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Notes from the Insurance Field

OUTLINES COMPENSATION ACT

P. Tecumseh Sherman Says Law of Tort is Unsatisfactory.

ANTAGONIZES LABORING CLASS

Law of Negligence Does Not Carry Its Theory Into Practice and Wrongful Claims Prevail and Just Claims Rejected.

Speaking before the Thursday session of the Nebraska Manufacturers' meeting last week, P. Tecumseh Sherman of New York said:

In order that you may comprehend the situation with which you are confronted by the proposed adoption of a comprehensive law, I will endeavor to outline briefly for you the origin, purpose and effects of the law of compensation and its relation to insurance, and then explain some concrete examples of defective and of effective compensation laws.

You all know that as between employers and employes our law of negligence (technically known as the law of tort) is generally unsatisfactory.

It engenders class feeling between the employers and their workmen; and it puts all classes affected—judges, juries, lawyers, insurers, employers and workmen—in false and unnecessarily antagonistic positions.

It is unjust, because: 1. It does not carry out its theories in practice. Wrongful claims often prevail, and rightful claims are often rejected. 2. Its theories are wrong. For example, its rule that an employe shall be deemed to assume the ordinary risks of his employment and consequently shall suffer all the loss from injuries resulting therefrom, is now almost universally adjudged to be unfair.

Therefore, to substitute, in the place of the liability for wrongful negligence, a rule of average justice, according to which the employer is liable for half the damage due to all ordinary work accidents, is, in practice, more just both to employers and to workmen.

That has been done throughout the rest of the civilized world.

But I approached this reform from another direction. I was formerly commissioner of labor and ex-officio chief factory inspector of the state of New York. In studying the problem of the prevention of accidents I soon discovered that it is the prevailing opinion of European experts that to confine the employers' liability for injuries caused by his wrongdoing to the penal law, and to so frame the civil law as to hold the employer and his workmen jointly and equally responsible for accidents, and consequently to make the employer pay half the wage loss and the injured workman suffer half the wage loss from every ordinary accident, certainly, without chance of escape by the gamble of a law suit, is the best known regulation to decrease accidents in organized industries.

Wants Liberal Limitations.

To be most effective for this purpose the scale of compensation should follow the theory just stated, and be approximately 50 per cent of the wage loss, which may be proportionately increased only where workmen contribute or where the limitations are short or low. But experience shows that it is better in every way to be liberal with the limitations, rather than to increase the scale over 50 per cent; and also that a two weeks waiting period is necessary to prevent malingering. A few of the European laws give small flat rates of compensation, without regard to wages. They are really laws for poor relief; and admittedly have no relation to justice and no effect in the way of accident prevention.

Therefore a 50 per cent compensation law should be the substitute for the law of negligence as between employers and their workmen; and would be both a measure of private justice and a public regulation for accident prevention. Always bear in mind these two purposes.

Elective compensation laws (such as have been adopted in many of our states) are makeshifts to avoid a constitutional doubt or difficulty. There are serious objections to their provisions designed to force the election by employers of the compensation liability. Therefore such laws should be regarded merely as temporary expedients on the way to compulsory compensation. The danger from such elective laws is that they may lead to the adoption of an absolute liability for compensation for all injuries regardless of cause in addition to the existing liability in tort, instead of to the adoption of the compensation liability as a substitute for the tort liability. Whether your law should be compulsory or elective is a question of expediency, for local counsel to decide.

Now as to insurance:

Insurance is no more an essential feature of the compensation law than it is of the tort law.

But the tort law is to a high degree a law of punishment for wrongdoers, whereas the compensation law drops the idea that industrial accidents are generally due to wrongs, but attributes them generally to unavoidable happenings, and therefore does not seek to punish anybody, but to distribute relief among the victims, and consequently inclines towards providing assurance of such relief. And in foreign countries the compensation law is often associated with sickness and old age insurance or incorporated in broad mutual benefit schemes.

Demands for Insurance.

