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The Exclusive Remedy Provision in Canadian Worker Compensation Law: The Need for Legislative Reform

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Résumé de l'article

Les revendications de nature constitutionnelle ont favorisé ces derniers temps l'opposition à l'obstacle législatif qui empêche le recours aux tribunaux dans les diverses lois sur les accidents du travail au Canada. Cette barrière enlève aux travailleurs la possibilité d'intenter une action en dommages contre les employeurs, mais, en retour, leur assure une compensation rapide et sure, et c'est là le seul moyen dont dispose le salarie qui a subi un accident du travail. Les tensions dans les régimes de réparation des accidents du travail comme les changements technologiques, l'évolution de la législation en matière de recours en dommages ou de responsabilité civile, les modifications dans la jurisprudence, de nouvelles découvertes concernant les maladies professionnelles, un raffermissement des droits des travailleurs garantis par la Charte des droits et des libertés ont donne lieu à diverses offensives pour contrer la clause protégeant les employeurs de poursuites relativement aux accidents du travail.

À l'occasion d'affaires récentes devant les tribunaux, les travailleurs victimes d'accidents ont plaidé que la clause excluant les recours civils enfreignait les articles 7 et 15 de la Charte. Ils soutiennent que, implicitement, l'article 7, qui a trait à la sécurité des personnes, leur permet d'engager des poursuites afin d'obtenir compensation pour des blessures corporelles. Ils estiment aussi que l'exclusion de la responsabilité civile des employeurs qu'on retrouve dans les lois sur les accidents du travail est discriminatoire, parce qu'elle prête à distinction entre ceux qui sont assujettis à la loi et ceux qui ne le sont pas.

Le présent article rejette l'opinion selon laquelle la clause d'exclusion des employeurs en matière de responsabilité civile n'est pas constitutionnelle. Il étudie les conséquences que pourrait entrainer son abolition et retient que cette exclusion remplace le droit de poursuivre par un droit également valide d'obtenir redressement sous un régime fonde sur des prérogatives collectives plutôt qu'individuelles. L'article affirme que la réparation assurée uniquement par la législation n'est pas discriminatoire au point d'abolir la similarité des recours, mais bien que, au contraire, cette exclusion se justifie, car elle agit de façon à répartir les ressources plus rationnellement de telle sorte que des considérations à la fois sociales et économiques fort légitimes sur lesquelles reposent les compensations favorisent les travailleurs.

Enfin, l'article signale deux aspects concernant la compensation des accidents du travail qui auraient besoin d'être corrigés, en particulier l'immunité des employeurs pour préjudices volontaires et la réparation inadéquate des dommages causes par les maladies professionnelles. Parce que ces deux questions sont de nature à déconsidérer le caractère d'équité du système de réparations des accidents du travail en général, elles constituent une menace pour les dispositions qui protègent les employeurs contre les recours en matière de responsabilité civile. Aussi, doivent-elles être soumises aux règles d'équité établies par la jurisprudence. Des reformes législatives s'imposent donc pour insérer dans les diverses lois sur les accidents du travail des mécanismes susceptibles de redresser les injustices qui sont apparentes dans ces deux domaines. L'adoption de certaines mesures d'exception et différentes modifications sont, par conséquent, nécessaires sur ces deux matières, si l'on veut améliorer les régimes actuels et conserver l'exclusion de la responsabilité patronale qu'on retrouve dans la législation.

The Exclusive Remedy Provision in Canadian Worker Compensation Law

The Need for Legislative Reform

Leigh West

This paper examines the effect and the constitutionality of the statutory bar as it impacts on workers and their dependents and comments on the significance and the merits of the constitutional challenges to the statutory bar which have already emerged. Statutory reforms which would help alleviate the strains while preserving intact the integrity of the worker compensation system are briefly reviewed.

Worker compensation boards in Canada are under siege on many fronts. Most dramatically, cracks are appearing in the formerly impenetrable fortress walls of the exclusive remedy requirement in the provincial worker compensation statutes. Under attack is the statutory bar which removes from injured workers the right to bring a tort action against employers and which grants worker compensation boards exclusive jurisdiction over workers' claims for recovery for work-related injuries and illness. The inequities and inadequacies of the present compensation laws which have long been criticized by workers and condemned by labour critics are surfacing and threatening to undermine the entire worker compensation regime.

The advent of the *Canadian Charter of Rights and Freedoms* has provided an opportunity for workers to challenge the system and to attempt to regain, in part, their right to litigate worker compensation claims in the courts. The *Charter,* the changing technology in the workplace, the increasing importance and recognition of the problem of occupational disease and a greater awareness and appreciation of worker rights has made it timely to review the basic and fundamental premises of the exclusive remedy rule. A basic premise of this paper is that the worker compensation system provides the best mechanism for the balancing of workers' needs for adequate, fair

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and speedy compensation against the employer's need to spread the cost for on- the- job injuries and illness. To maintain this balance, an exclusive remedy provision is necessary to provide predictability and efficiency. This paper examines the effect and the constitutionality of the statutory bar as it impacts on workers and their dependents and comments on the significance and the merits of the constitutional challenges to the statutory bar which have already emerged. Statutory reforms which would help alleviate the strains while preserving intact the integrity of the worker compensation system are briefly reviewed.

AN HISTORIC OVERVIEW OF WORKER COMPENSATION

Paradoxically, the first worker compensation program was created in the 1880's by Bismarck who proposed a social insurance scheme in an effort to turn aside the progressive reformist movement in Germany. Later Britain brought in a similar program in the 1890's and the U.S. adopted variations of worker compensation schemes between 1910 and 1920[1]. Worker compensation legislation was introduced in Canada and enacted by the provinces between 1914 and 1950[2]. Prior to the enactment of worker compensation legislation in Canada the only remedy available to workers who were injured on the job was to bring a tort action based on the negligence of the employer. Under the common law the employer had a duty to provide reasonably safe conditions of work but employer liability was held in check by the unholy trinity of employer defenses established in early nineteenth century British caselaw: contributory negligence; voluntary assumption of risk; and the fellow servant doctrine[3]. Judicial bias, which sought to protect the budding industrial development of the nineteenth century, interpreted these defenses so liberally that most injured workers were discouraged from bringing suit and so were left without income or the means of obtaining adequate medical care[4]. In the mid to late 1900's those who did sue met with a stunning lack of success in their attempts to prove their employer's liability and recover damages[5]. The inherent unfairness of the situation cried out for reform.

