Chapter 2

FORMS OF LIABILITY OF EMPLOYER

With the spread of industrialisation, there emerged a new class of factory workers. These workers were completely dependent on their wages for their subsistence. Because of this dependency on the wages, these workers were quite helpless, when their receipt of wages was interrupted by industrial injuries.\(^1\) By the latter half of the nineteenth century, the concept of placing the liability for compensation for industrial injuries on the employer evolved.\(^2\) The underlying reason was that the workman had been working for the benefit of the employer.\(^3\) So the latter should be held responsible for the security of the former.\(^4\) If the employer could not prevent industrial injuries to the workman, he should at least compensate the injuries sustained by the latter.\(^5\)

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2. Id., p.5.
4. Ibid.
5. Ibid.
Liability of employer based on negligence

The concept of employer's liability was first reflected in the tortious liability of the employer under common law. Employer's liability at common law is based upon proof of negligence or fault. The workman should establish negligence on the part of the employer as the cause of the accident, resulting in the injury. But negligence does not give rise to a right of action, unless there is a legal duty to take care. A legal duty to take care, negligent conduct in breach of that duty and damage, caused by that negligent conduct to another person, are the three elements, which together constitute the test of negligence and give rise to an action for damages.

6. The term 'tort' means a private or civil wrong or injury, for which the court will provide a remedy in the form of an action for damages. See Black's Law Dictionary (1990), p.1489.

7. Liability at common law arises under the ordinary law of the land, as interpreted by the courts. It does not depend upon an Act of Parliament. See John Munkman, Employer's Liability at Common Law (1985), p.2

8. M.A. Millner, Negligence in Modern Law (1967), p.25. Negligence in the air will not do; negligence, in order to give a cause of action, must be the neglect of some duty, owed to the person, who makes the claim. See Haynes v. Harwood, [1935] 1 K.B.146 at 152, per Greer L.J.

9. John Munkman, op. cit., p.27. In Bryce v. Swan Hunter Group Plc and Others, [1988] 1 All E.R.659 (Q.B.), although the plaintiff established breaches of duty on the part of each of the defendants, she did not establish that such breach had caused the deceased to contract the disease, which led to his death. For facts of the case, see infra, n.30. See also Page v. Smith, infra, n.10.
The employer is under a legal duty to take care for the safety of his workman, as there is a close and direct relationship between them. The employer invites the workman to enter his premises, use his machinery and follow his methods of work. The legal duty to take care extends only to those cases, where he can foresee the likelihood of injury. 10

If an employer omits to exercise the degree of care, necessary in the circumstances, he is guilty of negligence. The standard of care, expected from an employer, is that of

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10. See the dictum of Lord Atkin in Donoghue v. Stevenson, [1932] A.C. 562 at 580 regarding legal duty to take care. The appellant in this case sought to recover damages from the respondent, a manufacturer of aerated waters, for injuries, she suffered as a result of consuming part of the contents of a bottle of ginger beer, which had been manufactured by the respondents and which contained the decomposed remains of a snail. It was held that the manufacturer is under a legal duty to the ultimate consumer to take reasonable care that the article, manufactured by him, is free from defect, likely to be injurious to health. In Page v. Smith, [1994] 4 All E.R. 522 (C.A.), the plaintiff was involved in a collision with the defendant, caused by the latter's negligence. He was unhurt in the collision but the accident caused him to suffer myalgic encephalomyelitis, from which he had suffered for about 20 years. He brought an action against the defendant, claiming damages for chronic M.E. It was held that a plaintiff, who claimed damages for nervous shock, resulting from an accident, in which he had escaped physical injury, had to show that psychiatric injury was foreseeable and was of a kind, that would be suffered by a person of ordinary fortitude.
a hypothetical "reasonable man". In general, an employer is expected to keep reasonably abreast of current knowledge, concerning dangers, arising in trade processes. But he is not liable, if by doing so, he would not have been aware of any danger. There are three useful factors, which help to keep the standard of care, expected from an employer, an objective one. These factors are the magnitude of the risk; the practical possibilities and the general practice of competent persons.

Magnitude of the risk depends partly on the probability of an accident occurring and partly on the gravity of the results, if it does occur. The more serious the damage,

11. The reasonable man is presumed to be free both from over-apprehension and over-confidence. See Glasgow Corp. v. Muir, [1943] 2 All E.R.44 at 48, per Lord Macmillan.

12. In Graham v. C.W.S.Ltd., [1957] 1 All E.R.654 (Q.B.) the plaintiff was employed by the defendant company in a furniture workshop, in which there was an electric sanding machine. The plaintiff contracted dermatitis as a result of the mahogany dust produced by the sanding machine. The plaintiff's claim for damages failed, because the defendant had taken reasonable steps to keep their knowledge up-to-date and did not know that the wood dust was a source of danger.

13. For carrying out a task, by which metal particles may strike the eye, goggles may have to be provided for a one-eyed workman, though for a normal workman, the risk could be ignored. This is so, because total blindness is a much graver injury than the loss of one eye. In Paris v. Stepney Borough Council, [1951] A.C.367; [1951] 1 All E.R.42 (H.L.), the appellant was employed as a fitter in the garage of the respondent borough council. The respondents knew that he had only one eye but did not provide goggles to the appellant, as it was not the ordinary practice for employers to supply goggles to contd....
which will result from an accident, the more thorough are the precautions, which the employer must take. An equipment, through no fault of the employer, may not be entirely satisfactory and may involve some extra risk. The employer is not bound to bring his operations to a standstill because of the extra danger, if he has taken such precautions as are possible. Operations ought not to be stopped or

(\textit{f.n.13 contd.}) workmen of garages. While the appellant was removing a bolt on a vehicle, a chip of metal flew off and injured his only one eye, leading to his total blindness. The court held that the respondents owed a special duty of care to the appellant, who had only one eye, whether or not goggles should have been supplied to two-eyed workmen.

14. See \textit{Morris v. West Hartlepool Steam Navigation Co. Ltd.}, [1956] 1 All E.R. 385 (H.L.). The appellant was employed by the respondents on a grain ship in preparing the holds so as to be ready to receive grain on arrival at port. In the course of duty, he had to pass a hatch, which was not protected by any guard-rails. He fell through the open hatch and was seriously injured. The respondents were held to be guilty of negligence in not fencing the hatch of the hold, as the consequences of falling into the hold would obviously be serious.

15. See the comment of Asquith, L.J., in \textit{Daborn v. Bath Tramways Motor Co. Ltd.}, [1946] 2 All E.R. 333 at 336 (C.A.). D was driving an ambulance with a left hand drive with a large warning notice on the back "... No signals". Unaware of the fact that a motor omnibus was trying to overtake her, she turned towards the right and made a signal with her left hand. A collision occurred between the ambulance and the motor bus and D sustained severe injuries. It was held that in view of the necessity, in time of national emergency, of employing all available transport resources and the inherent limitations of the ambulance in question, D had done all that she could reasonably do in the circumstances and not guilty of negligence but the driver of the motor omnibus was.
slowed down to an unreasonable extent, merely because there
is some unavoidable risk. 16 Risks may have to be accepted,
where an important object is in view such as the saving of
life. 17 But there may be occasions, when the danger is so
great that work ought to be suspended or stopped altogether.
For example, coal mines in a gassy or fiery state may have
to be closed down for a time. 19 In deciding the standard
of care to be taken, another factor, to be taken into account,
is the practical possibilities. Employers in technical
trades are expected to keep in touch with current improve-
ments. But they are not bound to adopt them, until the

E.R. 449 (H.L.), a workman, working in a gangway slipped
and injured his ankle in the course of duty. The em-
ployers were not held liable, as they had taken all
reasonable steps for the safety of their servants by
spreading saw dust on the slippery floor, so far as
supplies permitted.