Therefore, and because of the broader application of the compensation liability, the adoption of a compensation law leads naturally, not only to a wider demand and a greater need for insurance, but also to a social demand for insurance aimed more directly for the benefit of the injured.

Insurance has two purposes: 1. For the employers' benefit—to distribute their risks. 2. For the workmen's benefit—to secure to them the payment of their compensation.

Insurance should effectively serve both these purposes.

But insurance under our tort laws has generally been defective:

1. Because it has indemnified the employer against his workmen, so that, for example, if an employer becomes bankrupt and does not pay his liability the insurer is not liable and the injured workman receives nothing on account of his right.

2. Because insurance has generally been limited in amount; and that amount has often been less than the liability of the employer. That has divided responsibility and led to abuses to the prejudice of the injured workmen.

These abuses must be corrected. To correct them it should be required by law that all employers' liability insurance shall run directly for the benefit of the injured workmen, and that the insurer shall underwrite nothing less than an employer's entire compensation liability.

But there is a specific danger under the compensation law that insurance may thwart the purpose of that law as a regulation for accident prevention. If the employer with a high risk is enabled to insure his liability at the same rate as a competitor with a distinctly lower risk; or if an employer with a low risk is compelled to pay for his insurance the same rate as a competitor with a distinctly higher risk, the effect of the compensation liability, as an incentive to the employer to study out methods and to incur expense to decrease his risks in order to cut down his rate of insurance, will be defeated.

Therefore insurance rates must be differentiated fairly according to comparative risks, as determined (a) by experience, and (b) by physical and moral conditions.

And in return for premiums paid the insurer should furnish beneficial inspection.

Finally, insurance must be sound. Employers should not pay for insurance, and then have it happen either that they are subjected to a ruinous liability or that their injured workmen do not receive their compensation from the insurance.

Insurance Not Compulsory.

Insurance, therefore, should operate to indemnify both the employers and their workmen, should be procurable at properly differentiated rates and should be sound. These tests should be applied to all insurance schemes.

Insurance should not be made compulsory except when and where that may be found to be necessary in order to prevent employers' liability from becoming vain and useless as a source of relief to injured workmen. Railroads and other large establishments having their risks well distributed may properly carry their own insurance, and it would be an imposition upon them to compel them to insure simply to round out a paper scheme. And English experience indicates that it is not necessary to compel insurance in order to secure relief to the injured. In England, where insurance is voluntary, experience shows that employers generally insure for their own protection—so generally that in England there is almost no record of loss of compensation by workmen on account of the bankruptcy of employers.

Even if insurance should be made compulsory the widest choice should be permitted in methods of insurance. Otherwise we would run into the evils of monopoly or near monopoly. All foreign countries except Germany, Austria, Luxemburg and Norway give employers some choice as to how they shall insure.

Now as to the cost of insuring compensation. Under the compensation law you must pay something for about 99 per cent of all injuries lasting over—say two weeks; while under our negligence laws you have only paid for about 20 per cent of injuries. Although the amounts payable under a compensation law will be limited yet the aggregate will be very much greater than before. And when you come to insure you will not be able to insure for a limited amount, but must cover your aggregate contingent liability in the event of a disaster. So that it will cost you on the average three, four or five times as much to insure as before. In England the change from the negligence law to the compensation law increased rates at once about six times, and experience has shown that that was not quite enough. Study the problem intelligently and you will see that when you buy insurance against the liability for compensation you get something that is much more expensive than insurance against the liability for negligence; and don't be gulled into any unsound insurance scheme which promises low initial rates—for if such rates be below cost they cannot be maintained. Such rates may be simply enticements into a bunco game of which you employers will be the victims.

There are various methods of insuring compensation. The more common are: 1. In private companies. 2. In mutual associations. 3. In joint benefit funds. 4. In a state managed fund or funds, as in Ohio and Washington. 5. By the state itself, as in Norway. 6. In a state guaranty fund, as in France, Belgium and Italy.

