The Law of Employers' Liability in Ontario 1861-1900: The Search for a Theory

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Abstract
In examining developments in Ontario's law of employers' liability during the latter half of the nineteenth century, Professor Tucker notes the striking changes - in doctrine, style of reasoning and judicial attitude - toward compensation for injured workers that came about following legislative modification of the common law in this area in 1886. He then discusses a number of theoretical frameworks that might explain the changes in legal response to industrial capitalism in that period, and finds that they do not adequately account for the observed changes. Finally, he develops the outline of a theory of the relative autonomy of the law from a Marxist perspective which, in his view, provides a better foundation for understanding the dynamics of legal change than do the other theories reviewed in the article.
THE LAW OF EMPLOYERS' LIABILITY IN
ONTARIO 1861-1900: THE SEARCH FOR A
THEORY

BY ERIC TUCKER*

In examining developments in Ontario's law of employers' liability during the latter half of the nineteenth century, Professor Tucker notes the striking changes — in doctrine, style of reasoning and judicial attitude — toward compensation for injured workers that came about following legislative modification of the common law in this area in 1886. He then discusses a number of theoretical frameworks that might explain the changes in legal response to industrial capitalism in that period, and finds that they do not adequately account for the observed changes. Finally, he develops the outline of a theory of the relative autonomy of the law from a Marxist perspective which, in his view, provides a better foundation for understanding the dynamics of legal change than do the other theories reviewed in the article.

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The nineteenth century development of the law of employers' liability for employee accidents provides fertile ground for debate amongst those concerned with the relationship between legal and social change. Industrial capitalism was only emerging at the beginning of the century. By the end of the century there was a well defined class structure based on the division between those who owned the means of production and those who owned only their labour power. Important political developments also took place: industrial entrepreneurs gained considerable political influence, thereby obtaining the co-operation and, frequently, the active assistance of the state in promoting their interests. Toward the end of the century, workers became more aware of their collective interests and formed organizations through which these interests could be protected both in the economic and political spheres. The legal system's response to these changes provides an almost unparalleled source to verify theories of social change and the laws.

One aspect of the legal system's response to industrial capitalism was the development of employers' liability. In the first part of this paper I provide a detailed description of the judicial development of employers' liability law in Ontario during the nineteenth century, fo-
focusing on shifts in legal doctrine, style of reasoning and judicial attitudes towards the problem of compensation for injured workers.\(^1\) I then examine a variety of theories that have been developed to explain the dynamics of legal change and test their validity according to their ability to account for the development of Ontario's law during this period. I conclude that none of the theories adequately explain that development and, in the final section, I propose, as an alternative, a theory based on the relative autonomy of the law from a Marxist perspective. I outline the structure of an argument supporting the view that the law develops relatively autonomously from economic and social change, and try to show the contribution that such a theory can make to our understanding of legal development by applying it to Ontario's law of employers' liability.

My analysis of the Ontario case law is divided into two periods. During the first — 1861-1886 — Ontario courts applied the common law of employers' liability (already well developed in England and the United States) in a strict and formal manner so that injured workers rarely obtained compensation through law suits against their employers. In 1886, Ontario enacted legislation which modified the common law rules in a manner more favourable to employees and, as well, factory act legislation, enacted two years earlier, was declared in force. During the second period — 1886-1900 — there is a startling shift in the case law. The legislation seems to have received a positive reception by the Court and shifts in doctrine, style of reasoning and attitude led to a great improvement (relative to the pre-1886 situation) in the legal position of workers seeking compensation.

The second period ends in 1900 when James Mavor, a professor of political economy at the University of Toronto, submitted a report to the Legislative Assembly on workers' compensation. His recommendation, that Ontario should observe British and Continental reforms

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\(^1\) That these cases have not previously been examined indicates neglect of Canadian history, as further evidenced by Parker's survey of law school courses offered in the area. See The Masochism of the Legal Historian (1974), 24 U. Toronto L. J. 279 at 280-81. The situation has begun to improve dramatically; see, e.g. Flaherty, ed., Essays in the History of Canadian Law (1981).

At the time I began research for this paper there was one published study of the origins of the Workmen's Compensation Act, but it pays little attention to the role of the courts in either developing or applying the employer liability laws. See Piva, The Workmen's Compensation Movement in Ontario (1975), 67 Ont. Hist. 39.

Risk's recent article, "This Nuisance of Litigation: The Origins of Workers' Compensation in Ontario" in Flaherty, ed., 2 Essays in the History of Canadian Law (1983) 418, covers much of the same ground that I do, and to some extent our papers overlap, but his focuses are on the origins of Workers' Compensation, while mine are on the determinants of judicial decision-making.
before taking any steps to establish a no-fault workers' compensation system, was accepted and employers' liability cases continued to be litigated in courts until the Workmen's Compensation Act was finally enacted in 1914. Significant changes in doctrine, judicial attitude and style of legal reasoning might have taken place during this period, but those questions require further research.

I have concentrated in this study on the legal data, accepting the popular picture of the economic and political changes taking place. A more definitive study would require a detailed and systematic analysis of the forces shaping the economic and social structure during this period, as well as the shifting political background against which legal change took place. There are studies of the emergence of the working class in Ontario and its response to industrial capitalism, but little attention has been paid specifically to the response of workers to the problem of industrial accidents and the more definitive studies required to integrate social and legal change have not been undertaken. It is hoped that this paper will facilitate and assist further research into how workers perceived the courts, the circumstances when employees sought compensation through legal action, the nature of possible alternatives and whether legislative reform of employer liability laws, including regulation of health and safety conditions, was high on the political agenda of organized labour. Answers to these and similar questions would be significant for a full understanding of the dynamics of social and legal change.

I. THE LAW OF EMPLOYERS' LIABILITY IN ONTARIO, 1861-1900

A. Cases, 1861-1886.

1. Reception
a) Developments in England

The English law of property and civil rights, as it stood on October 15, 1792, was introduced into Ontario by the first statute of the legisla-

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3 S.O. 1914, 4 Geo.V. c. 25.
4 Risk, supra note 1, at 432, does not note any significant change in the 1900-1914 period from the pattern which had emerged in the 1890's.
5 E.g. see Kealey, Toronto Workers Respond to Capitalism 1867-1892 (1980); Palmer, A Culture in Conflict (1979).
tecture of Upper Canada. The common law employer liability rules and, in particular, the fellow servant rule, did not begin to emerge in English common law until the case of Priestly v. Fowler which was decided in 1837. Nevertheless, the prevailing orthodoxy was that the common law was timeless, merely to be interpreted by the courts, so that the date of its reception held little significance. The obligation to follow English precedent, even though decided after the date of reception, was considered so clear that Ontario courts hardly found it necessary to comment on it. There was no suggestion that local conditions justified a departure from the common law of employers' liability as it had developed in England.

By the time the issue of an employer's liability for accidents to employees arose in an appeal from trial in the Ontario courts, the law of England, founded on the premise that the basic legal framework of master-servant relations was contractual, had become quite developed. The courts held that contracts of employment contained an implied term that the master would provide a reasonably safe work environment including proper tools, competent supervision and competent fellow servants, but employees who were injured on the job stood little chance of recovering damages from their employer. The employer was protected by a trilogy of defences: contributory negligence, voluntary assumption of risk and the common employment (fellow servant) rule.

Contributory negligence has been defined as “conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard with which he is required to conform for his own protection.” Under the common law, contributory negligence was a complete defence, barring any recovery regardless of the defendant's conduct. This defence was not peculiar to the employment relationship, but seems to have originated and to have been developed primarily in the context of highway and railroad crossing

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6 (1792), 32 Geo. III, c. 1, s. 3 reproduced as S. 1 of the Property and Civil Rights Act, R.S.O. 1980, c. 395. Generally, on the reception of English law, see Cote, The Reception of English Law (1977), 15 Alta. L. Rev. 29.
7 Priestly v. Fowler (1837), 3 M. & W. 1, 150 E.R. 1030.
8 For a general discussion, see Roberts-Wray, Commonwealth and Colonial Law (1966) at 565-67.
11 See Addison, id. at 92-93.
Nevertheless, it provided a powerful defence for employers by allowing them to shift the focus of the court from their own behaviour to that of the plaintiff.

The doctrine that a person who voluntarily assumes a risk will be precluded from recovering for an injury that occurs as a result of that exposure did not originate in, nor was it unique to, the employment relationship, but it came to prominence in the nineteenth century in this context. An employee who was aware, or who reasonably ought to have been aware, of a risk in the workplace was deemed to have voluntarily assumed it in the contract of employment. This result flowed from the principles of the market. Other things being equal, employees would choose less dangerous work over more dangerous work. An employee who was aware of a particular risk would be deemed to have negotiated for compensation in order to incur that risk. The terms of the contract would reflect the parties' valuation of the risk and therefore it would be unjust and improper for the court to make the employer pay twice by shifting losses from the employee onto the employer.

Finally, the notorious fellow servant rule, a third defence for employers, can be viewed as a particular application of the voluntary assumption of risk doctrine to the employment relationship. The origin of

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13 The case usually identified as the original source of the rule, Butterfield v. Forester (1809), 11 East 60, 103 E.R. 926, involved an obstruction on a highway. The growth of the doctrine in the U.S. is attributed to the development of a mass transportation system. See Malone, The Formative Era of Contributory Negligence (1946), 41 Ill. L. Rev. 151 at 151-52.

14 Bohlen claimed that no justification for the doctrine was offered when it was first articulated. See Bohlen, Contributory Negligence (1908), 21 Harv. L. Rev. 233. Ex post facto attempts to explain the emergence of the rule are numerous. Bohlen argued that the rule was a "distinct and separate exhibition of the individualism of the common law" at 258. Malone, supra note 13, argues that the doctrine developed in the U.S. because it provided an effective instrument for controlling pro-plaintiff juries. Flemming James argued that the rise of the doctrine can only be understood in the context of the industrial revolution and the individualistic political and economic philosophy that accompanied it. See James, Contributory Negligence (1953), 62 Yale L. J. 691.

15 The case usually identified as the originating one, Cruden v. Fentham (1799), 2 Esp. 685, 170 E.R. 496, involved a highway accident. A more prominent case, Ilott v. Wilkes (1820), 3 B. and Ald. 311, 106 E.R. 674 involved a trespasser who had notice of the fact that spring-guns were set.

