs to workers and to the public through therapeutic damage caused by claims processing, wage loss and other costs to the spouses of disabled workers, and the off-loading of costs, not only onto the health care system, but also onto welfare and legal aid.

The chapter does not mention several of the advantages of a state monopoly. For example, if the total claims volume was divided among several insurers, it would be more difficult to decentralize claims administration and adjudication. So this method of minimizing the frequency of mistakes and injustices would be lost or curtailed.

The chapter tries to compare the relative efficiency of workers' compensation in Canada and in the United States, and it recognizes some of the difficulties in doing so. On this point, the chapter states that "A legitimate measure of the effectiveness of WC might be seen in the minimization of claims costs subject to some confidence that claims were being dealt with reasonably and fairly."¹⁸ The chapter does not say how that confidence could be obtained or measured, or how the economic incentive that insurance companies would have to frustrate justice according to law would be negated. The chapter mentions appeal systems, but they can be

¹⁵ *Foundations*, *supra* note 1 at 240.

¹⁶ *Ibid.* at 200.

¹⁷ *Ibid.* at 230.

¹⁸ *Ibid.* at 232.

(and often have been) a way of greasing squeaky wheels while leaving injustice and ineptitude to prevail in primary decisions.

The chapter advocates allowing insurance companies to compete with the compensation boards. It recognizes that this could be a mistake, but “[i]f the problems cannot be resolved, then private entry would be rolled back.”¹⁹ The chapter does not explain how the political pressures against assessing the problems would be overcome. Nor does it estimate the harm from several years of turmoil while the “privatization” takes place, and is then “rolled back.” There is also no mention of whether such reversal would be politically feasible, or even whether it would be legally possible under “free trade” in services.

Chapter nine attempts to compare the cost of workers’ compensation in Ontario, British Columbia, and the United States. Cost comparisons of this type are notoriously difficult, and the authors advert to some of the problems. The first requirement in any cost comparison is product identification. The authors seek to cope with this by reducing benefit structures to a common unit of benefit. This is only possible for the countable benefits. There is no comparison of the non-countable benefits (such as courtesy in dealing with claimants so as to alleviate anxiety) or with externalized benefits (such as impacts of the system on the spouses of claimants). Also, the chapter only compares the benefits that workers are supposed to receive.²⁰ It does not compare the benefits that workers do receive. This makes it difficult to compare discretionary benefits. The authors try gallantly to control for extraneous variables, but one is not left with a confidence that they have succeeded in achieving a valid comparison of the benefits.

Even greater problems lie on the cost side. The authors compare only costs as they appear in the books of the administering agencies. As mentioned above, insurance companies have a greater economic incentive to externalize costs than does a government agency. The level of externalized costs is not readily measurable, but it is likely to be high.

Subject to some caveats, the authors conclude that “workers’ compensation programs in Canada, and the British Columbia program in particular, enjoy a relative cost advantage when compared to those in the United States.” If externalized costs had been included in the comparison,

¹⁹ *Ibid.* at 256-57.

²⁰ *Ibid.* at 276-80.

the apparent advantage of the Canadian systems would almost certainly have been much greater.

Chapter ten provides an excellent experience-based explanation of why workers' compensation in Ontario has become more adversarial over the last twenty years. Changes that the author suggests have made the system more adversarial include: the creation of an external appeals tribunal; the widespread expansion of experience rating (which the author describes as "[a]rguably the greatest single change in the Ontario system commencing in the 1980s");²¹ free representation of workers and employers; decentralization without adequate care in staff selection and quality control; older worker supplements; the abolition of physical impairment pensions for permanent disability and the substitution of benefits that require more decisions per claim; the introduction of compulsory rehabilitation; and the inadequacy of the Board's adjudicative manuals (though the manuals in Ontario have always been a problem). The explosion of controversies was a predictable and predicted consequence of the changes mentioned. The author shows a familiarity with the working realities of the system, and provides some penetrating insights.

Chapter eleven deals with the relationship of tort liability to workers' compensation. Some of the comments illustrate the bizarre extremities of economic theory; for example, the suggestion that prior to workers' compensation, the limitations on tort liability created over-saving among workers.²² Other comments are perceptive and credible, such as the comment on the publicity that Ontario has given to the prosecution of fraud. "While no-one would condone fraud, making this the central public-relations sphere of the system appears to have a chilling effect upon all claimants, and to undermine public respect for the institution of public insurance against workplace injuries."²³

The authors refer to experience rating as driving "straight at the heart of the original 'bargain' that was struck between labour and capital over the formation of the WC system—a bargain that was intended to save both sides from the cost, torment, and unpredictability of litigation."²⁴

²¹ *Ibid.* at 309.

²² *Ibid.* at 331.

²³ *Ibid.* at 337.

²⁴ *Ibid.* at 338.

A common assumption in the legal profession is that for cases in which a tort claim would succeed, tort liability generally pays more than workers' compensation. This chapter discredits that assumption. It reinforces the point that when a claimant has an election, an advising lawyer should do the arithmetic on the facts of the case before advising the client under which system to claim.

The authors suggest that tort claims should be allowed to survive the statutory bar if they are for "intentional torts." The misnomer "intentional torts" infiltrated legal education in Canada about thirty-five years ago, and has caused confusion ever since. For cases of disability alleged to result from some fault of the employer, acceptance of this proposal could divert enormous resources to metaphysical debate about whether a particular fault was an "intentional tort" or negligence.

A more limited but also more workable idea might be to clarify that the statutory bar does not preclude an award of restitution by a criminal court on a successful prosecution under the *Criminal Code*.

A shortcoming of the book is that the advocacy of change is not usually balanced by recognition of the countervailing value of system stability. Parts of the book include ill-considered suggestions for change, and would tend to aggravate the propensity of the contemporary political process to make changes without the implications of those changes being considered. Other parts, however, militate against that risk; and chapter ten shows one type of damage resulting from ill-considered changes made in Ontario over the last twenty years.

The book does not provide "foundations for reform," but it does include some interesting contributions on the design of workers' compensation. In particular, chapters three, five and ten are valuable additions to the literature.

Terence G. Ison, LL.D.
Barrister & Solicitor
Professor Emeritus
Osgoode Hall Law School