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Railroad Industry and Work-Incurred Disabilities

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THE RAILROAD INDUSTRY AND WORK-INCURRED DISABILITIES

Preface

A recent resolution of the American Bar Association to submit to Congress a bill substituting workmen's compensation statutes for the Federal Employer's Liability Act for railway employees' disabilities has intensified an old controversy. Persuasive arguments exist both for retaining the Federal Employer's Liability Act and for substituting a workmen's compensation scheme. The Editors of QUARTERLY have asked several leading exponents of these divergent viewpoints to express their opinions on our pages. We are pleased to publish both these articles in this issue.

FEDERAL EMPLOYERS' LIABILITY ACT — A REAL COMPENSATORY LAW FOR RAILROAD WORKERS

*B. Nathaniel Richter and Lois G. Forer**

I. INTRODUCTION

(a) *The Annual Toll*

There is one industrial injury in the United States every sixteen seconds. Every four minutes a worker is either killed or maimed in industrial accidents.[1] One hundred of these injuries each day befalls employees of the railroad industry.[2] The economic time lost from all these injuries is 233,700,000 man days per year.[3] Society faces the

* See Contributors' Section, Masthead, p. 301, for biographical data.

1 Address of Maurice J. Tobin, Secretary of United States Department of Labor, at Fifteenth National Conference on Labor Legislation, BUR. LABOR STANDARDS BULL. No. 104, at 1 (1948). In 1938, approximately 9,000,000 accidents occurred in the United States, resulting in disability or death. Of these, 1,400,00 were occupational accidents. See HOBBS, WORKMEN'S COMPENSATION 4 (2d ed. 1939). The latest figures indicate over 2,000,000 work-injuries annually. Horovitz, *The Litigious Phrase: "Arising out of" Employment*, 3 NACCA L. J. 17, note 2 (1949).

2 RAILROAD RETIREMENT BOARD, WORK INJURIES IN THE RAILROAD INDUSTRY, 1938-40 (1947). This two volume study will be referred to as "WORK INJURIES."

3 This figure includes allowance for future effects of death and physical impairment. McElroy, *Work Injuries in the United States in 1947*, 67 MO. LABOR REV. 361 (1948).

problem of apportioning the burden of the cost of this human wreckage. Dollars and cents cannot compensate for the pain and suffering, the sorrow and broken homes, the loss to wives of their husbands, or the loss to children of a father or mother. But the monetary expenses of illness and loss of income from death or disability should not be left upon those least able to bear them—the injured worker and his family.

Society has recognized that the work-connected injury is a part of the cost of doing business, and has devised various legislative schemes to require industry to recompense employees for loss of income and for medical expenses. This, in itself, is a tremendous step forward in the law from the time when the sanctity of the right of contract was presumed to be violated if a worker was prevented from signing away his legal claim against his employer. Bentham's declaration of the relation of master and servant was considered by nineteenth century America to be a correct and sound exposition of the law. Bentham stated, "All these conditions [master and servant] are a matter of contract. It belongs to the parties interested to arrange them according to their own convenience." As recently as 1908, Senator Parker of New Jersey declared, "Mr. Speaker, there is no contract except perhaps that of marriage which goes deeper into these personal rights of man and man which are reserved to the States, than the contract of employment and the rights as between employer and employee, as well as the right of suit for personal injury caused by the negligence of another."[4] Senator Parker protested that this intimate relationship should not be interfered with by an employers' liability law.

(*b*) *Legislative Provisions*

Today it is not seriously disputed that it is within the province of government to provide an equitable scheme for the distribution of these losses, nor that it is a proper cost of business. In urging the immediate passage of the second Employers' Liability Act, President Theodore Roosevelt, in 1907, declared:

> The practice of putting the entire burden of loss to life or limb upon the victim or the victim's family is a form of social injustice in which the United States stands in an unenviable position. I urge upon the Congress the enactment of a law which will at the same time bring federal legislation up to the standard already established by all European countries and which will serve as a stimulus to the various states to perfect their legislation in this regard.[5]

The problem facing the legislatures today is one of method, not of

[4] 42 CONG. REC. 4436 (1928).

[5] 42 CONG. REC. 73 (1907).

principle. Ideally, there should be insurance for all illness, industrial or otherwise. It should cover all workers and their dependents without limitation. Complete medical care, hospitalization and nursing should be available, and 100% compensation of salary loss for the duration of the disability. Since a comprehensive system is not politically or economically feasible at the present time, one must measure against it the present methods of compensation and possible improvements which are in the realm of political attainment. The non-work-connected illness is not at present covered by federal legislation in the United States. Only 6.0 to 6.7% of income loss occasioned by such illness is covered by voluntary insurance, and just 8.2 to 8.8% of the cost of medical care is covered by insurance.[5a]

With respect to non-work-connected injuries, the railroad workers have succeeded in obtaining non-occupational sickness or accident benefit clauses in approximately three out of every ten collective bargaining agreements.[6] In addition, fifty-three railroads report private pension plans for employees earning over $3600 per year. The employee, however has no vested right in the pensions.[7] The non-work-connected injury has also been recognized as an integral part of the employer-employee relationship because illness is an inevitable concomitant of employment. Since the employer can insure against it in a fashion less costly than can the individual, and since industry does pass the cost to society in the price of the product as a legitimate expense of doing business, this is a forward step in equalizing the burdens of sickness. Washington, California and New York are the only states which award disability compensation for non-work-connected illness.[8] New Jersey, Rhode Island and California award unemployment compensation benefits for sickness and disability. In all other states, the employee alone must bear the entire burden of non-work-connected ill health and disability.

With respect to the work-connected injury, on the contrary, there is now a vast amount of state and federal legislation. Growth has been slow. The first Employers' Liability Act was passed in 1862 in Iowa.

[5a] 70 MO. LABOR REV. 643 (1950).

[6] 70 MO. LABOR REV. 636 (1950). Note that the employer's refusal to bargain on the subject of group sickness plans has been held to be an unfair labor practice. W. W. Cross & Co., 77 N.L.R.B. 1162 (1948). *Cf.* Inland Steel Co. v. N.L.R.B., 170 F. 2d 247 (7th Cir. 1949).

[7] 70 MO. LABOR REV. 639 (1950).

[8] 70 MO. LABOR REV. 42 (1950). See also Donlon, *Social Insurance and Private Enterprise,* [1950] INS. L. J. 752-7. The New York benefits began July 1, 1950, and are limited to a small number of weeks.

Only in 1948 did Mississippi pass a Workmen's Compensation Act, completing the roster of the states having legislation of this type.

Both state Workmen's Compensation Acts, which provide for a limited liability of the employer without fault, and the Employers' Liability Acts, which provide for unlimited liability for negligence, have been subject to considerable criticism. Students of one act, dissatisfied with its inadequacies, immediately conclude that the other is superior because on paper it presents different problems.[9] However, an intelligent preference cannot be made abstractly. One must consider the operation of the acts as well as their avowed intents. The conclusion will also be affected by the point of view of the critic. Is he interested in labor or industry? What specific field of employment is under consideration? For the solution suitable to one type of employment may be wholly impracticable for another. From the time of the enactment of these statutes, their proponents have pointed out the gaps in coverage and the uncertainty of the remedy. Also, opponents of the legislation have hypocritically used these very arguments to attempt to defeat any type of ameliorative legislation.[10]

(c) *The A.B.A. Resolution*

Recently there has been a sudden impetus to criticize the Federal Employers' Liability Act (hereinafter referred to as the F.E.L.A.), and to suggest the substitution of a Compensation Act. The American Bar Association has adopted a resolution to submit to Congress an amendment to the F.E.L.A. which would substitute the workmen's compensation acts of the various states for the present rights to sue for negligence under the Act.[11]

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[9] The difference in emphasis between the present patchwork of ameliorative legislation and an over-all comprehensive scheme of insurance has been explained as follows: "The inherent defects of workmen's compensation are due to the fact that it is based on private rights, private negotiation, private disputes, private interests and private finance, as distinct from the social insurance schemes which are based on the principles of social rights secured by public administration, public interests and public finance." ROBSON, JUSTICE AND ADMINISTRATIVE LAW 197 (2d ed. 1947).

[10] In opposing the enactment of the second Federal Employer's Liability Act, Senator Parker stated that he favored a compensation law. 42 CONG. REC. 4437 (1928). His concern for a definite and certain remedy for injured railway employees is certainly suspect in view of the fact that he filed a minority report opposing the only act which feasibly could be passed at that time and was in fact enacted.

[11] The resolution, contained in 74 A. B. A. REP. 108 (1949), reads as follows:

"IV. *Resolved,* that the American Bar Association approves the submission to Congress of an amendment to the Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases,' approved April 22, 1908, as amended August 11, 1939, said amendment to embody substantially the following provisions:

Be it enacted . . . that the provisions of the Act entitled 'An Act relating to the

The arguments frequently heard in favor of a compensation act for railroad employees present a pious intention to give the worker greater protection. It is interesting, however, that this movement in favor of a compensation act has been a concomitant of recent high recoveries obtained by injured workers in actions brought under the F.E.L.A. Although the workmen's compensation scheme of recovery for industrial accidents is proposed as a more progressive and forward-looking type of legislation, it is well to note that England has abolished its compensation act as being inadequate by its very nature. Under the English law at the present time, a worker is given his choice of compensation or a common law action for negligence, thus embodying the benefits of both types of legislation.[12] If an action under the liability act fails,

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liability of common carriers by railroad to their employees in certain cases,' approved April 22, 1908, as amended August 11, 1939, shall not apply with respect to injuries suffered, or death resulting therefrom, when occurring in any state, territory, or the District of Columbia, having a Workmen's Compensation Act *applicable to such injury or death.* The liabilities of the parties and rights to recover for such injuries or death, shall be measured solely by the terms of the Workmen's Compensation Act applicable thereto, as hereinafter provided, which shall be binding and effective on all parties interested, without power of election between such Workmen's Compensation Act and the Act relating to the liability of common carriers by railroad to their employees in certain cases, approved April 22, 1908, as amended. *Provided,* that any employee or his personal representatives, as the case may be, shall have the right to recover benefits for such injuries or death under the Workmen's Compensation Act of any state, territory or the District of Columbia wherein the accident occurred, the employee's contract of employment was entered into, or the usual place of the employee's employment; and the provisions of the Act approved April 22, 1908, shall not apply.