The new legislation had a number of goals. It was designed to remove the «nuisance of litigation» from injured workers and to provide speedy, limited and standardized compensation without proof of fault for any injury which «arose out of and in the course of employment»[6]. It was also expected to deter accident and illness, to provide broad coverage, medical care and rehabilitation and to establish an efficient administrative system to collect and disburse benefits and to adjudicate claims[7]. The costs of work-related injuries were to be allocated to the employer community with the

quid pro quo being employer immunity from liability for their negligence in the workplace. Workers were not to be compensated to the full extent of their losses or for losses that did not affect employability and, in general, no compensation was to be paid for disfigurement or pain and suffering[8]. The benefit paid was, with a few exceptions, the sole remedy available to the injured worker[9].

Until recently, this statutory bar to tort action remained virtually unchallenged in Canada. With the advent of the *Charter,* however, a few serious challenges have been made in courts in Ontario,[10] Newfoundland,[11] and Alberta[12] with mixed success. These challenges signal that the existing inequities can no longer be ignored and that worker compensation regimes are in need of reexamination and readjustment.

STRAINS IN THE SYSTEM

The push for the right to litigate by claimants who are covered under worker compensation legislation is understandable. Damage awards under the tort system are rising and the perception that tort awards are far greater than worker compensation benefits provides a strong incentive for workers and their dependents to bypass the system[13]. Moreover, since the enactment of the early compensation statutes, tort law in both Canada and the U.S. has evolved to the point where many of the original obstacles barring plaintiff recovery have been removed[14]. The employer defenses have been weakened, strict liability has emerged for defective products[15] and has provided a basis of recovery against third parties, and the doctrine of comparative negligence has been created[16]. Labour laws now exist which protect employees from employer reprisals if they report or testify about job-related accidents or illnesses[17]. The more liberal and progressive legal climate and the advent of the *Charter* has increased the awareness of these and other legal rights and has encouraged workers and their dependents to pursue their own self-interests under the *Charter.*

Developments in American worker compensation law have not gone unnoticed. Canadian workers can point to the creation of new U.S. statutory and judicial exceptions to the exclusive remedy rule. Injured and ill U.S. workers have successfully established the dual capacity doctrine,[18] actions against co-workers,[19] and suits by third parties against employers for contribution and indemnity[20]. Injured American workers frequently successfully sue third party suppliers and manufacturers to recover damages[21]. An increasing number of documented cases of the employer's failure to inform workers of known toxic hazards and deliberate suppres-

sion of information about hazardous exposures has shocked the general public and inspired judicial action to expand the intentional tort exception[22].

Other important stresses in the system have been caused by changes in the nature of work, and in the state of scientific and medical knowledge[23]. The introduction into the workplace of thousands upon thousands of toxic substances has created new hazards requiring new work practices, new skills and greater information needs than ever before[24]. A most ominous problem, the undercompensation of occupational disease, has been recognized. The increasing incidence of silicosis, the explosion in Asbestos-related diseases and the Johns-Manville bankruptcy in the United States have alerted the general public to the far-reaching ramifications of the problem of industrial disease. Compelling and mounting evidence of the extent and prevalence of diseases attributable to workplace exposures has been accumulating[25]. At the same time there is widespread agreement that only a small fraction of actual occupational disease cases are recognized and determined by compensation boards to be job-related[26]. The scientific link required to prove a causal connection to the workplace is very often uncertain and incomplete. As a result, workers go uncompensated and the quid pro quo envisioned in the original bargain is unrealized[27].

It is not then surprising that with the arrival of the *Charter,* Canadian workers and their lawyers seized the opportunity to challenge the statutory bar and claimed a right to litigate.

CHARTER CHALLENGES TO THE EXCLUSIVE REMEDY RULE

Constitutional challenges to the statutory bar provisions in the worker compensation legislation emerged immediately with the enactment of the Charter in 1980. In the first cases to raise a *Charter* challenge, *Re Terzian et al. v. Workman's Compensation Board of Ontario et al,*[28] and *Ryan v. Worker Compensation Board et al.*[29] it was argued that the statutory bar violated a right to bring an action for damages which was within the meaning of the s.7 «security of the person» provision of the *Charter*. Both Ontario Divisional Courts held that the plaintiffs were not denied Charter-protected rights otherwise than in accordance with the principles of fundamental justice[30].

More recently, the Newfoundland Supreme Court came to an opposite conclusion. In *Piercey v. General Bakeries Limited*[31] the widow of a worker electrocuted at his workplace complained that the exclusive remedy provision in the Newfoundland legislation[32] was unconstitutional because it

deprived workers and their dependents of their equality rights guaranteed in s.15 of the *Charter*. While Mrs. Piercey's claim failed for timeliness, Chief Justice Hickman was sympathetic to the argument that the substitution of a tribunal for a court was contrary to the *Charter*. He stated:

«Of all the institutions required to ensure the well- being of a democratic society, the courts alone stand free and totally independent of Parliament, the Crown and any individual or group of individuals. The courts acting through their inherent jurisdiction, strengthened by the clear intention of the framers of the Charter, stand between the would-be oppressor and the intended victim; between the Crown and the accused, between the state and the individual and between the tortfeasor and the sufferer. There is no doubt that the courts have the machinery, power and legal skills to guarantee any citizen, the rights enshrined in s.15 of the Charter. On the other hand, statutory tribunals, such as the Workers' Compensation Commission, created for the purpose of carrying out the will of the Legislature, do not have the same unimpaired independence or knowledge of the law and the skill to interpret same which the judiciary and courts have and must continue to enjoy. No substitute has been devised, to date, to replace the courts as the guardian of the liberty and freedom of all Canadians and to deprive a class of citizens of access to the courts is at variance with the intent of the Charter and in particular, s.15 thereof.»[33]

The Chief Justice of Newfoundland concluded that the s.15 violation was not saved by s.1 of the *Charter*. He cited jurisdictions, such as the United Kingdom, which had retained their right of tort action and access to the courts while still attaining the goals of worker compensation. He found that «the unreasonableness of the restrictions in that regard stands out as an intolerable blot upon the legislative landscape of a free and democratic nation»[34]. The potential implication of this decision was given nationwide coverage and sent chills through worker compensation regimes across Canada.