16 "...[t]he essence of the defence of volenti is that there has been no breach of any duty on the part of the defender; inasmuch as the pursuer voluntarily encountered and took the risk, the defender was not owing him any duty of care." (Gow, The Defence of Volenti Non Fit Injuria (1949), 61 Jurid. Rev. 37 at 37-38.) But see Harper and James, The Law of Torts (1956) at 1162 where they distinguish this primary meaning from a secondary one in which the plaintiff is said to have voluntarily assumed a risk created by the defendant's breach of a duty towards him.

While such a secondary meaning might become significant under a legal regime in which employees are not deemed to have assumed risks, when the doctrine first emerged in the employment context it seems more accurate to say that no duty of care was owed to an employee, as he was deemed to have contractually assumed the risks present in the workplace.
the doctrine is usually traced to *Priestly*. In that case, the selection of the legal principle that an employer was not vicariously liable for the negligence of employees which caused injuries to fellow servants seems to have been based on two intertwined grounds: (1) The contractual argument — because a worker is free to refuse to work in hazardous conditions, an employee who continues to work alongside a negligent fellow servant is deemed to have contractually assumed the risk of injury resulting from such negligence; and (2) because workers are in a position as good as, or better than, the employer to detect negligence in their fellow servants, they are better able to protect themselves from the risk of injury by reporting the misconduct to the employer for appropriate action. There was also a general apprehension towards expanding liability “to an alarming extent.” Therefore, the employee should bear the risk of injury.

This second ground could have provided a limitation on the application of the fellow servant rule in situations where employees were not in a position to detect or report the negligence of fellow servants. This was decisively rejected by Shaw C.J. in *Farwell v. Boston and Worces-

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17 *Supra* note 7.

18 *Id.* at 5. Lord Abinger seems to have been generally concerned about expanding liability for productive economic activity. Thus, in a products liability case, *Winterbottom v. Wright* (1842), 10 M. and W. 109, 152 E.R. 402, Lord Abinger refused to allow an employee to sue the manufacturer of a defective coach which his employer had purchased, in part for fear of “letting in upon us an infinity of actions.”

19 Lord Abinger’s judgment in *Priestly* generated much criticism and discussion over the years. (For a review of this, see Ingman, *The Rise and Fall of the Doctrine of Common Employment*, [1977-78] Jurid. Rev. 106 at 111 and sources cited therein.) Much of the criticism is justified, but critics often fail to appreciate both the specific context of the decision and the fact that its reasoning potentially limited its application in an industrial context.

At an early stage in the development of capitalism, production still took place in small artisanal workshops in which traditional handicraft production techniques dominated. Under such conditions, skilled workers exercised considerable control over the production process; thus it was not outrageous to say that they were in a position to provide for their own safety. The plaintiff in *Priestly* was employed in a situation more closely resembling an artisanal workshop than an industrial manufactory.

As production became increasingly mechanized and as the size of production units increased, new forms of control were introduced. Rather than the employer personally supervising production, supervisory employees could fill this role. Further, a “de-skilling” process took place, so that the employer, not the employee, had knowledge of production processes, and was able to lower labour costs and exert greater control. (For a general discussion of these developments, see Edwards, *Contested Terrain* (1979) and Gordon et al., *Segmented Work, Divided Workers* (1982). These innovations resulted in employees being less able to protect themselves from risks in the workplace generally and, in particular, from risk of injury caused by careless fellow servants, including supervisors.

The second rationale of *Priestly* provided a basis for refusing to extend the fellow servant rule to industrial circumstances. Thus, the outrage of critics is more properly directed at subsequent developments of the fellow servant rule, which rejected this implicit limitation, than at the decision of Lord Abinger.
ter Railroad,20 because such a distinction would be "extremely difficult to establish as a practical rule" and "would vary with the circumstances of every case."21 A per se rule was seen as preferable to one which required the courts to inquire into the facts and make judgments based on the degree of proximity. Moreover, the implication of a contractual exemption of the master from liability for the negligence of a fellow servant was not grounded solely on the consideration that the servants had better means to provide for their own safety, but on the principle that, where parties are in a contractual relationship, their rights and obligations should be governed by the express or implied terms of the contract. The court did not think that employer liability for the negligence of fellow servants was contemplated in the nature and terms of employment.22 Thus, the fellow-servant rule received its classic contractual formulation and justification.

The fellow servant rule was affirmed by the English courts in Hutchinson v. York, Newcastle and Barwick Ry. Co.24 in 1850 and, in 1858, the House of Lords cited the reasoning of Shaw C.J. in Farwell with approval.25

b) The Early Ontario Cases

The English common law of employers' liability was harsh. By the 1860s, criticism could be heard within the legal profession as well as in the political arena. The controversy was followed and reported to the local bar even before the first Ontario case directly considering these aspects of employer liability law was decided.26 There were opportuni-

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20 (1842), 45 Mass. (4 Met.) 49.
21 Id. at 60.
22 Id. at 60-61.
24 (1850), 5 Ex. 343. (Farwell was cited to the Court by counsel.)
26 U.S. and English developments in employer liability law were reported in the Upper Canada Law Journal both as case summaries and as short articles. In 1863, three such articles
ties to mitigate the harshness of these rules, but the Ontario courts applied them rigorously when the opportunity first presented itself in *Deverill v. Grand Trunk Railway Company*. Deverill was an engineer employed by the defendant, and was killed in an accident caused by the failure of a switchman to raise the proper signal. The switchman had been on the job for less than three weeks at that time. Evidence was introduced that, after the accident, the defendant altered work practices and staffing arrangements in the yard. At trial, Draper C.J. reserved leave to enter a non-suit and allowed the case to go to the jury, which returned a verdict for the plaintiff, awarding damages of $3,700 to the widow and children. The defendant moved for a non-suit and the motion was heard by Hagarty J. and Draper C.J.

A strong indication that the fellow servant doctrine was understood to be the law of Ontario even prior to this case is provided by the fact that the action was framed on the grounds that the employer had been personally negligent, not that there was vicarious liability for the negligence of the employee (the switchman) under the doctrine of *respondeat superior*. The employer, it was claimed, had been personally negligent in hiring an incompetent fellow servant. The plaintiff’s underlying theory was that, whilst a worker was deemed to have assumed the risk of injury from the negligence of a fellow servant, it was an implied term of the employment contract that the employer owed a duty to the employee to exercise reasonable care in the selection of competent fellow servants.


Two earlier cases involving injured employees were decided on other grounds. In *Torpy v. Grand Trunk Railway Co. of Canada* (1861), 20 U.C.Q.B. 446, an employee of a railway contractor was injured in the course of being transported to work, as a result of the negligence of the railway’s employees. He sued the railway. Robinson C.J. held that the plaintiff was not a fellow servant, but rather a passenger to whom a duty of care was owed by virtue of the contract between the railway and the plaintiff’s employer. He distinguished this case from *Degg v. Midland R.W.Co.* (1857), 1 H. & N. 773, a decision in which Bramwell L.J. held that a volunteer killed while assisting employees could not maintain an action against the employer for the negligent acts of his servants.

In *Stoker v. Welland Railway* (1863), 13 U.C.C.P. 386 the administratrix of the deceased employee was non-suited at trial when the defendant introduced evidence that the deceased was riding in the locomotive at the time of the accident, contrary to the rules of the railway. The reported decision of Richards C.J. discusses the onus on a plaintiff seeking to set aside a non-suit on the basis of affidavits submitted after trial.

It was not uncommon for judges to sit on appeals or motions arising from their own decisions. E.g., see *Ryan v. Canada Southern R.W.Co.* (1866), 10 O.R. 745 (C.P. Div.).
Hagarty J. took it to be well settled law that a worker assumed the risk of injury from a negligent fellow servant, but accepted the duty of the employer to exercise reasonable care in hiring competent employees. This left two significant issues to be decided on the motion of non-suit: (1) the standard of care required, and, in particular, the legal distinction between an incompetent and a negligent fellow servant and (2) whether in law there was sufficient evidence of a breach of the standard of care to allow the question to go to the jury. A broad definition of incompetence or of a high standard of care in selecting fellow servants could have mitigated some of the harshness of the fellow servant rule, but the courts chose not to pursue these possibilities.

An incompetent fellow servant was defined as "a man unfit to be reasonably entrusted with the performance of the particular duty he neglected to perform." Thus, on the facts of this case, merely because the fellow servant in question had been hired with no experience and had only been on the job for three weeks when he failed to raise the signal was not held to be evidence that he was incompetent at the time of the accident or at the time of hiring. The court accepted evidence that the job could be learned in a short period of time by an intelligent fellow. With respect to the level of care required of the employer, the court stated that the defendant, to be liable, had to have knowledge of the employee's unfitness or incompetence, but made no requirement for a duty to ascertain the employee's competence. This low level of care may have been supported by the view that when an employee held himself out as competent, then there arose an implied warranty on which the employer could rely. In any event, evidence of a particular act of negligence by an employee was not evidence that the employer had failed to exercise reasonable care in hiring that employee. The result of this approach was that, between 1861 and 1900, there are no reported cases in which an employer was found liable for hiring an incompetent fellow servant.

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29 Supra note 27, at 525-26, where the development of the rule from Priestly to Bartonshill v. Reid was reviewed.
30 Supra note 27, at 525.
31 One witness for the defence stated that "a man of the smallest capacity from the class of labouring men could learn the duties in two days." Id. at 519.
32 Id. at 521.
33 This principle was first clearly articulated in Harmer v. Cornelius (1885), 5 C.B. 236 (N.S.), a wrongful dismissal case, decided after Deverill.
34 The Workmen's Compensation for Injuries Act of 1886 substantially limited the scope of the fellow servant defence and reduced the need to establish liability on this basis. Further, as employers gained control over the production process, fewer skilled workers were needed, lessening the likelihood of incompetence in performance of unskilled, but easily learned, work. Such was the
The issue of when there was sufficient evidence of employer wrongdoing for a case to go to the jury was crucial because, even by 1866, it was clear that juries were extremely sympathetic to the claim of injured workers.

To leave such a case to the jury is, as has been remarked by English judges, simply to direct a verdict for the plaintiff, where railway company are defendants. [Per Williams J. in Toomey v. London, Brighton etc. R. W. Co., 3 C.B.N.S. 150.]

