THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW

A Historical Perspective

MARC LINDER

Contributions in Legal Studies, Number 54
PAUL L. MURPHY, SERIES EDITOR

GREENWOOD PRESS
New York • Westport, Connecticut • London

Library of Congress Cataloging-in-Publication Data

Linder, Marc.
The employment relationship in Anglo-American law : a historical perspective / Marc Linder.
p. cm. — (Contributions in legal studies, ISSN 0147-1074 ; no. 54)
Bibliography: p.
Includes index.
ISBN 0-313-26824-X (lib. bdg. : alk. paper)
1. Master and servant—United States. 2. Labor contract—United States. 3. Independent contractors—United States. 4. Master and servant—Great Britain. 5. Labor contract—Great Britain. 6. Independent contractors—Great Britain. I. Title. II. Series.
K888.L56 1989
346.41'024—dc20
[344.10624] 89-7492

British Library Cataloguing in Publication Data is available.

Library of Congress Catalog Card Number: 89-7492
ISBN: 0-313-26824-X
ISSN: 0147-1074

First published in 1989

Greenwood Press, Inc.
88 Post Road West, Westport, Connecticut 06881

Printed in the United States of America

The paper used in this book complies with the Permanent Paper Standard issued by the National Information Standards Organization (Z39.48-1984).

10 9 8 7 6 5 4 3 2 1

Copyright Acknowledgment

The author and publisher gratefully acknowledge permission to reprint material from the following copyrighted source.

Marc Linder, "What is an Employee? Why It Does, But Should Not, Matter." *Law & Inequality.*

Part IV

TWENTIETH-CENTURY CONCEPTUAL INCOHERENCE

5

The Transition to Modern Protective Legislation: The Ascendancy of the Control Test under Workers' Compensation

A crucial turning point in the legal evolution of the employment relationship was marked by the enactment of potentially comprehensive legislation designed to protect workers against the physical dangers associated with industrial employment. Initially timid steps in this direction were taken in 1880 in Britain with the passage of the Employers' Liability Act.[1] Accomplishing little more than the abolition of certain employer defenses based on the fellow-servant or common-employment doctrine,[2] its "essentially trifling consequences" meant that litigation cost workers "more than it generally was worth."[3] It was only in 1897[4] and then again as amended in 1906[5] that workers' compensation insurance schemes were established.

In the United States the federal government initiated a wave of enactments in 1908 with the Employers' Liability Act, which applied only to those employed by railroads.[6] By the end of World War I almost all states except for a few in the deep South had passed workers' compensation laws.[7]

Common to virtually all of these statutes was a relatively undeveloped--if not empty--definition of the covered employee or employment relationship. Also universal was the triumph of the common-law control test in Anglo-American courts, on which the task of drawing the contours of coverage devolved by default. Although, as has been noted repeatedly, the employer's control over the worker was and remains the crucial defining aspect of the core capital-labor relationship in classical industrial capitalism--a point on which Karl Marx and Baron Bramwell could have agreed--the economic system also encompassed a whole series of

employment relations in which the matrix of exploitation had not yet been embedded in the direct subordination of labor to control.

In the workers' compensation context, however, no rational considerations supported restricting the protections of the insurance system to those subject to unambiguous physical control. Indeed, in light of the fact that the very purpose of the statutes was to obviate the need to prove fault--the only conceivable link to control--and to use the employer merely as a convenient financial conduit through which the ultimate consumers of the product pay for the blood of the injured producers,[8] the ascendancy of the control test was and remains irrelevant.[9]

Since, as the preceding chapters have demonstrated, broader conceptions of the employment relationship were intellectually available to legislatures and courts,[10] a plausible explanation of the choice of the narrower control test is class bias. When the strenuous resistance of certain factions of the employing class to the introduction of workers' compensation as a counterproductive interference with the unimpeded working of the labor market is taken into account,[11] the coherence of this explanation is enhanced. Some of the American cases also support this view.

