SEMINAR ON

LABOUR LAW

Motor Vehicle Compensation Law Employer Liability Act

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Introduction and Historical context of the Act

By the close of the eighteenth century, the common law doctrine of *respondeat superior* (let the superior pr principal be liable) had made serious inroads into the general rule of law that a person is liable only for the injuries occasioned by his own personal fault. This rule is an exception to the rule *cupla tenet suos autores* (fault binds its own author).

The rule of respondent superior is an application of the widespread principle formulated by Ashhurst, J. in Lickbarrow v. Manson[1]:

Whenever one or two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.

The aforesaid principle found the approval of Cave, L.C. in *Jones & Co.* v. *Waring and Gillow*[2]. However, Cave, L.J. added that "the principle so generally stated cannot . . . be treated as free from exception but . . . as a general principle. The tendency of the English law of torts has been indeed rather to expand than to contract the respondent superior"[3].

However, the rule makes no difference that the master did not actually authorize or even know of his servant's act or neglect, for even if he disapproved of it or forbade it, he is equally liable if the act be done in the course of the servant's employment.[4] For the act of the servant to be the act of the master, it must be done in the execution of the authority given by the master.

Bush v. Steinman[5] is a classic example. The owner of a house contracted with a surveyor a sum of money. The carpenter employed a bricklayer who contracted with a lime burner for the supply of the lime, who was negligent in delivering lime, part of which was left on the highway. The owner of the house was held liable for injuries resulting from this negligence:

A person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do.

That fact that the wrongdoer was employed through a contractor, and not directly by the employer, made no difference to the liability of the employer. Were the rule otherwise,

[1] (1793) 2 TR 63
[2] 1926 AC 670
[3] See Lloyd v Grace, Smith & Co 1912 AC 716
[4] Manley Smith: Law of Master and Servants, 3rd ed., p. 260
[5] (1799) 1 Bos & Pul 404

Chief Justice Eyre reasoned, considerable difficulty would arise in locating the proper defendant. Roo, J. pointed out that there was legal presumption that the employer had control over persons he employed, and that he could not be permitted to divest himself of that presumption of "law by any act or contract of his own".

During A.D. 1700 and 1800, the "implied command" theory of master's liability had replaced the "particular command" theory. The beginning of the nineteenth century witnessed the emergence of the "course of employment" theory, which tended to further increase the area of master's liability for the wrongs of "those whom the law denominates his servants". At this stage, the concept of "independent contractorship" was developed as a countervailing doctrine. It limited the scope of the expression "servant". Independent contractors were not servants. The decision in *Bush* v. *Steinam* was repudiated. An employer was no more answerable for the torts committed by the servants of independent contractors or by the independent contractors themselves.

Master's liability for tortious act of his servant may also be traced to the maxim qui *facit per alium facit per se* (he does an act through another is deemed in law to do it himself). This was best stated by Blackstone in his *Commentaries on the Law of England* in the following words:

As for those things which servant may do on behalf of his master, they seem all to proceed on this principle that master is answerable for the act of his servant if done by his command, either expressly given or implied *nam qui facit per alium facit per se.*[6]

The master's liability for the act done by servant has been said to be justified on the ground of general convenience and public policy.[7] Said Lord Pearson in *Imperial Chemical Industries v. Shatwell*.[8]

The doctrine of vicarious liability has not grown from any very clear, logical or legal principle but from social convenience and rough justice.

But in *Hern v. Nichols Holt*,[9] C.J. introduced the element of trust and confidence by the master over his servant for making the master liable:

Seeing somebody must be loser by this deceit, it is more reason that he employs and put a trust and confidence should be a lower than a stranger.

[6] Blackstone: Commentaries on laws of England Vol 1, p 429
[7] Queen V Holbrook (1878) 4 QBD 42, 51
[8] 1965 AC 656, 685
[9] Pollock: Law of Torts, 15th ed., p 61

Blackstone says that "there has been no other reason to give than the fiction of implied command".

The rule according to Chief Justice Shaw of Massachusetts "is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or by his agent or servants, shall so conduct them as not to injure another; and he does not, and another thereby sustains damage, he shall answer for it".

The master's liability for the act done by servant is also said to be justified. The servant not only works under the direction and control of the master but he works for the benefit of the employer. Said Denning, L.J. in *Broom* v. *Morgan*[10]:
He (master) takes the benefit of the work when it is carefully done and he must take the liability of it when it is negligently done.
Earlier in *Duncan* v. *Finlater* [11] Lord Brougham observed:
The reason that I am liable is that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it.

Doctrine of Common Employment

"The recorded history of employers' liability", writes Winfield, **"**does not start until 1837, and then it began by denying workman a remedy". In that very year the doctrine of common employment seems to have originated in the decision of House of Lords in *Priestley* v. *Fowler*[12]. The case "is generally regarded as the *fons et origo* of the doctrine of common employment"" which held that the employer was not liable to his employee for injury caused by the negligence of another employee. The rule was based on the theory that "the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself", and that according to this there would be a sort of presumption that the servant suffered to some extent by want of diligence on his part.

[10] (1953) I QB 597, 608
[11] (1839) 6 Cl &F 898
[12] (1837) 3 M&W I

It was extended to the United States by the decision in *Farwell* v. *Boston & Worcester Railroad Corporation*[13] and Scotland by the decision of the House of Lords in *Wilson* v. *Merry*[16a]. Shaw, C.J. of Massachusetts, however, whose judgement has been approved by later decisions in England, based the rule on the theory that the master has not contracted to indemnify the servant against the negligence of a fellow servant and that the servant has entered into service under an implied contract to run the risks and dangers of the service. The doctrine was fully stated by Erle, C.J. in *Tunney* v. *Midland Ry. Co.*[14]:

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

He also cites Lord Herschell in *Johnson* v. *Lindsay*[15] who, quoting Lord Cranworth in *Bartonshill Coal Co.* v. *Reid*[16], observed: When several workmen engage to serve a master in a common work, they know, or ought to know, the risks to which they are exposing themselves, including the risks of carelessness, against which their employer cannot secure them and they must be supposed to contract with reference to such risks.

If "the history of the rule be examined it will be found that in some cases stress is placed upon the rule known as *volenti non fit injuria*". Sometimes stress is place upon a supposed implied term in the contract of service. It will be found that in its first enunciation it was supported by reasons which, as Scrutton, L.J. observes in *Fanton* v. Denville[17] were not satisfactory, and was placed on a ground substantially different from that which was eventually adopted. It will also be seen that in the end the rule imported a fiction. The rule does not depend for its application upon the need to prove that in fact the circumstances of the employment were such as to show that the servant had impliedly contracted as part of the consideration for his wages to run the risk of negligence on the part of his fellow servants. Nor did it depend upon the need to prove that in point of fact the servant knew the risk and voluntarily undertook to run it. But it imported a fiction that

[13] (1842) 4 Met 49
[14] (1866) I CP 291, 296
[15] 1891 AC 371, 376
[16] 3 Mscq 266, 295
[17] (1932) 2 KB 309

a servant by the mere fact that he was a servant was by law courts to be deemed, however, in so far the evidence was from leading to any such conclusion to have contracted that he would, in turn for a portion of his pay, undertake to run the risk of the negligence of his fellow servant. It is thus, in its final form, based upon a supposed implied contract. Efforts have been made from time to time to lessen the scope of the rule. Thus if the person injured, though in the position of a fellow workman, is under no contract of service with the master of the negligent person, it does not apply. Nor does it apply if the master has himself been negligent in appointing an incompetent servant, but incompetence is not proved by the mere fact of negligence, for a competent man may on occasions be negligent. Nor does it apply if the person injured, though still on the master's premises, has ended his employment, being engaged for the day and the day's work having ended, though he has not been paid"[18c]. This view was affirmed in *Hutchinson v. York & Newcastle Rly. Co*[19].

The rule of common employment "has its roots in history. By this date and for many years before this date, it was a rule that was so firmly engrafted by succeeding decisions of the House of Lords on the English jurisprudence that whatever may have been thought of it, no tribunal, nor even the House of Lords, could have refused to apply it. It was and is firmly engrafted on to the English common law."

Since then trade and commerce has enormously expanded. The fear of unemployment became a real fear for a good and efficient person. Industrialization and number of accidents multiplied because workers were not familiar with other fellow workers in large undertakings. Further the limited liability company developed. Moreover, companies were having legal personality. It was then realized that the doctrine of common employment caused great hardship to workers. To mitigate the hardship courts introduced a new concept of duties personal to the employer. In *Patreal*[18] case "an attempt was made successfully to restrict the rule to an employment of such a nature that the service was so interrelated with the other servants' employment that the negligence is an ordinary risk of the service of the other". As a result of severe criticism the doctrine of common employment was largely abrogated in England by the Employers' Liability Act, 1880. It, however, remained the rule of common law until abolished altogether by the Law Reforms (Personal Injuries) Act, 1948.

[18] 1893 P 320

Application of Common Law and Doctrine of Common Employment in India

Pre-1938 position

Prior to the enactment of the Employers' Liability Act, 1938 the High Courts expressed conflicting views on the import of common law in general and doctrine of common employment in particular. Several problems in this connection have particularly agitated the minds of judges from time to time such as:

1. What is the applicable common law? It is the common law as it stood at the time of the granting of the relevant charter of enactment of the relevant statute or does it include subsequent modifications and refinements also?
2. Does not expression "common law" include, in this regard, merely the judge-made law or also the statute law?
3. What are the circumstances which would justify deviation from the English common law?
4. Does the jurisdiction conferred on Indian courts to decide issues in accordance with the principles of "justice, equity and good conscience" or "justice and right" include the jurisdiction to grant legal protection to interests which are not so protected under the common law? In other words, can Indian courts add to the number of recognized torts?

In *Elizabeth C. Blanchetta v. Secretary of State for India*[19] the Allahabad High Court imported the doctrine of common employment prior to 1880 in England. There was a collision between two passenger trains. The deceased was a driver on one of the two engines which collided. In the suit which was filed by the legal representative of the deceased, a Division Bench of the Allahabad High Court held that in this country where there is no legislation analogous to Employer's Liability Act a servant has no cause of action against his master for the neglect of another servant in the common employment of the same master notwithstanding the fact that the servant suffering injury and the servant whose neglect caused the injury were in employment of dissimilar nature.

The aforesaid view was followed by Sind High Court in *Abdul Aziz v. Secretary of State*[20] and Calcutta High Court in *T.J. Brockle Bank Ltd. v. Noor Ahmode*[21].

