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THE EMPLOYERS' LIABILITY/ WORKMEN'S COMPENSATION DEBATE OF THE 1890s REVISITED*

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ABSTRACT. *Historians have praised Joseph Chamberlain's workmen's compensation act of 1897, the foundation of Britain's modern insurance-based compensation scheme for on-the-job injuries, as a forward-looking social programme of great benefit to workers. By contrast, the Liberals' support of the option of potential unlimited employer liability for worker injuries has been viewed as unimaginative and a failure of political leadership at a crucial juncture in the history of the Liberal party's relationship with labour. This article re-examines the employers' liability/workmen's compensation debate of the 1890s, arguing that historians' criticism of the Liberals' position stems from a misunderstanding that the crux of the debate was over the method of fair compensation. To the contrary, as this article demonstrates, the real issue was workplace safety. Far from being caught napping, Liberals strenuously argued the workers' long-held position that workplace safety, that is, the prevention of accidents, was much more important than compensation after the accident occurred and that Chamberlain's compensation scheme would do nothing to improve safety. Significantly, this article reveals that the Liberals were correct in that, while employers immediately gained protection from unlimited liability at minimal cost, worker safety, in fact, did not improve and may have even declined during the first decade of the act's operation.*

'No Session [of parliament] is complete without an Employers' Liability Bill', *The Times* declared in 1890, continuing, 'This hardy annual makes its reappearance in the Queen's Speech with the regularity of spring.'[1] Indeed, by the 1890s, political positions were entrenched concerning what role government should play, if any, when a worker suffered an on-the-job injury. Writing in the *Law Quarterly Review* in 1889, H. D. Bateson accurately described the opposing points of view.[2] One of the 'two broad lines on which legislation might proceed', according to Bateson, was to handle most claims though a new insurance scheme, while preserving the rather limited liability of the employer under the common law and the employers' liability act of 1880. This was the famous workmen's compensation plan put forward by Joseph Chamberlain and the Conservatives and Liberal-Unionists in the 1890s and passed into law

* I would like to thank Drs Robert Malcolm and David W. Ullrich for many valuable criticisms and suggestions.
[1] *Times*, 5 Apr. 1890, p. 9.
[2] H. D. Bateson, 'Employers' liability', *Law Quarterly Review*, 5 (1889), pp. 182–4.

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in 1897.[3] Under this new plan, a fixed statutory scale would define somewhat limited payments for all injuries, regardless of whose negligence caused the accident. Workers would be assured of at least some compensation for all injuries; while employers could easily insure against a statutorily set maximum liability. The second and historically lesser known alternative was to broaden considerably the potential liability of employers by removing a number of common law defences, thus putting employers on the same footing with their workers as they were to the public. Initially favoured by trade union leadership and most workers, and championed by H. H. Asquith and other leading Liberals, this second alternative focused on worker safety. Most late Victorian employees wanted not so much payment for injury, but protection from injury. They argued that, with the threat of unlimited potential liability, employers would be more likely to provide employees a safe workplace. In 1893, the Liberals unsuccessfully attempted to enact this logic into law. Four years later, the Liberals' position was permanently overrun in the triumph of Chamberlain's workmen's compensation statute, the foundation of Britain's modern compensation scheme for on-the-job injuries.

The historical importance of the workmen's compensation act of 1897 has been universally recognized. Chamberlain's biographer J. L. Garvin declares the act 'an immense advance by comparison with former conceptions of social justice and industrial life'.[4] José Harris sees the act as one of the statutes that 'redrew many of the conventional boundaries between society and the state', for it is seen as one of the first major breeches in the private contractarian tradition, a breech that 'began the process of creating contingent property rights through the medium of statutory social welfare'.[5]

Historians have also generally praised Joseph Chamberlain for his leadership in the passage of the act. Biographers of Chamberlain, especially Peter Marsh in his recent work, have seen workmen's compensation as one of his most forward-looking proposals and greatest achievements for the working class.[6] Some have described the act as 'a tribute to the originality and political genius' of Chamberlain and have gone so far as to claim that the measure was 'one of the most important ever passed by Parliament'.[7] Others have called the Conservative party's handling of the issue 'most illustrative of its pragmatism'.[8] A. S. T. Griffith-Boscawen, a Conservative MP at the time of the passage of the

[3] Chamberlain's proposal had been adopted from Sir John Gorst who had modified it from Bismarck's welfare legislation in Germany. Richard Jay, *Joseph Chamberlain: a political study* (Oxford, 1981), p. 176.

[4] J. L. Garvin, *The life of Joseph Chamberlain* (2 vols., London, 1934), II, p. 159.

[5] José Harris, *Private lives, public spirit, a social history of Britain, 1870–1914* (Oxford, 1993), pp. 120, 144.

[6] Garvin, *Chamberlain*; Jay, *Chamberlain*; Peter T. Marsh, *Joseph Chamberlain: entrepreneur in politics* (New Haven, 1994).

[7] W. C. Mallalieu, 'Joseph Chamberlain and workmen's compensation', *Journal of Economic History*, 10 (1950), p. 57.

[8] Matthew Fforde, *Conservatism and collectivism, 1886–1914* (Edinburgh, 1990), p. 78.

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bill, called it 'perhaps the most notable achievement of the Unionist Government during their ten years' administration' and 'one of the most useful pieces of social legislation ever passed by either political party'.[9]

Just as many historians have seen workmen's compensation as a great success for Chamberlain and the Conservatives, they have also, as one might suspect, viewed the Liberals' support of the employers' liability alternative as a great failure of political leadership at a critical juncture in the history of the Liberal party's relationship with labour. In the most detailed study of the debate, David Hanes argues that the Liberals mistakenly emphasized removing the privileges of unique common law defences for employers rather than proposing a more positive role for government. In addition, Hanes believes trade unions were more concerned with their own survival and wage increases than with compensation for workers' injuries.[10] Philip Poirier describes workmen's compensation as 'a great advance over the abortive Liberal measure of 1894'.[11] Garvin sums up this position: 'All social reformers agree that Chamberlain was right and the Liberal Cabinet backward ... [Chamberlain] foresaw the future when he desired to make compensation universal and insurance the basis.'[12] More than likely, Garvin is referring to Sydney and Beatrice Webb's contemporary indictment that 'Considered as a method of preventing industrial accidents, the whole system of employers' liability is an anachronism.'[13] More recent historians have found that the Lib-Labs were 'caught napping' by the workmen's compensation scheme.[14]

But were the Liberals caught napping? The generally accepted picture of Joseph Chamberlain escorted by Unionist supporters forging out in front of the political pack and pushing a modern system of workmen's compensation through parliament principally for the benefit to workers does not do justice to the historical complexities embedded in these issues. For example, why did trade union leaders and many workers, persons primarily affected by the legislation, initially support the Liberal plan of expanded employers' liability and only later become reluctant supporters of a workmen's compensation scheme? Why did many Liberals, among them some of the best lawyers in England, men like H. H. Asquith and R. B. Haldane continue to insist even after the passage of the workmen's compensation scheme that, in order to be truly effective, such a plan must be accompanied by expanded employers' liability?

Many historians, perhaps following Chamberlain's formulation of the issue, have missed the crux of the employers' liability/workmen's compensation debate of the 1890s: the safety of workers. An investigation of the parliamentary

[9] A. S. T. Griffith-Boscawen, *Fourteen years in parliament* (London, 1907), pp. 124–5.

[10] David G. Hanes, *The first British workmen's compensation act 1897* (New Haven, 1968).

[11] Philip P. Poirier, *The advent of the Labour party* (London, 1958), p. 20 n. 5.

[12] Garvin, *Chamberlain*, pp. 579–80.

[13] Sydney and Beatrice Webb, *Industrial democracy* (2 vols., London, 1897), I, p. 376.

[14] H. A. Clegg , A. Fox, and A. F. Thompson, *A history of British trade unions since 1889* (2 vols., Oxford, 1964), I, p. 263.

