

# Can Workers' Compensation "Work" in a Mega-Risk World?: The COVID-19 Experiment

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To understand why workers' compensation has been difficult to apply during the Covid-19 period, some historical background is useful. Europe implemented workers' compensation beginning during the last quarter of the nineteenth century because the tort system of that time proved inadequate to remedy workers' injuries in the course of an injury onslaught occasioned by intensifying industrialism.<sup>1</sup> In short, workplace injury risks—even risks that were clearly the product of negligence—became too great for employees to bear;<sup>2</sup> the tort system, one way or another,<sup>3</sup> had to change. In the United States, policy makers, somewhat differently than in Europe, conceptualized workers' compensation as an exchange of rights in which employees and employers relinquished negligence rights in exchange for statutory rights to benefits and damages limitations.<sup>4</sup> Under this exchange, employees became entitled to a substantial portion of the wages that

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1. JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 22 (2004).

2. Negligence claims became extremely difficult to prove both prima facie and in overcoming the "unholy trinity" of negligence affirmative defenses: assumption of the risk, contributory negligence, and the fellow-servant rule. See HERMAN MILES SOMERS & ANNE RAMSAY SOMERS, *WORKMEN'S COMPENSATION* 18 (1954).

3. British unions were the driving force behind implementation of a "liability statute" in the United Kingdom in 1880. Liability statutes strip defendants of certain affirmative defenses and strengthen the legal position of plaintiffs (including workers). See DAVID G. HANES, *THE FIRST BRITISH WORKMEN'S COMPENSATION ACT* 19 (1968). The United States Congress successfully enacted a federal liability statute applicable to railroad employees in 1908. For a brief history of the statute, the Federal Employers' Liability Act, see John Fabian Witt, *Federal Employers' Liability Act (1908)*, ENCYCLOPEDIA.COM (updated Oct. 7, 2020), <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/federal-employers-liability-act-1908>. The Germans, through the efforts of the former Prussian chancellor Otto von Bismarck, enacted workers' compensation in 1884 as part of a broader system of social insurance. For a description of the statute, see BUREAU OF LAB. STATISTICS, U.S. DEP'T OF LAB., *BULLETIN* No. 203, *WORKMEN'S COMPENSATION LAWS OF THE UNITED STATES AND FOREIGN COUNTRIES* 316 (1917), <https://babel.hathitrust.org/cgi/pt?id=uc1.c004937481&view=1up&seq=326>. The comprehensive German efforts at creation of workers' compensation structures throughout the mid-nineteenth century probably earn the Germans the title of "creators" of modern workers' compensation. Michael L. Perlin, *The German and British Roots of American Workers' Compensation Systems: When Is an Intentional Act Intentional?*, 15 *SETON HALL L. REV.* 849, 853–57 (1985).

4. *N.Y. Cent. Ry. Co. v. White*, 243 U.S. 188, 203–04 (1917) (discussing the exchange of rights); *Mountain Timber Co. v. Washington*, 243 U.S. 219, 236 (1917) (same).

they had been earning at the time of their injuries and also to payment of medical benefits related to those injuries, without regard to employer or employee fault.<sup>5</sup> Employers in turn were immunized from crippling negligence damages and were required to pay the equivalent of insurance premiums.<sup>6</sup>

The United Kingdom's earliest workers' compensation statutes, upon which American laws were primarily patterned, made participation by stakeholders substantially elective: employees could choose whether they wished to pursue their employers through administrative workers' compensation claims or in negligence lawsuits.<sup>7</sup> The earliest American statutes, Wisconsin's of 1911 for example, similarly made workers' compensation "elective," though, in what was to become a common legislative policy for encouraging participation, employers choosing not to participate in workers' compensation were deprived of affirmative defenses under negligence law.<sup>8</sup> Eventually, American workers' compensation became almost entirely compulsory,<sup>9</sup> and, given state-enforced mandatory participation, courts began vigorously applying the exclusive remedy rule as upholding the employees' part (limited benefits) in a bargain.<sup>10</sup> Workers' compensation "exclusivity" means that an employee can neither sue his or her employer in negligence,<sup>11</sup> nor can the employee's family sue the employer in wrongful death,<sup>12</sup> for wrongful Covid-19 exposure. But more concretely it means that injured employees and the families of employees killed by wrongful exposure to Covid-19 are limited to meagre statutory benefits<sup>13</sup> in

5. SOMERS & SOMERS, *supra* note 2, at 59-92.

6. Though this exchange in modern times is called the "Grand Bargain," the origins of that terms are obscure, and it appears not to have been used broadly before the year 2000. Emily A. Spieler, *(Re)Assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017*, 69 RUTGERS U. L. REV. 891, 893 n.4 (2017).