[19] (1912) 9 ALJ 173
[20] AIR 1923 Sind 129

However, the Nagpur High Court in *Secretary of state* v. *Rukminbai*[22] took the contrary view, and held that the doctrine of common employment as it existed prior to 1880 in England was not Applicable in India. Stone, C.J. held "that in considering what is today consonant to justice, equity and good conscience one should regard the law as it is in England today, and not the law that was of the law of England yesterday. One cannot take the common law of England divorced from the former is in accordance with justice, equity and good conscience and that the latter which has modified it is to be ignored today in England, so far as this case is concerned. As at present advised I am of the opinion that the doctrine of common employment would not apply, not because this case would fall outside the common law doctrine of common employment, but because it would fall inside the Employers' Liability Act."

He added, "it is true that in considering what the common law of England is, one has not to look at the statute law of England; but the law of England is composed of both, and one seeks guidance when determining what is justice, equity and good conscience not by looking at a particular branch of the law in England, but by looking at what is the law England at present in force, and even then one is not compelled to apply that law unless one is of the opinion that bearing in mind the circumstances as existing in India today, that law can according to justice, equity and good conscience be here applied."

Neyogi, A.J.C. held that "the courts in India are, in the absence of any express provision of law applicable to any particular case, empowered to invoke the aid of common law on considerations of justice, equity and good conscience, but this can only refer to the common law which is actually enforced by the courts in England. The rule of common employment which has been evolved by the common law courts is to the effect that the master is not liable to his servants for injuries to them produced by the negligence of a fellow servant engaged in the same business provided there be no negligence in the employment of an incompetent servant or in the retention of such servant after notice of his incompetency" and added: "The rule of common employment therefore in so far as it has been abrogated by a statute cannot be treated as forming part of the enforceable common law of England. The result of this statute has been to deprive the master of the defence of common employment in the following cases: when the injury to a servant is caused by any defect in the machinery, plant or works or by the negligent

[21] 42 CWN 179
[22] AIR 1937 Nag 354

superintendence on the part of any servant or by the negligence of any servant to whose orders the servant injured was bound to conform; or caused by the act or omission of any servant in obedience to improper rules or bye laws made by the employer; or caused by the negligence of any servant having the charge and control of any signal, point, locomotive, engine or train. It is true that the Employers' Liability Act has no statutory force in India and no court would be justified in extending its provisions to India; nevertheless, any court in India which takes recourse to the common law of England and seeks to apply its principles to India cannot afford to ignored the extent to which the common law Stands abrogated by statute."

However, Staples, A.J.C. gave a dissenting opinion and observed:

The common law followed in India is in my opinion the unwritten law and English statutes have never been held to be in force in India. It is not for me to decide whether the rule of common employment is a correct one according to the principles of abstract justice, but I would point out that not only has it been followed in England, but also in America and other countries, and at any rate I cannot hold that it is intrinsically an unjust principle. It is still enforced in England and in a recent case, Fanton v. Denville, (1932) 2KB 309, all the authorities have been reviewed and the matter has been exhaustively discussed. I can see no justification for refusing to apply the principle in the present case or in similar cases.

Response of the Royal Commission of Labour in India

A milestone in the field of abrogation of the doctrine of common employment in India was made in the recommendation of the Royal Commission of Labour in India.

The Royal Commission on Labour regarded both the doctrine of common employment by which the employer is not normally liable to pay damages to a workman for an injury resulting from the default of another workman and the doctrine of assumed risk by which an employee is presumed to have accepted a risk if it is such that he ought to have known it to be part of the risks of his occupation, as inequitable and recommended:

Persons injured by accident may have a remedy by a suit for damages against their employer in the civil court, and it is suggested that the law there applicable is inequitable because two defences may be evoked by the employer to defeat claims which he should justifiably be called upon to meet. One is the defence of common employment which an

employer can plead that an accident was due to the default of a fellow workman, and the other is the defence of assumed risk by which an employer is not liable for injury caused to workman through the ordinary risks of employment, and a workman is presumed to have assumed risks which were apparent when he entered work. When the Workmen's Compensation Act was first introduced, it had in addition to the provisions for workmen's compensation, clauses designed to abrogate these defences in certain cases; but the Joint Select Committee of the Legislature deleted the clauses in question, apparently because they were not satisfied that the doctrines to which we have referred, which were derived from the British common law, would be accepted by Indian courts . . . . As the defences in question are in our view inequitable, there is need for ensuring that they cannot be invoked".

The provincial government were consulted in 1932 and were almost unanimously in favour of legislation for the purpose.

The Employees' Liability Act, 1938 abrogated to a considerable extent or at least a limited extent the scope of that doctrine.

The Act applies to whole of India. For the purposes of the Act workman 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 and whether the contract is expressed "includes any body of persons whether incorporated or not, any managing agent of an employer, and the legal representatives of a deceased employer where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, means such other person while the workman is working for him." Clause (*d*) of Section 3 of the Act provided:

Where personal injury is caused to a workman by reason of any act or omission of any person in the service of the employer done or made in obedience to particular instructions given by any person to whom the employer has delegated authority in that behalf or in the normal performance of his duties, a suit for damages in respect of the injury instituted by the workman or by any other person entitled in case of his death shall not fail by reason only of the fact that the workman was at the time of the injury a workman of, or I the service of, or engaged in the work of, the employer.

However, the Privy Council in *Council v. Constance Zena*[23] held that the scope of the aforesaid section is still limited and that the defence of "common employment" was still available to the employer. In this case on account of collision, a fireman of one of the colliding engines died and the suit for damages against the Governor General in Council was brought by the heirs of the deceased. The Lahore High Court, form whose decision the appeal to the Privy Council has been preferred, took the view that para (*d*) covered three categories---the act or omission of a fellow-servant done or made---

(i) In obedience to any rule or bye law of the employer;
(ii) In obedience to particular instructions given by a person to whom the employer has delegated authority in that behalf; and
(iii) In the normal performance of his fellow-servant's duties.

Their lordships of the Privy Council, while commenting on the view of the Lahore High Court, observed that if the interpretation placed by the Lahore High Court was correct and clause (*d*) could be interpreted into three categories, the case would fall in the third category and the doctrine of common employment would not be any defence. In the view of their lordships of the Privy Council, clause (*d*) covered only two categories, because such an interpretation conformed better with the limited purpose of the Act. Their lordships further observed:

If, however, what may be called the three category construction were to prevail, the result would be to reduce the doctrine almost, if not altogether, to the point of extinction and to render otiose much in Section 3 which is designedly detailed and specific.

Their lordships, while comparing the provisions of the British Employers'' Liability Act of 1880, on which the Indian Act of 1938 was obviously modelled observed that the words "or in the normal performance of his duties" in clause (*d*) did not find a place in the English enactment, and yet their lordships thought that these words were inserted

With the idea of enlarging the class of persons in obedience of whose instructions the fellow-servant has done or made the act or omission causing the injury complained of.

[23] Air 1950 Pc 22

The aforesaid view was followed by the Allahabad High Court in *Dominion of India* v. *Kaniz Fatima*[24]. In view of the Privy Council decision the court held that the case was not covered by clause (*d*) of Section 3 and the plea of common employment was still open to defendant and a suit would be barred by that doctrine.

Be it as it may, the decision of the Privy Council was mainly due to ambiguity in the language of clause (*d*).[36] This led to the amendment of clause (*d*) of Section 3.

The amending Act of 1951 substituted new clause (d) which reads as follows:

3. Where personal injury is caused to a workman---
   (*d*) by reason of the act or omission of any person in the service of the employer done or made---
      (i) in the normal performance of the duties of that person ; or
      (ii) in obedience to any rule or bye-law of the employer (not being a rule or bye-law which is required by or under any law for the time being in force to be approved) by any authority and which has been so approved ; or
      (iii) in obedience to particular instructions given by any other person to whom the employer has delegated authority in that behalf ;

A suit for damages in respect of the injury instituted by the workman or by any person entitled in case of his death shall not fail by reason only of the fact that the workman was at the time of the injury a workman of, or in the service of, or engaged in the work of, the employer

Any provision contained in a contract of service of apprenticeship, or an agreement collateral thereto, shall be void in so far as it would have the effect of excluding or limiting any liability of the employer in respect of personal injuries caused to the person employed or apprenticed by the negligence of persons in common employment with him.

Further, in any such suit for damages, the workman shall not be deemed to have undertaken any risk attaching to the employment unless the employer proves that the risk was fully explained to and understood by the workman and that the workman voluntarily undertook the same.

[24] (1961) 2 LLJ 197

Compensation

The Workmen's Compensation Act is the first piece of legislation towards social security. It deals with compensation for workers who are injured in the course of duty. The scheme of the Workmen's Compensation Act is not to compensate the worker in lieu of wages. The general principle is that a worker who suffers an injury in the course of his employment, which results in a disablement, should be entitled to compensation and in the case of a fatal injury his dependants should be compensated. Under the Workmen's Compensation Act it is the employer who is responsible to pay compensation (as opposed to the employees State insurance. Establishments to which the Employees' State Insurance Act applies to the liability to pay compensation is on the ESI corporation).

The meaning of compensation in this Act is limited to compensation granted under the Act for employment injuries sustained during the course of work. It is also limited to specifically monetary compensation *other* than a salary, travel allowance, and any other form of remuneration that could be paid under normal circumstances of employment.

To get an overall understanding of the Act it is useful to look at the "Statement of Objects and Reasons' published with the Act when it was first passed in 1923. To quote: " …the growing complexity of industry in this country with the increasing use of the machinery and consequent danger to workmen, along with the comparative poverty to workmen themselves renders it advisable that they should be protected, as far as possible from hardship arising out of accidents. An additional advantage of a legislation of this type is that by increasing the importance for employers of adequate safety devises, it reduces the number of accidents to workmen in a manner that cannot be achieved by official inspection. Further, the encouragement given to employers to provide adequate medical treatment for their workmen should mitigate the effects of such accidents as does occur.

The Workmen's Compensation Act, 1923

Industrial life more attractive and thus increase the available supply of labour. At the same time a corresponding increase in the efficiency of the average workmen may be expected."

While these were the official objects and reason, Indian reality today, is that the protection offered by the Act does not act as an incentive for workers, most of whom are unaware of it and who simply join work to earn a livelihood.

At the time the framing of the bill two criteria were followed in determining whom the Act would apply to:

1. Those industries which were more or less organized
2. Workmen whose occupations were hazardous.

Nowadays the government (State of Central) may extend the application of this Act to other establishments of an industry that may not be organised.

To which establishments does the Act apply?