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debates and other evidence reveals that the centre of the debate lay not in the method to compensate workers most fairly for injuries, but in the need for greater workplace safety. Chamberlain and his supporters believed that there was no pressing need to improve workplace safety; the primary exigency was to make it easier for workers to receive at least some payment for their injuries. In the words of some parliamentary supporters of this position, industrial accidents 'were nothing more than a cost of production' and workmen's compensation 'made compensation for accidents to employees a charge upon the business, similar to the wear and tear of plant and machinery'.[15]

In stark contrast, Asquith, many in the Liberal party, and most of labour believed increased workplace safety to be the most pressing need. To Asquith, the Unionists too often saw the country as a mere joint stock company, with the value of any programme judged merely by its dividends. As he stated during the employers' liability debate, 'nations, like individuals, do not live by bread alone'.[16] Workers wanted a system to compel employers to prevent accidents in the first place by providing a safer work environment not a minimum payment for injuries. The supporters of this alternative did not object in principle to a workmen's compensation scheme such as Chamberlain's, but they believed such a plan should be accompanied by broadened employer liability to force employers to improve safety. They wanted a sharp statutory distinction between the negligent and the non-negligent employer. John Munkman notes in his recent treatise, *Employers' liability at common law*, that the expansion of employer liability through the abolition of the defence of common employment at the end of the nineteenth century was long overdue and would have been a change of 'immense importance'. According to Munkman, safety in industries at that time depended on the acts of fellow employees even more than today.[17] The alternative of expanded employers' liability, of course, would not be cheap, but 'the setting aside of a few hundred pounds a year to form a fund out of which to pay compensation for occasional workmen's accidents', explained Sydney and Beatrice Webb, 'is a flea-bite compared with the cost and trouble of adopting elaborate precautions that might totally prevent their occurrence'.[18] In the end, Chamberlain's view prevailed, but at what cost?

After framing the issue of safety during the employers' liability/workmen's compensation debate, this article examines the record of the workmen's compensation act of 1897 during the first decade of its operation. Although the evidence is far from complete, there is a strong indication that worker safety did not improve as a result of the act and may even have declined. At least from the workers' perspective, although workmen's compensation may have offered *modest* financial compensation during the first years of its operation, the act did not improve safety. From the employers' perspective, however, the benefits

[15] *Parliamentary debates 1893*, 4th ser., vol. 10, col. 1053; Griffith-Boscawen, *Fourteen years in parliament*, p. 125.
[16] *Times*, 23 Jan. 1895, p. 6.
[17] John Munkman, *Employers liability at common law* (10th edn, London, 1985), p. 23.
[18] Webb and Webb, *Industrial democracy*, I, p. 375.

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were immediate; employers were able to avoid unlimited potential liability at a relatively small cost. In short, Chamberlain and his allies may have triumphed over Asquith and the Liberals, but British workers paid a price in injury and disability during the first decade of the operation of the workmen's compensation act.

I

The evolution of the law of a master's liability for an injured servant and the debates leading up to the employers' liability act of 1880 and the workmen's compensation act of 1897 have been described in detail in a number of works.[19] Nevertheless a brief description of these legal and legislative developments will place in context the issues raised in this article.

Until 1837, the law as to a master's liability for injury to a servant seems to be 'a complete blank'.[20] Before that date, there had been the common law principle of *respondeat superior* – vicarious liability of the master to the public for the torts of the servant. With regard to injuries to the public, 'the act of a servant is the act of his master'.[21] Under such a doctrine, it did not seem much of a stretch to make an employer responsible for the negligence of an employee that caused injury to a fellow employee. The law, however, began to take a different turn in 1837 in the famous case of *Priestly* v. *Fowler*.[22] The court held that a butcher was not liable for the negligence of his servant in overloading a van that broke down and injured another employee. Writing for the court, Lord Abinger declared an employee is 'not bound to risk his safety in the service of his master' because he is probably 'just as likely to be acquainted with the probability and extent of it [the danger] as the master'. As R. W. Kostal has observed, it was not *Priestly* v. *Fowler*, as is commonly supposed, but rather a subsequent case, *Hutchison* v. *York, Newcastle and Berwick Ry*. (1850) that established as a principle of English law what came to be known as the common employment (or 'fellow servant') rule – that an employer was not liable for the negligence of an employee who caused injury to a fellow employee.[23] Further, during the next decade, the English high courts continued to expand the doctrine of common employment, ruling, for example, that even foremen of employers were 'fellow servants' of the employees under their control.[24]

[19] See esp. Geoffrey Alderman, *The railway interest* (Leicester, 1973); Philip S. Bagwell, *Industrial relations* (London, 1974); P. W. J. Bartrip and S. B. Burman, *The wounded soldiers of industry: industrial compensation policy, 1833–1897* (Oxford, 1983); Hanes, *Workmen's compensation act 1897*; R. K. Kostal, *Law and English railway capitalism, 1825–1875* (Oxford, 1994); Munkman, *Employer's liability*; A. W. Brian Simpson, *Leading cases in the common law* (Oxford, 1995); Arnold Wilson and Hermann Levy, *Workmen's compensation*, vol. 1: *Social and political development* (Oxford, 1939); P. H. Winfield, 'The abolition of the doctrine of common employment', *Cambridge Law Journal*, 10 (1949), pp. 191–5.

[20] Arthur Larson, *Larson's worker's compensation* (New York, 1997), sec. 4.20, 2-2.

[21] *Jones* v. *Hart* [Nisi prius, 1698] KB 642, 2 Salk. 441.

[22] 3 M. & W. 1, 150 Reprint 1030, 3 Murph & H. 305 (1837).

[23] 5 Ex. 343 (1850); Kostal, *Law and English railway capitalism*, p. 271.

[24] Kostal, *Law and English railway capitalism; Wigmore* v. *Jay*, 5 Ex. 354 (1850).

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In addition to the doctrine of common employment, the common law gave employers two other important defences to employee negligence claims. Under the defence of assumption of risk, employers might claim that an employee knew of the danger and proceeded with the work anyway. An employer could also perhaps defend himself on the ground of an employee's own contributory negligence. Even where direct negligence of the employer could be proven, an employee could still lose his case if the employer could show that the employee was himself negligent, even to a much smaller degree.[25] Thus employers held the upper hand until well into the nineteenth century.

The first inroad to these common law employer defences was Lord Campbell's act,[26] passed in 1846. Prior to this legislation, the death of an injured worker barred any recovery. Under Lord Campbell's act, a claim for damages could be pursued by the deceased employee's spouse, child, or parent. By mid-century a growing agitation had developed, principally among workers, for additional legislative intervention. An employer's liability for injury by one employee to another was widely discussed by such organizations as the Social Science Association, and the Home Office eventually drafted several bills in the 1870s. In 1876, with the vigorous support of the Trades Union Congress, Alexander Macdonald introduced a bill abolishing the doctrine of common employment. Even at this early stage, reform advocates concerned themselves first with the safety of workers. Testifying before a parliamentary select committee in 1876, trade union leader George Howell summarized the argument: 'I think, as a means of providing against those accidents, the more responsibility you throw on the employer, and through him upon the manager and foreman, the less likely are we to have these serious accidents occur.'[27] Despite strong urgings to abolish legislatively the doctrine of common employment, the 1876 select committee stood firmly behind the doctrine, recommending, however, that the law should be changed so that the acts of an employer's agent should be considered as acts of the employer in cases where the employer had deliberately abdicated or delegated responsibilities.[28]

When the Liberals came to power in 1880, they were determined to make some adjustment in the doctrine of common employment. Employers' liability had been an issue in the general election, and the Trades Union Congress had made reform in the area the centrepiece of its parliamentary programme.[29] Even so, when Joseph Chamberlain, president of the board of trade, introduced a bill that later became the employers' liability act of 1880,[30] the act by no means abolished the doctrine of common employment. It largely followed the recommendation of the 1877 select committee and merely made an employer liable for the negligence of a person placed in a position of superindendence or whose orders the workman had to obey. An employer could also be held liable

[25] *Butterfield* v. *Forrester* [KB 1809] 11 East 60.

[26] 9 & 10 Vict. c. 93.

[27] 'Report from the select committee on employers liability for injuries to their servants' (372), *Parliamentary papers 1876*, IX (21 July 1876), p. 688.

[28] Ibid., p. 555.

[29] Bartrip, *Wounded soldiers of industry*, p. 149.

[30] 43 & 44 Vict. c. 42.

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if it could be proven the accident resulted from a defect in 'the conditions of the ways, works, machinery or plant'.[31] As a counterbalance to these provisions, employer common law defences of assumption of risk and contributory negligence remained, and the amount an employee could recover as damages was limited to a maximum of three years' wages.