The liabilities of the parties, the right to recover, and the procedure by which the claim shall be enforced for such injuries or death shall be governed solely by the terms of such Workmen's Compensation Act, and recovery thereunder shall be had only in the tribunal designated for that purpose by such Act. A recovery under the provisions of the Workmen's Compensation Act of any state, territory or the District of Columbia shall be a complete bar to any proceedings under the Workmen's Compensation Act of any other state, territory or the District of Columbia.

The provisions of this Act shall furnish the exclusive remedy in all causes of action arising under any federal statute enacted for the promotion of the safety of employees of common carriers by railroad.

The provisions of this Act shall be effective as to injuries and deaths occurring on and after the ..... day of ....., 195.., but shall not apply to claims arising prior to said date for such injuries or deaths.

"*Further Resolved,* that the Committee on Jurisprudence and Law Reform, jointly with the Committee on Commerce, be and hereby is directed to advocate the introduction and passage of such an act in the Congress of the United States by all appropriate means."

The American Bar Association has not always championed the cause of progressive legislation. It has, for example, condemned Health Insurance, approved the Taft-Hartley Act, etc. Its recommendation does not necessarily reflect a viewpoint friendly to the railroad employees. This proposal must be scrutinized with due care. See editorial, Horovitz, *The American Bar Association Resolution to Abolish the F.E.L.A. and the Jones Act,* 5 NACCA L. J. 11-17 (1950).

12 34 HALSBURY'S LAWS OF ENGLAND § 1318 (2d ed. 1940). See 32 HALSBURY'S LAWS OF ENGLAND § 386 (2d ed. 1939). The injured employee or his dependents (and each dependent

the court hearing the cause may assess compensation. Mr. Justice Brandeis was of the opinion that the F.E.L.A. provided the English type of relief, namely, that it was an additional right and not the worker's exclusive remedy. His opinion, however, did not prevail.[13] Moreover, no proposal to give the railroad workers an election of benefits has been suggested by the American proponents of a railroad workers' compensation act.[14]

II. Theories versus Actualities

The theories of the workmen's compensation and the employers' liability acts are at variance. The compensation act, ideally, should give automatic protection to the worker for all industrial accidents, irrespective of fault. The amount of the recovery is limited by statute, and payment should be immediate and automatic. The employers' liability act, on the contrary, imposes liability only for negligence, and the amount of damages to be recovered is commensurate with the injury. Experience has shown that the operation of the workmen's compensation act is not, as its proponents envisage, simple and automatic. It was intended to be like a slot machine into which a worker dropped his claim, turned a crank and immediately received his weekly compensation, based upon a definite schedule of payments for injuries and a percentage of his wages. To compare the benefits which railroad workers would obtain under the proposed use of the state workmen's compensation acts, it is necessary to observe them in operation, and not merely to read the statutes. Critics of the F.E.L.A. have minutely and statistically studied its operations and found them wanting in a number of instances. Unfortunately, they have not applied the same empirical tests to the compensation acts with which they propose to cure the faults of the F.E.L.A.

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may make his own election of remedies) may bring an action at common law, under the Employer's Liability Act, under the Compensation Act or, if applicable, the Fatal Accidents Act. If recovery is greater than that amount paid to him under compensation, then he retains one-half of what he was paid in compensation, since he contributed one-half of the premium to the fund and the employer is subrogated to the other half.

[13] New York Central R.R. v. Winfield, 244 U. S. 147 (1917). The United Railroad Workers of America, in Landreth v. Wabash R.R., 328 U. S. 855 (1946), filed a petition to intervene, seeking to have the United States Supreme Court review its decision in New York Central R.R. v. Winfield, *supra*. The petition was denied.

[14] Other opponents of F.E.L.A. have in the past suggested placing railroad workers under a federal act similar to the Longshoremen's & Harborworkers' Compensation Act, 33 U. S. 901 *et seq.*, which until recently provided niggardly and inadequate remedies similar to those of the state compensation acts. This unfair system has been imposed upon the longshoremen and harborworkers, who may well be considered the stepsons of federal legislation. These workers in some districts include large numbers of foreign or negro workers, and they had been for 20 years unable to obtain the legislative relief which other types of workers have been more successful in seeking.

Much of the statistical material upon which we base our conclusions with respect to F.E.L.A. is drawn from a two-volume report published by the Railroad Retirement Board—*Work Injuries in the Railroad Industry, 1938-40*. That report proposes a federal compensation act for railroad workers. It does so under the erroneous belief that the compensation acts function automatically, without cost to the employee and at all times awarding the maximum allowable compensation.[15] Law review critics have discussed the two types of statutes without reference to their operations and have concluded that liability without fault is to be preferred to liability for negligence.[16] Superficially the answer is correct. The question more properly should be phrased: How much and how certain is compensation for liability without fault? What degree of lack of responsibility is now required to prove negligence? The compensation for liability without fault is shockingly meager, punctuated with enormous litigation, and subject to the same vicissitudes as a common law suit for personal injuries. In answer to the second query, actionable negligence under F.E.L.A. no longer posits the difficult question of burden of proof in all cases. For example, mere violation of any of the safety inspection laws gives rise to absolute liability on the part of the employer, without regard to negligence.[17] The majority of the Supreme Court, in weighing a case for evidence of negligence, has sincerely attempted to follow the test laid down in *Jamison et al. v. Encarnacion*,[18] namely, that "negligence" is not to be given a "technically restricted meaning."

(*a*) *The Frankfurter Dicta*

Mr. Justice Frankfurter has observed in several dicta that a compensation act would correct the "cruel and wasteful mode of dealing with industrial injuries"[19] under the F.E.L.A. Mr. Justice Frankfurter is naturally impatient with unnecessary litigation under the F.E.L.A.[20]

[15] For example, at p. 99, the report states that attorney representation is used "in relatively few compensation cases." On p. 56, the report discusses awards under F.E.L.A. for disfigurement without noting that unless they involve loss of a member they are not compensable under most state compensation acts.

[16] See Schoene and Watson, *Workmen's Compensation on Interstate Railways*, 47 HARV. L. REV. 389 (1934).

[17] O'Donnell v. Elgin J. & E. Ry., 70 S. Ct. 200 (1950); Carter v. Atlanta & St. A. B. Ry., 336 U. S. 935 (1949); Lilly v. Grand Trunk Western R.R., 317 U. S. 481 (1943); Urie v. Thompson, 337 U. S. 163 (1949).

[18] 281 U. S. 635 (1930). See note 20, *infra*.

[19] See Mr. Justice Frankfurter's dissenting opinion in Wilkerson v. McCarthy, 336 U. S. 53, 66 (1949), and his concurring opinion in Urie v. Thompson, 337 U. S. 163, 197 (1949).

[20] Mr. Justice Frankfurter had sat upon the bench for four years, seen the workings of assumption of risk, observed how it had been a major stumbling block to recovery

Where there is resistance to the payment of claims predicated upon clear statutory duty, the claimant must litigate or be denied his due. In the same way, the judiciary may well resent the avalanche of tax litigation. But, if the taxpayer resists his obligations by every legal device, the government must litigate or forego its taxing power. In 1932, Professor Frankfurter, analyzing the work of the October, 1931, term of the Supreme Court, noted that petitions for certiorari were granted in eighteen cases involving the F.E.L.A.[21] These dealt with questions of assumption of risk and the issue of interstate commerce. Professor Frankfurter concluded that the court "works in a sterile field" in the F.E.L.A. Similarly, Chief Justice Taft, in 1929, deplored the amount of litigation under the F.E.L.A. and advocated a compensation law which he characterized as "practically a system of general insurance to save life and limb and widows. . . . "[22] Were those gentlemen to examine the work of the forty-eight state judiciaries, they would be outraged at

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under the Act as it then existed, and had remained silent. When assumption of risk had been outlawed as a defense, he, for the first time, became audibly concerned about the unfortunate lot of railroad workers, and has continued to bemoan their fate to this day. See Tiller v. Atlantic Coast Line R.R., 318 U. S. 54 (1943), where, at page 73, he said:

> "Perhaps no field of the law comes closer to the lives of so many families in this country than does the law of negligence, imbedded as it is in the Federal Employers' Liability Act."

Yet he also criticized the F.E.L.A. for being based upon the law of negligence, stating, at p. 71:

> "But the 1939 amendment left intact the foundation of the carrier's liability—negligence. Unlike the English enactment which, nearly fifty years ago, recognized that the common law concept of liability for negligence is archaic and unjust as a means of compensation for injuries sustained by employees under modern industrial conditions, the federal legislation has retained negligence as the basis of a carrier's liability. For reasons that are its concern and not ours, Congress chose not to follow the example of most states in establishing systems of workmen's compensation not based upon negligence."

See also Eckenrode v. Pennsylvania R.R., 335 U. S. 329 (1948), and Raudenbush v. Baltimore & Ohio R.R., 160 F. 2d 363 (3d Cir. 1947). His concern, however, did not temper his legal analysis of the existence or non-existence of negligence in a given case. In the Tiller case and ever since, without exception, he has been the most vigorous justice on the bench in his insistence on "negligence" being construed as a technical word of art requiring absolute proof of dereliction by the railroad. Long before, Mr. Justice Butler, a pre-New Deal justice, stated the law as follows in Jamison v. Encarnacion, 218 U. S. 635 (1930):

> "The Act [F.E.L.A.] is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted and to that end the word may be read to include all the meanings given to it by the courts and within the word as ordinarily used. Miller v. Robertson, 266 U. S. 243, 248, 250."

[21] Frankfurter and Landis, *The Supreme Court at October Term, 1931,* 46 HARV. L. REV. 226, 244 (1932).

