Industtrial Employment Injury: Growth of Protection Systems in India

In the present Chapter, our attempt would be to critically examine the growth and evolution of ancient and modern protection systems in India, to evaluate their efficacy and to identify their inadequacies and weaknesses. How far our modern systems are in conformity with ILO standards of protection in qualitative and quantative terms would also be looked into.

1.00 Employment Injury: Ancient Indian Social Protection Systems

Community life in ancient India, before the Mughals and Britishers came, was organized in democratic fashion at local level. We did not have the feudal system, which foreign conquerors introduced later on. Agriculture and cottage industries were the main occupations of the people. There was an ideal distribution of occupations, which later on came to be distorted into the caste system. Village panchayat was the repository of local fiscal, judicial and administrative powers. The writings of foreign travellers like Magasthenes, Fahein are adequate testimony of the general prosperity, happiness of the Indians in ancient days due to better social organization and productivity in agriculture and cottage industries. According
to Chansarkar:

"India had excelled in agriculture, industry, trade and commerce. Works of V.A. Smith, Majumdar, Chakladar, Dr. B.G. Ghokale are a wonderful testimony of the economic, social and cultural development in India."1

The workers and artisans enjoyed a place of pride in ancient Indian community and were respected and honoured for excellence of their work and were well looked after. India can take pride in evolving and operating highly successful social protection systems in ancient times against various contingencies including employment injury. Such systems included joint family system, caste system, village panchayats, religious-charity financed orphanages, widow homes and destitute houses, craftsmen's guilds and state assistance.

1.10 The Employment Injury: The Joint family and the Trade Guilds

In ancient India, joint family was the most important unit of social organization and it provided the best protection to each and every member of the family against all calamities—be it accident, sickness, old age. All members had reciprocal obligations to each other. Parents would support their small children, their own old parents and grandparents and the cycle would go on. The grown-up son had religious, moral and legal duty to support his parents and even to discharge parental debt if any, under the pious obligation of

Thus, joint family was the first line of defence against any calamity that threatened a member. According to Hasan:

"Family(joint) has been the oldest institution of group insurance. The earnings of the members are pooled together in the family exchequer. From this common fund, maintenance of every individual member is ensured according to the needs. Thus, the head of the family may not perform any economic function, the ailing members may not have any income of their own to secure medical care; expectant mothers may not be able to work; and some members of the family may not be in a position to secure outside employment for earning a living. But all share from the family income."

However, in due course of time, particularly with the advent of factory system in India, resulting in migration of rural worker to cities in search of paid employment, the institution of joint family started disintegrating and thus, workman was left high and dry to fend for himself in hostile urban environment. If employment accident struck him, he was completely ruined financially, on account of loss of job and physically, on account of disablement. Moreover with limited resources at its disposal, joint family was never equipped to ward off any serious and prolonged misfortune. Therefore, in due course of time joint family ceased to provide any adequate protection against social contingencies.

2. The scripture enjoined certain specific duties in respect of a House-holder which are summed up in the three debts:
   (i) Debts to Gods - Deva-Rnam
   (ii) Debts to the manes - Pitr-Rnam
   (iii) Debts to the sages-Rshi-Rnam, see, Manu,VI.53.
3. Supra, note 1 at 19.
5. Id., at 30.
Outside family circle, a workman and artisan in distress could appeal to his kinsmen, who formed his caste, and his neighbours. According to Punekar:

"On a broader but similar basis, (as in case of joint family), the caste system provided various safeguards to their members... (like) medical aid to the sick and invalid. Benefits are normally restricted only to the members of the sect or caste...The risks,...thus, are covered by a simple, natural and solid fellowship or the family or the caste".6

In modern times however, the caste system too is losing its utility, partly due to its disintegration on account of its perversion7 and partly on account of its outlawry by law and general hostility to it by secular forces. Moreover, in modern India, these defence mechanics of protection, although good for ancient times, have outlived their utility and in fact, have been completely undermined by 'the introduction of commercial agriculture, the establishment of factories and the growth of industrial cities and the development of modern means of transportation...(disrupting)Village life,...joint family., and caste'.8 Another demerit of these systems is that help is restricted to family and caste members only and

7. The Caste system in its prverted form perpetrated untouchability in Indian society. Untouchability today is an offence in India.
even there, there is no certainly of it's availability in all cases.

One of the most important institutions, devised in ancient Indian society, for protection of workers and artisans was the guild(sangh) system. These sanghs or guilds were voluntary bodies formed by workers and artisans in various occupations on the principle of mutual insurance of today. All the members contributed to a common fund, which was used to help the needy member. These guilds can be compared with modern mutual aid societies and trade unions. According to Punekar, "The artisans' guilds in India and the Nidhis(Trusts) of southern India can furnish proof of the existance of mutual insurance in India".  

Prof. Mazumdar, an eminent historian, has conducted an intensive research in these guilds in ancient India and has identified and listed 27 such guilds in his famous work. As

9. Supra/note 6 at 115.


The 27 Guilds are listed as follows:

these guilds were very important economic institutions. Kautilya in his Arthashastra laid down a number of regulatory rules for these guilds. He recognized them as autonomous and voluntary bodies and advocated that all profits and savings at the disposal of the guild were jointly owned by all members and that senior members of the guild would have the custody of guilds funds as trustees. Numerous jurists and commentators like Brahaspati and Shukracharya in ancient India allude to the working of these guilds. As a particular guild was formed by artisans in the same profession, all members carried a sense of brotherhood and this facilitated the smooth working of the guild.

1.20 Employment Injury: Religious charities and public Assistance

The spirit of extending help to the needy has been a part of Hindu religion since the very beginning. The very concept of Dharma is based on the idea of religious, moral and legal duties of an individual towards other fellow beings. According to Wadia:

"While each individual in a caste was bound by his traditional duties, there was the consciousness of the society as a whole and in the rural setting of the old Hindu society, the common will to help one another reigned supreme. This was what made the panchayat raj a living reality."13

13. 'Ethical and spiritual values in the Practice of Social work' supra, note 6 at 7.
The institution of voluntary help through charity (Dana) to the destitute was based on the concept of karma. Literally, it means action but philosophically, it stands for actions which generate definite consequences.\textsuperscript{14} With the belief that as we sow, so we reap, every one was inclined to help others so that in the next birth, one is rewarded for his good deeds in previous life.

Our religion extolled the virtues of charity (Dana) and ordained various types of Danas to sages, destitutes, guests (athitis) and others and there are reference to them in Manu's works.\textsuperscript{15} Besides individual charity, collective charities (community assistance) and state charities (Public assistance) were also well organized in ancient India. According to Mazumdar:

"It is recorded in Jatakas that such charities (community charity) were organized in the city of Sravasti (in modern U.P.), one of the famous towns in ancient India. We hear that in this town, a family used sometimes to give alms or else the givers would form themselves into companies or again the people of one street would club together, or the whole of the inhabitants would collect voluntary offerings and present them...many stories relate how the citizens combined their resources for alleviating the distresses of their less fortunate brethren by supplying them with money, food and clothing".\textsuperscript{16}

However, inherent in it's very nature, charity - whether individual or community - has its own drawbacks and limitations. As charity is ordained by religion and is absolutely voluntary,

\textsuperscript{14} Id. at 8.
\textsuperscript{15} Manu IV, 227, VI 53, III 70.
\textsuperscript{16} 'Social Work in Ancient and Mediaeval India', \textit{Supra}, note 6 at 19-20.
it is not available as a matter of right to the needy, in appropriate quantum and at proper time. Moreover, it is not certain and therefore, sometimes is not available to the most deserving cases. Apparently, like all charity, it lowers dignity of the recipient.

In ancient India, state or public assistance to the destitute was also available and we find references to it in various shrutis, smritis and commentaries by our jurist sages. According to Hasan,

"Under the influence of Hinduism, the ancient philosophers of India enjoined upon the king for the institution of various kinds of relief for the benefit of the specified categories of people. The Arthashastra of Kautilya, the sukrarniti, the Manusmiriti and yaznavalkya are some of the ancient books containing profuse allusions to such measures."\(^{17}\)

In addition to suggesting of state assistance to the destitutes, the jurist sages of India in their commentaries recommended institution of various relief programmes, for various categories of needy people, to be financed by the employers and the state. These relief programmes can be compared in some measure to the modern schemes like workmen's compensation and social insurance. Shukracharya suggested that no deduction out of workers' wages should be made for absence on account of sickness for one week and in case of prolonged sickness, a worker, with at least five years service, was to be paid three fourths of his wages for three months. For state

\(^{17}\) Supra, note 4 at 30-31.
employees, who put in forty years of service, a pension equal to half the wages was recommended.\textsuperscript{18}

Likewise, Manu and Kautilya in their famous works - Manusmriti and Arthashastra, were in favour of financial help on regular basis in certain defined contingencies. Kautilya suggested heavy fines for employers denying maternity benefit to women workers. Poor widows, convicts, prostitutes, disabled, devadasis and other destitutes, according to him, were to be employed in state spinning factories. Family pensions and maintenance grants were suggested for dependents - widows and minor children - of those employees who died, the line of duty.\textsuperscript{19} Manu too suggested that full wages for absence due to sickness were to be paid provided the workman returned to complete his work on recovery from sickness.\textsuperscript{20}

The above mentioned smritis and commentaries are ample proof of the fact that the subject of social protection to citizens including the workers against some specified contingencies was so important that almost all our jurist sages expressed their opinions and suggested various measures for the purpose. Not much is known about the actual working of various social relief programmes, but the general prosperity of the people as reflected in the writings of many foreign travellers is indicative of an elaborate and effective system of social protection to various sections of people.