Though it is often assumed that the notion of insuring against injury only came to the fore in the 1890s, during the 1880 parliamentary debates over employers' liability, members of parliament gave much attention to the possibility of some type of insurance scheme. A number of MPs even argued for a compulsory insurance scheme. Lord Randolph Churchill moved an amendment that, if an employer provided an insurance scheme (the employer making one third of contributions), then an employee would be barred from bringing a claim under the employers' liability act and would have to look to the insurance fund for compensation.[32] One member asserted that parliament should be working to avoid litigation by putting in place a compulsory insurance scheme to provide compensation 'without uncertain and costly litigation, which would not provide for more than one out of twenty cases'.[33] Labour leaders and many members of parliament opposed such a scheme, arguing that worker safety would decrease. Alexander Macdonald, miners' leader and MP, charged that 'a system of insurance would be simply a system of licence to destroy life'. Real safety protection for the worker, according to MacDonald, could only be obtained 'when owners were compelled to pay in purse for the negligence of those they employed'.[34] The executive committee of the Amalgamated Society of Railroad Servants told prime minister Gladstone that it would rather have no employers' liability bill than one that included compulsory insurance, arguing that such schemes freed employers not only from legal, but also financial, liability for accidents.[35]

Although many considered the employers' liability act of 1880 a step forward, Liberals still viewed it as merely a first step and believed that future action would undoubtedly be necessary to protect workers from injury and adequately compensate them when injury occurred. The operation of the 1880 act over the next decade showed definite deficiencies. It failed to cover all acts of negligence by employers; the employer was not liable to the estate of a worker killed on the job; and its provisions did not apply to domestic servants, seamen, and persons not engaged in manual labour. As one commentator observed in 1889, 'It is not to be wondered at that with all these difficulties before them the workmen are not content with the Act as it stands'.[36] Common law remedies for injured workers survived the 1880 act but provided little relief. The Home Office expressed concern that, under the doctrine of common employment, courts were stretching the definition of 'fellow employee' so far so

[31] Ibid. [32] *Parliamentary debates 1880*, 3rd ser., CCLV, col. 1121.
[33] *Parliamentary debates 1880*, 3rd ser., CCLII, col. 1100. [34] Ibid., col. 1111.
[35] G. M. Alcock, *Fifty years of railway trade unionism* (London, 1922), p. 174.
[36] Bateson, 'Employers' liability', p. 182.

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as to make recovery more and more difficult.[37] As for worker safety, the 1886 report of a select committee to study the operation of the 1880 act reported conflicting testimony as to whether the act had improved safety in the workplace. For the most part, employers testified that it had, and employees testified that it had not.[38]

As to the cost of the employers' liability act to employers, the 1886 select committee reported that 'The apprehensions as to its [the Act's] possible results in provoking litigation and imposing heavy charges upon employers have proved groundless'.[39] Reports show that just over 3,000 claims were tried in the county courts from 1881 to 1886. The amount claimed for damages in these cases amounted to over £450,000, yet only approximately £120,000 was awarded, an average of about £40 per case.[40] These statistics, however, do not tell the whole story. As the reports emphasized, although the amount awarded compared to the amount claimed was small, statistics were only available for the cases actually tried. Undoubtedly, although there is no record, damages were paid in many cases without going to trial.

II

'How far, I wonder', Sydney Webb asked after the Liberal victory in 1892, 'do Mr. Gladstone and his colleagues recognize that this time in their persons the Liberal Party is on trial?' According to Webb, the typical worker had 'grown weary of a purely political faith and imperatively demands an immediate show of works'.[41] Webb was most probably telling the Liberal leadership something they already well knew. From the late 1880s, many Liberals had become interested in industrial questions, such growing interest paralleling labour's increasing political strength.[42] The National Liberal Federation's 'Newcastle Programme' of 1891, although not known for its labour provisions, did promise reform of the law relating to employers' liability.

In the new Liberal government, the job of drafting a revision of the employers' liability legislation fell to the young home secretary, Herbert Asquith, serving for the first time in a cabinet. He paid close attention to industrial questions, and, for the most part, labour viewed Asquith as a friend.

[37] Public Record Office (PRO) HO45/9458/72731A, 'Employers liability for injuries to their servants' (15 Nov. 1878).

[38] 'Report from the select committee on the employers' liability act (1880) amendment bill' (192- Session I), *Parliamentary papers 1886*, VIII, pp. iff. (11 June 1886).

[39] Ibid., p. iii.

[40] 'Employers liability act 1880: return of the total number of cases tried in county courts' (151), *Parliamentary papers 1884*, LXIII, pp. 139ff; (320), *Parliamentary papers 1884–5*, LXIV, pp. 195ff; (226-Sess. I), *Parliamentary papers 1886*, LIII, pp. 99ff; (290), *Parliamentary papers 1888*, LXXXII, pp. 147ff; (357-Sess. I), *Parliamentary papers 1892*, LXXII, pp. 129ff; (301), *Parliamentary papers 1895*, LXXXI, pp. 329ff; (352), *Parliamentary papers 1897*, LXXIII, pp. 5ff.

[41] Sydney Webb, et al., 'What Mr. Gladstone ought to do', *Fortnightly Review* (Feb. 1893), p. 281.

[42] David Powell, 'The new liberalism and the rise of labour, 1886–1906', *Historical Journal*, 29 (1986), p. 381.

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Asquith expanded the factory inspectorate and appointed the first women factory inspectors. He also encouraged the regulation of trades that were particularly injurious to the health of workers. In his tenure as home secretary, Asquith acquitted himself well, becoming known as one of the best home secretaries in the nineteenth century.

The employer's liability bill that Asquith and the Home Office constructed proposed sweeping changes in the law and included almost everything labour had been working to achieve. Its essence was simplicity. The bill abolished employers' defences of common employment and assumption of risk. Employers' liability was extended to the negligence of subcontractors, and no limitation was placed on the amount of damages a worker could recover. Finally, employers would not be able to 'contract out' of their liability under the act. George Bernard Shaw and Sydney Webb on behalf of the Fabian Society reported that the bill gave trade union leaders 'everything they had for thirty years been fighting for – absolute compulsion, no contracting out, and universal application, excluding neither Government workmen nor seamen'.[43]

From the outset of the debate, Asquith made it clear that the main purpose of the bill was to improve workplace safety. This point has not been taken into account by historians who view Asquith's bill in the shadow of later workmen's compensation legislation, which emphasized payments to workers for injuries. According to Asquith, compensation to the worker was merely a by-product of his bill. Over and over again during the debates on the measure, Asquith emphasized that the bill was not just to provide compensation but 'to give protection to life and limb'.[44] The home secretary claimed that the doctrines of common employment and assumption of risk removed 'a great safeguard for the carefulness on the part of the employer, and operated as a distinct temptation to him to neglect those precautions which his duty to his servants as well as the public prescribes that he ought to take'.[45] With greater liability, the employer will have 'a hundredfold greater inducements than now to see that his business is carried on with greater care and supervision in the interests of the safety and health of his men'.[46]

Joseph Chamberlain, who as a Liberal had put forward the original employers' liability act in 1880, attempted to shift the focus of the debate by proposing 'That no amendment of the Law relating to Employers' Liability will be final or satisfactory which does not provide compensation to workmen for all injuries sustained in the ordinary course of their employment, and not by their own acts or default.'[47] Chamberlain was proposing an alternative scheme whereby workers would not have to prove any negligence on the part of the employer or fellow employee. Damages would be paid for *all* accidents,

[43] The Fabian Society (G. B. Shaw and Sydney Webb), 'To your tents, oh Israel!', *Fortnightly Review* (Nov. 1893), p. 581.
[44] *Parliamentary debates*, 4th ser., vol. 21 (1894), col. 401.
[45] *Parliamentary debates*, 4th ser., vol. 8 (1893), col. 1946.
[46] *Parliamentary debates*, 4th ser., vol. 21 (1894), col. 401.
[47] *Parliamentary debates*, 4th ser., vol. 10 (1893), col. 1053.

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regardless of fault. In return for this benefit, an employer would only be liable to pay a modest amount of damages set out in a statutory schedule. In this way, employers would have a known risk that could be insured against.