[22] Address of Chief Justice Taft to the Seventh Annual Meeting of the American Law Institute, 15 A. B. A. J. 332 (1929).

the number of cases involving the state compensation acts.[23] Multitudinous questions of whether an injury "arises out of the employment" are certainly arid legal waste. Mr. Justice Murphy, in dealing with such a problem (which rarely gets into the federal courts), characterized the workmen's compensation acts as "deceptively simple and litigiously prolific."[24]

Critics of the compensation acts are equally outspoken. Clarence W. Hobbs, representative of the National Association of Insurance Commissioners on the National Council on Compensation Insurance, concludes,

> Study of procedure [in workmen's compensation acts] not from the laws but in the field, brings one in close and intimate touch with a great and important element of human suffering and human sorrow, illuminated now and then by touches of humor and by highlights of devotion and self-sacrifice, and darkened now and then by shadows of greed, rapacity, fraud and corruption. The administration of the compensation acts is some distance short of perfection.[25]

The question of compensation for work-connected injuries is but one facet of the law of master and servant. The law has progressed haltingly and sporadically from a question of contract to one of status. At the same time the law of torts likewise has moved from liability solely for moral and intentional wrongs (akin to criminal law) to a liability with-

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[23] Workmen's compensation decisions in the higher courts of this nation run in the thousands annually, exceeding by far F.E.L.A. cases (even comparing the number of injuries in each). Add to this the "over one hundred thousand hearings and conferences before administrative tribunals" to which injured workers are subjected under state and federal compensation laws every year recently. 3 NACCA L. J. 15 (1949).

In fifteen months the Superior Court of Pennsylvania, the appellate court having final review of workmen's compensation cases, heard thirty-two appeals. Contrast this figure with the eighteen cases involving the F.E.L.A. in the U. S. Supreme Court heard in one term.

[24] Cardillo v. Liberty Mutual Insurance Co., 330 U. S. 469 (1947). See also Horovitz, *The Litigious Phrase: "Arising out of" Employment,* 3 NACCA L. J. 15 (1949) and 4 NACCA L. J. 19 (1949). See also Horovitz, *Current Trends in Workmen's Compensation,* 12 LAW SOCIETY JOURNAL 465-538, 611-682, 765-790 (1947).

[25] HOBBS, WORKMEN'S COMPENSATION INSURANCE 308 (2d ed. 1939). See the following authorities for critiques of both types of legislation: REEDE, ADEQUACY OF WORKMEN'S COMPENSATION (1947); see also the resolution adopted by the conference sponsored by the Department of Labor, the Federal Security Agency and the National Commission on Welfare and Rehabilitation, 70 MO. LABOR REV. 511 (1950). Shoene and Watson, *Workmen's Compensation on Interstate Railways,* 47 HARV. L. REV. 389 (1934), and WORK INJURIES, *supra* note 2, present accurate and careful analyses of the flaws in the F.E.L.A. and propose a Compensation Act without subjecting the record of compensation acts to the same searching scrutiny. Compare the definitive study of the operation of the various compensation acts, highlighting their manifest and serious shortcomings. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION (1936). See also the resolutions to increase the benefits under the Compensation Acts.

out fault for socially undesirable consequences. Mr. Justice Holmes observed that

> . . . while the terminology of morals [in tort law] is still retained, and while the law does still and always does, in a certain sense, measure legal liability by moral standards, it nevertheless, by the very necessity of its nature, is continually transmitting those moral standards into external and objective ones, from which the actual guilt of the party concerned is wholly eliminated.[26]

(*b*) *Legislative Remedies in Admiralty Cases*

The earliest efforts to provide some type of recovery for injured workers was in the maritime industry. In the reign of Edward II, by the fiction of giving life to the ship, "*omne illud quod movet eo accidit homines deodandum domino Regi erit, vel feoto clerici*"[27] the ship was held as a pledge for injuries both to goods and seamen.

Admiralty has always taken a paternal interest in the welfare of seamen, making them wards of the court. Doubtless this differentiation in the American treatment of seamen as opposed to other labor stems from the economic necessities of England, which depended upon maritime commerce. Even today in the United States, the injured American seaman receives a fairly full measure of protection.[28] He receives medical care as long as it is required.[29] Responsibility for injuries is not limited to those occurring on shipboard but covers the journey to and from the ship.[30] The classic standard of due care required of the shipowner in maintaining the vessel and its appurtenances in a seaworthy condition has been vitalized by the sound doctrine that if a mechanism proves to be faulty even though other equipment was available, the ship is not seaworthy.[31] The shipowner is liable to the seaman for complete maintenance and care for the period of his contract; the seaman may further pursue his unlimited remedies for negligence or unseaworthiness in court or proceed for compensation under the Jones Act (46 U. S. C. § 688), or under the State Compensation Acts if they are

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26 HOLMES, THE COMMON LAW 38 (31st printing 1938).

27 *Corone et plees de corone,* pl. 403, COLLECTE PAR LE IUDGE (Fitz. Abr. 1577). See HOLMES, *op. cit. supra,* note 26, at 26, 27.

28 See Freedman, *Current Trends in the Admiralty Law,* 1 NACCA L. J. 67 (1941). The Supreme Court is yet of a mind that seamen must have protection greater than that afforded other classes of American workers, although there is no just basis for the distinction, historically or otherwise. See Callen v. Pennsylvania R.R. Co., 332 U. S. 625, where the Court held, five to four, that the burden of establishing the invalidity of a release still rested upon a railroad employee, in contra-distinction to the rule applicable to seamen's releases. See also, Garrett v. Moore-McCormack Co., 317 U. S. 239 (1942).

29 Calmar Steamship Corp. v. Taylor, 303 U. S. 525 (1938).

30 Waterman Steamship Corp. v. Jones, 318 U. S. 724 (1942).

31 Mahnich v. So. Steamship Co., 321 U. S. 96 (1944).

available. This type of protection and choice of remedies would be desirable and suitable for the railroad industry. Both the courts and Congress have recognized the parallel situation.[32]

(c) *Legislative Remedies in Railroad Cases*

The railroad industry, like the older maritime industry, offers a hazardous type of employment. But in contrast to maritime labor in England, there was never in the United States a problem of obtaining railroad labor. Government, needing the railroad industry for the development of the country, gave its subsidies to industry rather than to labor.[33] Nevertheless, it was recognized that railroading was a very hazardous occupation, and several states enacted employers' liability laws to cover railroad and certain other specified industries. Germany passed similar legislation as early as 1884;[34] Britain followed in 1888.[35] In 1897, Britain adopted the principle of liability without fault.[36] Shortly thereafter, the American states began the long process of enacting workmen's compensation laws.[37]

The first Federal Employers' Liability Act was passed in 1906, but was declared unconstitutional.[38] This Act abolished the employers' defenses of contributory negligence and common employment in personal injury actions by employees against common carriers. The second act,[39] which is the basic law today, abolished the fellow servant doctrine, substituted the law of comparative negligence for the absolute defense of contributory negligence, abolished the doctrine of assumption of risk in cases involving a violation of any of the Safety Appliance Acts, invalidated contractual exemption from liability, granted a two-year statute of limitations, and provided for enforcement through both the state and federal courts. In 1910, the Act was amended to provide for the

32 See Jamison v. Encarnacion, 218 U. S. 635 (1930).

33 It is estimated that local, state and federal aid to railroads was equivalent to two-fifths of the cost of the railroads in existence in 1870. RIPLEY, RAILROADS: RATES AND REGULATIONS 39 (1911).

34 DOUGHERTY, LABOR PROBLEMS IN AMERICAN INDUSTRY 788 (4th ed. 1938).

35 Employer's Liability Act, 1880, 43 & 44 VICT., c. 42.

36 60 & 61 VICT., c. 37.

37 BUR. LABOR STANDARDS BULL. No. 99 (1948). Early state laws had been declared unconstitutional but the New York law of 1914 providing for compulsory coverage was sustained. N. Y. Central R. Co. v. White, 243 U. S. 188 (1917). See also Mountain Timber Co. v. Washington, 243 U. S. 219 (1917), upholding the Washington Act. At present, the Workmen's Compensation Acts of eleven states cover only "hazardous" or "extra-hazardous" employments. These include the bighly industrial states of Illinois and New York. BUR. LABOR STANDARDS BULL. No. 99, at 5 (1948).

38 34 STAT. 232 (1906). See The Employer's Liability Cases, 207 U. S. 463 (1908).

39 35 STAT. 65 (1908), 45 U. S. C. §§ 51-59 (1946).

survival of action upon the death of the injured employee.[40] The 1939 amendment[41] continued the process of making the Act more responsive to the needs of the employees and rendering recovery more likely. The 1908 act had abolished the fellow servant rule, which permitted the employer to shift the burden of an employee's negligence to the injured fellow worker. The courts, in construing this act, allowed the defense which had gone out by the statutory door to return through the judicial portal in the guise of assumption of risk.[42] The 1939 Amendment has succeeded in effectively debarring both defenses.[43]

The F.E.L.A. provides the exclusive means of recovery for work injuries in the railroad industry. These injuries totaled about 71,900 in 1947.[44] The aggregate loss in income to the injured railroad workers and their families has been estimated as at least $24,000,000.[45] To compensate for this loss, they received $12,000,000 in cash payments from their employers. Medical expenses and costs of obtaining this compensation are estimated at $1,000,000. From these figures it is clear that the employee under F.E.L.A. bears half of the burden of the industrial injuries. Clearly this is inadequate and unfair.

(*d*) *The Inadequacies of Workmen's Compensation*

But if we turn to recoveries under existing compensation acts, which is what the American Bar Association proposes, what do we find? Accurate figures are not available in all states. However, in Massachusetts a thorough analysis of the proportion of wage loss compensated was made for the "policy-year" 1935.[46]

Only 32.4% of the wage loss was compensated in cases where compensation was paid under the state act. The percentage is even lower today, as wages have gone up faster than the weekly compensation rate. When one considers the vast number of work-connected injuries in which no compensation at all was received, the percentage of loss covered is

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[40] 36 STAT. 291 (1910), 45 U. S. C. § 56 (1946).

[41] 53 STAT. 1404, c. 685, § 1 (1939), 45 U. S. C. §§ 51, 54 (1946).

[42] See Chesapeake & Ohio R.R. v. Nixon, 271 U. S. 218 (1926), and Atlantic Coast Line R.R. v. Driggers, 279 U. S. 787 (1929).

[43] See Tiller v. Atlantic Coast Line R.R., 318 U. S. 54 (1943).

