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OCCUPATIONAL DISEASE AS A DRIVING FORCE IN THE MOVEMENT FOR PUBLIC HEALTH AND WELFARE

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I was delighted to receive Jay's invitation to comment. Not only did I graduate from Rutgers Law School but a few years ago Fordham's Urban Law Journal published my history of the school: People's Electric - Engaged Legal Education at Rutgers Newark in the '60's and 70's. This symposium demonstrates that engagement with the lives of citizens remains alive here. And I am delighted to see that Northeastern is a co-sponsor. Northeastern has continued in the People's Electric tradition of service. Richard Daynard - Tobacco Product liability project and Wendy Parmet are two leading writers about public health. And now we have Emily Spieler's carefully researched paper.

And of course thanks to Bob Rabin - the dean of torts teachers whose casebook I have used since 2002; and my friend Adam Scales for his challenging paper.

FROM MASS PRODUCTION TO ATOMIZATION AND DIGITALIZATION

Workers compensation laws arose in the era of mass industrial production. They were an important progressive measure to protect workers from illness and impoverishment. The common industrial working conditions of workers led them and their organizations - trade unions - to advocate the expansion of workers compensation systems so as to benefit members and non-members. The labor movement and its Progressive allies sought to provide health insurance and other workers compensation benefits to even the lowliest employee in a non-union shop.

Workers compensation laws turned nearly all contracts of employment at will into contracts of adhesion - for the worker's benefit. This was a dramatic transformation. It is no wonder that business attacked it as an abrogation of freedom of contract.

The universality of workers compensation is a dramatic example of a value that is daily undercut via today's click bait contracts and the illusory autonomy of networked employees like the Uber drivers who have been declared independent contractors. Thanks to the United States Supreme Court's embrace of a dessicated, shriveled freedom of contract Uber drivers, like consumers, are relegated as grievants to claimant under a system that imposes private arbitration, blocking resort to the courts as a public forum for redress of grievances.

Today the strength of the workers compensation laws is under attack. Though it is unfashionable to say so the class struggle continues, much complicated by the change in technology. We are moving from a mass production factory model to a network-dominated and atomized workforce which many confuse with freedom or autonomy.

Our objective should be to preserve and expand the universalizing principles pioneered by workers compensation laws in the network era. And we should find a way to achieve the goals outlined in the 1972 report mandated by OSHA (§27 (d)(1) the Report of the National Commission on State Workers Compensation Laws. (Spieler). Expansion includes the mandatory extension of coverage to the millions of home workers and the drivers and laborers unreasonably classified as

independent contractors.

We need to establish that like employers in the 8 hour day era the owners and controllers of today's network businesses (think Uber, AirBNB, RE-Max,Google, etc.) should be compelled to take on the kinds of responsibilities that were thrust upon direct employers 100 year ago. Doctrinal tools like the relative nature of the work test, independent contractors, overtime, and minimum wage need to be tweaked to accomplish for today's "free lancers" and "part-timers" the kind of universal coverage that the progressive era reforms provided for the great majority of workers - even those in small businesses.

As Emily recounts, the basic structure of the workers compensation bargain has been detailed by the premier historian John Witt, and is treated as fact by Arthur Larson's treatise Workers Compensation Law.[§1.01-1.03] In my view the compromise has been undervalued in the discussion today. The doctrines of contributory negligence, the fellow servant rule, and assumption of risk were indeed (in the main) abolished in the 1911-1925 period when most states adopted workers compensation laws as an exclusive remedy. But the workers got the better end of the bargain because even a tort system without the unholy trinity of defenses was an unreliable road to what ill and injured workers needed most: medical care. The bargain was a larger labor victory than is often recognized.

For example the FELA tort action was enacted in 1906. Although the act

abolished the common law defenses (contrib, fellow servant, assumption of risk) and adopted pure comparative fault it preserved the need to prove negligence by the employer "in whatever degree". Medical and wage replacement benefits did not flow routinely. Such needs were the subject of collective bargaining with the railroad workers unions. The workers compensation laws wisely avoided the FELA model which if universally embraced would nonetheless be both inefficient, uncertain, and incomplete.

The structure adopted in the Progressive era 1910 - 1925 persists: Workers compensation laws provide universal coverage for all workers in an enterprise who suffer injury or illness associated with their work - "arising out of and in the course of" their employment. [1.01] The coverage includes medical care, wage loss replacement, partial and total disability and death benefits. Workers pay no premiums and there are no co-pays or deductibles. Benefits are not reduced or defeated by a worker's own negligence. When the fact of injury "arising" from the work is apparent medical care and temporary disability benefits are generally uncontested and flow quickly to the injured worker. Workers compensation provides that. Lump sum cash tort awards do not.

