"Without Feeling and Without Remorse"?
Making Sense of Employers' Liability and Insurance in the Nineteenth Century

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1. Employers' responsibility for employees

Speaking in 2002, Lord Bingham was clear about the principle that should guide the courts when determining cases involving employer's liability: "there is a strong policy argument in favour of compensating those who have suffered grave harm, at the expense of their employers who owed them a duty to protect them against that very harm and failed to do so".[1] This seemed so obvious as to require almost no explanation. But a hundred and fifty years earlier any judge would have been staggered by such a view. Erle CJ explained the position in *Tunney v Midland Railway Co* (1866):

> "a servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow-servant when he is acting in the discharge of his duty as servant of him who is the common master of both."[2]

Willes J sympathised with the plight of the injured worker in that case, but pointed out that, "one man's misfortune must not be compensated for at another man's expense".[3]

It might seem unfair to compare the views of people separated by such a long period of time – a cheap and ahistorical device to ridicule Victorian judges for not being people like us – were it not for the fact that *Tunney* was decided at a time when Parliament had been legislating on the obligations of employers to employees for more than 60 years. What explains this apparent discord? This paper contrasts the limitation the employers' liability with the emergence of the Factory Acts. It also considers how the modification of the common law in 1880 gave rise to employer's liability insurance, which in turn – for good or ill – opened new ways of protecting employees.

2. Pauper apprentices and the Factory Acts

The Factory Acts established the principle that the state could – even, should – require employers to provide healthy and safe working conditions. This long line of statutes began with the Health and Morals of Apprentices Act 1802, the roots of which lie in the poor law and the industrialisation of the British economy. The development of new technology in the late eighteenth century led to the construction of hundreds of textile mills which required cheap and plentiful labour. The problem was that these mills were driven by waterpower and many were, therefore, located in rural areas away from centres of population. This presented an opportunity to those parish officials that were charged with administering the Poor Law Acts 1597-1601.[4] Poverty was characterised as a problem of idleness that, in part, could be resolved by parishes binding pauper children to apprenticeships, but, by the eighteenth century at least, there were difficulties finding sufficient employers. Many parishes, therefore, seized on the demand for unskilled mill workers. This had the additional advantage of shifting future responsibility for maintenance of those children to the parishes in which the mills were located. The long hours and harsh conditions endured by these child workers were graphically depicted by Blake and later Dickens, and the Factory Acts, which, initially at least, focused on children, have been seen in terms of a straight fight between those who wanted reform and who opposed it. The true picture is, however, a little more complex.

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[1] *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 at 67.

[2] (1866) LR 1 CP 291 at 296.

[3] *Ibid* at 297.

[4] S Hindle, *The State and Social Change in Early Modern England*, London: Palgrave Macmillan, 2002; P Slack, *Poverty and Policy in Tudor England*, London: Longman, 1988.

The physical and moral health of the poor were key issues in eighteenth century economic and social policy. Crime, disorder and the cost of poor relief were all believed to be rising throughout the century, in spite of measures such as a draconian criminal code with perhaps 250 capital offences, the transportation of tens of thousands to the penal colonies of North America and later Australia, the public whipping of vagrants and the building of workhouses in which the poor could be incarcerated. These concerns were amplified by the belief that national wealth depended on imperial ventures, and, therefore, military strength, and on the size of the active workforce. The poor were the key to economic prosperity.

The focus on pauper children drew also on an humanitarian interest in their condition and education and linked up with shifts in thinking about childcare generally. A House of Commons report in 1715 claimed that three-quarters of the infants in the care of the poor law authorities in St Martin-in-the-field, London, died each year.[5] Something approaching accurate data on mortality was not collected until Hanway's Acts of 1762 and 1767, but the neglect of poor children prompted various philanthropic initiatives, such as the Foundling Hospital (1741) and the Asylum for Female Orphans (1758). Although they had only limited success in ensuring children survived to adulthood,[6] by mid-century interest in foundlings had become sufficiently fashionable to be satirised in Henry Fielding's masterpiece, *The History of Tom Jones, a Foundling* (1749). This was, in part, the result of an enthusiasm for sentimentality, which emphasised the public display of feelings, but it also reflected a growing interest in childcare. This arose out on an idealised and sentimentalised view of the way in which poor children were raised in the countryside, and, while the most famous example of this was Jean-Jacques Rousseau's book, *Emile, or on Education* (1762, translated 1763), new ideas were circulating more than a decade before its publication. In a manual, first published in 1749 and adopted by the Foundling Hospital, William Cadogan argued that the children of poor parents, who could not afford wet nurses or swaddling clothes, grew healthy and strong (at least those who lived in the country), while the children of wealthy parents were weakened and died young because they were "over-cloath'd and over-fed".[7]

Ideas about the proper care of poor children stressed the importance of training for what were regarded as their stations in life through a combination of work and religious education.[8] This was at the heart of the approach taken by the Foundling Hospital and by the charity schools, which had been established by the Society for the Propagation of Christian Knowledge (1699) and which proved the most successful of the new institutions for the maintenance of pauper children. The emphasis on work and on health meant that apprenticeship was not simply a way in which parishes could shrug off their responsibilities. It was implicit that attention should be paid to the conditions in which children worked. Efforts in this direction were made in the late eighteenth century, although these were intermittent and of limited effect. The Better Regulation of Chimney Sweepers and their Apprentices Act 1788 sought to improve the conditions of climbing boys by regulating their employment, although it proved a failure because it lacked efficient enforcement and depended on assessing their ages which proved impossible. The problem of enforcement became a constant theme because domestic government was organised around a decentralised model which frustrated attempts to legislate national change, although it did allow sufficiently enthusiastic poor law officials and magistrates to take the initiative and effect local reforms. In 1784, an outbreak of typhoid at a mill in Radcliffe near Manchester led to an inquiry by Dr Thomas Percival, a local physician whose later work on ethics was a principal source for the American Medical Association's own code. His report concluded that the conditions and excessive hours endured by children weakened their resistance to the disease and facilitated its transmission. As a result, local magistrates drew up rules on hours and working conditions, resolving not to bind their own paupers to any employer that failed to observe them, and magistrates in some other areas swiftly followed this example.[9] There is also evidence that by the early

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[5] H Cunningham, *The Invention of Childhood*, London: BBC Books, 2006, p103.
[6] The Foundling Hospital reported that in its first 16 years 2,822 children died out of a total of 6895: *Gazetteer and London Daily Advertiser*, 7 Apr 1759.
[7] [W Cadogan], *An Essay upon Nursing and the Management of Children, from their Birth to Three Years of Age. By a Physician In a Letter to one of the Governors of the Foundling Hospital*, 3rd edn, London, 1749.
[8] "Regulations to be observed as to the Nursing, Employment, and Destination of the Children of the Foundling-Hospital in order to make them useful to the Public", *London Gazetteer*, 21 Apr 1749.
[9] Anon, *A Short Essay Written for the Service of the Proprietors of Cotton-Mills and the Persons Employed in Them*, Manchester, 1784; J Innes, "Origins of the Factory Acts: The Health and Morals of

nineteenth century decisions in at least some London parishes on the apprenticing of children were being informed by inspection trips to factories and complaints from apprentices.[10] It is important to emphasise that none of this undermined the opinion in favour of putting children to work. The view was that, while a badly organised factory would destroy physical and moral health, a well-designed one would improve it. In this commentators were following arguments put forward by prison reformers such as John Howard who wrote *The State of the Prisons* (1777) not because he opposed imprisonment, but because he thought that the design and organisation of a prison could have a fundamental effect on the prisoner's health and character. Of course, it cannot be ignored that such ideas fitted the agenda of factory owners, some of whom realised that to limit the effect of radical reform on the availability of child workers it was necessary to admit some of the criticism of the factories in a way that saw them strengthened as institutions by representing them as beneficial both to the economy and to the workers.