I. THE BRITISH ACTS AND CASES

The British Employers' Liability Act of 1880 defined a covered "workman" as "a railway servant and any person to whom the Employers and Workmen Act, 1875, applies."[12] In the latter act was contained the following operative coverage definition:

> The expression "workman" does not include a domestic servant, but save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour,...has entered into or works under a contract with an employer, whether the contract be...oral or in writing, and be a contract of service or a contract personally to execute any work or labour.[13]

The first British Workmen's Compensation Act, 1897, defined a "workman" to include "every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise...."[14] In

its amended version in 1906 the Act's definitional provision read:

> "Workman" does not include any person employed otherwise than by way of manual labour whose remuneration exceeds two hundred and fifty pounds a year...but, save as aforesaid, means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise....[15]

Under the 1880 Act, the Queen's Bench Division had little difficulty in upholding the claim of the widow of a slater who had been killed when he fell off the defendant-builder's scaffold after having slated seven or eight houses for him.[16] Interestingly, both counsel's argument implied that the Truck Act case law was controlling; in other words, the issue was whether the deceased had contracted to perform personally.[17] The reported facts do not illuminate this question. By finding that this "was a case of an ordinary employment, without any special terms, of a workman, who did the work himself, and who did not generally employ other persons to do the work for him,"[18] the court impliedly deviated from the stricter standard of the Truck Act cases; for it did not expressly find that the deceased was bound to give his personal services.

The remaining pertinent cases under the Employers' Liability Act all involved mining. Easily disposed of was the issue of a workman under the so-called butty system. Because under the Coal Mines Regulation Act 1872[19] one working under a butty man was deemed under the real control of the mine owner, the same court held that the worker was an employee of the mine owner for the purpose of the 1880 Liability Act.[20] But when the injuries involved workers performing the ancillary mine activity of sinking shafts under a contractor, the Queen's Bench Division adopted a different analysis. Thus in Marrow v. Flimby,[21] both parties as well as the court focused their discussion on the issue of control. The plaintiff argued: (1) that contractually the defendant reserved sufficient control over the contractor (presumably by virtue of detailed instructions and provision of equipment) to preclude his independence;[22] and (2) that given the control statutorily exercised by the mine management pursuant to the Coal Mines Regulation Act, 1887[23]: "There can be no such thing in a coal mine as an independent contractor employing servants who are not the servants of the colliery owner."[24] The defendant's reasoning

typified a deeply rooted English jurisprudential proclivity to deny that statutory obligations could operate directly on an employment contract or relationship.[25] Thus the fact that the management had issued detailed special rules in accordance with the Coal Mines Regulation Act controlling the people working in the mine "cannot alter the contractual relationship between the parties."[26] Although the action did, after all, arise out of an accident resulting in the plaintiff's husband's death, the defendant viewed that statutorily imposed control as incidental--merely "to enable the mine to be worked safely."[27]

The court distinguished the case from Brown v. Butterley Coal Co. on the ground that the statutory definitional expression, "or works under a contract with an employer," was inserted to cover butty men and not workers such as the decedent.[28] For the rest, A.L. Smith, L.J., adopted the defendant's argument that the statutorily conferred control could not operate through the contractual relationship to convert the contractor into a workman; rather, it "simply g[a]ve control to the mine-owner over persons in the mine so as to enforce the prescribed regulations for carrying on without danger the mining operations."[29]

Control remained the dominant if not universally[30] applied test not only under the Employers' Liability Act,[31] but also under the workers' compensation statutes of 1897 and 1906 and their successors.[32]

II. THE AMERICAN STATE LAWS AND CASES

Between 1911[33] and the entry of the United States into World War I, thirty-seven states enacted workers compensation statutes.[34] Common to all of these as well as to the later enactments was an empty or circular definition of the employment relationship triggering coverage.[35] The most frequently occurring operative language included some version of: "engaged in employment of an employer,"[36] "enters into employment or works under a contract of service,"[37] "in service of another,"[38] "any employer who employs,"[39] "in service of another under any contract of hire."[40] The only[41] deviations from the definitional vacuity/circularity were provisions in the Indiana[42] and Kentucky[43] statutes imposing joint liability on principals, intermediates, and subcontractors for injuries to employees employed by their subcontractors.[44]

Although no statute expressly adopted the control test,[45] the latter dominated judicial interpretation of coverage in all jurisdictions.[46] It was not until the

1930s that any serious challenges to the control test emerged.[47]

Just how entrenched the narrow control-test approach to separating covered employees from ineligible independent contractors became during the formative years of workers' compensation can be gauged by examining how a judicial and a legislative effort to develop a socioeconomically more realistic criterion were thwarted in the jurisprudentially pioneering states of New York and California respectively.