\textsuperscript{18} See, Shukraniti, Chap.II, Lines 819-827.
\textsuperscript{19} Arthashastra, see, particularly Part II, Chap.13-27.
\textsuperscript{20} Manusmriti, Chapter VIII.
After the Muslim conquest and the consequent decline of Hindu supremacy, our social and political structure disintegrated. The elaborate system of social protection, in the absence of state sanction and patronage, also collapsed. The Muslim conquerors installed some such measures of social protection as were permitted by their religion. However, it is a matter of common knowledge that, as conquerors, they were hardly interested in the welfare of local inhabitants and therefore, the social protection instituted by them, if any, was generally made available to their own co-religionists. However, some enlightened Muslim emperors did establish at times a system of state assistance to the poor and the needy, irrespective of their religion. For example, Sultan Firuz started giving financial help (diwan-i-khurat) to the poor for marriage of their daughters and generally looked after his slaves.21

Like all religions, Islam also enjoins on the Muslims to extend financial help to the destitutes by way of voluntary charity. Charity on special occasions (sadaqah) is specially prescribed. Besides, one of the essential features of Islam is the payment of a compulsory poor tax (Zakah) by every Muslim.

21 Supra, note 16 at 24 "Some (slaves) were placed under tradesmen and were taught mechanical arts, so that about 12,000 slaves became artisans of various kinds. They were employed in all sorts of domestic duties, as water-coolers, butlers etc., in short, there was no occupation in which slaves were not employed—Altogether, there were 180,000 slaves in the whole dominion for whose maintenance and comfort the Sultan took special care".
Zakah is collected by state and put in a fund (Baital-mal) out of which relief to the poor is made available in accordance with the Koranic tenets.

The reasons why formal and institutional protection systems against employment injury could not be developed during Muslim period are not far to seek. During Muslim period there was a rapid decline of Indian industry, brought about by chaotic conditions due to frequent warfare. Artisan lost his place of pride and hardly enjoyed any state patronage.

Even during British rule, local industry was hardly encouraged. The Britishers wanted only to siphon off the raw material from India to their factories in England and to sell their machine-produced goods in the vast Indian market. As a consequence, even those cottage industries, which had survived the chaos of Muslim rule, gradually perished in the face of stiff competition from English factories, because goods produced there with the help of machine on a large scale were considerably low-priced in comparison to those produced by Indian artisans with hand tools. The then existing conditions were hardly conducive to the growth of industries and industrial law.

3.00 Employment Injury; Growth of Modern Protection Systems

As stated above, by the time, Britishers came, Indian industry had declined considerably. Except religious charity there was hardly any relief instituted under the law for the
victims of employment injuries. In fact, Britishers found that there was hardly any law of the land in India governing non-personal matters like penal, commercial and labour matters. The First Law Commission in its Lex Loci Report (1840) recommended that English Law should be declared as law of the land (Lex Loci) for India because "there is probably no country in the world which contains so many people, who, if there is no law of the place, have no law whatever".22

Gradually, English Law was introduced in the country, which governed all non-personal matters including labour matters. Consequently, the growth of modern institutional protection systems for employment injuries in India started only during the British period.

Initially, the Indian worker was entitled to the same protection of English common law, which was available to English workers before the introduction of workmen's compensation schemes in England. Till independence, almost all of our labour statutes including Workmen's Compensation Act 1923 were based on British pattern. Even the employees Insurance scheme, which was introduced in 1948, had its beginning in the pre-independence times.

One of the basic features of Indian Labour Legislation, including one applicable to employment injury, is its late growth e.g. first Workmen's Compensation Act was enacted in 1897 in England and as late as 1923 in India. One of the reasons

22. Quoted by M.P. Jain, Outlines of Indian Legal History 517 (1972).
or it is that modern factory system itself is of comparatively recent origin in India.\textsuperscript{23}

As modern employment injury protection systems have almost completely replaced the ancient protection systems in India also, it would be fruitful to study their growth and working individually.

3.10 Employment Injury: The Common Law protection in India

Before the introduction of workmen's compensation scheme in India in 1923, the only remedy available to the Indian worker in case of employment injuries against the employer was tort damages under the common law because common law had come to be accepted as law of the land in India also. According to Page, J., of Calcutta High Court, "The common law of England except where it has been abrogated by legislative enactments and in so far as it is not inapplicable to Indian conditions, is part of the law of India."\textsuperscript{24} Thus, if the Common Law of England was clear and there was no contrary enactment in India, no other law or principle except the English Common Law was to be applied to India.\textsuperscript{25}

Under common law, employers liability means liability of the employer to pay damages to his worker for employment

\textsuperscript{23} Supra, note 4 at 33-34.
\textsuperscript{24} Sundaramul v. Ladhuram AIR 1924 Cal.240; Also see, Secretary of State v. Rukminibai AIR 1937 Nag.354.
\textsuperscript{25} Ajudhia Prasad v. Chandan Lal, AIR 1937 Alld.610.
injuries and it is based on negligence of the employer. It has been held in Wilson and Clyde Coal Co. v. English that employers duty to take reasonable care not to expose his workers to unnecessary risks falls into three branches: (i) provision of a competent staff of men (ii) adequate material and (iii) a proper system and effective supervision. However, the general duty to take care is not absolute but a duty to exercise reasonable care and skill either personally or through his delegates.

In due course of time however, the common law liability of the employer was narrowed down as a result of various defences evolved by judiciary through various decisions in England. As a consequence, the worker could not successfully claim damages in most of the cases. For example at common law, an employer was not liable to his worker for injuries received from any ordinary risk incidental to employment including acts or defaults of any other employee. The employers liability was specifically excluded under the doctrines of common employment, assumption of risks, and contributory negligence.

Correspondingly, the above mentioned defences were and to some extent, are still available to employers in India in

Wigget v. Fox(1856) 11 Ex.832.
Smith v. Baker & Sons(1891) A.C.325.
claims for damages by workers for employment injuries. For example, the doctrine of common employment, which excludes employers' liability on the ground that worker is injured due to the negligence of a fellow worker, still seems to be applicable in India, although it was abolished in England first by Employers' Liability Act 1880 and ultimately, by Law Reform (Personal Injuries) Act 1948.

In India also, the doctrine of common employment was abrogated by Employers' Liability Act 1938. However, on account of a Privy Council decision, it continued to apply up to 1951 when an amendment in section 3(d) of Employers' Liability Act 1938 was made to neutralise the effect of the Privy Council decision. In that case, plaintiffs' husband, who was a fireman in the defendant's railways, was killed in an accident caused by the negligence of the fellow employee, the railway driver. It was held that section 3(d) of Employers' Liability Act 1938, "was intended not to abolish the doctrine of common employment but rather to reduce its scope". The Allahabad High Court followed the Privy Council ruling in Dominion of India v. Kaniz Fatima and observed that:

"The learned counsel for the respondents submitted that firstly, the view of the privy Council is not

31. Id. at 24.
32. (1961) 2 Lab.L.J. 197 (As the accident in the instant case took place prior to the substitution of S.3(d) of the Employers Liability Act by Act V of 1951, the substituted provision could not be applied to determine the claim of compensation).
binding on this court after the passing of the Constitution of India and secondly, that view is no more a good law after the legislature expressed its intention in unambiguous terms in the amending Act 1951. Both these contentions can not be accepted...the decision of the Judicial Committee (of the Privy Council) is binding upon the High Courts until the Supreme Court rules otherwise."

Thus, defence of common employment was available in India upto 1951.33

Another defence, generally available to the employer under common law, was volenti non fit injuria. This defence means that if the worker freely and voluntarily agrees to run a risk of injury from a certain course of conduct, the employer is not liable to pay damages if the risk materialises. It has been held, however, that 'mere knowledge of risk without the assumption of it, the principle of volenti non fit injuria does not apply.34 In India, the defence was available to the employer until it was diluted, to some extent, by the Employers' Liability Act 1938 vide section 4.35 Careful analyses of section 4 shows that such defence would still be available to the employer if he could prove that workman understood the risk and voluntarily undertook the same.

33. Ibid.
35. Employers' Liability Act 1938, section 4 provides, "Risk not to be deemed to have been assumed without full knowledge. In any such suit for damages, the workman shall not be deemed to have undertaken any risk attaching to the employment unless the employer proves that the risk was fully explained to and understood by the workman and that the workman voluntarily undertook the same."
Before the Employers' Liability Act 1938, the defence of volenti non fit injuria was raised by employers in claims for damages by workers for employment injuries. In South Indian Industrial Ltd. v. Alamelu Ammal, the employers for the purpose of their own business used a method of breaking cast-iron, which consisted of dropping a heavy weight of pieces of iron resting on a bed of iron with the intention that these pieces should be broken into smaller pieces. The plaintiff's husband, who was working at a distance for the employers, was killed by a piece of iron that flew off. When the defence of volenti non fit injuria was raised, the court rejected it and held that, for application of this defence, it was necessary to prove that the worker knew the danger, appreciated it and voluntarily took the risk.

The two doctrines of common employment and volenti non fit injuria were so well entrenched in English Common Law that in England as well as in India, they had to be abrogated by statutes. So long as these doctrines prevailed, the chances

36. AIR 1923 Mad. 565.
37. The Employers Liability Act 1938. Statement of objects and Reasons: "Under the common law of England, in suits for damages for injuries sustained by workman, it is open to the employer to plead-
1. The doctrine of common employment...
2. The doctrine of assumed risk...."

The Royal Commission on Labour regarded both these doctrines as inequitable and recommended...abrogating these defences...In the meantime, judicial decisions in British India while generally agreeing as to the inequitability of the doctrines have been such as to leave it open to employers in most provinces to have recourse to them"...Gazette of India 1938, Part V, P.286.
of recovery of damages by the worker were almost non-existent. The position of the worker under common law was no better than any other citizen claiming damages in tort. In fact, it was worse in the sense that doctrines like voluntary assumption of risk and common employment were applicable to worker only who agreed to work along with other workmen in inherently dangerous industrial occupations and thus, exposed himself to extra-risk unlike an ordinary citizen. Moreover, even after Employers' Liability Act 1938, these defences were not completely abolished but only reduced in scope and application with regard to certain specified situations. Thus, under section 4 of the Employers' Liability Act, if employer could prove that worker understood the nature of the risk and voluntarily assumed it, he could not recover damages in tort if the risk materialised.\footnote{Employers Liability Act 1938, section 3 reads, "Defence of common employment barred in certain cases...".} Commenting on the limited purpose of Employers' Liability Act 1880 in England, Munkman observes that:

"the Act shows the extreme nervousness of nineteenth century legislators in imposing burdens which in their view might have weakened the stability of industry."\footnote{Employer's Liability At Common Law, 13(1952).}

The Indian Employers Liability Act 1938, which is almost verbatim copy of its English counterpart, too can be said to be a bold legislative effort in eliminating the above said doctrinaire hurdles in workers' way of recovery of damages.