But why was the act of 1802 passed at that time rather than earlier or later? A significant trigger may have been the conviction in May 1801 of a Stepney muslin weaver called Jouvaux for cruelty to Susannah Archer, his 15-year old pauper apprentice.[11] This case was marked out by several unusual features. The sentence was announced a month after conviction rather than immediately, as was normal; Grose J, the sentencing judge, made a lengthy speech; the case was tried in the King's Bench court; and the prosecution was conducted by the Attorney-General. Moreover, the treatment of apprentices had rarely come to public notice before, and, indeed, a degree of chastisement and confinement were regarded as entirely appropriate. It is true that a few cases in which apprentices had been murdered did attract attention, but they were characterised as examples of what one pamphleteer called "Inhumanity and Barbarity not to be Equal'd" on the part of the employers concerned rather than systemic failure.[12] Grose J certainly condemned the behaviour of the defendant, but he then launched a long attack on the parish officers, who, "without feeling and without remorse, had obtruded her [the apprentice] on another wretch, as unfeeling and as relentless as themselves." To the obligation such officers had under the poor laws to place pauper children, he added duties to ensure the employer was suitable and to continue monitoring the situation. Referring to all seventeen of Jouvaux's female apprentices, he thought it:

> "grievous to observe, that such a number of objects, placed with the Defendant should never have awakened the attention or curiosity of the Overseers of the Parish, or of the Magistrates… With an apathy, not uncommon perhaps to Overseers like these, they might reason thus – 'We have got rid of these children out of the parish, let others now see to their treatment.'"

During the trial, Lord Kenyon CJ had similarly wondered aloud, "why don't the parish officers visit such places oftener?" And he had referred with approval to the practice of the Manchester magistrates.[13] Thus, the exposure of Archer to brutal treatment by Jouvaux was blamed, in part, on the failure of a system that should have protected her. But Grose J was not finished. He next delivered a withering criticism on working conditions:

> "these young children cannot work… during the hours required of them, without great danger of their health, and without a very great probability, from the wretched situation of their

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Apprentices Act 1802" in N Landau, ed, *Law, Crime and English Society, 1660-1830*, Cambridge: Cambridge University Press, 2002, pp237-239, 242; AGE Jones, "The Putrid Fever at Robert Peel's Radcliffe Mill", (1958) 203 *N&Q* 26; A Meiklejohn, "Outbreak of Fever in Cotton Mills at Radcliffe, 1784" (1958) 16 *British Journal of Industrial Medicine* 68.

[10] K Honeyman, "The London Parish Apprentice and the Early Industrial Labour Market", Economic History Society Conference, Exeter, 31 March 2007; A Levens, "Parish Apprenticeship and the Old Poor Law in London", (2010) 63(4) Econ Hist Rev 915. Also, report of Jouvaux trial (below) in *Caledonian Mercury*, 1 Jun 1801.

[11] Quotations in text (except Lord Kenyon) from *Lancaster Gazetteer; and General Advertiser*, 4 Jul 1801. For Lord Kenyon: *E Johnson's British Gazette and Sunday Monitor*, 24 May 1801. Also, *Caledonian Mercury*, 1 Jun 1801.

[12] Anon, *Inhumanity and Barbarity not to be Equal'd: Being an Impartial Relation of the Barbarous Murder Committed by Mrs Elizabeth Branch and Her Daughter, on the Body of Jane Butterworth, Their Servant*, London [1740].

[13] *E Johnson's British Gazette and Sunday Monitor*, 24 May 1801.

> bodies, in doing their work, of incurring deformity, and of being disabled at a future time, if they should be dismissed from this employment, to be able to earn an honest livelihood."

Responding to what he imagined might be the objection that such work could only be done by children, he simply said, "trade must not for the thirst of lucre be followed".

In the following year Robert Peel MP, father of the subsequent prime minister, introduced the bill that became the 1802 Act.

> "He began by stating the advantages the community derives from the employment furnished to young children by the cotton manufactories. But though these advantages were so considerable, he said great evils were experienced likewise. From an immense number being crowded together impurity often arose, and disease followed. A greater evil still was their want of instruction. Leaving their parents at a tender age, they were afterwards often completely neglected, and contracted the most profligate habits."[14]

Peel does not seem to fit the image of Factory Act reformers in popular history. He was a wealthy calico printer and arch exponent of the factory system, who employed around a thousand pauper apprentices. His factory in Radcliffe had been the source of the 1784 typhoid outbreak and had been criticised by the Birmingham overseers of the poor in 1796.[15] Yet, all of these things help explain why he brought forward the bill. Although most of his fellow owners deprecated his efforts, he saw the legislation as a way of preventing more radical proposals. Sometime later he proudly recalled how he had resisted the ideas of those who "were governed more by humanity than a knowledge of the business; and if the Bill had passed, as they desired it might pass, I believe the manufacturers of this country would not have been in the flourishing state they are now."[16] His other reasons are, however, more baffling. He said that he was greatly concerned about the bad health of the children in his own factories, ascribing it to overwork, a lack of ventilation and dirty conditions. Yet, he refused to accept any responsibility, remarking that, as a member of Parliament, he was away from his factories much of the time: "it is very certain, that persons in their circumstances should keep their property in business, and therefore a great deal of that business must be transferred to foremen or people of that description."[17] Thus, he introduced the bill "not so much for the benefit of others, but finding that my own mills were mismanaged, and that with my other pursuits I had it not in my power to put them under a proper regulation."[18]

3. Factory Acts

The 1802 act drew inspiration from – without following all the recommendations of – the Manchester Board of Health, a voluntary body formed in the 1790s to improve public health, as well as reports of 1784 and 1796 written by Percival, and it adopted some of the practices employed at David Dale's New Lanark cotton mills, which by that time were being managed by Dale's son-in-law, Robert Owen.[19] The act required that apprentices work no more than twelve hours each day and be provided with suitable clothing, basic education, religious instruction and separate sleeping arrangements for males and females. The walls and ceilings were to be limewashed, and inspection was by visitors appointed by local justices of the peace. It was followed by similar legislation, which, like the 1802 act, focused on the protection of children working for large and medium-sized employers. Some measures,

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[14] *Morning Chronicle*, 7 Apr 1802.
[15] SD Chapman, "Peel, Sir Robert, first baronet (1750–1830)", *Oxford Dictionary of National Biography*, Oxford: Oxford University Press, 2004.
[16] *Report of the Minutes of Evidence, taken before the Select Committee on the State of Children Employed in the Manufactories of the United Kingdom*, 1816 (397), p140. One source of pressure seems to have been the magistrates of Manchester: *ibid*.
[17] *Ibid*, p139.
[18] *Ibid*, p134.
[19] *Star* 14 Jan 1795; *English Chronicle or Universal Evening Post*, 13 Oct 1798; *Report of the Minutes of Evidence, taken before the Select Committee on the State of Children Employed in the Manufactories of the United Kingdom*, 1816 (397), pp133, 137, 139-40; H Harris, "Manchester's Board of Health in 1796" (1938) 28 (1) *Isis* 26 at 33-36. Peel was presumably aware of a pamphlet, which Percival praised, by his brother-in-law, Sir William Henry Clerke, *Thoughts upon the Means of Preserving the Health of the Poor, by Prevention and Suppression of Epidemic Fever*, London, 1790.

such as limewashing, ventilation and the obligations to report accidents, brought benefits for all workers in the regulated workplaces, and some provisions expressly applied to adults, such as the prohibition in 1842 on women working underground in mines. The courts played a role in this extension of the legislation to cover adults: when owners were required to fence machinery (Factory Act 1844, s. 21), the Court of Exchequer Chamber rejected the argument that because the Act primarily concerned children this obligation could only arise if children worked with a machine.[20]