7. Workmen's Compensation Act 1897, 60 & 61 Vict. c.37, cl. 1(2)(b). For the parallel development in the United States see Spieler, *supra* note 6, at 906.

8. See *supra* note 2; see also Robert Asher, *The 1911 Wisconsin Workmen's Compensation Law: A Study in Conservative Labor Reform*, 57 WIS. MAG. HIST. 123, 136-37 (1974).

9. All states but Texas and Wyoming now have compulsory systems. ELAINE WEISS, GRIFFIN MURPHY & LESLIE I. BODEN, NAT'L ACAD. OF SOC. INS., WORKERS' COMPENSATION: BENEFITS, COSTS, AND COVERAGE (2017 DATA) 6 (2019), [https://www.nasi.org/sites/default/files/nasiRptWkrsComp201710\\_31%20final\(1\).pdf](https://www.nasi.org/sites/default/files/nasiRptWkrsComp201710_31%20final(1).pdf).

10. LEX K. LARSON & THOMAS A. ROBINSON, LARSON'S WORKERS' COMPENSATION LAW § 100.01 (2020) [hereinafter LARSON'S WORKERS' COMPENSATION LAW] (discussing exclusivity doctrine).

11. *Id.*

12. See, e.g., *Karhoff v. Nat'l Mills*, 851 P.2d 1021, 1023 (Kan. App. 1993) ("[W]hen an employee's injury results in death, the remedies available under the Act are the exclusive remedies available as against the employer or co-employees, and those remedies are available only to an employee's spouse, children, and dependents.").

13. Totally disabled employees receive roughly two-thirds of preinjury wages capped at a state's average weekly wage. Partially disabled employees receive less depending on the severity of a disability and on a state's method of benefit calculation. LARSON'S WORKERS' COMPENSATION LAW, *supra* note 10, § 80.05. Increasingly under the current system, indemnity benefits expire before the disability has ended. Emily A. Spieler & John F. Burton Jr., *The Lack of Correspondence Between Work-Related Disability and Receipt of*

lieu of negligence damages. The rhetorical response to this limitation is that it is all part of the "Grand Bargain." But bargaining theory is problematic as a description of what actually happened in the development of workers' compensation<sup>14</sup> and leads some to the questionable proposition that workers' compensation was "meant" to function like a kind of collective bargaining agreement with a zipper clause.<sup>15</sup> No "reopeners" are thought to be allowed for changed circumstances.

Claims-extinguishing exclusivity<sup>16</sup> is not the only structural legal problem that workers' compensation brings to the Covid-19 table. Because workers' compensation was originally a nineteenth-century construct, it was designed with an eye to nineteenth-century "traumatic" industrial accidents clearly caused by work: everyone understands that an on-the-job blow to the head is caused by work. But what about disease? Was coverage of disease part of the original bargain? And even if it was, how could employees prove that a disease was caused by work? Pinning down whether work causes a disease has been elusive throughout the history of workers' compensation.<sup>17</sup> Certain workplaces, over time, have become so empirically associated with specific diseases that those diseases may earn categorization as presumptively "occupational" and therefore covered by workers' compensation. In these contexts, given the evidently close relationship between a disease and an occupation, the transaction costs for individual causation determinations may be difficult to justify.<sup>18</sup> "Black lung,"

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*Workers' Compensation Benefits*, 55 AM. J. INDUS. MED. 487 (2012), <https://onlinelibrary.wiley.com/doi/epdf/10.1002/ajim.21034>. Eligible family members usually receive burial expenses and a portion of the indemnity benefits that a deceased employee would have received had the employee survived. LARSON'S WORKERS' COMPENSATION LAW, *supra* note 10, §§ 98.02, 98.07.

14. See WITT, *supra* note 1, at 128–29 (pointing out the inconsistency of a binding "bargaining" theory with early statutes making workers' compensation elective).

