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Industrial Injuries Compensation: Tort and Social Security Compared

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ABSTRACT

This article highlights aspects of the tort system of compensation for personal injury by comparing the provision made for workers under the state's industrial injury scheme. The relative significance of the two schemes has rarely been considered and has not been dealt with in any law journal. Although lawyers are ever-present in tort claims, they have little involvement with applications for social security benefit. Partly as a result, there is a stark contrast between the voluminous literature on the common law, on the one hand, and the very limited information about statute-based workers' compensation on the other. This article tries to redress the balance by bringing the industrial scheme back into the spotlight. Comparisons are made of entitlement under both systems and the value of the compensation they provide. The industrial scheme is shown to pay benefits which, in the long term, can often exceed the lump sum paid in tort. A wide range of statistics is used to illustrate the relative importance and practical effect of the two regimes. The enduring significance of the industrial scheme is revealed together with other findings which may surprise those familiar only with litigation at common law.

1. INTRODUCTION

Tort scholars have rarely related the common law system of compensation to other schemes of public or private insurance which make provision for those suffering personal injury. In particular, comparisons of tort with the benefits provided by the welfare state are hard to find. Academics seem to not to be interested in the inter-relation of the tort system with other forms of compensation even where there is a

direct effect upon the damages that are paid.¹ However, Patrick Atiyah's *Accidents, Compensation and the Law* which first appeared in 1970 still stands as the outstanding exception to this closed-world analysis of tort. As part of a much wider perspective Atiyah compared tort with workmen's compensation. This became especially relevant following the report of the Pearson Commission which recommended that a no-fault road accident scheme be created based on that which had been established for industrial injuries.² Some members of that body even hoped that deducting these and other benefits from common law claims would eventually mean that tort would 'wither away.'³ A few years later Atiyah was still able to write⁴:

'It is hard to believe that anyone could make a dispassionate review of the tort system and the industrial injury system without coming to the firm conclusion that on almost every count the latter is the superior and more up to date model of a compensation system.'

Much has happened since. Instead of withering away, tort actions have flourished: there are four times as many claims brought today than there were forty years ago when the Commission reported. By contrast, the industrial injuries scheme has been cut and cut again in efforts to reduce welfare expenditure and rationalise benefits. This might lead one to suppose that the industrial scheme has become increasingly irrelevant to policy makers. However, it is argued here that a comparative analysis such as that undertaken by Atiyah is still of considerable value to students of the law of tort: it can help reveal the distinctive features of the common law action so that we can better assess the value of such litigation against the provision made more generally for those who suffer injury. This article also breaks new ground in using a

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¹ Although there is a small literature dealing with 'collateral benefits,' almost nothing has been written, for example, on the important practical rules and wider context concerning the deduction of social security benefits and health care costs from the damages award. R. Lewis, *Deducting Benefits from Damages for Personal Injury* (London: OUP, 1999) chap 1.

² *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, Cmnd 7054), chairman Lord Pearson vol 1 para 1004.

³ *Ibid.* For example, Professor Stevenson at vol 1 para 448.

⁴ P.S. Atiyah, *Accidents, Compensation and the Law* (London: Weidenfeld & Nicholson, 3rd ed 1980) 407.

range of statistics to bring the respective schemes up to date and thus provide a firmer base for describing how they operate in practice.

We begin with a summary of the history of compensation for injured workers. Then the present day significance of both schemes is assessed by considering the number of claims processed and the total compensation paid out. Next we compare various aspects of entitlement under each scheme and consider how the compensation is assessed and delivered. The final section looks at how claims are processed and administered and the relative cost of the two systems. Throughout the article more detail is given about the industrial scheme than tort because most readers are likely to be more familiar with the common law system.

2. HISTORICAL DEVELOPMENT

Although the origins of tort liability lie in pre-medieval times, the first reported case of an employee suing his employer for personal injury was not until 1837.⁵ The claim failed, and relatively few such actions were brought in that century and much of the next. There were many reasons why workers did not sue. It is true that the legal rules were very much against them: proving that another was at fault for their injury was fraught with uncertainty and, if any wrongdoing was established, workers faced several draconian defences which enabled employers to avoid liability entirely.⁶ If a worker was found to have contributed in any way to his accident his claim was barred. The same result followed when judges all too readily found that a worker had impliedly consented to running the risk of injury. Men were seen as free agents, knowledgeable about the risks encountered and either able to avoid them or walk

⁵*Priestley v Fowler* (1837) 3 M & W 1. A.W.B. Simpson, *Leading Cases in the Common Law* (Oxford: OUP, 1995) 128 and R.W. Kostal, *Law and English Railway Capitalism 1825-1875* (Oxford: OUP, 1994) 259 - 267. However, employees did sue for unpaid wages and other injustices. M.A. Stein, 'Priestley v Fowler and the Emerging Tort of Negligence' (2003) 44 *Boston College Law Review* 689 at 725. The relationship of employer and employee did not exist in the same form in earlier times when masters had implied obligations to care for their injured servants as discussed in S. Deakin and F. Wilkinson, *The Law of the Labour Market* (Oxford: OUP, 2005) chaps 2 and 3.

⁶ R.A. Epstein, 'The Historical Origins and Economic Structure of Workers' Compensation Law' (1982) 16 *Georgia Law Review* 775. K. Oliphant, 'Tort Law, Risk, and Technical Innovation in England' (2014) 59 *McGill LJ* 819 at 834. M. Horwitz, *The Transformation of American Law 1780-1860* (Cambridge: Harvard University Press, 1977) 99.

away from the job.⁷ The ease with which they were blamed, or even blamed themselves, for injuries that occurred was all too evident. Judges were inclined to accept that most accidents were caused by the negligence of workmen alone and it was they, rather than employers, who needed a deterrent to improve the safety of the workplace.⁸ As a result they ‘quashed nearly every innovative attempt to create law favourable to workers,’⁹ and at best only weak and confused rights emerged.¹⁰

A more important obstacle than these legal rules which limited claims was the ‘living law.’¹¹ That is, the real difficulties for employees lay not so much in the tort textbooks yet to be written but in the realities of workplace power and relations, and in people’s attitudes towards misfortune. The suggestion that an injured worker might have considered suing his master is very hard to contemplate. For example, in Merthyr, that crucible of the industrial revolution, no iron worker or miner for a second would have thought that he could have brought a claim against the likes of the Crawshay family or any of the other ironmasters. Lawsuits were simply not a plausible option.¹²

There were many reasons for the absence of claims. A root cause was that many workers were not aware that a wrong had been done to them. An accident was an everyday occurrence and part of their way of life, and the risk of injury was seen as in

⁷ J. L. Bronstein, *Caught in Machinery: Workplace Accidents and Injured Workers in Nineteenth Century Britain* (Stanford: Stanford University Press, 2008) 23 and chap 4.

⁸ M. Lobban ‘Tort’ in W. Cornish et al, *The Oxford History of the Laws of England: Vol XII: 1820-1914* (Oxford: OUP, 2010) 1009.

⁹ M.A. Stein, ‘Victorian Tort Liability for Workplace Injuries’ [2008] *University of Illinois L Rev* 933 at 983.

¹⁰ S. Hedley, ‘Tort and Personal Injuries, 1850 to the Present’ in T.T. Arvind and J. Steele, *Tort Law and the Legislature* (Oxford: Hart, 2013) 237.

¹¹ L. Friedman, ‘Civil Wrongs: Personal Injury Law in the late Nineteenth Century’ [1987] *American Bar Foundation Research J* 351. For the early history in the U.K. see P.W.J. Bartrip and S.B. Burman, *The Wounded Soldiers of Industry: Industrial Compensation Policy 1833 - 1897* (Oxford: Clarendon Press, 1983).

¹² Kostal above n 5 at 279 and G.A. Williams, *The Merthyr Rising* (Croom Helm, 1978).

the hands of Fate rather than the employer.¹³ There was a culture of stoicism and fatalism.¹⁴ If workers were aware that a wrong had been done, they were ignorant of how to take matters further. Often illiterate, they lacked the support of their fellow workers for there were only limited labour organisations to help them. It is true that for some workers there were guilds and nascent trade unions and there were friendly societies which could provide support at least in the short-term.¹⁵ However, these organisations did not begin to fund legal claims until many years later. Had anyone thought of seeking redress they would have had to act alone: finding a lawyer able and willing to act would have been almost impossible, especially in the new centres of industry. Workers would not therefore know, for example, that as plaintiffs they could not testify on their own behalf.¹⁶ In contrast, they would have been all too aware of the difficulties of getting others to speak out publicly against their employer and the ease with which their account could be contradicted.¹⁷

If an action were brought, there was the prospect of incurring costs which almost no worker could bear.¹⁸ A more significant deterrent in practice was the likelihood that a tort claim would lead to the loss of work-related benefits such as employer's sick pay, or continued employment in an easier job, or medical treatment from work

¹³ Friedman above n 11 at 376. See further K.S. Abraham and G.E. White, 'The Transformation of the Civil Trial and the Emergence of American Tort Law' https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2827667 at 10, forthcoming *Arizona LR*. 'Prior to the emergence of altered understandings of the sources of causal agency in the universe that accompanied the advent of modernity in England and America, fortuitous injuries to humans were thought of as "caused" by agents, such as God, fate, nature, the cycles of history, and a social order with relatively fixed ranks, that were independent of human will and determined the destinies of individuals and societies. Being injured, like falling sick, was treated by this view of causal agency as the equivalent of "fate" or "God's will" or as a punishment for failing to conform to the conduct expectations associated with one's rank in the social order.'