Very great compassion may be felt by the court, as sincerely as by the jury, for the family of the sufferer by this collision. Whatever jurors may feel at liberty to do, we at least must not allow this feeling to sanction what we believe to be a violation of a well settled legal principle.36

If judges were to succeed in limiting the liability of employers, juries would have to be controlled.38 This was accomplished by setting a low standard of care and a high burden of proof, and by the judiciary acting as a “gatekeeper” to prevent unworthy cases from reaching the jury. The elaboration and application of this gatekeeping function was a common theme in the judgments. In Deverill, Hagarty C.J. cited a variety of English formulations of the rule:

It is not enough to say that there was some evidence . . .
A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury . . .
Where the evidence is equally consistent with either view, — with the existence or non-existence of negligence — it is not competent to the judge to leave the matter with the jury.37

These formulations are commonly repeated in the case law, providing an effective and highly discretionary means to control juries.38 Thus, even where the action alleged a breach of a duty of the care admittedly owed to the employee, such as that in this case, the courts could still erect a legal barrier to keep the case away from the jury. A plaintiff

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36 Supra note 27, at 526.
37 Supra note 27, at 521-23.
38 The problem of controlling the jury in the context of railway crossing cases is explored by Malone, supra note 13, at 155-169. He argues that, in New York State, judicial determination of sufficiency of evidence of fault and causation was not strong enough to control “incurably pro-plaintiff juries.” The doctrine of contributory negligence filled that role. New York developed a doctrine which placed the burden on the plaintiffs to prove that they were not guilty of contributory negligence. This shift in the burden of proof gave the Courts added leverage to non-suit plaintiffs. In Ontario, the burdens of proving fault and causation were heavy enough to give judges leeway to keep cases out of the juries’ hands.
who was non-suited at trial stood little chance of success on appeal.\textsuperscript{39} 

In sum, it would have been possible for the court to mitigate the harshness of the fellow-servant rule, without formally overruling it, by imposing a high standard of care on the employer in the selection of competent fellow servants or by lowering the burden of proof that had to be satisfied in order to allow a jury trial. The failure to do so in the case of Deverill set the pattern for subsequent cases until the law was amended by statute in 1886.

2. Holding the Fort, 1866-1886

The case law beginning with Deverill and continuing until 1886 (when the Workmen's Compensation for Injuries Act\textsuperscript{40} altered the common law rules) can be viewed as a series of ingenious, but unsuccessful attempts by plaintiffs to evade or undermine the employers' common law defences. Whilst the small number of reported cases may not be a reliable indicator of the total volume of cases, their results would have discouraged prospective plaintiffs and their lawyers. My review of these cases will demonstrate the unwillingness of the courts to mitigate, even slightly, the harshness of the rules they were applying.

A major strategy for attempting to avoid the fellow servant doctrine was to plead that the employer or employer's agent had been personally negligent when working alongside the employee. However, the defendant was often able to avoid liability by arguing that, if personally present, it was not in its capacity as employer, or if present through an agent, the "agent" was really a fellow servant.\textsuperscript{41}

Another way a plaintiff could succeed in attaching personal liability to the employer was if the accident was caused by a defect which could be attributed directly to the employer's negligence, provided that the danger thereby created was not obvious to the employee. This was the strategy in Plant v. Grand Trunk Railway.\textsuperscript{42} An incoming train had failed to stop, striking and killing Mr. Plant, a day labourer clear-

\textsuperscript{39} Of six plaintiff appeals from non-suits during the 1860-1886 period, only one succeeded. That case, Vicary v. Keith (1873), 34 U.C.Q.B. 212 involved an injury to an 11-year-old employee, and was sent back for a trial on the evidence.\textsuperscript{40} (1886), 49 Vic., c. 28 (Ont.).\textsuperscript{41} E.g., in MacDonald v. Dick (1874), 34 U.C.Q.B. 623 the plaintiff alleged that he was injured as the result of the negligence of the employer's representative on the site. On the demurrer, Wilson J. allowed the case to go forward to determine, inter alia, whether the representative was an agent of the employer or merely a fellow servant. In Drew v. Corp. of East Whitby (1881), 46 U.C.Q.B. 107 the plaintiff was injured as a result of the negligence of the Reeve who was working on the site (albeit fraudulently, drawing pay in his son's name). The Court held that he was present in the capacity of a fellow servant, not as an official of the employer.\textsuperscript{42} (1867), 27 U.C.Q.B. 78.
ing snow. His widow alleged that the accident was caused by a defect in the brakes caused, in turn, by inadequate maintenance, for which the Company was responsible. Mr. Plant, it was argued, could not have known of the defect. Although the case was decided on the grounds of contributory negligence, Draper C.J. found that the defect was caused by the failure of an employee to tighten a bolt and was therefore negligence of a fellow servant, not of the company.

Plaintiffs could alternatively argue that the employer should be made vicariously liable for the negligent acts of supervisory personnel. In the United States this doctrine, known as the "vice-principal" rule, gained acceptance in the late 1860s. A vice-principal was defined as a person to whom the employer commits the entire charge of a business, including the power to hire, manage and fire assistants. A number of state jurisdictions adopted this principle of vicarious liability, as did the United States Supreme Court in 1884. However, its adoption was far from uniform and the Supreme Court later effectively overruled itself.

In England the doctrine was rejected by the House of Lords in an appeal from a Scottish case, Wilson v. Merry, in 1868. Not surprisingly, when the doctrine was subsequently raised by a plaintiff in Ontario, it was rejected. In O'Sullivan v. Victoria Railway Co., Hagarty C.J., relying on Wilson, held that workmen did not cease to be fellow servants merely because of differences in rank and authority. Indeed, in one case it was held that the General Manager of an explosives factory was a fellow servant. The company exercised reasonable care in hiring a competent manager and thus could not be found liable for his negligence.

A variation on the theory of vicarious liability, the non-delegable doctrine, was also argued and rejected. This doctrine held that an employer had certain duties which could not be delegated to supervisory personnel, no matter how competent. These included appointment of

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43 There is no mention of this doctrine by Hilliard, supra note 10, at s. 25, in which he discusses the fellow servant doctrine and its exceptions. However, in Shearman and Redfield, Treatise on the Law of Negligence (2nd ed., 1870) the emergence of the rule in some jurisdictions is discussed in ss.102-105.
44 Shearman and Redfield, id. at s. 102.
46 Baltimore and Ohio R.R. v. Baugh 149 U.S. 368 (1893). Massachusetts rejected the vice-principal rule. For an early commentary favouring its adoption, see Shearman & Redfield, supra note 44. For a more recent general discussion, see White, Tort Law in America (1980) at 31-35.
47 (1868), L.R. 1 Sc. and Div. 326.
48 (1879), 44 U.C.Q.B. 128.
49 Matthews v. Hamilton Power Co., (1887), 14 O.A.R. rev'g 12 O.R. 54 (Q.B. Div.). In fact, a director of the corporation had earlier visited the plant and ordered a repair. The General Manager had failed to ensure that the repair was done.
competent fellow workers and provision of a safe workplace. If a "non-delegable" duty was performed by a subordinate, the employer was held vicariously responsible for the negligence of the subordinate. If the employer exercised the duty personally, the employer lost the protection of the fellow servant doctrine. Again, in the United States, a number of jurisdictions accepted this doctrine. In England, Wilson was interpreted to support the proposition that an employer could delegate the obligation to select reasonably fit servants, provided the delegate was selected with reasonable care. In Ontario, the non-delegable duty doctrine was rejected in Wilson v. Hume et al., a case involving a master on a schooner who was injured as a result of the incompetence of a fellow servant. The plaintiff claimed that the owner of the vessel was liable for the negligence of the captain in hiring such a person. Osler J. considered the New York precedents, as well as a favourable comment on the doctrine in Wharton's Law of Negligence. While withholding comment on the reasonableness of that approach generally, Osler J. did not think it could apply in a case where the employee knew that a fellow servant was responsible for hiring. In such a case it could be assumed that the plaintiff accepted the risks flowing from that state of affairs.

The effect of the rejection of these attempts to expand vicarious liability was clear to contemporary commentators. As separation between ownership and management became the norm for industrial operations, it became virtually impossible for the legal employer to be held personally negligent. In 1870, Shearman and Redfield criticized Massachusetts for rejecting the vice-principal doctrine.

If the Massachusetts doctrine should be adopted it would afford complete immunity to a large class of employers, such as railroad companies, owners of large factories, foundries, mines, etc., who are accustomed, and indeed often compelled, to entrust the selection of almost all their servants to one or more superintendents.

Wharton made a similar comment with respect to the non-delegable

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50 For discussion, see Friedman and Ladinsky, Social Change and the Law of Industrial Accidents (1967), 67 Col. L. Rev. 50 at 62.
51 Smith v. Howard 22 L.T.N.S. 130.
53 Id. at 551.
54 Id. at 552.
55 For a study of this phenomenon in American enterprise, see Chandler, The Visible Hand (1977).
56 See Shearman and Redfield, supra note 43.
duties doctrine. Even Sir Frederick Pollock, who was otherwise supportive of the common law rules governing employers' liability, criticized this aspect of the case law and supported legislative reform. Yet, notwithstanding this criticism and the increasing divergence in the development of English and American case law, the Ontario courts remained rigid and unresponsive to the changing reality of capitalist organization of production.

Even workers who established that the employer was personally or vicariously responsible for creating a hazardous situation could be defeated by the common law defences of voluntary assumption of risk and contributory negligence which were frequently upheld by the Ontario Courts. Thus, an employee who consented to work on dangerous machinery without proper fencing was deemed to have assumed the risk in exchange for a wage premium. The fact that the employer had personally removed the guard made no difference. When a brakeman was killed when struck by a switchstand placed dangerously close to the tracks, his estate could not recover because the switchstand had been in place prior to the time he was hired and he was deemed to have assumed that risk. Examples of the employer's successful defence of contributory negligence included: not being at the proper station while a train was in motion, running along the track to avoid being hit by an oncoming locomotive rather than stepping aside, not replacing a guard removed by the employer, an 11-year-old not taking proper precautions when trying to fix a machine to which he had first been

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57 Cited in Wilson, supra note 52, at 551.
58 Pollock, Essays in Jurisprudence and Ethics (1882) Chapter V, on employers' liability, at 133-35.
59 The divergence between English and American courts was apparent to contemporary observers, as discussed by Shearman and Redfield in A Treatise on the Law of Negligence (4th ed., 1888) at 301:

... For, although starting from the same foundation, the English and American decisions have been gradually diverging, the former in favour of the master, and the latter against him, until English decisions upon new questions of difficulty are practically useless in most American courts. The English decisions, moreover, made, as the controlling ones have been, under the influence of a class-interest, and looking solely to the interest and convenience of a single class, have gone so far as to shock the moral sense of that very class, and have compelled a legislature, in which less than ten out of a thousand belonged to the class of employees, to overrule these decisions by statute. . . .

