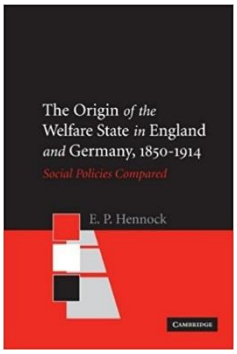
BOOK NOTE



THE ORIGIN OF THE WELFARE STATE IN ENGLAND AND GERMANY, 1850-1914: SOCIAL POLICIES COMPARED
by E.P. Hennock
Cambridge University Press. 2007. 381 pp.

The scholar E.P. Hennock, in 2007, summarized the lead up to, and the character of, early British workers' compensation in his book, *The Origins of the Welfare State in England and Germany, 1850-1914: Social Policies Compared*. Hennock's summary is just a part of a larger, ambitious work, in which he examines five social insurance schemes in their formative period. Those four programs are public relief for the poor; governmental action to address industrial accidents (our subject here); how the two countries addressed sickness, invalidity, and old age; and state action to deal with unemployment.

Hennock notes at the outset that social reformers in England were *initially* most concerned with the long hours of work that employers demanded of their workers, along with the related, shocking use of child labor. The "early factory movement was … primarily concerned with the protection of the labour force through limitation of working hours, and in the case of children, with supplementing work with school." Before 1833, few rules existed to govern hours of work. Workers, however, had been demanding a twelve-hour maximum work day, and in 1833 Parliament finally responded. It did so, however, by enacting a *different* law – it banned the use of all labor by children under the age of eight, and restricted the hours for older children. In 1844, meanwhile, the law was amended to similarly limit the hours of work at which women could labor. Finally, in 1850 Parliament enacted the 12-hour workday maximum, with a 10½ hour day for women and minors.

With these goals met, in part, factory inspectors and others turned to better cataloging the many accidents and deaths which were unfolding in the industrializing economy. These efforts reflected an early safety movement and resulted in laws like the ban on young children cleaning moving machinery and the requirement that such machinery be "fenced in." Injury and death rates were also better cataloged by physicians keeping more systematic records.

The safety regulations that were enacted, however, were hard to enforce, and government agencies were underfunded and employed pathetically few inspectors. As a result, those inspectors who were employed adopted an approach of "negotiating compliance," as opposed to investigating accident scenes and prosecuting those who had broken the law.

The state of the early "factory acts" changed, dramatically, in 1867, when Parliament extended the reach of safety laws reach *beyond* the textile industry into all forms of labor. This was a breakthrough moment, but enforcement was still a major issue – 29,000 places of employment to be inspected now existed, but the centrally-administered bureaucracy in charge of enforcing the law had a staff of only 55.

As the decades passed, the proponents of better hours of work and positive safety regulations began to address the issue of *compensation* for work-related injuries and deaths. This lobby, notably, was advanced by representatives of the working class – particularly those employed in the coal mining and railway industries – and their allies. Hennock notes that in Germany, by contrast, it was opponents of further safety regulation, particularly the industrialists, who proposed the no-fault compensation laws – in essence advancing a trade-off to the working class.

In addressing the issue of compensation, Hennock first turns, as he must, to the early English common law defense of "common employment" (*i.e.*, the Fellow Servant Rule). He explains that, in the face of a workplace injury or death, the employer was not vicariously liable for the negligence for its workers, even its supervisorial personnel. "In the case of large undertakings," he points out, "in which the owner was remote from the actual running of the business, such as mines and railways, that left the workman with no claim that he could in practice pursue." This rule – and legacy – was, of course, established in the quintessential landmark decision, *Priestley v. Fowler* (1837).

The Fellow Servant Rule (I will use the American term) was devastating to working class interests, and once organized labor started to have a more prominent voice in Parliament, proposals were made to abolish or modify it. Notably, railway workers of the day were especially vexed by the rule, because they observed how passengers injured on trains could sue for negligence, while they themselves were barred from doing so.

It was thus organized labor, specifically the Trade Union Congress (TUC), that dominated the campaign to change the common law. In fact, Hennock notes, the law was so unfair that by 1878 "no one was defending" the Fellow Servant Rule.

Under the leadership of the Alexander McDonald, the miners' leader turned MP, Parliament was to enact a law in 1880 that limited the reach of the defense. In this regard, the employer would no longer enjoy immunity when the injury or death resulted from the act of an agent, though the employer remained immune when the casualty was caused by a mere co-employee of the plaintiff. Hennock states that mine owners, in particular, were alarmed at this development. They were not, in this regard, accustomed to being sued as were the railways.