¹⁴ Bronstein above n 7 at 96.

¹⁵ E.A. Cawthorn, *Job Accidents and the Law in England's Early Railway Age* (New York: Edwin Mellen Press, 1997) chap 5.

¹⁶ Abraham and White above n 13.

¹⁷ J.F. Witt, *The Accidental Republic* (Harvard: Harvard University Press, 2004) 56.

¹⁸ Very limited aid was available as noted by Bartrip and Burman above n 11 at 25 – 28.

doctors.¹⁹ The wives or children of injured workers might be more readily given a job by the employer to make up for the loss in family income.²⁰ Suing an employer ‘often meant antagonising the most powerful men in the region and jeopardizing not only one’s employment prospects, but also one’s housing, church membership and even access to town poor relief.’²¹ Nor could workers endure the lengthy, complicated and uncertain litigation process itself. Defence tactics included adopting morally questionable strategies²² such as approaching still dazed victims to sign settlement agreements for paltry sums.²³ Ultimately any claims were opposed by the better lawyers who were able to specialise in civil litigation as a result of the repeated work and higher rewards that were on offer from defendants and their insurers.

The final difficulty faced by workers was that they often needed what tort could not supply: urgent recompense to replace their wage loss. As a result, they were all too ready to accept any money that was on offer.²⁴ In cases where the employer offered to pay some sickness benefit or provide medical care a ‘receipt’ had to be signed and this could release the employer from any liability in tort. The injured were thus contractually barred from pursuing a claim. A similar result was achieved by later legislation which dealt with the consequences of accepting a statutory payment that was on offer without having to prove the employer at fault. If the worker ‘elected’

¹⁹ Bronstein above n 7 at 35 – 40 notes that support was fragmentary, unpredictable and entirely dependent upon the employer’s goodwill. In pre-industrial times injured workers similarly received support not only from their extended family but also their masters. A. Wilson and H. Levy, *Workmen’s Compensation* (Oxford: OUP, 1939) vol 1 chap 1 and I. Metzler, *A Social History of Disability in the Middle Ages* (London: Routledge, 2013).

²⁰ Bronstein above n 7 at 57 and Friedman above n 11 at 373: ‘The hope of getting or keeping work was more important to most workers than the slim chance of winning a lawsuit.’

²¹ Witt above n 17, at 55.

²² Friedman above n 11 at 371.

²³ Witt above n 17 at 62. Similarly Wilson and Levy above n 19 vol 1 chap 8. In their preface they note insurers ‘learnt how to bring the maximum of pressure upon injured workmen to accept less than their just dues.’ Kostal above n 5 at 382 records that doctors in the pay of railway companies would secure releases from legal liability from the many railwaymen they treated.

²⁴ Friedman above n 11, Bronstein above n 7 at 32 – 40.

to take this payment his right to sue for damages at common law was lost.²⁵ In reality the worker had little choice: no-fault compensation provided an immediate and assured amount, whereas the damages suit offered only a remote prospect of obtaining an uncertain sum via a very unpredictable route.

After a decade of trade union pressure, some of the more egregious legal constraints on taking action were partly removed by the Employers' Liability Act 1880. The Act made an employer liable when a worker was injured in certain specific situations although, in effect, these still required proof of wrongdoing. Even then many groups of workers were not covered. In limited circumstances the Act also removed the defence of common employment whereby a claimant was prevented from suing at common law if he were injured by a fellow worker who was also employed by the same employer.²⁶ However, the Act did nothing to modify the other harsh defences and the compensation that it provided was severely limited. The reform was extremely modest with the result that the tort action remained largely irrelevant.²⁷ As observed in the USA, in practice the tort system in the late nineteenth and early twentieth centuries was one of 'non-compensation.'²⁸

Gradually all this changed. Not only was there a shift in workplace power relations and the 'living law' such as to make tort claims more likely, but also the tort rules themselves were further eased. For example, the defences were imposed less readily and their effects made less severe. However, claims still remained few and far between whether made under the Employers' Liability Act or at common law.²⁹ Thus the trade union, the Iron and Steel Trades Confederation, reported 967 injuries to their

²⁵ The 'election' rule was eventually abolished after criticism from the *Report of the Departmental Committee on Alternative Remedies* (1946, Cmd 6860), chaired by Sir William Monckton. A.F. Young, *Industrial Injuries Insurance* (Routledge, 1964) 152.

²⁶ Stein above n 9, T. Ingman, 'The Rise and Fall of the Doctrine of Common Employment' [1978] *Juridical Review* 106.

²⁷ Simpson above n 5 at 117.

²⁸ Friedman above n 11.

²⁹ Even as late as 1928-37 an average of only 30 cases a year were brought under the Employers' Liability Act 1880 although others may have been settled out of court. P.W.J. Bartrip, *Workmen's Compensation in Twentieth Century Britain* (Aldershot: Avebury, 1987) table 10.1 at 220.

members in 1937 but in only one case was a tort action brought.³⁰ How many were settled out of court remains unclear. In 1948 the bar was removed so as to allow claimants to sue in tort as well as claim the new no-fault industrial injuries social security benefit. By then, not only did workers have a different perspective upon accidents compared to their nineteenth century counterparts, but they had also gained the assistance of trade union funded lawyers who could specialise and become expert in personal injury work.³¹ As a result, from the second half of the twentieth century litigation substantially increased. By 1973 work injury claims had risen to well over 100,000 a year and constituted almost half of all personal injury actions brought. However, since that time there has been a continued rise in road accident claims with the result that work injuries have been much reduced in importance: they now number less than one in ten of all injury claims in tort. Nevertheless they still account for about 94,000 cases year.

Looking at the origin of workers compensation it is clear that the failure of the common law to compensate injured workers on any scale in the nineteenth century was a major reason for the creation of a no-fault system, albeit at first within the confines of tort. The Workmen's Compensation Act 1897 imposed a duty on employers to make limited payments to the victims of industrial accidents irrespective of whether those injuries were caused by wrongdoing.³² Employers were left to arrange their own private insurance to pay the cost of these claims. Despite the fact that it lay in private hands, the scheme was called by Beveridge the 'pioneer of social security' because it contained principles upon which broader welfare measures were later built.³³ However, Beveridge then made a series of criticisms and concluded that the scheme was 'based on a wrong principle and has been dominated by a wrong

³⁰ A. Russell-Jones, 'Workmen's Compensation, Common Law Remedies and the Beveridge Report' (1944) 7 *MLR* 13 at 21.

³¹ G. Latta and R. Lewis, 'Trade Union Legal Services' (1974) 12 *British J Industrial Relations* 56. For an engaging account of the emergence of the leading trade union law firm see S. Allen, *Thompsons: A Personal History of the Firm and its Founder* (Merlin Press, 2012).

³² The nineteenth century history is traced in Bartrip above n 11 and in Stein above n 9.

³³ *Social Insurance and Allied Services: Report by Sir William Beveridge* (London: Macmillan, 1942, cmd 6404) 79.

outlook.’ As a result, the scheme, which had lasted over fifty years, was taken over by the state in 1948.³⁴ Statutory no-fault claims in tort were thus displaced by applications for benefit payments under the new industrial injuries regime.

The new social insurance model set up by the Attlee Labour government was a core feature of its welfare reforms. Building upon the no-fault principle, it excluded private insurers from the system and also discouraged the participation of lawyers. New tribunals rather than the traditional courts were used to adjudicate matters in a more informal and accessible way. When devising the scheme, it was even questioned whether access to tort for work injuries should continue as before: should the ‘alternative remedy’ be retained? Eventually it was decided that it should, but not before the abolition of tort in this area was seriously considered.³⁵ As a result, the U.K. is now in a minority of countries to allow both workmen’s compensation and tort claims to proceed in parallel. The absence of an ‘employer privilege’ in this country restricting tort claims is sometimes overlooked by those academics and practitioners who seem to view the ability to sue at common law as almost an inalienable right of universal application.

Since 1948, in spite of a series of reforms designed to reduce expenditure and improve efficiency, the no-fault scheme has proved surprisingly resilient. In 1978 it was still paying out three times as much as the tort system in total, and there were seven times as many beneficiaries.³⁶ It was not until 1995 that tort paid out more money for all its injuries than did the industrial scheme for work injuries alone. What is the present day importance and scope of the scheme and what has happened to tort in the meanwhile?

3. THE NUMBER OF CLAIMS AND THE COMPENSATION PAID

Detailed figures concerning social security claims have existed for many years largely because public expenditure is involved and greater accountability has been

³⁴ National Insurance (Industrial Injuries) Act 1946.

³⁵ The Monckton Committee above n 25, and P. Bartrip, ‘Beveridge, Workmen’s Compensation and the Alternative Remedy’ (1985) 14 *J Social Policy* 49.