All establishments hiring 20 workers and above must compulsorily register themselves under the Employees' State Insurance Act (ESI Act). It is only those establishments, which employ a lesser number of workers, and therefore to do not come within the purview of the ESI Act that the Workmen's Compensation Act applies to. Also if employers fail to register themselves under the ESI Act, then they will be responsible to pay compensation under the Workmen's Compensation Act.

However, the Workmen's compensation Act will only apply to those persons considered "workers" and those Employers considered 'Employers', as defined under the Act.

Who is eligible to receive the benefits provided by this law?

(s. 2 (1) (n) read with Schedule II)

The Act will apply only to persons recognized as a "workmen" under the Act. The following criteria have to be satisfied:

With the amendment of the Workmen's Compensation Act in 2000 now it is not necessary that the worker in question is engaged in the employer's trade or business.

Further with the amendment of 2000 now even casual workers are covered by this law. The only requirement is that: The worker should be employed in an activity, which has to be either listed in schedule II of the Act OR any duty having connection with the specified activity mentioned in the schedule. In addition, schedule III to the Act contains a list of diseases and persons in occupations where infection is possible can claim compensation under this Act. They are 'workmen' for the purposes of this Act.

In addition to persons employed in the capacity mentioned in Schedule II, a driver, a mechanic, cleaner, or person employed in any other capacity in connection with a motor vehicle are also considered 'workers' under this Act.

Are Contract Labour eligible to receive benefits? (Section 12)

In case part of the work of an establishment is contracted out to a contractor and a worker employed by the contractor for this purpose, is injured then, the principle employer and not the contractor (who is the worker's immediate employer), is responsible to pay compensation as though the worker was directly employed by him.

However, this principal employer holds the right to be indemnified by the person who would normally pay for the compensation of an injured/deceased worker, i.e. the contractor. However, nothing shall prevent the worker from claiming his compensation from the principal employer.

Employer

The Employer is defined in this Act, as a body of person/s, who the worker has entered into a contract of apprenticeship or service with; the term 'employer' also extends to his agent, legal representative of a dead employer, or a temporary employer on to whom the worker has been lent to hire basis. Casual employment is employment, which is not regular or continuous. It is employment for short periods or for a limited or temporary purpose. Webster's Dictionary defines it as work 'Happening to come without being foreseen; coming without regularity.

When is an employer liable to pay compensation?

As per Section 3 of the Act, the employer is liable to pay compensation if the worker is injured by accident that:

- arises out of (i.e. while engaged in work), and;
- in the course of his employment (i.e. during work hours),and;
- such an injury results in disablement of the worker.

If three conditions are met, the employer of an establishment covered by the Act, is bound to pay compensation. While the second condition, i.e. during work hours is easy to prove, the first condition

(i.e., the accident occurred while engaged in work) has been difficult to establish in certain cases.

Disablement

The definition of disablement is very important in this Act, as it determines the extent of compensation that can be claimed by the worker injured in the course of his employment. Under the Act, there are four types of eventualities, which can be compensated, namely:

1. Death
2. Permanent Total Disablement: disablement that incapacitates a worker from all kinds of work.
3. Permanent partial disablement: disablement that reduces the capacity to work in any employment similar to that the worker was performing at the time of the accident.
4. Temporary disablement: This may be total or partial disablement, which is of temporary nature, which reduces the earning capacity of the worker in any similar employment for the period of disablement.

Compensation & Disablement

- Velu, who worked in a printing business, got his fingers cut off by accident. This is "Partial Disablement" as it reduces his capacity to work in any such employment of similar nature.

- Ramamurthy, a powrakarmika (Road sweeper employed on contract basis for Bangalore City Corporation) slipped and fell from a garbage truck and fractured his hand. He could not work for one month. This is temporary disablement.
- As Shiraz can no longer work as a coolie or do any work of a similar nature, he can be considered 100% disabled under this law.

Example**:** An accident left a worker- a coolie with a defect in his leg and as a result unfit to perform the work of a coolie. Legally he can be considered 100% disabled. In this case the court stated that the incapacity to earn is to be determined with reference to the work, the worker was doing at the time of accident.

Q: If the worker was already suffering from some disease and the accident suffered by him together with the disease resulted in the injury/ death would the employer be liable to pay compensation?
A: If the injury suffered by the worker produces a disease, which aggravates a pre-existing disease thereby causing a death or disability, it is still compensable (i.e. compensation can be paid.)
The employer cannot defend himself by saying that the worker already had an existing disease,

Example**:** A worker has a pre existing heart condition, which due to the strain or over exertion of work causes his death, the employer will and is still liable to pay compensation. All that is required is that the accident suffered during the course of and arising out of the work immediately led to his death injury.
In legal terminology: the injury suffered by the workmen at work should be the 'proximate cause' of his death, or that there should be a 'close causal connection' between the accident and the injury.
This has been held by the Bombay High Court in *Sadashiv Krishna Adke v. M/s Time Trader* 1992 I LLJ 877 (Bom)

Shivanna got injured at work because he was under the influence of alcohol. The employer is not responsible to pay compensation for the resulting disablement.
For accidents resulting in injury while the worker was not working, during work hours, no compensation needs to be paid.
Even if the cumulative result of a slight injury is death then such injury is compensable.

Q: If after the injury, the workman does not lose his old post and receives the same salary,
does the employer still have to pay compensation?

A: Yes. This was held in a Madras High Court judgement (1989 II LLJ 38) where the employee suffered from injury on the right side of the neck, shoulder and head and there was 100% hearing loss in the right ear and partial loss of hearing in the left ear. The court held the fact that he was holding the old post and getting the old wage would not dis-entitle him from compensation under the Act. This is because, the injury suffered would affect him getting another job of a similar nature, with a different employer.

Compensation is not payable by the employer in the following circumstances:

Where the disablement does not last for more than three days.

Where the disablement has arisen out of the following:

(a) Drugs or drink;

(b) Disobedience;

(c) Disregard for the safety measures prescribed.

The grey area in this section is that there is no definition whatsoever that defines what is "drink", "drugs", "disobedience" or "disregard to safety measures". The employers may take advantage of this section and evade paying the compensation. However, the worker's being under the influence of drugs or alcohol is not a defense in the case of death or total disablement resulting from injury. Secondly, in the case of disobedience, such disobedience should be 'wilful'.

Held by the Gujarat High Court in *Devi Behn Dudhabhai v. Manager Liberty* Talkies and another, 1994-II-LLJ-1207(Guj.)

In addition to these defences, employers have often taken the recourse that the worker was negligent. This may have nothing to do with provision of safety measures; for e.g. the worker may have fallen asleep during work. In such cases no compensation may be awarded or a lesser amount of compensation may be awarded.

Is the employer liable to pay compensation in case a worker gets inflicted by an 'Occupational Disease'? (Section 3(2))

An "occupational disease" while in service, is a disease that inflicts workers in that particular occupation in which s/he was employed in and resulting from exposure to a hazardous working atmosphere, particular to that employment. If a worker contracts such a disease then the employer is liable to pay compensation, provided that the worker was employed by him for a continuous period of six months.

An occupational disease that is contracted in the course of employment will fall within the meaning of an 'accident' for the purposes of this Act. In the case of such a disease being contracted, the employer will be liable to pay compensation to the affected worker. The occupational diseases for which compensation is payable are specified in a list attached to the Act- specifically, Part A of Schedule III.

Some examples of occupational Diseases:

(i) Skin diseases caused by physical, chemical or biological agents.

(ii) Bronchopulmonary disease caused by flax, hemp and sisal dust (Byssinosis).

(iii) Occupational asthma caused by recognized sensitizing agents inherent to the work process.

The back-related problems suffered by powrakarmikas due to constant bending can be considered an occupational disease Asthma resulting from repeated exposure to congress grass can also be considered an occupational disease

What if the Employer becomes bankrupt? - Liability In Case Of Insolvency (Section 14)

In the case where the employer of the worker has entered into an agreement with insurers, to pay compensation and subsequently the employer becomes bankrupt, then in the event of any accident happening, the employer's liabilities will be transferred to the insurers, and they would be treated as the employers of the aggrieved worker for the purpose of paying compensation irrespective of whether the employer is bankrupt or not. If he has taken insurance to cover claims arising out of workers' accidents, the insurance company will be responsible to pay compensation. It is interesting that in such cases were an employer has taken insurance, the employer will back the worker's claim against the insurance company naturally, as they are not responsible to pay the worker compensation which responsibility has shifted to the Insurance Company. The practice of taking insurance is common only amongst the bigger contractors/ companies.

However, they will be no more liable to the worker than the original employer. If the liability of the insurers is to be less than that of the original employers, then the worker can claim the balance amount from the insolvency proceedings.

In the case of the compensation being half monthly payments, the insurers may convert that to an appropriate lump sum and pay that compensation to the worker.

How is the amount of compensation decided?

The compensation to be paid by the employer for injuries caused depend on extent of the disablement suffered by the worker; more severe disablements naturally receive higher compensation. This has been categorised as follows. Compensation payable in case of:

1) Death;

2) Disablement

(a) Permanent total disablement;

(b) Permanent partial Disablement

(c) Temporary disablement-

(i) Temporary total disablement;

(ii) Temporary partial disablement.

In addition, the guiding principle is, the higher the age of the injured worker, the lower the compensation.

What is the basis of calculation of the amount of compensation?

Wages are the basis for amount of compensation paid. Two workers earning different salaries therefore will get different amounts of compensation even though the injury they suffered might be identical. Compensation under this Act is calculated on the basis of the monthly wage received by the worker. According to this Act, it is the amount of wages which would be payable for a month's service - i.e. irrespective of whether the worker is paid on a daily, weekly or piece rate basis.

Wages

Wages is defined as the privilege or benefit which is measurable in terms of money other than any travel allowance, or provident fund or any other special benefit claimable by the worker, during the course of his employment.

Compensation to be calculated on the basis of the minimum wage, if notified

Where a worker received a monthly wage less than what is prescribed under the Minimum Wages Act, 1948, s/he would be deemed to be drawing the monthly wages as prescribed by the Act for the purposes of calculating compensation. .

Determining wages in case of a worker inflicted with an occupational disease

According to the Karnataka High Court, compensation in the case of contracting of occupational disease is to be calculated on the basis of wages drawn at the time of termination of employment and not on the date of contracting the occupational disease.

In case a worker dies who is entitled to compensation and how much compensation should be paid?

Where death results from the injury the compensation is payable to the workers dependants.

Dependant

A dependant is defined under the Act in section 2(d). This definition is of vital value, as it determines who will be eligible to receive the compensation, in case the worker dies in course of his employment.