With the new Employers Liability law, employers could insure (if they wished) in three fashions. They could (1) insure through a mutual insurance enterprise; (2) insure privately through a commercial carrier; or (3) take advantage of a novel machination – set up a private fund (into which the employees would also contribute), and require that employees, as a condition of employment, take part in the plan and accepts its benefits, at the same time waiving the right to sue the employer in tort.

This latter approach was soon dubbed "contracting-out." Although it was to be controversial for decades, Hennock also points out that the practice was not particularly widespread. It was popular in coal mine enterprises (mainly, he says, in the most dangerous ones), where, at its height of popularity, 20% of such workers were covered by contracting-out plans. The author also explains that a dichotomy among plans existed. In the first formulation,

as noted above, the worker would have to agree, in advance of any injury, and as a condition of employment, to accept the plan and the waiver. In the second, the worker only waived his right to a tort action by actually accepting monies from the fund. Hennock states that in the coal mine experience, an even number of miners accepted each type of plan.

The organized labor movement vehemently attacked the contracting-out practice and sought, unsuccessfully, to have a law enacted overthrowing it. Labor, in this regard, viewed employer immunity from common law negligence liability as defeating the goal of leveraging employers to safety. It also viewed the creation of such funds as a ploy to undermine the labor movement itself. Others, however, thoughts that the funds were a superior answer to the crisis of uncompensated work injuries and deaths – in this regard, litigation would be avoided and workplace harmony encouraged.

As noted below, contracting-out was apparently never repealed, though it was allowed to "wither on the vine" after the enactment of workers' compensation laws.

Continuing calls for the complete abolition of the Fellow Servant Rule continued, but contention over labor demands that contracting-out be outlawed led to a stalemate. According to Hennock, the answer to this stalemate was the concept of workers' compensation. Hennock traces the British idea directly to Sir John Gorst, who had attended the International Labor Conference in Berlin, in 1890. However, the cause was aggressively taken up, from this early proponent, by a Member of Parliament, Joseph Chamberlain. He first proposed the law in 1893, and the concept was debated but enactment did not unfold. Ironically, organized labor opposed the law, as it was more intent on reforming the common law. By 1897, however, momentum was on the side of workers' compensation, as a new Liberal party government, of which Chamberlain was a part, had, in 1895, taken power. Hennock portrays Chamberlain as the hero of the 1897 enactment, as he possessed the leadership necessary to persuade even conservatives to join in supporting the new law.

Chamberlain's thinking as to workers' compensation was somewhat counterintuitive. He was disdainful of organized labor's view that strengthened employer liability laws would leverage employers to safety. In his view, more active, positive, safety laws were the answer to the problem. In the meantime, the best way to deliver compensation to injured workers or their widows was a no-fault plan. Indeed, he advised Parliament that a no-fault workers' compensation law would increase vastly the amount of compensation to be paid. From this vantage point, workers' compensation "proposals were greatly superior to any reform of the law of employers' liability. Chamberlain, in this regards, "calculated with the help of German accident statistics that 43 per cent of recorded accidents would not have qualified for compensation even if the defence of common employment were abolished." (Chamberlain did seem to believe that employers with bad experience would be punished, and presumably leveraged to safety, via insurers increasing premiums.)

Hennock points out three major differences in the German system that was so important in inspiring the British to enact no-fault liability. First, the German system was state run, with insurance institutes set up to underwrite risks; in contrast, employers under the British system could insure (or not insure) as they pleased. Second, the German program was marked by central

oversite and was heavily bureaucratic, whereas British administration was fragmented over several agencies, with litigation left to the county courts. Finally, the German legislation surrounding work injury compensation was coordinated with a program of compensation for *non-occupational* disability and medical needs.

Chamberlain and the other founders of the British system all seemed to agree that a German-style bureaucracy for administration of the new law was not workable in Britain. As to insurance, Chamberlain hoped that all employers would voluntarily insure via such enterprises as mutual insurance associations.

Hennock concentrates at length on the issue of how employers were to insure. A major concern, in lieu of mandatory insurance, was the specter of the bankrupt employer. (Hennock states that a notable practice was for an employer to dangle over the head of an injured worker the prospect that it may go bankrupt, in an effort to persuade the worker to take less than he might otherwise be owed under the law.) The bankruptcy worry persisted for a decade, but the major 1906 changes to the law, which added many occupations and for the first time facilitated the compensation of occupational diseases, failed to include an insurance mandate. Indeed, with the exception of the coal-mining industry, it was not until after World War II, when Britain completely overhauled all of its laws, that the principle of compulsory insurance ever succeeded.