The New York case arose in 1914 when a building painter named Robert Rheinwald was killed as a result of a fall from a scaffold. Rheinwald's widow appealed to the Appellate Division of the Supreme Court the State Workmen's Compensation Commission's ruling that, since Rheinwald was an independent contractor over whom the defendant had no control, he was not an employee within the meaning of the New York Workmen's Compensation Law, which had gone into effect only a few months earlier.[48] That law vacuously defined an employee, in pertinent part, as a person "engaged in a hazardous employment in the service of an employer."[49]

In announcing at the outset the court's decision in the decedent's favor, Woodward, J., summarized the overarching socioeconomic policy forming the backdrop for his analysis of the law and the facts. He noted that when the legislature replaced the fault system with the workers' compensation system, it had intended to socialize industrial risk by making the trade product incorporate the cost of all hazards:

> This mandate of the fundamental will of the people of this state should be remedially applied and beneficially enforced...and ought not now to be hampered or crippled by continued application of definitions, concepts, and rules of liability which indubitably produced in large part the very conditions of hardship for which the present statute was designed as comprehensive relief.[50]

In seeking to determine whether Rheinwald was an employee or an independent contractor, the court then found the relevant facts to be as follows. Rheinwald had done all of the painting for the Builders' Brick and Supply Co. for the previous five years, although he also worked for other companies and was unemployed some of the time. He was usually paid an agreed-upon sum in advance and hired no workers. He contractually agreed to do over without charge any defects from chipping or poor materials. He supplied the materials and tools.

Although he had letter stationery and bill heads printed, he never sent out bills or statements for any work done.[51] On these facts the court held that: "Rheinwald was in fact a workingman, engaged in doing, personally and exclusively, a kind of skilled manual labor which the Workmen's Compensation Law specifically covers...."[52]

Although this finding would appear to have been dispositive in itself, the court then proceeded to address two questions raised by the commission's action. The first was whether Rheinwald was an independent contractor within the scope of master-servant statutes or common-law decisions applying rules of masters' liability in negligence for their employees' injuries. The second was whether decisions at common law or those under employers' liability statutes, involving the issue as to whom the master owed a duty of care arising out of the contract of hiring, were controlling with regard to the determination of who was an employee under workers' compensation statutes.[53] Although Judge Woodward discussed the first question at length, he came to no clear resolution on the merits.[54] He appeared to accept the control test as controlling, but concluded that the record--which either he did not cite or as cited did corroborate his conclusion--indicated that Rheinwald was subject to his employer's control.[55] The court chose not to resolve the question because it viewed the whole notion of the independent contractor, which was rooted in the fault system, as part of the problem rather than part of the solution.[56] This perception also shaped the court's answer to the second question: The only "controlling, influential or even interesting" decisions with respect to determinations of employee status under the Workmen's Compensation Law were those under that or similar laws based on the same principle that the industry-customer should bear the cost of accidents sustained by those who do its work.[57]

As the new determinant of coverage Judge Woodward then formulated an economic reality of dependence test in which "[t]he economic status of the worker and the income he has been deriving from his toil...bec[o]me factors...."[58] Holding Rheinwald to be a covered employee rather than an independent enterpriser was "essential to effectuate the purpose of the act, in transmitting the burden of this bereavement from the scanty purse of this workingman's widow and children to all patrons of the product or service furnished by the employer."[59] Dismissing all the indicia of independence as mere "technical distinctions and elaborate refinements," the court held that "[c]ommon sense and the actualities should be potent on this issue," and

they showed that "Rheinwald really was a worker" because his earnings were wages and not profits, he was not himself an employer, his employer knew that and at least potentially[60] controlled the work.[61]

By holding that workers' compensation was intended to protect "those who do the actual work of a business, and are not themselves employers with a duty of insurance under the act,"[62] Judge Woodward in effect made all non-employing manual workers "employees" within the meaning of the act.[63] This simple criterion, by introducing virtually universal industrial accident insurance, would have radically reduced litigation over coverage.[64]

But the principle did not endure. The next year the same court, against Judge Woodward's lone dissent, reversed the award in a memorandum decision.[65] And two years later the New York Court of Appeals affirmed per curiam "on the ground that the deceased was an independent contractor."[66] Even the founder of modern progressive consumer tort jurisprudence, Cardozo, J.,[67] concurred in the decision.