\footnote{Supra, note 35. Also see, Employers Liability Act 1938, section 3 reads, "Defence of common employment barred in certain cases...".}

\footnote{Employer's Liability At Common Law, 13(1952).}
In India, even after the enactment of Workmens Compensation Act 1923, the worker has been allowed the option either to claim damages for employment injury under common law principles or to claim workmen's compensation. And if workman chooses first, the above mentioned defences would continue to be hurdles in his way unless the same are completely abrogated either by amendment in Employer's Liability Act or by an entirely new statute. In England, the doctrine of common employment has ultimately been abolished by Law Reform (Personal Injuries) Act 1948. The position in India continues to be unsatisfactory and it needs immediate attention of the legislature. The defence of voluntary assumption of risk has to be further narrowed down as has been done in England, primarily through judicial decisions. We may further amend the Employers' Liability Act (Section 4) to the effect that even if the worker takes a voluntary risk, it would be no defence to the employer if the worker proves that, in taking such risk, he was acting in employer's interest or in pursuance of a moral duty to save life or property in an emergency like out-break of fire etc.

40. Section 3(5), Workmens Compensation Act 1923.
41. Section 1(1): "It shall not be defence to an employer, who is sued in respect of personal injuries caused by the negligence of a person employed by him, that the person was at the time the injuries were caused, in common employment with the person injured".
Another defence which employers usually have recourse to in workers' claim for damages is the doctrine of contributory negligence. In India, there is no central legislation which abolishes it or at least reduces its severity. In England, the Law Reform (Contributory Negligence) Act 1945 provides vide section 1(1) that "...the damages recoverable in respect of negligence of the employer shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in responsibility (contributory negligence) for the damage."

Kerala, however, has taken a lead in the direction of apportionment of damages in cases of contributory negligence and has enacted Kerala Torts (Miscellaneous Provisions) Act 1976 for the purpose. Section 8 of the Kerala Act is almost identical to the similar provision in the English Law Reform (Contributory Negligence) Act 1945. Although various other High Courts in our country have applied the doctrine of apportionment of damages on the above lines in several cases, it should be incorporated through a statute so as to bring in uniformity in application of the doctrine. Abrogation of the doctrine is not possible.

43. Rural Transport Service v. Bezlim Bibi AIR 1980 Cal. 165;
   Subhakar v. Mysore State Road Transport Corporation AIR 1975 Kerala 73;
   Nani Bala v. Auckland Jute Co. AIR 1925 Cal. 893;
   Maya Mukherjee v. The Orissa Cooperative Insurance Society Ltd. AIR 1976 Orissa 224;
   Vidya Devi v. M.P. State Road Transport Corporation AIR 1975 M.P. 89;
because it would undermine the very basis of tort liability that morally and legally, fault has to be accounted for, irrespective of which party is guilty of it. If the worker is guilty of contributory negligence, reason and logic demand that his damages should be proportionately reduced, with a proviso that some circumstances like acting for the benefit of employer, or in emergency, would be considered as mitigating factors. Again, total abrogation of the doctrine of contributory negligence in favour of workman is not desirable because it would be discriminatory as against the ordinary citizen. An amendment to this effect may be incorporated in section 4 of Employers Liability Act 1938 which may provide that:

"Provided further that on account of the contributory negligence of the employee, the quantum of damages shall not be reduced if the employee proves that the act, alleged to have involved his contributory negligence, was in the interest of the employer or was warranted by emergency."

Again, well established but inequitable common law principle that 'a personal right of action dies with the person;' based on the maxim "actio personalis moritur cum persona" caused undue hardship and injustice to the dependents of the worker, who died of employment injury. The dependents could not claim any damages against the employer because the above rule was inflexible. Although dependents lost the

44. Ratan Lal, Dhiraj Lal, The English and Indian Law of Torts 60(1960) "It is not known when this principle came into being, for its genesis is hidden in the mists of antiquity. From time to time it had been severely condemned by the judges, for it is neither based upon justice nor common sense". Also see, Pollock, On Torts, 9th Ed. P.64.
support, which deceased worker provided to them, they were not allowed to bring an independent action for loss of their support on account of the rule that death of a person could not be complained of as an injury.  

In England, the ambit and scope of the application of this rule was substantially curtailed in 1846 by the Fatal Accidents Act. Ultimately the Law Reform (Miscellaneous Provisions) Act 1934 abolished the above principle altogether vide section 1 which transmitted the right of damages of the deceased person to his personal representatives. In India, the Fatal Accidents Act 1855 was enacted to achieve the same result. The Preamble to the Act shows that the legislature had assumed the application of the maxim actio personalis mortuorum cum persona in India and wanted to reduce the hardship of the dependents by holding the person, causing the death of another person as a result of his wrongful act, accountable in damages.

The question that arises is why does this Act hold a person, causing death of another person through a wrongful act, accountable in damages to dependents? The obvious answer is to help the dependents, who have lost the financial support.

45. Baker v. Bolton (1908) Camp. 493 per Lord Ellenborough: "In a civil court, death of a human being could not be complained of as an injury".

46. "Whereas no action or suit is now maintainable in any court against a person who, by his wrongful act, neglect or default, may have caused the death of another person and it is often times right and expedient that the wrong doer in such case should be answerable in damages for the injury so caused by him, it is enacted as follows..."

47. Section 1A: "...the court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought..."
which the deceased provided to them before death. In fact, the cause of action given to representatives of the deceased under this Act is statutory and is totally different from the cause of action vested in the deceased at the time of his death, although the cause of action statutorily given here is conditional upon the deceased having a valid and enforceable claim, had he lived.

Section 1A of the Indian Fatal Accidents 1855 enables an executor, administrator or a representative of the deceased person to bring an action for damages for the benefit of the family of the deceased. Family members entitled to claim damages are the wife, husband, parent and child. Section 4 defines the word 'Parent' as including father, mother, grandfather and grandmother. The word 'child' has been defined to mean son, daughter, grandson and grand daughter, step-son and step-daughter. According to Hindus, the words 'father' and 'mother' are generally understood to include even great grand-father and great-grandmother respectively. Moreover, factual dependency of other relations has not been taken into account, therefore, it is desirable to extend the definition of 'parent' under section 4 and to add a further clause by a suitable amendment that any other person, who was partly or wholly dependent on the deceased person, shall also be a beneficiary.

under section IA of the Act. The very purpose of the Act is defeated if all the dependents in fact are not made eligible to compensation under the Act by an amendment as suggested above.

Another major deficiency of the Act is inherent in its basic principle of compensation to specified relations for their actual financial loss occasioned by the death of the deceased. Obviously, the Act does not provide any solutum for suffering and bereavement etc. As is discernible from decided cases, the compensation under this Act has been very meagre. Kerala High Court has severely criticised this Act in this regard in the following words:

"The fatal accidents Act placed on the statute book as early as 1855 is a trifle archaic in form and somewhat obsolescent in content but courts are called upon to enforce the statute as it is.... It is sad that an Indian life should be so devalued by an Indian law as to cost only Rs 2000/- apart from the fact that the value of the Indian rupee has been eroded and Indian life has become dearer since the time the statute was enacted and the consciousness of comforts and amenities of life in Indian community has risen. It would have been quite appropriate to revise the fossil figure of Rs 2000/- per individual involved in an accident to make it more realistic and humane but that is a matter for the legislature".

To remove this deficiency, urgent amendments in the Act are needed so as to enlarge the rights of the dependents.

50. Such amendment as suggested above would make the list of dependents under Fatal Accidents Act comparable to the definition of 'dependents' under section 2(1)(d) of Workmen's Compensation Act 1923.

Provision may be made for general damages to the dependents for the loss they have sustained, as distinct from the actual loss of a purely financial character.

Again, on perusal of the cases decided under the Act, it has been found that comparatively much less number of claims with regard to employment injury deaths have been filed under the Act, which was enacted as early as 1855 - a century and a quarter ago. It shows that dependent relations of industrial worker, who are, by and large, illiterate, poor and have to come from distant rural areas, hesitate to have recourse to the Act, knowing it fully well that their chances of success against the superior resources of the employer are very slim. Moreover burden of proof being with the claimant dependents, it is difficult for them to prove the guilt, fault or negligence of employer and therefore, their claims are bound to fail in most of the cases. The employer can put up third party defence, in addition to other defences like contributory negligence. For example, if death is caused by an accident, precipitated by faulty equipment supplied to the worker by some third party, employer can successfully evade liability on the ground that it was 'third party' fault. This defence should be excluded by an amendment in the Indian Fatal Accidents Act 1855 to the effect that if the worker dies in course of employment in consequence of a defective equipment

52. Many cases for compensation under Fatal Accidents Act 1855 are filed under various Acts like Motor Vehicles, Carriage by Air Act 1934 etc.
53. Supra, note 4 at 35.
supplied to him by a third party, the employer shall be liable to damages to the dependent relations specified nonetheless. Such amendment, of course, should be made without prejudice to employer's defence of any contributory negligence on the part of the deceased worker.

Thus, on functional evaluation of the common law protection in India over the years shows that, in spite of legislative efforts through Employers Liability Act 1938 and Fatal Accidents Act 1855 to cut down and restrict the traditional common law defences of the employers - common employment, assumption of risk contributory negligence etc., it could not prove effective and purposeful. These statutes themselves suffer from some of the inherent and functional deficiencies and their extensive review and over-hauling by the Legislature is urgently needed.

