Towards a Less-Grand Bargain for Injured Workers

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Introduction

One of the lesser-known benefits of writing about a subject intensively covered by academics in other specialties, is that you can constantly improve your own understanding by trying to explain your thinking to people outside your field. I was talking to a public health researcher about what I thought was wrong with the workers compensation system. I said it was kind of like a combination electric mixer/toothbrush/cellphone sold on late-night TV. And that's what I really can't think about this system. It's an all-in-one device that looks and feels every bit like something you could buy for just $19.99.

Workers Compensation developed in the United States at almost exactly the wrong time. It solved, for injured workers, a host of problems that market and governmental forces would start solving in more effective ways within a generation of workers compensation's victory over the common law. This victory was a costly one. For while it ossified the social technology that solved a real problem - freezing that solution in amber - it could neither anticipate nor respond to changes outside the workers compensation system. At the same time, neither could it freeze the politics that made the grand bargain possible. That invested workers compensation with the worst of both worlds: as the world outside of workers compensation gradually got better and better, the world inside of it was uniquely subject to forces that gradually made it worse.

The Standard History

The essence of the Grand Bargain is as easily stated as it is found prefacing discussions of workers compensation. In exchange for forfeiting the right to sue their employers, injured workers received the promise of quick and certain compensation for work-related injuries. Neither the absence of fault by the employer, nor its frequent presence among injured workers, would delay or hinder recovery.

It goes without saying that this was a great deal for most workers. Although John Witt has suggested the formal scope of tort law was perhaps not as overwhelmingly employer-favorable as is commonly assumed, the practical constraints on tort claiming were formidable. And, to the extent that an injured worker could present a claim for employer negligence, that term simply did not have the capacious meaning it would come to enjoy by the latter decades of the 20th century. Employees as a whole were thus not giving up much. But some were. Specifically, a certain class of employee - those who were "lucky" enough to be (provably) injured by employer negligence - gave up the difference between the damages the tort system could deliver and those provided by workers compensation. "Unlucky" workers - the doubly unlucky - would have fared poorly under tort law as it stood. Workers compensation immunity can thus be seen as a transfer from lucky to unlucky injured employees. There were very few in the first category, and obviously one could not know a priori into which group one would fall, following an injury. Form behind the veil of ignorance, choosing limited, but universal, compensation made plenty of sense.

The Component Parts

On one level, it is strange to describe this as a tort replacement system. With fault as a total non-factor in compensation awards, workers compensation isn't about assigning blame, or providing a venue for the respectful and dignified hearing of an injured workers claim to have been wronged. It is, instead an insurance system. Or rather, three.

First, it provided a limited form of health insurance on a mass scale. Decades before group health policies would become a stable of employment, workers compensation ensured that workers would receive medical care for work-related injuries. Working-class individuals were not very likely to pre-fund their medical care a a hundred years ago. One could buy accident insurance, which compensated for medical care and disability - and this was indeed popular among the working class. But it bore only a passing resemblance to "health insurance" as we would recognize it today. Despite its obvious requirement of work-relatedness (which in the early years did not include occupational diseases), workers compensation was practically the only form of medical insurance widely available to workers.

It also provided disability insurance, for short- and long-term unemployment due to work injury. Again, this was not really available for workers a century ago. "Disability" coverage also did not then exist, apart from the accident insurance market. Then, as now, the inability to earn income following injury could be as devastating a consequence as medical costs themselves.

And although it is less-discussed in assessments of workers compensation, the families of fatally-injured workers receive a death benefit.

In one sense, my multi-gadget analogy is unfair - or rather, it would've been unfair a hundred years ago. Combining these coverages, otherwise inaccessible to average people, under the rubric of work-centered injury compensation was brilliant. Each of these insurance mechanisms was needed, but under supplied by the market. Their location in employment also made sense, given the work-relatedness trigger of coverage. Beyond that, employers, particularly large ones, were significant economic actors. In 1909, Standard Oil alone had nearly 1/3 as many employees as the entire civilian federal workforce. In an era where "company towns" were an unremarkable feature of the landscape, it is not surprising that a wide range of functions other than producing goods would be located there by political agreement. So, not only did workers need a insurance combo-tool, employment was the best place to look to buy one.