Chamberlain's insurance scheme had the support of a number of important employers. Many of the railways, which had vigorously opposed the employers' liability act of 1880, viewed an insurance scheme with much less alarm than Asquith's proposal of unlimited liability.[48] Also, many employers feared Asquith's proposed prohibition of contracting out liability. Under contracting out, companies established private insurance funds with contributions from both the employer and the employees. Often as a condition of employment and in return for participation in the private insurance fund, a worker had to waive his rights under the employers' liability act of 1880. Such plans not only limited the employers' liability, but also provided more control over workers. An employee was less likely to leave his position if it meant the losing of benefits from a scheme to which the employee had contributed for years.

Asquith's position on the Chamberlain plan was that, while some insurance scheme might be useful for compensation, it afforded 'no incentive for the exercise of care on the part of the employer'. To Asquith, '[a] system of industrial insurance, unless it is supplemented and safeguarded by an ancillary law, making the employer liable … for accidents due to his own negligence, would be rather a retrograde than progressive measure'.[49] Where Asquith wanted to put greater responsibility on the employer, Chamberlain believed '[y]ou cannot make a workman more careful by imposing extra liability on the employer'. Rather, '[i]f you want to make a workman more careful you must put extra liability on him, and not upon some other person'.[50] This is the heart of the debate between Asquith and Chamberlain throughout the 1890s on the issue of the responsibility of the employer for employee injuries.

Ultimately, Chamberlain withdrew his amendment. As Peter Marsh in his recent biography of Chamberlain admits, Chamberlain was 'playing politics' with Asquith's employers' liability bill.[51] This was especially the case with 'contracting out', the issue that eventually rang the death knell for Asquith's bill. Conservatives and Liberal-Unionists knew that the issue divided some workers from trade unions, and in fact some Liberal leaders practised contracting out in their own businesses.[52] Even though the Liberals could have removed the defences of common employment and assumption of risk, they were willing to allow the bill to die unless employers were prohibited from contracting with their employees to avoid liability under the act. Why was this the case? Why did Asquith and others insist on prohibiting contracting out? The answer lies in the primacy Asquith and the Liberals placed on safety over mere compensation.

[48] Alderman, *Railway interest*, p. 163.
[49] *Parliamentary debates*, 4th ser., vol. 8 (1893), col. 1957.
[50] *Parliamentary debates*, 4th ser., vol. 20 (1893), col. 18.
[51] Marsh, *Chamberlain*, p. 352.
[52] Ibid.

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Although both Conservatives and Liberals claimed to have had labour on their side, the evidence indicates that trade union leadership and a vast majority of rank and file workers opposed contracting out. They recognized that many of the workers who needed additional safety precautions were the same workers that were vulnerable to employer intimidation to 'opt out'. A return of the numbers of resolutions received at the Home Office shows over 150 trades unions or branches petitioning against contracting out with only eleven petitions in support.[53] The reasons for labour's antagonism were twofold. First, once again, the primary issue was safety. According to Sydney and Beatrice Webb, the middle class totally failed to grasp that to allow contracting out was 'to remit the all-important question of safety of the workman's life to the perils of industrial bargaining'. From the workers' perspective, 'If the employer ... can avoid all liability for negligence by making an annual contribution, fixed in advance, he has no inducement to take precautions against individual accidents.'[54] Second, labour, especially the trade union leadership, opposed contracting out because they saw employer-run insurance funds as a threat to unionism. Permissible under the 1880 employers' liability act, contracting out had failed to gain a foothold where unions were strong.[55] The most vulnerable workers, those not associated with unions, were also those most subject to intimidation to encourage them to contract out. To many trade unionists, the private insurance funds made it difficult for employees to leave their employment voluntarily or to be involved in union activity that might lead to dismissal, since years of contributions to the friendly society schemes would be lost. The Webbs noted that an 'accident fund or benefit society, confined to workmen in a particular establishment, is ... in many ways inimical to Trade Unionism'.[56] An internal Home Office memorandum confirmed that employers saw one of the great benefits of contracting out was that 'necessary discipline is promoted'.[57]

Asquith accepted the trade unions' position that permitting contracting out would severely limit the effectiveness of his bill in promoting safety in the workplace. As he told a deputation of trade societies from Birmingham, 'As far as I am concerned, I will never be a party to an Employers' Liability Bill in which the legislation which gives with one hand supplies with the other the means of taking away the boon which it has conferred.'[58] He was convinced that contracting out led to reduced safety. The record of accidents proves, he told a miners' delegation, 'that accidents are more frequent where the men contract out of the [1880] Act than where they are not'.[59] To Asquith, contracting out had the same flaw as Chamberlain's insurance scheme: it

[53] PRO HO45/9866/B13816A, 'Return of numbers of resolutions received at the Home Office from associations of workmen on the subject of contracting out'.

[54] Webb and Webb, *Industrial democracy*, I, pp. 371–2.

[55] Mallalieu, 'Joseph Chamberlain', p. 46.

[56] Webb and Webb, *Industrial democracy*, I, p. 313.

[57] PRO HO 45/9786/B3028C.

[58] *Times*, 22 Nov. 1894, p. 6.

[59] PRO HO45/9866/B13816A.

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reduced workplace safety. '[T]here is a tendency to assume', he told a workers' deputation, 'that mutual insurance can take the place of the safeguards of protective legislation: but this is not a sound view – indeed I think that the more General Mutual assurance becomes the more need there will be for restrictive legislation to secure proper precautions being taken about the mines'.[60]

With the Liberals refusal to accept contracting out, the bill had no hope of passage and was withdrawn.

III

When the Conservatives and Liberal-Unionists came to power in 1895, Joseph Chamberlain had the opportunity to put forward his measure for a workmen's compensation insurance scheme. His interest in the subject pre-dated his 1893 debate with Asquith over employers' liability. As early as 1874, he had proposed compensation for injuries caused by negligent employers in his 'radical programme of the future'.[61]Also it was Chamberlain, as the president of the board of trade in a Liberal cabinet, who introduced the original employers' liability act in 1880. Over the years, Chamberlain had been influenced by the German workmen's compensation insurance scheme, and from his intial resolution on the subject during the 1893 debates over Asquith's bill, it became a centrepiece of his political programme.[62]

Once the new government was formed, Chamberlain set out to gain cabinet approval for his workmen's compensation plan. Although it took him some time, Chamberlain finally convinced the cabinet to support his plan, and the bill was introduced in parliament in 1897. Workers injured during the course of employment in specifically limited numbers of businesses and industries could claim for compensation without any proof of negligence on the part of the employer or a fellow employee. Compensation was to be paid without recourse to litigation unless the employer alleged the injury was deliberately caused by the worker. In return for this concession, the bill limited the employers' liability to a statutory scale. With a specific limit to liability, Chamberlain hoped employers would easily be able to insure themselves at relatively low cost. As an alternative, workers could still proceed with a case at common law or under the employers' liability act of 1880 for unlimited damages, but they would be required to prove negligence and be subject at common law to the formidable defences of assumption of risk and common employment.

Many businesses saw tremendous advantages to the Chamberlain plan. The bill contained the two things in which railway companies and other large employers were most interested. Employers could still contract out of the 1880 employers' liability act liability and would have more or less a fixed liability to insure against.[63] As a result, the Railway Association did not oppose the

[60] Ibid. [61] Marsh, *Chamberlain*, p. 70. [62] Ibid., pp. 328, 370.

[63] The bill provided that private contracting out schemes could be established or remain in force so long as they provided the minimum benefits secured under the workmen's compensation act.

