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INTRODUCTION

THE DEMISE OF THE GRAND BARGAIN: COMPENSATION FOR INJURED WORKERS IN THE 21ST CENTURY

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I. A TALE OF TWO WORKERS

John Tooey was frequently exposed to asbestos dust while working as a salesman of industrial asbestos products. He developed mesothelioma (a cancer caused by asbestos exposure that is nearly always fatal) in 2007 and died less than one year later. Spurgeon Landis worked for a manufacturer of welding rods, and was also exposed to asbestos throughout his employment. He, too, was diagnosed with mesothelioma in 2007. Both men worked in Pennsylvania, and under the Commonwealth's workers' compensation statute, a worker could qualify for benefits for contracting an occupational disease only if the disease manifested itself within 300 weeks (roughly 5½ years) after the last exposure to the toxic substance associated with the disease. The

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average latency period for mesothelioma is 30 to 50 years, which made it impossible for Pennsylvania mesothelioma victims to pursue a claim for workers' compensation benefits. The Pennsylvania workers' compensation statute also provided that benefits under the statute were the exclusive remedy for any occupational disease covered by the statute. Thus, the statute potentially deprived victims of mesothelioma, and other occupational diseases with a long latency period, of any opportunity for compensation for their injuries.

Ineligible by law for compensation benefits, Tooey and Landis filed common-law tort claims against their employers. Predictably, the companies invoked the "exclusive remedy" provision of the statute and moved for dismissal of their claims. Tooey and Landis argued in court that the Act, by its own terms, provides that it does not apply in situations like theirs, thus the exclusive remedy provision must not have applied either, and they should have been free to pursue their tort claims. To hold otherwise, they argued, would deny them any chance of redress, and thus defeat the *quid pro quo* upon which the workers' compensation scheme is based. They added that, to deny them any opportunity to recover compensation for a tortiously-inflicted injury would also deny them their rights under the "open courts" and "reasonable compensation" clauses of the Pennsylvania Constitution. An intermediate appellate rejected their arguments and held that the common-law tort claims were barred by the exclusive remedy provision.

In a landmark 5–1 decision, *Tooey v. AK Steel Corp.*,[1] the Pennsylvania Supreme Court agreed with the plaintiffs' interpretation of Pennsylvania's workers' compensation statute. The court found it "inconceivable that the legislature, in enacting a statute specifically designed to benefit employees, intended to leave a certain class of employees who have suffered the most serious of work-related injuries without any redress under the Act or at common law."[2] The decision represents a remarkable easing of the Pennsylvania courts' decades-long rigid enforcement of the exclusivity provision.

In a perfect world, John Tooey and Spurgeon Landis would never have been exposed to carcinogens while at work. In an imperfect but just world, they would not have been denied compensation once they contracted an industrial disease. As "happy" as the ending of the *Tooey* story is, its facts highlight the limitations of compensation for industrial

1. 81 A.2d 851 (Pa. 2013).

2. *Tooey*, 81 A.3d at 863. Having held that the survivors of Tooey and Landis could pursue their common-law tort claims against the employers, the court found it unnecessary to address the constitutional objections to the contrary interpretation of the statute.

injuries and the problems underlying the limited workers' compensation scheme with its attendant employer immunity from civil liability.

II. THE GRAND BARGAIN

Statutory workers' compensation systems arose as one of the great constitutional compromises of the Progressive Era. Stated very generally, under the compromise, industrial workers gave up the right to sue their employers for personal injury damages if they were injured on the job, in return for less generous but more certain benefits. Their employers gave up their common-law defenses of contributory negligence, assumption of the risk, and the fellow-servant rule. That exchange became known as "The Grand Bargain." The bargain has survived over the ensuing century, but it is under attack. There have been frequent political battles in the states, often fought below the national radar screen. Over the past 25 years, the attacks on workers' compensation systems have escalated.

Benefits have become so constrained in some systems that workers are arguing in court that there is insufficient present *quid pro quo* to support the Grand Bargain at all, and that, deprived of a reasonable *quid pro quo*, they should be free to seek common-law remedies, as John Tooey and Spurgeon Landis did. In 2015 a coalition of major retailers, led by Wal-Mart, went beyond merely constricting benefits: they initiated legislative efforts, in several states, to allow them to opt out of state-controlled workers' compensation programs entirely and substitute self-designed and self-implemented programs for the traditional statutory systems. They have not yet succeeded, but they may eventually.