³⁶ The Pearson Report above n 2 vol 1 para 772.

required.³⁷ By contrast there used to be a paucity of publicly available information concerning tort claims for personal injury, although statistical and other analyses were privately available to the insurance industry.³⁸ However, from the new millennium the Department for Work and Pensions, via its Compensation Recovery Unit, has published basic figures for the annual number of tort claims and settlements.³⁹ These reveal that in 2015-16 there were 86,000 work injury claims⁴⁰ which, when added to about 25,000 new claims for industrial injury benefit that year,⁴¹ makes a total of 111,000. With over 32 million in employment, this means that about one claim is made for every 284 people in work,⁴² although that figure does not allow for the fact

³⁷ See eg Department for Work and Pensions, *Benefit Expenditure and Caseload Tables* <https://www.gov.uk/government/statistics/benefit-expenditure-and-caseload-tables-2016>

³⁸ For example, the internal statistical information released to official inquiries such as that led by R. Jackson LJ, *Review of Civil Litigation Costs: Final Report* (London: Judiciary of England and Wales, January 2010). There have also been various commissioned reports such as those concerning motor insurance and produced by the London International Insurance and Reinsurance Market Association (LIRMA), *UK Bodily Injury Awards Study* (London: LIRMA, 1997, 1999, 2003 and 2007).

³⁹ The Unit was set up by Government in 1989 to recover from damages certain social security benefits that claimants receive as a result of the tortious injury. All claims for personal injury must now be registered whether or not payment eventually results. However, it has only been since 2000 that the information about the number of claims and settlements together with the amounts of benefit recovered has been published: the Department for Work and Pensions, *Compensation Recovery Unit – Performance Data* <https://www.gov.uk/government/publications/compensation-recovery-unit-performance-data> (hereafter DWP, CRU). The reliability of this data is further considered in R. Lewis, A. Morris and K. Oliphant, ‘Tort Personal Injury Claims Statistics: Is there a Compensation Culture in the UK?’ (2006) 14 *Torts Law Journal* 158. For more detail on the figures see R. Lewis and A. Morris ‘Tort Law Culture: Image and Reality’ (2012) 39 *J of Law & Society* 562.

⁴⁰ Department for Work and Pensions, *Compensation Recovery Unit – Performance Data* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/516771/cases-registered-cru-2014-15.csv/preview

⁴¹ Calculated from the Department for Work and Pensions, *Industrial Injuries Benefit Quarterly Statistics*, table 1.5 <https://www.gov.uk/government/statistics/industrial-injuries-disablement-benefit-quarterly-statistics-data-to-september-2015> (hereafter DWP, II).

⁴² There were 31.58 million people in full or part-time work in March 2016. Office for National Statistics, *Statistical Bulletin May 2016*.

that some of those injured are able to claim both tort damages and industrial benefit. In theory the two schemes cover a wide range of injuries that can be suffered at work. However, as discussed below, there are various exclusions from the schemes and in practice there are also many injured workers who, for a variety of reasons, do not bring a claim.

A. Tort Claims

In the last forty years or so there has been a 20 per cent fall in the number of work-related tort claims: they have declined from an estimated 117,000 in 1973⁴³ to a yearly average of 94,000 in the five years from 2011-16.⁴⁴ A fall in claims might be expected given the decline in employment in traditional industries where danger was often present. Few employees are now involved in making iron and steel or in mining coal and, as a result, since 1974 there has been a decline in workplace deaths by 86 per cent and in reported injuries by 77 per cent.⁴⁵ However, the fall in tort claims is nowhere near this level.

The mere 20 per cent decline in claims since 1973 disguises the fact that work-related claims within the tort system are now much less important than they used to be compared to other types of claim: they have fallen from being 46 per cent of all personal injury claims in 1973⁴⁶ to being only 9 per cent now.⁴⁷ At the same time the

<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/uklabourmarket/may2016>

⁴³ The Pearson Report above n 2 vol 2 para 63 table 11.

⁴⁴ DWP above n 40.

⁴⁵ Health and Safety Executive, <http://www.hse.gov.uk/STATISTICS/history/index.htm> However, there are difficulties in making comparisons because of changes in the method of compiling the figures. See also R. Lofstedt, *Reclaiming Health and Safety for All: An Independent Review of Health and Safety Legislation* (HMSO, Cm 8219, 2011) chap 3 para 13.

⁴⁶ The Pearson Report above n 2 vol 2 table 11. In 1968 work injuries were found to constitute 62 per cent of all High Court actions by the Winn Committee, *Report of the Committee on Personal Injuries Litigation* (1968, cmnd 3691) 233.

⁴⁷ There were 86,495 employment claims out of a total of 981,324 in 2015-16. DWP above n 40. Work injury settlements, rather than new claims made, comprised about 10 per cent of the total and numbered 99,329. DWP, CRU above n 39.

total number of claims from all injuries has quadrupled to almost a million. The main reason for this lies in the rapid rise of motor claims which have almost doubled in the last ten years and now constitute almost four out of five cases.⁴⁸ It has long been the case that a smaller proportion of those injured at work sue in tort compared to those who are injured by motor vehicles. In 1978 it was suggested that whereas one in four injured following a road accident made a claim, only one in ten did so following a work accident, and only one in 67 did so if they were injured elsewhere.⁴⁹ More recently, on the basis of self-reporting statistics, the Trades Union Congress estimates that it is still the case that the rate of claiming is low with only one in seven people injured at work going on to seek compensation.⁵⁰ ‘Lumping it’ is still a common response to injury.⁵¹

The fact that work injury claims in tort are only reduced slightly from what they were forty years ago does not mean that they have always been around the same figure. In particular, there was an exceptional period in the five years from 1999 when claims rose rapidly. They reached a peak of 291,000 in 2004, three times as many as today. The increase resulted from the creation of temporary special schemes of compensation for coalmining diseases and injuries. The claims of miners in respect of respiratory disease and for the effects of using vibrating tools led to settlement schemes which were called by the Department of Trade and Industry ‘the biggest personal injury schemes in British legal history and possibly the world.’ During the

⁴⁸ Motor claims accounted for 78 per cent being 770,791 of the total of 981,324 in 2015-16. DWP above n 40. Reasons for the rise in claims are examined in R. Lewis, ‘Structural Factors Affecting the Number and Cost of Personal Injury Claims in Tort’ in E. Quill and R. Friel (eds), *Damages and Compensation Culture* (Oxford: Hart Publications, 2016) 37 – 59 and R. Lewis, ‘Compensation Culture Reviewed: Incentives to Claim and Damages Levels’ [2014] *J of Personal Injury Law* 209.

⁴⁹ The Pearson Report above n 2 vol 1 table 5. The table also revealed that overall only 6.5 per cent of all accident victims are compensated by the tort system. However, if only serious injuries are considered tort was more important: almost a third of claimants received tort damages where an accident caused incapacity for work for six months or more.

⁵⁰ Trades Union Council and the Association of Personal Injury Lawyers, *The Compensation Myth: Seven Myths about the ‘Compensation Culture’* (2014).

⁵¹ For examination of why so many injured people do not make a claim in the USA see D. Engel, *The Myths of a Litigious Society: Why We Don’t Sue* (Chicago: University of Chicago Press, 2016).

five years from 1999 when claims were allowed about 760,000 were registered.⁵² Following the closure of these schemes in 2004 the annual number of employers' liability claims has fallen by two thirds to its current average of 94,000.

B. Benefit Claims

Following the introduction of the state's industrial injury scheme in 1948 the number of claims increased every year for the first 16 years: they rose from 16,000 in 1949 to a peak of 214,000 in 1965. Since then they have been almost decimated and now stand at only 25,000.⁵³ The decline has not been even. Thus in the ten years from 1965 they fell by a third to 143,000 whereas just over ten years later they were 17 per cent lower at 119,000.⁵⁴ In these twenty years to 1985 they had fallen by almost half from their peak. In part the decline reflected greater safety in working conditions but it was also caused by reforms of the industrial scheme itself such as when short-term injury benefit was abolished and later when reduced earnings allowance was withdrawn. There were some exceptional years when claimant numbers rose. This happened especially after new entitlement was established or further extended for particular diseases. However, generally claims continued to fall significantly so that in 1998 there were 75,000, ten years later 40,000, and now there are only 25,000. The decline means that for every benefit claim under the scheme there are almost four others that are brought in tort. Therefore, it is clear that, although once of comparable importance, the industrial scheme now compensates many fewer newly injured workers than tort.

However, against this must be balanced the fact that there are 301,000 industrial disablement pensions currently in payment.⁵⁵ This is three times the annual number of settlements in tort for work injuries.⁵⁶ The high number of pensions is the result of

⁵² Department of Energy and Climate Change, *Coal Health Claims*
<https://www.gov.uk/government/collections/coal-health-claims>

⁵³ DWP, II above n 41 table 1.5.

⁵⁴ R. Lewis, *Compensation for Industrial Injury* (Abingdon: Professional Books, 1986) 16, relying upon figures supplied directly to the author by the Department of Health and Social Security.

⁵⁵ DWP, II above n 41 table 1.1. for September 2015.

⁵⁶ DWP, CRU above n 39 records 99,329 settlements of employment claims in 2015-16.

the accumulation of entitlement over many years. Although every year there are many more people receiving industrial benefit compared to tort damages, this is only because the benefit is paid as a pension in contrast to the single lump sum usually awarded in tort. The old injuries continue to affect the figures.