A compensation claiming worker need prove only the fact of employment and a work connection to the illness or injury. Coverage extends to the great bulk of workers - regardless of rank, gender, race, or union membership. This universality: that a worker injured or sickened on the job is entitled to benefits regardless of fault is the first such coverage for all benefit adopted in our history.

It was followed by Social Security - which provided not only old age benefits but was later extended to include benefits for the disabled.[1]

The movement to workers compensation was among the first in a series of laws - many at the state level - that accomplished important objectives protecting workers health and safety. The Progressive era also spawned child labor laws like the one famously struck down in Lochner v. New York. In the depression era profound changes in the labor market were adopted. Chief among these were the National Labor Relations Act (NLRA) (collective bargaining agreements), and the Fair Labr Standards Act (FLSA) which brought us the eight hour day and entitlement to overtime pay. Thirty years later after another mass movement protection was extended via Title VII (face and gender discrimination), BLBA, OSHA/NIOSH, Right to know TSCA , Mine Safety Act of 1977 (Workplace safety), ADEA, ADA

Of course the struggle continues. Employers have long sought to reduce their costs - often to workers detriment - and workers have sought to protect and expand their benefits. I will discuss shortly the occupational disease struggles that were fought to expand the scope of protection. But for the moment I note that the direct tort

[1] Social Security Act (1935) An act to provide for the general welfare by establishing a system of Federal old-age benefits, and by enabling the several States to make more adequate provision for aged persons, blind persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws; to establish a Social Security Board; to raise revenue; and for other purposes.

action was preserved - as was a narrow category of intentional injury cases [Borel v. Fibreboard, Laidlaw, Larson]. And the third party action - particularly for product liability - supplemented workers com benefits and invigorated tort law.

Silicosis: The struggle for recognition of occupational disease

I want to spend some time discussing this because it has gotten little attention today and because it is a struggle that was hard fought and ultimately successful in many respects. Because of my experience as a plaintiffs' lawyer in New Jersey for thirty years I am less pessimistic than is Emily about occupational disease claims; and more positive about what was accomplished.

The struggle for recognition of occupational disease as a workers safety and health measure has often been a dramatic one. The Zadroga bill and tort settlements for workers at the site of the World Trade Center disaster demonstrates the importance of both the compensation and tort remedies. The efforts of activists and scientists to gain recognition of occupational diseases has informed and improved workers compensation law at the state and federal levels. It has driven the expansion of Social Security to include disability benefits,

the

DisplayText cannot span more than one line!. And of course the overarching Occupational Safety and Health Act of 1972 which was driven in significant part by the emergence of the asbestos epidemic in the 1960's. These measures are examples of how labor and progressive advocacy has come to benefit worker far beyond that

of their own membership.

SILICOSIS: THE KING OF OCCUPATIONAL DISEASES

The fight for recognition of occupational disease has been a long one - though every state now has some form of coverage.[52.02, 52.07] The road was tortuous. Employers feared liability claims and insurers worried about the incalculable costs of prospective workers compensation claims. But at the start there was an obstacle familiar to anyone who has read Thomas Kuhn's The Structure of Scientific Revolutions. In the last two decades of the 19th century the germ theory of disease was developed, replacing the "miasma" theory of foul odors as a cause of disease. Robert Koch identified the tubercule bacillus and Pasteur and Lister strengthened the theory. Scientists and physicians were enthralled by the theory and did not recognize contrary or limiting evidence when it appeared, as David rosner and Gerald Markowitz recount in their masterful Deadly Dust - Silicosis and the Politics of Occupational Disease in Twentieth CenturyAmerica.

The fight for occupational safety and health was largely a product of the mode and means of mass production - classically the assembly line with its repetitive tasks(RSD), the coal mine, steel (asbestosis and chronic bronchitis, textile mill (byssinosis and asbestosis) as well as the garment workers sweat shops. But the issue first gained attention when in the granite quarries of the northeast stone cutters work changed from hand drills and sledge hammers to steam-driven equipment. Pneumatic jackhammers were nicknamed widowmakers. In 1910 the Barre Vermont Granite Cutters Journal - a union publication - warned of

"granite cutters consumption". Yet the killer was not disabling silicosis - serious as that was - but rather tuberculosis -the bacterial lung disease to which silicotic workers were especially vulnerable. While tuberculosis declined for the general population - thanks to the germ theory - it grew among granite cutters fro 25.7/100,000 to 953.4/100,000. [Dust 42] At the end of World War I only four states provided compensation for occupational disease. [Dust 84] In the 1920's only a few more states added occupational disease to their compensation laws. The rest adhered to the accidental injury model. [Dust 86]

In the enthrall of the germ theory and the haughtiness that the upper classes so often display to the lower the public health community emphasized improvement of workers hygiene and their poor living conditions at home. But Prudential Life Insurance Company actuary Frederick L. Hoffman conducted a careful study demonstrating the dose-response relationship between time in the cutting sheds and the development of silicosis. By the mid-1920's the germ theory had been vanquished and few doubted that silicosis was the primary problem affecting the workers.