E.R. 369 (C.A.), London Transport Executive lent a jack
to the defendants' fire station. Only one vehicle at
the station was specially fitted to carry it. While
that vehicle was out on other service, the station
received an emergency call to save the life of a woman.
The officer-in-charge ordered the jack to be loaded on
a lorry, the only available vehicle. On the way to the
scene of accident, the driver of the lorry had to brake
suddenly and the jack moved inside the lorry and injured
one of the firemen. It was held that the defendants
were under no duty to leave a vehicle specially fitted
to carry the jack available at all times and the risk
taken was not unduly great in relation to the end to be
achieved and, therefore, the defendants were not liable
for damages for negligence to the fireman.

18. Latimer v. A.E.C. Ltd., supra, n.16 at 659, per Lord
Tucker.

 practicability of its adoption has been investigated. To determine the practicability, it is necessary to balance the practical problems in the adoption of safety measures on the one hand against the magnitude of the risk on the other hand. If the former altogether outweighs the risk involved, these measures need not be taken. Marshall v. Gotham Co. Ltd.\(^{20}\) is a case in point. In gypsum mines, a rare geological phenomenon, known as "slickenside", gave rise to dangerous falls of rock. But systematic propping of the roof would not stop the falls, as the rock would still fall, in smaller pieces, around the props. Systematic propping in every part of such a mine was held to be not "reasonably practicable". Similarly, in Brown v. Rolls Royce Ltd.,\(^{21}\) failure to provide barrier cream as protection against dermatitis

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20. Marshall v. Gotham Co. Ltd., [1954] A.C. 360; [1954] 1 All E.R. 937 (H.L.). While working in a gypsum mine, owned by the respondents, a miner was killed by a fall of marl from the roof of the working place. The fall was due to a condition, known as "slickenside". Before the accident, the respondents undertook the usual procedure for making the roofs secure. Slickenside was not detectable by this method and there was no known method of detecting it. It was held that the respondents had done all that was "reasonably practicable" to make the roof secure and, therefore, the appellant was not entitled to recover.

21. [1960] 1 All E.R. 577 (H.L.). The appellant was employed by the respondents in a work, which required his hands to be constantly in contact with oil. He contracted dermatitis, as a result of the contact with oil. He brought an action for damages against the respondents for failure to supply him with barrier cream as a protection. The court dismissed the appeal, as the appellant had not proved negligence on the part of the respondents.
was not held to be a negligent act, as the value of such protection was found to be doubtful. In Morris, as the small risk to seamen, engaged in erecting a rope round an open hatchway at sea, was altogether outweighed by the risk to persons, moving near the hatchway, if it were left unguarded in poor light, it was held reasonably practicable to erect the rope.

The general practice is another factor, taken into consideration, in determining the standard of care, expected from an employer. A general practice is not always conclusive of the absence of negligence, because it may go wrong. For instance, motorists may, generally, take the wrong side of the road or take risks in overtaking. Such acts are negligent. So, an employer cannot be said to have taken due care by acting in accordance with general practice. He can defend himself, only if he acted in accordance with the general and approved practice. A general practice


23. "Approved" means primarily approved by those, qualified to judge but also approved, in the last resort, by the court itself. See John Munkman, op.cit., p.45. See Thompson and Others v. Smiths Ship Repairers (North Shields) Ltd. and Other actions, [1984] I All E.R.881 (Q.B.D.) The plaintiffs were employed as fitters in ship-building and repairing yards over a long period from the 1940's to the 1970's. During their employment in the yards, the plaintiffs were exposed to excessive noise, which progressively impaired their hearing. Upto 1963, there was no effective expert advice on the problem of industrial noise and so the employer's indifference to the problem was in line with common practice

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can be approved, as held in Markland case, only if it is reasonably safe. In Markland case, a burst pipe flooded a road. The flood water had remained undetected for three days, when it froze over and caused an accident. The water authority had carried out checks every seven days, in accordance with general practice. But on the average, fifty bursts a week occurred in the area. So, the general practice, followed by the water authority, was held to be not a reasonable precaution against an obvious danger.

The general practice in the window-cleaning trade was held to be negligent in that no precautions were taken to protect the workmen against loose window-sashes. Similarly,

(f.n.23 contd.) throughout the industry. But after 1963, expert advice and adequate protective devices were available to the employers. In an action for damages against the employer, it was held that the employer was not negligent up to 1963, when he followed the recognised practice in the industry as a whole, but was liable to pay damages for the period, when he failed to provide adequate protective devices, which were available after 1963.


25. In General Cleaning Contractors Ltd. v. Christmas, [1953] A.C. 180 (H.L.), a window-cleaning company had contracted to clean the windows of certain premises. One of the experienced employees of the company fell and sustained injuries, as one of the windows, he was cleaning, was defective. It was held that the employers had negligently failed in their obligation to devise a reasonably safe system of work, since they neither gave instructions to ensure that the windows should be tested before cleaning nor provided any apparatus, such as wedges, to prevent the windows from becoming closed.
when an omnibus crashed, owing to a burst tyre, though the omnibus company had followed the established practice in all respects, they were held negligent by the House of Lords, because they had not instructed their drivers to report incidents, which might cause an unusual type of tyre fracture. A general practice is not sacrosanct, where there is a danger, for which it does not provide adequately.

The duty of an employer towards his workman is to take reasonable care for his workman's safety in all the circumstances of the case. It is one single duty to take all reasonable steps to avoid unnecessary risk to his workmen. For convenience, it is often split up into

26. Barkway v. South Wales Transport Co. Ltd., [1950] A.C.185; [1950] 1 All E.R.392 (H.L.). The appellant's husband was killed, while travelling as a passenger in the respondents' omnibus. The respondents were held liable for negligence, as the cause of the accident was a defect of the tyre, which might have been discovered by due diligence on the part of the respondents.


28. In Wilson v. Tyneside Window Cleaning Co., [1958] 2 All E.R.285 (C.A.), a skilled and experienced window-cleaner was frequently sent by his customers to clean the windows of a particular customer. The employers did not inspect the customer's premises each time, they sent window-cleaners there nor did they specifically warn the window-cleaner of particular dangers but they did instruct him to leave uncleaned any window, which presented unusual difficulty. While cleaning a window, of which one of the two handles was missing, the window-cleaner attempted to pull the window down by the remaining handle. The handle broke and he fell and sustained severe injuries. It was held that the employers had taken reasonable care not to subject the plaintiff to unnecessary risk.
different categories, such as safe tools, safe place of work or safe system of work. But it always remains one single duty. If the employer delegates the performance of that duty to another, he remains liable for the failure of that other to exercise reasonable care. This principle holds good, whether the person employed by the employer, is a servant, a full-time agent or an independent contractor. If the employer is not able to eliminate the risk, he must, at least, take reasonable care to reduce it as far as possible. Where a man is exposed to an unavoidable danger,

29. Per Parker, L.J. in Davie v. New Merton Board Mills Ltd., [1958] 1 All E.R. 67 at 82 (C.A.). A drift, bought by the employers of D from a reputable supplier of tools of this kind, had a defect viz. excessive hardness of the steel. This defect in the drift was not discoverable by reasonable examination by the employers. Owing to the defect in its manufacture, a piece flew off the drift, when it was struck by D in the course of using the tools and he was seriously injured. The employers were held not liable for the injury caused, as they had used reasonable care and skill in providing the tools by buying it from a reputable supplier.