15. A zipper clause may be defined as "the labor relations equivalent of an 'entire agreement' or 'integration' clause used in commercial contracts . . . [and] . . . closes collective bargaining about any mandatory subject during the CBA's duration and makes the written CBA the exclusive statement of the parties' rights and obligations." *Collective Bargaining Agreement: Zipper Clause (Complete Agreement Clause)*, THOMAS-REUTERS PRACTICAL LAW LABOR & EMPLOYMENT (2020) (resource ID 4-520-9337).

16. In addition to preempting the negligence claims of employees and the wrongful death claims of certain surviving family members, workers' compensation exclusivity may eclipse employee-filed public nuisance suits that have been brought recently around the country. A handful of cases on the interaction of workers' compensation exclusivity and public nuisance exist; exclusivity appears to have prevailed in each of them. See *Acevedo v. Consol. Edison Co.*, 189 A.D.2d 497, 500–01 (N.Y. 1993); *Bowden v. Young*, 120 So. 3d 971 (Miss. 2013); *Cunningham v. Anchor Hocking Corp.*, 558 So. 2d 93 (Fla. 1990); *Rodgers v. GCA Servs. Grp.*, No. W2012-01173-COA-R3-CV, 2013 Tenn. App. LEXIS 99 (Tenn. Ct. App. Feb. 13, 2013); *Wilburn v. Boeing Airplane Co.*, 366 P.2d 246, 254 (Kan. 1961).

17. In apparent response to such elusiveness, the prototypical British Workmen's Compensation Act 1906 set up a list of diseases presumed as a matter of law to be caused by certain work functions. Workmen's Compensation Act 1906, 6 Edw. 7 c. 58, 3d sched. (Eng.), [https://iiif.lib.harvard.edu/manifests/view/drs:6093232\\$11i](https://iiif.lib.harvard.edu/manifests/view/drs:6093232$11i).

18. See David Hamer, *Presumptions, Standards and Burdens: Managing the Cost of Error*, 13 L. PROBABILITY & RISK 221, 225 (2014), <https://academic.oup.com/lpr/article/13/3-4/221/960545>.

for example, is so closely associated with coal mines that to the average observer it makes little sense to go forward with traditional causation determinations under conventional standards of proof, even if other factors may also have contributed to the disease's development.<sup>19</sup> Even the earliest workers' compensation statutes set up occupational disease presumptions.<sup>20</sup> Of course, not all diseases possess such clear relationships to specific kinds of work that they may presumptively be designated "occupational." Furthermore, some states originally declined to cover occupational diseases because of proof problems and because of the notion of the hypothetical workers' compensation "zipper clause."<sup>21</sup> It has additionally been understood that the full costs of occupational disease is not absorbed by workers' compensation even where it is covered.<sup>22</sup> To make matters more confusing, states may designate infectious diseases routinely contracted by members of the general public as categorically *not* occupational, excluding them altogether from workers' compensation coverage as "ordinary diseases of life," not "incident to employment."<sup>23</sup> Lost wages and medical expenses in such cases would be borne entirely by employees.

Into this disorganized mess of disease causation law waded Covid-19, which resembles both occupational diseases, covered by workers' compensation as an "incident of employment" (think of what has been happening in meatpacking plants and nursing homes), and an infectious "disease of life" to which the general public is equally exposed.<sup>24</sup>

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19. For an explanation of existing black-lung disease presumptions under federal law, see SCOTT D. SZYMENDERA & MOLLY F. SHERLOCK, CONG. RES. SERV., THE BLACK LUNG PROGRAM, THE BLACK LUNG DISABILITY TRUST FUND, AND THE EXCISE TAX ON COAL: BACKGROUND AND POLICY OPTIONS (2019), <https://crsreports.congress.gov/product/pdf/R/R45261>.

20. See *supra* note 17. "An evidentiary presumption is an inference that the law requires the trier of fact to draw, if it finds the existence of a 'predicate fact,' unless the presumption is rebutted." Keith B. Hall, *Practitioners' Notes: Evidentiary Presumptions*, 72 TUL. L. REV. 1321, 1321 (1998).

21. See *supra* note 15. For a discussion of eventual occupational disease coverage in the United States see SOMERS & SOMERS, *supra* note 2, at 49–53. Although the British Act of 1906, upon which the workers' compensation laws of many states were patterned, covered occupational diseases, a substantial complement of states limited workers' compensation coverage to "injuries [occurring] by accident." LARSON'S WORKERS' COMPENSATION LAW, *supra* note 10, § 100.01 Because development of diseases usually occur over time, they are difficult to describe as accidents. Nevertheless, all states eventually covered occupational diseases, either through their workers' compensation laws or through separate occupational disease statutes.