Another consequence of the build-up of pensions in the system is that the average age profile of the recipients has markedly increased: about two thirds of recipients are now aged over 60. Apart from age, there is also a clear sexual division with four times as many men than women receiving the pension.⁵⁷ On average, claimants are assessed as suffering between 30 and 40 per cent disablement and receive about £54 a week.⁵⁸ The maximum award is £168 but even this is less than a third of the average gross weekly wage.⁵⁹

C. Total Compensation Paid

When combined, the tort and industrial injury system provide injured workers with about £1.6 billion a year. Here the industrial scheme is the senior partner accounting for almost a billion of that expenditure so that it distributes half as much again to injured workers than tort. This is again because of the accumulation of pensions in the scheme. In 2014-15 £963 million was spent on the industrial benefit.⁶⁰ This is about 20 per cent lower than the highest level reached almost thirty years ago in 1986-87 when the equivalent of £1,209 million was spent. The fall in the expenditure does not match the sharp decline in the number of claims over that period. This is because the pensions awarded from those claims can last a lifetime and thus affect the expenditure figure for many years. In a broader context, expenditure upon both tort and industrial injuries benefit are of limited significance when compared to overall expenditure on welfare benefits: they account for only 0.9 per cent of the total of £168 billion.

⁵⁷ DWP, II above n 41 table 2.1. and DWP, *Equality Impact Assessment For Industrial Injuries Scheme Simplification* (2011). The *Assessment* noted that men account for 78% of claims made and suggested that this was because they are more likely to work in industries such as manufacturing, construction and agriculture where accidents are more likely to happen.

⁵⁸ DWP, II above n 41 table 1.2 for September 2015.

⁵⁹ Office for National Statistics, *Labour Market Statistics*.

⁶⁰ Department for Work and Pensions, *Benefit Expenditure and Caseload Tables* above n 37.

If we turn to expenditure on tort alone, the figures are less precise. Although we have data on the annual number of claims and settlements, no official statistics are produced on the monies paid out each year. However, insurers have revealed that in the five years to 2008 they paid out about £1.5 billion a year in settlements of employers' tort liability cases but this also included the claimants' legal costs.⁶¹ On average there were about 186,000 such settlements a year during that five year period. The average amount per settlement was therefore about £8,000. With claimant legal costs constituting about 30 per cent of the total,⁶² claimants themselves received on average about £5,000, the equivalent of a little over three months average weekly earnings. This is in line with findings made in earlier studies.⁶³ Following the ending of the special schemes of compensation for miners,⁶⁴ settlements since 2008 have fallen by half and numbered only 99,000 in 2015-16. However, the amounts paid have increased for a variety of reasons related to the way in which damages are assessed.⁶⁵ We can therefore roughly estimate that, excluding payment for legal costs, the amount of damages actually distributed to claimants is about £600 million a year. This is less than two thirds of the monies distributed in benefits under the industrial scheme.

4. THE EXTENT OF COVERAGE

Under the industrial scheme benefit 'shall be payable where an employed earner suffers personal injury caused ... by accident arising out of and in the course of

⁶¹ Association of British Insurers statistics cited by the Department for Work and Pensions, *Accessing Compensation: Supporting People Who Need to Trace Employers Liability Insurance* Consultation Paper (2010) para 31. <https://www.gov.uk/government/consultations/accessing-compensation-supporting-people-who-need-to-trace-employers-liability-insurance>

⁶² International Underwriting Association of London, *Fourth UK Bodily Injury Awards Study* (2007) para 7.21 and see below n 130 and 131 and accompanying text.

⁶³ P. Fenn and N. Rickman, *Costs of Low Value Liability Claims 1997-2002* recorded average damages of £3,000 for employers' liability accident claims. In a survey of conditional fee claimants in 2011 half of them received less than £5,000. Insight Delivery Consultancy, *No Win No Fee Usage in the UK* appendix 5 of the Access to Justice Action Group, *Comments on Reforming Civil Litigation Funding* <http://www.accesstojusticeactiongroup.co.uk/home/wp-content/uploads/2011/05/NWNF-research.pdf>.

⁶⁴ Above n 52 and accompanying text.

⁶⁵ The reasons for this are discussed in Lewis above n 48.

employment’⁶⁶ These words are examined here in outline to highlight some key aspects of entitlement and to draw comparisons with tort.

A. The ‘Employed Earner’ and the Self-employed

By compensating only ‘employed earners’ the industrial scheme confines its benefits to the 26 million workers who are employed as opposed to the 5 million or so who are self-employed.⁶⁷ Although it has been argued that the latter are just as deserving of compensation, concern has been raised that if they were brought within the industrial scheme it would create uncertainty because of the greater difficulty in identifying whether they are in the course of their employment when they are injured. A recommendation that at least those who work in construction and agriculture and are self-employed be brought within the scheme has not been implemented.⁶⁸

In comparing tort we similarly find that the primary common law duties are only owed to employees. However, where the tort action is based on vicarious liability anyone who is injured can sue. In that respect tort has wider coverage because claimants can include not only those who are in business for themselves but also, for example, visitors to the workplace or members of the public injured on the roads or elsewhere by the negligent employee when doing his job.

B. ‘Personal Injury’ and the Treatment of Minor Claims

Unlike tort, the industrial scheme has two measures designed to exclude small claims from being brought. However, in practice both systems are overwhelmingly concerned with minor injuries. The two threshold requirements in the industrial scheme are, first, that disablement continues for at least 15 weeks before entitlement can arise; and second, that a minimum of 14 per cent disablement be suffered.⁶⁹ In effect, this means that the claimant must suffer at least the equivalent of the loss of an

⁶⁶ Social Security Contributions and Benefits Act 1992 s 94 (1).

⁶⁷ Office for National Statistics, *UK Labour Market Statistical Bulletin*, September 2016.

⁶⁸ Industrial Injuries Advisory Council, *The Self-Employed in Construction and Agriculture* (London: HMSO 1993, Cm 2177).

⁶⁹ The exceptional cases not requiring this threshold involve certain industrial diseases such as pneumoconiosis.

index finger in order to recover any benefit; any other finger can be lost and will give rise to no claim. Even with the exclusions resulting from this threshold the great majority of successful claimants suffer only minor injury with about half being assessed at less than 24 per cent disabled.⁷⁰

A major distinguishing feature of tort, therefore, is that it does not have any requirement that a minimum loss be suffered before entitlement can arise. However, in practice, the system is similarly pre-occupied with small claims. As we have seen, the average payment in tort for an industrial injury is about £5,000.⁷¹ It can be said that both tort and the industrial scheme devote disproportionate resources to minor injuries. By contrast, many of those seriously disabled are likely not to have their needs met.

C. ‘Personal Injury’ and Mental Injury

Both tort and the industrial scheme accept that personal injury includes injury to the mind as well as the body. Tort devotes considerable resources to compensating the mental consequences that follow from physical injury no matter how relatively trivial the pain and suffering. In contrast, the industrial scheme spends very little on mental injury. Assessments under both systems are heavily dominated by anatomical loss with mental effects usually being compensated only when parasitic upon the physical injury. Thus the industrial scheme uses a very crude table of physical losses which result in prescribed percentages of disablement and these, in turn, equate to a set level of pension. Mental injury is not even listed in this table, but if medically established, it can be taken into account as a ‘non-prescribed condition’ to increase the percentage of disablement found. However, in practice, it rarely does so. If we compare how assessments in tort are reached, we find a much more detailed booklet being used instead of the basic industrial injuries table. The Judicial College’s *Guidelines for the*

⁷⁰ The 24 per cent assessment is then rounded down so that by far the most common pension is that payable for 20 per cent disablement. The average payment, taking into account the minority of substantially higher awards, is £54 a week. In 2016 this was equivalent to a pension slightly more than that payable for 30 per cent disablement.

⁷¹ Above n 63 and associated text.

*Assessment of Damages in Personal Injury Cases*⁷² is a text that should be ‘packed in every judge’s lunch bag’⁷³ for it provides the parameters within which awards for pain and suffering are to be assessed. However, like the industrial table, the descriptions of injury are almost exclusively concerned with the physical effects and the guidance on assessing mental injury is very limited.

In theory, even if the claimant does not suffer physically he may claim for a mental condition alone if it is the result of an accident caused by his job. On this basis, for example, benefit was paid where the claimant developed a neurosis after witnessing the death of another employee at work.⁷⁴ In tort these ‘pure’ mental injury cases occupy many pages of student textbooks. They are a primary concern for those chapters dealing with the problem areas when determining the scope of the duty of care. However, in practice these cases are much less significant than the books imply. For example, post-traumatic stress disorder is a factor in less 5,000 of the million personal injury claims brought each year and in the great majority of these cases physical injury is also involved.⁷⁵ ‘Pure’ mental injury unaccompanied by physical injury is rarely litigated. Overall, in spite of work being recognised as a major cause of stress and mental illness, there is only limited acknowledgement of this in tort.⁷⁶ Even worse, there is almost no such recognition in the industrial scheme. Stress-related illnesses are not included on the list of prescribed diseases allowed under the industrial scheme and, as a result, very few of them are compensated.⁷⁷ To succeed

⁷² Judicial College, *Guidelines for the Assessment of Damages in Personal Injury Cases* (Oxford: OUP, 13th ed 2015).