In the wake of this decision the Lieutenant-Governor in Council of Newfoundland referred questions relating to the constitutional validity of the statutory bar to the Newfoundland Court of Appeal. In a rare coalition, worker compensation boards from across Canada, unions and employers, were intervenors. The issue in the Court of Appeal was redefined to determine whether the removal of the right to sue would create an inequality contrary to s.15(1) of the *Charter*. The court found that the only disadvantage to injured workers and their dependents in being restricted to claims under worker compensation legislation was that there were others who would recover more as a result of a court action. This consequence to the persons deprived was held to be an acceptable limitation and not a discriminatory inequality when viewed in the context of the overall interest of the integrity of the Newfoundland Act. While there was a displacement of the right to sue, there was a corresponding replacement of «the right to compensation»

so that the discrimination was neither unreasonable nor unfair and did not offend s.15 of the *Charter*. The court went on to comment that if a compensation scheme is fair and reasonable when viewed globally then it will not offend the *Charter* even though there may be imperfections in its operation. It will be for the Supreme Court of Canada to have the last word[35].

A recent Alberta decision has gone the other way. In *Budge v. the Worker Compensation Board of Alberta*[36] the plaintiff, a cleaning supplies salesman, was injured when his vehicle was struck by a city owned «C» Train. The Alberta Workers' Compensation Board determined that he was entitled to compensation as a «worker» in «the course of his employment» pursuant to the *Alberta Workers' Compensation Act*[37]. Budge and his wife, the co-plaintiff, did not want compensation and after a long, complicated 4 year series of court challenges and new hearings they eventually commenced an action in the Court of Queen's Bench of Alberta against the train driver and the city of Calgary, arguing that the statutory bar[38] of the Alberta *Act* offended against both s.7 and s.15 of the *Charter*.

The court reviewed the scope and breadth of s.7 and concluded that it should be interpreted broadly and should be subjected to a purposive analysis. Mr. Justice Bracco declared that s.7 protects «the security of the person and the right not to be deprived thereof» and he relied on Blackstone who he quotes as writing that:

«The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.»[39]

He cited Blackstone's view that:

«a third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries»[40]

In examining the statutory bar, the court advanced two reasons for its conclusion that the Alberta Act casts too broad a net. First, the court held that Mrs. Budge was deprived of a cause of action she would otherwise have had for damages resulting in loss of consortium under the *Alberta Domestic Relations Act*[41]. For Mrs. Budge (unless her spouse died) there was no «fair exchange» principle operating to balance the loss of her right to sue. Secondly, the court concluded that s.18 of the Alberta Act which prohibited suits against «any employer» or «any worker» went far beyond what was necessary to accomplish the underlying purpose and goals of the Act[42]. While a suit against a worker's own employer might be justifiably prohibited, a blanket prohibition against suing «any» employer, however unrelated to the worker, could not be demonstrably justified in a free and democratic society. In applying the proportionality test, the court stated that the statutory bar was «an unduly broad prohibition»[43] and «a flagrant breach of the *Charter*»[44] which was both unreasonable and unfair.

THE RIGHT TO LITIGATE

Given the weaknesses and the inequities of existing worker compensation schemes should there be a right to litigate? Does the Charter protect such a right? Advocates of a right to litigate would strike down the exclusive remedy rule as unconstitutional and restore the worker's right to sue in at least some cases. Hopefully there will be little support for a measure which will dismantle or seriously weaken the worker compensation system and would, in effect, throw out the baby with the bathwater. Other than providing a bonanza for lawyers, a return to the tort system would create chaos and bring with it all the well documented problems of cost, delay, conflict, lack of access, and uncertainty which the worker compensation system does in part avoid[45].

In spite of the serious deficiencies and inequities which do exist with respect to occupational disease and which in any event would not be remedied by a return to the tort system, the worker compensation system does work remarkably well when viewed globally and in comparison with the tort system it replaces. Its record for compensating traumatic accidental injury is commendable. Across Canadian jurisdictions, the vast majority of all claims (at least for accidental injuries) are accepted and benefits are quickly paid out[46]. While dissatisfaction may exist with the amount of recovery, there is the distinct advantage of the certain and speedy benefit available under worker compensation. To undermine the entire system of worker compensation in order to recognize individual rights is to disturb the balance between individual and collective rights.

The argument in the *Piercey* and *Budge* cases that there is *Charter* based support for «a right to litigate» which can be found in section 7 is tenuous at best. While an exploration of the scope of section 7 is only just begun in the caselaw, support for the argument that every person is entitled to a day in court to redress personal injury is not found in the plain, necessary or in my view, permissible meaning of the text. An interpretation of section 7 which attempts to determine the purpose of the provision and of the constitutional text as a whole must examine the relevant policy and constitutional values that support a worker compensation system as well as those which militate against it. Such an examination of section 7 reopens the whole debate surrounding the establishment of administrative tribunals, boards and agencies. A review of this debate is beyond the scope of this paper but it should be noted that the balancing of the policy concerns to accommodate both the need for fairness to litigants and the functional needs of the administrative structures has already taken place and at great length. Even though this debate preceded the *Charter,* it would be difficult to im-

agine that the framers of the *Charter* intended that there be the potential to uproot and dismantle the entire administrative law regime. The existence of judicial review of administrative action protects the individual and provides access to the courts when there has been a failure of justice. The clear philosophy of curial deference to administrative decisionmaking which has been developed and articulated by the Supreme Court of Canada in both pre- and post- Charter cases of judicial review indicates that the Supreme Court does indeed envision the substitution of a tribunal for a court in appropriate cases[47]. The regulation of a complex, modern society would be impossible without such an administrative structure.