The later legislation did not flow inevitably from the 1802 act. While strong and popular campaigns were driven by people such as Richard Oastler, Michael Sadler and Lord Ashley, the reforms were not necessarily welcomed by working people, who saw family earnings fall as the result of restrictions on children's working hours and the prohibition on women working underground.[21] There was also robust opposition in Parliament and from business people. Some, like Lord Althorp, the Chancellor of the Exchequer, speaking in 1832, "could not admit the justice of the assertion, that our manufacturers conducted their factories in a manner which made the loss of health and life inevitable."[22] In 1816, Josiah Wedgwood objected on behalf of the pottery industry to "interference in the conduct of their business, until a case is made out of the necessity of such interference."[23] While admitting that children under 10 years old were employed, he claimed this "is never desired by the masters", but is "an accommodation to the workmen themselves, and perhaps in most instances they are employed under the eyes of their own parents".[24] Similar arguments were routinely repeated. In 1844, the Earl of Radnor attacked "all meddling interference with the labour of the people",[25] and Lord Brougham, while not denying the need for changes, argued that legislation "stayed the progress of society… and did the very thing which it desired not to do—prevented the arrival of the time when, by the dispensation of Providence, the advance of society would rescue women from hard work and children from any work at all."[26]

Paradoxically, the cause of reform was boosted by a statute Lord Althorp introduced in 1833 as a way of defeating more radical proposals. The act provided for the appointment by government of factory inspectors. This addressed, at least partially, a fundamental flaw in the enforcement mechanism of the 1802 Act, which had relied on local visitors and justices of the peace often drawn from – or sympathetic to – the mill owners. The new act did not entirely detach inspection from local influences because offences had to be prosecuted by the inspectors before magistrates, but the inspectors had something resembling a right of reply in the form of six-monthly reports. There was inevitability about the conflict between the inspectors and mill-owning magistrates, which eventually came to a head when the inspectors began a campaign against unfenced machinery in the mid-1850s. In 1854, Folson & Collins of Oldham, were acquitted following the death of Henry Glenny, whose foot had become entangled in an unfenced machine. The principal inspector, Leonard Horner, later observed that three of the five magistrates on the bench in that case (the other two were a clergyman and the mayor) were also mill owners and that they were subsequently prosecuted for the same offence. This drew the response that the prosecutions of these magistrates had been motivated by revenge, although a few months later two of them joined a large deputation that lobbied the Home Secretary for reform of the law, including the fencing provisions.[27] In 1856, Manchester magistrates dismissed a prosecution having concluded that the particular machine was less dangerous if not fenced, and, although this was rejected by Lord Campbell CJ in *Doel v Sheppard* (1856),[28] some magistrates continued to obstruct prosecutions by, for example, imposing minimum fines on the irrelevant basis that injury had been due to the worker's negligence.[29] The National Association of Factory Occupiers was formed at this time

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[20] *Coe v Platt* (1851) 6 Ex 752.
[21] *Mining District Report 1845* extracted at http://scottishmining.co.uk/100.html
[22] HC Deb 7 Jun 1832 c504.
[23] *Report of the Minutes of Evidence, taken before the Select Committee on the State of Children Employed in the Manufactories of the United Kingdom*, 1816 (397), p63.
[24] *Ibid*, pp63-64.
[25] HL Deb 3 Jun 1844 vol 75 c135.
[26] HL Deb 3 Jun 1844 vol 75 c136
[27] *Reports of the Inspectors of Factories*, cmd 1947 (1855), pp6-7, cmd 2031 (1856), pp3-16; *Manchester Times*, 31 Jan 1855, 10 Feb 1855; *Daily News*, 24 Mar 1855.
[28] *Doel v Sheppard* (1856) 5 El & Bl 856 at 859. For a contrary *obiter* view, *Coe v Platt* (1852) 7 Ex 923 at 927-8.
[29] *Preston Guardian*, 16 Feb 1856.

and quickly achieved partial repeal of the 1844 Act.[30] Under the 1856 Act the fencing obligation was restricted to those situations in which a child, young person or woman might encounter a dangerous machine during their ordinary occupations and an owner could challenge the inspector's instruction to fence. These changes drew the support of Lord Campbell, who told the House of Lords that the court in *Doel v Sheppard* (1856) had been obliged to reach its conclusion because of the wording used in the legislation, "although he did not believe that was the meaning of the framers of the Act."[31]

Centralised inspection was applied to other industries and maintained focus on the dangers encountered by workers, but the most significant influence on public opinion was likely to have been newspaper reporting. Most issues carried a story about a death or horrible injury suffered at work, and there were the occasional, but regular, reports of large scale disasters in the mining industry as demand for coal outran the ability or willingness of owners to improve safety: 95 were killed at Haswell colliery in the Durham coal field in 1844, 204 at Hartley Colliery, Northumberland, in 1862, and at Oaks Colliery in Yorkshire 73 died in 1847 and 380 in 1866.[32] The regime that was being established in factories was adapted to the mines, in spite of stiff opposition from owners. Progress was less impressive on the railways. Again, the desire for expansion outstripped the implementation of safety measures, and the growth from 25 miles of track in 1825 to around 8000 miles by the end of the 1840s brought plenty of accidents. A railway inspectorate was appointed in 1840 and a Select Committee in 1846 considered the safety of workers,[33] but the strength of the railway interest was largely able to keep Parliament's attention away from this issue and focused instead on expanding the network.[34]

The Factory Acts and the legislation on the mines and railways were limited in their scope, but it had at least been established as matters of public policy that some employers owed obligations in respect of the health and safety of at least some employees and that Parliament and government could legitimately intervene to enforce those obligations.

4. Seeking compensation

Injured workers and the families of those killed at work might seek assistance from the state in the form of poor relief, or bring an action at common law for compensation, but they faced serious obstacles with both. Complaints about the cost of poor relief and the efficiency of parish officials led to the Poor Law Amendment Act 1834, which obliged claimants to seek assistance in the workhouse and centralised aspects of administration. At the same time the courts developed the doctrine of common employment, which severely restricted the possibility of an action for workplace injuries and deaths.

An obstacle to litigation was, however, removed. The common law did not permit an action for wrongful death,[35] but the Fatal Accidents Act 1846 (Lord Campbell's Act) amended this rule to allow an executor or administrator to sue. This was a by-product of the principal objective of the act, which was the abolition of deodands. A chattel which caused death was forfeited as a deodand to the Crown or lord of the manor.[36] In practice, the owner redeemed the article by payment of its value as determined by the coroner's jury, although whether the family of the deceased received the money was a matter for the Crown or lord of the manor.[37] In determining value juries were guided by the irrelevant consideration of blame rather than the chattel's worth.[38] When the jury fixed no deodand after the death in 1830 of William Huskisson, the government minister killed at the opening of the Liverpool-Manchester railway (although not the first fatality, as is often asserted), it was assumed this was

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[30] *Manchester Times*, 18 Apr 1855.
[31] HL Deb 19 Jun 1856 vol 142 c1671.
[32] *The Standard*, 1 Oct 1844; Morning *Chronicle*, 27 Jan 1862, 8 Mar 1847; *Leeds Mercury*, 13 Dec 1866 (listing other serious incidents), 14 Dec 1866.
[33] *Report from the Select Committee on Railway Labourers*, 1846 (530), ppix-x.
[34] PWJ Bartrip and SB Burman, *The Wounded Soldiers of Industry: Industrial Compensation Policy 1833-1897*, Oxford: Clarendon Press, 1983, pp68-83.
[35] In *Baker v Bolton* (1808) 1 Camp 493 at 493, Lord Ellenborough.
[36] A Pervukhin, "Deodands: A Study in the Creation of Common Law Rules" (2005) 47 American Journal of Legal 237; H Smith, "From Deodand to Dependency" (1967) 11 American Journal of Legal History 389.
[37] *Jackson's Oxford Journal*, 15 Jan 1842; *Daily News*, 26 Mar 1846, contrasting the position in Scotland where an award could be made to the family.
[38] *Leeds Mercury*, 21 May 1814. But see, *Morning Post*, 31 Aug 1816, "Humanus".