Workers paid for this package of coverage in two ways. First, as noted, by giving up tort claiming rights that were not very valuable - and valueless for all but a small number of employees. Second, workers compensation costs are an item of labor costs. While it is unlikely to be a zero-sum proposition, money spent by employers on WC is unavailable for wages or other benefits. At a minimum, these costs are shared by workers in the form of foregone compensation.

Although I teach insurance law, I had always thought of the workers compensation system as something of a footnote to the torts system. As Bob [observed in his paper] a significant portion of product liability cases arise in workplace settings. WC immunity distorts what ought to be the proper allocation of responsibility in such cases, shifting blame to manufacturers for injuries caused by employer fault. This malign incentive structure further reduces employer investment in worker safety from the already-inadequate baseline that partial loss compensation - via WC - already establishes.

Some Additional Standard History

Unsurprisingly, tort law-oriented assessments of workers compensation today are largely prefigured by the ways in which the Grand Bargain's premises regarding the availability of the tort system remedies for injured workers. Although contributory fault in the employment context may have been disappearing earlier than is commonly understood, there is no question that the tort system as a whole began rejecting it decisively by the 1960s. Constraints on contingency fees - an effective check on the development of a robust counterweight to the defense bar - began to fall away in the early decades of the 20th century. These developments stripped away some of the obvious barriers to recovery.

Another tort system change over the past century has been the law's uneven progress toward recognizing and compensating for non economic harm. While it's true that the "impact" and "zone of danger" exceptions to the common-law rule of non-recovery for emotional harm were falling into place a century ago, these would not have been very likely bases for enhanced compensation. Similarly, pain and suffering has always been nominally available to successful tort claimants, though the awards of yesteryear were miniscule in comparison to those available today. Non-economic compensatory damages are particularly apt in cases where workers have suffered crippling or disfiguring injuries. And, of course, punitive damages loom large in the thinking of repeat-player defendants these days, despite their consistently low likelihood of being awarded. Whatever functions one might wish to locate in punitive damages awards - an expression of societal disapprobation, a confirmation of wrongdoing against the plaintiff, an in-terrorrem sort of enhanced deterrence - the tort system is theoretically capable of generating significant non-compensatory regulatory or expressive signals.

Workers compensation protected employers from these developments. It thus functioned as yet another type of "insurance" policy - holding employers relatively harmless from future changes in the tort landscape. This turned not out to be less of an insurance policy than a lottery ticket.

In talk he gave last year, John Burton suggested that employers at the the turn of the last century may have been concerned about the specter of absolute liability. While there have always been elements of this throughout tort law - something Bob Rabin has written about as well - I think this overstates the case. Pockets of strict liability have always been found within negligence law's domain. Possibly, with a world of quite limited tort liability having given way , by the 1890s, to one where negligence was an accepted and well-articulated yardstick, 19th century employers feared that "crushing liability" was just around the corner. I do think that, absent its pretermission by the Grand Bargain, tort law would've developed "naturally" in the employment context, probably developing a special sensitivity to the problems of unequal bargaining power and the industrial-sized risks to which workers were exposed.

Although the tort law changes sketched above were significant, and made trade-off between tort recovery and workers compensation ever more questionable as time wore on, the biggest change, in my view, was more nuanced. Simply put, the *meaning* of negligence has evolved during the past century from a narrow to broad conception of its role in regulating conduct. A coal mine operator in 1900 would have been understandably unenthusiastic about the prospect of a negligence claim arising out of a collapsed shaft. But it might have been relatively optimistic about a defense that emphasized the intrinsic risks of mine work. Even if assumption of risk wasn't expressly available as a defense, the idea limited the practical reach of a workplace negligence claim - if such a claim could be brought.

A tort lawyer time traveling from 1890 to the present would be delighted to learn that common-law courts still follow the classic formulation of negligence: duty, breach, causation and damages. But he would be astonished at the reach the intervening century has invested these simple terms with. By the time tort law hit its high-water mark in the 1960s and late 70s, the effective (though not formal) meaning of negligence had been transformed. I do not think the Grand Bargaineers could have foreseen this.

Institutional Inertia and Institutional Change Elsewhere

This lack of foresight had consequences. From a modern perspective, it is frequently surprising to recall that workers compensation laws required state constitutional amendments. That's why I like to keep Bob Williams around! While amending a state constitution isn't as hard as amending the federal constitution, it is nonetheless a heavy lift. All the more so when one considers the contending positions of labor, industry, and insurers. The tensions within these coalitions had to be managed long enough to get workers compensation over the finish line - beyond which lay, at last, the input of the judiciary. Even if the delicate balance among these groups had been perfectly struck at the time of enactment, that perfection was no guarantee against against time.