[44] 67 MO. LABOR REV. 185 (1948). This represents a vastly improved picture, since it indicates a 6% decrease over the injuries in 1946. Railroad employment in 1947 decreased 18%, while work injuries decreased 27%. See 70 MO. LABOR REV. 265 (1950). Compare these figures with the 20% decrease in injuries in mining.

[45] WORK INJURIES, *supra* note 2, at 1. This estimate allows for discounting future wage payments, since payments are customarily made in lump sums. If such allowance is not made, the cash value is $30,500,000.

[46] See REEDE, *op. cit. supra*, note 25, c. XI.

even less. Note that the figure for railroad injuries included all injuries. Massachusetts has one of the most generous compensation laws among the states.[47] Furthermore, the percentage of recovery varies inversely to the seriousness of the injuries:

Extent of Disability[48]

Fatal	14.8% compensated
Permanent total	75.4% compensated (there were only 13 such cases)
Major permanent	32.4% compensated
Minor permanent	39.2% compensated
Temporary	54.9% compensated

More than 95% of the claims were for temporary disability. This accords with nationwide figures for occupational disabilities, which indicate 94% were temporary cases. In the railroad industry, however, there is a higher proportion of serious injuries, more than 7% being for permanent or fatal injuries.[49] The frequency rate of injuries in the railroad industry is considerably lower than in other industries. The frequency rate in manufacturing was 18.12 in 1946.[50] In the railroad industry, it was 13.16. The severity rate, however, is much higher. In all manufacturing, it is 1.4.[51] Among railroad workers, it is 2.8.[52] From these figures it is clear that there are fewer injuries in the railroad industry than in other occupations, but that the injuries which do occur are more serious, and result in a much longer period of disability. The comparison of 1.4 and 2.8 severity rate indicates that the injuries are more than twice as severe, since there are proportionately fewer injuries per man hours worked. Therefore, an act which permits more adequate recovery for minor injuries but is niggardly with respect to major injuries will be most unsatisfactory for railroad workers. The Massa-

[47] At present, Massachusetts allows a maximum of $30.00 per week plus $2.50 for each dependent, for the duration of the injury in total disability cases. Only one state allows more, namely, Wisconsin, which grants $32.55. Many states have a maximum allowance of as little as $17.00 per week. Similar disparity existed in 1935. BUR. LABOR STANDARDS BULL. No. 99 (Revision 1949).

[48] REEDE, *op. cit. supra,* note 25, at 212.

[49] HOBBS, *op. cit. supra,* note 25, at 11.

[50] 67 MO. LABOR REV. 135 (1948). There has been a steady decrease in the number of injuries, the rate being 16.0 in 1947. Thus, in 1938, the year for which figures with respect to railroad injuries are available, the rate in manufacturing was doubtless higher than 18.2.

[51] McElroy, *Work Injuries in the United States in 1947,* 67 MO. LABOR REV. 361 (1948). The severity rate is figured at the number of days lost because of disabling injuries per 1000 employee hours worked.

[52] WORK INJURIES, *supra* note 2, at 11.

chusetts experience indicates that this is the expected operation of a compensation act. Moreover, railroad workers are highly skilled and receive much higher wages than the average salaries obtained in other industries. Therefore, the state maximum compensation would be even less adequate for railroad workers.

The very terms of the acts themselves prevent an adequate recompense for severe injuries or permanent disabilities. Perhaps the best illustration of this fact is a recent case arising in Pennsylvania.[53] William McCullough, aged 29, was employed by a railroad company as a special duty man, earning approximately $4000 a year when he was injured. He had a wife and a young daughter of 5. He had every reason to anticipate substantial increases in earning capacity. His injury left him totally paralyzed from the chest down. His future medical bills would be in excess of $5000 a year. His expected loss of earnings, reduced to present value, would amount to $115,000, if he were never to enjoy any increases. Combined with medical bills and losses to the date of trial, these specifics totaled in excess of $200,000. The jury, after a deduction of 30% for contributory negligence, returned a net verdict of $250,000. Under Pennsylvania law, where the accident occurred, he would have received $6000 in compensation, and medical care for 90 days, such medical care not to exceed $225—nothing more.

The inadequacy of a compensation act becomes most realistic in the case described, as the awards under it bear no relationship to the losses occasioned by the injury or the need for future care imposed by the injury. Nor has this award been singular.[54] Recently, in an F.E.L.A.

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[53] McCullough v. Pennsylvania R.R., Civil No. 47-116 (S. D. N. Y. 1949), unreported.

[54] $225,000: Reckenbiel v. Taylor Walcott Co. (Super. Ct., San Francisco, No. 366675, verdict Aug. 11, 1948)—motion for new trial denied by Judge Griffin. A fireman earning $220 a month, 41 years of age. Complete and permanent traumatic psychosis, in asylum at time of trial. Settled while on appeal before the District Court of Appeal, 1st Appellate Division, State of California, for $187,500.

$203,167: Jones v. Pennsylvania R.R., 353 Mo. 163, 182 S. W. 2d 157 (1944)—plaintiff, an 18-year-old brakeman, lost his right leg and thumb and also developed severe generalized osteomyelitis. First verdict was $175,000 and a new trial was granted. Second verdict was $203,167 but a new trial was granted. The case was then dismissed in the state court and refiled in the federal court for the eastern district of Missouri, retried, and a verdict of $150,000 was paid by the railroad, without filing a motion for a new trial.

$125,000: Sullivan v. City & County of San Francisco, 214 P. 2d 82 (Cal. App. 1950)—crushed pelvis, impotency, serious trouble with the urethra.

$125,000: Allbritton v. Sunray Oil Corp., 88 F. Supp. 54 (S. D. Tex. 1949)—serious back and lung injuries to oil field worker, permanent disability for manual labor.

$100,000: Southern Pac. Co. v. Guthrie, 180 F. 2d 295 (9th Cir. 1949), *rehearing granted* (1950)—railroad engineer past 59, lost right leg between hip and knee.

$85,000: Jennings v. McCowan, 215 S. C. 404, 55 S. E. 2d 522 (1949), *cert. denied sub. nom.* Atlantic Coast Line R.R. v. Jennings, 338 U. S. 956 (1950)—death case. Widow

case,[55] the United States Supreme Court held that $80,000 for the loss of a leg and other injuries was not "monstrous." These figures are realistic in compensating the actual losses occasioned by industrial accidents. Workmen's compensation payments in the same cases would have been pitiful.

The maximum amount of recovery is limited by the great majority of workmen's compensation acts. For a widow in death cases, the maximum recovery ranges from 35% of the decedent's wages to 66 2/3%, with a limit of from $17.31 per week to $36.92 per week. The total of payments is in nearly all cases limited, either by a flat sum or the number of weeks for which compensation may be paid, or by other contingencies, such as death, or re-marriage, and morals and place of residence. This ranges from 300 to 600 weeks and from $3,500 to $10,000.[56] Obviously, a young widow with minor children will, at the end of a few years, be thrown upon the relief rolls of most of the states. If she is not receiving the maximum benefits, and the minimum is as low as $3.00 per week in Louisiana, and $9.00 per week in a northern industrial state such as Pennsylvania, she may well need relief to supplement the meager compensation award.

The benefits under existing workmen's compensation acts for permanent total disability are even more niggardly. In cases of fatal injuries, the dependents of the wage earner are left without resources. But a totally disabled employee leaves his family not only without income, but also with additional expenses for his medical treatment and his nursing care. Again, compensation is limited sharply in duration in some states. Total monetary benefits are restricted to as little as $3,000 in Puerto Rico and $6,000 in South Carolina. No jurisdiction permits weekly compensation higher than 70% of the injured employee's wages. Most states limit recovery beyond a certain specified sum, regardless of the small percentage it might bear toward the average weekly wage

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and two children awarded $70,000 actual damages and $15,000 punitive damages for wrongful death.

$80,000: Counts v. Thompson, 359 Mo. 485, 222 S. W. 2d 487 (1949)—loss of both legs, 36-year-old railroad fireman.

$65,000: Western & Atlantic R.R. v. Burnett, 79 Ga. App. 530, 54 S. E. 2d 357 (1949)—50-year-old railroad switchman lost leg and other injuries.

For a more complete list see 4 NACCA L. J. 280-310 (1949) and 5 NACCA L. J. 223-235 (1950).

[55] Affolder v. New York Central & St. Louis R.R., 70 Sup. Ct. 509 (1950), commented upon in 5 NACCA L. J. 127 (1950).

[56] BUR. LABOR STANDARDS BULL. No. 99, at Table 4 (Revision 1948). ". . . for the seriously injured worker this great social insurance has become a veritable nightmare," Horovitz, *The Litigious Phrase: "Arising out of" Employment*, 3 NACCA L. J. 16 (1949).

earned by the injured employee. Clearly, this is unfair, since his needs are now considerably greater than when he was physically fit. Again, the worker and his family suffer. Society, through relief, charity and free clinics, again bears part of the cost of industry's operating expenses.[57]

The figures cited for benefits received, low though they be, represent vast increases. In 1949, thirty-seven states and Hawaii increased the maximum weekly benefits for temporary total disability. Pennsylvania represents a typical increase, from $20 to $25 per week, maximum. Nationally, the range is from $21 to $40.38.[58] This represents an extraordinary and concerted effort to make outmoded benefits more nearly commensurate with the original intent of the acts. It is well to note that from the dates of enactment to 1940, eight states had not increased their benefits.[59] The federal government is no more responsive to meeting the needs of injured employees.[60] Under a static statutory scheme, such as the workmen's compensation act, labor must forever importune the various legislatures to adjust the benefits to the cost of living.[61] Inevitably, the lag is considerable and the time and effort spent in this unending task can only be considered an economic waste. To date, there has been no scheme of linking statutory payments to a cost of living index as labor and management have succeeded in doing with respect to wages.[62] Under the Federal Employers' Liability Act, on the contrary, there is no fixed maximum or minimum payment; the jury, in awarding damages, can take cognizance of the cost of living and the purchasing power of the dollar.