30. In Bryce v. Swan Hunter Group Plc and Others, [1988] 1 All E.R. 659 (Q.B.D.), the deceased was employed from 1937 to 1975 in shipyards of the three defendant companies. In the course of his employment, the deceased was exposed to asbestos dust, which caused him mesothelioma, from which he died in 1981. In an action by his widow against the defendant for damages, it was held that the plaintiff had not established that the defendants' breach of duty had caused the deceased to contract the disease. Still, the defendants were held liable for damages, because, although the defendants were not under a duty of care to prevent all exposure of the deceased to dangerous quantities of asbestos dust, they were under a duty to take all reasonably practical steps to reduce the amount of asbestos dust, to which the deceased and his fellow-workers were exposed.
as by working in a high place as a window-cleaner or at a place near a ship's side, where there is no rail, the employer cannot say that the workman must rely upon his own skill and judgment. He must take such safety measures as are practicable.\(^{31}\) If, despite the exercise of due care, the workman sustains injury through an inherent risk of the employment, he cannot recover damages against the employer, because the employer is not liable in the absence of negligence.\(^{32}\) The employer's duty of care is owed to each workman as an individual. Therefore, the employer must take into account any special weakness or peculiarity of a workman, such as the fact that he is one-eyed.\(^{33}\) He owes a lower duty of care to an experienced workman\(^ {34}\) and a higher duty to a workman with insufficient experience, who needs help and supervision.\(^ {35}\)


34. \textit{Qualcast (Wolverhampton) Ltd. v. Haynes}, [1959] A.C.743; [1959] 2 All E.R.38 (H.L.). While handling a ladle of molten metal in a foundry, an experienced moulded was injured, when the ladle slipped, splashing the metal on to his foot. He was not wearing protective spats, though his employers, to his knowledge, kept a stock of them, available for the asking. He had not been ordered or advised to wear them. It was held that the plaintiff was so experienced that he needed no warning and, therefore, there was no negligence on the part of the defendants.

35. \textit{Mc Dermid v. Nash Dredging and Reclamation Co. Ltd.}, [1985] 2 All E.R.676 (C.A.). The plaintiff, who was only eighteen and had only limited experience of dredging operations, was appointed by the defendants as a deckhand in the course of dredging operations, carried out by the contd. . .
The duty of the employer to provide his workman with a safe place of work requires him to make the place of employment as safe as the exercise of reasonable care would permit. This duty extends not only to the actual place of work, but also to the means of access to and from it. The employer's (f.n.35 contd.) defendants and their parent company as a joint enterprise. While working on a tug, owned by the parent company under the control of a tug-master, employed by the parent company, he was seriously injured and his left leg had to be amputated. It was held that since the defendants had put the plaintiff, who was young and inexperienced, under the control of the tug-master, the latter was their agent or delegate and required, on their behalf, to take reasonable care to devise a safe system of work for the plaintiff on the tug and take reasonable care for his safety. The defendants were, therefore, vicariously liable for the tug-master's negligence.

36. Naismith v. London Film Productions Ltd., [1939] 1 All E.R. 794 (C.A.). The plaintiff, while employed as a crowd extra in a film studio, had to wear highly inflammable material. Suddenly, she noticed that her foot was on fire. Immediately, she was enveloped in flames and suffered serious injuries. The Court of Appeal held that if the employer provided dangerous equipment, he should take reasonable steps to minimise the danger.

37. See Thomas v. Bristol Aeroplane Co. Ltd., [1954] I W.L.R. 694 (C.A.). The ramp, leading down to the entrance of the defendants' factory, was rendered slippery by frozen snow. The plaintiff, on entering the factory, slipped on a piece of ice, fell and sustained injury. The defendants had maintained a squad of men to prevent such accidents. But there was no maintenance-man on duty till very shortly after the accident, the factory being closed during the week-end. It was held that the defendants had done all that they reasonably could be expected to do, in the circumstances, to see that their entrances were properly maintained.
duty to take reasonable precautions to provide a safe place of work may require him, for example, to provide a safety rail for work on a ledge over a steep drop; a hand-rail on a flight of steps, which, though short, is steep and irregular; a handhold on a roof-crawling ladder, used for carrying buckets; a line of demarcation on a roof, over which a ropeway runs; a safety belt or rope for work, which

38. Batn v. British Transport Commission, [1954] 2 All E.R. 542 (C.A.). A workman of the defendants was engaged in re-concreting the walls of a dry dock. He fell into the dock below, receiving fatal injuries. The defendants were held liable for negligence to provide a protecting fence or guard-rail.

39. Kimpton v. The Steel Co. of Wales, Ltd., [1960] 2 All E.R. 274 (C.A.). In the defendant's factory, there was a set of three steel steps without any hand-rail, which led to a platform. The plaintiff, an electrician, slipped and injured himself, while descending the steps hurriedly to deal with a breakdown in electricity. The defendants were held liable for not providing a handrail.

40. Cavanagh v. Ulster Weaving Co. Ltd., [1960] A.C. 145 (H.L.). The plaintiff was seriously injured, when he fell from a crawling ladder without any handrail, whilst carrying a bucket of cement in the course of his employment. It was found that the employer had followed the general practice of the trade for carrying cement on the roof. Still, the employer was held guilty of negligence, since the evidence as to trade practice alone could not be treated as conclusive in favour of the defendants.

41. Quintas v. National Smelting Co. Ltd., [1961] 1 All E.R. 630 (C.A.). For transporting material from one part of the factory to another, the defendants operated an overhead travelling cable-way. While the plaintiff was standing in the route of the cable-way, giving message to the foreman, the cable-way started up and knocked the plaintiff down. The defendants were held liable for not demarcating the area, traversed by the cable-way.
involves moving over steep and slippery altar courses in a dry dock;\textsuperscript{42} the re-siting of a points lever, which may endanger a person, riding on the footboard of a railway engine;\textsuperscript{43} or even the fencing of an open hatchway between docks at sea.\textsuperscript{44} The duty of an employer is to take reasonable care for the safety of his workmen throughout the course of their employment. This duty does not come to an end, because the workmen are sent to work at premises, which do not belong to the employer\textsuperscript{45} but to third party.

\textsuperscript{42} Hurley v. J. Sanders & Co. Ltd., and Another, [1955] 1 All E.R. 833 (Liverpool Assizes). The plaintiff was employed by the first defendants for painting a ship, standing on altar courses. While stepping down the side of the dock to his place of work, the plaintiff slipped and fell, sustaining injuries. It was held that as working on the altar courses was dangerous and the first defendants had not established that it was impracticable to take some precautions such as the provision of a safety belt and line, they were in breach of their common law duty to take reasonable for the safety of their servant.

\textsuperscript{43} Hicks v. British Transport Commission, [1958] 2 All E.R. 39 (C.A.). The plaintiff was employed by the defendants as a shunter. One day after finishing his shunting work, he rejoined the train by standing on a lower step. As the train moved, he struck a ground lever and fell and was injured severely. It was held that, though the defendants were liable for breach of their common law duty to take care for the plaintiff's safety, the damages recoverable by the plaintiff would be reduced by fifty per cent, as there was contributory negligence on his part.

\textsuperscript{44} Morris v. West Hartlepool Steam Navigation Co. Ltd., \textit{supra}, n.14.

\textsuperscript{45} See General Cleaning Contractors Ltd. v. Christmas, \textit{supra}, n.25. See also Smith v. Austin Lifts Ltd. and Others, [1959] 1 All E.R. 80 (H.L.). The appellant was employed as a fitter by the first respondents, who had contracted with the second respondents to maintain a lift on premises, occupied by the second respondents. The machine-house of the lift was in the roof and its

contd. ...
The employer must take reasonable care to provide his workman with the necessary plant and equipment and maintain them properly. He is liable, quite generally, for the negligence of himself, his servants and his agents in the provision and maintenance of plant. Where there is a proved need for certain plant, the employer will be negligent, if he fails to supply it.