- A widow,
- A minor, legitimate/ adopted son,
- An unmarried legitimate/ adopted daughter and;

- A widowed mother.

All the above people come under one category as being dependants of the deceased worker.

(ii) If wholly dependent on the earnings of the worker, then in addition: (a) a son or (b) a daughter who has reached the age of 18 but is infirm or sick.

This was held by the Karnataka High Court in the case of *Bharat Gold Mines Ltd., v. Hanuman* (1992) 1 LLN 1023

A minor in this Act is defined, as is normally the case, as a person who has not attained the age of 18 years.

(iii) If wholly or partly dependant on the worker, then the following can also be termed as dependants of the deceased worker:

(a) a widower;

(b) a parent other than a widowed mother;

(c) a minor illegitimate son;

(d) an unmarried or widowed, adopted, legitimate or illegitimate daughter;

(e) a minor brother;

(f) an unmarried sister;

(g) a widowed sister, if minor;

(h) a widowed daughter-in-law;

(i) a minor child of a deceased son;

(j) an orphaned grandchild;

(k) a paternal grandparent if the parents of the deceased worker are also dead.

Comment**:** The definition of the term "Dependant" shows that it is not intended to benefit all the legal heirs of a deceased worker but only those relations who to some extent depend upon the worker's earnings for their daily necessities. However, all persons mentioned in (i) above are beneficiaries who only have to prove their relationship with the deceased worker and do not have to prove that they were dependent on earnings of the worker.

How much should be paid?

The compensation due to the dependants is an amount equal to fifty percent of the monthly salary of the deceased worker multiplied by the relevant factor or an amount of eighty thousand rupees, whichever is more. The minimum compensation in the case of death in no circumstances can be less than Rs. 80,000/-.

Example**:** A worker aged 35 meets with an accident and dies while at work (i.e. in the course of employment). At the time he drew a monthly wage of Rs.2,500/-. As per Schedule IV of the Act the relevant factor applicable to his case would be Rs. 197.06. As such, the amount of compensation payable to his dependants will be arrived at in the following way:

(i) 50% of Rs. 2,500 = 1,250

(ii) 1,250 x relevant factor (i.e.197.06) = Rs.2,46,325.00/- (total compensation payable)

Where the monthly wages of a worker is more than Rs. 4000/- , it is taken to be only Rs. 4000/- for calculating either compensation in case of death, or permanent disablement.

In case of injury how is compensation to be calculated?

How much of Compensation in case of injury resulting in total permanent disablement?

Where there is total permanent disablement resulting from the injury suffered, the worker is entitled to be paid sixty percent of his monthly salary, multiplied by the relevant factor, or an amount of ninety thousand rupees, whichever is more.

The minimum compensation in the case of total permanent disablement, in no circumstances can be less than Rs. 90,000/-.

Example**:** A worker aged 35 meets with an accident and suffers permanent total disablement while at work (i.e. in the course of employment) At the time she drew a monthly wage of Rs.2,500/- The amount of compensation payable will be arrived at as follows:

(i) 60% of Rs. 2,500 = 1,500

(ii) 1,500 x relevant factor (i.e. 197.06) = 2,95,590.00/- (total compensation payable)

How much Compensation in case of injury resulting in permanent partial disablement?

In the case of partial disablement of the worker, the amount he is entitled to is the percentage of that for total permanent disablement, the percentage being given in the schedule of the Act.

The compensation is calculated on the lines given in the example above for permanent total disablement, substituting the percentage of disability suffered and the appropriate 'relevant factor' obtained from the, as per the age of the concerned worker.

Calculation of compensation for 'non scheduled injury' resulting in permanent partial disablement.

The problem arises when the partial disablement resulting from the injury is not listed in the schedule.

Then a reasonable percentage is to be given, as decided by the commissioner.

Example**:** A child labourer employed in a silk twisting and reeling unit, suffered third degree burns when a vessel of boiling water used for boiling silkworm cocoons, overturned on her during the course of work. The injury sustained is not mentioned in the schedule. How is the loss of earning capacity ascertained?

In such cases of 'non scheduled injuries' the procedure followed is to obtain a certificate from a medical practitioner who will certify the percentage of disability suffered. The certificate will form the basis for determining the loss of earning capacity, which is the labour commissioner's duty. Hence, the percentage loss of earning capacity may not be equal to the percentage of disability suffered.

Therefore it is very important to make sure that the certificate issued by the doctor contains all the relevant details. These include:

- The percentage of disability suffered as a result of the injury
- Whether the disability suffered is permanent in nature

In the case of an unscheduled injury occurring, once the percentage of permanent disability is ascertained by the doctor, the amount of compensation due to the injured worker can be got using the calculation mentioned above. The 60 % disability mentioned in that example can be substituted for the percentage of disability ascertained by the doctor for the unscheduled injury,

Example: A child labour employed in the silk reeling unit mentioned above, was certified by the doctor in the government hospital to be inflicted with 28% disability from the third degree burns she suffered from her accident. Her salary was Rs. 50/- per day. In accordance with the Act, for purposes of calculating compensation her salary will be as per the Minimum wage notified for that employment, i.e., Rs. 65/- per day, which works out to Rs. 1950/- per month. Being below the age of 16 yrs, only 60% of the wage will be applicable to her, i.e. Rs. 1170/-(as per the minimum wage notification for sericulture industry). Compensation is calculated as follow:

(i) Percentage of disability = 28%

(ii) Salary as per minimum wages Act = Rs. 1950

(iii) 60% payable to child labour = Rs. 1170/-

(iv) Relevant factor for worker of 14 years (i.e. Girija's age)= 228.54

(v) Therefore Compensation is: 28/100 x 1170 x 228.54 (relevant factor) = Rs. 74,869.70

The accident occurred in 29th September 1998, whereas compensation was awarded only in December 2003. Therefore interest @ 12% per annum which was payable from the date of the accident, was calculated as follows:

(i) 12/100 x 74,869.70 = Rs. 8984.36 (interest payable for one year)

(ii) Rs. 8984. 36 x 5(years) = Rs. 44, 921/- (interest from Sept 1998 to Sept 2003) + Rs. 2246.09 (interest from Oct. to Dec. 2003)

Therefore total amount due (principal + interest) = Rs. 12,2036.70

How much Compensation in case of injury resulting in temporary disablement?
(Section 4(2) to 4(4))

In case of temporary disablement, payments equal to 25% of the workers wages shall be made at half monthly intervals. Clause (d) of sub section 4(1) talks about compensation for temporary disablement In case the disablement lasts for more than 28 days then the employer should make the payment on the 16th day from the day of the disablement.

If the period of disablement lasts for less than 28 days then the payment shall be made after the expiry of 3 days. This wait for 3 days is to ascertain how long the temporary disablement will last; whether it is likely to get over before 28 days or take longer.

In case the employer makes any payment to the worker before the payment of this half monthly or lump sum amount it shall be deducted from this. (section 4 (2) (a))

This provision envisages a situation where an application is made when the worker is still undergoing treatment and recovering. While this is possible, in Bangalore workers' applications for temporary disablement compensation are normally made only after they recover from the injury and find themselves out of a job. Then they make an application to recover the compensation. In such cases, the Commissioner, grants a lump sum adding up half-monthly payments for the period starting from the day of the accident up till the date shown on the last medical record (i.e. doctor's. prescription, case sheet, outpatient coupon, etc) that the worker is able to produce. In addition, the Commissioner also grants 12% interest.

Therefore, in the event of suffering an injury-related disablement, workers should maintain these medical records. Because it is on the basis of this proof, that they get compensation.

Review of payments in case of temporary disablement (section 6)

In the case of temporary disablement where half-monthly wages is to be paid, there is provision for review of such amount, by the commissioner. Either party, supported by an attested certificate of a medical examiner can apply for the review to the commissioner.

The review might lead to the increase, decrease or the end of the half-monthly wages, depending on the condition of the worker. In case the temporary disablement leads to a permanent disablement, then the review has the power to call for the lump sum compensation to be paid to the worker. The lump sum the worker is entitled to is less any amount that s/he has already received in half monthly payments.

In case of temporary disablement, any worker, receiving the half monthly payment, shall be required to submit himself from time to time for a medical examination. According to Rule 17 of the Karnataka Workmen's Compensation Rules, 1966, the worker needs only to submit herself/himself for medical examination only twice in the month following the accident and only once in subsequent months, if the place is away from the worker's place of residence.

EMPLOYER'S LIABILITY FOR COMPENSATION

Employers's Liability for Compensation has been delineated in Section 3(1) of the Workmen's Compensation Act of 1993 which runs as follows: If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions. An analysis of the aforesaid definition reveals that there are three terms, namely: *(a)* personal injury, *(b)* accident, and *(c)* arising out of and in the course of employment, which need clarification.

Personal Injury

The word "injury" has not been defined in the Act. In the absence of any definition courts had an opportunity to delineate the expression. Thus, in *Indian News Chronicle Ltd. v. Mrs. Luis Lazar*[25]. The court cited the following passage from *Slazengers Australia Pvt. Ltd.* v. *Phyllis Eileen Burnatt*[26] to explain the term "injury". The word 'injury' (unless the context or subject-matter otherwise indicates or requires) must bear a very artificial meaning in that it is to include a disease which satisfies certain conditions and must, therefore, according to ordinary rules of construction, exclude any other disease.

Accident

Like the word 'injury' the term 'accident' has also not been defined in the Act. However, in *Halsbury's Laws of England* the word 'accident' has been defined to mean: Some unexpected event happening without design, but perhaps no general definition can be given of the word to cover all cases falling within the Act. To decide whether an occurrence is an accident, it must be regarded from the point of view of the workman who suffers from it, and if it is unexpected and without design on his part it may be an accident although intentionally caused by the author of it, or caused by some act committed willfully by him. The term 'accident' has also been delineated by the court. Thus, in *Bai Shakri v. New Manekchowk Mills Ltd*.[27] the Gujarat High Court spoke almost in the terms of Halsbury's Laws of England while explaining the term 'accident', namely: Some unexpected event happening without design even though there may be negligence on the part of the workman. It is used in the popular and ordinary sense and means a mishap or an untoward event not expected or designed. What the Act really intends to convey is what might be expressed as an accidental injury. It includes not only such occurrences such as collisions, tripping over floor obstacles, falls of roof, but also less obvious ones causing injury, e.g., strain which causes rupture, exposure to a draught causing chill, exertion in a stokehold causing apoplexy, and shock causing neurasthenia. But the common factor in all these cases is some concrete happening at a definite point of time and incapacity resulting from the happening.

