



Tort and Insurance Law
Vol 31



Ken Oliphant
Gerhard Wagner (eds)

Employers' Liability and
Workers' Compensation

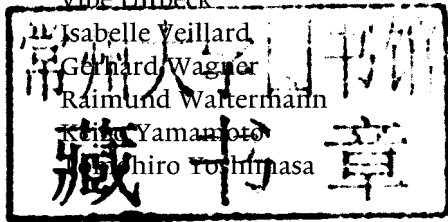
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Employers' Liability and Workers' Compensation

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This study was supported by Munich Re.



ISBN 978-3-11-026996-3
e-ISBN 978-3-11-027021-1
ISSN 1616-8623

Bibliografische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

© 2012 Walter de Gruyter GmbH, Berlin/Boston

Druck: Hubert & Co. GmbH & Co. KG, Göttingen

Gedruckt auf säurefreiem Papier

Printed in Germany

www.degruyter.de

Preface

This book on employers' liability and workers' compensation presents the results of research undertaken by the European Centre of Tort and Insurance Law (ECTIL), in collaboration with the Institute for European Tort Law (ETL) of the Austrian Academy of Sciences. The project aims were developed in discussion with representatives of Munich Re, whose financial support for the project, and ECTIL's ongoing work in general, is most gratefully acknowledged.

Some early results from the project were presented and discussed at a public conference hosted by Munich Re in March 2011, from which the editors derived very useful comments and suggestions.

The project could not have been completed without the tremendous efforts of many members of ECTIL/ETL staff, amongst whom we must particularly highlight Thomas Thiede and Marlene Steininger, who acted as project assistants, Donna Stockenhuber, Emma Witbooi and Kathrin Strobach-Karner, who did the copy-editing, and Edina Busch-Tóth, who compiled the index. Annelise Tracy Phillips translated the Austrian country report from German into English. The editors express their grateful thanks to them all.

The editors gained considerable assistance from discussion of the research topic with Ina Ebert and Nicholas Roenneberg of Munich Re, and their former colleague, Christian Lahnstein, and thank them all for their input. The latter's retirement came during the course of the project, and the editors would like to take the opportunity to record their debt of gratitude to him for his immense contribution to ECTIL's work over several years, and to express the hope that they will continue to benefit from his knowledge, wisdom, enthusiasm and friendship in the future.

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Vienna and Bonn
July 2012

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Introduction

This book on employers' liability and workers' compensation addresses a topic that is of perpetual interest to lawyers, insurers and policy-makers, but appears never before to have been addressed through a comparative academic study of this scale. The subject-matter warrants analysis for numerous reasons, amongst them society's need for proper mechanisms to ensure the compensation of work injuries and the promotion of occupational safety, the opportunity to compare liability-based and non-liability-based approaches to these tasks, and the practical challenges thrown up by the increasingly complex interactions between compensation and liability systems. Research into these questions is especially timely because of the revival of employers' liability in recent decades, resulting not just from the abolition or curtailment of workers' compensation in some jurisdictions (albeit a minority) but also the growing number of liability claims brought around the edges of workers' compensation where it still exists. Important examples include claims brought for compensation of dignitary injuries and harm resulting from sexual harassment, and actions against third parties who contribute to the injury, such as manufacturers and suppliers of plant and equipment.

The *research aims* were to provide a rich and detailed description of existing systems of compensation and liability for work injury in selected countries, to investigate the interactions between those systems, and to make a comparison of their quality and efficacy both individually and in combination. The project also sought to explore the political choice to be made between employers liability and workers compensation as two competing mechanisms for addressing identical social problems. It asked: what is the proper response to those problems in the 21st Century – the collectivisation of responsibility through workers compensation, the use of ordinary private law remedies under a regime of employers liability, or some combination of both? Obviously, answering this question calls for a comparative approach, harnessing experiences with the systems in operation in jurisdictions around the world.

The results of the research comprise twelve *country reports* (Australia, Austria, Denmark, England and Wales, France, Germany, Italy, Japan,

the Netherlands, Poland, Romania and the United States of America) which are based on a common set of headings (see Annex below), and a concluding set of *thematic analyses*. The choice of countries was designed to allow the comparison of the different major legal traditions in Europe – common law, Germanic, Romanic, Nordic and the diverse category of post-communist legal systems – and a spread of countries from elsewhere in the world, the latter through the inclusion in the study of Australia, Japan and the United States. The selection also reflected the need to ensure different approaches to compensation and liability issues – in particular, different combinations of employers' liability and workers' compensation regimes – were adequately represented.