Time worked its will on the "perfection" of the WC system in different ways. I described above the familiar evolution of the negligence system during the last century. Before turning to developments outside the tort system, I want to highlight some institutional dynamics. In retrospect, one can see the potential for mischief in setting up an alternative to the tort system alongside the actual tort system. This meant that Grand Bargaineers were unable to control the most obvious point of comparison with workers compensation - the kinds of claims for damages, the persons able to obtain them, available via the tort system. Ken Abraham, discussing the limitations of compensation policy reforms, observed that reformers tended to be constrained by the shape of the system as they currently perceived it. The genius of the tort system, however, is it elasticity and decentralization. This stands in stark contrast to workers compensation systems. While the tort system can adapt rather fluidly to changing social conditions or evolving norms regarding compensation and responsibility, workers compensation is highly unlikely to.

That's because, once struck, the Grand Bargain created entitlements that became virtually immovable. And I don't mean workers' entitlement to compensation, but rather employers' entitlement to sharply restricted liability. Anyone with a passing familiarity with the mess that is ERISA preemption can appreciate the difficulties in refocusing legislative attention on something overwhelming regarded as settled by industry. Abstractly, it's rather amazing that the workers compensation could pass through a century of tort law upheaval and look essentially unscathed. It's only amazing when one doesn't consider the role of inertia and preference intensity in determining the allocation of scarce legislative resources.

This unwillingness to revisit the rights compromises at the heart of workers compensation extends to the judiciary. Modern courts are reluctant to overturn legislation of such economic significance (another change during the past century). And after the wave of either unsuccessful or amendment-forcing constitutional challenges, courts until recently rarely intervened in the politics of workers compensation. These interventions have been marginal, including the availability of limited exceptions to WC immunity, or legislative efforts to foreclose both WC and the tort system to injured claimants. While there are very interesting arguments that time has altered the (state)

constitutional calculus legitimating WC's remedy-limiting nature, we may be waiting a long time before a court is willing to judicially invalidate (rather than interpretively prune) the entire system.

Erosion from the Outside: Unforeseen Alternatives

There are additional political and institutional factors intrinsic to the WC system, but I want to return first to the economic and political changes in insurance systems. Recall that WC is essentially a collection of insurance policies, sharing a common trigger of work-relatedness. This concatenation made sense a century ago, when these protections were effectively unavailable to most workers. But time has left the virtues of the Grand Bargain behind on this point as well.

By the middle of the 20th century, two developments substantially undermined the relative value of WC benefits to seriously injured employees. The first of these was the development of a modern health insurance system. The second was the creation of a federal entitlement to disability compensation.

Health Insurance

At about the same time as the workers compensation system was closing in on final victory over the common law that, the forerunner of Blue Cross was born in Texas. This hospital-based plan led to the development of the fee-for-service model that came to dominate health insurance throughout the rest of the twentieth century. In those early decades, health insurance was not the costly national obsession it is today. Indeed one reason it *is* so costly is that the federal government has been subsidizing it since shortly after WWII, for insured employees. That became the dominant channel for health coverage in the United States. This pattern has declined markedly in recent years, particularly as the ACA's exchanges have drawn substantial numbers of new insureds into the total insured population (thus diluting the role of employment somewhat). But, since all workers compensation claimants are obviously employed, this change is immaterial here.

A this point, I have a confession. Despite doing workers compensation for my first few months in practice twenty years ago, and approximately 1.5 lectures per year on it between the Torts and Products Liability courses I teach, I had not thought carefully about its relationship to the health insurance system. The relationship is a strange one.

On the one hand, employees are paying - both directly and through foregone wages - to obtain health insurance. Employees are sensitive to issues of premium cost, and as cost-sharing has become a dominant feature of the landscape, they are increasingly alert to the substantive features of their health plans (breadth of physicians networks, etc.). There is some opportunity for input, as unions negotiate aspects of health coverage, or employees themselves elect among an increasingly limited set of plan options.