60 Vicary v. Keith (1873), 34 U.C.Q.B. 212 at 220 (per Richards C.J.). Also see Rudd v. Bell (1887), 13 O.R. 47 (Ch. Div.).
61 Miller v. Reid (1884), 10 O.R. 419 (Q.B. Div.).
62 Ryan v. Canada Southern Railway Co. (1886), 10 O.R. 745 (C.P. Div.).
63 Stoker v. Welland Railway (1863), 13 U.C.C.P. 386 (brakeman riding in the locomotive); Ryan, supra note 62 (brakeman on a ladder at the side of the car rather than on top of the car).
64 Plant, supra note 42.
65 Miller, supra note 61.
assigned earlier that day.\textsuperscript{68}

Finally, plaintiffs frequently lost because they had failed to discharge the onus of proof that rested upon them. Thus, where there was no eye-witness to the accident itself, and the evidence consisted of a corpse and an apparent defect, the court was not prepared to infer causation.\textsuperscript{67} The evidentiary principle of \textit{res ipsa loquitur} was emerging in England at this time, in contexts other than that of master and servant.\textsuperscript{68} In the employment context, a claim relying on \textit{res ipsa loquitur} could be defeated by asserting that contributory negligence on the part of the employee, or negligence on the part of a fellow servant, were equally plausible explanations.

3. Judicial Attitudes and Reasoning, 1861-1886

Twenty cases involving issues of employers' liability were reported between 1861 and 1886.\textsuperscript{69} In seventeen of these, the employee lost at the end of the day.\textsuperscript{70} Of the three in which employees "won", only in an independent contractor case did the employee succeed outright.\textsuperscript{71} Non-suits by the trial court were reversed in the other two and the cases sent back for trial.\textsuperscript{72} The percentage of plaintiff losses supports the view that the decision rules and their application were highly unfavourable to injured workers.

To develop a fuller understanding of the behaviour of the Ontario courts in this area of the law during this period, it is useful to distinguish between the substance and form of the common law rules themselves and their application by the judiciary. Such a distinction is the heart of a theory of justice known as legal formality according to which impartial courts ought to apply rules selected independently by a legiti-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{68} Vicary, supra note 60.
\item \textsuperscript{67} Ryan, supra note 62 (brakeman found dead at side of track next to switchstand located perilously close to tracks); see also Jarvis \textit{v. May} (1876), 26 U.C.C.P. 523 generally re plaintiff's onus of proof.
\item \textsuperscript{66} Byrne \textit{v. Boadle} (1863), 2 H. and C. 722 is regarded as the origin of the rule. The doctrine was applied in an action against a railroad in England by a non-employee in Kearney \textit{v. London, Brighton and South Coast Railway Co.} (1871), Ex.Ch.L.R. 6 Q.B. 759. The problem of causation emerged as a major litigation issue in the post-1886 cases; see Section C, infra.
\item \textsuperscript{69} In this group, four concerned employees of independent contractors. In only one of them did the plaintiff win.
\item \textsuperscript{70} If the independent contractor cases are excluded, employees lose in 14 out of 16.
\item \textsuperscript{71} Torpy \textit{v. Grand Trunk Railway Co. of Canada} (1861), 20 U.C.Q.B. 446.
\item \textsuperscript{72} Vicary, supra note 60. (That case involved an injury to an 11-year-old, who claimed he had not been properly instructed. The Court decided to allow a trial because there might have been more than a scintilla of evidence in the plaintiff's favour if a jury believed everything he said and disbelieved the defendant entirely.)
\end{itemize}
\end{footnotesize}
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Such a model might seem highly inapt in jurisdictions where courts play an active role in formulating common law rules, but it is plausible in Ontario where the Courts purported to apply rules formulated externally through English precedent.

There is little doubt that the common law of employers' liability, developed in England and applied in Ontario, was substantially unfavourable to plaintiffs, since the trilogy of employer defences severely restricted the possibility of launching a successful lawsuit. Further, English rules were harsher than those developed in many American jurisdictions where the vice-principal and non-delegable duties doctrines were adopted. For the purpose of this part of the analysis it is not necessary to understand why these rules were selected, but merely to appreciate their effect, absent any effort to subvert them through creative application.

A second aspect of the rules themselves is their formal dimensions. The employer liability rules exhibited a high degree of formal realizability in that a small number of distinguishable facts triggered determinate outcomes. For example, it was usually not necessary for the courts to decide the standard of care owed with respect to provision of safe working conditions; an employee who continued to work in hazardous conditions was deemed in law to have voluntarily assumed the risk of injury. The presence of a single fact triggered a denial of liability. As well, the rules exhibited a high degree of generality in that they applied to all employees with little regard to such characteristics as age, sex, skill or rank. The courts refused to draw distinctions based on the fact that a fellow servant was actually a supervisor, or that plaintiffs had had no opportunity to protect themselves from, or even to detect, the negligence of their co-workers. In this, formal realizability and generality supported each other in suppressing the need to make detailed factual determinations and particularistic judgments. To use Noonan's terminology: the rules themselves imposed masks on the litigants; no longer discrete individuals engaged in complex interrelations, they became 'A', 'B' and 'C' with identities and positions defined by few criteria. Finally, the employer liability rules could, to a large extent, be characterized as formalities designed to facilitate private ordering rather than as rules designed to deter wrongful behaviour. The courts, in theory, were telling the parties that they did not care what

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73 For a description of this theory see Kennedy, Legal Formality (1973), 2 J. Leg. Stud. 351.
74 In this analysis, I follow the approach of Kennedy in Form and Substance in Private Law Adjudication (1976), 86 Harv. L. Rev. 1685 at 1687-1694.
arrangements were made, but were simply directing them to use certain forms in order to make their wishes known.\textsuperscript{76}

The rules themselves, both in terms of the substantive policy choices they articulated and their formal dimensions, provide a good explanation of the decisions in the cases. Nevertheless, rules themselves do not have any effect unless they are actually applied. The model of legal formality requires a judge to apply the law without regard to consequences, on the basis of a few legally relevant facts which trigger determinate outcomes. For this application to take place, the rules themselves must exhibit a high degree of formal realizability, but this characteristic in itself is not sufficient. Not only did the English law of employer liability exhibit a high degree of formal realizability, but judges in Ontario adopted a formal style of rule application, never commenting on the substantive rationality of the rules. When faced with the dichotomy between English and American approaches to the vice-principal doctrine, Hagarty C.J. stated: "There is a marked difference between English and American laws on the 'fellow servant' question. Of course, we have to follow the former."\textsuperscript{77} Refusal to comment on the merits of the different positions is indicative of the formal approach.

Further, the courts would consider only those facts that were distinguished as legally relevant. A positive finding that the accident was caused by a fellow servant, or that the employee was aware of the presence of a hazard, automatically triggered a legal result: no compensation. The fact of inequality of bargaining power, even in the case of children,\textsuperscript{78} was legally irrelevant and ignored. When the harsh consequences of their decisions were so obvious that they could not be ignored, the judges offered only their sympathy to victims, refusing legal relevance to consequences. "We must not be drawn out of our path of duty, even by our feelings for the widow and orphan."\textsuperscript{79}

The formal trend in legal reasoning during this period, which has been identified both in England and the United States, was not unique to the Ontario judiciary or to this particular area of the law;\textsuperscript{80} but the

\textsuperscript{76} As Kennedy points out, \textit{supra} note 74, at 1693, such directives cannot be treated as merely facilitative in that they do express a preference by making it known in advance that unless a wish is explicitly indicated, a particular result will follow.

\textsuperscript{77} \textit{Matthews}, \textit{supra} note 49, at 265.

\textsuperscript{78} \textit{Alexander v. Toronto and Nipissing R.W.Co.} (1873), 33 U.C.Q.B. 474; \textit{Vicary}, \textit{supra} note 60.

\textsuperscript{79} \textit{Plant}, \textit{supra} note 42, at 88 per Draper C.J.

highly unfavourable rules, applied in a formal manner, prevented workers from obtaining compensation except in those rare cases where the plaintiff could prove that the employer was personally negligent in creating a hazard of which the employee was not aware.

What, then, can be said about the effect of the personal attitudes of the judges on the outcome of the cases? Indeed, what were the personal attitudes and values of the Ontario judges who were applying the law? It is not easy to answer this latter question. Precisely because a formal style of rule application prevailed, judges did not express their preferences directly. Openly instrumental reasoning processes reveal the values of decision-makers; formal ones mask them. Judges occasionally expressed sympathy for the plaintiffs to whom they had just denied compensation, but their statements do not necessarily reflect personal disagreement with the rules. The lack of compensation for widows and children may have been viewed as an unfortunate, but necessary, result of a proper set of principles, or may have been instances of incomplete suppression of personal values under the formal role that judges adopted when assuming their judicial masks.

The absence of clear statements of personal policy preferences compels resort to other sources, such as extra-judicial statements, but Ontario judges of this period did not espouse their personal views in statements to legislative committees or in pamphlets, as did English judges. Further, good judicial biographies are not available. Thus, conclusions can be drawn only from inferences based on judicial behaviour. It has been argued that personal attitudes and formal doctrines have interactive effects, in which case one would expect pro-plaintiff attitudes to survive and to affect either the rules themselves or their results in relation to the facts. One area in which judges exercised discretion was determination of sufficiency of evidence to leave to the jury. It was clear that, if the case did go to the jury, there was a strong likelihood of a finding of liability. However, Ontario judges interposed themselves between pro-plaintiff juries and employer liability cases in

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Plant, supra note 42, per Draper C.J., Deverill, supra note 27, per Hagarty J., O'Sullivan v. Victoria Railway Co. (1879), 44 U.C.Q.B. 1218.

E.g. Lord Bramwell, aside from numerous judgments and appearances before Parliamentary Committees, also wrote a pamphlet: Laissez Faire, published by the Liberty and Property Defence League, cited in Fairfield, A Memoir of Lord Bramwell (1898) at 139-147.

This is being remedied, in part, by the Wallace Dictionary of Canadian Biography, (1945).