As beleaguered as it is, the premise of the Grand Bargain remains sound: we still need a system that fairly compensates workers for workplace injuries, and does so faster and more efficiently than common-law litigation through the courts usually does. The critical need is to stabilize compensation systems and make them more equitable.

III. THE CONFERENCE

To involve a variety of professionals more directly in discussing solutions to these problems, the Pound Civil Justice Institute joined with the Rutgers Center for Risk and Responsibility and Northeastern University School of Law in hosting a day-long conference at Rutgers Law School in Camden, New Jersey, on September 23, 2016, for legal academics, judges, practitioners, labor representatives, government

officials, non-profit advocates, and representatives of the insurance and manufacturing industries.[3]

The conference re-examined The Grand Bargain in light of evolving legal doctrine, a changed labor market, and changing politics. How well is the workers' compensation system serving its original purposes of swift, sure, and efficient remedies? Does an employer-based insurance scheme for workplace injuries supplanting tort remedies remain desirable? How does the common law's command of a remedy for every legal wrong affect the architecture of workers' compensation systems? What responsibilities should employers and employees bear in this system? What are the ramifications of a move towards universal health insurance? Responses to these questions can inform debates occurring now in courts and legislatures across America.

The symposium yielded five major, original academic papers which make valuable contributions to the legal literature on compensation. They were presented and discussed by panels assembled from across disciplinary lines, addressing four topics.

Panel I was titled *The Challenges of the Changing Legal Structure of Workers' Compensation and the Changing Workforce*, and was centered on a paper by Professor Emily A. Spieler, of Northeastern University School of Law: *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the U.S., 1900–2017*.[4]

In meticulous detail, Professor Spieler outlines the evolution and devolution of the workers' compensation mechanism over the last 100 years, showing how it has been affected by significant changes in work, in notions of safety, in regulation of the work environment, in the social "safety net" for workers and their families outside of the compensation systems, in the provision of health care, and in the political environment.

Spieler observed, *inter alia*, that:

> most of our jobs are safer than they were one hundred years ago. Despite this, the rhetorical and political parallels between 1900 and 2017 are troubling. Contingent attachment to the labor market is growing; proposals for elective workers' compensation laws are re-emerging; the reach of existing mandatory laws is being narrowed; the employment-at-will doctrine remains at the core of our employment law regime.

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3. The papers as submitted for the symposium, as well as video recordings of the presentations and panel discussions, are available at http://poundinstitute.org/node/52.

4. Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the U.S., 1900–2017*, 69 RUTGERS U. L. REV. 891 (2017).

> Workers fall from the labor market into poverty as a result of work-caused injuries and illnesses. That is precisely the problem that workers' compensation was designed to address.[5]

Spieler makes an observation that is familiar to those who study, and work to promote, public health and the welfare of workers: that if the United States only had a comprehensive social safety net that supported working-age people when they were injured or became ill, workers' compensation as such would be less important. But in the year 2017, that "if only" seems even farther out of reach. Far from moving toward a more equitable society, the current policy is to undermine workers. She argues that this makes it important to defend and improve the system where and when we can, resist the incursions of industries and their legislative advocates to undermine it further, and be prepared to create a better, broader array of worker protections when the political pendulum returns to a more worker-friendly position.

Following Professor Spieler's presentation, comments were offered by Professor Price V. Fishback, University of Arizona, Department of Economics, Charles R. Davoli, a practitioner in Baton Rouge, Louisiana, (on behalf of the Workers' Injury Law & Advocacy Group, www.wilg.org) and Hon. David B. Torrey, a Workers' Compensation Judge for the Commonwealth of Pennsylvania.[6]

Panel II was titled *Compensating Injured Workers in the U.S.: Back to the Future or Back to the Drawing Board?* It focused on a paper by Professor Alison D. Morantz, of Stanford Law School entitled *Economic Incentives in Workers' Compensation: A Holistic, International Perspective.*[7]

Professor Morantz argued that, while workers' compensation is for the most part state-based and state-contained, and can vary considerably across state lines, it interacts with three other national institutions that, together, determine worker health and safety policy in the United States: the free-market economy, government regulation of workplace safety, and social insurance.

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5. *Id.* at 1013.

6. A written response by Professor Fishback appears in this issue. Price V. Fishback, Comment, *Long-Term Trends Related to the Grand Bargain of Workers' Compensation*, 69 RUTGERS U. L. REV. 1185 (2017). His PowerPoint slides are available at http://poundinstitute.org/sites/default/files/docs/2016%20Symposium/fishback-ppt-9-2016.pdf. A written response by Mr. Davoli also appears in this issue. Charles R. Davoli, Commentary, *Challenges of the Changing Legal Structure of Workers' Compensation and the Changing Workforce*, 69 RUTGERS U. L. REV. 1173 (2017).