In collaboration with the Public Health Service and the Vermont Division of Industrial Hygiene the granite cutters union began exhaustive studies of the occurrence of silicosis. The 1924-1926 study was intended to set limits for dust exposure. But the measures led to "little if any improvement". Significant changes in production did not come about until the late 1930's when silicosis among foundry workers, potters, glass blowers, metal miners and grinders had

been recognized. Like the 1924-1926 study a 1937-1938 U. S. Public Health Service study confirmed that practically every cutter with 15 years experience "could be expected to develop the disease."

Recognition of silicosis as an issue spurred successful law suits. In 1932 James hackett, the head of New York's Division of Industrial Hygiene, opined that successful civil actions had brought "silicosis within the range of practical politics." Recognition of an occupational disease created other problems: insurers insisted on lung function tests - which often led to discharge of workers found to have developed silicosis disease. [Dust 78-79]

In 1936 it was learned that at Gauley Bridge, West Virginia as many as 1,500 men had died of silicosis - half of the Union Carbide workers digging the Hawks Nest hydro-electric tunnel. Overwhelmingly Black, the survivors returned home. The ill and the families of the deceased received no workers compensation. The inadequacy of tort remedies was demonstrated: there were 538 suits for damages. The cases settled for an aggregate of $200,000 - of which 1/3 went to counsel fees. [Dust 98] Tort thus provided compensation for only a fraction of those sickened.

Public awareness of silicosis dramatically increased due to the tragedy. With the support of the Roosevelt administration Congress commissioned a study by the Secretary of Labor. In 1936 the Secretary - Florence Perkins - convened a National Silicosis Conference. Despite the Secretary's sympathy the conference

was industry dominated. Management argued that silicosis was a disease that had attracted "shyster" lawyers and "quack" doctors. Changes in techniques had the disease on the way out argued a lawyer for Owens Illinois Glass Co.

Rosner and Markowitz recount that John Frey of the American Federation of Labor argued that silicosis was a problem for workers even before they became disabled. The disease was not past, but rather continued to afflict workers by the hundreds of thousands or millions. The National Conference supported the development of standards and urged that decisions on compensation be made by expert medical boards - not juries and not judges. Despite the support of Perkins's Department of Labor Senate Bill 2256 introduced in 1939 failed: it would have provided funds to the states in order to give benefits to silicosis claimants.

With the war public attention to the silicosis issue declined. At that time the industrial efforts, particularly ship building exposed thousands of shipyard workers to asbestos as they filed bulkeads with the fire-retardant mineral. In the 1950's there was a flare up of interest due to the dreadful epidemic among zinc miners in the Tri-state area surrounding Picher Missouri, Kansas and Arkansas. But after that flareup interest in occupational health again receded. Eventually changes in production - the decline of granite cutting, etc. reduced the incidence of new exposures, anti-biotics helped to reduce the rate of tuberculosis, and the issue faded from view. Until the corresponding disease known as asbestosis again

placed occupational disease in the "dusty trades" in the forefront of public attention.

By 1920 45 states and the federal government had workers compensation laws. But a 1964 report of the Bureau of Labor Standards found that coverage of occupational diseases still lagged behind that for accidental injury. At that time only 27 states allowed permanent partial disability for both accidental injury and occupational disease. The rest either barred indemnity for all OD claims or sharply limited it sometimes setting dollar caps but more often allowing no indemnity at all. [Proceedings 722, 734]. Nonetheless there were significant numbers of cases. For example in the period 1952-1961 the Industrial Commission of the Wisconsin Statistical Department reported that thousands of compensable occupational disease claims were settled each year - ranging from 1,277 in 1952 to 960 in 1961. [Proceedings 740]

ASBESTOS: THE MIRACLE MINERAL

The next big headline in occupational disease was of course asbestos. In the 1950's Dr. Irving Selikoff presided over a tuberculosis clinic in Paterson New Jersey. He observed the incidence of lung disease among workers at the United Asbestos and Rubber Company. Attention was drawn to asbestos and health when Dr. Selikoff initiated and organized the 1964 conference of the New York Academy of Sciences - Biological Effects of Asbestos. Selikoff brought

together researchers from around the wor. The proceedings demonstrated the massive toll being inflicted on workers who used the material.