For an attempt to prove this proposition empirically, see Croyle, Industrial Accident Liability Policy of the Early Twentieth Century (1978), 7 J. Leg. Stud. 279.
order to implement pro-employer rules designed to restrict recovery. Although too great a weight cannot be placed on such inferences, it is evidence that judicial attitudes were not at odds with the substantive policies embedded in the rules they applied. Formal application of unfavourable decision-rules, by judges who were in substantial agreement with them, resulted in an extremely low probability of employees obtaining compensation for injuries through the courts.

B. The Legislative Response

Having been denied relief in the courts, workers could have followed the unrealistic exhortations of the Bramwells and the Shaws to demand wage premiums for the risks they were encountering. However, there is no evidence that they did so. Indeed, the inequalities in bargaining power were such that, even if wage premiums were being paid, they were probably not substantial; in the event of a disabling or fatal injury, the accumulated savings of a worker were unlikely to be adequate to support a family. Instead, workers turned to another forum to resolve the problem: parliamentary politics.

The first Ontario statute specifically concerned with employee safety, enacted in 1874, was: An Act to require the Owners of Threshing and Other Machines to guard against accidents. Noting that numerous accidents were occurring as a result of unguarded machinery, the Act required all owners or operators (of machines connected “to a horse-power” by specified means) to provide guards, safe oiling systems and protective platforms for drivers. The penalty for non-compliance was a fine of from one to twenty dollars plus costs or, in the event of default, imprisonment of from two to twenty days. To encourage enforcement, half of any fine would be paid to the complainant or prosecutor. Further, an action to recover money owing for services rendered by the machine could be defeated by showing that the machine was in

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85 For an argument that emphasizes the importance of judicial attitude in the application of English common law in Ontario, see Nedelsky, “Judicial Conservatism in an Age of Innovation: Comparative Perspectives on Canadian Nuisance Law, 1880-1930,” in Flaherty, ed., supra note 1, at 281-322. The author notes that the judiciary applied traditional nuisance law in Canada, avoiding innovations developed in England. In explaining the conservatism of the courts, Nedelsky gives weight to the view that the courts saw law reform as a legislative function, and had an attachment to traditional property values. This may be the explanation for the rigidity of the courts in the application of common law defences to employers’ liability. Prior to 1886, the courts were not confronted by innovations, either from the English courts or local legislatures; thus there is no need to distinguish between formalism and conservatism since here they coincided.

86 There is evidence that, toward the end of the period, some judges were developing a different attitude. E.g. in Matthews, supra note 77, the Court of Queen’s Bench found for the plaintiff on a rather novel legal theory and view of the facts. The Court of Appeal reversed.

87 S.O. 1874, 37 Vict., c. 12. This was possibly a response to Keith, supra note 60.
violation of the requirements of the section. The Act did not specifically create civil liability for injuries resulting from a breach of its provisions, and the question of its effect, if any, on civil liability was never brought before the court.

The second legislative intervention was directed toward providing greater safety for railway employees. The preamble to the Railway Accidents Act, 1881, indicates the posture of the legislature towards the problem of railway accidents.

Whereas frequent accidents to railway servants and others are occasioned by the neglect of railway companies to provide a fair and reasonable measure of protection against their occurrence; and whereas a proper construction of railway bridges and certain precautions in the construction and maintenance of railway frogs, wing-rails, guardrails and freight cars would greatly lessen, if not entirely prevent, the happening of such accidents.88

The Act went on to require a number of safety precautions including a seven-foot clearance between the tops of freight cars and the lower beams of bridges, as well as packing of railway frogs (spaces between converging rails) to prevent workers from getting their feet entangled.

The means by which this legislation was to be implemented were unusual. There was no direct means for enforcement. Rather, the Act provided that where an employee was injured as a result of the failure to comply, the employee’s “right of compensation and the remedies against the railway company shall be the same as if such railway servant had not been a servant of, nor in the employment of the railway company, nor engaged in its work.”89 However, this was subject to three exceptions: (1) if the company or its employees were not negligent in failing to discover or remedy the defect; (2) if the injured servant knew of, but did not inform the company; and (3) where the injured servant was responsible for the defect. Finally, compensation under the Act could not exceed three years’ wages.90 Thus, there would be compliance with the Act only when estimated accident costs, including compensation under these rules, exceeded the costs of compliance.91 The linkage of compliance with safety standards to compensation costs was unique to this Act. Only in recent years are these issues again

88 S.O. 1881, 44 Vict., c. 22.
89 S.O. 1881, 44 Vict., c. 22, s.7.
90 This limitation was copied from the English Employers’ Liability Act, 1880.
91 The two reported cases under the Railway Accidents Act both involved failure to comply with the seven foot clearance standard. In Gibson v. Midland Railway Co. (1883), 2 O.R. 658 (Q.B.D.) it was held that a railway was not liable under the Act where the bridge was not owned by the employer. McLaughlin v. Grand Trunk Railway Co. (1886), 12 O.R. 418 (C.P. Div.) involved a complex jurisdiction problem.
being considered from a unified perspective. The first general industrial safety legislation enacted in Ontario was the Ontario Factories Act, 1884. In addition to providing special protection for women and children from the harmful effects of industrial employment, the Act adopted a general safety standard in s.14:

> It shall not be lawful to keep a factory so that the safety of any person employed therein is endangered, or so that the health of any person employed therein is likely to be permanently injured.

The penalty for failure to comply was a fine of up to $500.00, or imprisonment for up to one year. More significantly, the Act was to be enforced by inspectors. Thus, for the first time in Ontario, minimum safety standards in the workplace would be enforced by an arm of the state.

Finally, in 1886, the Legislative Assembly enacted the Workmen's Compensation for Injuries Act. This substantially modified the common law rules restricting an employer’s liability for injuries to workers. Where an injury was caused by a defect in machinery, or by the negligence of a fellow servant (either exercising a supervisory or control function or carrying out the instruction of the employer), the employee could sue the employer as if no employment contract existed. However, the employee could not sue under the Act unless the defect in the machinery was caused by or not discovered because of the negligence of the employer. Nor could the employee sue where he or she had been aware of the defect or negligence and did not report it. Compensation under the Act was limited to three years’ wages, whilst contracting out of the provisions of the Act was possible only if the employer could satisfy the Court that the consideration for such an agreement was

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93 S.O. 1884, 47 Vict., c. 39.

94 The Act was not declared in force until Dec. 1, 1886. Considerable confusion existed at the time re the respective boundaries of Federal and Provincial jurisdictions in this area. Between 1879 and 1885 six bills were introduced in the Federal Parliament, but none were enacted. For a brief discussion of the problem, see Forsey, *A Note on the Dominion Factory Bills of the Eighteen-Eighties* (1947), 13 Can. J. Econ. Pol. Sci. 580.

In England safety legislation was first enacted in 1802, but not until 1844 were minimum standards of industrial safety established by statute. That legislation was slowly extended, then consolidated in 1878. For a discussion of the English experience, see Hutchins and Harrison, *A History of Factory Legislation* (3rd ed., 1826) (reprint 1966), and Bartrip and Burman, *supra* note 25, at Chapter 3.

95 S.O. 1886, 49 Vict., c. 28.

96 S.O. 1886, 49 Vict., c. 28 ss. 5-6.
“ample and adequate” and otherwise “just and reasonable.”

Time limitations and service requirements for actions under the statute were also enacted.

This legislation was instrumental in undermining the common law defences, particularly the fellow servant doctrine, and strengthened the employer’s obligation to provide minimally safe work conditions. Its very enactment indicates that the existing labour market mechanism for determining minimal health and safety standards was considered unsatisfactory by significant groups in society which called for its replacement by politically determined and legally enforceable standards.

In the absence of good background studies it is difficult to assess the role of working class political organizations in instituting these changes, but it is certain that the working class had made its presence on the political scene felt by 1872. The nine-hour movement provided a focus for workers and an entry into the national and provincial political arena. As Kealey notes: “Most important, the 1872 election was the first in which workers affected national politics in a major way.”

The worldwide depression in the mid-1870s was accompanied by a decline in the strength of working class organizations, but recovery in the 1880s led to renewed trade union activity, including strike waves and the emergence of the Knights of Labour. Kealey found that working class politics in the 1880s shifted to the provinces and its support to the Liberals.

The resurgence of Toronto and Ontario Labour made the Mowat government particularly responsive to trade-union pressure. . .

The TTLC (Toronto Trades and Labour Council), the Knights of Labour DA125, and their allies throughout the province enjoyed an intimacy with the Mowat government unknown before the 1880’s, and seldom seen after in Canadian working-class history.

The general picture that Kealey paints is one in which both major parties competed for the worker’s vote by focusing on working class issues. This is borne out by the attempt of the Tories to introduce an employer liability act in 1885 and to criticize the Liberals’ Act of 1886 for not going far enough.

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97 S.O. 1886, 49 Vict., c. 28 s. 8.
98 For the most comprehensive account of this, see Kealey, supra note 5, at chapters 8-13. On the nine-hour movement in particular, see Creighton, George Brown, John A. MacDonald and the Workingman (1943), 24 Can. Hist. Rev. 362; Ostrey, Conservatives, Liberals and Labour in the 1870’s (1960), 41 Can. Hist. Rev. 93.
99 Kealey, id. at 135.
100 Id. at 218.
101 The opposition conservatives, lead by William Ralph Meredith, introduced an Employers’ Liability Bill (modelled on the English Act of 1880) on January 16, 1885. (Meredith was ap-
C.  *Cases, 1886-1900*

Until 1886, Ontario courts applied the common law of employers' liability in a formal and orthodox fashion. The refusal of the courts to modify these doctrines, even marginally, or to relax their control over jury findings, reflects both a formal definition of the judicial role, reinforced by a colonial deference to English precedent, and a probability that the judges shared the values and interests of those who benefitted from the legal status quo. As long as there was no conflict between content of the rules and the attitudes of the judges, formal application of the rules presented no problem.

In view of this, the case law following the *Factories Act* and *Workmen's Compensation for Injuries Act* is particularly interesting. If there is disjuncture between the substantive law and judicial attitudes, will judges adhere to a formal definition of their roles, deferring to the legislature by giving full effect to the statutes, or will they attempt to minimize their effect? Are judicial attitudes altered by the substance of the legislation? To the extent that modification of the common law rules raised new litigation issues, did that affect the style of legal reasoning? Did changes in form and substance affect each other? These are the questions I will explore in analyzing judicial response to the legislative reform of employers' liability law.

1.  The Problem of Voluntary Assumption of Risk

The doctrine that most strongly expressed the dominance of the contractual concept in regulating health and safety was that an employee was deemed to have accepted the risks known to be present in the workplace, and to have been compensated for that risk through an adjustment in wages.  