The view taken by the Alberta Court of Queen's Bench that the scope of the statutory bar is too broad and casts too wide a net is more supportable but even here it must be kept in mind that one of the major structural features of Canadian worker compensation regimes is the operation of the group liability model. The employers are assessed collectively and are immunized from suit collectively. The choice of this model was not accidental but was intended to promote industrial peace by deflecting conflict arising from the compensation process away from the employer-employee relationship and onto the Board[48]. This effectively limits an injured worker's claim and thereby, arguably, reduces administrative costs and simplifies compensation procedures. While cost and efficiency considerations cannot justify limiting fundamental rights they must be given some weight. Additionally, focussing a claim on a single defendant ultimately protects the worker's entitlement to compensation as it reinforces and simplifies the claim reducing problems of identifying defendants and of proving the causal connection. Epstein notes:

«Targeting the action against the employer reorients the structure of the basic action on a host of substantive issues. All the modern difficulties in establishing the identity of a supplier of a defective product or component part are gone. The questions of causal intervention and product modification, ever recurrent in modern product liability actions, are virtually eliminated by the absence of intermediate parties. Whatever the appropriate liability regime for industrial accidents, the system operates better when the proper defendant is the immediate employer and not some remote party to the case.»[49]

Given that the fundamental goal of compensation is to maximize compensation to the victim and that it is less concerned with allocating fault or individual responsibility for causing loss, then a bar to third party actions seems appropriate and necessary in order to preserve the structural integrity and the simplicity of the system.

THE SECTION 15 CHALLENGE TO THE STATUTORY BAR

Budge and *Piercey* argued that the exclusive remedy rule violates s.15 of the Charter because it differentiates between individuals who are restricted to worker compensation remedies and those who are not so restricted. Their claim is that even when the discrimination is not invidious or pejorative, the equality provision requires a universal application of law. If a differentiation of any kind is made, it must be «reasonable» and «demonstrably justified in a free and democratic society».

This view of equality is extremely narrow. The notion that all individuals or groups of individuals must be treated alike no matter what the circumstances is not the essence of equality. The application of worker compensation law does not involve any assumption about the intrinsic worth of human beings nor does it distinguish between them on illegitimate or irrational grounds. The law has no disproportionate impact on any disadvantaged group. Ronald Dworkin has made a distinction between equality as a policy and equality as a right which is relevant in this situation[50]. He argues that occasionally an individual right to equality must give way to important economic and social policies which will improve equality overall[51]. The statutory bar in worker compensation legislation operates to rationally allocate resources to the victims of workplace accident and illness, and it may be justified because it furthers a social and economic policy which will contribute to society as a whole and which will improve equality overall.

Finally, the view, implicit in the arguments of *Budge* and *Piercey,* that the amount of recovery under worker compensation is less than damage awards available in a tort action, is debatable[52]. The Newfoundland Court of Appeal made a general attempt to compare benefits under the two systems and found a number of advantages to recovery under worker compensation[53]. Ison has also compared the two systems and concluded that potential recovery will depend in each case on a number of variables; age, type of injury, earnings etc.[54] Empirical evidence comparing the benefits with tort damages would be useful in this area but at present no Canadian evidence exists to indicate that the tort system would necessarily result in much higher awards. Indeed, many claims which are successful under worker compensation law would never succeed in tort. This is especially true of occupational disease claims which are already so problematic.

In conclusion, even if a court makes the narrow interpretation that the very act of distinguishing between groups constitutes discrimination which violates s.15 of the *Charter,* such differentiation is reasonable and justifiable and within the limits of s.1. In *R.v. Oakes*[55] the Supreme Court of Canada set out a two step test for determining whether a limit is

reasonable in a free and democratic society. The first step requires the party defending the limit to demonstrate by a preponderance of probability that the limit has an objective «of sufficient importance to warrant overriding a constitutionally protected right or freedom» and its «concerns are pressing and substantial in a free and democratic society»[56]. The reasonableness of a group liability model of insurance can surely be demonstrated by the speed and fairness with which the vast bulk of claims are disbursed and by the amount of entitlement recovered. The provincial objective of providing all injured workers with compensation is based on a desire to allocate resources fairly and efficiently within an administrative system which provides for judicial review where natural and procedural justice requires it.

The second step of the *Oakes* test requires the party seeking to uphold the limit to demonstrate that the «means chosen are reasonable and demonstrably justifiable»[57]. Although the social insurance model set up in Canada is not the only means of compensating injured workers, it may well be the most effective, egalitarian and certain. Mr. Justice Hickman noted that the British system allowed workers to retain their right to sue but the British system is dissimilar to the Canadian and requires employers and employees to contribute equally to a National Insurance Fund[58]. The British system is also characterized by the reliance of workers on legal assistance and lawyers, a state of affairs that the Canadian system hoped to minimize. While no compensation system is perfect, the Canadian regimes have been held out as model jurisdictions[59] and should easily meet the means test of step two.

IS THE WORKER COMPENSATION SYSTEM FAIR?

More serious challenges to the fairness of the worker compensation system may come from two different areas of worker compensation law mentioned above; the employer's intentional misconduct and the under-compensation of occupational disease. It is with respect to these areas that the question can truly be asked as to whether the trade off agreement made by workers is still a fair one and can be demonstrably justified in a constitutional challenge.

Critics of the statutory bar have argued that its immunization from liability even for the gross negligence and the wilful, wanton and reckless misconduct of the employer is inequitable and runs counter to the stated goals of worker compensation to encourage safety and to deter workplace injuries. U.S. cases have held that the bar shields an employer who may knowingly permit dangerous working conditions to exist,[60] may knowingly

violate safety and health regulations,[61] and may knowingly withhold information or mislead workers about hazards in the workplace[62]. While there is no Canadian caselaw, it is fair to assume that Canadian employers would have similar immunity.

However, while the problem has not as yet been addressed in Canada, American courts have begun to create exceptions for intentional torts. Some state statutes have provisions allowing workers to sue in tort or to receive punitive damages in addition to receiving worker compensation benefits from employers whose wilful misconduct allegedly brought about the injuries[63]. Other states permit workers a cause of action for intentional torts in lieu of compensation[64]. Canadian workers must be satisfied with the regular entitlement even in cases where employers have deliberately suppressed information as to hazards[65].

The second challenge to fairness under the Act comes from the under compensation of occupational disease and the legislation's failure to provide a sufficient quid pro quo for the worker's agreement to relinquish common law rights[66]. The nature of occupational disease with its difficult diagnosis, long latency period, multiple etiology and difficult-to-trace link to the workplace makes it much less adaptable to compensation schemes than accidental injury. For diseased workers who lack scientific information to causally link their disease to a workplace, the exclusive remedy is no remedy at all. This glaring inequity undermines the legitimacy of the system overall and places it in danger of failing to meet the test of fairness and reasonableness set out in the Newfoundland Court of Appeal.