After the New York conference there was no turning back. Selikoff's seminal methodical environmental studies of morbidity and mortality among insulation workers provided irrefutable proof that asbestos caused not only lung scarring asbestosis, but also lung cancer and pleural and abdominal mesothelioma. Selikoff's work and increasing environmental awareness were essential prologue motivating the passage in 1972 of the Occupational Safety and Health Act was quickly followed by the emergency rule which effectively barred the use of asbestos. That of course was an enormous advance - brought about by labor and health advocates.

Neither silica exposure standards nor any research into the particular form of pneumonconiosis called - asbestosis - prevented the ubiquitous industrial use of the mineral. The long latency periods of asbestosis, lung cancer, and mesothelioma meant that the epidemic first garnered close attention in the 1960's, while thousands of new exposures were still occurring. But once asbestos diseases were recognized the compensation system was able to respond - even if inadequately. Workers got treated, received modest partial disability payments. The most ill received social Security Disability benefits, and their dependents death benefits from workers compensation. The only force that could reduce the losses was third party product liability actions.

The Era of Mass Tort claims - Asbestos

In his landmark opinion Judge John Minor Wisdom, in Borel v. Fibreboard, 493 F.2d 1076 (5th Cir. 1974), found the plaintiff's evidence showed that defendant manufacturers either were, or should have been, fully aware of the many articles and studies on asbestosis. And that during Clarence Borel's 33 year working career from 1936 to 1969 no manufacturer ever warned contractors or insulation workers, including Borel, of the dangers associated with inhaling asbestos dust or informed them of the American council of Governmental Industrial Hygienists (ACGIH) threshold limit values for exposure to asbestos dust. Furthermore, no manufacturer ever tested the effect of their products on the workers using them or attempted to discover whether the exposure of insulation workers to asbestos dust exceeded the suggested threshold limits.

Plaintiffs' lawyers took the evidence amassed by the heroic New Jersey pulmonologist Dr. Irving Selikoff and others, and determinedly confronted the difficult issues in asbestos cases: identification of the defendant suppliers, the problem of multiple suppliers, apportionment of liability, proving causation of disease, the impact of smoking, the problem of latency - delayed development of disease many years after inhalation when witnesses and records (if any) were unavailable, and the increasingly skillful use of epidemiological evidence. The latter had the benefit of equipping plaintiffs lawyers for the next wave of mass

litigation - drugs and medical devices.

Laments abut mass tort litigation are common - the bankruptcy of 75 companies, entichment of plaintiffs lawyers, 70 billion dollars on defense and indemnification, protracted litigation, clogged courts, political logjams that prevented an efficient mechanism to resolve claims, evidence that the most seriously injured are underpaid and the minimally injured are overpaid.

THIRD PARTY MASS PRODUCT LIABILITY LITIGATION INVIGORATED TORT

But even the least popular of these elements - the enrichment of some lawyers - provided a core sufficiently well-financed to take on the drug companies. The plaintiffs' lawyers and their efforts have been widely disparaged - their success painted as greed, or the product of dishonesty, etc. Prof. Anita Bernstein - a stranger to the litigation - reviewed the evidence and recognized plaintiffs lawyers collective achievements as zealous advocates for their clients. In her article Asbestos Achievements, 37 Southwestern Law Review 709 (2009), she concluded from her review of the controversial history:

"Asbestos liability reveals clients who were retained and compensated. Antagonists were won over. Claims were strengthened by aggregation. Settlements were negotiated. Procedural hurdles were overcome. Evidentiary rules were made more permissive. Statutes of limitation, the province of legislatures, were revised

by judges in a plaintiff favoring direction. Hazards were exposed. Large business corporations were brought to their knees."

How did this come to pass? "Lawyers advocating for clients effected these achievements. They rewrote the law of civil procedure and torts, bringing redress to clients who had started out obstructed by conservative rules and presumptions. One may debate the merits of their doctrinal innovations; but at a minimum, their victories suggest new opportunities to other persons hurt by negligence and defective products. Even if one grants that these lawyers were as relentless, dishonest, and greed-crazed as their foes say—for the record, I will say here I doubt it—they set a record for achievement that, in magnitude, surpasses what almost anyone else in the history of American civil justice has ever accomplished."

Also worthy of mention is that asbestos litigation introduced a new kind of evidence: epidemiological and other such means of establishing cause and effect. The landmark Daubert case, though subject to abuse, established that sound reasoning and employment of the methods of science to reach are threshold requirements for the introduction of scientific evidence. The decision - which emphasizes the judicial review of methods, not conclusions - is essential to maintaining the integrity of the judicial process and that jury verdicts are themselves founded in reason and therefore in justice.

Regardless of where we stand personally in relation to the litigation we can share in a collective recognition that the zeal that lawyers bring to their cause is a powerful force and, as here, though imperfect, can do much to advance the cause of justice.