22. See generally J. Paul Leigh & John A. Robbins, *Occupational Disease and Workers' Compensation: Coverage, Costs, and Consequences*, 82 MILLBANK Q. 689 (2004) (estimating that workers' compensation "misses from 91.1 percent to 99.9 percent of deaths and from 80.0 percent to 93.8 percent of medical costs").

23. See, e.g., *Sturgess v. OA Logistics Servs.*, 784 S.E.2d 432, 436 (Ga. Ct. App. 2016) ("The accident must be one resulting from a risk reasonably incident to the employment.").

24. Some infectious diseases are covered under workers' compensation because they originated with a traumatic work-related injury or are clearly an incident of employment. LARSON'S WORKERS' COMPENSATION LAW, *supra* note 10, § 51.04.

The Covid-19 experiment has essentially forced states to take a position on whether workers' compensation is like a collective bargaining agreement with a zipper clause. Maybe the mega-risks presented by Covid-19 are simply outside of the Grand Bargain.<sup>25</sup> Under that view, a new hybrid remedial structure may be required in which causation plays a limited role or no role at all—something like Social Security Disability for shorter-term work incapacity.<sup>26</sup> Alternatively, some states have "reopened" the workers' compensation agreement (not presuming a zipper clause), creating COVID-19 workers' compensation presumptions that are structured similarly to occupational disease presumptions, making it much easier for "essential workers"<sup>27</sup> to prove causation in workers' compensation claims.<sup>28</sup> In general, if employees fall into an essential worker classification and are reliably diagnosed as having contracted COVID-19, the burden of proof on causation shifts from the employee to the employer (or insurance carrier) to prove "non-causation."

The Covid-19 experiment reveals that state workers' compensation systems may be poor remedial vehicles for large-scale mega-risks to which employees and the general public are equally exposed. Future pandemics and climate-change events may generate similar problems. Furthermore, if workers' compensation does not cover Covid-19, employees living in states that have enacted Covid-19 civil immunity provisions<sup>29</sup> face a rather dramatic dual-denial problem.<sup>30</sup> Wrongful exposure to Covid-19 will not be "actionable" under either workers' compensation or negligence. The same will also be true for gig workers deemed not employees and therefore not eligible for workers' compensation. The constitutional problem is palpable.

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25. See *supra* note 6.

26. Under social security disability law, a totally disabling impairment preventing an individual from engaging "gainful activity" must be expected to result in death or must have lasted (or be expected to last) for at least twelve continuous months from the date of onset. See SSR 83-52 (1983), [https://www.ssa.gov/OP\\_Home/rulings/di/01/SSR82-52-di-01.html#:~:text=Since%20the%20Social%20Security%20Amendments,%2C%20from%20January%2017%2C%201981%2C](https://www.ssa.gov/OP_Home/rulings/di/01/SSR82-52-di-01.html#:~:text=Since%20the%20Social%20Security%20Amendments,%2C%20from%20January%2017%2C%201981%2C).

27. Just who qualifies as an essential worker can be a matter of some contention. The presumptions apply in all cases to "first responders." See *infra* note 28.

28. See MINN. STAT. § 176.011(15)(f) (2019); S.B. 2380, 2020-2021 Leg., Reg. Sess. (N.J.) (enacted Sept. 14, 2020); CAL. LAB. CODE §§ 3212.87, 3212.88 (effective Sept. 17, 2020).

29. North Carolina, Ohio, Oklahoma, Utah, Wyoming, Louisiana, and Kansas have adopted state legislation providing businesses civil-liability immunity for negligence if customers and employees contract COVID-19 at their premises. See Thomas F. Morante & Yani R. Contreras, *Liability Immunity Laws for Businesses May Impact Insurance Industry*, BUS. L. TODAY (June 23, 2020), [https://www.americanbar.org/groups/business\\_law/publications/blt/2020/07/liability-immunity-laws](https://www.americanbar.org/groups/business_law/publications/blt/2020/07/liability-immunity-laws).

30. See Spieler & Burton *supra* note 13, at 495-503.