The contemporaneous process in California was more streamlined. There the legislature in 1917 sought to achieve the same end as Judge Woodward by amending the state workers' compensation statute to define an independent contractor as "[a]ny person who renders service, other than manual labor, for a specified recompense for a specified result, under control of his principal only as to result of his work."[68] Two years later the state supreme court held this shortcut to coverage for all manual workers unconstitutional because it violated the provision of the state constitution, which, in establishing the Industrial Accident Commission, expressly confined the latter to resolving disputes between employers and employees.[69] The ruling endured.[70]

NOTES

1. 43 & 44 Vict., c. 42 (1880).

2. Id. § 1.

3. David Hanes, The First British Workmen's Compensation Act 1897, at 25 (1968).

4. Workmen's Compensation Act, 60 & 61 Vict., c. 37 (1897).

5. Workmen's Compensation Act, 6 Edw. 7, c. 58 (1906).

6. Ch. 149, § 1, 35 Stat. 65 (1908).

7. Mississippi did not enact a statute until 1948.

8. See, e.g., Douglas, "Vicarious Liability and Administration of Risk I," 38 Yale L.J. 584 (1929).

9. Stevens, "The Test of the Employment Relation," 38 Mich. L. Rev. 188, 188-90 (1939). See also Wolfe, "Determination of Employer-Employee Relationships in Social Legislation," 41 Colum. L. Rev. 1015, 1020 (1941):

> It may appear somewhat odd that in construing legislation, one of the objects of which was to escape completely the law of negligence and to impose an obligation on the employer for the benefit of the employee regardless of fault, the courts should resort to the concept by which the employer-employee relationship had been severely limited for the very object of curtailing the employer's responsibility in the negligence field: the concept of independent contractorship.

Wolfe's article elaborates his dissenting opinion in Stover Bedding Co. v. Industrial Comm'n, 107 P.2d 1027, 1041-45 (Utah 1940).

10. When courts began construing workers' compensation statutes in the early part of the twentieth century, it was, therefore, neither the case that "there was no prior social legislation that they could use as a pattern" nor that "[i]t was only natural that they carried over the only criterion they felt to be relevant--the master-servant relationship test." Sears, "A Reappraisal of the Employment Status in Social Legislation," 23 Rocky Mt. L. Rev. 392, 393 (1951).

11. The fact that workers' compensation insurance systems limited and regularized liability led to its acceptance by some factions of industrial capital. See Friedman and Ladinsky, "Law and Social Change in the Progressive Era: The Law of Industrial Accidents," in 2 New Perspectives on the American Past: 1877 to the Present 171, 188-93 (S. Katz and S. Kutler ed. 1969 [1967]); James Weinstein, The Corporate Ideal in the Liberal State: 1900-1918, at 40-61 (1969).

12. 43 & 44 Vict., c. 42, § 8 (1880).

13. The Employers and Workmen Act, 1875, 38 & 39 Vict., c. 90, § 10 (1875).

14. 60 & 61 Vict., c. 37, § 7(2) (1897).

15. An Act to consolidate and amend the Law with respect to Compensation to Workmen for Injuries suffered in the course of their Employment, 6 Edw. 7, c. 58, § 13 (1906).

16. Stuart v. Evans, 49 L.T.N.S. 138 (Q.B.D. 1883).

17. Id. at 139.

18. Id. at 140.

19. 35 & 36 Vict., c. 76, § 72 (1872).

20. Brown v. Butterley Coal Co., 53 L.T.N.S. 964, 966 (Q.B.D. 1886).

21. 2 Q.B.D. 588 (C.A. 1898).

22. Id. at 593.

23. 50 & 51 Vict., c. 58 (1887).