7. Alison Morantz et al., *Economic Incentives in Workers' Compensation: A Holistic, International Perspective*, 69 RUTGERS U. L. REV. 1015 (2017).

Morantz observes that "[t]he U.S. workers' compensation system is at a historic crossroads," with the "grand bargain" unraveling, providing satisfaction to few, if any, of its stakeholders.[8] Benefits decline, and costs increase continually. The costs of injuries and illness that are unreported and unclaimed are shifted to taxpayers. Because of the uniquely complex US system, she argues, it is unlikely that the system's chronic deficiencies can be corrected in a piecemeal process. What is needed is "a sweeping overhaul . . . of several different pillars of the [occupational safety and health] system."[9] However, she also recommends some more limited reforms to begin incremental change.

Following Professor Morantz's presentation, there was incisive commentary by Professor John F. Burton, Jr., Rutgers School of Management and Labor Relations (emeritus),[10] James Lynch, Chief Actuary of the Insurance Information Institute,[11] Monica Galizzi, University of Massachusetts Lowell, Department of Economics, and Leslie I. Boden, Boston University School of Public Health.[12]

Panel III considered *Workplace Injuries as a Constitutional Law Issue.* Professor Robert F. Williams, of Rutgers Law School, presented a paper titled *Can State Constitutions Block the Workers' Compensation Race to the Bottom?*[13]

Williams describes the constitutional dimensions of the Grand Bargain, and reminds us that some of the first compensation systems were invalidated by state courts. Both law and public opinion later evolved, so that there was more general acceptance that the cost of industrial injury and disease should be recognized as a cost of doing business, and ultimately passed on to the consuming public. But currently, he observes, there is "a movement afoot in the country to further erode the workplace-injury compensation programs that formed

8. *Id.* at 1078.

9. *Id.* at 1079.

10. A written response by Professor Burton also appears in this issue. John F. Burton Jr., *Comment to Economic Incentives in Workers' Compensation: A Holistic International Perspective*, 69 RUTGERS U. L. REV. 1233 (2017).

11. A written response by Mr. Lynch also appears in this issue. James Lynch, *Comment to Economic Incentives in Workers' Compensation: A Holistic International Perspective*, 69 RUTGERS U. L. REV. 1249 (2017).

12. A written response by Professor Galizzi and Professor Boden appears in this issue. Leslie I. Boden & Monica Galizzi, *Blinded by Moral Hazard, Comment to Workers' Compensation: A Holistic International Perspective*, 69 RUTGERS U. L. REV. 1213 (2017). PowerPoint slides of the comments by Professors Galizzi and Boden are available at http://poundinstitute.org/sites/default/files/docs/2016%20Symposium/Boden_Galizzi_Rutgers_September_2016%20final_2.pdf.

13. Robert F. Williams, *Can State Constitutions Block the Workers' Compensation Race to the Bottom?*, 69 RUTGERS U. L. REV. 1081 (2017).

one-half of the Grand Bargain."[14] He calls it "the Race to the Bottom," in which employers, insurers, and their lawyers are arguing that injured workers "are sometimes entitled to *no or inadequate* compensation."[15] The "race" has led to greatly increased interest in state constitutions, which in some instances provide more protection than does the U.S. Constitution.

Constitutional analysis is particularly important, Williams argues, when litigating the validity of the revisionist statutes that form the backbone of the "race to the bottom," since the original Grand Bargain legislation cannot bind present legislatures. Thus, state constitutions can serve as a valuable check on erosion of workers' rights.

Following Professor Williams's presentation, comments were offered by Professor Justin R. Long[16], of Wayne State University Law School, and the Hon. Dan Friedman of the Maryland Court of Special Appeals.

Finally, Panel IV examined *Alternative Structures for Addressing Workplace Injuries: Tort Law and Beyond.* Two papers were presented.

In the first, *Accommodating Tort Law: Alternative Remedies for Workplace Injuries*,[17] Professor Robert L. Rabin, of Stanford Law School, considers the past and present roles played by third-party tort litigation in compensating worker injury and death. Beginning with a discussion of the seminal products liability case of *Escola v. Coca Cola Bottling Co. of Fresno*,[18] Professor Rabin outlines the important complementary role played by tort law. In *Escola*, the plaintiff suffered a serious injury when a soda bottle exploded in her hand while she was working at a restaurant. For her injury[19] she received a workers' compensation award in the munificent amount of $42.60. She could not sue her employer owing to the exclusivity provision of her state's "grand bargain," but she could recover full damages in tort against the bottling company.