Except to take care of such exceptional classes of risks as cannot secure private insurance on proper terms and conditions, state insurance has no advantage unless it be given a monopoly. State insurance offices abroad have never been able to hold their own in general competition with other insurers unless favored by public subsidies or by special privileges.

Monopolistic state insurance has the sole advantage that it eliminates the cost of competition from expenses of management. But, except under peculiar conditions like those of Norway, this saving is nearly offset by the relatively higher cost of public service in comparison with the cost of private service.

And, as against any possible saving in expenses of management, monopolistic state insurance has overwhelming economic, social and political disadvantages, to be explained later.

State manager fund insurance is even worse. It has nearly all the defects of pure state insurance, and in addition:

In the Ohio form, it is unsound and does not insure compensation; that is, it does not guarantee the payment of compensation to injured workmen.

In the Washington form, it does not adequately distribute employers' risks.

State guaranty insurance is only half insurance—it does not insure employers at all, it insures only the workmen.

So far I have dealt in generalities. I will now briefly explain some concrete examples of compensation laws.

Norway Assumes Liability.

In Norway the state itself has assumed the liability to pay compensation for industrial injuries, and taxes employers, at rates graded according to rough estimates of the degree of risk in their respective trades, to maintain a fund out of which the state pays the compensation. Government officials do everything—manage the fund, fix the rates for the trades, assign the employers to trade classes, investigate claims and decide and pay the awards. There is no "come back" on employers after they have paid their annual premiums; if the premiums prove to be insufficient the state loses and taxpayers must make good the deficiency. This happened once, and there was a serious political struggle before it was settled who should be taxed to make good the deficiency. This method of insurance is not without advantages in the way of economy of administration in a thinly populated country with widely distributed petty industries like Norway, but there are serious objections to it for an industrial state.

1. It results in a practically "flat" rate for all employers in each trade, without proper regard to the variations in hazards in different establishments. That removes the economic incentive to accident prevention, since each employer knows that his competitors must share equally with him in any losses from the hazards of his business; and it penalizes the better employers by imposing upon them a large share of the losses of their more careless and poorly equipped competitors. The differences in risks between establishments in the same trade are often far greater than the differences between average risks in different trades. The injustice of and harm from putting bad risks and good risks on the same plane cannot be overemphasized.

2. No proper progress has been made in differentiating the rates fairly for the different trade classes. Some have long been taxed double their true risk cost, while others have been favored with rates 50 per cent below cost. The apparent policy has been to shift part of the cost of the hazardous industries upon the safer industries. Employers are absolutely at the mercy of the officials as to which of several trade classes they respectively are to be assigned to and consequently as to which of several widely different rates they shall be taxed.

3. The allowance of claims and the adjustment of awards are absolutely in the discretion of administrative officers. Employers have nothing to say about the management of the fund, and no check at all upon the allowance of claims against it. They merely foot the bills. European experience indicates that this practice results in extreme laxity in precautions against fraud and exaggerations, and in a tendency on the part of officials to misuse their powers to distribute political favors or charitable relief at employers' expense.

Without going further into details, this method of insurance may be fairly described as a scheme to avoid the difficulties of adjusting and securing private rights and liabilities between employers and employes by turning the whole matter of compensation over to a political bureau with power to tax employers and to distribute the proceeds among employes about as it pleases. If this be good practice in regard to compensation, why should not all other private rights and liabilities be adjusted and secured in the same way? The answer is—because that would be pure socialism. So also is this scheme socialism—partial, but pure.

The Washington Law.

The Washington law is somewhat like the Norwegian law, except that the state does not itself insure or guarantee the payment of the compensation, and that employers are divided into trade classes and those in each class taxed for a special fund out of which compensation is to be paid to all workmen injured in that trade. If the fund is exhausted the employers in that trade class are subject to assessment to make good the deficiency. The rates for each class are fixed by statute, but the officials are empowered to increase the rate for unusually dangerous conditions. This law is not only an accident breeder, because it does not differentiate rates, but also is grossly unjust to employers and particularly to the higher classes of employers—and for the following reasons:

The compensation law in its simple form—as in England and the majority of foreign countries—makes the employer liable as an insurer of his workmen in limited amounts. That liability subjects the average employer to serious peril of financial ruin, unless at a reasonable rate he can reinsure and distribute his risk. Now, what the Washington law does is to make each employer not only an insurer of his own workmen, but also an insurer of all the workmen of all his competitors in the same trade, thus multiplying his risk, and it then taxes him a heavy premium as if for insurance, but does not insure him, does not indemnify him, does not distribute his risk. Take the case of the Dupont Pawder company, which is in the same class with two other smaller concerns, and in the first year of the Washington law was taxed 10 per cent on its payroll, or $14,400, as against some $2,400 from its two competitors together. One of those other concerns blew up and killed six persons. The amount of the liability to their dependents is not yet determined, but may be or might have been $32,000. And whatever the excess of that liability over the amount in the powder trade insurance fund—be it $15,200 or less—85 per cent of it is to be assessed back upon the Dupont company. So, when the Dupont company paid $14,400 it did not procure insurance, but remained liable for 85 per cent of any deficiency in compensation due by the fund to all workmen in powder mills in the state of Washington. To procure indemnity such as the English employer gets when he buys insurance the Dupont company must still go out in the open market and buy real insurance, under the same conditions as—but for a much larger risk than—before the adoption of this fancy scheme. Whatever may be said in criticism of the state insurance schemes of Europe at least none of them are as bad as this.

But in America we have one law yet worse, namely, the Ohio law. It is not a compensation law in theory, for while it provides compensation for a workman injured from his own fault, yet it retains the employers' liability for full damages for the faults of himself and all his employes—provided those faults are violations of statutes. It thus retains all the evils of the old law, its speculative litigation, its uncertainties for employers, its expense and waste; and it will simply breed accidents by holding employers responsible for all faults, and workmen responsible for practically no faults. It has already manifested the abuses of a political bureaucracy. And with all that it provides no certain insurance for injured workmen. It is an abomination in theory and practice, that will ruin industry.

I recommend an adaptation of the British law. Under that law each employer is liable for approximately one-half of the wage losses from injuries to his own workmen, and to no others. And the employer is free to insure as and how his own judgment and best interests may dictate. If satisfactory to him he may buy his insurance from private companies (which in England have differentiated rates carefully, and sell insurance cheaply); or, if he prefers, he may associate with others of his own selection in a scheme of mutual insurance; or he may join with his own workmen in a scheme of broad mutual benefit insurance which covers the compensation liability. In placing his insurance and in adjusting his liabilities the English employer is free and not under the thumbs of politicians.

Mutual insurance (which the German law makes compulsory), in my opinion, is not the best form of insurance. It requires of employers that they carry on, on the side, a highly technical business in which they are not expert. That not only calls for a great deal of time and labor, but often results in ruinous mistakes. And where a mutual association is composed of antagonistic elements, the position of the minority party is lamentable. Generally insurance should be bought from those who make it a business to sell it. But as a check upon impositions by organized insurers and as an alternative under special conditions, mutual insurance in voluntary associations, organized on trade lines, is very valuable. It should, however, therefore, be permitted, not only in one association, but in many associations—subject to state regulations and official supervision.

Insurance Personals.

W. A. Horton of Omaha has contracted to write life insurance for the Union Central Life Insurance company.

A. W. Perry, secretary of the St. Paul Fire and Marine company, was in Omaha last week.

Frank L. Ebey of Topeka, state manager in Kansas for Missouri Fidelity and Casualty company, was in Omaha last week visiting J. E. Austin.

Thomas E. Gallagher, general agent for the Aetna Fire Insurance company in Chicago and Charles Elgas, state agent, were guests at the luncheon held in the "blue goose" room last Monday.

Frank E. Martin, secretary of New Hampshire Fire Insurance company of Manchester, visited his agents, the Foster-Barker company, last week. His visit had reference to the appointment of a special agent for the company to succeed C. W. Krueger, who has been transferred to Colorado.

Key to the Situation—Bee Advertising.

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