⁷³ Tony Weir, *A Casebook on Tort* (London: Sweet and Maxwell, 9th ed 2000) 637.

⁷⁴ R(I) 49/52.

⁷⁵ The Transport Committee, Eleventh Special Report, 2013-14, *Cost of Motor Insurance: Whiplash: Further Government Response to the Committee's Fourth Report of Session 2013-14*, (HC 902) 4 and Annex B.

⁷⁶ However, vulnerable employees for whom no special provision is made are now better able to seek redress from tort if work is a cause of their mental breakdown. *Hatton v Sutherland* [2002] 2 All ER 1 and D. Marshall, *Compensation For Stress at Work* (Bristol: Jordan Publishing, 2009).

⁷⁷ Industrial Injuries Advisory Council, *Stress at Work as a Prescribed Disease and Post-Traumatic Stress Disorder* (2004) Position Paper No 13.

claimants must bring themselves within the accident provisions by showing that their mental state results from a specific disturbing event. As a result, for example, a fire officer failed in his claim for post-traumatic stress disorder which he claimed resulted from attending a series of horrific fatal crashes because he could not show which precise incidents had actually contributed to his mental state.⁷⁸ With such onerous causation requirements, it is not surprising that most employees suffering the usual stress-related illnesses find it very difficult to claim under the industrial scheme and instead are forced to try their luck in tort.

D. The ‘Course of Employment,’ Fault and Contributory Negligence

One of the two ways in which entitlement to benefit arises under the industrial scheme is by establishing an ‘accident arising out of and in the course of employment.’⁷⁹ These words originated in the Workmen’s Compensation Act 1897. It has been suggested that they have given rise to more litigation than any other in the English language.⁸⁰ Lord Denning thought that the phrase ‘has been worth – to lawyers – a King’s ransom.’⁸¹ The course of employment has caused similar problems, of course, in relation to tort when the vicarious liability of an employer is in issue. Interpretation of the phrase under the workmen’s compensation regime was more generous and in recent years this has affected the development of the common law. Liability in tort has been extended, partly influenced by the idea of enterprise risk which lay behind the interpretation under the workmen’s compensation legislation.⁸²

⁷⁸ *Chief Adjudication Officer v Faulds* [2000] 2 All ER 961.

⁷⁹ Social Security Contributions and Benefits Act 1992 s 94 (1).

⁸⁰ *Departmental Committee Report on Workmen’s Compensation* (Holman Gregory Report) (1920, Cmd 816) para 29.

⁸¹ *R v National Insurance Commissioner, ex parte Michael* [1977] 2 All ER 420.

⁸² S. Deakin, ‘Tort Law and Workmen’s Compensation Legislation: Complementary or Competing Models?’ in Arvind and Steele above n 10 chap 12.

Although this is not the place to examine course of employment in detail,⁸³ one aspect can be mentioned here: how does any fault of the claimant affect entitlement to benefit? At first sight it may appear that tort is very different from the industrial scheme because it requires proof of fault whereas wrongdoing seems to have little part to play in a claim for benefit. In particular, the defence of contributory negligence reduces damages in perhaps about a quarter of all tort claims⁸⁴ whereas no such percentage reduction can take place under the industrial scheme. Critics of the fault principle argue that it is an uncertain standard, difficult and expensive to apply, and it often does not correspond to popular notions of moral responsibility for causing injury.⁸⁵ Supporters of the benefit system therefore celebrate the absence of fault from the state scheme. However, this difference between the two schemes may not be quite so stark. This is because, if the claimant's conduct creates a new or different risk from that which arises from the employment and this risk is the real cause of the accident, then the injury will not arise out of and in the course of employment and the claim will fail entirely. This argument can have a greater effect than contributory negligence in tort because it may deny all benefit under the scheme instead of leading to only a partial reduction in compensation. This is illustrated by the refusal of any industrial benefit to employees who were injured when they left their place of work for their own purposes by going off to explore another part of the building.⁸⁶ However, in more

⁸³ For an interpretation of the phrase in relation to the scheme see Lewis above n 54 chap 2, and for more recent analysis of tort decisions see P. Giliker, *Vicarious Liability in Tort* (Cambridge: CUP, 2010) chap 6 and D. Brodie, *Enterprise Liability and the Common Law* (Cambridge: CUP, 2012).

⁸⁴ It is very difficult to analyse the effect of the defence of contributory negligence in practice upon the overall system because the parties need not agree whether and to what extent the defence is a factor in the final settlement. However, it was thought to be the cause of the reduction in damages in a quarter of all settlements studied by D. Harris et al, *Compensation and Support for Illness and Injury* (Oxford: Clarendon Press, 1984) 91. The Law Commission found at least 12 per cent of recipients of damages awards considered that the defence had been relevant in reducing their payments. Report No 225, *Personal Injury Compensation: How Much Is Enough?* (1994) table 407. For a survey of only those cases that went to court see J. Goudkamp and D. Nolan, 'Contributory Negligence in the Twenty-First Century: An Empirical Study of First Instance Decisions' (2016) 79 *MLR* 575.

⁸⁵ P. Cane, *Atiyah's Accidents, Compensation and the Law* (Cambridge: CUP, 8th ed, 2013) chap 7.

⁸⁶ For example, R(I) 45/59.

recent times a less strict view has been taken of the scope of employment and it is now required that the claimant's conduct must create a new or different risk before benefit is denied.⁸⁷ Overall, therefore, this offers only a very limited possibility to use the fault of the claimant to deny benefit. It cannot compare with the frequency and effect of such arguments made in tort.

E. Accidents and Diseases

Under the industrial scheme there are only two routes to obtaining benefit: the claimant must show that injury is either the result of an 'accident' or a 'prescribed disease.' Unlike tort where claims for disease are open-ended, the industrial scheme confines claims almost entirely to those appearing on a legislative list which also prescribes the occupations or work processes with which they may be associated.⁸⁸ Against this limiting factor must be balanced a particular advantage given to claimants under the scheme and which is not enjoyed by those who sue in tort: proving causation of a prescribed disease is made much easier by statutory presumptions which help establish the necessary work connection with a particular employment. This means that if the claimant has worked in a listed occupation for the minimum specified time and develops the relevant disease it is presumed that it has been caused by the employment.

Historically the accident route has been the more important than that for disease even though there is evidence that the victims of disease are more likely to have serious medical needs and be left with residual incapacity.⁸⁹ Of the 275,000 disablement benefit pensions still in payment no matter when entitlement first arose there are 201,000 being paid for accidents compared to only 74,000 for prescribed diseases.⁹⁰ However, this disguises the fact that disease has become much more

⁸⁷ R(I) 2/63(T).

⁸⁸ The dividing line between accidents and disease is sometimes unclear and the scope of an 'accident' is not as limited as it may appear. As a result there are diseases which are found to have been caused by an accident and they are compensated even though not on the prescribed list. R. Lewis, 'Compensation for Industrial Disease' (1983) 5 *J Social Welfare Law* 10.

⁸⁹ Harris et al, above n 84.

⁹⁰ DWP, II above n 41 tables 1.3 and 1.4 providing figures only until 2011.

important in recent years. The nature of work has changed. When the industrial scheme was introduced in 1948 almost two thirds of jobs were in heavy industry whereas today 70 per cent of employees work in office and service industries. As a result, accidents are less common and, with increasing scientific recognition of the effects of work upon health, diseases now constitute the majority of new claims. In 2014 there were 13,000 disease claims, over 2,000 more than there were for accidents.⁹¹ There is a notable division between the sexes with women being much less likely to suffer from industrial disease: of new claimants, only 7 per cent are women whereas, for accidents, they constitute 30 per cent of the total.⁹² In addition, it can be argued that the industrial scheme has failed to recognise the occupational cause of many diseases which are compensated in other countries. The Industrial Injuries Advisory Council has been accused of adopting a very conservative approach to prescribing new conditions and using unfair epidemiological tests. As a result, for example, only a fraction of occupational cancers recognised by the Health and Safety Executive result in compensation under the scheme.⁹³

Deafness, vibration white finger and pneumoconiosis account for almost half of the 74,000 prescribed disease pensions which are presently in payment.⁹⁴ This figure again reflects old claims and the continuance of awards in the system resulting from the risks of work years ago. Two thirds of new awards are made to men over pension age.⁹⁵ Of new awards, diseases associated with asbestos now account for about a third of the total, with the onset of mesothelioma typically occurring thirty to fifty years after first exposure. The next most important disease is pneumoconiosis followed by the osteoarthritis of the knee which was first prescribed for coalminers only in 2009.⁹⁶ By contrast, cases of occupational deafness have declined to less than two per cent of

⁹¹ Ibid table 1.5 reveals there were 13,210 disease claims compared to 10,890 for accidents.

⁹² Ibid table 2.3.

⁹³ For detailed trenchant criticism see A. Watterson and R. O'Neil, 'Mean Test' (2015) 129 *Hazards Magazine* <http://www.hazards.org/compensation/meantest.htm>

⁹⁴ Above n 41 table 1.3.

⁹⁵ Ibid table 2.5.