because no blame attached to the company.[39] But by the 1840s juries seem to have changed their opinions and were targeting railways with heavy awards: in 1840, "frequent and appalling accidents by railway travelling" led a jury to make an award of £2000 against the London and Birmingham Railway in the hope that it would force the company to take greater care.[40] Yet, juries seem to have been of the view that workplace accidents were ordinary hazards of life and awarded only nominal sums. When a boiler explosion at a mill near Farnley killed two workers in 1830 only one shilling was awarded because the event was "the result of inevitable accident."[41] In 1846, Ellen Moran was ripped apart and killed after becoming tangled in machinery at a Birmingham factory. Although the Factory Act 1844 required the fencing of dangerous machinery and the jury observed, "that there was not the slightest protection before the shaft, which rendered it exceedingly dangerous", the value of the deodand was set at only one shilling.[42] A jury did award £150 when Richard Peake, a stoker, was killed on the Eastern Counties Railway in 1845, but this should be contrasted with the award of £1000 in the same year after Charles Dean was killed while a passenger on the London and Birmingham Railway.[43] The railway companies seem to have been largely successful in overturning high awards before the Court of Queen's Bench; nevertheless, they lobbied for the abolition of deodands.[44]

Did the 1846 Act improve the position of the families of those killed at work? There were some advantages in deodands: they did not depend on proof of negligence and the costs involved were relatively low compared with litigation. But awards tended to be small in the case of workplace accidents, the courts were prepared to overturn those that exceeded the value of the goods, the worker's family had no right to any payment, and, of course, this remedy did not apply where the worker had only been injured. In introducing his bill, Lord Campbell did acknowledge the importance of holding people responsible for their negligence and for this reason removed the common law bar on actions for wrongful death. Yet, one struggles to find evidence of a wish to assist workers' families to compensation in his reform. The act only permitted an executor or administrator to bring an action and the family could not compel the representative. More importantly, there was no support for those without the means to obtain letters of administration.[45] Finally, the act did not remove a key obstacle to such an action: the doctrine of common employment.

5. The doctrine of common employment

If a member of the public was killed or injured by a negligent employee during the course of employment, the employer was liable on the basis of the maxim *qui facit per alium facit per se*,[46] but this was not the case if the victim was an employee. In *Priestley v Fowler* (1837),[47] Fowler was not liable when his van overturned fracturing the thigh of an employee, Charles Priestley, and dislocating his shoulder. Lord Abinger CB believed that if he ruled for the employee, "the principle of that liability will be found to carry us to an alarming extent."[48] His view was that, "the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself".[49] Indeed, he said that the employee was better placed to know whether the van was safe, and that any employee could refuse to abide by an

[39] *Leeds Mercury*, 25 Sep 1830. In 1830, it was reported that 15 people had been killed since the opening of the Stockton and Darlington Railway in 1825.
[40] *Northern Star & Leeds General Advertiser*, 19 Dec 1840.
[41] *Hull Packet and Humber Mercury*, 23 Nov 1830. At least one other worker was killed.
[42] *Preston Guardian*, 28 Mar 1846. See A Gray, "A Review of Transport and the Law of Deodand" at http://tinyurl.com/nk6ly7q
[43] *Freeman's Journal and Daily Commercial Advertiser*, 16 Aug 1845.
[44] HC Deb 11 August 1846 vol 88, cc624-25. See *R v The Great Western Railway Co* (1842) 3 QB 333; Bartrip and Burman, *op cit*, pp98-103.
[45] An Act of 1864 allowed dependants to sue if the executor or administrator refused.
[46] *Michael v Alestree* 2 Lev 172; *Weyland v Elkins* (1816) Holt 227. Someone hiring a carriage and driver or boat and crew was not liable for the negligence of driver or crew: *Laugher v Pointer* (1826) 5 B & C 547; *Dalyell v Tyrer* (1858) El Bl & El 899.
[47] (1837) 3 M & W 1, 3 Murph & H 305, LJ 7 Ex 45, 1 Jur 987; AWB Simpson, *Leading Cases in the Common Law*, Oxford: Oxford University Press, 1995, pp100-134; MA Stein, "Victorian Tort Liability for Workplace Injuries" (2008) College of William & Mary Law School Faculty Publications, Paper 106.
[48] (1837) 3 M & W 1 at 6.
[49] *Ibid*.

instruction if it involved danger, ignoring the fact that a refusal to work carried risks of disciplinary action by a supervisor or employer, dismissal or even prosecution. In what was the most important part of the judgment Lord Abinger argued that if the employer were under a duty to ensure the safety of an employee certain consequences might follow, which he regarded as totally unacceptable: "The footman… who rides behind the carriage, may have an action against his master for a defect in the carriage owing to the negligence of the coach-maker… The master… would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed".[50] These examples show that, although the claim in *Priestley v Fowler* was against the employer, Lord Abinger believed that to find for the plaintiff would also render employers liable for the actions of negligent employees. Thus, this broader principle, which came be known as the doctrine of common employment, was accepted right from 1837. Certainly, that was the view of Edward Spike in *The Law of Master and Servant* (1839), the Select Committee on Railway Labourers (1846),[51] and judges in later cases.[52] The doctrine was also adopted in the US in *Murray v South Carolina Railroad* (1841),[53] and *Farewell v Boston and Worcester Railroad Corporation* (1842).[54]

Lord Abinger's judgment was construed to mean that an employer was not vicariously liable if the victim was an employee.[55] The *qui facit per alium* maxim was forgotten and liability to non-employees became an exception to this principle that an employer was not responsible for the acts of employees: "The public interest may require this [liability for injury to non-employees] for the public benefit; but why should a wrongdoer have power to create such a responsibility, and such a duty? No reason can be assigned."[56] The courts never contemplated that rendering employers liable might reduce accidents. Instead, they accepted the arguments made on behalf of the employers that most employees were careless about safety and compensation would worsen the situation; that employees were better placed to protect themselves and to control those with whom they worked and should not be discouraged from doing so by the prospect of compensation; that wages reflected the level of risk; and that an employer could be ruined by a large accident.[57] Mr Justice Coleridge expressed the general view: "if this duty arises from the general relation of master and servant, I do not well know where the master's liability is to stop."[58] Pollock CB was even more forceful:

> "it appears to me that we ought to discourage these attempts to multiply instances in which masters are to be held liable for all sorts of accidents to their servants. If the wholesome rule laid down in 'Fowler v Priestley' is to be eaten up by exceptions, nothing is more calculated to multiply all human flesh and blood into plaintiffs and defendants."[59]

Yet, the reasoning used to support the doctrine does not stand much scrutiny. Take the case of *Tunney v Midland Railway*.[60] Mr Tunney, a labourer for the company, was injured by the negligence of a train guard while travelling between work and home on the company's railway. Had he been an ordinary passenger, the company would have been liable, but here he was deemed to be in common employment with the guard. Yet, Tunney could not have controlled the guard, nor could he have protected himself, nor would his wages have taken account of this risk.

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[50] *Ibid*.
[51] *Report from the Select Committee on Railway Labourers*, 1846 (530), ppix-x.
[52] Starting with *Hutchinson v York, Newcastle & Berwick Railway* (1850) 5 Ex. Rep 343.
[53] 1 McMul 385. There were three dissenting judgments.
[54] 4 Met 49. See, CL Tomlins, *Law, Labor, and Ideology in the Early American Republic*, Cambridge: Cambridge University Press, 1993. US courts referred to English cases (eg *Walker v Bolling*, 22 Ala 294 (1853) at 10) and English courts returned the compliment (eg *Morgan v The Vale of Neath Railway Co* (1864) 5 B & S 570 at 578).
[55] S Jack & A Jack, "Nineteenth-century Lawyers and Railway Capitalism: Historians and the Use of Legal Cases" (2003) 24(1) J Leg Hist 59. It was later argued that the doctrine was an application of *volenti non fit injuria*: *Alexander v Tredegar Iron & Coal Co Ltd* [1945] AC 286 at 294 (but *Radcliffe v Ribble Motor Services Ltd* [1939] AC 215 at 224).
[56] *Degg v Midland Railway Co* (1857) 1 Hurl & N 773 at 781, Bramwell B.
[57] HC Deb 19 March 1862 vol 165 cc1842-9.
[58] *Seymour v Maddox* (1851) 16 QB 326 at 331, Coleridge J.
[59] *Daily News*, 16 Jan 1861 (*Riley v Baxendale*).
[60] (1866) LR 1 CP 291.