Very little of this is relevant when the employee's health needs arise from workplace injury. First, the employee's main health insurance universally excludes injuries or diseases for which workers compensation is responsible. That might be acceptable if the workers compensation medical system were just as good. This not does not appear to be the case, as WC medical costs and outcomes are higher and worse than their private health insurance system counterparts. Employees often must obtain approval to see the doctor of their choice - and the reality of that choice may be heavily dependent on the reimbursement rates the physician has been offered for

workers compensation work. In order to "ensure appropriate care"/maximize disincentives to claiming, injured employees are typically required to submit to independent medical examination at the behest of the carrier. Under the rather unusual remit to get injured employees back to work, these exams provide a means by which the carrier can 1) refuse to pay for additional medical treatment and 2) minimize the severity of the injury/disablement in order to avoid paying a claim for disability.

Now, no one suggests that conventional health insurers are entirely disinterested conduits for medical care. But treatment disputes there are not exacerbated by the mandate promptly to return employees to work, or the desire to avoid subsidiary costs. What I never appreciated prior to this project was the perverseness of requiring an employee - who may have completely satisfactory "general" medical coverage for which he has paid and bargained - to be forced into a medical bureaucracy that primarily serves the interest of the employer. Employees have paid for two different health systems. Beyond the obvious inefficiency, this structure can leave them with the worst of both worlds.

Several studies have examined ER records and other data on work-related injuries and medical care, to find that a significant percentage of work-related injuries are routed through the non-workers compensation health insurers. This has been attributed to various factors, from the presence of employer-sponsored coverage (though not necessarily to the affected employee), to worker's concerns about stigma resulting from perceptions of WC fraud, to actual fear of employee retaliation. Cultural factors appear to be strong, as the rate of "proper" characterization of workplace injuries also varies significantly among industries. Commentators observe that mischaracterization is a type of externality, saddling health insurers with costs that "should be" borne by employers via workers compensation. This may be true, but I am left to wonder whether we should instead take a different message from these observations: employees know which health system is best for them, and they are voting with their (injured) feet.

That they cannot do so without subterfuge can be laid at the fault of the Grand Bargain, which froze a "company town" model of health care delivery in place just before the market and federal government would act to make health insurance much more widely available. Like the tort claims compromised likewise compromised away, this arrangement undeniably substituted a substantial "something" where there was effectively "nothing" for injured employees. But, just as with the tort system, health insurance outside the WC context became both available and superior to what was delivered inside of it.

Of course, it would theoretically be possible to reform medical claiming practices, to remove roadblocks to care, and even to channel work-related injuries to the right system. But there are reasons for doubt. First, there is little to suggest that the divided (at best) loyalties of the WC medical system - between patients and their employers - can be wished away through reform. This issue is complicated - on all sides - by the use of ERISA plans that united the employer and "insurer" as one. There is no easy way to disentangle these roles so that the focus is on the patient. Again, conventional health insurance has problems on this score, but one is struck by the passive role assigned to workers compensation claimants with respect to entitlement to care. The term "benefit" is typically used to describe the care (or funds) the employee is receive. I am reminded of the language and practices of the National Flood Insurance Program, which similarly describes payments to insureds in a way that minimizes their role as consumers. Instead, they are passive "beneficiaries" of corporate (or governmental) grace. This may sound like a picayune, Crit-flavored nitpick, but I language such as this is accidental. Rather, it neatly ignores that

consumers - workers - are paying for the entitlement to protection in the form of lower wages (or NFIP premia). It will be difficult for any conceivable reform within the workers compensation system, a system whose true constituency consists of employers - to re-orient itself to a constituency of injured workers.

The second reason for doubt is the simple question of why reforming the system to generate more accurate or effective claims *within* the workers compensation health system is a worthwhile objective. At best, working "perfectly', that system is an unnecessary duplication of the vast system of private health insurance that arose in its wake. For that reason alone, it's worth considering what, exactly, we would be trying to improve. All the more so when it appears that the system is not working perfectly, and at considerable unnecessary cost to employers and employees alike.

Disability Coverage

The final component of insurance offered by workers compensation is disability. This seemingly-simple promise lies a the heart of some of the most complicated disputes within the system. Defining and interpreting different categories of disability consumes substantial resources within the system - a task that has become superficially, if odiously, simplified by the use of scheduled payments to represent the maximum lost employment value of missing limbs.