⁹⁶ Ibid table 2.7.

new cases.⁹⁷ It may surprise some that none of these cases are recorded as involving women,⁹⁸ but the reason is that the conservatively specified occupations are in industries that traditionally have been dominated by men.

When we turn to consider the tort system there is again much less publicly available information than for the industrial scheme. However, we do know that tort is similar to the industrial scheme in compensating more men than women: only about a quarter of all claims for work injuries are brought by women.⁹⁹ A freedom of information request has also revealed that tort is like the industrial scheme in that diseases are of growing importance to employers' liability claims. From 2012-16 disease claims averaged 33,000 a year, almost three times as many as there were under the industrial scheme. However, unlike under the scheme, accidents were more important than diseases: they outnumbered them by about two to one.¹⁰⁰ If we turn to consider the tort system in general - no matter what the cause of injury - the significance of disease diminishes greatly: for each disease claim made there are 29 based on accident.¹⁰¹ With road traffic accidents now dominating the system this reflects the fact that disease is not relevant to such claims.

⁹⁷ Ibid table 1.10. This contrasts with tort where such cases appear to have risen very sharply in recent years increasing more than threefold between 2010 and 2013. Association of British Insurers, *Tackling the Compensation Culture: Noise Induced Hearing Loss Claims* (2015). This increase does not seem to be reflected in the overall official CRU statistics.

⁹⁸ Department for Work and Pensions, *Statistics on the number of people claiming Industrial Injuries Disablement Benefit for occupational deafness in GB by gender: 1998 to 2011* (2013 ref 3161) <https://www.gov.uk/government/publications/number-of-people-claiming-industrial-injuries-disablement-benefit-for-occupational-deafness-in-gb-by-gender-1998-to-2011>

⁹⁹ Department for Work and Pensions, *Consultation Paper* (2010) above n 61 at 40 para 46 citing unpublished statistics of the Compensation Recovery Unit.

¹⁰⁰ In the four years there were 252,837 accident claims compared to 133,429 for disease. Employment claims accounted for 98 per cent of all the disease actions brought in tort from whatever cause. Response by the Department for Work and Pensions to a Freedom of Information Act request from the author, August 2016.

¹⁰¹ In the four years from 2012 -16 almost four million accident claims were registered but there were only 136,000 disease claims. Response to a Freedom of Information Request from the author by the Department for Work and Pensions, July 2016.

Despite this rise in claims for certain diseases, tort continues to make it difficult to succeed in an action for many other types of illness. Traditional problems persist of proving that the employer was at fault and that it was work that in fact was the cause of the disease.¹⁰² Some conditions are especially hard to litigate. For example, although the Health and Safety Executive suggest that, stress, anxiety and depression are second only to musculoskeletal disorders as the causes of occupational health problems, they constitute only two per cent of the occupational disease claims brought in tort.¹⁰³

In spite of this, we can still say that the common law is increasingly recognising the wider effects of work upon health as we gain more knowledge about the risks involved. We now have a better understanding, for example, not only of the concealed dangers of asbestos but also of the effects of repetitive manual movements or of excessive of noise at work. This has resulted in many new claims for disease being brought. There have been times when claims have multiplied within a short period. For example, as noted above, large scale settlement schemes were put in place to satisfy the claims of miners suffering not only from respiratory disease but also from the effects of using of vibrating tools. From 1999 to 2004 there were 760,000 such claims registered. Under the respiratory disease scheme £2,300 million was paid out, and under the vibration scheme a further £1,700 million.¹⁰⁴ Whereas the median award for vibration was £8,300, for respiratory disease it was only £1,500. The cost of administration was very high: lawyers' costs under the respiratory scheme averaged £1,920 out of a total cost of £3,200 required to administer each claim.¹⁰⁵ These settlements have all now been concluded and this accounts for the substantial fall in the number of disease claims in the recent figures. The fall masks the underlying trend which reveals the growing importance of disease in employer's liability and the extent that occupational ill-health is a major underlying cause of disability and suffering.

¹⁰² J. Stapleton, *Disease and the Compensation Debate* (Oxford: OUP, 1986).

¹⁰³ S. Pickvance, 'A Little Compensation' (2005) 90 *Hazards Magazine* and H. Teff, *Causing Psychiatric and Emotional Harm* (Oxford: Hart Publishing, 2009) 165.

¹⁰⁴ House of Commons Parliamentary Debates, 25 June 2009, Written Answer at column c1110W and above n 52.

¹⁰⁵ National Audit Office, *Coal Health Compensation Schemes*, HC 608 session 2006-07.

5. THE COMPENSATION AVAILABLE

A. Full Compensation and the Emphasis on Non-Pecuniary Loss

On the surface there appears to be stark contrast between the two systems with regard to the amounts of compensation they can provide. Their aims when assessing the claimant's loss seem very distinct. However, as shown below, the practical effect of these differences is much less than might be supposed.

Tort aims to provide full compensation in order to return the claimant as close as possible to the pre-accident position.¹⁰⁶ In theory it tailors the compensation to the circumstances of each individual by making a very subjective assessment of the loss suffered. By contrast assessment under the industrial scheme compares the claimant to a person of the same age and sex who is of normal health. This objective approach ignores the claimant's own personal or social circumstances. Instead disablement benefit is mechanically fixed by using simple tables which prescribe the degrees of disability to be associated with the loss of faculty, almost all being based upon anatomical loss. All in the same bracket get the same award irrespective of the extent that their injury affects their everyday living. These differences between the two systems account, on the one hand, for the eye-catching news coverage given to tort claimants who receive multi-million pound awards and, on the other, the relative anonymity of beneficiaries under the industrial scheme. But how far does the portrayal in the media accurately reflect the scope and importance of each scheme?

A major reason for the potential difference in payment in the two systems is that tort tries to compensate in full for financial losses whereas the industrial scheme almost entirely ignores such claims whether they are for loss of earnings or the cost of care. Instead disablement benefit, in effect, is a payment exclusively based on non-pecuniary loss.¹⁰⁷ However, if we look at how tort actually compensates in practice this difference is much less marked. Partly because of the dominance of small claims

¹⁰⁶ Lord Blackburn in *Livingstone v Rawyards Coal Co* (1879-80) LR 5 App Cas 25 at 39, more recently reiterated by Lord Hope in *Wells v Wells* [1999] 1 AC 345 at 390.

¹⁰⁷ The one very limited exception is that in cases of the most severe injury, affecting only one in a hundred recipients of disablement benefit, two supplements can be claimed to meet the need for care and attendance.

for minor injury, most tort claims involve very little, if any, financial loss. A key fact insufficiently emphasised in tort texts is that two thirds of the total damages paid are actually for non-pecuniary loss¹⁰⁸ with by far the most common type of claim involving a motor accident which causes minor neck injury and no financial loss.¹⁰⁹ In practice, therefore, both tort and the industrial scheme focus their attention on the non-financial effects of injury. In doing so they privilege what has been classified as a secondary, less important, form of compensation compared to the primary need for replacement of direct financial loss. Despite this, it remains true that only in tort is full compensation possible and only in tort can lump sums be paid which, when they take into account lost earnings and care costs, can be in seven figures. The highest one per cent of awards account for almost a third of the total damages.¹¹⁰ It is in these unusual cases that the industrial scheme cannot begin to match tort damages even if the capital value of the social security pension is taken into account as described below.

Thirty years ago there were several different benefits available under the industrial scheme but today only disablement benefit remains. Although loss of earnings is not covered by the scheme today, this was not always the case. Reduced earnings allowance was available and used to account for 40 per cent of expenditure on the industrial scheme. Although it was abolished in 1990, past entitlement has been maintained. This means that there are 97,000 old pensions for reduced earnings allowance still in payment compared to the 205,000 pensions for disablement benefit alone.¹¹¹ The allowance was withdrawn because of its complexity and, in particular,

¹⁰⁸ The Pearson Report above n 2 vol 2 table 107. The Health and Safety Executive estimated that the cost of including pain and suffering would increase payroll costs from 1 per cent to 2.5 per cent in an integrated compensation scheme for work injury. Greenstreet Berman, *Changing Business Behaviour - Would Bearing the True Cost of Poor Health and Safety Performance Make a Difference?* (2002).

¹⁰⁹ Transport Committee Special Report, above n 75. Claims which would have previously been labelled as 'whiplash' are now instead being labelled as 'back or neck' injuries. See also K. Oliphant, "'The Whiplash Capital of Europe'? European Perspectives on Compensation Culture' in Quill and Friel above n 48.

¹¹⁰ Lord Chancellor's Department, *Courts Bill: Regulatory Impact Assessment* (November 2002) table 1.

¹¹¹ DWP, II above n 41 table 1.1.

because of the burden of determining the precise reduction in earnings. This was in spite of a maximum award being set which, in practice, prevented 90 per cent of claimants from obtaining their full loss. If we compare tort, a similar precise calculation must be made to assess exactly the pounds and pence lost. This very subjective approach is watered down in practice by the use of several rough and ready rules but the computation still demands the use of high resources and is one of reasons for the tort system being so expensive to operate as discussed below.