The doctrine of common employment did not, however, close off the possibility of litigation. Indeed, Lord Abinger himself had admitted, "[the employer] is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of the judgment, information, and belief."[61] This was rather baffling in light of his other statements in the case, but, coupled with the removal of the bar to actions in the case of death and the financial support provided to some litigants by trade unions, sympathetic philanthropists, such as Lord Ashley, and even the Home Office (under a power in the Factory Act 1844, s.24),[62] it encouraged some plaintiffs to test the doctrine. For the most part these actions resulted in its boundaries being drawn more broadly, although this did expose the doctrine's harshness and absurdity. The courts concluded that common employment existed between those employed by, or working voluntarily for, the same employer, even if they were not in the same line of work, or the negligent person was the employee's supervisor.[63] The employer was not obliged to ensure employees were careful,[64] and, although required "to select proper and competent persons [as employees], and to furnish them with adequate materials and resources for the work",[65] few cases succeeded on this basis because the employer's responsibility for the competence of an employee was tested only at the time of appointment,[66] and the court would not challenge an employer's view of the appropriate number of employees for a task.[67] The courts also took a narrow view of the chain of causation and dismissed claims where the immediate cause was the injured employee's negligence.[68]

All of this meant employers were rarely found to have been negligent, except if directly involved in the work that caused the injury, which excluded the large employer or the joint-stock company.[69] This might seem out of line with at least the spirit of the Factory Acts, which purported to regulate large employers. Having said that, the provisions on fencing dangerous machinery did have an impact. In *Brydon v Stewart* (1855),[70] the House of Lords held that an employer must take reasonable precautions for the safety of employees working with dangerous machinery. Byles J explained in *Clarke v Holmes* (1862): "the owner of dangerous machinery is bound to exercise due care that it is in a safe and proper condition."[71] This was extended in *Grizzle v Frost* (1863),[72] where, although the machine was properly fenced, the employee, who was under 16 years of age, had not been properly instructed in its use by the foreman:

> "if the owners of dangerous machinery, by their foreman, employ a young person about it quite inexperienced in its use, either without proper directions as to its use or with directions which are improper and which are likely to lead to danger, of which the young person is not aware, and of which they are aware; as it is their duty to take reasonable care to avert such danger, they are responsible for any injury which may ensue from the use of such machinery."[73]

Yet, as this passage hints, even where negligence was shown, an employer might be able to prove the victim had not taken reasonable care or had consented to run the risk and so plead the complete defences of contributory negligence,[74] or *volenti non fit injuria*.[75] This meant, for example, there was

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[61] (1837) 3 M & W 1 at 6.
[62] Bartrip and Burman, *op cit*, pp110-11; AWB Simpson, *op cit*, pp127-8; HC Deb 10 April 1878, c1043. But *Manchester Times*, 30 Jun 1852.
[63] *Degg v Midland Railway Co* (1857) 1 Hurl & N 773; *Wiggett v Fox* (1856) 11 Exch 832; *Swainson v North Eastern Railway Co* (1878) 3 Ex D 341; *Wilson v Merry & Cunningham* (1868) LR 1 Sc 326. See also *Couch v Steel* (1854) 3 El & Bl 402.
[64] HC Deb 19 March 1862 vol 165 c1847.
[65] *Wilson v Merry & Cunningham* (1868) LR 1 Sc & Div 326 at 332, Lord Cairns LC.
[66] *Tarrant v Webb* (1856) 18 CB 797 at 804-5. The first successful action seems to have been *M'Aulay v Brownlie* (1860) 22 D 975: Bartrip and Burman, *op cit*, p120.
[67] *Skipp v The Eastern Counties Railway Co* (1853) 9 Ex Rep 223.
[68] Eg the first count in *Tunney v Midland Railway Co* (1866) 1 LR 1 CP 291.
[69] *Brown v The Accrington Cotton Spinning and Manufacturing Co Ltd* (1865) 3 Hurl & C 511.
[70] (1855) 2 Macq 30. Also, *Feltham v England* (1865) 4 F & F 460.
[71] (1862) 7 H & N 937 at 947.
[72] (1863) 3 F & F 622.
[73] *Ibid*, at 625.
[74] *Butterfield v Forrester* (1809) 11 East 60.
[75] *Woodley v Metropolitan District Railway Co* (1877) 3 Ex D 384.

no liability if an employee continued to work in spite of knowing that conditions were unsafe.[76] Again, this ignored the reality of the nineteenth-century workplace by assuming workers were free to make such choices and that running these risks amounted to consent.

The cases in which employers were held liable for injuries inflicted on children by machinery do show that the Factory Acts loosened the doctrine, but only to a limited extent. Why did the judges effectively exclude the employer's liability at a time when that legislation was advancing worker's protection? It is not necessary to show personal financial interests influenced them,[77] or that they felt compelled by precedent. Their value system led them to disparage interference in business, but, more importantly, having little knowledge of the modern workplace, they viewed such issues from their own perspectives as employers of domestic servants – hence Lord Abinger's references to coach drivers and chambermaids – and were horrified at the thought of opening up employers to such liability.

The Factory Act 1844, s. 60, did provide a limited alternative to an action for negligence by allowing compensation to be awarded out of fines. But this required a prosecution by the inspectors and they took the view that the objective of this section was to protect employees from dangerous machinery, not to provide compensation, which meant that, rather than prosecute, they would negotiate with employers in order to secure compliance.[78] Moreover, as has been seen, it was not necessarily easy to obtain a conviction before the magistrates and any fine might be small. This provision was also weakened by the 1856 Act, which restricted the obligation to fence, because the inspectors believed compensation could only be awarded to a woman, child or young person injured during their ordinary occupation by a machine that should have been fenced.[79]

6. Who maintained the injured worker?

In view of the high number of accidents, litigation was uncommon. Even if workers understood their rights, they faced various other obstacles: the doctrine of common employment and the defences available to the employer; the impact on future work prospects; the costs involved; and, doubtless, the belief that the law was made by and for people who were sympathetic to their employers. The obvious question is, who maintained the worker no longer able to work or the family impoverished by the death of the principal wage earner? Someone rendered indigent by a workplace accident could apply to the poor law officers, and it may be no coincidence that actions against employers only emerge in the 1830s at the same time as a more restrictive and punitive poor relief system.[80] This may also explain the rise of alternative forms of assistance.

After a major incident, such as a colliery explosion, a fund would often be established with donations from employers, local dignitaries, workers and the public – as much as £81,000 was collected after the Hartley Colliery disaster in 1862.[81] Such funds were not always well organised, which led to disputes, and were usually controlled by local dignitaries prone to make moral distinctions between claimants. There were workplace schemes to provide support, many funded by contributions from employer and employee. A third of textile mill owners surveyed in 1833 claimed to have a permanent scheme, while others paid wages for a certain period and/or medical care.[82] Employers controlled payments and could exclude workers deemed responsible for their own injuries or troublemakers.