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measure and only attempted to limit the duration of compensation for incapacity.[64] A number of the arguments that the business community put forward resembled those of the Railway Association; business leaders did not necessarily oppose the principle of the bill but rather the details of its operation. For example, the Mining Association thought the compensation rates too high and that the bill might promote malingering. More importantly, since mining was one of the industries included under the bill, the Mining Association particularly objected to a few industries being 'selected for an experiment in legislation of the most novel and revolutionary character'.[65]

In his initial reply to Chamberlain's bill, Asquith once again returned to what he saw as the 'first question' of worker safety.[66] He noted that he had never objected to the principle of 'universal compensation'. Yet the first concern, Asquith argued, should be 'reducing the risks of trade and in diminishing the number of injured workmen who have claimed compensation'. The Conservative government's bill, according to Asquith, 'does not give the employer any additional incentive to take precautions'.[67] As a result, although Asquith generally supported Chamberlain's bill, he led the charge to have the doctrine of common employment abolished. Chamberlain's bill, according to Asquith, failed to fix 'a direct personal responsibility on the employer for taking all precautions which skill and foresight can suggest against accident, to raise the level of safety'.[68] In 1897, just as in 1893, we see Chamberlain and Asquith taking opposite views on the issue of how best to increase the level of worker safety. Asquith wanted to place greater liability on the employer. Asquith's friend and ally, R. B. Haldane, pointed out that there was nothing in Chamberlain's bill to distinguish when the employer was negligent. According to the Liberals, the solution to worker safety was to increase employer common law liability available to workers as Asquith's 1893 bill had proposed. 'If they are going to have a scheme of compensation and wanted to keep up the motive to be careful', Haldane argued, 'they ought to have some remedy over.'[69]

Chamberlain saw no such need, arguing that accidents would not be reduced 'by laying on the employer a pecuniary liability'.[70] In fact, Chamberlain saw no real urgency in the issue of worker safety at all, declaring 'I myself have never yet been convinced that such additional precautions were urgently required.'[71] He noted that he had never contended his bill would greatly effect safety precautions, because he believed that 'every good employer already voluntarily takes all the precautions that he can be called upon to take'.[72] In taking this position, he reflected the feeling of many employers, like

[64] Alderman, *Railway interest*, pp. 163–4.

[65] PRO HO45/9867/B13816L(104), 'Deputation of Mining Association of Great Britain to Lord Salisbury, et al.', (2 July 1897); HO45/9867/B13816L(90), 'Statement on behalf of the Mining Association of Great Britain' (7 Apr. 1897).

[66] *Parliamentary debates*, 4th ser., vol. 48 (1897), col. 1434.

[67] Ibid.

[68] *Parliamentary debates*, 4th ser., vol. 49 (1897), col. 748.

[69] *Parliamentary debates*, 4th ser., vol. 48 (1897), col. 1447.

[70] Ibid., col. 1463.

[71] Ibid., col. 1462.

[72] Ibid., col. 1464.

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the Mining Association of Great Britain which told Chamberlain 'the obligations of the employer are quite sufficient as they are now'.[73]

Asquith and his allies made a desperate attempt to amend Chamberlain's bill and abolish the doctrine of common employment, but to no avail.[74] Chamberlain tepidly responded to the proposed amendment claiming 'It would raise such a crop of difficulties that they could not possibly undertake to deal with them.'[75] Translated, this probably meant that, having brought his supporters a long way in supporting a compensation scheme, any attempt to widen the purview of common law liability would destroy the measure's possibility of passage.

One telling episode during the debates shows not only Chamberlain's and the government's efforts to avoid an expansion of common law liability, but also an attempt actually to *reduce* the employer's common law exposure. The original bill provided that a worker could resort to common law liability only when 'the injury was caused by the willful and wrongful act or default of the employer or some person for whose act or default the employer is responsible'. R. B. Haldane moved to strike the 'willful and wrongful' language, noting that this was a term not used in the law and went above the usual standard of negligence.[76] Asquith joined in the attack, declaring that 'the workman ought to have reserved to him as complete a right and as complete remedies against the employer in all cases of negligence as he has in the present'.[77] The amendment was withdrawn on the promise of the government that it would reconsider the wording. The bill went through several changes in the key language until the phrase 'the personal negligence or wilful act of the employer' was proposed. Again, Asquith questioned the language, moving to omit the word 'personal'. He inquired, 'Was it the intention of the Government to preserve in their full integrity all the rights of the workman?'[78] Chamberlain rather flippantly responded that he never intended to preserve all the present rights of the workman, because he had now 'substituted something better than their present rights'.[79] Chamberlain's wording remained. As it turned out, ultimately the language did not affect the common law rights of workers; however, until the courts interpreted the language of the new law, there continued to be great concern.[80]

Before leaving the discussion of the passage of the workmen's compensation act of 1897, it should again be noted that parliament passed the act against a wider political backdrop, particularly the attempt on the part of the

[73] PRO HO45/9867/B13816L(2), 'Notes of deputation of Mining Association of Great Britain' (7 Apr. 1897).

[74] The amendment was defeated 169 to 107. *Parliamentary debates*, 4th ser., vol. 50 (1897), cols. 1147ff.

[75] Ibid., col. 1150.

[76] *Parliamentary debates*, 4th ser., vol. 49 (1897), cols. 1329ff.

[77] Ibid., cols. 1341–2.

[78] *Parliamentary debates*, 4th ser., vol. 50 (1897), col. 1169.

[79] Ibid., col. 1170.

[80] W. Addington Willis, *The workmen's compensation act, 1897* (London, 1898), stated that the common law rights of the workers had been affected by the act, but by the sixth edition (1899) Addington stated that the act had left intact the workers' common law rights of action.

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Conservatives and Liberals to attract the support of the growing ranks of labour voters. Both parties sought the same ends: compensation for victims of industrial accidents paid for by employers (or ultimately consumers) and the political support of workers that might result from such a compensation scheme. To be sure, Chamberlain's plan reflected his readiness to abandon notions of laissez-fare, while Asquith's reliance on an extension of common law remedies showed greater deference to liberal notions of an economy free from government interference. Nevertheless, it was political pressure, particularly that of employers, rather than political or economic philosophy, that largely dictated the terms of the workmen's compensation act of 1897.

Chamberlain strongly believed that the Conservatives had to make a bid for the labour vote with a workmen's compensation scheme. Shortly before the introduction of the workmen's compensation bill in 1897, he frankly admitted to Lord James of Hereford 'It would be fatal to us if our first social reform were less favourable to the working-classes than [the previous Liberal government's] proposal.'[81] Chamberlain's strategy was to appeal to workers over the heads of the trade union leadership. He calculated that employees would be so gratified to receive *some* compensation for injuries that they would rally to support the Conservatives, ignoring the finer points about the amount of compensation and need for increased safety argued by the trade union leadership and the Liberals.

Yet Chamberlain in his appeal to labour was by no means willing to sacrifice the support of employers. At no time during the 1897 debate did Chamberlain oppose, in any significant way, the desires of the employers. Employers had long wanted an insurance scheme for which costs could be readily calculated, together with the continued ability of workers to 'contract out'. Chamberlain even went a step further and attempted, although unsuccessfully, to reduce employers' common law exposure. While the evidence does not point to Chamberlain yielding at any specific point to employer pressure, nevertheless, his measure contained exactly what the employers desired, and received their whole-hearted support.

The Liberals were also subject to political pressure. The trade unions had originally pressed the Liberals to adopt the position of extending employers' common law exposure as the remedy for worker on-the-job injuries. Throughout the years of debate on the issue, Liberals were sensitive to the position of the trade unions. This was especially the case with the issue of contracting out. There is little doubt that one of the principal reasons Asquith allowed his 1893 bill to be defeated was the uncompromising opposition of the trade unions to contracting out.

For the most part, the passage of the workmen's compensation act of 1897 ended the political debate on the particular issue of compensation for injured workers. A few echoes of the debate, however, can be seen in some of the issues

[81] Quoted in Marsh, *Chamberlain*, p. 385.

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affecting labour in the next decade. Chamberlain continued to be convinced that he could effectively make a direct appeal to labour over the heads of the trade union leadership. He attempted this in his tariff reform campaign and, after 1906, he wanted to outflank the Liberals with a populistic appeal to working-class voters.[82] The 1890 debate also foreshadowed Chamberlain's and Asquith's positions on the 1902 Taff Vale decision, which held unions liable for damages resulting from strikes. When the Liberals came to power in 1906, Asquith once again looked to the common law, urging an indirect method of restricting the law of agency to remedy the trade union's vulnerability to suit. He did not prevail, and the Liberals instead put forward a trade disputes bill giving a direct exemption for unions from damage actions. As for Chamberlain, just as in the 1890s, in the debate over Taff Vale, he once again showed his complete distrust of trade unions. Although careful to allow Labour to have its way on the issue, he believed the trades disputes act placed unions in a position of irresponsible privilege.[83]

IV

How successful was the workmen's compensation act of 1897 in its first decade of operation? The answer to this question will shed some light on the validity of arguments posed during the debates of 1893 and 1897. Overall, both employers and workers seem to have been satisfied with the workings of the new scheme. G. N. Barnes, a leading member of the Labour party, declared in 1906 that the workmen's compensation act even with its 'defects and blemishes' had proved 'one of the best bits of social legislation that had been put on the Statute Book in recent years'.[84] Employers were pleased that the act was not placing an undue financial burden on businesses. The 1903 departmental committee on the workings of the act revealed that, based upon the experience of mutual insurance companies, 'the pecuniary burden imposed by the Acts upon the employer had not been excessive'.[85]

Two of the most contentious issues that dominated the debates during the 1890s – contracting out and common employment – for the most part disappeared after 1897. Within the first year of the act's operation, only fifty-eight employers (representing 89,000 workers) had contracting out schemes approved by the Home Office.[86] While a few employers, such as the Great Eastern Railway, contracted out under an approved scheme, by 1903 the departmental committee concluded that the act had put an end to compensation schemes supported by workers and employers. 'On the other hand', the committee

[82] Jay, *Chamberlain*, p. 311. [83] Marsh, *Chamberlain*, p. 640.