Each of the country reports begins with *an introductory section* addressing, in the first place, the basic system applying to the compensation of and liability for occupational injuries. Contributors were asked to include a short historical overview, dealing with the introduction of workers' compensation in their respective jurisdictions and the reasons for it, together with information about any fundamental changes made to it subsequently, and an indication of the *general role of private law remedies (primary, supplementary or excluded?)*. *Additional sub-headings invited consideration of the interaction of compensation and liability systems with other institutions, and the available empirical evidence about each system's operation*. Contributors were asked for an outline of the main sources of empirical evidence and, where available, details relating to the number of claims per annum, total and average amounts awarded, the cost to employers as a percentage of payroll, numbers of work accidents and occupational diseases per annum, and rates of work accidents and occupational diseases over time, with an indication of the factors that were or could have been responsible for any rise or fall in such rates. Unfortunately, several contributors reported that only rather limited empirical evidence was available to them.

The second section of the country reports deals specifically with *workers' compensation*. For present purposes, this term was taken to embrace all forms of work accident insurance independent of the establishment of employers liability. Contributors addressed in turn the scope of cover, the compensation trigger, the scope of protection, the heads and levels of benefits, funding, the administration and adjudication of claims, the rights of recourse enjoyed by workers' compensation institutions, and the interaction of workers' compensation with general social welfare provision and private insurance, and with employers' liability. In the case of the Netherlands, where workers' compensation was abolished in 1967 so as to integrate compensation for occupational injuries wholly within general social welfare provision, this section departs from the common sub-headings and

instead includes a short description of the principal social security benefits available to injured workers. By contrast, the report on England and Wales does follow the common headings in analysing the industrial injuries scheme introduced in place of the former regime of workers' compensation in 1948. The new scheme is administered through the social security system but can still be regarded as a (diluted) form of work accident insurance.

The third section of the country reports, focusing on *employers' liability*, replicates broadly the same structure as that applied to workers' compensation, though with some necessary amendments. The sub-headings the contributors were asked to address were: the classification of the liability (contract or tort?, general law or a special category?); the elements of liability; the scope of protection; the heads and levels of damages; the administration of claims; rights of recourse; the interaction of employers' liability with general social welfare provision and private insurance; and insurance. Statistics on the numbers and costs of claims were included where available. A particular focus of the research was the extent to which liability claims in respect of harassment and discrimination are able to circumvent attempts to make workers' compensation the exclusive remedy for occupational injury, and contributors were therefore requested to provide an outline of the relevant liabilities in general civil law and any special regime applying to discrimination. It should be stressed, however, that these are large topics that could not be addressed comprehensively within the present volume.

In the fourth, concluding section of the country reports, contributors were asked to address the '*big policy questions*' raised by the types of system adopted in their respective jurisdictions, and their mutual interaction. The questions highlighted for analysis included the extent to which the goals of compensation and prevention are attained, whether the overall costs are reasonable in light of the benefits provided, whether the interaction of workers' compensation and employers' liability furthers or obstructs the attainment of policy goals, and the overall quality of each system independently and in combination. Plans for reform, if any, were also discussed here.

The country reports are followed by three *thematic analyses*. In the first, *Thomas Thiede* analyses the coordination of employers' liability and workers' compensation regimes in Europe through rules governing international jurisdiction and applicable law. As separate principles of EU law govern the coordination of social security systems (including workers' compensation) and national civil liability laws, a further meta-level of coordination – coordination of the coordination regimes – is required.

Despite the complexities thereby entailed, the overall system appears to work well enough in practice, though the reliance upon separate institutions in the Member States entails increased bureaucracy and cost.