In an effort to address the problem of occupational disease, most Canadian jurisdictions[67] have developed presumptive schedules which relieve the worker's burden of proof by linking certain recognized industrial diseases to the occupation of the worker. The schedules, in conjunction with policy guidelines, establish a set of conditions (e.g. minimum exposure times) under which it is presumed that claimants have contracted their disease in the workplace. The effect of such schedules is to reverse the burden of proof in favour of the worker. However, even given presumptive standards workers still face an uphill task in trying to substantiate disease claims which do not fall within the policy criteria. Restrictive policy guidelines, lack of recognition of the occupational origin of diseases, minimum exposure periods and employer and Board reluctance to legally define and recognize some diseases have impeded progress in this area. Concern about the cost of a more liberal evaluation of industrial disease claims is a major obstacle. Currently there is a real employer concern that the unfunded liability of many of the worker compensation schemes is dangerously high. Employers are not eager to liberalize schedule criteria and are much

more likely to appeal and challenge new linkages. The recent establishment in Ontario of employer as well as worker advisors indicates the growing concern among employers of the rapidly increasing costs of worker compensation. As a result of the employer lobby there appears to be little political will to improve the prospects of an occupational disease claimant.

LEGISLATIVE REFORM: EXCEPTIONS TO EXCLUSIVITY

The lack of mechanisms in the worker compensation legislation to adapt and adjust the system to ease the tensions between worker compensation and the tort system may destroy the balance required to keep the system fair. Escape provisions, which build in safety valves to relieve the pressure points in the law, must be legislated. The need for safety valves becomes clear when judges cannot resist the temptation or weaken the exclusive remedy rule. What is required is legislative reform which leaves intact the structural integrity of the system but which recognizes, identifies and relieves the pressure points.

Intentional torts

Two possible legislative solutions merit consideration to protect employees from intentional torts. One approach is to expand the boundaries of the exclusive remedy rule to include penalty provisions in the worker compensation statute which will increase compensation awards for various types of employer misconduct. A definition of the degree of employer misconduct which will be necessary to constitute an intentional tort could incorporate some version of the «substantial certainty» test which is currently applied in the U.S.

A second approach would allow a tort action to be brought in certain narrowly defined circumstances. The availability of a tort action limited to a restricted range of cases where egregious employer misconduct can be proven, will assure equity in the small number of cases which currently undermine the fairness of the worker compensation system[68].

Occupational disease

The failure to properly compensate for occupational disease is a more intractable problem which cannot be addressed by the present worker compensation systems given the present state of scientific knowledge and the

current political climate. Only some form of comprehensive social insurance scheme which would compensate victims regardless of the cause of illness would adequately resolve the problem. The adoption of such a system has been proposed by some notable worker compensation experts[69] and this option is worth of careful consideration but it is beyond the scope of this paper. However, realistically, it is not likely to be implemented in the near future and in the meantime some alternative solutions must be found.

Weiler's comprehensive study of the Ontario WCB included a number of recommendations to improve the coverage and undercompensation of industrial diseases. Ontario has since implemented some of his suggestions, in a series of amendments to the Ontario Act. One new provision in the Ontario Act which should improve the success rate for disease claims is the benefit-of-the-doubt clause which resolves close cases in favour of the worker[70]. The removal of definitional limitations with the exception of the required proof that the disease results from a condition or feature of the workplace, would broaden the scope of diseases covered[71].

The creation of an independent medical panel similar to the new Ontario Industrial Disease Standards Panel which was set up to study disabling diseases and to formulate criteria may also eventually serve to expand the chances for recovery for occupational illness[72]. Such a panel would be charged with keeping up-to-date on the latest scientific information and reviewing the difficult cases which are on the borderline. Legislation should also be considered which would require certain employers to offer to their workers the opportunity to have periodic medical exams when these would be appropriate.

Finally, the MacDonald Commission Report recommends that one approach to ameliorating the undercompensation of work-related diseases would be to amend the Canada Pension Plan to substantially expand the availability of disability benefits. This would, of course, take the problem outside workers compensation and impose the cost on all citizens but until such time as a general social insurance scheme is acceptable these measures may be necessary to improve the situation and to help ward off further constitutional challenges to the exclusive remedy rule.

CONCLUSION

The constitutional challenges which have argued that there is an inherent right to seek redress for bodily injury in the courts have, by and large, been unsuccessful because the collective rights protected by the social insurance system play a role in advancing the rights of individual workers

overall. The application of the exclusive remedy rule in worker compensation law does distinguish between workers and their dependents and non-workers but does not do so on irrational or illegitimate grounds. The reasonableness of the state objective to provide all injured workers with compensation is based on the need to allocate resources fairly, efficiently and without delay.

Inequities in worker compensation do exist but they are better addressed within the system itself. The adoption of suitably confined legislative exceptions which effectively preserve the statutory bar while bringing more equity into the system is the desirable approach.

L'exclusion de la responsabilité des employeurs dans les accidents du travail

Les revendications de nature constitutionnelle ont favorisé ces derniers temps l'opposition à l'obstacle législatif qui empêche le recours aux tribunaux dans les diverses lois sur les accidents du travail au Canada. Cette barrière enlève aux travailleurs la possibilité d'intenter une action en dommages contre les employeurs, mais, en retour, leur assure une compensation rapide et sûre, et c'est là le seul moyen dont dispose le salarié qui a subi un accident du travail. Les tensions dans les régimes de réparation des accidents du travail comme les changements technologiques, l'évolution de la législation en matière de recours en dommages ou de responsabilité civile, les modifications dans la jurisprudence, de nouvelles découvertes concernant les maladies professionnelles, un raffermissement des droits des travailleurs garantis par la Charte des droits et des libertés ont donné lieu à diverses offensives pour contrer la clause protégeant les employeurs de poursuites relativement aux accidents du travail.