The creation of workers' compensation in England did not feature a compromise under which injured workers automatically gave up the right to sue in tort. No so-called "Grand Bargain" attended the creation of no-fault liability. Employer liability theoretically endured, though a worker who accepted workers' compensation, elected out of his tort remedy against the employer.[1]

In any event, employers for workers' compensation had a similar selection of methods to insure for the new liability. They could "carry their own risk," that, is self-insure; insure with a mutual insurance enterprise; receive underwriting via a commercial carrier; or, as before, demand that an employee contract-out of the system, by accepting the employer fund and waiving workers' compensation rights. This always-controversial practice, however, soon fell out of favor. This was so in critical aspect because the employer plan had to "be at least as favorable to the workmen and as costly to the employer as the provisions made under the act …. [T]hat requirement deprived the fund of any attraction by employers." By 1920 only 20 such schemes existed in the whole country.

An arguable oddity about the popular new mutual insurance companies was that they often paid only the most serious of claims, leaving employers in effect to self-insure for the others. True collective responsibility was hence elusive. Hennock is critical of this scattershot and unorganized approach to insurance, and he states that, as a result, the British system never engendered, as did that of Germany, programs emphasizing safety and rehabilitation.

[1] Richard Lewis, *Employers' Liability and Workers' Compensation: England and Wales*, in KEN OLIPHANT AND GERHARD WAGNER, EMPLOYERS' LIABILITY AND WORKERS' COMPENSATION, pp.139-40 (De Gruyter/European Centre of Tort & Insurance Law 2012).

As foreshadowed above, in 1906 the law was amended to add virtually all occupations. This addition included domestic workers, the retail trades, and even small handicraft workers. (Agricultural workers, meanwhile, had been added in 1900.) This momentous change prompts Hennock to make a sarcastic remark as he notes that, with the 1906 changes, Britain took a leap ahead of Germany in terms of occupations covered: "This difference is not surprising; the British law had no organizational implication of any kind."

Hennock establishes that the initial British system featured the same type of disability benefits that are so familiar in U.S. law today, to wit, total disability, partial disability, and death benefits. (He does not mention PPD.) A maximum compensation payable existed, which indeed could work a hardship on "skilled men" who achieved significant earnings. An anomaly, arguably, was that widows were paid lump sums, and not periodic payments as in Germany. Hennock reports that this practice was condemned by theorists, but he points out that, unless the widow was quite aged, she would need to re-marry to support her children, and the possession of a lump sum or "dowry" would presumably make her more attractive to the right suitor.

A marked omission in the British law was that disability and death benefits *only* were paid – there *was no* medical compensation prescribed by the law. Presumably the doctor and/or hospital was to be paid out of the weekly compensation, and for serious injuries the worker was expected to resort to the "Poor Law" or charity hospitals. Hennock notes that because employers desired workers to recover (to limit liability), they would sometimes pay voluntarily, and demand also that workers report for periodic examinations to monitor recovery. He reports, notably, that workers in both England and Germany thought it unfair that employers could control their medical treatment. The lack of medical coverage to Hennock marks a significant contrast between the two countries – in Germany, a worker's rehabilitation from a serious injury was taken seriously, as an able workforce was thought to be an essential aspect of "national capital."

The 1906 changes to the British law also included addition of occupational diseases. Theretofore only "accidents" had been covered, but the House of Lords in 1905 had, in a well-known decision, held that the incurrence of anthrax could be conceptualized as an accident. This judicial decision apparently motivated a liberal Parliament to make the additions. Importantly, bureaucrats could add other diseases without the need for amendatory legislation. In 1907, 18 were added, and by 1913 a total of 26 diseases were featured on the list. Although Hennock does not say so, a presumption of causation applied.

Hennock also addresses the issue of litigation. The system was, in this regard, a disappointment from the outset. Many disputes unfolded over coverage and benefit entitlement, and lawsuits for compensation were common. Labor, in this regard, had apparently no interest in cooperating with the establishment of joint arbitration tribunals (two exceptions are noted), and were accustomed in any event to the litigation of cases under the employer liability law. Insurance carriers were litigious as well. In short, the adversarial nature of litigation under the existing law carried over into workers' compensation.

The author concludes his discussion by reproducing a famous quote by Churchill: "Germany … is organized not only for war but for peace. We are organized for nothing except

party politics." As to this dictum, Hennock declares that, while the British leader's statement is "extravagant," it nonetheless "seems particularly appropriate to compensation for industrial injury. Government and parliament were soon to turn to the needs of the elderly, the unemployed, the sick and the disabled by setting up new forms of organizations. Workmen's compensation remained a disorganized backwater of social policy for another thirty years."