Next, *Ken Oliphant* looks at the challenges for employers' liability and workers' compensation posed by the 'new landscape' of work injury claims. By this he refers to a shift from the traditional focus on accidental personal injury to a more complex claims environment in which compensation and liability regimes have had to respond to increasing scientific recognition of the adverse impacts of work on health and to new social sensibilities, including an intolerance of discrimination and harassment. To illuminate the impact of these changes, the paper adopts an analytical framework reflecting scholarly accounts of the social construction of personal injury claims, addressing in turn the issues associated with the recognition of adverse experiences as 'injurious' and issues relating to the attribution of recognised injuries to the employer (for employers' liability) or the employment (for workers' compensation). Oliphant submits that recognition issues are particularly troublesome for workers' compensation – as evidenced by the approach taken in different countries to process-related conditions, disease, mental illness and the effects of harassment and discrimination. Conversely, employers' liability has greater difficulty with the attribution of injuries to persons liable to compensate for them, especially in cases of long-term exposure to risk, gradual onset, uncertain aetiology, uncertain specific causation, chronological uncertainty (when did the risk materialise?) and long latency. Oliphant concludes by identifying respects in which employers' liability and workers' compensation fail to attain their respective objectives, and problems resulting from a lack of mutual coordination, and by considering possible reforms to address these deficiencies.

Lastly, *Gerhard Wagner* draws basic policy conclusions from the project as a whole. He begins by noting that the basic features of workers' compensation have been surprisingly stable across national boundaries: compensation regardless of the fault of the employer and the contributory fault of the employee; the collectivisation of claims through public (or mandatory private) insurance; the limitation of the scope of protection to personal injury, disease and death; the limited compensation payable (especially for non-pecuniary loss) and its simplified assessment; the resolution of claims by administrative agencies rather than courts; and the employer's (partial) immunity from civil claims where there is workers' compensation. Employers' liability, conversely, has the following central features: a general fault-basis; contributory negligence is a possible defence; full compensation is awarded for both pecuniary and non-pecuniary losses; the individualised assessment of damages; and judicial resolution of claims. Wagner

then explains how there has been a ‘revival’ of employers’ liability in recent decades. Workers’ compensation has been abolished in the Netherlands and (substantially) in England and Wales, with the hope that general social security provision would result in greater equity as between victims of accident and disease in the workplace and elsewhere. When the promise of social security proved an illusion, employers’ liability came to perform a correspondingly larger role. Wagner is critical of these trends, and of any substantial limitation or circumvention of the immunities from civil liability afforded to employers by workers’ compensation, which in his view compensates more equitably than liability law, works well in terms of deterrence, and avoids the high adjudication costs of civil litigation.

It should be stressed that, although the editors have written separate concluding chapters addressing different specific aspects of the research, they endorse each others’ analysis of the issues and the conclusions to be drawn for future action.

Ken Oliphant
Gerhard Wagner

ANNEX: HEADINGS AND GUIDANCE FOR CONTRIBUTORS

Contributors were asked to structure their reports according to the numbered headings below. Items designated by bullet points did not have to be addressed in separate sub-headings, but were at least to be addressed clearly and unambiguously in the text. Short explanatory notes were provided in parentheses under certain headings. Additional guidance was also provided to contributors, individually and collective, as the project progressed.

I. Introduction

A. Basic system of compensation and liability

- Existence of public insurance schemes covering workplace injuries?
- General role of private law remedies: primary, supplementary or excluded?

B. Interaction with other institutions

C. Empirical evidence

- Outline of main sources of empirical evidence and details relating to the relative scope of employers' liability, workers' compensation and (so far as they deal with employees' injuries) other institutions; empirical evidence should also, wherever possible, be integrated into each report at appropriate points throughout

II. Workers' compensation

A. Scope of cover

- Workers covered
- Spatial, temporal and other limitations (eg 'course of employment', with discussion especially of the extent that travelling to and from work is covered)
- Effect of the victim's contributory conduct

B. Compensation Trigger

- Accidents (including how distinguished from disease)
- Disease (prescribed lists, proof in individual cases or both? Special provision for particular conditions?)

C. Scope of protection

- Personal Injury
- Sexual Harassment
- Dignitary Injuries (eg resulting from discrimination)
- Property Damage
- Pure Economic Loss

- (The extent of such protection offered by general employment laws may be mentioned, but the focus should be upon the specific workers' compensation rules and injuries resulting from accidents or disease)

D. Heads and levels of benefit

- Medical Care
- Rehabilitation Assistance
- Lost Earnings, Loss of Earning Capacity and Loss of Pension Entitlements
- Non-Pecuniary Losses
- Dependants' Benefits
- Comparison with Damages in Tort (How much lower?)
- Lump sums or periodical payments?