[25] 3 FJR 190
[26] 54 CWN 952
[27] 1961 I LLJ 585 (Punj)

Arising out of and in the Course of Employment

The accident, however, must 'arise out of and in the course of employment'. The aforesaid expression is the key to Section 3. Indeed, it has been subject-matter of judicial controversy in a series of decided cases.

The Condition Precedent

A survey of decided cases reveals that compensable "personal injury" is one which not only "arises out of employment" but also "in the course of employment". Both the conditions must be fulfilled. An injury which "arises out of employment" but not "in the course of employment" is as much non-compensable as an injury which though arising "in the course of employment" does not arise "out of employment". Courts have rarely analysed fact-situations of a case to verify the fulfillment of the two conditions separately. In overwhelming majority of cases, courts assumed the existence of one of the aforesaid two conditions and were content to ascertain the fulfillment of the remaining condition.

In *Mackinnon Mackenzie and Co. (P) Ltd. v. Ibrahim Mahmmed Issak*[28] the Supreme Court pointed out:

To come within the Act the injury by accident must arise both out of and in the course of employment. The words 'in the course of the employment' mean 'in the course of the work which the workman is employed to do and which is incidental to it. The words 'arising out of employment' are understood to mean that 'during the course of the employment', injury has resulted from some risk incidental to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered. In other words, there must be casual relationship between the accident and the employment. The expression 'arising out of employment' is again not confined to the mere nature of the employment. The expression applies to employment as such, to its nature, its conditions, its obligations and its incidents. If by reason of any of those factors the workman is brought within the zone of special danger the injury would be one which arises 'out of employment'. To put it differently, if the accident had occurred on account of a risk which is an accident of the employment, the claim for compensation must succeed, unless of course the workman has exposed himself to an added peril by his own imprudent act ….

From this it is evident "that the term 'employment' has been given an extended meaning.

In *Union of India v. Mrs. Noor jahan*[29] the High Court of Allahabad has taken a similar view. The deceased was employed as a gangman in the railway. While working at the place of his duty during duty hours he was asked along with other gangman working with him to shift to another site for cleaning the same and doing other odd jobs in connection with 'Janmashtami'

[28] (1970) 2 Lab IC 1413
[29] 1979 Lab IC 652

celebrations. While he was going from the former site to the latter, in the company of other gangman led by their head known as the mate, he was knocked down by a motor lorry on the public street and died as a result of the accident. The High Court of Allahabad held that the accident having taken place within the duty hours when the deceased was proceeding to discharge his duty at the behest of his employer at the second site, the accident must be taken to have occurred in the course of his employment.

In *Varkeyachan v. Thomman*[30], the High Court of Kerala had an occasion to decide a similar question. In that case a workman under the appellant was employed to do odd jobs. When there was labour unrest, the workman was running errands to fetch tea and then to return empty tumblers. While he was on the second, errand, he sustained stab injuries which were fatal. In the proceedings under the Act, the dependents succeeded and the employer appealed to the Kerala High Court. In order to determine whether the accident arose in the course of his employment the Court evolved the following test:

> Whether the workman in the instant case could be said to have met with an accident out of employment?

Applying the test the court held:

> The querulous workmen were at the gate from the morning. It was hazardous for anyone to be there when a tense situation prevailed. Yet his employment obliged the workman to pass and repass that area. Hence the accident arose out of his employment.

A similar view was taken by the Mysore High Court in *M.G. Shanthamallappa* v. *M.D. Chandrappa Shetty*[31]. The court observed as follows:

Even if the particular circumstances under which the accident occurred and the injuries were sustained are not established, it is beyond doubt that the deceased sustained the injuries when

He was present on the spot in discharge of his duty as a workman. It appears to me that it is not necessary to establish as suggested by the learned advocate for the appellant, that it should be shown that the workman was engaged in 'doing something'. There is no basis in principle or in the working of the section for the proposition that the workman should be engaged in some positive activity at the time of the accident and that the accident should be related to such activity. The presence of the workman on the spot at the time of the accident, if such presence itself was attributable to the discharge of his duty, is enough to show that the accident arose but of his employment. . . . .

[30] 1979 Lab IC 986 (Ker)
[31] AIR 1958 Mys 116

In *P.E. Devis and Co. v. Kesto Routh*[32], a division bench of the Calcutta High Court observed:
Where a workman employed by stevedores was injured as a result of assault by ship's crew while attempting to drink water and it was in evidence that the water arrangement not being made by stevedores, the workman were supposed to have taken water from the ship itself, the injury was held to have been received in the course of his employment. . . .

The court added:

> It has been held in India as well as in England and America from where the concept of workmen's compensation has been borrowed and imported to India that an injury received within reasonable limits of time and space, for instance, in cases where the workman meets with an accident while in the act of satisfying thirst or satisfying his bodily needs in the use of food, drink and even tobacco is to be regarded as employmental injury that is to say, injury received in the course of employment. . . .

Burden of proof

Under the Workman's Compensation Act, the burden of proving that the accident arose "out of" and also in the "course of employment" falls on the claimant. But under the Employees' State Insurance Act once the claimant proves that the accident has arisen in the "course of employment", the burden of proving that the accident arises "out of" the employment shifts to authorities. It is submitted that since the provision in the latter Act is a beneficial one and obviously serves the social justice, it may be adopted in the area of Workmen's Compensation Act.

The Nexus

The relationship between the two phrases, namely, "arising out of employment" and "in the course of employment", was explained by the Kerala High Court in *Indian Rare Earths Ltd. v.Subaida Beevi*.[33]

The expression 'arising in the course of employment' further limits the scope of the expression 'arising out of" wherefore, while an accident 'arising in the course of employment' is always one 'arising out of employment', the converse need not always be so and it may be that an accident arising out of one's employment is not an accident arising in the course of his employment.

Similar view was earlier taken by Lord Dunedin in *Charles R. Davidson* v. *M. Robb*[34], wherein his Lordship observed:

[32] AIR 1968 Cal 129
[33] (1981) 2 Lab IC 1359
[34] 1918 Al 304

> The addition of the word 'and in the course of' are meant in some way either to qualify or further explain the words 'out of'. My own view is that they do the latter. It is in one sense difficult to imagine that there could be any injury held as arising out of the employment which would not also be in the course of employment. But it may well be that the determination of the question whether at the moment of injury the workman was in the course of employment may go to solve the question whether the injury arose out of the employment.

The principal underlying the above observations appears to be that all cases of claims "arising out of employment" will be covered by "arising in the course of employment" which ultimately supports the proposition that the phrase "in the course of employment" forms a bigger circle within the periphery of which the phrase "arising out of employment" forms another smaller circle. But in *Bombay Municipal Corporation* v. *P. Gangapathy*,[35] the Bombay High Court held that these two phrases are distinct, separate and independent of each other without one having any nexus or connection with the other. The one cannot be substituted for the other. The words "arising out of employment" are necessarily less wide than the words "in the course of employment". The words "arising out of employment" unlike the words "in the course of employment" must necessarily mean that the accident must be the direct result of the employment and must be immediately connected with the employment and performance of the duty of the worker concerned. The legal fiction of notional extension of time and place given to the words "in the course of employment" cannot be given to the words "arising out of employment". This decision suggests that these two phrases are distinct and independent of each other, even at certain points that may intersect each other. Thus, it would be a better proposition that these constitute two circles intersecting each other instead of saying that one is smaller circle within the bigger circle.

Arising out of Employment

It is difficult to determine with precision either the scope of the aforesaid expression or to lay down a test for its determination. Attempts have, however, been made to explain it by categorizing it to the nature, condition, objects and incidence of the employment. Thus, in *Mackinnon Mackenzie* v. *I.M. Issak*[36], the Supreme Court explained the words "arising out of employment" to mean:

During the course of employment, injury has resulted from some risk incidental to the duties of the service which unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered. In other words, there must be a casual relationship between the accident and the employment.

The court added:

[35] (1976) 2 Lab IC 1472
[36] (1970) 2 Lab IC 1413

The expression ‘arising out of employment’ is again not confined to the mere nature of employment. The expression applies to the employment as such, to its nature, its conditions, its obligations and its incidents. If by reason of any of those factors the workman is brought within the zone of special danger, the injury would be one which arises ‘out of employment’. To put it differently, if the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless the course of workman has exposed himself to an added peril by his own imprudent act.

From the aforesaid observation it is evident that the term “arising out of employment” indicates that there must be casual connection or association between the accidental injury and the employment.

Notice of accident to the employer

In the case of an accident or an accident leading to death, a notice must be sent to the employer or any other person who is employed to supervise work in the same establishment as soon as is practicable after the occurrence of the accident. The notice from the aggrieved party can be served to the employers either by sending the notice by registered post to the residence or the office of the employer, or by entering such notice into the notice book, maintained at the premises of the office.

The state government may require that a certain class of establishments must maintain a “notice book” which must be accessible to all the employees at all times.

The notice must contain:

(a) The name and address of the person who died or was injured, and;

(b) In normal language must state the cause of the injury, and;

(c) The date on which it occurred.

Q: Would establishments (not covered by the ESI Act) manufacturing garments come under this category?

A: Yes, they would. If there is any law in force requiring the employer to give notice regarding the death or serious bodily injury of an employee, the employer shall do so, by giving the notice to the labour commissioner within seven days of such event, describing the circumstances of the injury or death. All references to Commissioner in this booklet refers to the Labour Officer who handles Workmens’ Compensation cases.

Procedure to be followed when an accident occurs, for receiving compensation

Under this Act, the commissioner is a public servant as per the Indian Penal Code, and is appointed by the state government by notification in the official gazette. In practice, Labour officers are appointed under the Industrial Disputes, within thirty days of such notice being served, the employer should reply as to the circumstances of such death, and whether, in his opinion, he is to deposit compensation to the commissioner.

Commissioner's powers in case of accident resulting in death (S. 10-A)

Anyone can report to the Labour Commissioner in case of a worker being killed in an accident.

- If the employer feels that he is responsible to do so, then he must deposit the compensation with the commissioner within thirty days after the notice is served. If he feels in the contrary, he must inform the commissioner of the grounds under which he claims such exemption.
- On claiming such exemption, the commissioner may inform the dependants of the deceased worker, leaving it open to them, whether they would want to claim compensation or not.
- In case, the commissioner is aware of a fatal accident, he has the power to send a notice to the employer (i.e. without receiving any application), requiring him to submit a statement within a month's time.

Penalties (on Employer for not discharging duties under the Act)

If an employer fails to send the commissioner a statement; or report as required in case of fatal accidents fails to do so, or, maintain a notice book S/he shall be liable to pay a fine, which may extend to five thousand rupees. Such a proceeding cannot be made without the previous permission of the commissioner, and the court shall not take cognizance of any offence, if such matter is not brought before the court at least within six months from the time that the commissioner becomes aware of such offence.