À l'occasion d'affaires récentes devant les tribunaux, les travailleurs victimes d'accidents ont plaidé que la clause excluant les recours civils enfreignait les articles 7 et 15 de la Charte. Ils soutiennent que, implicitement, l'article 7, qui a trait à la sécurité des personnes, leur permet d'engager des poursuites afin d'obtenir compensation pour des blessures corporelles. Ils estiment aussi que l'exclusion de la responsabilité civile des employeurs qu'on retrouve dans les lois sur les accidents du travail est discriminatoire, parce qu'elle prête à distinction entre ceux qui sont assujettis à la loi et ceux qui ne le sont pas.

Le présent article rejette l'opinion selon laquelle la clause d'exclusion des employeurs en matière de responsabilité civile n'est pas constitutionnelle. Il étudie les conséquences que pourrait entraîner son abolition et retient que cette exclusion remplace le droit de poursuivre par un droit également valide d'obtenir redressement sous un régime fondé sur des prérogatives collectives plutôt qu'individuelles. L'article affirme que la réparation assurée uniquement par la législation n'est pas discrimi-

natoire au point d'abolir la similarité des recours, mais bien que, au contraire, cette exclusion se justifie, car elle agit de façon à répartir les ressources plus rationnellement de telle sorte que des considérations à la fois sociales et économiques fort légitimes sur lesquelles reposent les compensations favorisent les travailleurs.

Enfin, l'article signale deux aspects concernant la compensation des accidents du travail qui auraient besoin d'être corrigés, en particulier l'immunité des employeurs pour préjudices volontaires et la réparation inadéquate des dommages causés par les maladies professionnelles. Parce que ces deux questions sont de nature à déconsidérer le caractère d'équité du système de réparations des accidents du travail en général, elles constituent une menace pour les dispositions qui protègent les employeurs contre les recours en matière de responsabilité civile. Aussi, doivent-elles être soumises aux règles d'équité établies par la jurisprudence. Des réformes législatives s'imposent donc pour insérer dans les diverses lois sur les accidents du travail des mécanismes susceptibles de redresser les injustices qui sont apparentes dans ces deux domaines. L'adoption de certaines mesures d'exception et différentes modifications sont, par conséquent, nécessaires sur ces deux matières, si l'on veut améliorer les régimes actuels et conserver l'exclusion de la responsabilité patronale qu'on retrouve dans la législation.

NOTES

1 For a history of workers' compensation, see National Commission on State Workmen's Compensation Laws, Compendium on Workmen's Compensation 16 (M. Rosenblum ed. 1973). For a comprehensive overview of Ontario worker compensation see R.C.B. RISK, «The Nuisance of Litigation; The Origins of Workers' Compensation in Ontario», in D. Flaherty, ed. *Essays in the History of Canadian Law,* Vol. 11, 1983, 419.

2 For a listing of the Acts and their respective dates, see T. ISON, *Workers' Compensation in Canada,* Butterworths, 1983, p. 1.

3 For a discussion of the defenses and the caselaw see DEE, MCCOMBIE and NEWHOUSE, *Worker Compensation in Ontario,* Butterworths, 1987 at 3-5. See also Eric TUCKER, «The Determination of Occupational Health and Safety Standards in Ontario 1860-1982: From the Market to Politics to...?», (1984) 29 McGill Law Rev. 261. A discussion of the defenses can be found in most tort textbooks, see for example FLEMING, *The Law of Torts,* 6th ed., 1983.

4 RISK, «The Law and the Economy in Mid-Nineteenth Century Ontario: A Perspective», 27 *U.T.L.J.* 403, 421.

5 RISK, supra note 1 at 426-430. Risk provides data for court cases in Ontario during a period from 1888-1914. In the U.S., Prosser In the Handbook of the Law of Torts at 526 (4th ed.) stated that from 70% to 94% of workers remained uncompensated.

6 ISON supra note 2, p. 19.

7 Sir William Ralph Meredith CJO Final Report on Laws Relating to the Liability of Employers to Make Compensation for their Employees for Injuries Received in the Course of their Employment, Toronto 1913.

8 In the current Canadian worker compensation regimes disfigurement and pain may be compensated in some circumstances. See, ISON, supra note 2, pp. 67-68. See also, DEE, MCCOMBIE and NEWHOUSE, supra note 3, p. 109. They describe the willingness of the Ontario Worker compensation Appeal Tribunal to compensate for chronic pain syndrome.

9 For a discussion of some of the exceptions, see ISON, supra note 2, pp. 157-158.

10 *Re Terzian and W.C.B.* (1983), O.R. (2d) 144, 148 D.L.R. (3d) 380 (Div. Ct.); *Ryan v. W.C.B.* (1984), 6 O.A.C. 33 (Div. Ct); and *Ryan V. Her Majesty,* unreported, October 29, 1986 (Ont. SC.).

11 *Piercey v. General Bakeries Ltd.* (1986), 61 Nfld. & P.E.I.R. 147, 185 A.P.R. 147, 31 D.L.R. (4th) 373 (S.C.); *Re ss. 32 and 34 of the Workers' Compensation Act* 1983, c. 48, Newfoundland Court of Appeal, October 23, 1987, Goodridge, C.J.N., Morgan, Gushue, Mahoney and O'Neill, JJ.A (unreported) (1986 No. 209).

12 *Budge v. W.C.B.,* 34 Alta. L.R. (2d) 97 [1985] 1 W.W.R. 437, 12 C.C.R. 375 (Q.B.); revd 42 Alta. L.R. (2d) 26, [1987] I W.W.R. 83 (C.A.); unreported.

13 Whether or not the perception is accurate is controversial. In the U.S. one study suggests that at least for asbestos injuries workers are better off suing in tort, see JOHNSON and HELLER, «Compensation for Death from Asbestos», (1984) 37 *Industrial and Labour Relations Rev.,* p. 529. But two empirical studies carried out in Great Britain came to the opposite conclusion, see *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury,* 1978, [the Pearson Report]; and MACLEAN, GENN, LLOYD-BOSTOCK, PENN, CORFIELD and BRITTAN, *Compensation and Support For Illness and Injury,* Oxford, 1984.