The cyclical fluctuation of prices in the American economy is extreme. Taking an average month of 1919 as an index of 100, the retail prices

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57 Note that even non-occupational illness has been considered an industrial risk which should be insured against by employers and employees in New York, Rhode Island, California, New Jersey and Washington. See Donlon, *Disability Benefit Programs Here and Abroad,* 36 A. B. A. J. 191, 194 (1950).

58 60 Mo. LABOR REV. 514 (1949).

59 REEDE, *op. cit. supra,* note 25, at 68 *et seq.*

60 The Federal Employees Compensation Act payments were increased in 1949 for the first time since 1927. 70 Mo. LABOR REV. 514 (1950). The maximum monthly compensation was raised from $116.66 to $525.00. The inadequacy of the compensation paid in 1948 is apparent. And even today no hearing procedure (as provided in state acts) is allowed federal employees. Witnesses cannot be produced. Letters alone constitute the evidence. HOROVITZ, WORKMEN'S COMPENSATION 177, n. 9 (1944). The recent inauguration of the Appeal Board is helpful.

61 The Fifteenth National Conference on Labor Legislation adopted extensive recommendations to liberalize the Workmen's Compensation Acts to "recognize the rights of the workers to a standard of living above the subsistence level, and minimum should not be less than the subsistence level. . . . " BUR. LABOR STANDARDS BULL. No. 104, 22 (1948).

62 Note the labor agreements in the automotive industry.

of thirty grocery products were used as a standard of the variance in prices generally. It was found that from 1919 to 1925, prices varied from 74 to 122.[63] Since that date, depressions, recessions, war and cold war have caused even greater fluctuations in prices. In general, however, there has been a steady rise in the cost of living. Taking the price index of the United States in 1938 as 100, the comparable price index for the first half of 1948 is 215.[64] No state or federal compensation act has been amended to increase its benefits commensurately with the cost of living. Recoveries under the F.E.L.A. have, on the contrary, more nearly reflected the actual monetary loss to the injured worker. Moreover, under the F.E.L.A., the jury may take into consideraion, as items of damages, inconvenience, humiliation and suffering, and, as to children, the monetary value of those individual elements of care that a father ordinarily performs for his children.[65]

III. The F.E.L.A. Remedy

There can be no question but that recoveries under the Federal Employers' Liability Act for serious injuries are more adequate in fact than under the compensation acts. The figures of the Railroad Retirement Board study compare actual recoveries under the Federal Employers' Liability Act with a theoretical maximum under a proposed Federal Compensation Act which has more generous provisions than any state act.[66] The assumption that the maximum award would be made in all cases is patently fallacious. From the Massachusetts figures it is evident that the maximum recovery allowed is seldom obtained. Moreover, the Railroad Board deducts legal costs from the gross return under the F.E.L.A. but not from the theoretical maximum gross return under the compensation act. As will be shown, comparative costs under both acts are very nearly the same.

With respect to injuries resulting in temporary total disabilities of four days or more, a theoretical comparison is again made between actual recoveries under F.E.L.A. and proposed recoveries under a compensation act. Under all the state compensation acts there is a waiting period during which compensation is not payable. This period is seven days under most acts.[67] The burden of minor injuries under existing

63 Kravis and Ritter, *World Prices,* 67 Mo. Labor Rev. 647 (1948).

64 *Ibid.*

65 Vreeland v. Michigan Central R.R., 227 U. S. 59 (1912).

66 Work Injuries, *supra* note 2, at 18, 19.

67 Oregon alone has no waiting period. Alaska has a one-day waiting period. All other jurisdictions require at least three days. Under some acts, compensation is payable for the waiting period if the illness lasts at least a specified period, such as four weeks. See Bur.

compensation laws is, therefore, exclusively upon the employee. Under the F.E.L.A., he can bargain for some recompense, for he is entitled to recovery for every injury within the scope of the act, no matter of what duration.

(a) *Comparative Recoveries*

Under the F.E.L.A., courts have recently taken into account the probable earning capacity of the injured employee, the probable life expectancy, the period of dependency of the minor children, the life expectancy of the employee's wife, and all other relevant factors, to determine on an actuarial basis the monetary loss occasioned by the injury. Moreover, under the F.E.L.A., pain, suffering, and the loss of a parent's tutelage to his children may be compensated. Under the compensation acts, there can be no recovery for these losses. In computing all of these factors, and discounting the sum which is paid as a lump sum settlement rather than an annuity, courts have reached the conclusion that in many cases the damages of $50,000 and more are not excessive.

It can easily be seen that there is no comparability of actual loss in a $50,000 verdict and a maximum of $22 a week for 300 weeks, which would be the national average available under a compensation act. Even under the more liberal acts, with the exception of a few progressive states, there is a statutory maximum award of $12,000 or less for permanent total disabilities! When one deducts from these recoveries the expense of expert witnesses and incidental costs, the compensation award is materially decreased.

The compensation for medical expenses is also strictly limited under the majority of state acts. Not only is the maximum amount of money set by law but also the period for which medical care is compensable. Thus, even though an employee must be hospitalized and under a doctor's care for six months or a year, he will, in the majority of states, be able to receive medical expenses only for ninety days or some limited period only.[68] In some states, the employer has the choice of physician. Medical practice is commercialized by the use of contract physicians engaged by the employer or the insurance carrier. The health of the worker

LABOR STANDARDS BULL. No. 99, 26, Table 10 (1948), and HOROVITZ, WORKMEN'S COMPENSATION 260-262 (1944).

68 BUR. LABOR STANDARDS BULL. No. 99, at 24 (1948). Only fifteen states, by statute, give full medical benefits. Others are limited from four weeks to one year, and from $165 to $1500. By far the most common maximum sum allowed for medical care is $500.

Increases are possible only by new legislation entailing endless struggle, with medical costs increasing faster than legislative relief in the majority of states. 4 NACCA L. J. 316 (1949) and 5 NACCA L. J. 240 (1950).

is therefore jeopardized.[69] Under the F.E.L.A., recovery is had for actual medical expenses. No arbitrary limit is established for the amount of care and medicines which he needs, or for the period of time they are needed.

(*b*) *Workmen's Compensation Not Automatic*

The question raised by proponents of compensation acts is whether recovery under such acts, though strictly limited in amount, is more certain, less arduous and less expensive to the employees. The answer to all of these questions is no.

Coverage under the compensation acts is not extended automatically to employees. In twenty-six states, the workmen's compensation acts are elective, the employer—not the employee—being given the choice of accepting or rejecting the provisions of the act.[70] Only twenty-eight state acts are compulsory, and even some of those acts are elective as to certain industries. Thus, the employee is granted or denied the benefits of the act at the choice of his employer. The F.E.L.A., on the contrary, covers all employees of common carriers engaged in interstate commerce, regardless of the preference of the carrier. The railroad worker knows that his employer cannot decide to reject the legal protections established for the employee.

Even where the compensation act is compulsory or where the employer has elected to come under an optional act, a serious question arises as to whether the employee who is awarded compensation can collect. State insurance systems for insuring against the risks of liability under the compensation acts have been established in eighteen states, but in only seven is the employer required to insure with the state fund. In all other states he may qualify as a self-insurer or insure with a private carrier. Even the self-insurers may reinsure against excessive loss. The self-insurer is usually only a very large employer whose spread of risk is great enough that he may enjoy the benefit of the law of large numbers.[71] Accurate figures for all states are not obtainable. In Pennsylvania, for example, the self-insurers constituted only 2/10 of 1% of the employers under the act in 1932, although they assumed 42% of the total compensation liability.[72] This disparity between the small percentage of self-insurers and the large proportion of benefits which they pay, indicates a weakness of the compensation system as it is

69 DODD, *op. cit. supra*, note 25, at 490. As one of the physicians quoted herein observed, "It is sometimes cheaper to amputate a leg than to try to save it, and to let a man die than to attempt a cure."

70 BUR. LABOR STANDARDS BULL. No. 99 (1948).

71 KULP, CASUALTY INSURANCE 183 (1928).

72 DODD, *op. cit. supra*, note 25, at 521.

administered. The issue of compensation for industrial injuries in the vast majority of cases is no longer a matter between the employee and the employer, but a struggle between the employee and the insurance carrier. The employer, either because of union relations or simply because he wishes to preserve good employee relations and is personally aware of the fact of the injury, obviously is less resistant to paying compensation claims than the large, impersonal insurance company. The contest between the insurance carrier and the employee is singularly ill-matched and results in precisely the litigation and avoidance of liability which the act was designed to prevent. Either the self-insurer with proper security[73] or the exclusive state fund[74] is often said to be preferable to the overwhelmingly popular commercial insurance carrier.[75]

The railroads, on the contrary, are principally self-insurers, reinsuring only for extraordinary losses. The employee thus deals directly with the employer with all the attendant advantages. This is of primary importance in the cases which are not litigated but settled by agreement.

(c) *Defects in Workmen's Compensation*

Under the compensation acts, the injured employee is restricted in the amount of his claim. This, of course, is the crux of the matter. The employee not only loses his right to actual compensatory damages, but also the leverage in bargaining power which this right gives him. The workmen's compensation scheme sets a ceiling upon the injured worker's recovery. It does not, however, put a floor under him. Even where

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[73] In many states, if the self-insurer becomes bankrupt or goes into receivership, the employee has a preferred claim for compensation. See Lawe v. Industrial Commissioner, 54 F. 2d 388 (2d Cir. 1931). Stock insurance companies also fail, resulting in a complete denial of recovery.

[74] The Supreme Court has held that under an exclusive state fund where the amount of the employers' premiums are dependent upon his cost experience, the employer has no standing to challenge the constitutionality of the legislation, despite an allegation of denial of due process. Gange Lumber Co. v. Rowley, 326 U. S. 295 (1945). For a discussion of the problem of standing to sue, see Davis, *Standing to Challenge and to Enforce Administrative Action,* 49 COL. L. REV. 759, 787 (1949).

Both the A. F. of L. and the C.I.O. favor state funds and have filed bills in many states to abolish private insurance and have the state take over, as in unemployment insurance. All of the Canadian provinces have exclusive state funds. See Andrews, *Progress of State Insurance Funds under Workmen's Compensation,* BUR. LABOR STANDARDS BULL. No. 30 (1939); and HOROVITZ, WORKMEN'S COMPENSATION 394-397 (1944). *Cf.* Larson, *The Welfare State and Workmen's Compensation,* 5 NACCA L. J. 18, 33 (1950).