(f.n.45 contd.) Left door was in a defective condition. The appellant had reported the defect to the first respondent, who, in turn, had reported to the second respondents. The second respondents did not repair the door and the first respondents neither repaired it nor visited the premises to see, whether the place of work and the access to it were safe. One day, when the appellant tried to enter the machine-house, the left door gave way and the appellant fell and was injured. The first respondents were held liable to the appellant. See also Mc Dermid v. Nash Dredging and Reclamation Co. Ltd., infra, n.63.

46. "Plant" is used in this context as a convenient general term to denote all manner of things, employed in the course of the work. It comprises, for example, such widely divergent objects as scaffold poles and cart-horses. See John Munkman, op.cit., p.106.

47. Williams v. Birmingham Battery and Metal Company, [1999] 2 Q.B.338 (C.A.). While a workman was, in the course of his employment, descending from an elevated tramway, belonging to his employers, his foot slipped and he fell to the ground, receiving fatal injuries. The employers had provided no ladder or other safe means of ascending to and descending from the tramway. It was held that the defendant was liable for negligence. See also Lovell v. Blundells and T. Albert Crompton & Co. Ltd., [1944] 1 K.B.502. The plaintiff, a boiler-maker found some planks for himself and set up his own staging to carry out an overhaul of boiler tubes on a ship. The employer was held liable for failure to provide planks.
In England, formerly the duty to take reasonable care in the provision of equipment did not make the employer liable for the negligence of a manufacturer or other supplier, since these were not persons, to whom he delegated his duty. The employer's liability depended on, whether he exercised reasonable care in purchase or hire. If an equipment of apparently good quality was bought or hired from a reputable manufacturer or supplier, the employer was not liable for unknown defects. This law was changed by the Employer's Liability (Defective Equipment) Act, 1969. This Act makes an employer liable for negligence, if an employee sustains personal injury in the course of his employment in consequence of a defect in equipment provided by his employer, though defect may be attributable wholly or partly to the fault of a third party. The Act of 1969, thus, improved the rights.

48. Davie v. New Merton Board Mills Ltd., [1959] A.C.604 (H.L.). While using a drift, manufactured by reputable makers, a particle of metal flew off and struck a maintenance fitter's eye, causing injuries. The employers were held not liable, as they had bought the tool from a reputable source and had no means of discovering its latent defect.

49. See the Employer's Liability (Defective Equipment) Act, 1969, Section 1 (1). See also Knowles v. Liverpool City Council, [1993] 4 All E.R.321 (H.L.). The respondent, employed by the appellant council as a labourer flagger, injured his finger, when a flagstone, he was manhandling, broke, causing him to drop it. The flagstone broke, because of a defect in its manufacture, which could not reasonably have been discovered before the accident. The question, to be decided, was whether flagstone was 'equipment' for the purposes of Section 1 (1) of the Employer's Liability (Defective Equipment) Act, 1969, since 'equipment' referred to 'plant', which comprehended contd...
of the workman against his employer, in this regard. It made in-roads into the "fault" principle, the basis of liability under common law for personal injury. The principal advantage of the employer's liability under the Act of 1969, from the workman's point of view, is that he is relieved of any need to identify and sue the manufacturer of defective equipment, provided by his employer. But the worker has to prove the "fault" of some third party, leading to a 'defect' in the equipment.

(f.n.49 contd.) such things as tools and machinery, required for the performance of a particular task and did not include articles, produced by the use of plant and machinery. It was held that the flagstone was 'equipment' for the purposes of the 1969 Act, as Section 1 (i) of the Act embraces every article of whatever kind, furnished by the employer for the purpose of his business and not merely for the use of his employees. See also, Coltman and another v. Bibby Tankers Ltd. [1986] 2 All E.R.65 (Q.B.). A ship, owned by the defendant, sank off the coast of Japan. In an action by the plaintiffs, representing the estate of a crew member, for damages under Section 1 of the Employer's Liability (Defective Equipment) Act, 1969, it was held that a ship was 'equipment' for the purposes of Section 1 (3) of that Act.

The employer is not bound to provide all the latest safety devices for the safety of his workmen. But he is bound to take reasonable steps to protect them from injury in his service. 53

The employer is under a duty to provide competent staff. A skilled employee may hold all necessary qualifications and act with reasonable care. But he may be deficient in experience to deal with certain dangerous situations. If accidents occur by their lack of experience, the employer is liable. 54 If a fellow-workman is likely to prove a source of danger to his fellow-employees by his habitual misconduct, the employer is duty-bound to remove the source of danger by dismissal, if necessary. 55

53. See Toronto Power Co. Ltd. v. Kate Pakistan, [1915] A.C. 734 (P.C.). A workman was killed by a block, falling from a travelling crane. The accident was caused by the overwinding of the chain, which hoisted the block. There was in existence a safety device, which would have prevented this overwinding. The employer was held liable for not adopting this device.

54. Butler (or Black) and another v. Fife Coal Co. Ltd., [1912] A.C. 149 (H.L.). The husband of the pursuer was killed by an outbreak of poisonous gas, while working in the coal-mine of the defendants. It was held that the defendants were liable, as they had failed in their duty to appoint and keep in charge persons, competent to deal with the dangers arising in the mine.

55. Hudson v. Ridge Manufacturing Co. Ltd., [1957] 2 Q.B. 348. One of the defendants' employees had made a nuisance of himself to his fellow-employees, including the plaintiff, a cripple, by persistently engaging in skylarking. One day, this employee indulged in horseplay, trapped up the plaintiff and injured him. The employers were held liable, as they had failed to prevent such behaviour of their employees.
The employer's duty also involves the duty to establish and enforce a proper system or method of working. This system includes such matters as co-ordination of different departments and activities, the lay-out of plant and appliances for special tasks, the method of using particular machines or

56. Wilsons and Clyde Coal Co. v. English, [1937] 3 All E.R. 628 (H.L.). The haulage plant of a coal-mine was negligently operated by the servant of the coal-mine, while the workmen on the morning shift were leaving the pit, resulting in injury to a miner. In an action by the miner against the coal-mine, it was held that to provide a proper system of working is a paramount duty of the master and if it is delegated by the master to his servant, the former still remains liable.

57. Grantham v. New Zealand Shipping Co. Ltd., [1940] 4 All E.R. 256, (K.B.). The plaintiff was engaged in unloading a cargo of cheese from a hold of the defendants' vessel into a barge, when a crate of cheese slipped from a sling, in which it was being lowered, rolled along the deck and over the side of the vessel and injured the plaintiff, standing in the barge below. A fellow-servant of the plaintiff had been appointed to superintend the unloading and the defendants contended that if there was any negligence, it was the negligence of that fellow-servant in failing to use the ropes and spars. It was held that the negligence, which caused the accident, was that of the defendant in failing to provide a safe method of working and they could not, therefore, avail themselves of the plea of common employment.

58. Kilgollan v. William Cooke & Co. Ltd., [1956] 2 All E.R. 294 (C.A.). The plaintiff was employed as a strander in the defendants' wire-rope factory. She was in charge of a machine, which consisted of a long barrel, which revolved at eight hundred revolutions a minute and which contained some eighteen bobbins, to each of which was attached a strand of wire. As the barrel revolved, the strands were drawn to one end and twisted together into a wire-rope by the rotation of the barrel. The machine was only partially fenced. The plaintiff, who was standing in front of the moving machine, was struck in the eye by a small particle from a broken wire and was blinded. He was held to be entitled to recover damages for negligence from the defendants, because they had knowledge of the risk and reason to foresee injury to their workpeople, as a result of it and had failed to take reasonable care for the safety of the plaintiff.
carrying out particular processes,\textsuperscript{59} the instruction and supervision of inexperienced workers\textsuperscript{60} and the general conditions of work, covering such things as fire precautions, ventilation, lighting and washing facilities.\textsuperscript{61} In setting up and enforcing the system, due care and skill must be

\textsuperscript{59} Finch \textit{v}. Telegraph Construction and Maintenance Co. Ltd., [1949] 1 All E.R.452 (K.B.). A factory workman, while operating a double grinding machine without wearing goggles, suffered an injury in his eye from a piece of metal, sent out by the machine. The employer was held to have failed to provide a safe system of work in not guiding the workmen to use goggles.