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[76] *Assop v Yates* (1858) 2 H & N 768; *Griffiths v Gidlow* (1858) 3 H & N 648. But *Clarke v Holmes* (1862) 7 H & N 937.
[77] RW Kostal, *Law and English Railway Capitalism, 1825-1875*, Oxford: Clarendon Press, 1997.
[78] This was not the view of the courts: *Coe v Platt* (1851) 6 Ex 752.
[79] *Reports of the Inspectors of Factories to Her Majesty's Principal Secretary of State for the Home Department, for the Half Year Ending 31st October 1856*, 1857 Session 1 [2153].
[80] AWB Simpson, *op cit*, pp100-34.
[81] *Wrexham & Denbighshire Weekly Advertiser & Cheshire, Shropshire, Flintshire & North Wales Register*, 25 Oct 1856; *Morning Chronicle*, 27 Jan 1862; *York Herald*, 2 Feb 1867.
[82] *Factories Inquiry Commission. First Report of the Central Board of His Majesty's Commissioners Appointed to Collect Information in the Manufacturing Districts, as to the Employment of Children in Factories, and as to the Propriety and Means of Curtailing the Hours of their Labour*, HC 1833 (450), p72; *Reports of the Inspectors of Factories for the Half Year Ending the 31st December 1841*, HC Papers (1842) (31) XXII.337, p5; *Liverpool Mercury*, 2 Apr 1852. For railway schemes: London and South Western Railway (*Morning Post*, 8 Aug 1851) and South Wales Railway (*Bristol Mercury*, 28

Incidents in which one or two were injured might lead fellow employees to make a collection.[83] Trade unions established funds for, among other purposes, the assistance of sick and disabled members: the Ironfounders' Society in Bolton reportedly paid out more then £80,000 between 1837 and 1866.[84] Workers joined friendly societies. First established in the late seventeenth century, by 1803 there were 9,672 societies providing a range of benefits to 704,350 members.[85] But these societies were often confined to a small geographical area, under-resourced, poorly managed and vulnerable to a major accident or economic depression.[86] Insurance companies may have entered this market, but, if this was the case, they had no impact. The Mutual Insurance Benefit Institution (1820) and the Royal Union Association (1825) advertised cover for accidental workplace injuries and deaths, but both failed within a generation.[87] Although the life assurance industry was well established by the nineteenth century, there was little interest in writing policies for working people. This did change in the 1850s with companies, such as the Prudential, charging low weekly premiums collected by local agents,[88] but they focused on fixed death benefits rather than maintenance and so did not meet the needs of the injured worker.

Low paid and casual workers were unlikely to have been members of workplace schemes, trade unions or friendly societies, and most employers were either too small to offer support or had no interest in doing so. In short, it is probable that most of the people disabled at work and the families of those killed slipped into penury and were forced to seek support from the Poor Law authorities. Thus, while the Factory Acts represented a gradual shift in attitudes to the obligations of employers, the burden of workplace accidents continued to be transferred from employers to the state.

7. Rendering employers liable

The doctrine of common employment drew criticism from the start. In 1846, a select committee recommended making employers liable because, "society, if the sufferer dies, is deprived of a useful, industrious and productive member, in the prime of life and efficiency; or, if he survives, he lives a wretched cripple, a mendicant, or a pauper, to be maintained, with those who were dependent on his labour, at the expense of the public."[89] The committee exposed fallacies in the doctrine:

> "In a system of combined labour, the greater the subdivision of employment, the less control has each labourer over the general conduct of the operation; and it is to acts or defaults in this conduct, that Your Committee believes one portion of the accidents occurring may undoubtedly be traced. More or less, by the tools and machinery which he furnishes, by the engineering arrangements which he makes, by the direction which he assumes over the execution of the work, the employer co-operates with the labourer, and the charge of carelessness or neglect of due precaution, may as much lie at his door, as rising from his share of the joint operation, as at that of the labourer; yet the labourer, the weaker and least educated party to the operation, the one least likely to anticipate, or to provide against the danger, is the only sufferer."[90]

Feb 1857). Also, JL Bronstein, *Caught in the Machinery: Workplace Accidents and Injured Workers in Nineteenth-Century Britain*, Stanford: Stanford University Press, 2008, pp34-5, 36-7.

[83] *York Herald*, 22 Aug 1874; JL Bronstein, *ibid*, pp40-3, 46-7, 48-9.

[84] *Liverpool Mercury*, 3 Jun 1868. For railway benevolent institutions: *Morning Post*, 31 Aug 1846; *Essex Standard*, 13 Jul 1849; *Daily News*, 19 Apr 1858, 15 Nov 1858.

[85] S Cordery, *British Friendly Societies, 1750-1914*, Basingstoke: Palgrave Macmillan, 2003; PHJH Gosden, *The Friendly Societies in England 1815-1875*, Manchester: Manchester University Press, 1961; E Hopkins, *Working-Class Self-Help in Nineteenth-Century England*, London: UCL Press, 1995.

[86] HC Deb 7 Mar 1864 vol 173, c1575.

[87] *Berrow's Worcester Journal*, 15 Sep 1825. Royal Union failed in 1840 and Mutual in 1858: *Morning Post*, 24 Jan 1840; *Belfast News-Letter*, 6 Sep 1858.

[88] The main companies were The Prudential (1854), Refuge Friend in Deed Life Assurance and Sick Fund Friendly Society (1858) and Pearl Assurance Co (1864): G Clayton, *British Insurance*, London, Elek Books, 1971.

[89] *Report from the Select Committee on Railway Labourers*, 1846 (530), pix.

[90] *Ibid*.

The committee pointed out that the motivation for the worker to take care was the avoidance of pain, while the impunity enjoyed by employers meant "a want of care, resulting in fearful injury to his workpeople."[91]

Thirty years later Mr Justice Brett (later Lord Esher MR) expressed some difficulty with the reasoning behind the doctrine. In *Lovell v Howell* (1876), he remarked: "I decline to say, because I feel a difficulty in understanding or defining it, what is the precise principle on which the immunity of the master in these cases rests."[92] The following year he remarked to a select committee:

> "I cannot conceive that a servant, or a workman going into employ, ought to know that he has to run the risk of the negligence of a fellow servant in the same employ, of whom he knows nothing, and never will, probably, know anything until the accident happens… [A]s long as the general law lasts that a master should be liable to everybody for the act of negligence of his servant… there is no just or logical reason why he should not be liable to a fellow servant of that servant for whose negligence his is liable."[93]

He wondered why the argument that an employee accepts the risk by entering into the contract of employment did not also apply to railway passengers. But his criticism was more fundamental in that he rejected the idea that liability depended on whether or not an implied term existed in the different contracts. His opposition to the doctrine of common employment was part of this broader critique. In his view the employer should not be liable for the negligence of an employee, irrespective of the nature of the victim, unless there had been a failure to take reasonable care to ensure that only competent employees undertook the tasks assigned to them. The doctrine of common employment was, therefore, "a bad exception to a bad law".[94]

The first real attempt to abolish the doctrine of common employment followed the mining disaster in 1862 at Hartley Colliery. The bill was swiftly defeated by familiar arguments. The Attorney-General, Sir William Atherton, said, "The intention of the engagement between the parties was not that the employer should himself be the co-operator or collaborateur of the workmen, but that the person who engaged to work under a master should work with his fellow-workmen."[95] Sir Morton Peto, the civil engineer responsible for Nelson's Column, feared "a sea of litigation" submerging employers and rehashed the idea that "the greatest difficulty the masters had was to make the men take even the most ordinary precaution for their own safety."[96] Nevertheless, bills and inquiries on employer's liability continued,[97] as changes in the nature of politics gave the employee a stronger voice. New industrial towns were had been allocated representation that reflected their size and importance. The Second Reform Act 1867 extended the franchise to many from the skilled working class. Trade unions were shaking off legal restraints, becoming more powerful, better organised and acquiring parliamentary representation. In 1874, Alexander Macdonald, an ex-miner and President of the Miners' National Association, was elected.[98] Although accused of compromising with mine owners, he had played an important role in lobbying for the Mines Acts of 1860 and 1872 and the Criminal Law Amendment Act 1871, which reformed trade union laws, and on taking his seat immediately began to press the government hard on colliery safety and employers' liability.[99]

Reform was hindered, to some extent, by disagreement over tactics and, in particular, whether to modify or abolish the doctrine of common employment.[100] But what might loosely be called the