3.20 Employment Injury: Safety Legislation and Employer's Statutory duties

We have analysed above that common law liability of the employer to compensate the worker or his dependents for employment injury caused as a result of his failure to take reasonable care, to ensure safe conditions of work, is a general liability, independent of any statute. We have also discussed that employers general duty of care is three-fold. In any claim for damages for breach of this duty, the employer is entitled to all defences available in tort law

54. Supra, note 26.
except those which have been excluded or modified under statutes like Employers' Liability Act 1938 and Fatal Accidents Act 1855.

Parallel to the common law liability of the employers, a new type of liability in common law was emerging. It was the employers' liability for breach of statutory safety duties, introduced under the expanding factory safety legislation.

We have discussed already in Chapter II that employment accident problem assumed serious dimensions with the advent of modern factory system. Consequently, in England and elsewhere, a serious attempt was made to minimise the number of accidents through safety measures, made compulsory under the Factory Acts, as early as the beginning of 19th century. 55 Factory system came quite late in India and the first Factory Act was enacted as late as 1881.

The Factory safety legislation imposes statutory duties on the employer to comply with the prescribed safety standards to prevent employment accident injuries to the workers. These statutory duties are enforced primarily through penalties prescribed for their breach in the relevant statute.

Now, the question that arises is whether a worker who is injured as a result of breach of these statutory duties by the employer, could bring a common law action for damages

55. See, (English) Apprentices Act 1802; (English) Factoy Acts 1844-1901; (English) Mines Acts 1855-1872 and (English) The Health and Safety at Work Act 1974.

56. Supra, note 23.
or not? At first sight, the impression which one gathers from the statutes is that the worker has no such right and that specified mode of enforcement of these statutory duties through statutory penalties excludes the common law action. In England, after a long drawn judicial controversy, it is now a settled principle that worker and his dependents have right to common law damages. The basis of this principle is the notion that a safety statute is passed for the benefit of workers as a class and therefore, a common law action lies whenever workers are injured in consequence of breach of statutory duties under such statutes.

In spite of close resemblance between negligence and breach of statutory duty, they are not one and the same. The statutory duty to provide safety standards is an absolute liability which extends to all foreseeable risks and dangers and defences like *employment, volenti non fit injuria* are not available against the worker in cases of breach of statutory duty. However,


58. Groves v. Wimborne (Lord) (1898) 2 Q.B.402 Per Vanghan Williams L.J. at P.415: "Where the statute provides for the performance by certain persons of a particular duty and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, prima facie and if their is nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty".

59. Caswell v. Powell Duffryn Associated Collieries Ltd. (1940) A.C.152 per Lord Wright at P.178.

60. Findley v. Newman Tender and Co. (1937) 4 All E.R.58. Also see Carr v. Mercantile Produce Co.Ltd. (1949) 2 K.B. 601, per Stable J.at P.608: "The Factory Acts are there, not merely to protect the careful, the vigilant and the (contd.)
contributory negligence of the employee can be a factor which would reduce the employee's damages. 61

Before we discuss the common law right of the Indian worker, if any, to claim damages for employment injuries due to breach of statutory duties by the employer under the safety provisions of Factories Act 1948, let us examine as to how these statutory duties are enforced through statutory penal sanctions and factory inspection.

The Indian Factories Act 1948 incorporates various statutory duties of the employer and occupier with regard to safety, health and welfare of the workers. In the context of employment injury, safety provisions 62 in our Factories Act 1948 are of utmost importance. For breach of safety provisions, penalties are prescribed in section 92 to 94 and certain exemptions of occupier from liability are contained in section 101. The enforcement of employer's/occupier's statutory duties is through criminal prosecution in the first instance. Some decided cases do reflect that statutory duties under the Act are absolute and the Act does not make a breach of statutory duty an offence only in the event of a worker being injured in consequence thereof. For instance, unfenced machinery is always a source of danger to careless and thoughtless worker and proof of an accident is not necessary to maintain a conviction. 63

2. See, Factories Act 1948, Chapter IV, Ss. 21 to 41.
determine the question as to whether a particular employer had committed a breach of safety rules, the relevant consideration is whether, without an actual accident happening, the employer could have been prosecuted for non-compliance with an absolute provision.64

The only limitation on such absolute statutory duties is the rule of reasonable foreseeability. Supreme Court has held that when a breach of such duty occurs, the employer is liable unless he can establish that, notwithstanding such a breach, he is not liable because accident occurred in circumstances which could not have been reasonably foreseen by him. It added that 'A statute does not, of course, require an impossibility of a person'.65

Before Independence, administration, being openly sympathetic to employers, was not interested in effective enforcement at all. The Royal Commission on Labour in its Report(1931) exhibits openly the 'Don't worry, Let them go on' attitude by recommending that:

"...the policy of gradualness, which underlies our proposals for legislation should also influence it's enforcement... To begin with, there are bound to be many contraventions of the law resulting from ignorance of it's provisions, and... prosecutions should ordinarily be instituted only for an offence committed after a previous warning."66

The above words (a recommendation at that) of the Royal Commission have dangerous portents. Ignorance of law by the employer has been accepted officially as a valid excuse for non-compliance with statutory duties. Added to that, administration has been advised 'gradualness' in enforcement.

That enforcement of safety provisions in Factory Act through criminal prosecution has been lax is now a well known fact. The National Commission on Labour observed:

"The statutory provisions on safety are adequate for the time being, effective enforcement is the current need".67

The following break-up of convictions obtained for offences relating to the safety provisions under Factories Act 1948 for different years is supportive of the above observation of the National Commission on Labour:

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of Convictions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1951</td>
<td>127</td>
</tr>
<tr>
<td>1956</td>
<td>380</td>
</tr>
<tr>
<td>1961</td>
<td>338</td>
</tr>
<tr>
<td>1965</td>
<td>698 (Provisional)</td>
</tr>
</tbody>
</table>

However, the increasing number of penal convictions mentioned above does not by itself prove effective enforcement, particularly in view of the fact that penalties provided for various offences relating to safety standards are light and

68. Id. at 99 (Adapted from Table 9.4).
Therefore, such penalties can hardly have any deterrent effect. Most of the prosecutions result in small fines and employers find it more profitable to pay these small fines rather than spend substantial money on safety equipment and safety measures in their factories. The following observation of the National Commission in this regard is a serious indictment of the entire penalty system for offences under Factories Act 1948:

"We have referred to the evidence which shows that the penalties imposed by courts are light and judicial pronouncements often do not take into account the broader social objectives of legislation...we do feel that the penalties should be more stringent than at present so that their deterrent effect is felt. Serious offences should be made cognizable." 69.

The Committee on Labour Welfare also reached the same conclusions and recommended stringent penalties under Factories Act. In its Report it observed:

"There is a consensus of opinion among the Study Groups appointed by various state Governments that, although defaulters under Factories Act can be punished with imprisonment or fine or both, in practice fines imposed or punishments awarded have not met the purpose of the penal provisions. They have not proved deterrent enough to reduce the extent of defaults. The study Groups, therefore, have suggested that section 92 of Factories Act be suitably amended by laying down a minimum penalty for contravention of the provisions of the Act." 70

The Committee on Labour Welfare has suggested a definite

69. Id. at 100, Para 9.22.
minimum, \(^{71}\) whereas National Commission on Labour has refrained from doing so 'on principle'\(^{72}\). However, in order to ensure strict compliance with safety provisions in particular, only minimum imprisonment should be provided and not fine for their breach. Obviously, employer should not be allowed to take the life or limb of the worker through his breach of safety standards and get away with it by payment of a fine, which most of the employers can readily do without feeling a pinch at all. \(^{73}\) Threat of imprisonment would make them more responsive to their statutory duties. Beyond the minimum imprisonment, courts may, in their discretion, order longer imprisonment in proportion to the gravity and seriousness of the offence by the employer.

Moreover, prosecutions for breach of statutory duties under Factory Act 1948 are generally brought in the ordinary criminal courts. \(^{74}\) Such court are not always equipped to decide

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71. *Id.* at 70, Para 11.47(a): "...there should be a minimum fine of Rs 500/- which may go upto Rs 3000 for repeated infraction or violation of statutory provisions".

72. *Supra* note 67, Para 9.22 at 100.

73. *Supra* note 66: "There are numerous cases of inadequate fines...the fine is smaller than the profit made by the offender out of the offence". (Quoted in K.D.Srivastava's Commentaries on Factories Act 1948(1972) at 471.

74. *Factories Act, 1948*. Section 105(2): "No court below that of Presidency magistrate or of a magistrate of the first class shall try any offence punishable under this Act."
technical questions regarding safety standards, the Royal Commission on Labour (1931) had correctly observed:

"Unfortunately, offences, particularly in smaller centres, frequently come before magistrates with little or no special experience of the kind required and the results show too often an imperfect grasp of the principles of factory laws."

To remove this lacuna, statutory provision should be made for compulsory requisition of the services of the safety experts regarding offences under safety provisions by the criminal court in question.

In addition to penalties for breaches of statutory duties under safety provisions and penal convictions for the same, another important method to ensure compliance with safety standards by employers is the effective factory inspection. In fact, factory inspection is more desirable because it is really preventive in nature. Criminal conviction is at best a deterrent for the future. However, on this count also, position is less than satisfactory. In several instances and for various reasons, the enforcement of safety provisions in Factories Act 1948 by the factory inspectors has been found to be ineffective. The Labour Investigation Committee (1944) reported that enforcement was inadequate and not up to the mark. The obstacles in the effective enforcement include numerical inadequacy of inspection staff, lack of technical qualifications.

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75. Supra, note 66 at 471.
76. Supra, note 70 at 74, Para 11.11.
77. Ibid.
tion of inspectors, excessive work load of inspectors etc.

With regard to effective enforcement of safety provisions through factory inspection, many recommendations and suggestions have been made by various Commissions, Committees, Study Groups and safety experts. Urgent steps should be taken to implement these recommendations.