[75] The commercial insurance carrier is also subject to the vicissitudes of bankruptcy. Eighteen stock companies were liquidated in New York during the period from June 1, 1927 to 1934, leaving appalling suffering for the approximately 6500 employees who had compensation claims against them. See Andrews, *Exclusive State Fund Needed for Compensation Insurance,* 24 AM. LABOR LEG. REV. 165 (1934).

minimal standards, which are as low as $5.00 per week, are established by statute, compromises are encouraged. In only one state, New York, has a thorough investigation been made of the agreements entered into under the Workmen's Compensation Act.[76] This study disclosed that reports of employers and physicians, as required by the act, were missing. Many claimants could not be located. 114 cases reopened and heard by the commission resulted in the awarding of additional compensation, amounting to an average of $450 per case.[77] From this study, one can only conclude that the vast percentage of uncontested cases referred to as an argument in favor of the compensation acts must be further scrutinized.

For the year 1929-1930 the following statistics with respect to the number of contested and uncontested cases are available:

State	*Compensable Injuries*	*Uncontested*
Illinois	56,100	53,300
Massachusetts	41,000	37,000
Pennsylvania	85,000	80,000
Wisconsin	21,700	19,800
Ohio	64,000	57,600

(These figures include both minor and serious cases. Most of the contests are over the serious cases and estimates place contests on serious cases as high as 23%). The claimants in the uncontested cases could not have received more than the inadequate maximum amounts established by statute. New York experience indicates that in reality they received much less.

The merit of the compensation system is presumed to be in its freedom from litigation. To protect the injured, a government agency is established to administer the act. In almost all states this is known as the Workmen's Compensation Board. The Board acts as a judicial tribunal to review contested cases. It is, in effect, a special court. The rules of evidence are relaxed in some instances, but it is still an adversary proceeding between the injured worker and in most cases a large insurance carrier.

Pennsylvania recoguized the difficulties of administration, and in 1933

[76] CONNOR, REPORT TO THE GOVERNOR OF NEW YORK (Leg. Doc. 26, 1920).

[77] DODD, *op. cit. supra,* note 25, at 170 *et seq.* The 1948 Annual Accident Report of Pennsylvania does not indicate what percentage of compensable cases were contested. It lists 52,186 cases for 1938 and 63,507 cases for 1948. See Part II. Nowhere is the term "compensable" defined. Apparently it is used in the Pennsylvania report as synonymous with "compensated." There are many injuries for which compensation should legally be made but which in fact are not compensated. No statistics are available as to this number.

reported: "The director of the Workmen's Compensation Bureau has discovered numerous cases in which the insurers have the claimant agree to take what they will later choose to allow, and to sign receipts for money before it is paid."[78] The Pennsylvania experience is typical; the employee is in no position to assert his rights. They are so meager that he cannot afford to litigate them. Consequently, he has no bargaining position and must accept what he can get. Dodd concludes that

> . . . the success of compensation administration depends primarily upon adequate safeguard to the injured employee in the uncontested case—the one place where he is most likely to suffer in his relation with the employer and the insurance carrier.[79]

Since the uncontested cases constitute the overwhelming majority of compensation cases, one inevitably discovers that the injured employee under a compensation law is unprotected. A system which permits the victimization of the injured and their dependents is not to be commended.

The great preponderance of F.E.L.A. cases are also settled without going to court. 641 cases of fatal injuries to railroad workers in 1938-40 were studied. Of these, 497 resulted in cash settlement. Of the 497, 320 were settled under the F.E.L.A. Suit was filed in only 84.[80] It must be noted that where suit was filed, the recovery even 10 years ago averaged more than $10,000. This is more than the maximum now permitted under most state compensation acts and vastly exceeds the maximum under such laws as existed in 1938. The settlements under the workmen's compensation acts of fatal injuries in intrastate commerce to railroad workers during the same period averaged $5,187, or just about half the average recovered under the F.E.L.A. By 1950, F.E.L.A. settlements have vastly increased in dollars, and compensation settlements did not even keep up with the devalued dollar. There is no reason to believe that if the state compensation laws were the railroad employees' sole remedy, they would fare any better under them than they have in the past. In fact, they would have even less satisfaction, since the possibility of an F.E.L.A. action constitutes a bargaining point.

Since the possibility of legal action results in signally greater recovery for the injured employee or the dependents of the fatally injured, this right should not be denied them without serious factual consideration. The argument that these cases clutter the calendar of the courts is not

78 20 PA. LABOR AND IND. 17 (1933).

79 DODD, *op. cit. supra,* note 25, at 185.

80 WORK INJURIES, *supra* note 2, at 98.

only inverted, but is also specious reasoning.[81] The courts are established to promote justice and to provide the public with a forum for that very purpose.

The F.E.L.A. itself is a legislative expression of the need to protect the railroad workers. The figures cited are ample proof of the fact that the very existence of the right of action under the Act is in itself a protection. Moreover, only 8% of the fatal injury cases and 16% of the permanent total disability cases were litigated. Of the less serious cases, less than 1% were litigated.[82]

Another frequently voiced objection to the F.E.L.A. is that in contested cases the expense of litigation reduces the net recovery to the claimant. It was contemplated that under the compensation acts the employee himself would file his claim and that no expense or professional assistance would be required in effecting a recovery under the act. It is on this premise that the U. S. Railroad Retirement Board makes its recommendations.[83] As any practicing lawyer knows, this is a vanished dream. The Supreme Court itself has commented upon the undue amount of litigation that has been caused by the workmen's compensations acts.[84] This comment should be read in connection with the one frequently cited,[85] condemning the Employers' Liability Act and suggesting that some other method of paying for the severe injuries in the railroad system should be found. These two criticisms by the Court emphasize the fact that neither act in itself compels the employer to compensate his injured employee. The latter must still take the initiative legally to compel the employer or insurance carrier to fulfill the obligations under either act.

(*d*) *Comparison of Litigation Difficulties*

Thus it is necessary to compare the difficulties and successes of litigation under the two types of statute to determine which more adequately protects the employee. The cost of litigation is a serious deterrent to contesting a claim, no matter how rightful it may be. Although the compensation acts most commonly provide for a hearing before an

81 This litigation is now well distributed, since 28 U. S. C. A. § 1404a (1948) (forum non conveniens) permits transfer from large metropolitan areas, to which cases had heretofore gravitated, back to the scene of their occurrence. See Kilpatrick v. Texas & P. Ry. Co., 337 U. S. 75 (1950).

82 WORK INJURIES, *supra* note 2, at 10.

83 WORK INJURIES, *supra* note 2, at 39 *et seq.*, discussing legal costs under F.E.L.A. See especially p. 99.

84 Cardillo v. Liberty Mutual Insurance Co., 330 U. S. 469 (1947). See also note 23 *supra.*

85 Wilkerson v. McCarthy, 336 U. S. 53 (1949).

administrative board or referee, the employee must, for his own protection, be represented by counsel. Only in Boston has the Legal Aid made a real effort to provide this service for employees. In all other parts of the country, they must usually rely upon private counsel.[86] The devious and technical refinements urged by insurance counsel in their efforts to avoid liability under compensation acts would render an ordinary worker who attempted to handle his own case a "clay pigeon." Under many compensation acts, the amount of the lawyer's fee is restricted in practice to a bare ten per cent. Considering the limited recovery permitted, the injured employee is frequently unable to obtain skilled and competent counsel. The necessity for legal representation was early recognized in New York, which provided that claimants could be represented only by legal counsel or licensed representatives.[87] Many compensation acts provide that the Administrative Board shall supervise "attorneys' fees." Boards never dare thereunder to supervise *insurance* attorneys' fees, although such fees come out of the same premium dollar as claimants' attorneys' fees. Recently, however, enlightened boards and courts, recognizing the need for workers' attorneys in *litigated* cases, have increased fees to 20% or more, especially where the recoveries are so small as to make the case economically unfeasible for counsel.[88]

Further, it is assumed by proponents of compensation laws that the administrative body will itself investigate the claims and thus avoid much litigation. This requires an adequate staff. Since the budget of these administrative agencies must be appropriated every year or every biennium, the entire system is subject to the vagaries of political considerations. For example, in Pennsylvania, in the year 1929-30, there were more than 80,000 uncontested claims filed. This is an average annual figure for Pennsylvania. In 1931, there were only eleven agents assigned to investigate uncontested claims.[89] Obviously, it is impossible even to do a cursory paper examination. Where studies have been under-

86 DODD, *op. cit. supra,* note 25, at 263.

The Boston Legal Aid Society has recently given up its workmen's compensation department and refers such cases to private attorneys specializing in workmen's compensation.

87 DODD, *op. cit. supra,* note 25, at 274. See also Senior, *Legal Aid and Workmen's Compensation in New York City,* 30 LEGAL AID REV., No. 4, p. 1 (1932). But in recent months the New York commissioner has unduly limited legal fees for claimants' attorneys, making more difficult proper legal representation.

88 Hobbs, *op. cit. supra* note 25, at 292, and see excellent discussion of attorneys' fees in 4 NACCA L. J. 100-7 (1949) centering around the leading case of Thatcher v. Industrial Commission, 207 P. 2d 178 (Utah 1949). See also 3 NACCA L. J. 187-9 (1949).

89 Dodd, *op. cit. supra* note 25, at 168.

taken to ascertain the adequacy of the compensation awards in uncontested cases, it has been found that the claim reports did not accurately reflect the extent of the injury; thus, the employee did not receive the maximum to which he is entitled under the compensation act.[90] Therefore, any comparison of the awards under the two acts must be weighted to reflect this undisclosed gouging of the employee.

Under the F.E.L.A., the attorney is usually retained on a contingent fee basis. Although it has been criticized,[91] the courts have recognized that the contingent fee is a boon to indigent clients with just claims. Only then does the law consider rich and poor alike when both can pay court costs, witness fees, and obtain representation. The use of attorneys more than justifies the cost. In permanent total injury cases under the F.E.L.A., the average payment without representation was $6,797. With attorney representation where no suit was filed, the average settlement was $10,360. Where suit was filed, the average payment was $13,930. Similar differentials were noted in permanent partial and temporary total cases. The excess of final payment over initial offer, in temporary total disability cases without attorney representation, was on the average 75%. With attorney representation where suit was not filed, it was 130%, and where suit was filed, 573%.[92] Obviously, the claimant receives value when he employs an attorney.

