

Historical development and operation types of workers' compensation

Key questions:

1. How old is workers' compensation in the human written history?
2. What were the main principles of workers' compensation and its actual limitation in the early industrial revolution?
3. What was the situation like when EII was introduced first in Germany and how did it spread to other industrialized countries?
4. What are the historical and logical justifications for introduction of EII?
5. How has the EII scheme developed in countries' context?
6. Has tort system in civil court survived after introduction of EII?

Objectives:

This paper provides the understanding on the introduction and development of EII scheme in historical and logical contexts for the trainees. It covers the history and origin of modern workers' compensation system and developmental phases of the scheme in each country's context, through which trainees can comprehend the complex system of current workers' compensation in their countries. In detail, it deals with traces of workers' compensation in ancient times, common law and its limitation to address increasing cases of occupational accidents in early industrial revolution, the examination of the first emergence of EII in Germany, the historical and logical justification for introduction of EII and various development pattern of each country. At the end of this module, you might ask by yourself about the original reason of the scheme, "Social justice or economic efficiency?" Whatever it is, EII scheme practically contributes at individual, enterprise and national level.

Overview:

1) How old is workers' compensation in the human written history?

The workers' compensation traces back to about 2050 B.C. if we find in human written history. In ancient Sumeria, King Ur made a law which was the base for financial compensation for injury happening to workers' body part inclusive of fracture. Later, a notable Hammurabi code also set a reward for injuries and their expected invalidity from 1750 B.C. Among other ancient cases, compensation schedules with certain payments for the loss of a body part can be found in Ancient Greek, Roman, Arab, and Chinese law. However, all the early compensation schemes did not imply the concept of the loss of function of a body part.

As the time transited to early and middle part of the Middle Age, the feudalism has come to main political structure and the arbitrary benevolence of the feudal lord determined what compensation was expected for injuries. The concept of workers' compensation was closely related with noblesse oblige which means that injured serf would be cared by his lord.

2) What were the main principles of workers' compensation and its actual limitation in the early industrial revolution?

English common law developed in the late Middle Age and Renaissance has provided a legal framework prevailing in the early Industrial Revolution in Europe and America. Three critical principles determining what injuries were compensable have evolved based on the common law. The below three rules were so restrictive that it was not easy for occupationally injured workers to prove their employers' liability and get compensated by them during the period.

✓ Contributory negligence

If the worker was in any way responsible for his injury, the principle of contributory negligence held the employer was not at fault.

✓ The fellow servant rule

Under this rule, employers were not liable if the worker's injuries resulted in any part from the action or negligence of a fellow employee.

✓ The assumption of risk

It held simply that employees know of the hazards of any particular job when they sign their contracts. Assumption of risk was often formalized at the beginning of an employee's tenure; many industries required contracts in which workers abdicated their right to sue for injury.

Under these quite restrictive common law principles, the method of enforcement proved most cumbersome. An injured worker used tort system, which means he or she needed to prove employer's negligence on the injury. However, in the nineteenth century as in our own, litigation cost was so expensive for them to bear in many cases.

Nevertheless, the worker occasionally relied on tort system. As the century came near the end of the century, the legal disputes in the civil court happened so frequently that employers also got not comfortable with the uncertain aspect of work injury and high cost of litigation cost.

3) What was the situation like when EII was introduced first in Germany and how did it spread to other industrialized countries?

The most remarkable events in the history of modern workers' compensation occurred in Germany, exactly Prussia under Chancellor, Otto von Bismarck. In Germany at the time, there was a very active Marxist and socialist movement and social protection for workers was the agenda of top priority. While suppressing the institutions of his socialist opponents, he absorbed their main agenda. One of them was establishing social insurance. His first intervention was Employers' Liability Law of 1871 which provided limited social protection to workers in certain factories, quarries, railroads, and mines. Later he pushed further by workers' accident insurance in 1884, the first social insurance in the world. Few years later, public pension insurance providing a stipend for workers incapacitated due to non-job related illnesses and public aid providing a safety net for those who were never able to work due to disability have been established. The system was for the active worker; the greatest benefits were granted to job-related injuries and medical care and rehabilitation were covered. The state-administered Prussian system also established an important precedent: it was regarded as an exclusive remedy to the problem of workers' compensation based on no-fault doctrine of compensation and social risk-pooling. Employers under the system could not be sued through the civil courts by employees.

The Prussian system has served as a basic model for the social insurance programs of a variety of countries. Other western nations gradually began to accept the notion that modern industrial society required some form of mandated workers' insurance. As early as 1880, the British Prime Minister William Gladstone pushed through the employer's liability act. This abolished the old

common-law defences in theory, but it did not establish a "no-fault" system. A proof of negligence on the part of the employer was necessary for the employee to collect. In addition, the contracts in which workers renounce their right to sue for injury were still legal and widely used by English industry. Thus, the 1880 law had little effect.