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[91] *Ibid*.
[92] (1876) 1 CPD 161 at 167.
[93] *Report from the Select Committee on Employers Liability for Injuries to their Servants*, Parliamentary Papers, 1877 (285), p116.
[94] *Ibid* at p118.
[95] HC Deb 19 March 1862 vol 165 c1844.
[96] *Ibid* at c1852.
[97] Bartrip and Burman, *op cit*, chap 5.
[98] Richard Lewis, "Macdonald , Alexander (1821–1881)", *Oxford Dictionary of National Biography*, Oxford: Oxford University Press, 2004.
[99] HC Deb 21 April 1874 vol 218 c924; 22 July 1874 vol 221 c488; 7 May 1875 vol 224 c289; 11 June 1875 vol 224 c1714; 28 April 1876 vol 228 c1831; 13 June 1876 vol 229 cc1760-2; 11 July 1876 vol 230 cc1279-80.
[100] *Sheffield & Rotherham Independent*, 6 June 1876.

opposition was also divided. Some resisted any change: the select committee before which Brett had appeared thought abolition "would effect a serious disturbance in the industrial arrangements of the country."[101] Yet, when the Mining Association of Great Britain lobbied the Home Secretary, it did not argue against support for workers and their families, only the method. The association favoured voluntary provident societies funded by contributions from miners and employers on the ground that these "encouraged a feeling of independence on the part of the men to watch over one another without undue espionage."[102] In Parliament, some opponents of reform conceded that, "The doctrine of common employment had been pushed too far."[103] Others were more explicit: "The grievance of which the working men complained arose less from the principle of law than from the interpretation put upon it by the Judges".[104]

In the end, the Employers' Liability Act 1880 became part of an electoral bargain, which helped see Gladstone's Liberal Party returned to government. Almost inevitably, the act was a compromise. It did not abolish the doctrine of common employment, but the employer would be liable in the same way as if the victim had not been an employee where injury or death occurred by reason of, among other things, any defect in the works or machinery, or any negligence of a supervisor or someone whose instructions the worker is obliged to follow (s.1). This meant that the act did not apply where injury or death was caused by the negligence of a fellow employee, who was not a supervisor.[105] The employer could use those defences such as contributory negligence that would have been available had the victim not been an employee.[106] In addition, there were statutory defences in section 2. These included where a defect in the works or machinery arose from, or had not been discovered or remedied owing to the negligence of the employer or an employee entrusted to maintain it (s.2(1)). Another defence was "where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence" (s.2(3). The amount of compensation recoverable for an action under the act was limited to an estimate of the earnings during the previous three years of a person in the same grade of employment and the same district as the injured person (s.3). The plaintiff had to give notice of the injury within six weeks and commence the action within six months (s.4). Finally, the definition of a worker to whom the act applied was restricted to railway employees and manual labourers (s.8). This meant the doctrine of common employment continued with regard to others, as well as where injuries were caused by circumstances not mentioned in section 1.

The Workmen's Compensation Act 1897 added a new compensation scheme for personal injury or death and arising out of and in the course of employment.[107] This did not depend on proof of negligence, as long as injury was not caused by the worker's "serious and wilful misconduct" (s.1(2)(c)). The act was restricted to particular workplaces, but the list was long (and was later extended), and thus covered a broader range of workers than the 1880 act. It only applied if the workers suffered total or partial incapacity which lasted more than two weeks (reduced to one week in 1906), but there was no restriction on the nature of the accident to match that in section 1 of the 1880 act. Compensation was based on the worker's average wage, and, in case of death, the number of dependent relatives. Notice of the accident had to be given "as soon as practicable" and the claim made within six months (s.2(1)).

In summary, there were three possible actions: at common law, or under the 1880 Act, or under the 1897 Act. When compared with the 1897 Act, the main advantages of the 1880 Act were the possibility of a large lump sum compensation award and that there was no need to show partial or total incapacity, but against this was the cost of litigation, which could be awarded against a losing plaintiff, and the uncertainty as to the amount of damages that might be awarded. Neither act abolished the doctrine of common employment, and, remarkably, it survived into the twentieth century until finally abolished by

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[101] *Report from the Select Committee on Employers Liability for Injuries to their Servants*, Parliamentary Papers, 1877 (285), para 9.
[102] *Leeds Mercury*, 20 May 1876. The owners also lobbied Prime Minister Gladstone: *Aberdeen Weekly Journal*, 3 Jun 1880. See HC Deb 24 May 1876 cc1155-81.
[103] HC Deb 24 May 1876 c1168, Serjeant Simon MP.
[104] *Ibid* at c1179, Robert Tennant MP.
[105] *Radcliffe v Ribble Motor Services Ltd* [1939] AC 215 at 224.
[106] *Weblin v Ballard* (1886) 17 QBD 122.
[107] DG Hanes, *The First British Workmen's Compensation Act 1897*, London: Yale, 1968.

the Law Reform (Personal Injuries) Act 1948 (s,1(1)). The judges seemed increasingly embarrassed by its presence. They reduced its impact by emphasising the employer's obligation to take reasonable care that employees were not subject to unnecessary risks and by developing the concept of the non-delegable duty. But as Viscount Simons admitted in 1959, *Priestley v Fowler* had led "to a great deal of artificiality and refinement which would have been otherwise unnecessary."[108]

8. Liability insurance

During the passage of the 1880 Act almost no thought was given to how employers might meet any liability. Nevertheless, the commercial opportunity afforded by the act was grasped by the incorporation in October 1880 of The Employers' Liability Assurance Corporation (ELAC).[109] ELAC's business developed rapidly. Agents were appointed around the country and within six years the company covered around half-a-million employees and had dealt with 2,467 claims.[110] By the end of the century it boasted capital of £1 million and offices on the Thames described as "an ornament to the Embankment".[111] Premiums were based on a combination of the employer's wage bill and where the business fitted in a relatively simple classification of the danger involved in each industry. One director resigned when ELAC decided not to require employers to retain part of the risk,[112] although some industries were regarded as too dangerous to insure – in its early years, policies were not offered in the South Wales coalfields.[113] ELAC appointed surgeons to care for employees of policyholders, making policies more attractive, while reducing payments and rooting out false claims.[114]

Other companies were established in 1881: the Engine, Boiler and Employers' Liability Insurance Company in Manchester, although it soon became an agent of ELAC; the Employers' Liability and Workpeople's Provident Accident Insurance Company Ltd in Birmingham; the Provident Clerks' Office in London; and the Scottish Employers' Liability and General Insurance Company Ltd in Aberdeen. The Northern Accident Insurance Co Ltd was incorporated in 1884 with offices in Glasgow and London, and the General Accident and Employers' Liability Assurance Association in 1885.[115] The depression of the mid-1880s may have led to a decline in premium income,[116] but seems not to have discouraged new ventures, so that by 1887 twelve companies were offering liability policies.[117] Indeed, competition became so intense that in 1882 an ELAC employee was convicted of assaulting someone found copying company files.[118] Insurers advertised to employers, but also put pressure on them by publicising employees' rights.[119] ELAC demonstrated both its support for employers and the importance of having insurance by paying some claims irrespective of liability.[120] The Scottish Employers' Liability offered employees policies that supplemented the limited compensation provided