Emily Spieler and others are more qualified to discuss the intricacies of disability claiming; I want to make two small points that have larger significance. First, workers compensation disability predates the creation of SSDI by decades - and this was likewise not something that could've been imagined until very late in the adoption of worker compensation. Significantly, Social Security provides much more restrictive benefits - compensating only for *total* disability - the complete inability to perform work in the national economy. While there is an unavoidable softness at the edges of a socially-constructed definition, there's no question that workers comp offers broader protection. Injured employees may be entitled to near-immediate short-term benefits, as well as benefits for *partial* disability. If Social Security were the only comparator, the argument that the Grand Bargain unwisely ossified an outdated vision of employees' insurance needs. It isn't.

Like health insurance, private disability coverage, often tied to employment, developed in modern form during the 20th century. And while the mechanisms can be slightly different, disability policies likewise exclude work-related injuries from the promise of compensation. Once again, this means that employees are shunted into a shadow disability coverage system organized and incentivized differently from one they may have chosen. This situation is more complicated than the case of health insurance. Private disability coverage is not as widespread as health insurance; the take-up rate for disability coverage is under 40%. So, it's often not the case that work-related disablements should be covered by "better" coverage obtained elsewhere. Moreover, there are distinctions among private disability policies that may or may not be mirrored in workers compensation disability entitlements. For example, a private policy may provide coverage where an policyholder is unable to perform her "regular" work. This entitles the employee to compensation determined in the first instance by the policyholder's income. But, in states with scheduled disability payments, the amount of compensation may be limited without regard to actual income. If an employee is also covered by private disability insurance, that policy might make up the difference, depending on its wording. In fact, the

relationship between private disability coverage and workers compensation can make it extraordinarily difficult for employees to assess ex ante the value of private disability coverage.

That said, the first broader point is that disability coverage is another problem that workers compensation system solved - genuinely so, a century ago. But it is a solution whose relative value has faded, from "above" and "below". Above - albeit partially - by the SSDI system. More comprehensively, the problem also solved by an insurance marketplace that developed a range of disability products, sometimes conveniently tied to the employee's place of work.

Paths Taken and Paths Foreclosed

Stepping back, we have a package of coverages - health, disability and life - that were largely inaccessible to workers a century ago, but for which deep market alternatives developed - and are in wide use today by workers themselves. Today's tort system - a mandatory insurance policy unto itself - provides remedies far in excess of what the Grand Bargain's authors would have imagined possible. It is no slight to the Progressive Era to note that those who lived through it were not clairvoyant. Yet it is inconceivable that, had a system of workplace injury compensation been designed today, it would look anything like the present system. If we were writing on a clean slate, the baseline for tort recovery would be different - at a minimum, the restrictive presumptions that governed compromise in 1916 could not be expressed in the same way. On the positive side of the ledger, virtually none of the insurance protections afforded by workers compensation systems are actually needed *in that form* to protect workers today. Even if the current system were operating fairly and efficiently, these observations would still be true.

Of course, public policy is rarely written on a clean slate. As it happens, workers compensation policy has been undergoing a process of revision for some time. This process has not challenged the fundamental assumptions of employer tort immunity from the consequences of negligence, or the desirability of sharply limiting the value of the recoveries WC does provide. Indeed, it would be fair to say that legislature around the country have doubled down on these policies over the past twenty years. That ought to be bad news for the idea of comprehensive reform. However, I want to offer a reading of these reform efforts that, paradoxically, may point the way toward reimagining the entire system.

The Fortunes of Politics

There was something else the framers of the Grand Bargain couldn't foresee: the changing political fortunes of compensation systems. Earlier, I described some of the significant advances in the overall politics of compensation. These did not directly benefit injured workers, but can broadly be thought of as advancing a similar norm of compensation, just in different domains - for unlucky participants in the workforce (SSDI, unemployment insurance) or those unlucky outside of it (the remarkable expansion of tort liability, including workplace injuries attributable to non-employer actors). Considered together, these developments amounted to (with apologies to Ken Abraham) a "Compensation Century".

There is at least a temporal linkage between some of this and developments in workers compensation. The 1960s and 70s were a period of foment within the tort system, as duty- and damage-limiting doctrines were widely swept away, and the understanding of "responsibility" impliedly reset. It is interesting to observe that workers compensation benefits also increased during this time. Some of this was spurred by the 1972 Report of National Commission on State

Workmen's Compensation Laws, which encouraged states to broaden and deepen coverage (with the implicit threat of a federalized workers compensation system otherwise). I would like to know more about the thinking that prevailed with state legislatures as they voted to provide greater benefits. While the general tide of postwar (and shared) affluence was likely a strong factor, I find myself wondering if legislators were also taking note of plaintiff-friendly developments in the tort system, to which injured workers were denied access. In any event, a rising tide lifted all vessels devoted to injury compensation.