\textsuperscript{60} Bux \textit{v}. Slough Metals Ltd., [1974] 1 All E.R.262 (C.A.). The plaintiff was employed to remove molten metal from a furnace by means of a ladle in the defendants' factory. He was trained for that work for some weeks and during that time no goggles were provided or worn or instructed to be worn. But later on, goggles began to be provided. But as there was no persuasion or insistence with regard to the use of goggles, the plaintiff stopped using them. While thus working without goggles one day, some of the molten metal was thrown up into his eyes. It was found that the plaintiff would have worn the goggles, if he were instructed to do so in a firm manner with supervision. So the defendants were held liable for breach of their common law duty to maintain a reasonably safe system of work by giving the necessary instructions and enforcing them by supervision. But the damages, the plaintiff could recover, was reduced by 40 percent, considering his contributory negligence.

\textsuperscript{61} Mc Ghee \textit{v}. National Coal Board, [1972] 3 All E.R.1008 (H.L.). The respondents provided no adequate washing facilities to the appellant, engaged in cleaning out brick kilns, which exposed him to clouds of abrasive brick dust and caused him dermatitis. The respondents were held liable to the appellant, because the respondents' breach of duty had materially contributed to his injury, in the absence of positive proof by the respondents to the contrary.
exercised by the employer for the safety or the workmen. It is the personal duty of the employer to see to the safety of the system of work. He cannot escape liability by delegating performance of the duty to someone else. Where the workmen are engaged in dangerous operations, the employer does not discharge his duty to provide a safe system merely by the provision of protective equipment. The employer should see that the workmen are instructed to use it or its use made compulsory by proper order. If the harm, liable

63. Wilsons and Clyde Coal Co. v. English, supra, n.56. See also Mc Dermid v. Nash Dredging and Reclamation Co. Ltd., [1987] 2 All E.R. 878 (H.L.). The defendants employed the plaintiff as a deckhand in the course of dredging operations, carried out by them and their parent company. While working on a tug, owned by the parent company under the control of a tug-master, employed by the parent company, he was seriously injured. It was held that the duty to provide a safe system of work was a personal or non-delegable duty, which was broken by the defendants. So the defendants were liable to the plaintiff for damages.

64. Nolan v. Dental Manufacturing Co. Ltd., [1958] 2 All E.R. 449 (Manchester Assizes). The plaintiff, employed by the defendants as a tool-setter, lost his left eye, while sharpening tools without goggles. The defendants were held liable for breach of their common law duty not to expose the plaintiff to unnecessary risk, because the defendants were obliged not only to provide goggles but also to instruct and supervise the workmen so as to make them use the goggles and the defendants had done none of these things. See also Pape v. Cumbria County Council, [1992] 3 All E.R. 211 (Q.B.D.). The plaintiff, a cleaner, employed by the defendant, contracted dermatitis from sustained exposure of the skin to the cleaning products. She was held to be entitled to damages, as the defendant had not warned the cleaner of the danger of dermatitis from the sustained exposure of skin to the cleaning products and instructed her to wear the protective gloves, provided at all times.
to occur, if the equipment were not worn, is very serious, the use of protective equipment should be ensured by supervision. 65

Liability of the employer at common law may arise in more than one way. Liability arises, when injury is caused to a workman by the employer's own negligence. For example, if the employer carries on dangerous industry or operations without establishing a safe method of work and thereby causes injury to his workman, he is personally liable. 66

Liability also arises for the acts of his workmen, which cause injury to the fellow-workman. For example, if one workman injures another by handling a crane carelessly, the employer is liable to compensate the injured workman. 67 This is known as the employer's vicarious liability. 68 Formerly, though the employer was vicariously liable 69 for the acts of his workmen to third parties, he was not so liable to his

65. Bux v. Slough Metals Ltd., supra, n.60. See also Nolan v. Dental Manufacturing Co. Ltd., supra, n.61.


67. Ibid.

68. Ibid.

69. The doctrine of vicarious liability was set up to protect the interests of strangers on the basis that in the eyes of an outsider, master and servant are one. But it could not be applied to insiders or workers, because they had agreed to accept the risk. See John Munkman, op.cit., p.5.
own workmen for the negligence of the fellow-workmen. This was because of the application of the doctrine of common employment. According to this doctrine, a workman, by his contract of employment, is deemed impliedly to have agreed to run the risk of negligence on the part of fellow-workman in common employment with him.\textsuperscript{70} This doctrine was a reflection of the early nineteenth century, dominated by the economic theory of laissez-faire. The theory meant that the welfare of the community was best served by leaving each individual free to pursue his own interests. So, if a workman entered a dangerous employment, he accepted its risks.\textsuperscript{71} He had to look after himself, as though he were a free agent. The mere relation of employer and workman did not imply an obligation on the part of the employer to take more care of the workman than he might reasonably be expected to do of himself.\textsuperscript{72} The employer had to take only reasonable care.

\textsuperscript{70} The doctrine was originated by the decision of the House of Lords in Priestley \textit{v.} Fowler, [1835-42] All E.R. Rep. Ex. 449 (Exch.). The plaintiff, employed by a butcher, was directed to take certain goods in a van, driven by another servant of the defendant. Owing to the overloading of the van, one of the wheels of the van gave way and the plaintiff was injured. It was held that the plaintiff was under a duty to act with due diligence to secure his safety, because he knew that the van was overloaded.

\textsuperscript{71} John Munkman, \textit{op.cit.}, p.3. See also J.N. Mallik, \textit{Law of Workmen's Compensation in India} (1972), p.IX.

\textsuperscript{72} Priestley \textit{v.} Fowler, supra, n.70 at 451, \textit{per} Lord Abinger C.B.
for the safety of his workman by employing competent fellow-workmen and supervisors. He should not be deemed to have contracted to indemnify the workman against the negligence of a fellow-workman.

The doctrine of common employment resulted in hardship to workers. Workmen, who had never heard of one another nor had the faintest relation with one another, were held to be in common employment. If one was injured by the negligence of the other, the injured had no title to damages.

The first breach in England in the application of the doctrine of common employment was made by the Employer's Liability

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73. See Hutchinson v. York, Newcastle and Berwick Rly Co., (1850) 5 Exch. 343. In this case, two trains, belonging to the same railway company, had collided. The plaintiff, a railway employee, travelling on duty in one of the trains, brought his action against the company, alleging negligence on the part of both engine-drivers. The company pleaded that both engine-drivers were fellow-servants of the plaintiff and were fit and competent persons. The plea was held good by the court.

74. Young v. Hoffman Mfg. Co., [1907] 2 K.B. 646 (C.A.) at 657 per Kennedy, L.J. The plaintiff, a boy of fifteen, was injured through his arm being caught by a circular saw, while working in the defendant's engineering works. The question, to be decided, was whether the defence of common employment could be raised in a case, where the workman had been injured by the negligence of the employer's foreman to give proper instruction. It was held that, where a master employs an inexperienced workman upon dangerous work, it is his duty to instruct and caution him. The master may delegate that duty to a competent person. If he does so, he will not be liable for an injury to the workman, resulting from the negligence of the delegate in not properly instructing him.