The workers' compensation act was proposed in parliament in 1893 and was largely equivalent to the 1884 Prussian law in establishing a no-fault doctrine of compensation. Unlike the German model, it did not fully rely on state administration. Instead the "Friendly Societies" which had organized various forms of private disability insurance for workers for many years were relied upon to provide the insurance itself. Nevertheless, the act encountered strong opposition from manufacturing interests in parliament, and the House of Lords delayed its passage by attempts to add language which would have made "right to die" contracts a permissible means of circumventing the entire system. Finally, the act was passed in 1897 after a four-year legislative struggle. Later, in 1911 National Insurance Act became passed.

4) What are the historical and logical justifications for introduction of EII?

The historical background of workers' compensation is different according to countries because of their difference in cultural, historical, political and economic perspective. However, the backgrounds might be grouped into mostly three as follows¹.

The first is the social compromise theory. Employees are compensated by the EII on the condition that they give up legal procedures whereas employers are required to pay the EII benefits to employees who suffer from industrial injuries or diseases whether they are negligent or not. The payment of the EII benefits excludes employers from the process of the civil trials. As examined in German case, employers pay the contribution to EII scheme and are free from further liability derived from tort system in civil lawsuit. However, it is not applicable to all countries because tort system is allowed in some countries such as UK, some states of Australia even though EII is operating.

The second one is the least social cost theory. The non-fault liability under the EII is much more efficient in time and cost than the judicial system which focuses on who is responsible for the accidents. Both employers and workers have felt this logical background in the nineteenth century in Europe because related litigation cost was high. Rather than solving the compensation cases by themselves in each workplace, they felt it more efficient to rely on social risk pooling through EII because it brought employers financial and management stability and workers way of more securing workers' compensation right.

The third background is the occupational risk theory. In a broad sense, industrial accidents are inevitable under capitalism system and should be compensated regardless of who is responsible for the accidents. Thus the expenditure for industrial accidents should be considered as a part of production cost. This model is applicable to some of developing countries while the previous two models are applied to developed countries' early experience of introducing EII scheme. As the industrialization is made, the number of occupational injury and disease tends to increase. To some extent, EII made it possible for developing countries to make economic growth possible and sustainable by meeting the surging demand for workers' compensation caused by rapid industrialization.

¹The theoretical background frame was from the ILO feasibility study on employment injury insurance scheme for Sri Lanka.

5) How has the EII scheme developed in countries' context?

About this subject, it would better to examine both theoretical and practical sides of EII scheme.

Given that EII is focused on to some extent, securing loss of previous income before injury based on no fault principle of employer liability, it is difficult for the scheme to be tax-based, which means EII scheme is different from social assistance system. Thus EII is contribution-based generally on income security side and employers pay contribution to the scheme as we examine the origin of modern workers' compensation system previously.

When it comes to medical care, if the universal medical system such as NHS is provided, medical care benefits tend to be covered by the universal scheme. UK is one of the cases and its income security for injured or sick workers is covered by sickness and disability scheme. If there's no universal medical care system, medical care benefits is included in EII scheme. In this case, EII is separately implemented along with other schemes. Canada, USA, Germany are the examples. In addition, there's possibility of it covered by national health insurance scheme and the scheme operator collects the contribution which includes sickness, work injury and other schemes in some cases from employers and employees. For instance, in India, Employees' State Insurance Corporation collects 1.75% and 4.75% from insured persons and employers respectively through collecting system for sickness and maternity schemes. The contributions also finance work injury benefits and the unemployment allowance. State governments pay 12.5% of the cost of medical benefits. State government contributions also finance work injury medical benefits and the cost of necessary medical care for unemployment allowance beneficiaries and their dependents.

When it comes to service provider of EII, it is divided into "public / private carrier" or "federal(central)/ provincial(local)". There remain countries with employer liability only or one with voluntarily purchased private insurance but it is categorized into the previous two. This division is based on cultural, historical background of each country at the introduction and development of EII scheme. If a country has philosophy or belief that government should not engage much in jurisdiction which is expected to belong to market mechanism, it would prefer private carrier of EII service. However, if so, federal or provincial government set the criteria for private insurance companies to follow. In addition, more than 85% of workers' compensation schemes are social insurance type of EII, a public carrier.

The above mentioned can be summarized as in the below table.