But, by the late 1970s, this began to change. While the exact mechanism varied from domain to domain - common-law courts getting out ahead of public opinion, more conservative elected officials at state and federal levels, a renewed focus by business or ideological groups on pushing back against perceived excesses - the impetus for enhanced compensation drained away. And by the late 80s, it had been replaced by a norm of retrenchment, in the guise of "tort reform" and efforts to foster a more "business-friendly" environment among the states. These efforts can be easily summarized: they allow defendants and employers to pay injury claimants less, often much less.

Causation, Fault and New Realities

In the workers compensation arena, the two variables are: 1) trigger of coverage, and the 2) extent of liability. When I began this project, I was ore familiar with the second category, aware that legislatures had failed to adjust certain benefits for inflation, or had introduced award caps that sharply limited the compensation available to injured employees. In their lack of imaginativeness, these are very similar to the wave of damage-capping tort reforms imposed by legislatures during the same time. But, as I became aware of reforms in the first category, I saw that there was a more ambitious project at work here. That ambition seems largely unacknowledged. If it were transparently acknowledged, it would reflect a remarkable change in the understanding of employer's compensation obligations. That acknowledgment might be the key to more positive reform.

The workers compensation laws of virtually every state are keyed to a deceptively simple-sounding trigger of coverage, that the injury "arise out of, [and/or] in the course of, employment." There are many cases where work-relatedness does not pose a difficult factual or conceptual challenge. The paradigmatic example of a worker being crushed by a piece of heavy machinery he is operating is an easy case. And it is irrelevant whether the accident was caused by the employer's negligence - or anyone else's. But, once one moves away from the industrial plant example, the wide variety of work-related settings puts pressure on a natural or colloquial understanding of work-relatedness. Moreover, infirmities of the worker - say, a bad ankle from an old football injury that led the employee to stumble toward the machinery - could also give rise to interesting questions of causation and allocation of responsibility.

But these questions were answered by expansiveness of statutory language and its judicial interpretations. Workers compensation is potentially available for a wide variety of events having *some* connection to the workplace; the standard is much close to "but-for" than "proximate" causation. And, like the eggshell-skull plaintiff rule of tort law, workers compensation law has long been understood to embrace a view that the employer "takes his victim as he finds him," imposing responsibility for harms contributed to, in some way, by the employee's infirmities.

It is difficult to grasp how expansive this really is, without considering the absence of a fault requirement. Fault is an attractive basis for resolving close calls on causation. Indeed, fault has proven *essential* to causation in the products liability context, where the postwar dream of liability without fault has consistently foundered in real-world application. Employers a century ago certainly understood that they were being invested with a new liability designed to internalize the cost of workplace injuries within the goods or services themselves. While it's at least debatable whether the creators of worker compensation understood deterrence in quite the same way we do now, they clearly understood that liability implied a duty of care - or at least an acknowledgment that injury-reducing practices and workplace design were prudently observed - to avoid excessive injuries attributable to the lack of care. But, injuries unavoidable with due care are not likely to be avoided in fact under a strict liability regime. But the employer will be responsible for them nonetheless.

This risk-shifting arrangement may be attractive to legal economists (granted the assumption that alternative forms of risk protection are more costly). But I do not think that strict liability is more morally attractive to most people today then it was when the air started running out of the expanding balloon of tort liability over thirty years ago. Together with the loose causal standard described above, workers compensation liability can in theory be far removed from a natural conception of employer responsibility.

Now, I hate to suggest that workers compensation reforms might rest on some principle other than ensuring a continued flow of campaign contributions from the local Chamber of Commerce. And yet, whether or not one agrees with how causally expansive employer responsibility should be, it is becoming clear that it is being rapidly recalibrated toward something closer to "fault". The mechanism for this recalibration is the wave of "contributing cause" reforms during the past twenty years.

John Burton has written a lot about these statutes, and invite him to look at them from a different angle. "Classical" workers compensation causation requires a fairly minimal degree of work-relatedness. A common formulation is that employment be a not-insignificant contributor to the injury. Legislatures have embraced a range of more demanding standards, requiring work-relatedness to be a "substantial", "major" or even "predominant" cause of the injury. These standards attempt to winnow out pre-existing infirmities that lead in some way to injuries associated with the workplace. Some statutes are more specific, dealing with occupational injuries such as repetitive stress claims, or "cardiac events" that while plausibly linked to stressful employment, might fairly be more accurately attributed to poor health.