Commissioner has the power to require further deposit in cases of fatal accident (sec 22-A)

- In the case of a fatal accident, where the commissioner feels that the amount deposited as compensation is not adequate, he may serve a notice to the employer stating his reasons, and asking the employer to show cause as to why the amount deposited is adequate.
- If the employer fails to show cause, the commissioner may make the award and direct the employer to pay the deficiency.
- The award in such a case is normally on the basis of the Act (i.e. 50% of wages multiplied by the relevant factor.

Medical Examination (section 11)

In cases of injury not amounting to death, on serving notice of accident to the employer, the employer may require the employee to undergo a medical examination free of charge. The injured worker should submit himself to such medical examination.

Act to do the job of conciliation and inspection. The State government by issuing a notification in the official gazette appoints some labour officers as 'designated commissioners for Workmen's Compensation.' And hence they perform the additional work of a claims authority to hear and

decide claims under the Workmen's Compensation Act. The commissioner is appointed for the compensation of workers for a specific designated area.

- The time of the examination shall not be between 7 p.m. and 6 a.m. unless the workman specifically agrees.
- If the workmen's condition is so bad that it is either impossible or in advisable for him to leave his residence then the employer cannot force him to get examined at any other place other than his residence.
- A women worker has a right to ask for the presence of another women if a male doctor is examining her. (Rule 19)

If the worker does not agree to submit himself for a medical examination, by a qualified medical practitioner, then he shall lose his right to claim compensation from his employer, and this right shall be suspended till he refuses to appear for the examination. In case the worker does not submit himself for the examination and dies before doing so, the commissioner may make an order to pay compensation to the dependants of the worker.

Note: If the employer does not take the worker for a medical examination, or if the worker is not satisfied with the employer's doctor's medical certificate, he may approach any other registered medical practitioner for a certificate. In case of different percentages of disability being certified, it is up to the Labour Officer in the claims proceeding to decide what to rely on, when judging the loss in earning capacity of the worker.

Choice to enter into an agreement (SECTION 28)

The employer and employee, have the choice of entering into an agreement. The provision relating to agreements under the Workmen's Compensation Act, relate to cases where the parties have arrived at an agreement prior to any hearing before the court. It does not refer to any agreement reached by parties between whom there is an existing dispute before the court regarding the quantum of compensation.

These agreements may be for: the settlement of any lump sum payable as compensation, (i.e., payment of a lump sum (one-time) payment to convert the employer's liability for half monthly payments, or otherwise) or;

Legal disability is a disability, which can be enforced by law. A person under a legal disability is one who is incapable of representing themselves, e.g. minor or a mentally challenged person.

14 Held by the Gujarat High Court in *Bai Chanchalben v. Burorji Dinshaw Sethna* (1969) 2 LLJ 357

If in the agreement the employer states that the amount is an ex gratia payment and the language of the receipt does not show that the money given was in settlement of compensation, then the employers liability to pay compensation still exists.

Registration of Agreements and consequences of not doing so (Section 29)

The Law requires that the employer registers such agreements with the Commissioner. Failing which, the employer will be responsible to pay the full amount and not the reduced amount if any under the settlement/ agreement. If the employer fails to register such a memorandum, the commissioner may order the employer to pay the entire amount of compensation that the provisions of the Act provide for. In the agreement entered into the employer cannot pay less then the principle sum due as per the provisions of the Act. If s/he does the agreement will not be registered. A compromise can only be made in terms of the interest and penalty due from the employer.

In practice, several times the principle amount it self is not paid and as such agreements are not submitted for registration to the commissioner, they do not also come up for scrutiny. The practice is common in the construction industry.

In cases where the agreement is placed before the Commissioner, no compromise is allowed in the principal amount of compensation payable in *fatal* cases. However in *non-fatal* cases, compromise is often permitted to a certain extent. The Commissioners may themselves 'appraise' the worker of the consequences of not compromising. I.e. the ensuing litigation, and the time and money that s/he will have to incur, which often influences the worker to accept the lesser amount.

In cases of compensation payable to a women or person under a legal disability the Act requires that the sum be deposited with the any compensation payable to a woman or a person under any legal disability.

In such a case a memorandum is to be sent to the commissioner, who, after examining the genuineness of such a memorandum, must register it in the manner prescribed.

Note: This provision for registration and depositing payment with the commissioner is to safeguard the interests of the women and dependants from fraud or force. An unscrupulous employer may pay a lesser amount to the deceased's dependents. Similarly an unscrupulous dependent may collude with the employer to deny other dependents of their share. Therefore, in the case of payments to women and dependents of deceased, an employer can enter into agreement with them, however:

- Such agreement should be registered, and;
- The money should not be given directly, but deposited with the commissioner.

However:

- No memorandum can be registered by the commissioner before the lapse of seven days from the time he had received the notice of such accident.

- The commissioner may at any time alter the registration. And if he has reason to believe that the agreement has been reached due to fraud or undue influence, he may refuse the memorandum sent by the employer, and can pass an appropriate order, including an order to pay the compensation.

Distribution of compensation (including in case of worker's death, and payment of compensation to women workers / persons under legal disabilities).

Money given by employer to worker is only considered as 'compensation' under this act if it is given through the commissioner.

Once the compensation is deposited with the Commissioner, in case of the injured party being a workman, the Commissioner can directly pay the money to him (S.8(6)).

In case of payment made to a widow and other heirs of a worker whose injury resulted in death.

- The wait for seven days is to give time for objections in case of fraud etc.
- The employer cannot be deducted from actual amount of compensation payable. (Section 8).

All workmen covered by the Act may register with their employer and the commissioner the names and addresses of their dependants.

In case of death of a worker, in an inquiry for the distribution of compensation, if no other person makes a claim the commissioner may presume the persons registered by the deceased worker are the dependants.

After the compensation is deposited with the commissioner, he may, if he thinks fit, call the dependants, to appear before him, to decide how much compensation each one gets.

The receipt given to the employer by the Commissioner on payment of such compensation is proof enough of giving compensation to the worker and the burden is no longer on the employer.

The practice 50% is given to the widow, if any, of the deceased and the rest is distributed equally among the dependants mentioned in section 2(d) of the Act (mentioned above).

After such hearing is done, and if the commissioner finds that there is no dependant, then he must return the money to the employer. Also, if there is any balance amount, the commissioner must return the same to the employer.

The employer may demand a detailed account of the distribution of compensation.

Where any lump sum compensation deposited with the Commissioner is payable to a woman or person under legal disability, it may be invested or otherwise dealt with by the Commissioner for the benefit of such persons (S.8(7)). The Commissioner may invest the compensation due to the deceased workmen's dependents only in (a) Government securities, or; (b) Government Savings Bank, or; (c) Post Office Savings Bank. This Rule also applies where compensation is payable to a woman worker/ persons under legal disabilities (i.e., workers who haven't yet attained adulthood).

Note: How much of compensation money is given in cash and how much is invested is entirely at the discretion of the Commissioner.

But it fair to say that more investments are made in case of women workers than men, although the Commissioner may also invest the compensation amount in case of workmen. Also, in the case of women beneficiaries, a larger percentage of the compensation amount is invested and the remaining is given as cash, compared to men. This is decided entirely on a case-to-case basis.

Comment**:** These provisions for (a) paying full amount of compensation regardless of any payments already made; and (b) not giving compensation directly; are examples of the 'protectionist approach' (as opposed to the 'Rights based approach') that the legislature has in making laws covering/dealing with women workers (considered to be persons under legal disabilities). At the same time, it cannot be forgotten that women workers are often more vulnerable, and could be exploited.

Revision of compensation paid to dependants

On account of neglect of children on the part of a parent or on account of the variation of the circumstances of any dependent or for any other sufficient cause, the commissioner may make orders with regard to changes in the compensation payable to the dependants. This may be done on an application to the commissioner or by the Commissioner acting on his own on the basis of information received by him.

What if employer does not accept the extent of compensation?

Essentially, compensation is to be paid as soon as it falls due, i.e., when the accident occurs - at the latest within 30 days. In case the employer does not accept the extent to which compensation is being claimed, then the employer is to pay the amount of compensation to the extent of responsibility he accepts, at the earliest. He is to do so by depositing the amount at the office of the commissioner or with the worker. By doing so, the worker, however, is not prevented from making a further claim before the Labour commissioner for the remaining amount of compensation.

Procedure in brief to be followed when an accident occurs

The employer and employee, have the choice of entering into an agreement for: the settlement of any lump sum payable as compensation, i.e., payment to convert the employer's liability for half monthly payments, or otherwise (compensation for total/ partial disability).

The Commissioner for Workmen's Compensation has powers to act by himself, without receiving a notice, if he comes to know of any accident where a worker was injured. S/he may issue a notice

to the employer asking what the cause of the injury was and whether the employer thinks s/he is liable to pay compensation.

In cases of injury not amounting to death, on serving notice of accident to the employer, the employer may require that the injured worker should submit himself to a medical examination

In the case of an accident or an accident leading to death, a notice must be sent to the employer or any other person who is employed to supervise work in the same establishment as soon as is practicable after the accident occurs. The notice can be served to the employers either by sending the notice by registered post to the residence or the office of the employer, or by entering such notice into the notice book. The commissioner's power to determine how much each dependant gets is discretionary. The practice is that 50% is given to the widow if any, of the diseased workman, and the rest is equally distributed amongst the other dependants.

In such a case a memorandum (of the settlement) is to be sent to the commissioner, who, after examining the genuineness of such a memorandum, must register it in the manner prescribed.

In cases of compensation payable to a woman (who may be a worker or dependent of a deceased (workman) or person under a legal disability the Act requires that the sum be deposited with the commissioner and not paid directly to the woman/ person under a legal disability, even though an agreement can be entered into with her.

In cases where the employer does not pay compensation after notice has been issued and after the lapse of 30 days from the date of the accident, or where the employee and employer fail to arrive at an agreement, an application can be made to the labour officer by the worker. The proceedings before the Labour officer are quasi-judicial in nature.

In case of workers' injuries, the government has the responsibility of disposing workers claims, in a speedy way. No technical procedure is followed in workmen compensation cases. However, as the employer has to be heard, and the matter may need to be investigated, there is some minimum procedure followed. As it will take away from the government's time, a Labour Commissioner is appointed to discharge this responsibility. To enable him/her, the rules provide that few provisions of the Civil Procedure Code may be used to empower the Commissioner to dispose of the cases.