[84] *Parliamentary debates*, 4th ser., vol. 154 (1906), col. 901.

[85] 'Report of the departmental committee appointed to inquire into the law relating to compensation for injuries to workmen', vol. I 'Report and Appendices' (Cd 2208), *Parliamentary papers 1904*, LXXXVIII, p. 745 (16 Nov. 1903).

[86] 'Statistics of the proceedings in county courts in England and Wales under the workmen's compensation act, 1897 and the employers' liability act, 1880 during the year 1898' (Cd 9251), *Parliamentary papers 1899*, LXXIX, p. 390 (10 Apr. 1899).

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reported, 'the benefit clubs, supported by the workmen themselves do not appear to have had their activity in any way diminished by the Act.'[87] The issue of the doctrine of common employment also seemed to fade from view. Although there were continued efforts now and then to have the doctrine legislatively overturned, the courts themselves had an increasing tendency in the twentieth century to limit its application until its abolition by parliament in 1948.[88]

The workmen's compensation act also proved successful in keeping non-death claims out of court. Before the passage of the act, the Home Office estimated that there would be approximately 120,000 to 150,000 accidents each year for which compensation would be available.[89] However, in the nine years until the passage of the 1906 workmen's compensation act, only an average of just over 2,000 cases a year came before the county courts.[90] Despite these low numbers, during the same period, the number of cases dealing with the *death* of an employee and contested in the courts dramatically increased from 219 (1899) to 553 (1906). The number of death cases as a percentage of all contested claims grew from 15 in 1899 to 33 in 1907.[91]

The county courts were intricately involved in contested claims under the workmen's compensation act of 1897. Recent scholarship on the attitudes of county court judges to the working poor, particularly in the area of credit, has emphasized the courts' lack of sympathy with the poor and the judges' advocacy of harsh market moralism.[92] This imposition of 'class law', as Paul Johnson has termed it, has been marginally challenged by Margot Finn, who has found many county court justices 'nonetheless skeptical about the ability of thrift and perseverance alone to insulate workers from the incidental vagaries of the labour market'.[93] Similarly, the admittedly limited sample of existing returns of county court judges on the workings of the workmen's compensation act, together with the increased number of death cases brought to the courts, seems to indicate some level of sympathy of the courts for injured workers.

[87] 'Report of the departmental committee', p. 765.

[88] Winfield, 'The abolition of the doctrine of common employment', p. 193; law reform (personal injuries) act 1948, 11 & 12 Geo. 6 c. 41.

[89] 'Statistics during the year 1898', p. 391.

[90] Ibid., p. 383; 1899 (Cd 281), *Parliamentary papers 1900*, LXIX, p. 449 (16 July 1900); 1900 (Cd 816), *Parliamentary papers 1902*, XCVII, p. 615 (18 Sept. 1901); 1901 (Cd 1210), *Parliamentary papers 1902*, XCVII, p. 655; 1902 (Cd 1702), *Parliamentary papers 1903*, LV, p. 709 (Sept. 1903); 1903 (Cd 2269), *Parliamentary papers 1905*, LXXV, p. 445 (Aug. 1904); 1904 (Cd 2727), *Parliamentary papers 1906*, CXIII, p. 659 (Aug. 1905); 1905 (Cd 2727), *Parliamentary papers 1906*, CXIII, p. 703 (Aug. 1906); 1906 (Cd 3622), *Parliamentary papers 1907*, LXXX, p. 479 (July 1907); 1907 (Cd 4333), *Parliamentary papers 1908*, XCVIII, p. 943 (Sept. 1908).

[91] 'Statistics during the year 1907', p. 946.

[92] Paul Johnson, 'Class law in Victorian England', *Past and Present*, 141 (1993), pp. 147–69; G. R. Rubin, 'The county courts and the tally trade, 1846–1914', in G. R. Rubin and David Sugarman, eds., *Law, economy and society, 1750–1914: essays in the history of English law* (Abingdon, 1984); with regard to court prejudice based on gender, see Erika Diane Rappaport, *Shopping for pleasure: women in the making of London's west end* (Princeton, 2000).

[93] Margot Finn, 'Working-class women and the contest for consumer control in Victorian county courts', *Past and Present*, 161 (1998), p. 126.

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One of the reasons employees contested few cases, and indeed one of the major problems with the operation of the act, rose from the unscrupulous methods of insurance adjusters. As county court judge Percy Gye of Winchester reported to the Home Office in 1900, 'In small claims, the conduct of the case is frequently intrusted to some local [insurance] agent, whose sole consideration is to make a good bargain for his Company, and applicants for compensation are induced by *any* means possible, proper and improper, to accept the smallest possible sum.'[94] County court judge W. C. Smyly reported similar abuse, citing the example of a fifty-four-year-old lace maker who lost the ends of three fingers and was awarded a disability payment of 16 *s* a week. His solicitor claimed that the award was worth a lump sum of £580 and, even though the judge felt such a sum was excessive, he was still shocked that the worker settled with the insurance company for a lump sum of £47. In the judge's words, this was 'quite an insufficient sum' for full discharge.[95] Trade unions reported to the Home Office that abuse by insurance agents was 'common' and agents 'do not leave a stone unturned to evade or at least reduce their liability'. One union reported that 'in several instances even their [the worker's] examining surgeon has used his influence to get the man to settle for a sum entirely inadequate to the loss sustained'.[96]

Statistics on the total amount of compensation paid under the act are not available. The act required that only cases legally contested in the courts be reported. In the vast majority of cases, compensation was settled by agreement or by informal arbitration, so that no memorandum was registered and no official information is available. The data available in the official reports show that from 1899 to 1906 the average compensation for contested death cases was approximately £179.[97] For the same period, the average compensation in contested cases for total disability was £11 6 *s* per week, and for partial disability the figure was £9 17 *s*.[98] Since these figures represent only the contested cases, it might be fair to assume that they are somewhat larger than would be represented by all cases. This is confirmed by data reported in 1908 for *all* compensated accidents in the category 'Shipping, factories, docks, mines, quarries, constructional work, railways'. These figures show out of a total employment of over 7 million, 3,447 deaths and 323,224 disability cases with an average death benefit of £154 and £1.5 million in total disability payments. No breakdown was given of the weekly disability payments.[99] Seen from the employers' perspective, throughout the first decade of the operation of the workmen's compensation act, taking the board of trade returns as to the

[94] PRO, PIN/12/1, 'Report on the workings of the workmen's compensation act' (3 Nov. 1900).
[95] Ibid. (1 Dec. 1900).
[96] Responses to committee circulars by Amalgamated Association of Cotton Spinners (6 Jan. 1904), National Associated of Nut and Bolt Makers (26 Jan. 1904), Amalgamated Society of Mill Sawyers, Wood Cutting Machinists, and Wood Turners (Feb. 1904), 'Report of the departmental committee', pp. 893, 894, 897.
[97] 'Statistics during the year 1907', p. 966.
[98] 'Statistics during the year 1906', p. 483.
[99] 'Statistics during the year 1908', p. 97.