75. F.P. Walton, supra, n. 3, at p. 39.
This Act, however, excluded the application of the doctrine only in certain specified cases. The Law Reform (Personal Injuries) Act, 1948 finally abolished the doctrine of common employment. Any agreement in a contract of service or apprenticeship or any collateral agreement was declared to be void in so far as it would have the effect of excluding or limiting the liability of the employer for the negligence of fellow-servants. Smith v. British European Airways Corp. is a case, which illustrates the application of this Act. An airways employee, whilst being carried in an aircraft, was killed in a collision, due to the negligence of his fellow-servant, the pilot. He had entered into a pension scheme, collateral to his contract of service. One of the terms of the scheme was that the employers were not to be liable for damages or any other payment except the benefits under the scheme. This clause was held to be void. An employer, therefore, is liable for

76. The legislation in India, in this respect, is the Employers' Liability Act, 1938.
77. See Employer's Liability Act, 1880, Sections 1 and 2.
78. See the Law Reform (Personal Injuries) Act, 1948, Section 1 (1).
79. Id., Section 1 (3).
the negligence of his workmen towards one another in the same way as he is liable for their negligence towards the world at large. In general, the effect of the Act of 1948 is that the employer's personal liability and his vicarious liability have been integrated into a single general duty. The employer, acting personally or through his workmen or agents, must take reasonable care for the safety of his workman.

During the currency of the Employer's Liability Act, 1880, an attempt was made to defeat its object by introducing the doctrine of common employment under another form viz. the defence of *volenti non fit injuria*. This defence involved the plea that the workman had voluntarily assumed the risk of dangerous work and, therefore, the employer was not liable. It was raised in *Smith v. Baker & Sons*.


82. Id., pp.1-2; See *Broom v. Morgan*, [1953] 1 All E.R.849 (C.A.). The plaintiff and her husband were employed by the defendant to manage and work in a beer and wine house. The plaintiff was injured through the negligence of her husband in the course of his employment. It was held that, where a servant, while acting in the scope of his employment, negligently harms another, the fact, that his relationship to the injured person is such that suit cannot be brought against him, does not relieve the master from liability, because the master's liability for the negligence of his servant is not a vicarious liability but a liability of the master himself.

83. [1891] A.C.325 [H.L.] The plaintiff was employed by railway contractors to drill holes in a rock cutting near a crane, worked by men, employed by the contractors. The crane lifted stones and at times swung them over the plaintiff's head without warning. The plaintiff was fully aware of the danger, to which he was exposed. A stone fell from the crane and injured the plaintiff.
the House of Lords rejected the argument that the plaintiff had taken the risk of injury with his eyes open. They held that it was not enough that the plaintiff, knowing of the risk, carried on with his risk. It must be shown that he consented to take the risk upon himself without compensation. The principle of *volenti non fit injuria* is now given so narrow an application that it rarely affects a person in relation to his employment.

An accident may be caused by the fault of the employer and the workman's failure to take reasonable care for his own

84. Ibid.

85. Bowater v. Rowley Regis Borough Council, [1944] 1 All E.R.465 (C.A.). The plaintiff, employed by the defendants for going round the streets, collecting leaves and rubbish, was ordered to take an unruly horse for the purpose. He carried out the order, after protest. The horse ran away and the plaintiff was thrown out of the cart and injured. It was held that *volenti non fit injuria* did not apply, as it was no part of the plaintiff's employment to manage unruly horses. See also Merrington v. Ironbridge Metal Works Ltd., [1952] 2 All E.R.1101 (Salop Assizes). While fighting a fire at the defendant's factory as a part-time fireman, the plaintiff was injured by a dust explosion, caused by the exceptional danger of fire and explosion, which the defendants had created on the premises by not removing accumulation of aluminium and carbon particles. It was held that *volenti non fit injuria* applied, only if the plaintiff had consented to assume the risk without compensation, after appreciating fully the dangerous character of the risk. See also Morris v. Murray and another [1990] 3 All E.R.801 (C.A.). A passenger, who appreciated the risk, he was taking in embarking on a joyride with a pilot, whose drunkenness was so extreme that to go on the flight was like engaging in an obviously dangerous operation, was held to be barred by the defence of *volenti non fit injuria* from claiming damages for personal injury, sustained in a crash, caused by the pilot's negligence, because, in such circumstances, the passenger had thereby implicitly waived his right to damages.
safety. Under the old law, in such cases, the employer could free himself of all liability by taking up the defence of contributory negligence. This rule was changed by the Law Reform (Contributory Negligence) Act, 1945. Under this Act, the workman is entitled to recover damages, reduced in amount, according to the extent of his own negligence. Thus, where both parties are to be blamed for an accident, the loss is shared between them, in proportion to their respective degrees of fault. In other words, if the workman's negligence was one of the causes of accident, he is no longer defeated totally, in an action for damages. He gets reduced damages.

86. Contributory negligence of a workman does not depend upon any duty of care to the employer. A workman is guilty of contributory negligence, if he can foresee that his conduct may expose him to injury. Unless the workman's conduct, though blameworthy, does not contribute to the accident, it is irrelevant. John Munkman, op. cit., pp.601-602.

87. See Law Reports Statutes (1945), p.221


89. Davies v. Swan Motor Co. (Swanesa) Ltd., [1949] 1 All E.R.620, (C.A.). An employee of the Swanesa Corp. was, contrary to regulations, riding on steps, attached to the offside of a dust lorry, belonging to the Corporation, when an overtaking omnibus, the property of the defendants, collided with the lorry. The employee was struck by the omnibus and he died. It was held that the driver of the omnibus was guilty of negligence, but the deceased was guilty of contributory negligence, resulting in apportionment of liability. See also the Law Reform (Contributory Negligence) Act, 1945, Section 1 (1).
Under common law, if death of a workman was caused by an industrial injury, the right to sue did not pass on to the heirs or legal representatives of the workman. This principle is commonly known as actio personalis moritur cum persona, which means that a personal action dies with the person. The application of this rule resulted in serious hardship to the dependants of poor persons, dying as a result of accidents. This rule was modified in England by the Fatal Accidents Acts. Now the specified dependants of a deceased workman have a right of action for damages for wrongful act, causing death of the workman. This right of action may include a claim for damages for bereavement.

The concept of employer's liability at English common law, based on employer's fault, was applied in India also. In Elizabeth C. Blanchetta v. Secretary of State for India, the Allahabad High Court imported the doctrine of common employment, prior to 1880 in England. There was a collision


91. Fatal Accidents Act, 1976, Section 1.

92. Id., Section 1 A.


between two passenger trains. The deceased was a driver on one of the two engines, which collided. In the suit, filed by the legal representative of the deceased, a Division Bench of the Allahabad High Court held that in this country, where there was no legislation analogous to Employer's Liability Act, a servant had no cause of action against his master for the neglect of another servant in the common employment of the same master notwithstanding the fact that the servant, suffering injury and the servant, whose neglect caused the injury, were in employment of dissimilar nature. 95 A milestone in the field of abrogation of the doctrine of common employment in India was made in the recommendation of the Royal Commission on Labour in India. The Royal Commission regarded both the doctrine of common employment and the doctrine of volenti non fit injuria as inequitable. 96 This paved the way for the Employers' Liability Act, 1938. It abrogated, to a considerable extent, the scope of the doctrine of common employment. 97 However, the Privy Council in

95. This view was followed in T.J.Brockle Bank Ltd. v. Noor Ahmade, 42 C.W.N.179. For contrary view, see Secretary of State v. Rukhminibai, A.I.R.1937 Nag.354.