24. Marrow v. Flimby, 2 Q.B.D. at 594.

25. See Kahn-Freund, "Blackstone's Neglected Child: The Contract of Employment," 93 Law Q. Rev. 508 (1977); Kahn-Freund, "A Note on Status and Contract in British Labour Law," 30 Mod. L. Rev. 635 (1967).

26. Marrow v. Flimby, 2 Q.B.D. at 595.

27. Id.

28. Id. at 597-98.

29. Id. at 599. While echoing this statement, Rigby, L.J., perversely sought to draw support for it from the fact that the definition of "workman" in the Employers' Liability Act "contains no reference to control exercised by one person over another, so that it certainly does not affect to include cases in which a person not an employer may by reason of control exercised over a person not his workman become liable for injury caused by the negligence of the latter." Id. at 601. This claim is, given the significant strand of common-law tradition defining the master-servant relationship by exclusive reference to control, to say the least, remarkable. It also appears to suit the tenor of the judge's concluding remarks, in which he regretted that the outcome depended on a technical question rather than on the merits, and wished the widow the best in any common-law action she might bring. Id. at 605-6.

30. In the leading cases under the 1897 Act, the court virtually summarily--without illuminating the facts--held the workers involved to be independent contractors. See Simmons v. Faulds, 17 T.L.R. 352 (C.A. 1901); Vamplew v. Parkgate Iron & Steel Co., Ltd., [1903] 1 K.B. 851.

31. See, e.g., Fitzpatrick v. Evans & Co., 1 Q.B.D. 756 (1901), aff'd, 86 L.T. 141 (C.A. 1902).

32. See, e.g., Bobbey v. Crosbie & Co., 85 L.J.K.B. 239 (1915); Underwood v. Perry & Son, Ltd., 15 B.W.C.C. 131 (C.A. 1922); Short v. Henderson Ltd., 115 L.J.P.C. 41 (1946); McHale v. Park Royal Woodworkers, Ltd., 40 B.W.C.C. 14 (C.A. 1947). The statutes include the Workmen's Compensation Act, 1925, 15 & 16 Geo. 5, c. 84, Part I, § 3.--(1) (1925); National Insurance (Industrial Injuries) Act, 9 & 10 Geo. 6, c. 62, Part I, § 1.--(1) and First Schedule, Part I, § 1 (1946); National Insurance (Industrial Injuries) Act, 1965, c. 52, Part I, § 1.--(1) and Schedule I, Part I, § 1; and Social Security Act, 1975, c. 14, Part I, § 2.--(1)(a).

33. Workers' compensation statutes enacted in Montana and New York in 1909 and 1910 respectively were held unconstitutional. The New York law, ch. 674, §§ 215-16, defined "workmen" as those engaged in manual or mechanical labor in specified dangerous employment.

34. Hawaii, Alaska, and Puerto Rico also enacted insurance schemes. For an overview, see U.S. Department of Labor, Bureau of Labor Statistics, Workmen's Compensation Laws of the United States and Foreign Countries (No. 203, 1917).

35. The Arizona law, ch. 14, June 8, 1912, contained no definition at all.

36. See, e.g., Washington, ch. 74, § 3, 1911.

37. See, e.g., Kansas, ch. 218, § 9(i), 1911.

38. See, e.g., California, ch. 399, § 6(2), 1911.

39. See, e.g., Ohio, ch. 524, § 20-1, 1911.

40. See, e.g., Minnesota, ch. 467, § 34(g), 1913.

41. Some statutes confined coverage to manual or mechanical workers. Nevada, ch. 183, § 3, 1911; New Hampshire, ch. 163, § 1, 1911; Oklahoma, ch. 246, § 3(4.), 1915. Most statutes also excluded those employed only casually or not in the usual course of the employer's trade or business.

42. Ch. 106, § 14, 1915.

43. Ch. 33, § 10, 1916.

44. In addition, the workers compensation statute in Montana, ch. 96, § 6(j), 1915, defined "employee" and "workman" as including a contractor other than "'an independent contractor.'"

45. The Pennsylvania law, ch. 338, § 104, 1915, after generally defining an employee or servant to include all natural persons who perform services for another for valuable consideration, added a phrase applying to

those to whom articles or materials are given to be made up, cleaned, etc., in the worker's own home or other premises not under the employer's control or management.