Table 1. Categorization of operation types of workers' compensation scheme

| Medical care Service Provider | By universal health | By health insurance | By EII |
|----------------------------------|---|---|--|
| By employer liability | Medical care is provided by universal health scheme and loss of income by employer direct payment. a) Country case | Medical care is provided by health insurance scheme and loss of income by employer direct payment or purchasing insurance on some occasions. d) Country case | There is seldom case for this category. |
| By public carrier | Medical care is provided by universal health scheme and income security by disability, sickness schemes. b) Country case | Medical care is provided by health insurance and loss of income by disability, sickness schemes. e) Country case | Medical care and cash benefits for income security are provided by public institution on central (federal) or local (provincial) level. g) Country case |

| | | | |
|--------------------|--|--|---|
| By private carrier | Medical care is provided by universal health scheme and income security by private insurance companies. c) Country case | Medical care is provided by health insurance scheme and income security by private insurance companies. f) Country case | Medical care and cash benefits for income security are provided by the private insurance companies. Even in this case, the central (federal) or local (provincial) sets the guideline (level of benefits, premium range, etc.) h) Country case |
|--------------------|--|--|---|

Table notes

- a) Brunei belongs to this category. There's also case of allowing employers to purchase private insurance policies for workers' compensation on voluntary basis, which is applicable to current system of Sri Lanka. However, Sri Lanka has been considering conversion of employer liability into EII for income security for occupationally injured or sick workers.
- b) UK belongs to this category. Any employee who is injured or made ill at work is entitled to claim benefits under the social security system and to receive health care services from the National Health Service. Statutory sick pay coverage is provided for a period up to 28 weeks. Durations of disability longer than 28 weeks are entitled to an incapacity benefit under the Industrial Injuries Scheme administered by the Department of Work & Pensions.
- c) Denmark bases workers' compensation system on universal scheme for medical benefits and direct provision (cash benefits) system, involving compulsory income security provisions through a private carrier (for accident and the Labor Market Occupational Disease Fund (for occupational disease).
- d) In Kenya, employers should pay direct payment or may insure against liability with private insurance companies. In Argentina, employer and public institutions (other than national institutions), may self-insure if solvency requirements are met and medical care services can be guaranteed. If the employer does not meet both conditions, mandatory insurance must be purchased from a work injury insurer (ART).
- e) Besides Indian case mentioned in the above, in Serbia there is no specific program for work injury. Cash and medical benefits for a work injury or an occupational disease are provided through the Old Age, Disability, and Survivors and Sickness and Maternity programs. However, the provision of temporary disability benefits is still left in employer liability.
- f) In Finland, Ministry of Social Affairs and Health provides general supervision in employment injury system. Federation of Accident Insurance Institutions coordinates statutory accident insurance legislation. Insurance is administered by licensed private companies.
- g) Most of EII operating types belong to this category. In Germany, work accident insurance funds, known as "Berufsgenossenschaft" (BGs) are organized by economic sector, operate nationally, and each is governed by the social partners (representatives of workers and employers). The former central federation of the BGs, HVGB, merged with the accident insurance funds covering public sector workers in 2007. The amalgamated federation is known as DGUV. In Canada, even though the public carriers provide workers' compensation services, there are various operating types on state level.
- h) Switzerland belongs to this category. Swiss National Accident Insurance Fund (<http://www.suva.ch>) manages the accidents program. However, the workers' compensation services are delivered through private insurance companies. In USA and Australia, there are various pattern of operating workers' compensation on state level, most of which are through private insurance companies.

6) Has tort system in civil court survived after introduction of EII?

As examined earlier, one of the historical backgrounds of modern workers' compensation system is social compromise between employers and workers. It means in return for employers to secure workers' compensation through insurance mechanism, workers give up their rights to

file lawsuits against their employers in civil court based on tort system. This is applicable to the countries such as Germany, Canada, USA, etc.

However, this historical compromise theory is not always true of other countries. As mentioned earlier, in UK, workers receive medical care in kind from National Health System and cash benefits for income loss from other social insurance schemes as sickness and maternity schemes. In addition, if the employers' negligence in the injury or disease is severe, workers can file lawsuits against their employers in civil court separately. For the case, employers purchase private insurance policies mandatorily. In addition, some states of Australia still allow common law actions against an employer for negligence.

If we take a specific look at UK case, there are two sources of disability income security available to a worker in the UK. One is the social security benefit system administered by the Department for Work and Pensions, and the second is the employers' liability insurance. Any employee who is injured or made ill at work is entitled to claim benefits under the social security system and to receive health care services from the National Health Service. Statutory sick pay coverage is provided for a period up to 28 weeks. Durations of disability longer than 28 weeks are entitled to an incapacity benefit under the Industrial Injuries Scheme administered by the Department of Work & Pensions.

Separate from the previous social insurance system, in UK, employers' liability insurance is compulsory, enabling employers to meet the cost of employees' injuries or illnesses, whether they are caused on or off site. Injuries or illnesses relating to motor accidents that occur while employees are working are usually covered separately by motor insurance. State benefits do not involve fault being established. By contrast, employers' liability insurance requires the courts to establish the negligence of an employer. This is done through actual or threatened litigation. Employees in the UK who are injured or made ill at work are entitled to sue their employer for compensation in the civil courts within a three-year period.

Key points:

Modern workers' compensation, EII was introduced by historically addressing constraints caused by common law based on tort system. While workers became more secured from uncertain compensation from work injury and disease, employers also felt EII more efficient than common law approach in the perspective of exemption from liability, business operation stability, less litigation cost, etc. As EII was introduced in each country, the scheme has been developed in various ways reflecting the countries' own historical, cultural contexts.

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