97. See the Employers' Liability Act, 1938, Section 3 (d). It reads as follows:- "Where personal injury is caused to a workman by reason of any act or omission of any person in the service of the employer done or made in obedience to particular instructions given by any person to whom the employer has delegated authority in that behalf or in the normal performance of his duties, a suit for damages in respect of
Council v. Constance Zena\(^98\) held that the scope of the section in the Act of 1938, abrogating the doctrine of common employment, was limited and the defence of common employment was still available to the employer.\(^99\) The decision of the Privy Council was, mainly, due to ambiguity in the language of the abrogating provision in the Act of 1938.\(^100\) So this provision was substituted by the Amending Act of 1951.\(^101\) Any provision, contained in a contract of service, excluding or limiting the liability of the employer by the application of the doctrine of common employment, was declared void.\(^102\)

\((f.n.97\text{ contd.})\) the injury instituted by the workmen or by any person entitled in case of his death shall not fail by reason only of the fact that the workman was at the time of the injury a workman of, or in the service of, or engaged in the work of, the employer".

98. A.I.R.1950 P.C.22 at 24. In this case, on account of collision, a fireman of one of the colliding engines died and the suit for damages against the Governor General-in-Council was brought by the heirs of the deceased. It was held that Section 3 (d) of the Employers' Liability Act, 1938 does not deprive the employer of the plea of common employment in defence in a suit by a workman for damages. The clause covers and takes away the defence only where the claim is based on two classes of negligence, namely, where the act or omission complained of, was done or made by the fellow-workman (1) in obedience to any rule or bye-law of the employer or (2) in obedience to particular instructions, given by a person, either by virtue of authority, delegated by the employer in that behalf or in the normal performance of such person's duties.

99. The aforesaid view was followed by the Allahabad High Court in Dominion Of India v. Kaniz Fatima, (1961) 2 L.I.J.197 (All.).

100. Supra, n.97.

101. See the Employers' Liability Act, 1938, as amended by the Act of 1951, Section 3 (d).

102. Id., Section 3 A.
Further, the workman's action for damages cannot be defeated by the application of *volenti non fit injuria*, unless the employer proves that the risk was fully explained to and understood by the workman and the workman voluntarily undertook the same. 103 As under English common law, the employer should take reasonable care for the safety of his workman. 104 He should ensure that the premises, where the men are working, are reasonably safe. His duty, in this respect, is not limited to unusual dangers nor is it discharged by giving warning of the hazard. He should maintain the work premises in as safe condition as reasonable care by a prudent employer can make them. 105

The Indian Fatal Accidents Act, 1855, largely modelled on the English Fatal Accidents Act of 1846, provides for payment of damages to certain heirs of the deceased person. 106

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103. Id., Section 4.
105. J.P.Pareira v. Eastern Watch Co. Ltd., (1985) 1 L.L.J. 472 (Bom.). A salesman, working in a watch company in the ground floor, was found unconscious in the third floor and died in hospital. It was argued that the salesman's climbing three flights of stairs accelerated his death, which could have been avoided, if lift were provided. It was held that the obligation to provide a safe place for work does not include provision of lift.
106. The action for damages under the Act of 1855 shall be for the benefit of only the husband, wife, parent and child of the deceased. See the Fatal Accidents Act, 1855, Section 1 A. In England, brother, sister, uncle and aunt of the deceased and the issue of such relatives have been included in the list of heirs. See Fatal Accidents Act, 1959, Section 2. The Indian Fatal Accidents Act, 1855, Section 1 A. In England, brother, sister, uncle and aunt of the deceased and the issue of such relatives have been included in the list of heirs. See Fatal Accidents Act, 1959, Section 2.
whose death was caused by the tortious act of another. 107
Thus, this Act helps the specified dependants 108 of a
deceased workman to claim damages for the death of the
latter, provided it was caused by the actionable wrong of
the employer. 109

Thus, attempts, both statutory and judicial, have
been made in England and India, from time to time to resist
the defences against employer's liability at common law.
But nothing was done to change its basis on the employer's
fault or negligence. So, employer's liability at common
law proved to be of little use to the injured workman, as
it was very difficult for the workman to prove the employer's
fault in a court of law. 110 Further, before the Industrial
Revolution, industrial accidents were caused, generally, by
the negligence of the employer or his workmen. A workman,

(f.n.106 contd.) Accidents Act, 1855 should be amended, in-
cluding in the list of heirs 'minor brothers and sisters,
dependent upon deceased elder brother'. See Dewan
Harichand v. Delhi Municipality, A.I.R.1951 Del. 71 at
74 (D.B.).

107. Fatal Accidents Act, 1855, Section 1 A.
108. Ibid.
110. Sunil Rai Choudhuri, Social Security in India and
Britain (1962), p.8; J.N. Mallik, supra, n.71; Deepak
Bhatnagar, Labour Welfare And Social Security Legis-
lation In India. (1984), p.86.
injured by such accidents had a remedy, though insufficient, at common law, where the basis of employer's liability was his negligence. But, after the Industrial Revolution, industrial accidents began to result from unforeseeable mishaps or untoward events, which did not have any connection with the negligence of the employer or his workmen. In such cases, the employer's liability at common law, based on negligence, could not provide a remedy to the injured workman.

Liability of employer in absence of negligence

The insufficiency of the employer's liability at common law to provide adequate relief to workmen for industrial injuries forced the jurists to evolve a new principle of liability that would facilitate recovery of compensation for industrial injuries without the need to prove negligence on the part of the employer, by his workman. This led to the emergence of "the principle of occupational risk". According to it, the employer, who sets up a factory, creates an agency, likely to cause industrial injuries through no fault of his or his workmen. So, when industrial injuries are caused to workman, justice requires the employer to compensate.

111. It was out of the local customs and habits of peaceable life in England that the royal judges, going on assize, gradually developed the common law. They could not be expected to anticipate the changes, brought about by technological developments. Horatio Vester and Hilary Ann Cartwright, op. cit., p.2.
the workman.\textsuperscript{112} The employer, that bears the burden of
depreciation and destruction of the plant and machinery, has
also to bear the burden of repairing the human machine.\textsuperscript{113}
Upon this principle of occupational risk were founded the
Workmen's Compensation Acts of England, starting from the
Act of 1897.\textsuperscript{114} These Acts introduced the concept of no-
fault liability. Accordingly, the employer became liable
to compensate his workmen for industrial injuries, whether
he was negligent or not. The workman was expected to esta-

\begin{itemize}
\item \textsuperscript{113} J.N. Mallik, \textit{supra}, n.71, p.4.
men's compensation legislation has been justified by
other theories like 'social cost', 'social compromise'
and 'status' also. See K.L. Bhatia, \textit{Administration Of Workmen's Compensation Law} (1986), p.26; The fact, that
a worker was almost remediless at common law, was not
grasped by the legislators of various countries, until
late nineteenth century. The publication of 'Das Capital' by Karl Marx and the emergence of trade unions
\item \textsuperscript{115} Workmen's Compensation Act, 1897, Section 1 (1). For
discussion of the phrase 'arising out of and in the
course of employment', see \textit{infra}, Chapter 4.
\end{itemize}
workman had no title to compensation, if the accident was due to his serious and wilful default. Thus, the common law doctrine of contributory negligence continued to be a defence to the employer. Where the injury was caused by the personal negligence or wilful act of the employer or of some person, for whose default, the employer was responsible, the workman could either bring an action under common law or claim compensation under the Act. The employer was not

116. Workmen's Compensation Act, 1897, Section 1 (2) (c). It reads, "If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed". But under the Workmen's Compensation Act of 1906, if the injury, caused by the serious and wilful misconduct of the workman, resulted in his death or serious and permanent disablement, compensation was not disallowed. Workmen's Compensation Act, 1906, Section 1 (2) (c). It reads, "If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed".