Pointed to the bench in 1894, and later to the Royal Commission which, in 1914, recommended the establishment of Workmen's Compensation in Ontario.) The government was clearly embarrassed and caught off guard. During the debates, Prime Minister Mowat noted the lack of demand expressed by labour for such an act:

There have been workingmen's societies in existence and they have brought their influence to bear in seeking legislation, but of all subjects about which they have asked our opinion, this is not one of them ... the workmen themselves are not pressing it.  

[See *Ont. Leg. Deb.*, Feb. 27, 1885.] The bill was killed and the Government brought in a similar bill the following term. During its discussion, Meredith chided the Government for its new-born zeal, and criticized the exclusion of domestics as well as the limitation of damages to 3 years wages. The Government, on the defensive, again indicated the lack of demand, and sought to justify its limits by pointing to the English Act. They also argued that an unspecified damages limit would help only lawyers and that, in any event, common law recoveries seldom exceeded this amount.  

[See *Ont. Leg. Deb.*, Mar. 2 and 11, 1886.]

Employers' Liability

the employer had (at least in theory) already paid the worker a premium for agreeing to assume the risk of injury. Adopting the language of Lord Abinger in *Winterbottom v. Wright*, it might be said that the courts would not allow the implied terms of the contract of employment to be "ripped open by this action of tort." Not only was this a powerful defence for employers, but the selection of the contractual doctrine by the courts was functionally compatible with the perfection of capitalist relations of production in mid-nineteenth century Ontario.

Neither the *Factories Act* nor the *WCIA* expressly abolished or restricted that defence. True, the *Factories Act* declared it unlawful to maintain a factory in an unsafe condition, but did not address the question of how civil liability might be allocated, and certainly did not contain provisions giving injured workers the right to sue their employers for injuries caused by a breach of the Act. The *WCIA* allowed injured workers to sue their employers as if they were not employees when their injuries had been caused by, *inter alia*, defects in the machinery or plant, but was the doctrine of voluntary assumption restricted to employment relationships? The effect of these legislative changes on the operation of this doctrine remained to be clarified by the court.

*Dean v. Ontario Cotton Mills Co.*, the first reported case to come before the courts under the *WCIA*, raised this precise question. The plaintiff was employed in the defendant's dye works, and was required to climb onto boards placed across large dye vats. Prior to the accident, the plaintiff had complained that there were insufficient boards covering the openings, but nothing was done and the plaintiff fell into the boiling vat when one of the boards slipped sideways. Section 15(l) of the *Factories Act* required that openings in dangerous structures be securely guarded, so far as practicable. At trial, Cameron C.J. relied on the English case *Thomas v. Quartermane* and nonsuited the plaintiff because he had full knowledge of the defect and thus came within the maxim *volenti non fit injuria*.

In *Thomas*, the Court had held that the *volenti* doctrine survived the *Employer Liability Act* of 1880, although Bowen L.J. was prepared to admit that knowledge of a defect would not, in all cases, give rise to an inference that the employee had legally assumed the risk of injury. Lord Esher M.R. dissented. His opinion was that this doctrine was a tenet of master-servant law, not a general principle of contract

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103 Supra note 18, at 115 (Wm. & M.).
104 (1887), 14 O.R. 119 (Q.B.D.).
105 (1887), 18 Q.B.D. 685 aff'g 17 Q.B.D. 414.
106 Id. at 696.
law which survived the abolition of the defences specific to employers.

No one ever suggested that there could be such a contract in the case of any person other than a servant, so that when a servant is put on the footing with other persons that defence of the master is gone. The case is reduced, therefore, to personal action founded on negligence.

... The question, therefore, is was the master negligent in allowing a defect to exist in the works by reason of which defect the injury has arisen, and if that is established, was the plaintiff guilty of negligence directly contributing to the injury he has sustained?¹⁰⁷

Knowledge of the defect was material only to a determination of whether, in the circumstances, the plaintiff was contributorily negligent.¹⁰⁸

On appeal from Cameron C.J.’s decision in Dean, the non-suit was set aside. Armour J. was able to distinguish this case from Thomas on two grounds: firstly, that in England there was no statutory duty to guard the vat, such duty arising only after an order had been made by an inspector. In Dean, the employer was found to be in violation of s. 15(l) of the Factories Act.¹⁰⁹ However, Armour J. offered no theory to explain why knowledge of a breach of a statutory duty should not be treated in the same way as knowledge of a breach of a common law duty.¹¹⁰ Secondly, in Dean, the plaintiff had complained of the defect, whereas in Thomas the plaintiff had not. Armour J. treated the fact of continued employment after the complaint as evidence that risk of injury from such a condition was not contemplated by the parties, rather than evidencing voluntary assumption.¹¹¹ The question of whether or not a risk was voluntarily assumed was to be treated as a question of fact for determination by the jury, not as a question of law to be determined by the judges.

Wilson C.J. took a more cautious approach in a concurring judgment. Although he noted that “[i]t is hard to apply the maxim [volenti] in many cases against a workman when the choice before him is to run the risk or give up his work, or starve,”¹¹² he held that the volenti doctrine applied outside the employment relationship, and thus provided a good defence to an action under the WCIA. Nevertheless, he allowed the plaintiff to recover under the Factories Act because of the

¹⁰⁷ Id. at 688, 689.
¹⁰⁸ Id. at 690.
¹⁰⁹ Dean, supra note 104, at 125.
¹¹⁰ In Thomas, supra note 105, Bowen L.J. suggested that a statutory duty might be treated differently (at 696), whereas Lord Esher, M.R. could see no basis for this. Armour J. does not discuss this question.
¹¹¹ Dean, supra note 104, at 125.
¹¹² Id. at 128.
employer's breach of its terms.\footnote{113} 

The case is remarkable in several respects. It is the first in this area where the Ontario courts did not routinely apply English precedent. The fact that the cases involved the interpretation of somewhat different domestic statutes made this constitutionally possible, but the distinctions were not obvious and could easily have been ignored.\footnote{114} Indeed, not only did the court depart from English precedent, its direction was unexpected in light of the pre-1886 decisions. By holding that whether the risk was voluntarily assumed was a question of fact, the court substantially undermined the force of the doctrine derived from the contract of employment. It thus set the stage for the selection of the negligence principles, advocated by Lord Esher M.R., as the basis on which to re-structure the law of employers' liability.\footnote{115}

In order to emphasize the exceptional character of the Ontario court's interpretation, it is useful to compare it not only with the English interpretation, but with that of the Supreme Court of Massachusetts, where the Employer Liability Act of 1887 had been modelled on the English Act of 1880. A study of the decisions of the court concluded that the scope of the defence of voluntary assumption of risk was not substantially reduced, and the court continued to allow employers to rely on it when it could be shown that the employee had knowledge of the danger.\footnote{116}

Further, once the veil of legal presumption was lifted, the court was willing to recognize that, in master and servant relations, a significant element of compulsion was involved. The need to examine facts in order to decide cases can have an effect both on the attitude of the judge to the nature of the problem raised by the case, and on the possibility of resolving cases through formal reasoning processes.

The volenti maxim came under further attack in Madden v. Hamilton Iron Forging.\footnote{117} The plaintiff, following his supervisor's orders,
was injured whilst placing an iron gate into steam-powered shears. The
jury found the supervisor negligent in giving the orders. The plaintiff
had testified he was apprehensive about the possibility of an accident,
but did not refuse the order for fear of dismissal. The jury found that
the degree of danger was not fully appreciated and thus could not be
said to have been voluntarily assumed.

McMahon J. upheld the jury verdict, citing Lindley L.J.’s decision in
Yarmouth v. France.

If nothing more is proved than that the workman saw danger, reported it, but, on
being told to go on, went on as before in order to avoid dismissal, a jury may in
my opinion properly find that he had not agreed to take the risk and had not
acted voluntarily in the sense of having taken the risk upon himself. Fear of
dismissal, rather than voluntary action, might properly be inferred.118

It should be noted that in Yarmouth (decided less than five months
after Thomas and three months after the decision in Dean), Lord
Esher, supported by Lindley L.J., gave a narrow reading to Thomas by
emphasizing that there must be a finding of fact that the employee
agreed to incur the risk for higher wages. The mere knowledge by the
employee of the defect did not necessarily give rise to a legal presump-
tion of voluntary assumption. The fact that MacMahon J., when faced
with a range of English precedents, chose to rely on the one more fa-
vourable to plaintiffs also indicates a judicial preference to give broad
effect to the legislative modifications of the common law defences. Any
doubt that the mere continuation of work with knowledge of the defect
did not constitute volenti as a matter of law was settled in Ontario by
an amendment to the WCIA in 1889.119 This is the first instance in
which Ontario courts preceded both the Legislative Assembly and the
English courts120 in reforming the law of employers’ liability.

A few further observations need to be made about this defence
following the 1889 amendment. In Rogers v. Hamilton Cotton Co.121 it
was held that where injuries resulted from a breach of the Factories
Act, the defence of volenti was not available, even if it was proved that

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118 (1887), 19 Q.B.D. 647 at 661, cited in Madden, id. at 62.
119 The Workmen’s Compensation for Injuries Amendment Act, 1889, S.O. 1889, 52 Vict., c.
23, s.7:
In an action against an employer under the Principal Act or this Act, a workman shall not,
by reason only of his continuing in the employment of the employer with knowledge of the
defect, negligence, act or omission, which caused his injury, be deemed to have voluntarily
incurred the risk of the injury.

120 In England, the question was not settled under Smith v. Baker and Sons, [1891] A.C.
325 (Lord Bramwell dissenting) which held that voluntariness was a question of fact both under
the Employers’ Liability Act, 1880 (U.K.), and at common law.