Who can make the claim? (section 10(1))

The injured employee or someone on his behalf can file a claim before the commissioner for workmen's compensation. In reality mostly a lawyer files the claim.

Note: While a matter is pending for settlement before the commissioner, the employer's liability to pay compensation is not suspended. It is the duty of the employer to pay the compensation at the rate prescribed under this Act as soon as injury is caused to the employee.

Who should the claim be made to? (s. 19)

In the event that the employer does not pay compensation for accidents sustained by his workers while at work, a claim can be made to the labour commissioner, of the area where the accident took place. In case of a fatal accident the claim can be made where the claimant ordinarily resides, or where the employer has his registered office.

Time period within which the claim should be made (section 10)

All such claims have to be made within two years of the occurrence of the accident, or death of the worker. The commissioner can refuse to hear the matter if no notice was issued to the employer on the occurrence of the accident and no claim made to the commissioner within two years. If there is a delay in making such a claim it is possible for the delay to be excused by the commissioner, but the worker should give sufficient reason. As the Act is a 'Beneficial Act', delays and technical short comings are not given importance unlike criminal and civil cases.

What is 'Sufficient Reason'?

Example # I: As a result of an accident arising out of work, a workman sustained multiple fractures on both his legs and had to be operated upon twice. He remained under treatment for three and-a-half years. The court held that there was sufficient cause to condone the delay.

Example # 2: In a Madras High Court case it was held that "... the cause for the delay i.e., illiteracy, minority of children, nature of employment in its totality is sufficient reason to condone the delay…." In this case the widow of the deceased workman filed the application after a delay of 8 years.

In case the accident is the contraction of an occupational disease, the first few days of the worker being continuously absent due to the disease, shall be considered as the day of occurrence of the accident. In case, the disease does not force the worker to take leave, then the period of limitation shall be from the date that the worker gives notice to his employer of his condition.

Form of application (section 22)

! The commissioner shall not be liable to entertain an application for compensation unless it is given in the prescribed format, *Laxmi and others vs. Deputy commissioner of Labour of Madras and Another* 1998 I LLJ158(Mad) (DB) i.e. it must be made with the following details being furnished

(a) a statement in ordinary language with regards to the circumstances under which the application is being forwarded and the relief or order which the applicant claims

(b) in case the claim for compensation is made against the employer, the application should mention the date when the notice of such accident was made to the employer, and if there was any delay in doing so, the reason for the delay;

(c) The name and address of the parties.

All applications for claims for compensation must be made to the commissioner with the appropriate accompanying fee.

The fee is Rs. 2 for every Rs. 1000 of compensation claimed.

If the worker is unable to pay this amount an application can be filed for exemption till the final order is passed;

In case of application made by/on behalf of dependants of the deceased worker, the photographs of the dependants should be fixed on the application.

A role that can be played by Activists is to gather evidence at the time of the occurrence of the accident, or as soon as possible thereafter, as to the fact of worker's employment with that particular employer and; the fact that the injury occurred during the course of work. This is crucial if a claim is being made before the labour officer later on.

Sometimes the employer denies that s/he employed the worker and secondly, that the accident occurred in the establishment premises during the course of work.

Example**:** A child worker employed in a silk reeling and spinning factory suffered burns when a tub of boiling water fell on her. Subsequently when a claim was made, the employer denied that the worker worked for him, and also denied that the accident occurred at his work premises. The case was complicated by the fact that there was no record of employment kept by the employer showing that he employed the worker. Further there was no person, other than the worker's relatives, who were available to testify before the labor officer about having witnessed the accident.

Appearance and Record of Evidence (sections 24 and 25)

The parties must make their appearance before or to the commissioner. A registered legal practitioner/ trade union member/ inspector or other person appointed by the Government for this purpose can represent the worker or can represent the parties if the necessary.

Note: Sometimes the employer absconds, and successfully evades the summons to appear before the Commissioner and submit his written statement (proving that he is not liable to pay compensation).

Then the practice is for the Commissioner to print the summons in the State gazette publication and paper publication (a widely circulated local newspaper), OR paste a copy of the summons on

the employer's premises. Even after this, if the employer refuses to appear, the case will proceed without him and s/he will have to suffer the possible consequence of an adverse order.

The commissioner must make a memorandum, recording the substance of the evidence given by each of the witnesses. This must be written in his own hand and must be signed by him, and this memorandum would be a part of the official record.

Note: In this connection, if neither the worker or the employer are able to produce any documents supporting their respective claims as to how much wages was paid to the worker, the practice is the Labour Officer will support the worker's claim.

Arguments will be presented by both parties after which an order is issued by the commissioner

The commissioner may, if he thinks it being fit, refer such a matter to the High Court.

What happens if the employer delays in paying of compensation? (Section 4-a) Provision for interest and penalty

Compensation is to be paid as soon as the injury is caused to the worker. If the employer does not pay the compensation amount to the disabled worker within a month from when the compensation fell due, then the commissioner on application can give relief to the worker in the following way:

(a) The commissioner can direct the employer to pay the compensation to the worker, plus simple interest at the rate of 12%, or any other rate, not exceeding the rate of a scheduled bank, or as published in an official gazette; and

(b) If the commissioner feels that there was no justification for the delay in payment to the worker, he may order the employer, in addition to the simple interest, to pay a penalty of not greater than 50% of the compensation to be paid. Interest and penalty can be levied by the commissioner only on application by the worker after a claims proceedings has been completed and the workmen's compensation commissioner has passed an order awarding compensation to the worker. In consonance with principles of natural justice, the employer has to be given the opportunity of being heard by the commissioner before he passes such an order directing the payment of penalty.

In practice penalty is not levied often, normally the labour officer only imposes interest. In rare cases where the employer wilfully doesn't deposit the money, the authorities, after observing the behaviour of the employer may impose a penalty.

Is the insurance company liable to pay interest and penalty in cases of delay in payment of compensation?

The Supreme Court has held that if compensation is not paid within one month from when if fall due, then the payment of interest is almost automatic. It is considered part and parcel of the liability to pay compensation. Hence when the employer takes insurance coverage for any liabilities arising under the Workmen's Compensation Act, the insurance company will have to

pay the compensation as well as interest on it. The Commissioner for Workmen's Compensation may calculate the interest either from the date of the accident or else from the date of passing the order for compensation. It is within his/her powers to do either. Regarding the payment of penalty, it was held that as the delay was due to the personal fault and negligence of the insured employer, he and not the insurance company would have to pay the penalty.

However, the Supreme Court went on to approve a decision of the Karnataka High Court. In that particular Karnataka case, the insurance policy taken by the employer expressly excluded the payment of interest and penalty in the event of any compensation payable under the WCA, and so the High Court held that the insurance company was not liable to pay interest in addition to compensation. Therefore it depends on the terms and conditions of the insurance policy taken.

Appeal (section 30)

A worker can appeal against any decision can be made in the high court, this can only be done so under certain circumstances, and only if the commissioner allows the appeal, which is determined by his certificate allowing so, attached along with the appeal.

Bar against double remedies (section 3 (5))

Once an injured worker, initiates action against, or reaches an agreement with, an employer the said worker cannot initiate a simultaneous proceeding in a civil court in respect of the same injury (but s/he can in a criminal court). Similarly if the worker institutes a suit for compensation, for injury sustained during the course of work, in a civil court, then s/he cannot then apply to the labour commissioner under this Act. Therefore the worker can chose the type of remedy s/he wants i.e. either under the WCA, or civil court or Motor Vehicles Act (incase of a motor accident), but s/he cannot apply for more than one remedy.

If a worker has made an application before the Motor Vehicles Accidents Claims Tribunal (MVCT), it is possible to subsequently withdraw it from that forum and make another application under the Workmen's Compensation Act. The only requirement being that s/he must prove that no compensation was taken through the MVCT.

Choice of Forum for Claiming Compensation

1. **Legislative changes. -**Section 167 of the Motor Vehicles Act, 1988 corresponds to Section 110-AAof the Old Motor Vehicles, Act 1939. Section 167 of the new Act reads as under :-

   "167. Option regarding claims for compensation in certain cases.-

   Notwithstanding anything contained in the Workmen's Compensation Act, 1923 (8 of 1923) where the death of, or bodily injury to any person gives rise to a claim for compensation

under this Act and also under the Workmen's Compensation Act, 1923, the person entitled to compensation may without prejudice to the provisions claim such compensation under either of those Acts but not under both."

2. **Bar to claim under Motor Vehicles Act---Alternative remedy under the Workmen's Compensation Act, 1923.-** Deceased was driver who died in the course of employment when his car was met with an accident. Employer deposited amount of compensation under the Workmen's Compensation Act, 1923 with Commission. The Commissioner summoned the claimants and claimants accepted the compensation. Mere acceptance of compensation on the part of claimants does not act as bar to institute claim proceedings before M.A.C.T. under Section 3 (5) of the Workmen's Compensation Act, 1923.

Cleaner fell from top of stationary bus and caused fatal injuries. Claimant claimed that the deceased was employed for cleaning, repairing, changing tyres etc. at a salary of Rs. 600/- per month. Owner refused to have given employment to him and that such work was being done by the deceased to several buses also at the same place. On going through the evidence adduced by both the parties, Commissioner held that owner employed the cleaner and was also travelling with bus. Therefore, accident arose out of and during the course of employment.

The claimant has to make a choice either to claim compensation under the Workmen's Compensation Act or to claim damages under the general law. However, the question of making such election does not arise so far as third party is concerned.

The language of Section 167 (Section 110-AA, old) is clear and it unambiguously conveys that the option is with the dependants to choose their remedy under either of the statues, and mere deposit of compensation money by a third party and receipt thereof by the dependants cannot amount to exercise of option, for to do so would tantamount to foisting an option not exercised by the dependants. The language of Section 167 is not capable of two meaning but even if it were so the Courts would have preferred the meanings which would have furthered the legislative policy of granting just compensation to the victims of motor accidents.

Tribunals may determine compensation in accordance with the provisions of Workmen's Compensation Act. When the deceased are coolies, the Tribunal should determine the compensation in accordance with the provisions contained in the Workmen's Compensation Act and need not embark upon an exercise otherwise, *i.e.*, by determining the monthly income and monthly dependency etc.

Award of compensation under the Workmen's Compensation Act does not affect the jurisdiction of the Tribunal. Wherever there is an employment injury or death, the employer is required to deposit such amounts as are awardable under the Scheduled to the Workmen's Compensation Act, 1923 with the Commissioner within the stipulated time. In depositing the amount, the employers purport to discharge their statutory obligation under that law. If that

amount is paid over to the claimants, all that can be said is that such payment should be given deduction to in the compensation awardable in these proceedings. The bar contained in Section 167 (Section 110-AA, old) of the Motor Vehicles Act, 1988 is not attracted, because in such a case claimants have not made any election under Section 167 of the Motor Vehicles Act, 1988.