It is common to look at these as "reforms" in derogation of the correct and longstanding understanding of the workers compensation promise. I understand where this view is coming from, but I want to suggest another interpretation: The nature of that promise is being renegotiated, incrementally but with decisive effect, across the country. And virtually everything that made the Grand Bargain what it is has changed - beginning, perhaps, with the political power of labor unions. There is absolutely no reason to expect legislatures in 2016 to behave exactly as their predecessors a century ago did. Or rather, there is no reason to expect them not to do precisely what their predecessors did: taking account of the current realities of injury compensation.

For any given case of injury, if one lacks a theory of employer fault, it is going to be difficult to argue that there is something unnatural or unfair about allocating work-related injuries to the

health insurance system. I think this is the subtle and not-very-transparent conclusion many legislatures are coming to. They are stuck with the somewhat kludge-y language of causation, because that is the closest synonym to "fault" they can find, without expressly undoing the workers compensation promise. This approach does not have the virtue of candor, but that doesn't make it wrong.

What is wrong is the "all or nothing" character of most state triggers. Either the workplace is a sufficiently "major" contributor to an injury so as to trigger "full" WC compensation, or it falls short of that mark, and is entirely uncompensated by that system (and possibly, the tort system as well). Ideally, there would be an allocation between potentially responsible entities - perhaps by assigning partial responsibility to a negligent employer, whose inadequate consideration of ergonomics exacerbated an underlying arthritic condition. California has a very limited nod to this concept, permitting WC disability costs in some instances to be apportioned among successive employers.

The vast majority of persons covered by worker's compensation today are, post-ACA also covered by health insurance. Part of the suggestion that employers are externalizing WC costs to health insurers rests on the assumption that employment is properly regarded as "the cause" of the injury or disease. In many cases, that will be so, but if applied indiscriminately, this assumption seems grounded in old realties, not new ones.

A Modest Suggestion

My modest suggestion is to blow up the workers compensation system almost entirely. If it were working well - "well" meaning something other than a steady decline in workers comp premiums for employers - it might be worth saving. And if there was reason to believe that state legislatures, unswervingly focused on competition for business with other states, were likely to reassess this commitment and redirect their efforts toward improving benefits to workers, then it might be possible to save it. Indeed, if federal healthcare entitlements were so wildly popular politically that the 45-year-old threat of a federal takeover was a plausible scenario, we could even conclude that saving workers compensation as we know it was likely.

None of these is true, or likely to become true, in the foreseeable future. We must resist well-intentioned efforts to rearrange deck chairs, and try something else. And because politics these days is not just the "art of the deal" but of the possible, my suggested something else has something for almost everybody (who is going to vote).

I suggest eliminating workers compensation, and its associated tort immunity. I would replace these with new or existing insurance mandates, and a limited remedy in tort.

Health Insurance: The individual mandate should cover anyone who is currently covered by a state workers compensation program. For medical costs, coverage should be provided by the worker's own health plan. *Employers would not be responsible for medical costs in tort or through a separate liability system.* One wrinkle is the fact that the employer health insurance mandate is more limited in reach than the state-level workers compensation mandate. This raises the intriguing possibility of "swapping" the WC obligation for the current non-obligation for employers with fewer than 50 employees. That is, perhaps ACA-exempted businesses, which will now be relieved of medical costs via WC, should be required to provide health insurance to

their employees in its place. I suspect many ACA-exempt employers would be willing to take this deal in exchange for workers compensation relief. But, I need to study the premium cost comparisons to know how, and to whom, this would be attractive.

Disability Insurance: I suggest dealing with this on two levels. First, temporary and partial disability protection *would be provided by policies employers will purchase for employees*. This is a mandate, but one that replaces only a portion of employers existing obligation to provide disability protection via workers compensation. The unreplaced portion - total and long-term disability - would be take up by SSDI. Currently, injured workers are already covered by SSDI for total disability. However, the statutory offset means that workers compensation pays first, leaving SSDI without immediate liability. Total disability under SSDI can be temporary, but I am trying to deal with the very low likelihood that SSA can process TTD claims before injured employees start missing paychecks.

Life insurance: This is not expensive, and employees should have private life insurance covering them more broadly anyway. This issue is too insubstantial a problem to require fixing amidst the moving pieces otherwise discussed here.