46. See Comment, "Workmen's Compensation: Employer and Employee: Independent Contractor," 6 Cal. L. Rev. 235, 236 (1918); Comment, "Control and the Independent Contractor," 20 Colum. L. Rev. 333, 333-34 (1920); Annot., 43 A.L.R. 335, 347 n.2 (1926); Comment Note, 134 A.L.R. 1029 (1941).

47. See Note, "Workmen's Compensation: Distinction between Employee and Independent Contractor," 19 Cal. L. Rev. 220, 221 (1931); 1 Schneider's Workmen's Compensation, § 226 at 588 (3d ed. 1941).

48. In re Rheinwald, 153 N.Y.S. 598, 601-3 (N.Y. App. Div., 3d Dept. 1915).

49. Id. at 602.

50. Id. at 601. Compare Litts v. Risley Lumber Co., 224 N.Y. 321, 120 N.E. 730 (1918) (common-law master-servant concepts still prevail in workers' compensation cases) with In re State Workmen's Compensation Comm'n, 218 N.Y. 59, 112 N.E. 571 (1916) (respondeat superior, etc., have no application under Workmen's Compensation Act).

51. In re Rheinwald, 153 N.Y.S. at 604-5.

52. Id. at 605.

53. Id. at 606-7.

54. For an exhaustive overview of the case law in New York, see "Communication and Study Relating to Liability of a Principal for Negligent Injuries Inflicted by Independent Contractors," State of New York, Report of the Law Revision Commission for 1939, Legislative Document (1939) No. 65(K), at 409-684.

55. In re Rheinwald, 153 N.Y.S. at 607-8.

56. Id. at 608. The United States Supreme Court adopted this position in interpreting the District of Columbia workers' compensation act. Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469, 481 (1947).

57. In re Rheinwald, 153 N.Y.S. at 608.

58. Id. at 609.

59. Id.

60. As another New York court noted in a workers' compensation case a few years later: "One may be sent into a forest to fell trees, or be sent to his home to sew garments, and in either case be none the less an employee. If the employer chooses to order work so done as to waive supervision, this does not make the

employee less an employee." Allied Mutual Liability Insurance Co. v. De Jong, 205 N.Y.S. 165, 167 (N.Y. App. Div., 1st Dept. 1924).

61. In re Rheinwald, 153 N.Y.S. at 609-10. Just how bold Judge Woodward's opinion was can be gauged by comparing it with the distinctly timid and tentative dissenting remarks by Justice Brandeis fifteen years later in a Longshoremen's and Harbor Workers' Act case. Crowell v. Benson, 285 U.S. 22, 82 (1931).

62. In re Rheinwald, 153 N.Y.S. at 610.

63. The current Wisconsin workers' compensation statute approximates this principle by making an employee "[e]very independent contractor who does not maintain a separate business and who does not hold himself out to and render service to the public" provided he is not himself an employer for the purposes of the act. Wis. Stat. § 102.07(8) (1987).

64. Disputes over whether consumers--such as house owners--were covered employers could have been precluded by excluding casual or occasional employees as many state statutes did. Disputes might have arisen as to who was the appropriate insured employer in cases involving intermediate employers. But even this issue, which would not have affected coverage of the workers, could have been dealt with by making immediate and intermediate employers jointly liable. See In re Sundine, 218 Mass. 1, 105 N.E. 433 (1914).

65. 160 N.Y.S. 1143, reh'g denied, 161 N.Y.S. 1142 (1916).

66. Rheinwald v. Builders' Brick & Supply Co., 119 N.E. 1074 (N.Y. 1918).

67. See G. Edward White, Tort Law in America 115, 120-38 (1979).

68. 1917 Cal. Stat., ch. 586, § 8(b).

69. Flickenger v. Industrial Accident Comm'n, 181 Cal. 425, 184 P. 851 (1919).

70. See Fidelity & Casualty Co. v. Industrial Accident Comm'n, 191 Cal. 404, 216 P. 578 (1923). On the subsequent history, see Comment, "Labor Law: Scope of the Term 'Employee,'" 32 Cal. L. Rev. 289, 293 (1944).