E. Funding systems

- Type of System (Private or public insurance? Voluntary or mandatory? To what extent, if any, can the employer self-insure?)
- Contributions to the Workers' Compensation Fund (Who pays for what?)
- Incentives (eg Risk-Rating of Contributions)?

F. Administration and adjudication of claims

- Organisational Framework of Workers' Compensation Institutions
- Who Decides over Claims for Benefits?
- Reviews and Appeals: Special tribunals or general civil justice system?
- Speed of claims' resolution and administrative cost

G. Rights of recourse of workers' compensation institutions

- Recourse against the Employer
- Recourse against a Co-worker?

- Recourse against Third Parties (equipment/component manufacturers, suppliers of raw materials, etc)

H. Interaction with general social welfare provision and private insurance

- Fund of First Resort (Who initially bears the cost: the Social Health Insurance/Public Health Service, Private Health Insurance or Workers' Compensation?)
- Deductibility of Benefits (Collateral Source Rule? – Are benefits provided by social or private health insurance deducted from claims against workers' compensation carriers)
- Recourse of Social Welfare Agencies, Social Health Insurance, Private Health Insurers, etc, against Workers' Compensation Institutions?

I. Interaction with employers' liability

- Availability of Damages in addition to Workers' Compensation Benefits?
- Deductibility of Benefits provided by WC from Claim against Employer (Collateral Source Rule?)
- Subrogation of WC into the Claim of Worker against Employer?

III. Employers' liability

A. Classification

- Contract or tort?
- General Law or a Special Category?

B. Elements of liability

- Liability of employers for their own acts or omissions
- Liability of employers for the acts or omissions of their employees and others (the scope of vicarious liability; the effect of any 'common employment' exclusionary rule)

- Relevance of health and safety legislation in establishing liability
- Overall a fault-based or strict liability?
- Causation (highlighting specific problems of causal uncertainty related to work injuries)
- Effect of the victim's contributory conduct

C. Scope of protection

- Personal Injuries
- Sexual Harassment
- Dignitary Injuries (eg resulting from discrimination)
- Property Damage
- Pure Economic Loss

D. Heads and levels of damages

- Same Level as in other Cases of Personal Injury?
- Main heads of recoverable damages
- Costs of Medical Care
- Costs of Rehabilitation Assistance
- Lost Earnings, Loss of Earning Capacity and Loss of Pension Entitlements
- Non-Pecuniary Losses
- Dependants' Benefits
- Form of Payment (Lump sums or periodical payments?)

E. Administration of claims

- Courts or Specialised Tribunals?
- General Civil Procedure or Special Procedures?
- Reviews and Appeals
- Speed of claims' resolution and administrative cost

F. Rights of recourse

- Against other Employees (who caused the harm) or their liability insurer?
- Against Third Parties (equipment/component manufacturers, suppliers of raw materials, etc) or their liability insurer?

G. Interaction with Social Welfare Systems and Private Insurance

- Deductibility of Benefits Received from Social Welfare Agencies (Collateral Source rule)?
- Recourse of Social Welfare Agencies and Private Insurers against the Employer?

H. Insurance

- Voluntary or mandatory? (If voluntary, how common?)
- General Liability Insurance or Special Policy? (If a special policy, what is its usual scope?)
- Basic Principles of Employers' Liability Insurance (Trigger, Scope of Coverage, Exclusions, Limits, Deductibles, etc)

IV. Evaluation and conclusions

A. Compensation

- Does the overall system provide compensation of adequate breadth at adequate levels?

B. Prevention

- Are there appropriate incentives to ensure health and safety and compliance with relevant regulations?

C. Overall costs

- Are they reasonable in the light of the benefits provided?

D. Interaction between workers' compensation and private law (Employers' Liability)

- Does this interaction further or obstruct the goals of compensation and prevention?

E. Plans for reform

F. Overall Quality of each system independently and in combination

- How do they work in the eyes of those concerned? Principal advantages and disadvantages