118. Workmen's Compensation Act, 1897, Section 1 (2) (b). It reads, "When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid".
liable to pay both common law damages and compensation under the Act. 119 The Workmen's Compensation Acts 120 continued the common law principle of employer's liability. But they contained no provision for compulsory insurance of the liability of the employer. Hence, the receipt of compensation by workmen for industrial injuries was uncertain. 121

The Insurance Scheme

Insurance on a national basis was introduced in England in 1946. Steps were then taken to incorporate industrial insurance into the general system of insurance, in which the State plays an integral part. This has resulted in a series of Acts, known together as the National Insurance (Industrial Injuries) Acts, 1946 to 1960. 122 These Acts

119. Ibid.
120. i.e. the Act of that name of 1897, 1900, 1906, 1918 and the Acts that may be cited together as the Workmen's Compensation Acts, 1925 to 1945. See Horatio Vester and Hilary Ann Cartwright, op. cit., p.5. The workmen's compensation law was consolidated in the Workmen's Compensation Act, 1925, after a series of amendments. See John Munkman, op. cit., p.16.
121. Sunil Rai Choudhuri, supra, n.110, p.31.
introduced a new scheme of compulsory insurance against industrial injuries. The scheme is now financed by the National Insurance Fund, which is composed of contributions payable by employers, employees and supplements provided by the Treasury. The insurance scheme differs fundamentally from the scheme under the Workmen's Compensation Acts in that compensation is payable from the National Insurance Fund. The liability for compensation is shifted from the employer to the Fund. Thus, there is a sharing of liability between the State, the employer and the workman instead of the sole liability of the employer. The principle of social insurance is substituted for the principle of employer's liability. The liability for compensation under the insurance scheme is also based on no-fault theory as the one under the Workmen's Compensation Acts. But it is wider than the one under the latter, because the employer is liable, if an accident, causing personal injury, has arisen.


124. Id., p.508.

125. Id., p.360.


in the course of employment. The injured workman need not further prove that the accident has also arisen out of employment, since an accident, arising in the course of employment, is deemed, in the absence of evidence to the contrary, also to have arisen out of employment. The new type of liability, under the social insurance scheme, has superseded the principle of employer's liability under the Workmen's Compensation Acts.

As in England, in India also, the inadequacy of the employer's fault-based liability at common law necessitated creation of a new employer's liability, independent of his fault. The Workmen's Compensation Act, 1923 introduced such no-fault liability of employer for compensation. As under the English Workmen's Compensation Acts, the workman need not prove employer's fault for obtaining compensation

128. Id., p.371.
129. The new system of social insurance was brought into operation on the 5th July, 1948 by the National Insurance (Industrial Injuries) Act, 1946 (Appointed Day) Order, 1948. On this date, workmen's compensation ceased to be payable in respect of any employment on or after that date and the Workmen's Compensation Acts, 1925-1945 were accordingly repealed. The dividing line between workmen's compensation, on the one hand and social insurance, on the other is drawn in respect of employment before and employment on or after this date. But as incapacity on or after this date may be the result of employment before it, it was provided that the Workmen's Compensation Acts are to continue to apply to cases, where the right to compensation arises or has arisen in respect of employment before this date. Horatio Vester and Hilary Ann Cartwright, op.cit., pp.7-8; See also Halsbury's Laws of England, supra, n.123, p.206.
under the Indian Act of 1923. He can recover compensation, if he proves that he has sustained an accident, arising out of and in the course of employment. 130 But the employer is not liable, if the injury is caused by the worker's being under the influence of drink or drugs or his wilful disobedience of safety rules or wilful removal or disregard of safety guard or device except in the case of injuries, which result in the death of the workman. 131 As under the English Workmen's Compensation Acts, the Indian Act of 1923 does not have any provision for compulsory insurance of employer's liability. Absence of insurance coverage may be a factor, leading to evasion of liability by the employer. 132 The enactment of the Employees' State Insurance Act, 1948 remedies this defect, in so far as those workmen covered by the Act, get compensatory benefits from the Employees' State Insurance Corporation. 133 Like the National (Industrial

130. Workmen's Compensation Act, 1923, Section 3 (1). See Works Manager, C. & W. Shop v. Mahabir, A.I.R.1954 All. 113, where it was held that the liability under the Workmen's Compensation Act, 1923 is not a liability, which arises out of tort. It is a liability, which springs out of the relationship of master and servant.

131. Id., Section 3 (1), proviso (b). For the position in England, see supra, n.116.

132. For an example of evasion of liability by the employer under the Workmen's Compensation Act, 1923, see the news item entitled "Azhalinte theeramillah kadalil", Malayala Manorama, August 2, 1994, p.3. One Joseph, who was working in Galaxy Shipping Co., died in the course of his duty, when the ship in which he was working, sank. Even after the lapse of one year from the date of his death, his dependants could not get any compensation from the company, which is evading its liability by the technique of changing its name.

Injuries) Acts of England, the Employees' State Insurance Act, 1948 is based upon the principle of social insurance and no-fault liability. It replaced the concept of employer's liability by the one of sharing of liability by the State, the employer and the employee.\textsuperscript{134} Thus, it helps prevent the evasion of liability by the employer. Further, the liability under the Act of 1948, like its English counterpart, is wider than the one under the Workmen's Compensation Act of 1923. This is, because the employer is liable on the workman's proving that an accident has arisen in the course of employment. On such proof, in the absence of evidence to the contrary, the accident shall be deemed to have arisen out of employment.\textsuperscript{135}

Evaluation of these different forms of liability for compensating industrial injuries makes it evident that the liability under the social insurance scheme is the most befitting one, as it eliminates the problem of evasion of liability by the employer by providing for sharing of liability.\textsuperscript{136} But in practice, proper sharing of liability by the State cannot be expected, in the absence of any mandatory provision to that effect.\textsuperscript{137} So, Section 25 (2) of

\textsuperscript{134.} Employees' State Insurance Act, 1948, Sections 26 (2) and 39.
\textsuperscript{135.} Id., Section 51-A. See also infra, Chapter 4.
\textsuperscript{136.} Supra, n.134.
\textsuperscript{137.} See Employees' State Insurance Act, 1948, Section 26 (2). It is as follows:-

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the Employees' State Insurance Act, 1948 should be amended, making it obligatory on the part of the State to share the liability. It is also suggested that the Workmen's Compensation Act, 1923 may be amended, providing for compulsory insurance of the liability of the employer so as to ensure the receipt of compensation for industrial injuries by the workmen, covered by the Act. The liability for compensation under the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948 will arise only in the case of accidents arising in the course of and out of employment. But the operation of a hazardous industry may result in accidents such as escape of poisonous gas, causing injuries to workmen, even when they are resting in their residential quarters or homes nearby. Such accidents are not accidents arising in the course of and out of employment, attracting the liability for compensation under the Workmen's Compensation Act, 1923 or the Employees' State Insurance Act, 1948. Workmen, injured by such accidents, are entitled to be compensated just like the other members of the public.

(f.n.137 contd.)

"The Corporation may accept grants, donations and gifts from the Central or any State Governments, local authority, or any individual or body whether incorporated or not, for all or any of the purposes of this Act".

138. Supra, n.132.
under the Public Liability Insurance Act, 1991. But the injured workmen of hazardous industries should be treated as different from the general public by providing the former a special statutory remedy, instead of the general one. So the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948 may be amended, providing for the liability for compensation for industrial injuries, sustained by workmen in the residential quarters or homes nearby, on account of accidents, resulting from the operation of their hazardous industry.

139. Act No.6 of 1991. This is an Act to provide for public liability insurance for the purpose of providing immediate relief to the persons, affected by accident occurring, while handling any hazardous substance.