Rabin notes that the very survival of tort law as a vital mechanism of compensation might astonish the founders of the statutory compensation movement, were they alive today. He mentions several

14. *Id.* at 1083.

15. *Id.* at 1084.

16. An edited transcript of Professor Long's remarks appears in this issue. Justin R. Long, Edited Remarks, *Workplace Injuries as a Constitutional Law Issue*, 69 RUTGERS U. L. REV. 1265 (2017).

17. The paper appears in this issue. Robert L. Rabin, *Accommodating Tort Law: Alternative Remedies for Workplace Injuries*, 69 RUTGERS U. L. REV. 1119 (2017).

18. 150 P.2d 435 (Cal. 1944).

19. "The bottle broke into two jagged pieces and inflicted a deep five-inch cut, severing blood vessels, nerves and muscles of the thumb and palm of the hand." *Id.* at 438.

other landmark products liability cases, all of which arose from workplace accidents, and makes an excellent case for the retention of tort law as a parallel avenue of redress. The paradigm example, of course, is the litigation over disease caused by exposure to asbestos, almost always in the workplace.

In comparison to the usually parsimonious awards under workers' compensation, Rabin observes, recovery in tort, when (and *if*) successful, offers full wage replacement and non-economic damages. He also points out that the two regimes differ significantly in other aspects besides the amount of money changing hands: third-party litigation supports the "make-whole" philosophy of tort law and promotes deterrence of wrongdoing, but it is a carve-out in the overall compensation scheme and benefits only a small percentage of workers. Workers' compensation, on the other hand, is more consistent with social welfare goals but in most cases does not make the injured worker whole. Rabin concludes that "perhaps it is most sensible to live with this complementarity and concentrate on incremental adjustments that promote more satisfactory allocation of blameworthiness."[20]

In the second Panel IV paper, *Towards a Less-Grand Bargain for Injured Workers*,[21] Professor Adam Scales, of Rutgers Law School, suggests that, owing to accidents of history, workers' compensation has been frozen in time, while society, industry, politics, and other areas of the law have changed considerably. At bottom, he argues, workers' compensation is an insurance system—or, more accurately, three insurance systems grouped into a "combo-tool." It provided a form of health insurance at a time when such coverage was almost nonexistent; it provided disability insurance when an injury resulted in unemployment; and it doubled as life insurance, providing death benefits to the families of workers who died on the job.

In view of the drastic changes to the landscape in the past century, Scales forthrightly suggests that we "blow up the workers [sic] compensation system almost entirely," replacing it and the immunity from tort suits it provides with "new or existing insurance mandates, and a limited remedy in tort." The components would be similar to the historical functions of workers' compensation: (1) health insurance provided through the federal Affordable Care Act, or other regime with similar employer-provided healthcare mandates; (2) disability insurance, with temporary and partial disability coverage provided by employers and total and long-term disability coverage provided through

20. Rabin, *supra* note 17, at 1137.

21. Available at http://poundinstitute.org/sites/default/files/docs/2016%20Symposium/scales-symposium-draft-9-13-16.pdf.

the Social Security Disability Insurance program; and (3) private life insurance purchased by employees themselves. To those components he would then add a limited "employment tort" remedy for employer negligence. Scales argues that such a system would amount to a new *quid pro quo*. He is uncertain of the proposal's likely effect on injury prevention, but argues that it would slow the "race to the bottom." Achieving such major changes would require compromises by many political players. The consensus of the discussion was that it was not realistic to expect such changes in the foreseeable future.

Following the presentations of Professors Rabin and Scales, reflective comments were offered by Professor George W. Conk, of Fordham University School of Law,[22] and Professor Michael C. Duff, of the University of Wyoming College of Law.[23]

22. A written response by Professor Conk also appears in this issue. George W. Conk, *Deadly Dust: Occupational Health and Safety as a Driving Force in Workers' Compensation Law and the Development of Tort Doctrine and Practice*, 69 RUTGERS U. L. REV. 1139 (2017).

23. Professor Duff's PowerPoint slides are available at http://poundinstitute.org/sites/default/files/docs/2016%20Symposium/duff-ppt-9-2016.pdf. An edited version of his remarks appears in this issue. Michael C. Duff, Edited Transcript, *Reflections on the "Persistence of Tort" and the "Demise of the Grand Bargain"*, 69 RUTGERS U. L. REV. 1257 (2017).