Admittedly, even if factory inspection is made effective and penal sanctions made stringent for breaches of statutory duties by the employer, some breaches of statutory duties are bound to occur which may lead to serious accidents causing death or disablement to the worker. The question that arises is, who should compensate the worker or his dependents for the pecuniary loss and to what extent? As stated above, now, it is a settled law in England that safety legislation, imposing statutory duties on the employer, is for the safety of the worker and therefore, worker has a common law right to damages for breaches of such statutory duties provided he is injured in consequence thereof.

78. Id. at Para 11.35, "The Committee...recommends that the existing factory inspectorates should be bifurcated into technical and non-technical wings."

79. Id. 75 Para 11.17 "The Study Groups have also pointed out that factory inspector has to perform multifarious jobs. Besides the work of enforcement of the Factories Act, he is also an inspector under the Payment of Wages Act, Maternity Benefit Act, Employment of Children Act and Personal Injuries Insurance Schemes...has also to make his appearance in the courts to pursue the prosecution".


81. Supra, note 58.
Under the Indian Factories Act 1948, the author has not come across a single case in which the worker or his dependents claimed common law damages with regard to employment injury for the breach of statutory duty by the employer under safety provisions. However, the absence of such claims does not by itself indicate that the common law right of action was not available in India for breach of statutory duties.

In fact, section 66 of the Employees' State Insurance Act 1948 and the decisions given thereunder do recognize such a cause of action. The absence of claims by workers against the employers before 1948 only proves that workers, being ignorant, illiterate and poor could not afford the costly litigation against the employers with their superior resources. Under section 66 of Employees' State Insurance Act 1948, the E.S.I. Corporation in several cases has successfully claimed reimbursement from employer of the periodical payments made by it to the employee, who has been injured on account of breach of

82. Some claims by dependents were off and on made under Fatal Accidents Act 1955 but the same are not very relevant here. The Fatal Accidents Act, enacted with different objectives, has a limited application. See supra note 46.

83. Section 66 of the E.S.I. Act 1948 provides:

"Corporations right to recover damages from employer in certain cases-(1) Where any employment injury is sustained by an insured person as an employee under this Act by reason of the negligence of the employer to observe any of the safety rules laid down...the corporation shall...be entitled to be reimbursed by the employer...the actuarial present value of the periodical payments which the corporation is liable to make under this Act(to the insured person)."

safety standards by the employer.

Section 66 now stands omitted from E.S.I. Act 1948. Thus, employer virtually has been exonerated of his liability to pay damages for breach of statutory duties under safety provisions. The only sanction behind safety provisions that remains now is the penal sanction under section 92 of Factories Act 1948. There is all the more reason to strengthen the penal sanction, as suggested above, to make the employer conscious of his statutory duties regarding workers' safety.

The omitting of section 66 is in keeping with the basic philosophy of social insurance that employment injury is a social problem and therefore, society should devise such systems of protection in which there is no place for individual fault and blameworthiness. Moreover, common law liability of the employer has not served the purpose for which it was designed and developed. The damages paid by the employer are ultimately shifted to the consumers by adding the same to the cost of production. Moreover, for the same reasons, under the E.S.I. scheme insured employee has not been allowed common law damages as an alternate remedy. Thus, for employees insured

85. S.66 was omitted by Amendment Act 44 of 1966.
86. E.S.I. Act 1948, section 53 provides: "Bar against receiving or recovery of compensation or damages under any other law: An insured person or his dependents shall not be entitled to receive or recover whether from the employer of the insured person or from any other person, any compensation or damages under the Workmen's Compensation Act or any other law for the time being in force or otherwise, in respect of an employment injury sustained by the insured person as an employee under this Act."
under the scheme, common law action under Employers' Liability
Act 1938 or Fatal Accident Act 1855 or Compensation under Work-
mens' Compensation Act 1923 are barred. However, employees
outside the scope of E.S.I. scheme are still entitled to such
remedies and only to this limited extent, these remedies survive
in relation to employment injury.

3.30 Employment Injury: Indian Workmen's Compensation
System

The question of providing statutory workmen's compensa-
tion for employment injury was first raised in India in the
year 1884. In fact, the factory and mining inspectors had
recommended such a legislative measure as a method of creat­ing
a sense of responsibility among employers in order to
secure ultimately better safety for the worker. Thus, the
two reasons—workmen's compensation and promoting safety—which necessitated the enactment of Workmen's Compensation
Act 1923, are clearly stated in the statement of Objects
and Reasons annexed to the then Bill.

The first step towards workmen's compensation in India
was taken in 1922, when by an amendment in Factories Act, a
new section 43 was inserted conferring power on a criminal

87. Industrial Labour in India 103 (1951) (ILO, Geneva).
88. Gazette of India 1922, Part V, P. 313 "The general principles
of Workmen's Compensation command almost universal acceptance
and India is now nearly alone amongst civilized countries
in being without legislation embodying these principles... An additional advantage of legislation of this type was that
by increasing the importance for the employer of providing
adequate safety devices."
court to order the whole or part of a fine imposed in respect of an offence causing employment injury to be paid as compensation to the injured workman. Soon after, Workmen's Compensation Act 1923 was enacted, which Royal Commission on Labour called as the first measure of social security on all India basis. 89

As discussed in Chapter III, the workmen's compensation system is based on an entirely new philosophy and principles and thus, it constitutes a complete departure from common law liability for damages. It has been held by our courts that compensation is not a remedy for employer's negligence but is in the nature of insurance against accident risks. 90 It is not a solatium to a relative of deceased workman but something to replace the actual loss suffered. 91


An exhaustive analysis of the provision of W. Compensation Act 1923 is neither possible nor desirable here. Therefore, a perusal of its important and basic aspects would be enough to enable us to assess its institutional and functional parameters.

3.31 Workmen's Compensation Scheme:
Scope and Coverage

Unlike the English Workmen's Compensation Act 1925 (now repealed), the Indian Workmen's Compensation Act 1925 has

89. Supra, note 66 at 295.
90. Secretary of State v. M.I.Exite, AIR 1938 Nag. 91
(had) a limited application. Under Section 2(1)(h) and Schedule II of the Act, the definition of workman includes persons employed in schedule II capacity and earning up to Rs 1000/- per month as average wages. Persons whose employment is casual and not connected with employer's trade and business and members of Armed Forces are excluded.

The words 'employment is of casual nature and... employed otherwise than for... employer's trade and business' in section 2(1)(h) have come up frequently for judicial interpretation. Our courts have given a liberal interpretation to these words and in fact, to the entire definition of 'workman'. Now a near unanimous judicial opinion is that the two limbs thereof (casual and unconnected with employers trade and business) can not be read disjunctively. The entire clause must be read conjunctively, and that both conditions should be fulfilled simultaneously to take a person outside the scope of the definition. It follows that if an employer has employed a person for the purpose of his trade or business, then even though employment be of a casual nature, he would still fall within the category of workman. Thus, a well-digger employed by a farm owner, a mill sweeper, a truck cleaner, a house-repairer employed

95. Ram Sarup v. Gurdrev Sinch 1969 Lab.1 C.371(Punj.)
for employers' business have been held to be workmen. More recently, a mechanic employed on daily wages for installation of machine only, a thirteen years old boy working on sugarcane crusher, a person working on power-charkhi for crushing cane on farm land, a person employed to repair a compressor at road-construction site have been held to fall within the scope of definition of workman. A person engaged by the owner of a coconut garden, to pluck nuts once in a period of 50 days or so is a workman.

A very interesting ruling with regard to Railway porters has been given by Kerala High Court in K.Narayanan v. Southern Rly. Madurai. It has been held that the terms of contract of licence and overall control vested in the administration(Rly) are sufficient indicia for holding that the licensed porters are railway servants, employed by the Rly. administration under section 53(7) of the Railways Act 1890 and therefore, workmen under section 2(1)(n) of Workmens' Compensation Act.

The liberal trend exhibited in judicial decisions, is in conformity with the basic principle that labour statutes, being

96. Jeethala Sharma v. Saradambal AIR 1936 Mad. 941
98. Baru Ram v. The Labour Officer, Sonepat 1984 Lab. 1.C. 80 (Punj. H.C.)
100. Vijay Ram v. Chander Prakash 1981 Lab. 1 C. 359 (J&K H.C.)
in the category and social legislation should be given liberal interpretation.

However, the principle of exclusion from or inclusion of an employee within the scope of the definition of workers on the basis of prescribed wage ceiling of Rs. 1000/- per month is logically untenable. Nature of work of the employee rather than his wages should be the criterion. Fortunately, the wage-ceiling in the definition has now been removed by the Workmen's Compensation (Amendment) Act 1964. Thus, one of the major defects of the Act that it has limited application and coverage has been rectified by the amendment. Now, all employees have been brought within the purview of the definition including managers and supervisors irrespective of the quantum of their wages.

The words "on monthly wages not exceeding one thousand rupees" in Section 2(1)(c) of the Act, have been deleted.\(^{103}\)

However, so long as schedule II is not repealed, Indian Workmen's Compensation Act 1923 would still remain below international standards of coverage. For example, the ILO Recommendation\(^{104}\) recommends that 'all employed' persons (and even self-employed persons) should be covered. To begin with, schedule II should be further enlarged as a first step towards comprehensive coverage. The power of State Governments under section 2(3) to add to schedule II any class of persons employed in any

103. The Current Indian Statutes 64 (August 1964).
occupation which they are satisfied, is hazardous, may be used for the purpose.

3.32 **Workers' Compensation Scheme:**

**Conditions of Liability and Non-liability**

The liability of an employer under the Act is limited and is subject to the provisions of the Act. Under section 3(1), the liability to pay compensation is dependent on four conditions:

(a) Personal injury (b) caused by an accident (c) arising out of and in the course of employment and (d) the injury must have resulted either in death of workman or in his total or partial disablement for a period exceeding three days.

The conditions of non-liability are also contained in section 3(1)(a) and (b). The employer shall not be liable:

(a) in respect of injury (partial or total disablement) not exceeding three days and (b) in cases where accident is directly attributable to willful disobedience to safety orders, intoxication while at work and willful disregard of safety devices, provided death has not occurred.