14 For a discussion of the changes in tort law see PAGE, «The Exclusivity of the Workmen's Compensation Remedy: The Employee's Right to Sue His Employer in Tort», 2 B.C. Indus. and Com. L. Rev. 555,557 no. 12, 1963; Comment, «The Exclusive Remedy Provision of Michigan's Worker Disability Compensation Act» 63 Univ. of Detroit Law Review, 453, p. 455, 1986; KUTCHINS, «The Most Exclusive Remedy is No Remedy At All: Workers' Compensation Coverage for Occupational Disease», 32 Lab. L.J./ 212, 1981: Note, «Workers' Compensation Expanding the Intentional Tort Exception to Include Wilful, Wanton and Reckless Employer Misconducts», 58 Notre Dame Law Rev., 890, pp. 906-907.

15 About 1/2 of all product liability suits in the U.S. are based on work-related injuries. 3 Interagency Task Force on Product Liability, *Product Liability: Final Report of the Legal Study,* 78-79, (1977).

16 Page supra note 14, p. 455.

17 The provincial Occupational Health and Safety Acts all prohibit employer reprisals against workers who exercise their rights under the Acts; BROWN, «Canadian Occupational Health and Safety Legislation», (1982) 20 Osgoode Hall Law J.90.

18 This doctrine allows an employee to sue an employer if the employer acts in some capacity in addition to the employer-employee relationship such as manufacturer or distributor of a defective product, provider of medical services, vendor or owner of real estate. See generally, Note, «Workers' Compensation: The Dual Capacity Doctrine», 6 Wm. Mitchell L. Rev., 813 (1980); Comment, «The Dual Capacity Doctrine: Piercing the Exclusive Remedy of Worker Compensation», 43 U. Pitt. L. Rev. 1013, (1982).

19 See generally, MARKS, «Status of the Exclusive Workers' Compensation Remedy: Actions by Employees Against Coemployees, Employers and Carriers», Tort and Ins. Law J1. 612.

20 For a general discussion of these exceptions see Note, «Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes», 96 Harv. Law Rev., 1641 (1983).

21 See generally WEISGALL, «Product Liability in the Workplace: The Effect of Workers' Compensation on the Rights of liabilities of Third Parties, 1977 Wis L Rev., 1035, and see, Olson, Johns-Manville Products Corp. v. Superior Court: The Not So Exclusive Remedy Rule», 33 Hasting L.J. 263.

22 See E.G. Wadev. Johnson Controls, Inc. 693 F.2d. 19 (1982); Boek V. Wong Hing, 180 Minn. 470, 231 N.W. 233 (1930); Mandolidis v. Elkins Indus. 246 S.E. 2d 907 (W> Va.1978); Blankenship v, Cincinnati Milicron Chems., Inc. 69 Ohio St. 2d 608, 433 N.E. 2d 572 (1982).

23 See The report of the National Commission on State Workmen's Compensation Laws, G.P.O. Document No. 477-053, July 1972, p. 13.

24 See generally, LOCKE, «Adapting Worker Compensation to the Special Problems of Occupational Disease», 9 Harv. Envtl Law rev., 249, (1985).

25 N. ASHFORD, *Crisis in the Workplace,* Boston MIT Press, 1976, pp. 84-92. For a general discussion see E. SCHROEDER, and S. SHAPIRO, «Responses to Occupational Disease: The Role of Markets, Regulation and Information», 72 Georgetown Law Review 1231, pp. 1231-1237.

26 P. WEILER, *Protecting the Worker from Disability: Challenges for the Eighties,* Ontario Government Report, Toronto, Queen's Printer, 1983. Weiler reviewed several studies which attempted to estimate the number of cancer deaths attribuable to the workplace and converted them to Ontario cancer figures for 1980. Even using the most conservative estimates Weiler predicted that toxic exposures in Ontario produced approximately 700 cancer fatalities per year. The Ontario WCB compensated only 64 in 1980. Ashford, supra note 29, p. 11, cites similar examples of undercompensation in the U.S. A Niosh study found the probable incidence of occupational disease was 28.4 cases per 100 workers whereas only a 3% incidence rate was found in worker compensation records. See also, Note, «Compensating Victims of Occupational Disease», 93 Harv. L. Rev., 916, (1980), (compensation is provided annually to approximately 30,000 occupational disease claims, less than 1/3 of the estimated number of fatalities and only 1/13 of the number of occupational illnesses); and see, U.S. Dept. of Labor, *An Interim Report to Congress on Occupational Disease* (1980), pp. 60-61, table 11-4 (5% of severely disabled occupational disease victims are awarded workers' compensation).

27 For a general discussion of this point see REUTTER, «Workmen's Compensation Doesn't Work or Compensate», Business and Society Rev., Fall (1980); SOLOMONS, «Workers' Compensation for Occupational Disease Victims: Federal Standards and Threshold Problems», 41 Albany Law Rev., 195; LARSON, «Occupational Diseases under Workmen's Compensation Laws», 9 Richmond Law Rev., 87; GOSNEY, «Whatever Happened to Brown Lung? Compensation for Difficult to Diagnose Occupational Diseases», 3:1 Ind. Rel. Law J., 102.

28 42 O.R. (2d) 144.

29 (1984) 6 O.A.C. 33.

30 When *Terzian* and *Ryan* were heard s.15 of the *Charter* had not yet come into law. Currently *Medwid v. The Queen in Right of Ontario* is before the courts and the plaintiff Medwid is renewing the arguments of *Ryan* and *Terzian* that the two schedules set out in the Act have a discriminatory impact on employees of Schedule 1 employers. In an unreported motion decision of Mr. J. Montgomery, he denies the existence of a constitutionally protected right to bring a tort action for redress of a personal injury. He concludes that the establishment of two schedules does not constitute discrimination contrary to s.15 of the *Charter.*

31 (1987) 6 O.A.C. 33.

32 S.32 and s.34 *Workers' Compensation Act,* 1983 (Nfld) c.48.

33 *Id.*, p. 384.

34 *Id.*

35 The plaintiffs in the action have filed an appeal from the reference to the Supreme Court of Canada.

36 The Public Trustee for the Province of Alberta (Budge) v. W.C.B. Alta Q.B. Aug. 14, 1987, Bracco J. (unreported).

37 R.S. A. 1981 c. W-16 As Amended.

38 Section 18 R.S.A. 1981.

39 *Supra*, note 36, p. 28.

40 *Id.*

41 R.S.A. 1980, c. W-15.

42 The American counterpart to the Budge case is *Ferritero, Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 413 N.E. 2d 690 (1980) (wife's suit against husband's employer for negligence causing loss of consortium outside exclusivity clause).