B. Lump Sums versus Pensions and their Capitalised Values

A major distinction between the two systems lies in how the compensation is delivered: whereas the industrial scheme pays benefits exclusively by means of a pension,¹¹² the great majority of tort awards take the form of a once-and-for-all lump sum. Although this single payment is obviously the most efficient way of disposing of the mass of small claims, it has attracted much criticism especially when it has proven insufficient in cases of long-term serious injury. There are a number of reasons to account for this potentially inadequate provision. For example, the lump sum cannot be reviewed later to cater for an unforeseen deterioration in the claimant's condition.¹¹³ In contrast, a disablement pension can be increased if the original injury becomes worse. Again, whereas the traditional lump sum cannot be supplemented if the claimant outlives the life expectancy projected when the award was made, entitlement under the industrial scheme continues to protect the long-lived. As long as disablement continues, payments can endure through incapacity, unemployment and retirement and may end only on death, no matter at what age. Disablement pensions also enjoy the protection against price inflation given to other welfare payments. In contrast, recipients of tort awards in the past have seen their monies eroded by a combination of inflation and market fluctuations which affect the return they are expected to make by investing their lump sum. To counter some of these criticisms a new way of paying damages has been developed. In some tort cases involving very

¹¹² Lump sums which used to be awarded for minor injuries were abolished in 1986. At that time the maximum was £4,000.

¹¹³ There is a very limited 'provisional damages' procedure which offers additional payment if a risk identified in a court order actually materialises.

serious injury it is now possible to obtain periodical payments instead of the lump sum.¹¹⁴ The regular payments can be arranged to be free of tax and can be indexed to protect against inflation. Crucially, they can avoid the artificial presumptions upon which the lump sum has been based and which have diminished its value over time.¹¹⁵ However, they still cannot readily protect against unforeseen deteriorations in the claimant's medical condition.

The value of an industrial injuries pension can be very high if assessed in capital terms. This is partly because it can last for life and is protected against inflation, as just discussed, but also because it is tax free and is not means-tested. Generally, the pension does not lead to a reduction in other contributory benefits available under the main social security scheme. As a result, if attention is confined to minor or moderate injuries, the capitalised value of the pension can often compare very favourably with the lump sum in tort. To illustrate this, consider the case of a recipient of disablement benefit who has lost an eye and is assessed as 40 per cent disabled, this being only a little higher than the average award under the scheme of 30 per cent. In 2016-17 the resulting pension is £67.20 a week amounting to £3,494 a year. If this claimant is aged 21 at the date of injury the lifetime capitalised value of the pension based on the recently revised presumptions now used in tort is £304,467.¹¹⁶ Even if the claimant

¹¹⁴ The history is traced in R. Lewis, *Structured Settlements: The Law and Practice* (London: Sweet and Maxwell, 1993). See also N. Bevan, T. Huckle and S. Ellis, *Future Loss in Practice: Periodical Payments and Lump Sums* (London: Butterworths, 2007) and R. Lewis, 'The Politics and Economics of Tort Law: Judicially Imposed Periodical Payments of Damages' (2006) 69 *MLR* 418.

¹¹⁵ *Thompsonstone v Tameside and Glossop Acute Services NHS Trust* [2008] 2 All ER 537. R. Lewis, 'The Indexation of Periodical Payments of Damages in Tort: The Future Assured?' (2010) 30 *Legal Studies* 391.

¹¹⁶ Using a multiplier of 87.14 based on a minus 0.75 per cent discount rate for a loss for life for a 21 year old man. This multiplier is set by the Government Actuary's Department, *Supplementary Tables* issued in March 2017 as an addition to table 1 of the *Actuarial Tables for Use in Personal Injury and Fatal Accident Cases* (London: The Stationery Office 7th ed 2011). The figures are even higher for a woman. The discount rate was dramatically cut by 3.25 per cent in March 2017 resulting in a considerable increase in damages. For example, young claimants suffering financial loss for the rest of their lives now receive up to three times the damages previously awarded. The Damages (Personal Injury) Order 2017 (SI No 216) resulted from the Ministry of Justice, *Damages Act 1996: The Discount*

were aged 60, the capital value based on these actuarial tables is still £101,937. By contrast the non-pecuniary valuation in tort for the loss of an eye is between £45,840 and £55,000.¹¹⁷ Under the industrial scheme the younger the worker the more valuable their total pension, whereas in tort age rarely affects the non-pecuniary damages paid unless the claimant is very old. The overall comparison illustrates that, over the course of their lifetime, almost all workers suffering lesser injury obtain far more for their non-pecuniary loss from the industrial injuries system than they would for pain and suffering and loss of amenity in tort. However, it must be remembered that the industrial scheme, unlike tort, offers nothing for any earnings loss or for the cost of any private care that may be needed.

The comparison can be taken further by examining what would happen in the case of the most catastrophic injury, such as quadriplegia or severe brain damage. The maximum basic pension which could be awarded by the industrial scheme is £168 a week, equivalent to £8,736 a year.¹¹⁸ For a 21 year old the capitalised value of the basic pension is £761,255 and for a 60 year old it is £254,916. These figures are again comparable with the prescribed amounts of between £271,000 and £337,000 awarded in tort for the most severe injury. Indeed, for younger claimants the scheme in effect pays twice as much as tort does for non-pecuniary loss. However, we must remember that the tort system would also take into account the financial losses and care costs incurred. This means that invariably in such a case, especially if a high income earner is involved, the award in tort would run into millions of pounds and the difference with the industrial scheme would then be very apparent.

6. ADJUDICATION AND ADMINISTRATIVE COST

As part of general social security provision, the industrial injuries scheme is administered by the Department for Work and Pensions. Claims are determined by the

Rate – How Should it be Set? Consultation Paper CP12/2012. Insurers are lobbying vigorously for the rate to be revised.

¹¹⁷ Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (13th ed 2015).

¹¹⁸ This ignores the two supplements that are also payable partly because they have lesser equivalents under the main social security scheme.

Department without a hearing and on the basis of the paperwork alone.

Documentation may include advice from doctors who have been especially trained in disability analysis. Partly because of the medical questions that may have to be resolved, adjudication is often more complicated than in other social security cases. This complexity also makes it more likely that claimants will challenge the decision so that there were 1,773 appeals to tribunals from the 25,000 claims for benefit in 2015-16.¹¹⁹

Tribunals are very different from those courts which determined workmen's compensation cases before the system was taken over by the state in 1948. Under the old system

‘... workmen's compensation descended from its lofty ideals of being a no-fault social service into a squalid legal battlefield between trade unions and insurance companies, with lying, cheating, and chicanery on all sides and astronomical expenditure on administrative, legal and medical costs.’¹²⁰

In perhaps less forceful language it may be argued that tort claims today share some of these features. With employers being required to insure against their liability, in effect the tort system is similarly administered by private insurers. The practices of these insurance companies are essential to the understanding of how the tort system actually works.¹²¹ In 98 per cent of tort cases the claim is settled out of court,¹²² and the factors affecting the bargains that are struck are very different to the strict rules of

¹¹⁹ Ministry of Justice, *Tribunals Statistics* 2015-16, table 1.4.

¹²⁰ O.H. Parsons, ‘A No-Fault System? Not Proven’ (1974) *ILJ* 129 and similarly the sources cited in J.C. Brown, *Disability Income: Industrial Injuries* (London: Policy Studies Institute, 1982) 13 - 17. A new edition of Willis on *Workmen's Compensation* (London: Butterworth Ltd) was published almost every year. The final edition in 1945 was its 37th and contained 1200 closely printed pages and references to over 4,000 cases.

¹²¹ R. Lewis, ‘How Important Are Insurers in Compensating Claims for Personal Injury in the UK?’ (2006) 31 *Geneva Papers on Risk and Insurance* 323.

¹²² Lord Justice Jackson, above n 38 chap 2 paras 3.3 and 3.4 received data from insurers which indicated that only two cases out of 943 went to trial. For earlier similar findings see the Pearson Report above n 2 vol 2 table 12, and the Lord Chancellor's Department, *Report of the Review Body on Civil Justice* (1988, cm 394). See also H. Genn, *Judging Civil Justice* (Cambridge University Press, 2009) chap 2.

law that would be applied by a judge in a court hearing.¹²³ Especially in cases of low value, rough and ready rules of thumb are applied to dispose of many claims as efficiently as possible and limit the bill for costs.

Insurers process these routine payments and they decide which elements of damage they will accept or contest. It is unusual for them to contest liability, one study revealing that insurers' files 'contained remarkably little discussion of liability', finding it initially denied in only 20 per cent of cases.¹²⁴ As a result, insurers make at least some payment in the great majority of personal injury claims, often because the costs are such that they are not worth contesting too vigorously. It has been suggested that about 95 per cent of work injury cases supported by trade union solicitors result in some payment to the claimant.¹²⁵ Tort thus provides a structure for processing mass payments of small amounts of compensation before any formal legal proceedings are begun. Court litigation is very much the exception rather than the norm.

In contrast, private insurers have no part to play in the state-run industrial injuries scheme. All claims are adjudicated and there is no scope for informal bargaining. There is no question of a claimant accepting a deal outside the tribunal for a lesser sum than that to which he is entitled. Nor is contributory negligence to be applied with all its vagueness and uncertainty. There is only limited room to manoeuvre for those administering the industrial scheme. Unlike in tort where the calculation of damages is a key issue, almost all disputes focus upon basic entitlement to benefit rather than the amount due. On appeal, the tribunal system offers an efficient, cheap and speedy system of justice.¹²⁶ Although the procedure is much less formal, work injury cases differ from other social security cases because claimants are more likely to be assisted by their trade union and sometimes represented by a lawyer.