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numbers employed, and the average weekly earnings, the amount paid by employers under workmen compensation averaged only about 10 *s* per £100 of wages.[100]

Although contested claims represented only a minute number of the total claims under the workmen's compensation act, there was still great disappointment at the amount of litigation.[101] One of the great claims of the supporters of the act was that workers would receive payment for injuries with a minimum of litigation. 'Those hopes and expectations were not realized', according to one of the leading legal experts on the act, W. Addington Willis, writing in 1906. In fact, Willis claimed that 'no statute has ever produced such a flood of litigation', citing Lord Bramton in *Cooper and Crane* v. *Wright*, who stated that the legislation was 'framed as to provoke rather than minimize, litigation'.[102] Chamberlain was especially disappointed at this turn of events, fearing that his jest about Asquith's employers' liability bill being a lawyers' employment bill might be aimed at his own creation.[103] Legislation like the workmen's compensation act that had to apply legal definitions to an almost unlimited number of factual situations was bound to lead to extensive litigation. Willis described the situation: 'A yard or two in considering whether an accident occurred "about" the locality of an employment made all the difference between being within or without the Act; the thickness of a single brick in the height of a building sometimes separated a widow and her family from £300 or the workhouse'.[104]

We should remember that the workmen's compensation act of 1897 did not repeal the employers' liability act of 1880. If a worker was employed in a business or industry covered by both acts, then he or she could invoke either act. Common law remedies also remained intact, but if employees brought a common law or employers' liability claim and lost, they were barred from subsequent workmen's compensation action. They could, however, ask the court to assess compensation with a deduction of the employer's costs. Failure of a workmen's compensation claim did not bar common law or employers' liability act recovery. Employees also considered the amount of compensation that might be received. As W. Ellis Hill noted in his 1898 treatise, under workmen's compensation 'the compensation is of a very meagre description in any case in which the workman is not actually killed'. He gave an example of a workman earning 26 *s* a week who breaks his leg and is laid up for eight months. Under workmen's compensation he would be entitled to a sum not exceeding 13 *s* a week. When deducting for the first two weeks for which

[100] 'Statistics during the years 1898–1907'.

[101] One of the few historians to criticize the act, Chris Wrigley, has noted that many workmen had to litigate to obtain their rightful compensation. Chris Wrigley, 'The government and industrial relations', in Chris Wrigley, ed., *A history of British industrial relations, 1875–1914* (New York, 1982), p. 151.

[102] W. Addington Willis, *The workmen's compensation act 1906 with notes* (10th edn, London, 1907), p. 7.

[103] Garvin, *Chamberlain*, pp. 158–9.

[104] Willis, *Worker's compensation act 1906*, p. 7.

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compensation was not available, this would be a total payout of £19 10 *s*. By contrast, under a common law or employer liability action, 'it is most improbable that he would get less than £50, he would probably get from £80 to £120, and perhaps £150 or more'.[105] The 1903 departmental committee confirmed that in cases of 'comparably slight injuries when much pain or disfigurement has been caused, or where medical expenses have been incurred without prolonged disablement', larger damages could be recovered under a common law or employers' liability case than under workmen's compensation.[106]

Nevertheless, employees preferred to proceed under the workmen's compensation act, a preference dramatically shown in the experience of miners. According to the Miners' Relief Societies, approximately 70,000 miners were disabled for more than two weeks and eligible for compensation in 1899. Of this number, 128 claims were contested in the county courts, and only two cases were brought under the employers' liability act.[107]

Even though workers, when they had the option, almost always chose to seek payment under the workmen's compensation act, there was still a great reluctance to repeal the employer's liability act. The reasons point out some of the deficiencies in the new workmen's compensation scheme. To begin with, workers could often get a better deal under the employers' liability act. County court judge Charles Whitchorne noted that the lump sum paid under the employers' liability act 'is more useful – at any rate more attractive' to the worker than a weekly payment under workmen's compensation, since the weekly compensation payment 'is always open to revision on proof of renewed capacity to work'.[108] Even the threat of an employers' liability claim could often be useful in leveraging a greater settlement under the workmen's compensation act. This was a common practice, especially in Scotland.[109]

The real importance of employers' liability, however, was that, unlike workmen's compensation, it differentiated between the negligent and the non-negligent employer. Evidence confirms Asquith's and the Liberals 'contention that safety concerns only tended to be addressed when employers faced the unlimited liability of the employers' liability act. The Amalgamated Society of Mill Sawyers, Wood Cutting Machinists, and Wood Turners reported in 1904 that they 'very rarely' brought cases under the employers' liability act. When they did, it was to achieve greater safety in the workplace. According to the Society, 'we only resort to it where employers frequently and habitually use defective or unguarded machinery, and we do this to bring the matter home to the employer more forcibly than can be accomplished by any other means'.[110]

[105] W. Ellis Hill, *The law and practice relating to workmen's compensation and employers' liability* (London, 1898), p. xii.
[106] 'Report of the departmental committee', p. 833.
[107] 'Statistics during the year 1899', p. 458.
[108] PRO PIN/12/1, 'Report from Charles Whitchorne, judge, Birmingham county court' (2 Nov. 1900).
[109] 'Report of the departmental committee', p. 833.
[110] Ibid., p. 888.

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County court judge Bradbury succinctly stated this advantage in a report to the Home Office in 1903 opposing the repeal of the employers' liability act.

> I think myself it is very advisable to keep alive the distinction between those accidents where negligence on the master's part is alleged, and where it is not ... At present the position seems to be fair and equitable all around viz., negligence of the master, full compensation up to limit; negligence of workman (serious and willful), no compensation; no negligence (i.e. accident pure and simple), and equal share of the burden.

The judge also accepted the notion that employers' liability played a vital role in promoting the safety of the worker. 'Another reason for not abolishing the difference between accidents due to negligence and accidents pure and simple, is that it tends to prevent accidents by stimulating to careful attention on the part of the master.'[111]

Judge Bradbury was right on target: the employers' liability act still had an important role to play in attempting to correct perhaps the greatest deficiency of the workmen's compensation act of 1897 – the lack of protection for the safety of the employees.

As the debates in the 1890s over employer liability and workmen's compensation show, Asquith consistently urged that the Liberals main concern was the safety of the worker. To Asquith, the worker could only be properly protected if the employer faced the possibility of substantial damages for his negligence. Chamberlain countered this argument with the claim that employers were already insuring safety and, even if they were not, under his workmen compensation scheme employers would take steps to insure the safety of their workers in order to avoid higher insurance premiums. Who was right?

The 1903 departmental committee that studied the operation of the workmen's compensation act did not hesitate to declare that the act had not improved safety in the workplace: 'No evidence has been brought before us which enables us to find any great improvement in the direction of safety is to be placed to the credit of this Act.' More disturbingly, the committee went on to state, 'Indeed, some of the evidence rather points in the opposite direction.'[112] The evidence on this point came from both employers and employees. Mr Radcliffe Ellis of the Miners Association stated, 'I do not think there is anything in the Compensation Act which would lead to further safety.'[113] There was even conflicting evidence on whether or not the operation of the act actually *increased* the number of accidents. The committee reported that the number of accidents in coal mines and railways had stayed the same.[114] Some employers, however, reported an increase in the number of accidents. The general manager of the Midland Colliery Owners' Mutual Indemnity Co. Ltd stated that the act had not lowered the number of accidents and, in fact,

[111] Ibid., p. 919. [112] Ibid., p. 764.

[113] 'Minutes of the evidence taken before the departmental committee appointed to inquire into the law relating to compensation for injuries to workmen', vol. 2 'Minutes of evidence with index' (Cd 2334), *Parliamentary papers 1905*, LXXV, p. 657 (1904). [114] Ibid., p. 726.