121 (1893), 23 O.R. 425 (C.P.Div.).
the employee had, in fact, agreed to incur the risk, because such an agreement would be void as against public policy. This would be as true of common law actions as of actions under the *WCIA*. Even where the defect was not a violation of the *Factories Act*, Meredith J. held in *Haight v. Wortman and Ward Mfg. Co.* that, for a defendant to succeed on the basis that the contract of employment had allocated the risk and thus barred the action, he would have to satisfy the court that there was special, adequate and reasonable consideration.\(^{122}\) Thus, the courts were directed to inquire into the fairness of any special agreement, replacing the formalism of the pre-1886 period with a more purposeful analysis of risk allocation. As Osler J.A. observed in *McCloherty v. Gale Manufacturing Co.*:

> The defect was one which could have been remedied by a trifling expenditure, or the danger obviated by the simplest precaution, which the plaintiff, if she thought about it at all, might well suppose the defendants would have made or taken, and thus there could be nothing to suggest to her that if she remained in the employment, she would be relying on skill or caution to avoid the danger or taking a risk which it would be unreasonable to expect the master to prevent.\(^{123}\)

This approach of the Court resembles a cost-efficiency solution to risk allocation. Defects which can be remedied by the employer inexpensively should be, while others might be more efficiently dealt with by the payment of a judicially approved risk premium. Finally, juries did not readily infer voluntary assumption of risk, and courts did not readily interfere with such findings.\(^{124}\)

2. Problems of Statutory Interpretation and Application

\(a\) *The Factories Act*

The effect of a breach of the *Factories Act* on civil liability was a question that bedevilled the courts in the years following its enactment. At the very least, it was said that a breach of the Act was evidence of a breach of a duty of care owed to the worker. Thus it sometimes was necessary for courts hearing employer liability suits to interpret the Act in order to determine whether or not its requirements had been breached.\(^{125}\)

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\(^{122}\) (1894), 24 O.R. 618 (Ch. D.). Section 8 of the *WCIA* provided that the employer could rely on a contractual allocation of risk as a defence only when the court was satisfied that (1) there was consideration other than that of the worker being taken into or continued in employment; (2) that such consideration was adequate; and (3) that the agreement was not improvident on the part of the worker, but was just and reasonable.

\(^{123}\) (1892), 19 O.A.R. 117 at 120.

\(^{124}\) See, e.g., *Haight*, *supra* note 122.

\(^{125}\) The problem of statutory interpretation and application also arose in the context of prose-
Interpretation in the case law was not consistent. In *Hamilton v. Groesbeck*, the court very narrowly interpreted ss.15(1) which required that moving parts be “as far as practicable, securely guarded” and held that “moving parts included only transitive parts that supplied power, not those that were intended to be moved.” The legislature subsequently amended the Act to require that all dangerous parts be, as far as practicable, securely guarded. Whether this standard was satisfied was treated as a question of fact, to be determined by a properly instructed jury, and the courts generally accepted the jury's finding. However, in at least one case a plaintiff was non-suited by the trial judge after the jury found that the employer had breached the Act by failing to guard a shaft adequately. The judge ruled that, because of special circumstances, the shaft was secured insofar as possible, but he did not become embroiled in a discussion of the proper legal interpretation of the standard.

*b) The Workmen's Compensation for Injuries Act*

Although standard of care and causation issues dominated litigation under this Act, the Court also faced a number of cases raising questions of statutory interpretation. Most of these related to the scope of section 3 of the Act, under which a worker could sue as if not an employee of the defendant. In particular, section 3 limited the fellow servant defence by extending employers’ vicarious liability to injuries caused by the negligent acts of fellow servants who supervised others and had authority to give binding orders, and to acts or omissions of fellow servants in obedience to the employer's rules or instructions. If the fellow servant who caused the injury did not come within these categories, then the employer could still claim the fellow servant defence.

Because the five reported cases dealing with this issue present sharp contrasts, it is difficult to be conclusive. In the first two, the...
Employers' Liability courts interpreted the categories of vicarious liability expansively, but in the next three, the courts took a stricter view of the circumstances in which a fellow servant could be found to be exercising supervisory powers. Employees who relied on customary craft lines of authority found themselves without a valid claim against their employer. Perhaps the courts were influenced in these cases by major industrial reorganization at the turn of the century. In many industries knowledge of the production process and, thus, a measure of control over that process, remained with skilled employees who frequently directed fellow workers. However, as employers learned that, in a capitalist economy, profitability was maximized by more intensive exploitation of labour, it became increasingly important for them to be able to control directly the production process by taking control of both technology and manpower. The older structure of labour relations constituted an impediment to the introduction of these new management techniques and had to be dismantled. The court decisions reinforced the new lines of authority flowing from top to bottom, weakening customary craft lines of authority which employers had previously accepted.

Section 3 of the Act also made employers liable for injuries caused to workers "by reason of any defect in the condition of the ways, works, machinery or plant . . . used in the business of the employer." By reading such terms as "defect" or "ways" broadly or narrowly, the court could control the impact of the statute on employers' liability. Again, the cases are not consistent, making it difficult to draw conclusions about judicial attitudes to the Act. The first case to define "defect", Hamilton v. Groesbeck, took as narrow an approach to the WCIA as it did to the Factories Act. In that case, the court held that the defect must be inherent in the condition of the machinery with re-

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131 Cox v. Hamilton Sewer Pipe Co. (1887), 14 O.R. 33 (Ch. D.) (order need not be negligent per se); Hamilton Bridge Co. v. O'Connor (1895), 24 S.C.R. 598, aff'g 21 O.A.R. 596, aff'g. 25 O.R. 12 (foreman negligent in not advising of dangerous character of work).

132 Garland v. City of Toronto (1896), 23 O.A.R. 238 rev'g. 27 O.R. 154 (Ch. D.) (custom that oldest man on derrick has authority is not sufficient to cloak him with employer's authority); Ferguson v. Galt Public School Board (1900), 27 O.A.R. 480 (mason's authority over hodman rejected). Also see Carnahan v. Robert Simpson Co. (1900), 32 O.R. 328 (Div. Ct.), a case not involving craft traditions.

133 For discussions of scientific management in the late 19th and early 20th centuries, see Braverman, Labour and Monopoly Capital (1974) esp. at 85-123; Gordon et al., supra note 19, at 112-135; Stone, "The Origin of Job Structures in the Steel Industry", in Brecher et al., eds., Root and Branch: The Rise of the Workers' Movements (1975), at 123-157.

134 E.g. Caldwell v. Mills (1893), 24 O.R. 462 (C.P. Div.) (liability found because plank constitutes a way); Stride v. Diamond Glass Co. (1895), 26 O.R. 270 (Ch. D.) (no liability because public street is not a way for which the employer is responsible).

135 See, supra note 126, and accompanying text.
spect to the purpose for which it is used. Thus a worker who was in-
jured by an unguarded sawblade did not recover under the Act because
the guard was not essential for the purpose for which the saw was used
and the saw itself was not defective. Subsequent to the accident, but
prior to the Queen's Bench decision, section 3(1) of the Act was
amended to include defects in the condition or arrangement. This
amendment resulted in a more expansive application of the section.

Finally, the Act required workers claiming compensation to serve
notice to their employers in a specified form and manner, but it also
stipulated that such notice would not be invalid by reason only of a
formal defect, unless that defect prejudiced the employer's defence.
Attempts to defeat actions on the basis of defective notices did not
meet with success.

In sum, the courts did not exhibit a consistent pattern of restrict-
tively interpreting the Factories Act or the WCIA to defeat the pur-
poses of the legislation. In the few cases that they did, the Legislative
Assembly promptly amended the legislation. Most cases did not turn on
questions of pure statutory interpretation, but involved problems of
statutory application to various fact situations. The pattern of results
reflects the emergence of standards of reasonableness as the foundation
for liability in place of an implied contractual term that the worker had
assumed all risks present in the workplace.

3. The Standard of Care and Causation

The existence of a defect in the condition or arrangement of ma-
chinery was a necessary, but not a sufficient ground for obtaining com-
ensation under the WCIA. A worker also had to prove that the defect
arose, or was not discovered, due to the negligence of the employer or
an employee entrusted with responsibility; that the injured worker's
own negligence had not contributed to the accident (including failure
to report the defect of which the worker had knowledge, unless he knew

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136 Id.
137 S.O. 1889, 52 Vict., c. 23, s. 3.
138 McCloherty v. Gale Manufacturing Co. (1892), 19 O.A.R. 117 (placement of rotating
shaft constitutes defect in arrangement); Wilson v. Owen Sound Portland Cement Co. (1900), 27
O.A.R. 328 (use of sound machine for improper purpose brings it within defective category); but
see Bridges v. Ontario Rolling Mills Co. (1980), 19 O.R. 731 (C.P. Div.) (bolt projecting from
power shears did not constitute defect).
139 S.O. 1886, 49 Vict., c. 28, s. 10.
140 See Cox v. Hamilton Sewer Pipe Co. (1887), 14 O.R. 33 (Ch. D.); Cavanaugh v. Park
(1896), 23 O.A.R. 715 at 716.
that the employer was already aware of the defect);\textsuperscript{141} and that the defect had indeed caused the accident. These issues dominated the litigation between 1886 and 1900. The manner in which the Court dealt with them provides another prism through which to gain insight into the attitudes and role of the judiciary, as well as exposing doctrinal developments in the law of employer liability following its legislative alteration.

a) \textit{Breaches of the Factories Act: Negligence or Strict Liability?}

The \textit{WCIA} stipulated that liability arose where there had been negligence with respect to the defect. Surprisingly, there were few cases in which the defect is acknowledged but negligence denied.\textsuperscript{142} It is difficult to determine whether the courts were, in effect, adopting a standard of strict liability when a defect was established, or if they were collapsing the two issues, so that a defect was found only when it was also found that there had been negligence on the part of the employer. The problem was presented more sharply where a violation of the provisions of the \textit{Factories Act} was involved. In an early case, one judge held that a breach of a statutory duty imposed by the \textit{Factories Act} created an independent cause of action.\textsuperscript{143} Presumably, liability in such an action would have been strict in the sense that a violation of the statute would be deemed negligence \textit{per se}.\textsuperscript{144} However, that theory of liability was subsequently rejected by the courts.\textsuperscript{145} Nevertheless, the problem of how violations of the \textit{Factories Act} were to be treated in the context of employer liability claims, either under the \textit{WCIA} or at common law,\textsuperscript{146} remained. In \textit{McCloherty}, a case involving a woman whose hair became caught in an unguarded rotary shaft, Osler J.A., writing

\begin{footnotesize}
\begin{enumerate}
\item S.O. 1886, 49 Vict., c. 28, ss. 5(1) and 5(3). The common law defence of contributory negligence was otherwise unaffected by the legislation.
\item E.g. in \textit{Kelly v. Davidson} (1900), 27 O.A.R. 657, rev'g 32 O.R. 8, rev'g 31 O.R. 521, the central issue was whether a foreman was negligent in failing to notice that a stay supporting scaffolds had been removed. The Court of Appeal held that the foreman had not been negligent. An alternative to denying negligence was to attribute responsibility to someone other than the employer personally, or a person for whom the employer was responsible. See, e.g., \textit{Black v. Ontario Wheel Co.} (1890), 19 O.R. 578 (Q.B. Div.) (negligence of contractor, not employer).
\item See supra note 104, and accompanying text.
\item \textit{Finlay v. Miscampbell} (1890), 20 O.R. 29 (Ch. D.); \textit{Roberts v. Taylor} (1899), 31 O.R. 10 (Div. Ct.).
\item The \textit{Workmen's Compensation for Injuries Act} did not amend the common law, but provided a means of getting around common law defences by an action pursuant to that Act. However, damages under the Act were restricted so an employee might still bring an action at common law. It is unclear from the cases whether distinctions between the two actions were clearly drawn.
\end{enumerate}
\end{footnotesize}
for the majority, deemed machinery that violated the *Factories Act* was
defective for the purpose of the *WCIA*. Yet the question of whether
the employer had been negligent with respect to the occurrence of
the breach was neither put to the jury at trial, nor addressed by Osler J.A.
Rather, he assumed that where a breach of the *Factories Act* was
established, there was negligence *per se* and no separate and distinct finding
was necessary to impose liability. The absence of any sustained discussion of
the point in the majority judgment is more surprising, since
Burton J.A., in dissent, explicitly raised the fact that the jury had not
found negligence. He was prepared to admit that breach of the
*Factories Act* might constitute evidence of negligence, but insisted that there
had to be a finding of negligence as well as of breach of statute.