In Chapter III, the important notions like 'accident', 'employment accident arising out of and in the course of employment', 'occupational disease' etc., have already been discussed with the help of decided cases. It would suffice

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105. Supra, paras 2.10 to 3.32, Chapter III.
to say in brief, therefore, that under Indian Workmen's Compensation Act, the phrase 'arising out of and in the course of employment' has been given an extended connotation by courts through the application of principles like notional extension. Some latest cases show a liberal application of the principle. For example, in Indian Rare Earths v. Subhalesh Bali, an employee, who was allowed to come to work-site on cycle, was held entitled to workmen compensation when he was knocked down by a car on a public highway, while on his way to work on cycle. Again, in Naujanne v. The City Municipal Council, Mysore, a municipality-sweeper, injured by a passing jeep, while standing on a public high-way for roll-call by the sanitary inspector, was also held entitled to workmen compensation.

The principle of notional extension, which lately courts have been applying quite liberally, has not been statutorily incorporated in the Act by the Amendment Act 1984. The scope of the phrase "course of employment" has been widened by courts and now compensation is generally payable in the event of an accident taking place not only while on duty but also during travel to and from the place of employment. The burden of proof is on the workmen to prove that

106. Id. paras 3.11 and 3.30.
108. 1982 Lab. 1.C.1210.
accident has arisen out of and in the course of employment. The phrases 'arising out of' and 'in the course of' have generated a lot of litigation and technical rigidity. The only way to dilute the technical rigidity of the phrase is the liberal judicial interpretation. As suggested above, instead of legalistic and technical interpretation, the courts should apply the functional test of work-connection between accident and employment for the purpose.

Fine legal reasoning, medical evidence, on the other hand, is hardly of any help. In Guj. State Road Transport Corporation v. Jiviben Arjan, an assistant Traffic Inspector died of heart attack, which he had suffered while on duty. Gujrat High Court held that there was no medical evidence to show that his duties involved over-strain, tension or anxiety. One may ask as well, which employment does not involve stress and strain? Later, when a goods train driver died of heart attack on duty, the same court boldly upheld the compensation claim with the observation:

"The connection between the injury and employment may be furnished by ordinary strain of ordinary work if the strain did in fact contribute to or accelerate or hasten the injury".

The functional test of work-connection can also help in the cases where employer alleges general or statutory negligence

110. Supra, Para 3.30, Chapter III.
of the workman. Such cases should be decided by taking into account all the facts, attendant circumstances, standards of care expected from a worker, natural human impulses and reactions to situational factors. In *Koduri v. Atchamma*, attempt by a truck-cleaner to hit a rabbit from the top of the moving truck and his consequential fall were held to have happened outside his employment. How would court compare this situation with a hypothetical situation in which the same person falls from the moving truck, while stretching his neck to have a closer look at a road-side poster with a nude female picture is anybody's guess?

Under Indian *Workmens' Compensation Act* 1923, occupational diseases are also considered as employment accidents. In this regard, a method of 'Open schedule' coverage has been followed. In schedule III of the Act, occupational diseases, in Part A, B & C are listed in column 1, corresponding to the employments (in column 2) to which such diseases are connected. The Act does not contain a conceptual definition of 'occupational disease'. The state Governments, however, been empowered under section 3(3) to add any other disease to schedule III. This ensures some flexibility in the otherwise rigid schedule system of coverage. With regard to non-scheduled diseases, the onus is on the claimant to establish that such diseases like neurosis and insanity have arisen out of and in

114. Section 3(2).
the course of employment.\footnote{116}{Chunni Lal v. G.M.N. Foundry AIR 1957 H.P. 33.}

As introduction of new industrial processes is giving birth to new occupational diseases\footnote{117}{Report on Health Insurance for Industrial Workers (Addarkar Report) 1944 recommended inclusion of industrial dermatitis and various forms of cellulitis and bursitis, (at 216).} which were hitherto unknown and thus the upgrading of occupational diseases schedule is a continuing process. Schedule III in W. Compensation Act 1923 for that reason has been amended several times already in 1938, 1959 and 1962. Again, in 1984, by an amendment occupational diseases covered under the Act have been increased to 34 as against 22 earlier.\footnote{118}{The Workmen's Compensation (Amendment) Act 1984 provides that: “6. Substitution of new schedule for schedule III For Schedule III of the principal Act, the following Schedule shall be substituted, namely

SCHEDULE III (See Section 3)

LIST OF OCCUPATIONAL DISEASES

<table>
<thead>
<tr>
<th>S.No.</th>
<th>Occupational diseases</th>
<th>Employment</th>
</tr>
</thead>
<tbody>
<tr>
<td>PART A</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. Infectious and parasitic diseases contracted in an occupation where there is a particular risk of contamination</td>
<td>(a) All work involving exposure to health or laboratory work;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(b) All work involving exposure to veterinary work;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(c) Work relating to handling animals, animals, animal carcasses part of such carcasses, or merchandise which may have been contaminated by animals or animal carcasses;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(contd.</td>
<td></td>
</tr>
</tbody>
</table>
is always a time-gap between discovery and inclusion of an occupational disease in the schedule. If a workman contacts

1. Diseases caused by work in compressed air
2. Diseases caused by lead or its toxic compounds
3. Poisoning by nitrous fumes
4. Poisoning by organo-phosphorus compounds
5. Diseases caused by phosphorus or its toxic compounds
6. Diseases caused by mercury or its toxic compounds
7. Diseases caused by benzene or its toxic homologues
8. Diseases caused by nitro and amido toxic derivatives of benzene or its homologues.
9. Diseases caused by chromium or its toxic compounds
10. Diseases caused by arsenic or its toxic compounds
11. Diseases caused by radioactive substances and ionising radiations
12. Primary epitheliomatous cancer of skin caused by tar, pitch, bitumen, mineral oil, anthracene, or the

(d) Other work carrying a particular risk of contamination.

PART B

1. Diseases caused by phosphorus or its toxic compounds
2. Diseases caused by mercury or its toxic compounds
3. Diseases caused by benzene or its toxic homologues
4. Diseases caused by nitro and amido toxic derivatives of benzene or its homologues.
5. Diseases caused by chromium or its toxic compounds
6. Diseases caused by arsenic or its toxic compounds
7. Diseases caused by radioactive substances and ionising radiations
8. Primary epitheliomatous cancer of skin caused by tar, pitch, bitumen, mineral oil, anthracene, or the

(contd.)
an occupational disease during such time-gap, he is likely to fail in his claim on account of inadequacy of proof of

<table>
<thead>
<tr>
<th>1</th>
<th>2</th>
<th>3</th>
</tr>
</thead>
<tbody>
<tr>
<td>compounds, products or residues of these substances.</td>
<td>All work involving exposure to the risk concerned.</td>
<td></td>
</tr>
<tr>
<td>Diseases caused by the toxic halogen derivatives of hydrocarbons (of the aliphatic and aromatic series).</td>
<td>All work involving exposure to the risk concerned.</td>
<td></td>
</tr>
<tr>
<td>Diseases caused by carbon disulphide</td>
<td>All work involving exposure to the risk concerned.</td>
<td></td>
</tr>
<tr>
<td>Occupational cataract due to infra-red radiations</td>
<td>All work involving exposure to the risk concerned.</td>
<td></td>
</tr>
<tr>
<td>Diseases caused by manganese or its toxic compounds</td>
<td>All work involving exposure to the risk concerned.</td>
<td></td>
</tr>
<tr>
<td>Skin diseases caused by physical, chemical, or biological agents not included in other items.</td>
<td>All work involving exposure to the risk concerned.</td>
<td></td>
</tr>
<tr>
<td>Hearing impairment caused by noise.</td>
<td>All work involving exposure to the risk concerned.</td>
<td></td>
</tr>
<tr>
<td>Poisoning by dinitrophenol or a homologue or by substituted dinitrophenol or by the salts of such substances.</td>
<td>All work involving exposure to the risk concerned.</td>
<td></td>
</tr>
<tr>
<td>Diseases caused by beryllium or its toxic compounds.</td>
<td>All work involving exposure to the risk concerned.</td>
<td></td>
</tr>
<tr>
<td>Diseases caused by cadmium or its toxic compounds.</td>
<td>All work involving exposure to the risk concerned.</td>
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<tr>
<td>Occupational asthma caused by recognised sensitising agents inherent to the work process.</td>
<td>All work involving exposure to the risk concerned.</td>
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<td>Diseases caused by fluorine or its toxic compounds.</td>
<td>All work involving exposure to the risk concerned.</td>
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<tr>
<td>Diseases caused by nitroglycerine or other nitroacid esters.</td>
<td>All work involving exposure to the risk concerned.</td>
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(contd.)
occupational origin of the disease. Even extension of the schedule would not solve the problem fully because main difficulty here lies in the lack of medical expertise.  

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<td>21. Diseases caused by alcohols and ketones</td>
<td>All work involving exposure to the risk concerned.</td>
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<td>22. Diseases caused by asphyxiants: carbon monoxide, and its toxic derivatives, hydrogen sulfide.</td>
<td>All work involving exposure to the risk concerned.</td>
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<td>23. Lung cancer and mesotheliomas caused by asbestos.</td>
<td>All work involving exposure to the risk concerned.</td>
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<tr>
<td>24. Primary neoplasm of the epithelial lining of the urinary bladder or the kidney or the ureter.</td>
<td>All work involving exposure to the risk concerned.</td>
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</tbody>
</table>

PART C

1. Pneumoconioses caused by sclerogenic mineral dust (silicosis, anthracoosilicosis, asbestosis) and silico-tuberculosis provided that silicosis is an essential factor in causing the resultant incapacity or death.  