The other major cost in a contested case under both types of statute is the medical expert's fee. In all personal injury cases, and thus under each of the acts being considered, the medical witness is of prime importance. In practice, he must be paid an expert witness' fee. If the doctor has been retained by the employer, he is unlikely to give testimony favorable to the employee. The claimant must then engage his own doctor. The compensation acts make no provision for such expenses. Although most compensation acts permit the subpoenaing of witnesses for a modest fee—from two to five dollars—it is obvious that the busy and successful medical practitioner is reluctant to come for any such

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90 Reede, *op. cit. supra* note 46, at 212, discussing the Massachusetts experience.

91 WORK INJURIES, *supra* note 2, at 99.

92 WORK INJURIES, *supra* note 2, at 50.

Recent studies by the chief attorney for the Federal Security Agency, Bureau of Employees' Compensation, showed that even after deducting attorneys' fees, the use of lawyers for third party injuries to mail clerks gave the worker "over two and one-half times the amount which the employees were able to recover without the Bureau's assistance or without an attorney." Wright, *A Study of Settlements Made in One Hundred Third Party Mail Clerk Cases,* 5 NACCA L. J. 185-91 (1950).

fee; the plaintiff, who must rely on this forced testimony, is at a great disadvantage.[93]

The report of the Pennsylvania Governors' Committee in 1933 made very pertinent recommendations to eliminate this problem of partisan expert witnesses and the attendant expense.[94] The following is a quotation from that report:

> Over half of the cases appearing before the Board or referees hinge on medical testimony. Did the accident produce the injury? Is the injured fully recovered, able to return to work? Is the injured totally or only partially disabled? What is the percentage of partial disability? Under the present regime a lay referee must often hear conflicting medical testimony from the doctors on the two sides. Presentation of the injured workman's case is frequently handicapped because he is unable to retain physicians to testify in his behalf.
>
> We recommend: That impartial medical opinion be provided by registered physicians approved by the Board and that the cost of this service should be provided for: (1) by an appropriation of the Legislature, earmarked for the purpose, or (2) by assessing the cost of the examination against the employers or insurance companies, or (3) through a special fund collected by requiring payments for fatal cases involving no dependents.
>
> . . . It would seem only just that the state should provide for medical examiners whose testimony can be relied upon as impartial by the referees and the Board. Under the present act the Board and the referees may appoint such examiners but there are insufficient funds provided to pay the cost. The above recommendation provides funds for this necessary service.

These recommendations were not adopted by the Pennsylvania Legislature. Nor have they been accepted by an appreciable number of states.[95] Thus, there is little, if any, difference in the problem of obtaining and paying for medical testimony under the compensation acts and the F.E.L.A. Under the latter act, however, the recovery may be sufficient to pay these costs.

Furthermore, under the compensation acts, lump sum settlements are generally frowned upon; the employee recovers a weekly pittance, subject at any time to being contested by the employer. This, of course, entails further litigation upon the part of the employee to prove that

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93 The employee does not know who the experts in the particular field of medicine are, what he need prove by them, or how to meet the technical requirements of local rules of evidence. Moreover, rarely can he afford the substantial fees demanded by these experts. Large employers or their insurance carriers can afford them because of the lower rates, due to frequent calls to testify.

94 20 PA. LABOR AND INDUSTRY 19 (1933).

95 New York does provide state employed physicians to examine compensation claimants. Additional medical testimony may be requested by these examiners, and charged to the employer or his insurance carrier.

the status of his health has not changed materially since the last litigation. In New York, during the calendar year 1930, there were 9613 applications for re-opening, over half of them being made by employers or insurance carriers.[96] Though the Supreme Court has declared that while man is mortal, litigation may not be immortal,[97] this doctrine applies only partially to compensation cases. The employee is subject to a strict statute of limitations in bringing his action, but the board or bureau retains jurisdiction of the award, so that the employer may at any time move to discontinue paying the award. Then more doctors and more lawyers. The employee may also petition to have the award increased if his injuries prove more severe. He cannot, of course, receive more than the statutory maximum.

The administrative aims of workmen's compensation have not been realized.[98] The employee is not protected against the economic losses due to work-connected injuries. He must bear the cost of minor injuries —of less than one week's duration—himself. He does not receive automatic coverage but must fight for his compensation. In the vast majority of cases, being unable to litigate, he settles for less than his legal due. Where he does litigate, the administrative tribunal does not spare him either the necessity or the cost of a lawyer. Furthermore, he must incur all the expenses of proving his injuries by medical witnesses in the same fashion as if he were in court.

IV. Liability Without Fault Still Overly Litigious

The remaining argument asserted in favor of the compensation acts is that they permit recovery "without fault" in contrast to the F.E.L.A., which simply permits liability for negligence. Vast litigation has taken place in workmen's compensation cases through the myriad defenses that have been advanced or devised by the ingenuity of compensation carrier counsel.

Many common law concepts, thought to have been abolished by com-

[96] Dodd, *op. cit. supra* note 25, at 203. See N. Y. Dept. of Labor Special Bull. Nos. 178, 160.

[97] See Ocean Ins. Co. v. Fields, 18 Fed. Cas. No. 10406 (1st Cir. 1841).

[98] Dougherty, *op. cit. supra* note 34, at 796, sums up the failure of compensation laws as follows:

> Unfortunately, actual realization has in many cases missed the ideal; there have been too many central boards far below the standard of the best. In some states the miserliness of legislatures has been to blame. Little can be done with meager funds. In other states, politics has been responsible for the appointment of inept, unqualified personnel, rarely sympathetic with the spirit of the statutes and too ready to interpret them in a legalistic, letter-of-the-law fashion. In a few states, compensation cases have been fixed in ways that were downright dishonest. All this has brought discredit on the cause of workmen's compensation. What has made it doubly deplorable is the fact that the workers have been the direct sufferers.

pensation acts, often creep back in some disguised garb under a different name. Note, for example, the street risk cases, acts of God, added risk, violation of rules and law defenses, proximate cause and scope of employment, assaults, horseplay, exclusions of charities from coverage, of illegal or non-voluntary employments, of quarrels over rules of evidence, etc. Add to these the varying interpretations of "personal injury", "by accident", "arising out of", "in the course of", questions of disability, of dependency, of causation between accident and disability, of extra-territoriality, constitutionality—*ad infinitum,*—and one realizes why Schneider on Workmen's Compensation now has reached 16 large volumes and Horovitz on Workmen's Compensation lists over 190 important nation-wide problems in the Table of Contents, with thousands of cases illustrating merely the high-lights and not the minutiae and why Professor Small (Workmen's Compensation Law of Indiana) wrote an entire volume on the law of one state alone!

Although the compensation acts prescribe absolute liability, without fault, for accidents occurring within the scope of the employment, it is obvious that there is much to litigate in the technical word "accident."[99] The reports are replete with cases involving the minutiae of what is within the scope of the employment—going to and from work, to and from lunch, and from one part of the employer's plant to another. The long line of common law cases dealing with frolic and detour have found their counterpart in workmen's compensation law.[100]

Compensation, furthermore, is limited to certain classes of dependents, and many are the cases determining whether a common law wife, an illegitimate child, an aged parent and other persons dependent in fact are dependents within the law. Another point involving considerable litigation is jurisdiction. Since the F.E.L.A. involves interstate commerce, any attempt to fit interstate injuries into the Procrustean bed of state jurisdiction would result in the legal amputation of benefits to a vast number of railroad workers[101] as well as variations regarding amounts recoverable, depending on the locus of the accident.

[99] See Horovitz, *The Litigious Phrase, "Arising Out Of" Employment,* 3 NACCA L. J. 15 (1949) and 4 NACCA L. J. 19 (1949). See also Mr. Justice Murphy's statement in Cardillo v. Liberty Mutual Ins. Co., 330 U. S. 469 (1947). There are also innumerable cases in which insurance carriers have successfully denied compensation on the grounds that the injury was not the result of an "accident." For example, a back strain from lifting was held uncompensable because it was not an "accident."

[100] See SCHNEIDER, WORKMEN'S COMPENSATION (3rd ed. 1941) for a discussion of the litigable issues under the compensation acts.

[101] The difficulties of Bradford Electric Light v. Clapper, 286 U. S. 145 (1932), have not yet been resolved. In that case, the employee, a resident of Vermont who entered into a contract of employment in that state, was injured in New Hampshire. Suit was

Time and judicial accretion have wrought severe limitations upon the doctrine of absolute liability. Both procedural and substantive hurdles have been placed in the path of the employee's claims for compensation.

(a) *The New Trend under F.E.L.A.*

A contrary trend is apparent in the recent judicial interpretation of the F.E.L.A. Early F.E.L.A. cases strictly construed negligence as being a personal dereliction of duty.[102] The question of proximate cause was magnified and the claimant required to prove not only the probability that the injury was due to negligence, but the certainty.[103] By the 1939 amendment, the defense of assumption of risk was prohibited, although it still prevails in disguised form under some compensation acts. Also, recovery under the F.E.L.A. is not restricted to accidental injuries. Most compensation acts are limited to accidents. Thus, in the absence of an occupational disease act, there can be no recovery under state law for this type of work-connected injury which is compensable under the F.E.L.A.[104]

Causal relationship between negligence or violation of a Safety Appliance regnlation, and injury, has been markedly reduced as a hurdle and has been uniformly held to be a question of fact for the jury.[105] A vio-

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brought in New Hampshire under an act which permitted the election of either compensation or an action for damages. Recovery was denied. Full faith and credit required recognition of the compensation laws of Vermont as a defense to the New Hampshire action. See also: Ohio v. Chattanooga Boiler and Tank Co., 289 U. S. 439 (1933) and Alaska Packers Assn. v. Industrial Accident Commission, 294 U. S. 532 (1935). The obverse, however, is true when an employee has recovered in one state and seeks compensation in another. Then he is met with the full faith and credit clause as applied to the judgment obtained. Magnolia Petroleum Co. v. Hunt, 320 U. S. 430 (1943). See Holt, *Reflections on Magnolia Petroleum Co. v. Hunt,* 30 CORNELL L. Q. 160 (1944).