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claimed, 'We have had more in the Midlands that ever we have had before for many years.'[115] The conclusion of contemporaries that accidents actually increased has been somewhat supported by a modern study of the safety record under the workmen's compensation act. Peter W. J. Bartrip and P. T. Fenn, while recognizing the deficiency of the statistical database, conclude that the act might possibly have led to a real *reduction* in workplace safety.[116]

Why did not the workers' compensation act improve safety as its proponents claimed? As one might expect, some employers attributed the increase in accidents to the 'carelessness and indifference' on the part of the employees.[117] Predictably trade unions tended to blame employers who, once insured, cared little for safety. The president of the Amalgamated Association of Card and Blowing Room Operatives asserted, 'In our district some of the employers when they have paid their premium to the insurance company do not care a snap of the fingers so long as the responsibility is off their shoulders.'[118] A superintending inspector of factories reported, 'it is now a common thing where an Inspector says "This is very dangerous, a man was killed last year by this kind of machinery, you ought to do something", for the occupier to reply, "Oh, I am insured, you know".'[119] One of the reasons that the worker's compensation act had little or no effect on safety was that apparently insurance companies, at least in the first years of the operation of the act, did not greatly concern themselves with the safety record of their policy holders. In testimony before the 1903 departmental committee, James Crinion, president of the Amalgamated Association of Card and Blowing Room Operatives mentioned that a mutual insurance company had an inspector to insure safety in factories the company insured. The novelty of the practice was apparent when a surprised committee member responded, 'This is quite a new point. I never heard of insurance companies having inspectors; it seems to me a capital thing.'[120]

What is even more disturbing is evidence that the operation of the workmen's compensation act might have had the effect of actually *decreasing* the level of factory safety. After the passage of the act, many, following Chamberlain's own logic, believed that the safety of the workers was best insured through the vigorous enforcement of the penalties for an employer's failure to abide by the safety provisions of the factory and workshop act, the coal mines regulation act, and the metalliferous mines regulation act.[121] Indeed, Chamberlain argued this point during the 1897 debates. Under the factory act, an employer could be penalized a maximum of £100 for negligence in failing to fence machinery. At the discretion of the home secretary, a portion of the fine could be paid to

[115] Ibid., p. 665.

[116] Peter W. J. Bartrip and P. T. Fenn, 'The measurement of safety: factory accident statistics in Victorian and Edwardian Britain', *Historical Research*, 63 (1990), p. 68.

[117] 'Minutes of the evidence', pp. 712–13.

[118] 'Report of the departmental committee', p. 811.

[119] Ibid., p. 764.

[120] Ibid., p. 811.

[121] 'Minutes of the evidence', pp. 656–7.

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the injured worker. The 1897 workmen's compensation act did provide that nothing in the act 'shall affect any proceeding for a fine under the enactments relating to mines and factories'. However, the act went on to provide that any sums paid to an injured worker under the safety acts could be taken into account in estimating compensation under the workmen's compensation act.[122] Some of the most disturbing testimony before the 1903 departmental committee on the effect of the workmen's compensation act on the enforcement of penal provisions of other acts came from Commander Smith, RN, one of the supervising inspectors of factories. 'Since the passing of the Workmen's Compensation Act, it is no use going before a bench of magistrates.' If you prove the machinery is dangerous, 'in almost every case now the solicitor on the other side gets up and says "That really is not a case to be decided in this Court at all; it will be heard in the county court and the question of compensation will be settled there."' '[A] mere nominal penalty' is charged, and the employer ' is not in any way penalized for not having carried out a statutory obligation.'[123] To its credit, the 1903 departmental committee was impressed by Smith's testimony. In their final report they concluded, 'we see no reason why the Legislature should go out of its way to nullify the one remaining provision of law, which marks the difference between the liability of the careful and negligent employer'. Accordingly, they recommended the repeal of the section of the workmen's compensation act that permitted a deduction from compensation for fines received by the injured employer.[124] Parliament carried out this recommendation in the 1906 workmen's compensation act.[125]

Curiously parliament did not differentiate between the negligent and non-negligent employer in the workmen's compensation act of 1897. The 1903 departmental committee made this point: 'However much the accident is due to his [the employer's] negligence, he is under no greater liability to the injured person, so far as this Act is concerned, than is the employer who is entirely free from blame.'[126] For example, it would have been easy to provide that in the case of an employer's negligence the employee would be entitled to a higher scale of compensation, as is the case in many modern workmen's compensation statutes. The idea had certainly been proposed. Indeed, the 1903 departmental committee discussed the concept and rejected it because it 'would amount to reenacting in another form the Employers' Liability Act, and that too in a way which would operate oppressively upon the employer'.[127] The last phrase is the most telling. With negligence out of the calculation, employers could more easily insure themselves, liability being easier to predict, and thus substantial premiums saved.

Other problems with the 1897 act bear mentioning. The operation of the act complicated the employment of old, weak, or maimed workers. John Taylor,

[122] Workmen's compensation act, 1897, 60 & 61 Vict. c. 37, s. 1(5).
[123] 'Report of the departmental committee', p. 764. [124] Ibid., p. 822.
[125] Workmen's compensation act, 1906, 6 Edw. 7 c. 58, s. 1(5).
[126] 'Report of the departmental committee', p. 754. [127] Ibid., p. 834.

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secretary of the Cotton Trade Insurance Association Ltd described the problem. '[A] man can earn as much money, and in some cases more, after the loss of an eye, but now, after the Workmen's Compensation Act, if anything should happened to the other eye, they are totally incapacitated, and it makes a very serious matter indeed.' He concluded, 'If a man applies for work with one eye again I should not have him because there is a danger of having to pay a big sum.'[128] The 1903 departmental committee concluded that the operation of the act 'has largely increased the difficulties of old men finding and retaining employment' and voiced fears that 'the tendency is for these difficulties to grow'.[129] There was also the question of coverage, or rather lack of coverage of the 1897 workmen's compensation act. While the act did pertain to such dangerous occupations as railways, miners, and quarrymen, occupations where the fatal accident rate was more than twice that of the average for all occupations, it did not apply to bargemen and seamen, among whom the fatal accident rate was more than three times the average.[130] Finally, there continued to be the problem of the insolvency of employers. Although this had not been apparent during the first decade of the operation of the workmen's compensation act because of the relatively prosperous times, the 1903 departmental committee expressed the concern that if the coverage of the act was expanded to more occupations, 'the danger of insolvency, with the consequent distress which would be occasioned, is very real'.[131]

Some of the defects of the original workmen's compensation act were remedied in the major revision which took place in 1906. The bill introduced by the new Liberal government vastly expanded the coverage of the act to include an estimated 6 million more workers.[132] Now all jobs were included unless expressly excluded.[133] Some industrial diseases were made subject to compensation. The bill allowed those over sixty years of age to contract to reduce their maximum death benefit to as low as £25. Perhaps of most immediate importance to workers was the provision that compensation would be paid after only one week of incapacity rather than two. Workers with claims against bankrupt employers would now be able to have those claims addressed on the same level as a wage claim in bankruptcy proceedings. As to the issue of the safety of workers, the bill did nothing further. Home secretary Herbert Gladstone in introducing the measure frankly admitted, 'we must not flatter ourselves that by providing compensation we provided increased security for the workman'. Rather, Gladstone reflected the predominant view of parliament of the issue of employer safety when he stated, 'increased security will have to be found in the operation of other Acts, and more particularly, of

[128] 'Minutes of the evidence', p. 686.
[129] 'Report of the departmental committee', p. 781.
[130] PRO HO 45/9942/B29142, 'Mortality from accidents among males over 15 years'.
[131] 'Report of the departmental committee', p. 780.
[132] Willis, *Worker's compensation act 1906*, p. 8.
[133] Agricultural workers (estimated at the time to be approximately 1 million workers) had been included in 1900. 63 & 64 Vict. c. 22.

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course, in the operation of the Factory and Workshop and Mines Regulation Act'.[134]

V

The modern British workmen's compensation scheme resulted from compromise, and there is little doubt of the *ultimate* success of such legislation. We cannot be blinded to interim difficulties by such ultimate success. A fresh re-examination of the employers' liability/workmen's compensation debate of the 1890s reveals that, while workers gained much under workmen's compensation, labour also paid a high price, especially during the early years of the act's operation. Chamberlain and the employer supporters of workmen's compensation drove a hard bargain. The early goal of the trade unions and the Liberal party to improve workplace safety through increased employer liability had to be sacrificed for minimum, albeit for the most part, assured payments for injuries. And even these payments were reduced through the efforts of unscrupulous insurance adjusters and the continued need for litigation to obtain recovery. As their part of the bargain, employers continued to be protected from unlimited liability at a cost of what the Webbs termed a 'fleabite' compared to the cost of prevention of industrial accidents. In short, the economic compromise forged with the workmen's compensation act of 1897 represented not a triumph of employer/employee co-operation, but rather the acceptance of the principle that workers' injuries were 'nothing more than a cost of production'.

[134] *Parliamentary debates*, 4th ser., vol. 154 (1906), col. 895.

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