2. Bagassosis  

3. Bronchopulmonary disease caused by cotton, flax hemp and sisal dust (Byssinosis).  

4. Extrinsic allergic alveolitis caused by the inhalation of organic dusts.  

5. Bronchopulmonary diseases caused by hard metals.  

On account of these problems, cases of compensation for occupational diseases, as shown by statistics in the Annual Notes on the working of the Workmens' Compensation Act, have been relatively very few. This problem can be solved by the establishment of a specialised unit of Industrial Medicine, for study and research in occupational diseases, in one of the well equipped E.S.I. hospitals. Whenever necessary, the workmens' compensation commissioner and the court may call for the expert opinion in controversial cases. Moreover, such unit may suggest ways and means to minimise the incidence of such diseases through preventive action.

3.33 Workmens' Compensation Scheme: Benefits

The Workmens' Compensation Act provides for cash payment of benefits in cases of (a) temporary total disablement (b) permanent total disablement (c) permanent partial disablement (d) temporary partial disablement and (e) death as per details in schedule IV of the Act.

Extent of disablement under the Act has to be assessed in terms of loss or reduction in earning capacity and not in terms of loss of physical capacity. The Act regards Workman as a wage-earner and therefore, it is not concerned

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120. Punekar, Social Insurance for Indian Workers in India 77 (1950).
with any physical pain or suffering or disfigurement but only with the loss of power to earn wages resulting from an injury. However, if the physical defect or disfigurement makes workman's labour unsaleable in the labour market, there would either be partial disablement or total disablement, even if, such physical defect or disfigurement does not impair the workman's capacity to work.

The Act defines partial disablement in Section 1(i)(g) and total disablement in section 2(1)(L). In Part I of Schedule I, certain injuries are listed which amount to permanent total disablement with 100% of loss of earning capacity. In Part II of Schedule I, numerous injuries are listed, which are deemed to be permanent partial disablement, and the percentage of loss of earning capacity which they entail are correspondingly specified. Some injuries in Part I of Schedule I, like very severe facial disfigurement, indicate that loss of earning capacity is not necessarily co-extensive with the loss of physical capacity to work and certainly the former does not prove the latter.

Total disablement in section 2(i)(L) is defined in terms of 'incapacity for all work' which is not the same as 'incapacity to work'. The use of 'for' instead of 'of' indicates that 'incapacity for all work' includes the 'incapacity to get work' as well. It has been held that where there is no longer any earning power left due to nonsaleability o
labour for any physical defect, and no employer could be persuaded to offer the workman any employment, the disablement of the workman is total, irrespective of his physical capacity to do work. In Pratap Narain Singh v. Shrinivas, an accidental injury to a carpenter resulted in amputation of his left hand above the elbow. On the ground that carpenter can not work with one hand, his disablement was held to be total. When an organ or limb is not lost in the physical sense of being sliced off or amputated but its use is completely and permanently lost, such loss is to be taken as loss of that organ as contemplated by the note in Schedule I. However, a controversial question arises regarding physical loss of an organ, which was already useless. There is at least one entry in Schedule I, i.e., Permanent total loss of hearing, which is suggestive of the fact that reference has been made to the function of the ear and not to the physical ear itself. The inference may be further supported by the argument that outer ear (pinna) is not really an organ of hearing but that it has only a cosmetic value. In some cases, suspensory awards have been given which would take effect once it is proved that loss of even a cosmetic organ like richless eye-ball has adversely affected the chances of future employment.

124. AIR 1976 SC 222.
In case of death of the workman as a result of employment injury, cash benefit in lumpsum is payable to his dependents as per details in schedule IV. Dependents under the Act are classified in three categories. Although dependency is a question of fact and where a person claims as a dependent should establish his partial or total dependence on the earnings of the deceased workman. However, statutory presumptions have been incorporated for the benefit of certain relations, like a widow, a minor legitimate son, an unmarried legitimate daughter and a widowed mother. Such presumptions eliminate the need for any of these relations to prove actual dependence. In other two classes are listed some such relations who are required to prove partial or total dependency in fact. Obviously, all other persons who are not included in section 2(1)(g) are excluded, even if such persons prove dependency in fact.

As the purpose of death benefits under compensation law is to compensate the loss of support that the deceased workman provided to others during his life time, the list of dependents should include all such survivors, who might reasonably have expected to receive support, had the workman not died of employment injury. Step-parents, non-legal wife and such other relatives should be covered because, as observed by Clifford Davis, "fault-oriented rules (and even morality norms)

126. Section 2(1)(d), Workmen's Compensation Act 1923.
should not be borrowed from domestic relations law" and used for defeating the basic purpose of a piece of social legislation. Likewise, on the analogy of a widowed daughter, supported by deceased workman during his life time, being treated as 'unmarried daughter', although not so treated if she is divorced, a divorced wife should always be allowed a share in compensation as a dependent if she could show that she has or could have obtained a court order for her support against the workman, had he been alive. The aforesaid objective can be achieved by adding a further sub-clause to this effect in the definition of 'dependent' in section 2(1)(d).

A major inequity in Indian Workmens' Compensation Act 1923 thus far was that rates of payment for all workmen for permanent total disability and death were uniform corresponding to their monthly wage-slabs and age of the worker was of no consequence at all. Such inequity spelled a disaster for the young disabled worker who had his entire life ahead to provide for. Still worst was the position before 1959 when a minor used to get a fixed amount which was a pittance as

128. 'Soleman Bibi v. East Indian Ry' AIR 1933 Cal. 358.
130. Before the Workmens' Compensation Amendment Act 1959, Section 4 provided as follows:
"(a) Where death results from the injury
(i) in case of an adult in receipt of monthly wages falling within the limits shown against such limits in the second column thereof, and
(ii) in case of a minor-two hundred rupees;

(contd.)
against the adult whose compensation rate was linked with his average monthly wages. The Amendment Act 1959 abrogated these inequitable rates of compensation for minor in respect of the same injury and provided for uniform rates for workers in similar wage-groups, irrespective of their age.

However, even the uniform rates of compensation for workers of different age-groups in respect of similar injuries do not meet the ends of justice. Death or disablement of a young worker is a much more serious matter than death or disablement of a worker of advanced age in terms of economic losses to the worker himself and his family. The Workmens' Compensation (Amendment) Act 1984 has incorporated a very progressive principle of working out the quantum of compensation with reference to the age of the worker at the time of his death or disability. Thus far, a permanently disabled worker with monthly average wages up to ₹ 1000/- was entitled to compensation of ₹ 42000/-. According to the revised rates, compensation for permanent total disability would be an amount equal to fifty percent of monthly wages of the injured workman, multiplied by the relevant

(b) Where permanent total disablement results from the injury-
(i) in case of an adult in the receipt of monthly wages falling within the limits shown in the first column of schedule IV - the amount shown against such limits in the third column thereof, and
(ii) in the case of a minor-twelve hundred rupees;

(d) Where temporary disablement...results from the injury...
(i) in the case of an adult in respect of monthly wages falling within the limits shown in the first column of schedule IV - of the sum shown against such limits in the fourth column thereof; and
(ii) in the case of a minor one half of his monthly wages, subject to a maximum of thirty rupees."
factor' or an amount of twenty four thousand rupees whichever is more. In case of death, the amount would be equal to forty per cent of monthly wages of the deceased workman multiplied by the relevant factor or an amount of twenty thousand rupees whichever is more. The 'relevant factor' for the purpose, in relation to a workman means the factor specified in the second column of schedule IV against the entry in the first column of that schedule specifying the age of the workman. Moreover in case of monthly wages of workman exceed one thousand rupees, for purpose of calculation of compensation, the same shall be deemed to be one thousand rupees only. For example workman, 

131. Workmen's Compensation (Amendment) Act 1984, section 4 provides as:

"4. Amount of Compensation: (1) Subject to the Provisions of this Act, the amount of compensation shall be as follows, namely:

(a) Where death results from the injury

an amount equal to forty per cent of the monthly wages of the deceased workman multiplied by the relevant factor;
or
an amount of twenty thousand rupees.
whichever is more.

(b) Where permanent total disablement results from the injury

an amount equal to fifty per cent of the monthly wages of the injured workman multiplied by the relevant factor;
or
an amount of twenty four thousand rupees.
whichever is more.

Explanation I: For the purposes of clause (a) and clause (b) "relevant factor", in relation to a workman means the factor specified in the second column of Schedule IV against the entry in the first column of the Schedule specifying the number of years which are the same as the completed years of the age of workman on his last birthday immediately preceding the data on which the compensation fell due; (contd.)"
(c) Where permanent partial disablement results from the injury:

(i) in the case of an injury specified in Part II of Schedule I, such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury and;

(ii) in the case of an injury not specified in Schedule I, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioners) permanently caused by the injury;

Explanation I- Where more injuries than one are caused by the same accident, the amount of compensation payable under this head shall be aggregated but not so in any case as to exceed the amount which would have been payable if permanent total disablement had resulted from the injuries;

Explanation II- In assessing the loss of earning capacity for the purposes of sub-clause (ii), the qualified medical practitioners shall have due regard to the percentages of loss of earning capacity in relation to different injuries specified in Schedule I;

(d) Where temporary disablement, whether total or partial results from the injury:

a half-monthly payment of the sum equivalent to twenty-five
at the time of accident, would get Rs 49685 for permanent total disablement and his dependents Rs 39748 in case of his death.

(2) The half-monthly payment referred to in clause (d) of subsection (1) shall be payable on the sixteenth day-(i) from the date of disablement where such disablement lasts for a period of twenty-eight days or more, or (ii) after the expiry of a waiting period of three days from the date of disablement where such disablement lasts for a period of less than twenty eight days; and thereafter half-monthly during the disablement or during a period of five years, whichever period is shorter:

Provided that-
(a) there shall be deducted from any lumpsum or half monthly payments to which the workman is entitled the amount of any payment or allowance which the workman has received from the employer by way of compensation during the period of disablement prior to the receipt of such lump sum or of the first half-monthly payment, as the case may be; and

(b) no half-monthly payment shall in any case exceed the amount, if any, by which half the amount of the monthly wages of the workman before the accident exceeds half the amount of such wages which he is earning after the accident.