[102] Note that the compensation laws were not always well received by the courts. In 1919 Mr. Justice Holmes wrote to Sir Frederick Pollock about the Arizona compensation law.

> My last opinion was in favor of the constitutionality of a state law throwing all the risks of damage to employees on the employers in hazardous businesses. To my wonder, four were the other way, and my opinion was thought too strong by some of the majority. I pointed out that even in what was supposed to be the Constitutional principle of basing liability on fault, it meant that a man had to take the risk of deciding the way the jury would decide in doubtful cases.

Pollock replied:

> It is amazing to my English mind that four judges of your Court should be found to assert a constitutional right not to be held liable *in a civil action* without actual fault.

2 HOLMES-POLLOCK LETTERS 15, 21 (Howe ed. 1941).

[103] N. Y. C. R. Co. v. Ambrose, 280 U. S. 486 (1930).

[104] See Urie v. Thompson, 337 U. S. 163 (1949) and Mr. Justice Frankfurter's dissent at 187. *Cf.* Steel v. Connell L. & Co., 2 K.B. 232 (1905).

[105] Tennant v. Peoria & P. U. R. Co., 321 U. S. 29 (1944); O'Donnell v. Elgin J. & E. Ry. Co., 70 Sup. Ct. 200 (1950); Eglsaer v. Scandrett, 151 F. 2d 562 (1945).

lation of the Boiler Inspection Act,[106] which provides in broad terms that locomotives, boiler tenders and all parts and appurtenances to, in proper condition and safe to operate, imposes absolute liability on carriers, irrespective of negligence.[107] The use and probative value of the doctrine of *res ipsa loquitur* as applied in F.E.L.A. cases has materially lessened the burden of proof on the part of the plaintiff.[108]

Section 5 of the Employers' Liability Act has, at long last, been construed to mean precisely what it says. Releases which have been fraudulently or forcibly obtained from injured employees have been invalidated by the courts.[109] Similarly, unfair compromises have been subject to severe scrutiny by the courts.[110] The venue provisions of the Employers' Liability Act likewise are applied to afford the maximum of protection to the employee, and he may no longer be required to contract away his right to bring his case in the jurisdiction most convenient to him.[111]

From this brief review of the recent leading cases, it is evident that the F.E.L.A. does impose liability upon the employer for almost every type of railroad accident; the standard of care approximates that of the steamship owner who has long been held liable for defective or unsafe working conditions and appurtenances, under a doctrine of negligence.

In assessing the values of the two types of legislation here discussed, one must consider not only the practical application of the acts, but the philosophical basis. The Employers' Liability Act stems from the common law. It leaves untouched the entire process of litigation which the law has developed through the centuries. It merely seeks to equalize the positions of the employer and employee by debarring certain defenses of the employer which were developed in a period when the law was unduly sensitive to the economic pressures of the industrial order. Now that the position of industry and its capital requirements are secure and stable, industry is able to bear the cost of these industrial accidents. Moreover, it is able to spread the costs by insuring against them. It is the genius of the common law that it has always been able to reflect the changes in the needs and temper of the times, and now, under the Federal Employers' Liability Act, the flexibility of the judicial process is able to adjust to the varying economic conditions.

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106 45 U. S. C A. §§ 1-16.

107 Urie v. Thompson, 337 U. S. 163 (1949); Lilly v. Grand Trunk Western R. Co., 317 U. S. 481 (1943); O'Donnell v. Elgin J. & E. Ry. Co., 70 Sup. Ct. 200 (1950); Carter v. Atlanta & St. A. B. Ry. Co., 336 U. S. 935 (1949).

108 Jesionowski v. Boston & M. R.R., 329 U. S. 452 (1947).

109 Scarborough v. Pennsylvania R. Co., 326 U. S. 755 (1945)..

110 Duncan v. Thompson, 315 U. S. 1 (1942).

111 Boyd v. Grank Trunk Western R. Co., 70 Sup. Ct. 26 (1949).

Rights under the F.E.L.A. are defined abstractly but the judge and jury are left free to apply the principles to concrete cases. The importance of the jury in tort law is very great. In recent cases the Supreme Court has returned to the sound old principle of leaving jury verdicts under the F.E.L.A. undisturbed.[112] Moreover, in disputed questions of fact, the court has insisted that the matter be sent to the jury.[113] With the wide fluctuations in wage levels and cost of living, either the court or the jury is able to reflect these conditions in the size of the verdict awarded.

In determining whether the liability act meets the needs of the industry, it is well to consult those involved. When the 1939 amendment to the Employers' Liability Act was adopted, the railroad brotherhoods testified that the amendment met their needs and that they were satisfied with it.[114] Railroad labor is highly organized and the officials of the brotherhoods are well qualified to speak for their members.[115] Thus, their manifest satisfaction with the Act is entitled to greater weight than the armchair criticism of various writers and government agencies.

The cost of injuries to the railroads under the F.E.L.A. has been very modest indeed. In 1932 that average cost over the country was .85% of the payroll.[116] If the figure be computed in relation to gross income, it assumes an even smaller percentage of the costs of doing business. The costs of a compensation system as reflected in the burden on the employer are difficult to compute. A comparison of the present costs of state compensation with those before the adoption of the state acts would not give a fair comparison, since at that time liability was exceedingly difficult to enforce against an employer. The cost of

112 Affolder v. N. Y. C. & St. L. R. Co., 70 Sup. Ct. 509 (1950); Coray v. So. P. R. Co., 335 U. S. 520 (1949); Lavender v. Kurn, 327 U. S. 645 (1946). See Mr. Justice Miller's statement in Jones v. East Tennessee V. & C. R. Co., 128 U. S. 443, 445 (1888):

> We see no reason, so long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these [negligence and contributory negligence] as well as others.

113 Myers v. Reading Co., 331 U. S. 477 (1947); Lavender v. Kurn, 327 U. S. 645 (1946); Wilkerson v. McCarthy, 336 U. S. 53 (1949); Lillie v. Thompson, 332 U. S. 459 (1947).

114 84 CONG. REC. 9407 (1939). Senator Burke, in explaining the provisions of the 1939 Amendment, stated:

> The representatives of the railroad brotherhoods appeared and presented a very full and clear justification for the measure. The Federal Employees Compensation Board approves the changes.

See also SEN. REP. No. 243, 76th Cong., 1st Sess. (1939).

115 The transportation unions are among the oldest American labor organizations, dating back to 1863. 70 MO. LABOR REV. 275 (1949).

116 SEN. DOC. No. 68, 74th Cong., 1st Sess. 1, 16 (1935).

administering the state compensation acts is considerable.[117] This expense is borne not by the industry but by society at large. The cost of recompensing injured railroad workers is not unreasonable; it is appropriate that it be borne by the carriers and not the public. Mr. Justice Douglas succinctly declared, "The F.E.L.A. was designed to put on the railroad industry some of the cost for the legs, eyes, arms and lives which it consumed in its operations.[118] More important is the fact that making the employer pay for his negligence has resulted in the adoption of safety devices and a marked reduction in the number of railroad injuries.[119] An earnest supervision by the Interstate Commerce Commission of technical operations and improvements would result in its adopting regulations to promote safety, which of course have the effect of law.

V. Conclusion

The purpose of all this legislation is to approach more nearly adequate compensation for the injured workers and their families. The trend of both legislation and decisions is to further this aim.[120] We assert that the substitution of the state compensation acts for the F.E.L.A. would be a retrogression. Even a Federal Compensation Act would severely limit the awards to the seriously and fatally injured without eliminating the costly problem of adversary proceedings before some tribunal, whether administrative or judicial.

If those who speak of change in the remedies afforded injured railroad employees engaged in interstate commerce are sincere, in that their interest springs from their genuine regard for the worker, and not because of some private interest in or relationship with the carriers, let them come forward with the request that the English system be adopted, whereby the employee is assured a minimum of compensation, regardless of fault, with the additional remedy of a trial by jury for extra damages when he can establish negligence.[121] This would provide a complete

[117] The cost of administration in New York in 1930 was $1,431,061.20. The estimated expense in Pennsylvania was $327,000. Dodd, *op. cit. supra* note 25, at 804 *et seq.*

[118] Wilkerson v. McCarthy, 336 U. S. 53 (1949).

[119] In the last three months of 1905, 931 railroad employees were killed in the course of their employment. 40 Cong. Rec. 1.4602 (1906). Statement of Rep. Mann of Illinois. In 1938 there were 704 fatal injuries. Work Injuries, *supra* note 2, at 53.

[120] See 84 Survey 234 (1948), discussing the trend toward liberalization in compensation legislation.

[121] See Behrendt, *Rationale of the Election of Remedies,* 12 U. of Chi. L. Rev. 231 (1945). The concurrent pursuit of both with, of course, a reduction of the judgment by the amount of compensation paid, is the most equitable and simple solution. To require an election of remedies poses many difficulties, especially with respect to suits against negligent third parties. See Branahan v. Terminal Shipping Co., 136 F. 2d 655 (4th Cir. 1943).

remedy, in which every worker would be compensated for injury while at work, regardless of fault, and the innocent victims of the negligence of others would be given the benefit of every item of damages now incorporated within the F.E.L.A.

If the F.E.L.A. is amended to provide automatic workmen's compensation without regard to negligence *in addition* to the benefits already provided, then the injured worker will have funds upon which to live pending the ultimate disposition of his action under the F.E.L.A. based on negligence.

Moreover, under the Railway Labor Act (45 U. S. C. A., § 151 *et seq.*), the injured employee is already immediately provided with a maximum of 130 days at $5.00 per day for disability from injury sustained while at work. Therefore, the argument that under state compensation acts an injured worker is provided with support more speedily than in actions under the F.E.L.A. is today without merit. If, *in addition* to the existing rights for negligence under the F.E.L.A., workmen's compensation protection is enacted, then there can be no argument that under a state compensation system injured railroad workers would receive speedier awards.