¹²³ H. Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Oxford: Clarendon Press, 1987) and, in the USA, H. L. Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustment* (Chicago: Aldine, 1970). R. Lewis, 'Tort Tactics: An Empirical Study of Personal Injury Litigation Strategies' (2017) 37 *Legal Studies* 162.

¹²⁴ T. Goriely, R. Moorhead and P. Abrams, *More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour* (London: The Law Society and the Civil Justice Council, 2002) at 103.

¹²⁵ Citizens Advice Bureau, *No Win, No Fee, No Chance* (2004) para 4.31.

¹²⁶ J. Baldwin, N. Wikeley, and R. Young, *Judging Social Security* (Oxford: Clarendon Press, 1992).

In 2007 the administrative cost of paying disablement benefit was said to be only two per cent of the total cost of the scheme.¹²⁷ In contrast, fourteen years earlier the cost was said to be 11 per cent of the benefit expenditure.¹²⁸ Whatever the exact figure and however it is calculated, the costs sharply contrast with common law litigation: the tort system consumes in operating costs 45 per cent of the total of the damages paid and the administrative expenditure. This applies to all claims disposed of by the system irrespective of whether formal proceedings are begun (when costs are likely to increase substantially). It means that for each pound spent on the tort system overall only 55 pence goes to the claimant, and that for each pound the claimant receives about another 85 pence is consumed in costs.¹²⁹ Such eye-watering figures are partly the result of including not only the legal costs of both sides but also the insurers' wider costs and their profits from being involved in the system. Claimants' legal costs alone account for about 30 per cent of the damages awarded.¹³⁰ In particular areas, especially where claims are of low value and get as far as court, these costs will far exceed the damages payable.¹³¹ For example, in hearing loss claims in 2013 whereas

¹²⁷ Department for Work and Pensions, *The Industrial Injuries Disablement Benefit Scheme – a Consultation Paper* (2007) 4.19. The costs nevertheless were about 20 per cent of the cost of new claims.

¹²⁸ Industrial Injuries Advisory Council, *Periodic Report* (1993) 28.

¹²⁹ The Pearson Report above n 2 vol 1 para 256. In 1986 the Lord Chancellor's *Review of Civil Justice*, above n 122, estimated that the cost of the tort system consumed 50 to 70 per cent of the total compensation awarded in personal injury cases. Both reports echo earlier analyses as noted by N. Wikeley, *Compensation for Industrial Disease* (Aldershot: Dartmouth, 1993) 34. Lord Justice Jackson also found very high costs in his more recent review, above n 38.

¹³⁰ International Underwriting Association of London, above n 62 para 7.21. Previously insurers had similarly stated that overall they paid an additional 38p in legal costs for every £1 recovered by the claimant. However, this amount rose to 90p for claims below £5,000. See *The ABI Response to the Government's Consultation on Case Track Limits and the Claims Process for Personal Injury* (2007).

¹³¹ Data collected for one survey reported by Lord Justice Jackson, above n 38 chap 2 para 2.6 showed that for 280 personal injury cases which had come before the District Court the claimant costs alone amounted to £1-80p for every £1 of damages paid. On average, costs exceeded damages for cases settled up to £15,000 in the 'fast track' procedure. Similarly, the legal cost of the special schemes of compensation for coalminers was very high even though proving fault in those cases was not required and almost none went to court. See above n 105 and associated text.

claimants received damages which averaged £3,100 their legal costs were £10,400.¹³² Both tort and the industrial scheme focus upon minor injury claims where costs are likely to be out of proportion to the compensation paid. But only in the industrial scheme - where there are no insurers, fewer lawyers and a simplified procedure - is the costs ratio within what many would view as acceptable limits.

Whereas benefit claims are resolved within three to eight months, tort claims take much longer. Even though small sums are usually involved, the majority take between one and two years to process and settle.¹³³ If a case goes to court the time taken is much longer, averaging between three and five years.¹³⁴ The more serious the injury, the longer the time it takes. As a result it can be said:

‘If it were not for the social security system, which provides many claimants with benefits during the settlement process, the tort system would probably have collapsed long ago.’¹³⁵

In this sense, any later action begun in tort may be seen as merely supplementary to the benefit claim. However, in the minority of cases where there is serious injury and substantial financial loss the large lump sum award of damages can make the weekly benefit payment look insignificant and merely peripheral to the tort litigation.

7. CONCLUSION

In reconsidering the relationship between the tort system and that for industrial injuries this article has explored the effect of each in practice. In particular, the statistics revealed here support findings which may surprise some readers. Just over twenty years ago the industrial scheme was providing more compensation in total than all the damages paid for personal injury in tort no matter where the injury occurred.

¹³² Association of British Insurers above n 97 at 8.

¹³³ The Department of Social Security reported an average settlement period of 2.3 years for those tort cases where benefits were recouped from 1990-94, although in 28 per cent of cases the recoupment period lasted for between three and five years. DSS *Memorandum of Evidence to the Social Security Select Committee* (1995) HC 196 appendix B. The Pearson Report above n 2 vol 2 table 17 found that 49 per cent of claims settled within a year and 80 per cent within two years of injury.

¹³⁴ The Pearson Report above n 2 vol 2 table 129, and similarly the Lord Chancellor’s Review, above n 122.

¹³⁵ Cane, above n 85 at 282.

With the exponential rise of motor claims in tort, the industrial scheme has now been overtaken. However, it still distributes more money each year than the tort system does for work injuries alone. It pays out half as much again as tort and it continues to compensate three times as many workers.

Although true, these statistics can easily mislead. Most of the beneficiaries under the industrial scheme first started receiving their pensions some years ago and these old injuries have accumulated in the system. For new accidents and diseases tort is far more important for it deals with almost four times as many claimants a year. Although in historical terms, therefore, the two systems can be seen as of comparable value, it is clear that today tort is the more significant source of compensation for those who are newly injured. In addition, for the minority who are seriously injured, tort is unchallenged in potentially providing full compensation for the loss suffered.

Traditionally both schemes have found it difficult to compensate claims involving mental injury and stress. The work connection has been difficult to prove. That same reason accounts for diseases in general having had only a minor role to play compared to accidents. However, this is now changing. Under the industrial scheme diseases constitute the majority of new awards whilst in tort they constitute a third of all work-related claims. Even though this may be only the tip of the iceberg of occupational ill-health, the statistics gathered here offer a fresh perspective on the growing importance of disease to the two regimes.

In other respects the schemes on the surface appear to have very different bases of entitlement: whereas the tort claim is supposedly founded upon proof of another's wrongdoing, the state scheme operates irrespective of fault. However, when we look more closely this distinction may not be quite so clear. Both systems use the 'course of employment' formula to determine the work relationship and, in theory, fault of the claimant can then be raised in relation to both schemes. In addition, although the tort system emphasises fault more, in practice many smaller claims are settled without contesting the issue. In effect, both schemes largely provide mechanisms for paying small amounts of money irrespective of wrongdoing to those who suffer minor injury.

When we compare the compensation offered, although there seem to be stark differences in theory between the two systems, these are again much reduced in practice. Unlike tort, the state scheme does not profess to embark on a subjective

assessment of the claimant's loss in order to restore the position enjoyed before injury took place. In particular, nothing is paid for any financial losses whether for lost earnings or the costs of care. In catastrophic injury cases the benefit claim is therefore much less important than the millions of pounds potentially available from tort. However, for younger claimants suffering the most serious injury, the pension paid under the industrial scheme can still equate to a lump sum value of around £750,000. Such serious injury cases are few and far between. Instead both systems predominantly deal with minor claims. It is then that the capitalised value of the social security pension can often be shown to greatly exceed that portion of the damages award which is paid for non-pecuniary loss. In many cases the value of the pension will exceed even the total damages paid in tort whether for pain and suffering or financial loss. Tort can then be seen as the less important source of compensation. It is thus essential to examine what both systems offer in the long-term before conclusions can be drawn about the true value of what they provide.

Finally, if we compare how claims under the two regimes are administered and at what cost we again find very considerable differences but this time what happens in practice does not bring them closer together. Instead they are drawn even further apart. In tort the rough and ready factors applied to settle almost all claims out of court stand in contrast to the formal rule-based adjudication evident in the applications for benefit. It is somewhat ironic that lawyers play a major role in the informal settlement system of tort but rarely feature in the other. Tort negotiations predominantly focus upon the amount of damages claimed whereas disablement benefit disputes are more concerned with basic entitlement rather than final value. The speedier and cheaper resolution of claims under the industrial scheme may indicate a simpler and less personal process but may also point to major criticisms of tort. When the cost of administration is almost as much as the compensation paid to claimants it must be questioned whether the game is really worth the candle.

This last point was a key factor for Atiyah forty years ago when he concluded that the industrial scheme was the superior and more up to date compensation model.¹³⁶ Although this article traces the decline of that scheme, it is argued here that lessons

¹³⁶ Above n 4.

can still be learned from the history of workmen's compensation and how the no-fault system operates today. Fundamental questions are posed about how compensation ought to be delivered to those who really need it and at what cost.