Explanation: Any payment or allowance which the workman has received from the employer towards his medical treatment shall not be deemed to be a payment or allowance received by him by way of compensation within the meaning of clause (a) of the proviso.

(3) On the ceasing of the disablement before the date on which any half-monthly payment falls due there shall be payable in respect of that half-month a sum proportionate to the duration of the disablement in that half month.

7. Substitution of new Schedule for Schedule IV-For Schedule IV of the principal Act, the following Schedule shall be substituted, namely-

(contd.)
3.34 Workmen's Compensation Scheme: Its Administration

Although Workmen's Compensation Act 1923 is a Central Act, its day to day administration is entrusted to the state.

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**SCHEDULE IV**

*(Section - 4)*

Factors for working out lump sum equivalent of compensation amount in case of permanent disablement and death

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<thead>
<tr>
<th>Completed years of age on the last birthday of the workman immediately preceding the date on which the compensation fell due</th>
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<td>not more than 16</td>
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<td>17</td>
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<td>139.13</td>
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governments. Under Section 20, state government may appoint any person/s as compensation commissioner for a specified area/s. The Workmen's Compensation Commissioner performs the functions/an administrative judiciary and settles disputed claims, revises periodic payment and registers agreements regarding mutual settlement of compensation claims under the provisions of the Act.

However, there is a complete lack of uniformity in practices of different states regarding appointment of persons to function as Workmen's Compensation Commissioners. In some states like Bengal and Bihar, Labour Commissioners generally discharge the duties of Workmens' Compensation Commissioners, whereas in others, district magistrates, district and session Judges and sometimes even sub-judges work as ex officio commissioners. Most of the Workmens Compensation Commissioners so appointed do not have any expertise, particularly medical

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<td>65 or more</td>
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132. Supra note 66 at 267. "But the work of Workmen's Compensation Commissioner demands specialist knowledge and a specialist out-look, which is not very easy to acquire...It is not surprising, therefore, that there should be demands from organizations closely concerned with the Act for the appointment of specialist Commissioners in all provinces".
which is so important in determining the nature of employment injury, degree of disablement etc. Although they are authorised to seek the assistance of professional experts etc. under section 20(3), likelihood of miscarriage of justice, where such expert help has not been called for, is very much a possibility. Sometimes medical certificates are accepted as such by them and made the basis of award without examining the certificate-issuing medical officer. Such practices have been held to be improper.  

Secondly, the number of Workmens' Compensation Commissioners is not adequate and this results in delay in disposal of compensation cases.  

### 3.35 Workmens' Compensation Scheme in Action

The Workmen's Compensation scheme has been in operation already for almost 60 years. When the scheme was first introduced in 1923, there was scepticism from various quarters with regard to the success of this new experiment and even Govt. of India admitted that many of the features of the scheme owed their origin more to a desire to minimise the difficulties attendant on the introduction of an entirely new measure than to any belief in their permanent value. During the course of its working, many institutional and functional deficiencies have been observed in the scheme by various

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133. *M.S.N.Co.Ltd. v. Modh Kunjee* AIR 1956 Trav.Co.935  
Commissions, Committees and others. A critical evaluation of the scheme in action, therefore, is appropriate at the place.

One of the major institutional deficiencies in the scheme is complete lack of medical care for the victims of employment injury. It provides only the compensation and medical aspect has been completely ignored. Medical care and treatment of the worker when he meets an accident is the greatest need. Employment accidents excluding occupational diseases are generally traumatic occurrences which not only disable the workmen from undertaking work but also inflict physical suffering and psychological shock. This necessitates not only payment of pecuniary compensation for wage-loss but also the provision for medical care and treatment to relieve suffering and to refurbish his confidence. Moreover, non-availability of medicare destroys all chances of workers rehabilitation and restoration. Besides, under the scheme, there is no provision for preventive medicare. In this regard, the scheme falls short of suggested international standards.

As discussed above, workmens compensation systems based on a principle entirely different from the fault principle of

137. Beveridge Report (1942) Cmd.6404, Para 79 at 37. "In the 45 years of its existence, the present system (Compensation system) of dealing with the results of industrial accident and disease has contributed little or nothing to the most important purpose of all which should have come first, namely, restoration of the injured employee to the greatest degree of production and earning as soon as possible."
tort liability. In practice, however, it has proved itself nearer to fault liability rather than completely detached from it. The functioning of workmens compensation scheme in India and elsewhere has demonstrated that practically all the common law technicalities including employer's defences, and workers' problems in discharging burden of proof etc., are visible in workmens compensation claims. In India also, the case-law regarding interpretation of the phrase 'arising out of and in the course of employment' has been as prolific as it has been elsewhere. Every single claim by workman is contested by the employer and therefore, the whole scheme has generated hostility and confrontation between employers and workmen. Protracted litigation, delays and difficulties in getting compensation under the Act are well known.

As employer is required to pay compensation without any fault, there is a temptation on the part of the employers to evade responsibility through various mal-practices. The Labour Investigation Committee referred to the tendency of the employers to exploit the ignorance of the workers to escape liability. It observed that:

"Very often, the worker is paid hush-money and bundled off to his village with the result that his claim becomes time-barred...(there are) actual instances in which workers are coerced into accepting a lower sum than what is due to them by taking their thumb impression on an agreement which they are incapable of reading."140

139. Supra, note 67 at 165, Para 13.21.
140. Supra, note 119 at 173.
Another important deficiency of the scheme, connected with employer's unilateral liability, is that it does not require the employer either to insure his compensation liability compulsorily or to make some other provision to discharge his liability. Duty to insure compensation liability still remains purely voluntary.141 Under section 12 of the Workmens' Compensation Act 1923. The consequence of this absence of the compulsory insurance of the liability is that sometimes, in case of small employers, no compensation is recoverable by the workman on account of financial inability of such employer to pay. Numerous Annual Notes on the working of the Workmens' Compensation Act clearly establish such situations.142 The National Commission on Labour has also taken note of such situations in the following words:

141. However, under the Personal Injuries(Compensation Insurance) Act 1963, there is a provision for compulsory insurance of compensation liability, see section 9.

142. For extracts from the Annual Notes on Working of compensation Act, see Punekar, Social Insurance for Indian Workers in India (1950)

(i) 1934 Note: "It is reported from Bengal that claims are often tenable against small manufacturing firms which are unable to pay the compensation required within the statutory periods..."

(ii) 1935 Note: "In Bombay, awards for compensation against the proprietor of an unlicensed fireworks factory could not be enforced by dependents of workmen killed in an explosion, as the proprietor was without resources..."

(iii) 1938 Note: "In Bengal, Madras and Bombay difficulties were experienced in recovering decretal amounts in some cases because the judgement-debtors either had hardly any means to satisfy the decrees or were prone to adopt unscrupulous ways and means for avoiding payment as long as possible." (P. 70).
"Cases of evasion occur, even though the enactment is over 45 years (in 1969) old. A weak feature of the measure is that the Act places the entire liability for compensation on the employer, there being no obligation on the part of the employer to insure his liability. A small employer in many cases finds it difficult to pay compensation in the event of a heavy liability arising out of a fatal accident." 143

The aforesaid functional problems that arise, out of employer's liability to compensation being unilateral, can be tackled if some improvement measures are introduced in the scheme. Any radical change in the employer's unilateral liability principle is neither desirable nor feasible for logical and other considerations in immediate future and therefore, the unilateral liability principle has to be retained so long as workmen's compensation scheme is in force.

Within the existing framework of the workmen's compensation scheme, some improvements can be introduced to ensure its efficient working. As recommended by National Commission on Labour, a Central fund for workmen's compensation may be established and all employers covered by the scheme may be required to pay a specified percentage of the total wage-bill of workmen to the fund. 144 All cash benefits can be paid out of this fund only and it may be administered by the E.S.I. Corporation. The adjudication of the disputes under this scheme

143. Supra, note 67 at 165, Para 13.21.
144. Supra, note 67 at 165, Para 13.24.
may be entrusted to E.S.I. Court and not to the Tripartite Regional Boards as suggested by the National Commission on Labour. Two advantages would accrue out of the later suggestion. First, entrusting of adjudicatory powers under the scheme to E.S.I. Courts would check unnecessary multiplication of Labour authorities which would otherwise occur if Tripartite Regional Boards are appointed. Secondly, the ultimate objective being total replacement of the scheme with E.S.I. scheme, it would facilitate this task. As an alternative, if the workmen's compensation commissioners are retained under the scheme, they should be appointed in adequate numbers, keeping in view the necessary expertise which their job involves.

As stated above, under the scheme, medical benefit is not available to the injured worker. The medical benefit may be provided to workmen under the scheme by the E.S.I. Corporation at its own hospitals, dispensaries and the expenditure involved may be recouped by the E.S.I. Corporation out of the Central Fund for workmen's compensation.

Another anomaly in the scheme, which the National Commission on Labour pointed out, is that there is no provision for compensation to the injured worker for the loss of employment due to disablement, whereas a healthy worker, who loses his employment due to retrenchment, is entitled to retrenchment under section 25F of Industrial Disputes Act 1947.

145. Id. at 166.
146. Ibid.
With regard to the general working of the scheme, there has been skepticism from the very beginning. The Royal Commission on Labour has paid rich tributes to the efficient working of the scheme, mainly due to its precision and efficient administrative machinery.\(^{147}\) On the other hand, Prof. Adakar has criticised not only its theoretical basis but its working as well.\(^{148}\) Even labour Investigation Committee has noted its malfunctioning, particularly in small establishments and mofussil areas where various malpractices are adopted by employers to avoid payment of compensation. The larger undertakings, by and large, discharge their liability under the scheme honestly either by insuring their liability or by earmarking separate funds for the purpose.\(^ {150}\)

For purposes of assessment of the working of the scheme in farm sector, a limited functional study has been conducted, the details of which are given in Chapter VIII.

\(^{147}\) Supra, note 66 at 295-96.
\(^{148}\) Supra, note 117 at 214, Appendix XXVI.
\(^{149}\) Supra, note 140.
\(^{150}\) Supra, note 140 at 53.