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[108] *Davie v New Merton Board Mills* [1959] AC 604 at 618.
[109] Sir Harry Perry Robinson, *The Employers' Liability Assurance Corporation Ltd, 1880-1930*, London: Waterlow, 1930.
[110] *Daily News*, 22 May 1886.
[111] *Freeman's Journal and Daily Commercial Advertiser*, 30 Mar 1897; *Sheffield & Rotherham Independent*, 3 May 1899.
[112] London Metropolitan Archive, MS 14,061/1, fo 78 (29 Jun 1881). A resolution to oblige mine owners to bear a third of losses from explosion or inundation of water was withdrawn, but proposals were referred to a special committee: *ibid*, fo. 161 (24 Nov 1881), fo 229 (2 Mar 1882).
[113] *Ibid*, fo 158 (17 Nov 1881), fo 165 (24 Nov 1881).
[114] London Metropolitan Archive, MS 14,061/2, fo 189-90, 28 Jun 1883).
[115] London Metropolitan Archive, MS 14,061/1, fo 111 (25 Aug 1881), fo 169-70 (1 Dec 1881), fo 184 (22 Dec 1881); MS14,061/2, fo 2-3 (18 May 1882); *Birmingham Daily Post*, 26 Mar 1881; *Derby Mercury*, 21 Dec 1881; *Aberdeen Weekly Journal*, 17 Jun 1881; *Glasgow Herald*, 4 Feb 1884. The Brickmasters' Employers' Liability was operating in 1898, and the Bolton Mutual Insurance, probably established in 1876, was issuing policies by the end of the 1890s: Bolton Archive and Local Studies Service, ZZ/50/3; *Insurance Directory 2006* at http://db.riskwaters.com/data/insurancedirectories/pdf/samplepages.pdf
[116] *Birmingham Daily Post*, 14 May 1886.
[117] *Ibid*, 13 May 1887.
[118] London Metropolitan Archive, MS 14,061/2, fo 18 (22 Jun 1882), fo 21 (29 Jun 1882).
[119] London Metropolitan Archive, MS 14,061/1, fo 122-3 (15 Sep 1881); *Birmingham Daily Post*, 1 Aug 1882; *Aberdeen Weekly Journal*, 17 Jun 1881.
[120] *Berrow's Worcester Journal*, 11 Mar 1882; London Metropolitan Archive, MS 14,061/1, fo 121 (15 Sept 1881).

by the Act.[121] Companies also had to reassure shareholders. At its annual general meeting in 1884, the Employers' Liability and Workpeople's Provident Accident Insurance Company Ltd tried to explain that an increase in claims over the previous year was a good sign because it "showed to employers of labour the value of the indemnity granted by the company."[122]

In spite of all this activity, the future of employers' liability insurance remained uncertain. Not all those employers that came within the 1880 Act chose to take out insurance. Indeed, it seems likely that many – perhaps, most – did not immediately put in place any arrangements. Some employers did continue existing accident schemes or established new ones, and the general manager of ELAC reported to the board of directors his fear that company schemes "would become a powerful competitor".[123] Certainly, trade unions seem to have favoured these schemes over insurance because they did not have the distraction of shareholders and were part of the broader relationship between employer and employee.[124] The Permanent Accident Fund, which had been established in 1873 in the South Staffordshire and East Worcestershire mining district, obtained registration under the Workmen's Compensation Act 1897, s.3(1), following consultation with employers and employees. This allowed subscribing employers to opt out of the statutory system, although old attitudes lingered, with the annual general meeting of the scheme in 1899 turning into an opportunity for employers to assert that accidents arose from the carelessness of miners and for miners to blame owners.[125] These mutual indemnity associations remained extremely important, at least in the mining industry (which may have been partly due to a reluctance among insurance companies), well into the twentieth century: in 1934 it was reported that in Northumberland 30,196 mineworkers belonged to such associations and only 483 to companies with liability policies, while 9,220 workers were not covered by any scheme.[126]

From the outset insurers sought to direct aspects of policyholders' working practices in order to reduce claims. In 1881, ELAC's directors resolved to offer advice on working practices at the Millwall Docks: "The Board being of opinion that the Millwall Docks & other employers of labor [sic] would welcome any suggestion for reducing the risk to their men."[127] In January 1882, ELAC instructed another employer to fence a hot water tank following an accident.[128] As insurance grew into the preferred option among employers, so insurers extended the nature and scope of these interventions. Some sought to influence employment policy in order to exclude those workers thought more likely to be at risk of injury: the Scottish Employers' Liability Co Ltd warned that "employers would have to be very careful in selecting workmen who were not suffering from any physical defect."[129] Insurers were criticised for exceeding what was thought to be their role. The use of claims cooperation clauses led counsel for one plaintiff to complain bitterly in 1882 that because a settlement could not be reached without the consent of the insurer the injured worker had "to fight, not with his employer, but with a great and rich corporation in the shape of an insurance company."[130] Trade unions continued to fund actions, but now were likely to be litigating against insurance companies, as in 1881 when ELAC's board was informed that a case to test the new act was being contemplated by "friends" of John Hogan, who had died from woolsorter's disease – a form of anthrax contracted while working for Sir Titus Salt Company in Yorkshire.[131]

9. Insurance and welfare

The Factory Acts emerged from humanitarian interest in the conditions in which children worked and from a belief that work was more than simply a private concern between the employer and the

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[121] *Birmingham Daily Post*, 20 Apr. 1883.
[122] *Ibid*, 3 May 1884.
[123] *Birmingham Daily Post*, 1 Mar 1881, 9 Jun 1881; London Metropolitan Archive, MS 14,061/1, fo 50 (26 Apr 1881), fo 60 (19 May 1881), fo 67 (2 Jun 1881), fo 89-90 (14 Jul 1881).
[124] *Aberdeen Weekly Journal*, 3 Jun 1880, 18 Dec 1880; *Pall Mall Gazette*, 9 Jun 1886.
[125] *Weekly Standard and Express*, 22 Jul. 1899.
[126] HC Deb 2 Mar 1934 vol 286 c1436.
[127] London Metropolitan Archive, MS 14,061/1, fo 132-3 (6 Oct 1881).
[128] *Ibid*, fo 202-3 (19 Jan 1882). See *Manchester Times*, 20 May 1882.
[129] *Dundee Courier & Argus*, 28 Feb 1899.
[130] *Manchester Times*, 20 May 1882. In other cases, it was the employer's claim for reimbursement that was resisted: *Aberdeen Weekly Journal*, 11 Jun 1890 (argued that the injured worker was not an employee and the claims control clause had been breached).
[131] London Metropolitan Archive, MS 14,061/1, fo 177-8 (15 Dec 1881).

employee, but also played a key role in public policy by training workers and reducing future claims on poor relief. The legislation could not be confined itself to children if only because providing a healthy environment for one set of workers necessarily affected the working conditions of all. There were also campaigns to broaden the protections to adults led at first by those who drew comparisons between the situation of the slaves and factory workers[132] and later by trade unions. The principle that an employer was not liable to compensate an employee, who had been injured by the negligence of another employee, arose from beliefs that work accidents were part of the ordinary incidences of life, that employees were largely responsible for accidents, and that to allow such claims would increase carelessness and unleash a flood of litigation. Employers opposed government intervention under the Factory Acts, but their virtual immunity from liability for workplace accidents passed to the state the burden of supporting employees injured at work and the families of those who had been killed. The judges struggled to understand the changing nature of work. Their approach seemed to be contradicted by the theme (if not the detail) of the Factory Acts and to show little understanding of modern working conditions and industrial relations. In spite of minor inroads, the judges were keen to maintain the doctrine of common employment and this drove them to ever more absurd conclusions, so that by the late 1870s even some who were opposed to its wholesale abolition were willing to acknowledge the difficulty involved in its defence.

The legislation on compensation did not seek to punish negligent employers, but it did begin to shift the burden of supporting employees away from the state. Thus, while insurance was not part of the original scheme, there was no objection to its use. Insurers, who were keen to reduce claims, took an interest in advising or even requiring improvements in safety that went beyond the Factory Acts and was more easily adjusted to each workplace, or at least each sector, than was possible with general legislation. As employers' liability was extended to sectors not included in the original legislation, and although not made compulsory until 1969,[133] insurance began to dominate the field, and, therefore, acquire a greater role in delivering welfare. It was for this reason, in part, that regulation of liability insurance companies was introduced as early as 1907. But that is another story.[134]

[132] HC Deb 16 Mar 1832 vol 11 c345.

[133] Employers' Liability (Compulsory Insurance) Act 1969. Compulsory cover through insurance or mutual indemnity had been required in coal mines under Workmen's Compensation (Coal Mines) Act 1934 (s1).

[134] P Rawlings, "The Confused Origins of Insurance Regulation" in A Georgosouli and M Goldby, eds, *Systemic Risk, Macroprudential Policy and the Future of Insurance Regulation*, London: Informa, forthcoming.