The provisions are a piece of social and welfare legislation. If at the time of receiving the sum in response to the notice by the Commissioner, the claimant who had already initiated proceedings before the Tribunal under Section 166 (Section 110-A, old) it is not possible to read into his conduct a conscious choice of a forum which he could be said to have elected. A mere receipt of money without more, does not indicate any election, though that principle for election is recognized in Section 167 (Section 110-AA, old).

Where the claimant prefers the forum of the Tribunal and undertakes the burden of proving negligence there is no reason why his claim should be restricted with reference to the provisions of the Workmen's Compensation Act. It is under Section 168 of the Motor Vehicles Act, 1988 that the Legislature has provided for compensation to the victim of a motor accident. The provision there under requires the Tribunal to make an award determining the amount of compensation which appears to it to be just.

By change of forum the standard of justness in the Motor Vehicles Act, 1988 and the 1923 Act cannot vary and the rate given in the Schedule to the 1923 Act would be the guideline for the Tribunal for determining the compensation to be awarded.

The option is with the dependants to choose their remedy under either of the statues, and mere deposit of compensation money by a third party and receipt thereof by the dependants cannot amount to exercise of option, for to do so would tantamount to foisting an option not exercised by the dependants.

The claimants opted for a relief under the Motor Vehicles Act and, therefore, the Tribunal was obliged to determine the amount of compensation which appeared to it to be a just amount to be paid under the provisions of the Motor Vehicles Act. This was not done and the Tribunal, rather, took the maximum provided in the Schedule under the Workmen's Compensation Act, as the amount to be paid under the Motor Vehicles Act. Obviously, the Tribunals was not right.

Once the claim case was restored and is to be proceeded with, it is elementary that opposite-party No.2, the claimant himself cannot be prohibited from participating in it by adducing evidence.

In determination the just compensation in a claim case filed in exercise of the option under Section 166 (Section 110-A, old) of the Motor Vehicles Act, Claims Tribunals is not bound to confine the amount of compensation to the Schedule in the Workmen's Compensation Act.

It is open to the claimant to choose either the forum created under the Workmen's Compensation Act or under the Motor Vehicles Act. If once that option was exercised and an award was passed under the Workmen's Compensation Act, it is not open to the claimant to avail the remedy under the Motor Vehicles Act.

A mere receipt of money without more, does not indicate any election though that principle of election is recognized in Section 167 (Section 110-AA, old). Where, however, the claimants initiate proceedings only in one forum and exercise their option and take an election but a certain amount is made available to them although through the media of Commissioner, Workmen's Compensation Act, it cannot be said that the proceedings have been initiated by the claimants in the other forum as well.

The appellants had filed a claim under the Workmen's Compensation Act and have been awarded Rs. 8000/-under it that being so Section 167 (Section 110-AA, old) would operate as a bar to the maintenance of the claim petition leading to the present appeal.

Where a person by reason of the death or bodily injury to any person is entitled to claim compensation under the two enactments, he has to prefer either of the two and the claim for compensation cannot be made in both the forums. Choice between these two courses is permissible and the claimant is left free to prefer either of the two forums. Such a situation may arise only when by nature of the death or bodily injury the claim for compensation arising out of such death or bodily injury can be entertained under both the Acts. But when such a claim can be laid only before either of the two Tribunals, Section 167 (Section 110-AA, old) is not attracted at all.

When a workman suffered a motor accident in the course of his employment, as a result of the tortious act of a third party and he has not opted to get compensation from his employer under the Workmen's Compensation Act and instead has opted to claim damages from the tort feasor under the Act, the Motor Accident Claims Tribunal is bound to follow the principles that underline such claims and fix the liability. Sitting as a Motor Accidents Claims Tribunal, it is not open to the Tribunal to import into the proceedings the principles on the basis of which the liability under the Workmen's Compensation Act is fixed. If the claimant alleges that the accident was due to the tortious act of a third party and adduces evidence in support of that allegation and if the Tribunal finds that the accident was solely due to the act of a tort feasor, the Tribunal has no other option but to fasten the tortious liability on the tort feasor alone, even though the accident might have occurred in the course of his employment and the employee would have a right to recover damages from his employer and did not choose to do so.

Section 167 (Section 110-AA, old) gives option to claim compensation under either of the enactments and not both. With the choice left to the victim or the dependents of the victim in case of death, that choice must be exercised and once so exercised, the Act under which they

pursue the remedy must decide the quantum of compensation in accordance with the facts of the case.

In absence of the fact that how the proceedings were initiated in the Court of the Commissioner for Workmen's Compensation it cannot be said with certainty that the proceedings were initiated by the respondents. As such their acceptance of the compensation amount did not debar them from seeking a relief under the Motor Vehicles Act in the proceedings which were initiated either in point of time than the proceedings under the Workmen's Compensation Act before the lower Court. in the circumstances, that the amount received by the respondents under the Workmen's Compensation Act should be deducted from the amount of the award given by the lower Tribunal in favour of the respondents.

3. **Alternative remedy under Section 2 (8) of E.S.I. Act, 1948.---**Employee on his way to attend to his duty met with accident by truck and injured seriously disabling him permanently to attend to his duty. He claimed compensation under Employee State Insurance Act, 1948. His claim could not be denied on the ground that claim lied under the Motor Vehicles Act only. His claim under the Motor Vehicles Act provision is in addition to the benefit under E.S.I. Act, 1948 and not in substitution of his other remedies under general law.

Employee while proceeding on duty to the working place on bicycle for the purpose to resume his duties involved in accident and injured. Injuries were received by him during the course of his employment.

Remedy under Workmen's Compensation Act is alternative remedy and not additional remedy. Claimants are not entitled for both the remedies under both provisions. Claimant having claimed remedy against Workmen's Compensation Act, 1923 before Commissioner are not entitled to claim compensation before M.A.C.T. under Motor Vehicles Act, 1988 and, therefore, claimant is not entitled to claim difference between the awards under both Acts.

Accidents took place between truck and bus by collision. Driver claimed compensation under the provisions of Workmen's Compensation Act, 1923 and also filed claims before Motor Accidents Claims Tribunal under Motor Vehicles Act. *Held,* driver could maintain claim of compensation under provisions of Motor Vehicles Act. Claims arising out of negligence of another offending vehicles driver are decided by Claims Tribunal. Liability not in excess of amount that could be awarded under Workmen's Compensation Act could be fixed on insurer of vehicles on which driver was working.

Workman labour working with contractor on road work, engaged by contractor was killed by road-roller by rash and negligent driving by driver of road-roller. Road roller was hired by contractor for the road work. Tribunal found that the death of labour was caused due to rash and negligent driving of road-roller by driver. Tribunal fixed liability for compensation to deceased on owner and driver jointly and severally and also on contractor by relying on

clause 6 of tender agreement. Contactor was not liable since he was neither the owner nor driver of the road-roller, the offending vehicle.

4. **Whether the claimants are entitled to claim compensation under the Motor Vehicles Act as they had claimed compensation under the Workmen's Compensation Act?-**The only argument advanced before the learned single Judge by the Insurance Company was that the claimants were not entitled to claim any compensation under the Motor Vehicles Act as they had claimed compensation under the Workmen's Compensation Act. The argument did not find favour with the learned single Judge because no such plea was raised in the written statement. Thus, no amount of evidence can be looked into a plea which is not taken in the written statement.
5. **Maintainability of claim petition.-**the claimant had proved to be the owner of vehicle even if registration certificate has not been issued, so far it cannot be said that the claim petition under Section 167 could not be maintained by the present claimant.
6. **Compensation under Motor Vehicle Act as well as under Workmen's Compensation Act.-**When mother of the deceased has preferred to claim the compensation under Motor Vehicles Act, she will be debarred from claiming the compensation under Workmen's Compensation Act, and if at all she prefers to claim, it would be open to the Insurance Company to challenge the claim invoking Section 167 of the Act.

   Apart from the fact that Section 167 of the Motor Vehicles Act, 1988, starts with a *non obstante* clause and gives the person concerned the option to raise a claim for compensation either under the Workmen's Compensation Act or under the Motor Vehicles Act. The obligation of the Insurance Company to indemnify a person specified in the policy is enforceable under the Motor Vehicles Act in view of the provisions of Section 147 (5).
7. **Death of a truck driver in accident.-**Liability of Insurance Company and the owner of truck is not lessened in view of Workmen's Compensation Act.
8. **Award.-**Where in case of death in motor accident, award was passed under Workmen's Compensation Act and subsequently, award was passed under Motor Vehicles Act, 1988, but the passing of award under Workmen's Compensation Act was not brought to the knowledge of M.A.C.T. The award by M.A.C.T. was without jurisdiction.
9. **Deduction from compensation.**---A sum of Rs. 30,000/- should not have been deducted from the total compensation amount on account of uncertainty of life as the compensation was being paid in on lump sum.
10. **Compensation.**-Where accident happened on a manned level crossing which was not closed when the bus crossed the same and the bus was hit by a running train. The M.A.C.T. would not have jurisdiction to award compensation to the victims of accident caused solely due to the negligence of the Railways. But in special leave the victims of the accident cannot be disentitled for the compensation solely on the ground that they should have approached a different forum. Mere receipt of the amount without any claim being made of the amount deposited by the employer cannot take away the right of the heirs of the deceased to claims compensation under Motor Vehicles Act, 1988.

CONCLUSION

With growing complexity of Indian industries, increasing use of machinery and consequent danger to workmen (with their comparative poverty) it was felt that there should be a legislation to protect the workmen from the hardship arising from accident.

The Workmen's Compensation Act is a mechanism for providing relief to victims of work-connected injuries. It places the cost of these injuries only upon the employer. The basic operating principle is that a workman is entitled to compensation for work – injuries whenever he suffers a "personal injury by an accident arising out of in the course of employment.

The employer's liability under this scheme is not based on negligence or fault because it does not lessen his liability. The workmen's compensation scheme is, therefore, neither a branch of law of torts not social insurance of the British type, it bears some of the characteristics of each.

Like torts, but unlike social insurance, its operative mechanism is unilateral employer's liability with no contribution by the employees or the State. Like social insurance but unlike tort, the right to compensation an amount of compensation are based largely on a social theory of providing support and preventing destitution, rather than settling accounts between two individuals according to their personal blame.

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