Tort Law: Employer immunity from tort claims is indefensible. It has also been the baseline for a century. While the torts professor in me would like to abrogate it fully, this is not very plausible. However, a very limited tort remedy might be.

Specifics

There are two items of damage not currently provided by workers compensation: recovery for non-economic damages (emotional distress and pain and suffering), and punitive damages. Unfortunately for a would-be reformer, these are precisely the items most likely to drive employers away from any reform. My solution is a sharply limited "Employment Tort" claim that provides that where an employee has been injured by an employer's negligence, recovery may be had as follows:

Pain and Suffering: $25,000 unless serious injury is demonstrated;

Emotional Distress: $25,000, unless serious injury is demonstrated;

Punitive Damages: $250,000, upon demonstrating a reckless disregard for employee health, and the employee demonstrates that a serious injury resulted.

Wrongful Death, *or* pain and suffering/emotional distress awards in non-fatal cases involving serious injury: $250,000.

Let's get a couple things out of the way first: I've made these numbers up and I personally hate damages caps. I know that somewhere, Jeff O'Connell is grinning as he reads this which makes sense as I am borrowing from some of his ideas.

Repeat-player defendants object to nonpecuniary damages primarily because of their assumed variability, in the absence of numerical caps. Whatever the empirical merits of that view, and its normative implications, one thing is undeniable: under current law, workers get nothing in these categories, except for wrongful death, which is typically limited to 500 weeks of the employees

average weekly wage. Admittedly an echo of Grand Bargain thinking a century ago, this is a clear step forward for injured employees.

For employers, the sharp limits, variations of which can be found sprinkled among general tort-law damages caps, are designed to minimize the already-nonexistent threat of crushing liability. The "non-serious injury" limits for pain and suffering/emotional distress are the size of standard auto policies. I have no doubt that employers will carefully study the settlement techniques of the auto industry to reduce their liability. The serious injury "verbal threshold" triggers higher potential awards in limited cases. Most worker compensation claims are for small injuries that would not be eligible for enhanced compensation under this standard.

Winners and Losers: Some Thoughts On Feasibility

Reform, as ever, creates winners and losers. Employers will get out from a workers compensation cost that is already at historic lows. In return, they will have to purchase disability insurance, and will likely see a small increase in health insurance costs, as insurers could no longer exclude work-related injuries. Employers would also face sharply limited liability for their own negligence. That is reasonable quid pro quo.

Just as most employees a century ago had no practical negligence claim - and thus nothing much to lose - most employees under this system are going to receive about the same level of benefits from work-related injuries. A "lucky" few will receive more, where there is employer fault. Roughly speaking, most of these employees will be about as well off as they might expect to be after being involved in a car accident attributable to another driver's fault, carrying the minimum required auto insurance. And a small subset of that group is eligible for compensation award roughly equivalent to being hit by an adequately-insured driver.
The Social Security system is a net loser under this plan because it will absorb the costs of those totally disabled by work injury. This may require a small increase in SS contributions, which would be split by employers and employees. Fortunately, the SSA doesn't vote.

Health insurers may see somewhat higher costs, and admittedly, the timing is not good. However, if the current system really is externalizing those costs to insurers, they would much rather be able to capture those transparently through "enhanced" coverage for the appropriate premium.

Whether the cause of injury prevention is advanced or retarded is difficult to say. Workplace injuries have been falling for nearly 25 years. This has happened at the same time that workers compensation costs have been halved, which creates an interesting and unresolved problem of cause and effect. With reform, it's possible that employers might feel less pressure for safety, as medical and disability costs would be borne elsewhere. There are two reasons to doubt this, however. First, to the extent excess (risk) costs are passed on to health and disability insurers, he employer faces the prospect of premium adjustment. Workplace safety might become the new health and wellness plan, to keep premiums low. Moreover, the existence of non-economic, limited but substantial, should discourage employers from rolling the dice and abandoning safety efforts. A lack of safety - negligence - is not "free" under this reform, and accordingly should be priced into the employer's thinking.

For individual states, this transformation of the WC system should lessen substantially the impetus for the "race to the bottom" -which is plainly in view otherwise. By disentangling the

insurance elements, and creating a uniform standard of limited liability, there would be nothing to compete on. Note the requirement of uniformity. Successful implementation of this proposal will require close coordination with, and buy-in from ALEC, labor unions and other groups.