43 *Supra*, note 36, p. 39.

44 *Id.*, p. 40.

45 According to the *National Commission on State Workmen's Compensation Laws Report*, 25, (1972):
«We have discussed the implications of abolishing workmen's compensation and reverting to...negligence suits, a remedy abandoned some 50 years ago. This option is still inferior to workmen's compensation ...{Tort liability suits} are a drawn out, costly, and uncertain process that was dismissed long ago as a means of dealing with occupational injuries and diseases.»

46 WEILER, *supra* note 26. Weiler notes that in Ontario the WCB rejects only 1% to 2% of all accident claims on the merits, and benefits are paid on average approximately ten days after the claim is accepted.

47 C.U.P.E., Loc. 963 v. New Brunswick Liquor Corp. [1979] 2 S.C.R. 227; I.B.T. Loc. 938 v. Massicotte [1982] 1 S.C.R. 710.

48 RISK, *supra* note 1, p. 459.

49 R. EPSTEIN, «The Historical Origins and Economic Structure of Workers' Compensation Law», 16 Ga. Law Rev., 775, 1982, pp. 806-808; and see CALABRESI, A Common Law for the Age of Statutes 198 no. 16, 1982 [Calabresi concludes that updating workers' compensation laws is preferable to product liability suits against manufacturers].

50 R. DWORKIN, *Taking Rights Seriously*, London, Duckworth, 1977, p. 226.

51 *Ibid.*, 227.

52 See *infra* note 13.

53 *Supra* note 11, pp. 18-19. Mr. Justice Goodridge enumerates the following advantages: medical aid benefits are greater under the Act since they include future expenses unforseen at the time of the tort action; compensation for lost wages is superior under the statute; part of increased living expenses can be recovered as medical expenses; and survivors' benefits are probably greater under the Act.

54 ISON, *supra* note 2, p. 105. Ison cites an example. A young worker whose injury results in a high degree of social handicap but little work- related physical impairment would receive more in damages than in compensation benefits. An older worker, entitled to a pension, who suffers physical injury would receive more from the compensation system.

55 (1986), 26 D.L.R. (4th) 200, 53 O.R. (2d) 719, 24 C.C.C. (3d) 321.

56 *Id.*, p. 227.

57 *Id.*

58 *Social Security and Housing Benefits Act*, 1982, Part 11, Chapter IV, ss.50-75.

59 See WEILER, *supra*, note 26.

60 See e.g. *Penton v. Southern Shipbldg.*, 667 F. 2d 500 (5th Cir. 1982); *Houston v. Bechtel Assocs.*, 522 F. Supp. 1094 (D.D.C. 1981); *Provo v. Bunker Hill Co.*, 393 F. Supp. 778 (Idaho 1975); *Kerrigan v. Firestone Tire & Rubber Co.*, N.W. 2d 578 (Iowa 1973).

61 See e.g. *Shearer v. Homestake Mining Co.*, 557 f. Supp. 549 (D.S.D. 1983); *Brown v. R.S. & Sons Painting*, 680 F2d 1111 (5th Cir. 1982); *Cortez v. Hooker Chem. & Plastics Corp.* 402 So. 2d 249 (La.Ct. App., 1981); *Evans v. Allentown Portland Cement Co.*, 252 A. 2d 646 (Pa. 1969).

62 See e.g. *Austin v. Johns-Manville Sales,* 508 f. Supp 313 (D. Me. 1981); *Williams v. International Paper Co.,* 129 Cal. App. 3d 810, (1982).

63 See 1A Larson, *The Law of Workmen's Compensation;* 2.10 (1982). For states allowing damage suits in addition to worker compensation benefits see e.g. *Cal. Lab. Code* } 3602 (West Supp. 1985); *Or. Rev. Stat.* } 656.156 (Supp. 1983); *Wash Rev. Code Ann.* } 51.24.020 (Supp. 1985); *W. Va. Code* } 23-4-2(b) (Supp.)

64 See e.g. *Ariz. Rev. Stat.* } 23-1022 (Supp. 1984); *Idaho Code* } 72-209 (1973); *Ky. Rev. Stat.* } 342.610(4) (1983); *La. Rev. Stat. Ann.* } 23.1032 (West Supp. 1985); *Md. Ann. Code* art. 101, } 44 (1979); *N.J. Stat. Ann.* } 34:15-8 (West Supp. 1985); *S.D. Codified Laws Ann.* } 62-3-2 (1978).

65 The employer would however be subject to prosecution under the provincial Occupational Health and Safety Statutes.

66 Early American constitutional challenges to worker compensation suggest this possibility. See e.g. *New York Cent. R.R. v. White* 243 U.S. 188 204-05 (1917).

67 See, ISON, *supra,* note 2, pp. 32, 33.

68 A novel approach, which has been advocated occasionally in the U.S., suggests amending the Occupational Safety and Health Act to provide employees and their dependents the right to sue their employer for damages, if they are killed or permanently disabled due to the wilful, intentional or grossly negligent conduct of their employer. The provision would expressly prevail over any state worker compensation statute. See for a discussion of this remedy, Amchan, «Callous Disregard» for Employee Safe by: The Exclusivity of Workers' Compensation Remedy Against Employers», 34, Lab. L.J. 685.

69 Both Terry Ison and Paul Weiler recommend such a plan.

70 Section 3(4) states;

«In determining any claim under this Act, the decision shall be made in accordance with the real merits and justice of the case and where it is not practicable to determine an issue because the evidence for or against the issue is approximately equal in weight, the issue shall be resolved in favour of the claimant.»

In a precedent setting Windsor case, the widow of a pharmaceutical worker who died of brain cancer won compensation when the Ontario Board applied the benefit of the doubt clause to her claim that the cancer was linked to exposure to formaldehyde.

71 At present, for example, in some jurisdictions, if a disease is not mentioned in the schedule, it must be one that is «peculiar to or characteristic of a particular industrial process, trade or occupation in order to be recognized.

72 A 1972 government report on compensation in the U.S. suggested the establishment of a scientific advisory system composed of a panel of scientists who would keep up to date with the latest research in the area, supra, note 23. See also, HANSEN, «Scientific Decision-making in Workers' Compensation: A Long Overdue Reform», 59 Southern California Law Rev., (May 86).