The debate on whether breach of a statute connotes strict liability
or is merely evidence of negligence, or is treated in an intermediate manner
(that is, *per se* evidence of negligence), was never clearly resolved with respect to breaches of the *Factories Act*. For example, in
two subsequent cases, *McCloherty* was relied upon for the proposition
that a breach of the *Factories Act* was *per se* evidence of negligence.

b) Contributory Negligence

With the demise of the voluntary assumption of risk doctrine and
the restriction of the fellow servant defence, issues of causation
emerged as the most powerful defence in employer liability cases. In
particular, the doctrine of contributory negligence provided employers
with a means of escaping liability entirely. Whether or not a plaintiff

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147 (1892), 19 O.A.R. 117 at 122.
148 *Id.* at 124.
149 See e.g., Fleming, *supra* note 144 at 122-133. The Supreme Court of Canada recently
reviewed the confused state of the authorities to clarify the Canadian position and held that proof
of breach of statute may be evidence of negligence, but is not negligence *per se*. See *R. v. Sas-
150 *Thompson* and *Rodgers*, *supra* note 128.
151 Employers escaped liability in 8 out of 11 cases where they had raised the defence that
the employee's own negligence either caused or contributed to the accident. Four plaintiffs were
non-suited (*Bridges v. Ontario Rolling Mills Co.* (1890), 19 O.R. 731 (C.P. Div.); *Finlay v. Mis-
aff. 21 O.A.R. 164, affg 23 O.R. 335 (Ch. D.); *Truman v. Rudolph* (1895), 22 O.A.R. 250); two
plaintiffs were found contributorily negligent by the jury (*Poll v. Hewitt* (1893), 23 O.R. 619
(Q.B.D.); *Badgerow v. Grand Trunk Railway Co.* (1890), 19 O.R. 191 (C.P. Div.), and in two the
jury's findings were overturned on appeal: *Brunell v. Canadian Pacific Railway Co.* (1888), 15

A recent study of employer liability claims in a Massachusetts textile mill at the turn of the
century reveals patterns in the employer's allegations of contributory negligence, in that they are
associated with factors such as the age, sex, fluency in English, level of skill and department
within the mill of the employee. Young unskilled foreign workers were most likely to face this
had contributed to the occurrence of the accident was usually treated
as a question of fact and left to the jury, although a number of plain-
tiffs were non-suited if the judge found contributory negligence. Em-
ployees were held contributorily negligent in a wide variety of situa-
tions: for example, employees responsible for overseeing, repairing or
inspecting the equipment that caused their injury;\textsuperscript{165} experienced em-
ployees injured in the normal course of employment;\textsuperscript{166} and employees
deviating from the normal route.\textsuperscript{167} Of the three reported cases in
which a jury finding of no contributory negligence was upheld, two in-
vented employer breaches of the \textit{Factories Act}\textsuperscript{168} suggesting that, when
such breaches occurred, the behaviour of the plaintiff was of little con-
cern to juries or judges. The other case went to the Supreme Court of
Canada to determine whether the jury finding was unreasonable.\textsuperscript{169}

Employees were held to a high standard of care for their own
safety, which reflects an acceptance by the judiciary of what we would
today call the unsafe acts theory of accident causation. According to
this, most accidents are not caused by unsafe conditions or workplace
pressures, but by the carelessness of workers. By upholding a high stan-
dard of care, workers will be encouraged to be more careful, thus re-
ducing accident rates. As well, the maintenance of high standards may
have reflected a continuing belief in the values of individual autonomy
and responsibility. It would be unfair to hold the employer liable for
the carelessness of the injured plaintiff.

The inadequacy of such perceptions stem from their failure to take
account of developments in the organization of production that were
already visible by the late nineteenth century. A legal doctrine that
assumes a high level of autonomy and responsibility in the individual
worker is unrealistic and harsh in view of the trend towards more in-
tensive exploitation of labour through increasing mechanization and su-
pervision,\textsuperscript{170} which may have resulted in soaring accident rates.\textsuperscript{171}

\textsuperscript{162} See Brunell, \textit{id.} (fireman killed when boiler exploded); Badgerow, \textit{id.} (brakeman killed by
accident caused by alleged defect in the brake); Truman, \textit{id.} (head brewer injured as a result of a
failure to make a repair he had ordered).

\textsuperscript{163} See Bridges, \textit{supra} note 151 (fingers in power shears); Farmer, \textit{supra} note 151 (coupler
going between cars with lumber extending over end).

\textsuperscript{164} See Finlay and Headford, \textit{supra} note 151.

\textsuperscript{165} Rogers and Thompson, \textit{supra} note 128.

\textsuperscript{166} Canada Southern Railway Co. v. Jackson (1890), 17 S.C.R. 316. Gwynne J., in dissent,
expressed pique at the majority decision denying contributory negligence:
I am further of the opinion that the doctrine of contributory negligence had better be
abolished altogether if it can be held that the plaintiff was not a party contributory by his
own culpable negligence to the injury which unfortunately he received.
[At 323-324].

\textsuperscript{167} See, \textit{supra} note 134 and accompanying text.
However, before we condemn these nineteenth century judges too quickly, it should be noted that the “blame the worker” approach to industrial safety is still alive and well.\(^{169}\)

c) Sufficiency of Evidence and Causation

When an injured worker had cleared the first two legal hurdles, showing there was an unsafe condition in the workplace for which the employer was responsible (either by negligence or breach of statute), and that the worker was not guilty of contributory negligence, one last problem had to be faced: Was there proof that the employer’s breach of the standard of care caused the injury? This emerged as one of the most litigated employer liability questions at the appellate level in the late nineteenth century. Indeed, the issue of causation became a central and controversial issue for the law of torts generally.\(^{160}\) Earlier, courts controlled the extent of liability through the duty of care question or through a deemed contractual allocation of risk. As duty of care broadened to include strangers and as the doctrine of voluntary assumption of risk lost its force in the field of employers’ liability law, the potential for liability expanded. So, although causation was not a new issue, its potential as a tool for judicial control of liability took on new importance.

The courts in the nineteenth century initially adopted an objective theory of legal causation which required the plaintiff to prove that the act of the defendant was the immediate or proximate cause of the injury and that there was no intervening event which broke the chain of causation. However, a second view emerged, much more skeptical of the possibility of finding isolated objective causes, which held that causation could be determined only on the basis of probabilities, since there was always a series of antecedents contributing to any particular occurrence. The objective causation test was much stricter and could easily be applied to deny liability, or to limit its extent. A probabilities test gave the court greater flexibility in determining when to infer causation and was less amenable to formal application, requiring consideration of a range of factors particular to the individual case.

A tentative shift to a more probabilistic approach is seen in the

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\(^{160}\) Gordon et al., id. at 148.

\(^{169}\) The difficulties inherent in allocating fault for particular accidents in mechanized and integrated production processes perhaps provides the strongest argument for no-fault compensation systems. See also Ashford, Crisis in the Workplace (1976) 108-115, and Reasons et al., Assault on the Worker (1981) Chapter 7.

Employer liability cases. The issue arose most frequently in two closely related situations. First, when there was evidence of a breach of duty of care on the part of the employer, but no direct evidence that the alleged breach actually caused the accident (often because the worker was dead) could an inference of causation be drawn? Second, when there was some evidence of causation, was it sufficient to allow the question to go to the jury? A paradigmatic case was presented by the facts in Farmer v. Grand Trunk R.W. Co.\textsuperscript{161} A worker was found dead on the tracks under the wheels of a box car. He had been coupling a flat car to some box cars, some lumber extended over the edge of the flat car and a piece of wool, resembling that of the deceased's hat, was found on the end of one of the boards. The plaintiff (the deceased worker's spouse) alleged failure to employ a safe system for loading lumber which would prevent it from shifting over the ends of the car. The jury found the defendant liable. On a motion to set aside the judgment, the court found there was no direct evidence linking the defect to the cause of death. "How his body got across the rails and under the wheels must be mere surmise."\textsuperscript{162} The plaintiff failed to prove objective causation.

Yet in later cases, the Court of Appeal inferred breach of the standard of care as the proximate cause of injury, particularly where the industrial process involved was highly dangerous.\textsuperscript{163} Further, between 1896 and 1900, ten cases, mostly from Quebec, came before the Supreme Court of Canada on the issue of causation. As well as a Factories Act, Quebec had Article 1055 of the Civil Code, which provided that an individual was liable for damages caused to others by his negligence. The Court held that the effect of the Civil Code was no different from that of the common law; that proof of causation, not merely proof of a breach of the duty of care, was necessary to establish liability.\textsuperscript{164} The trial and appellate courts of Quebec seem to have ignored this judgment and continued to find employers liable where there was the least evidence that the employer's acts caused the accident, only to have the Supreme Court reverse their decisions five times in the next two years.\textsuperscript{165} In the last of these cases, Dominion Cartridge, King and

\textsuperscript{161} (1891), 21 O.R. 299 (C.P. Div.).
\textsuperscript{162} Id. at 305.
\textsuperscript{163} See Badcock v. Freeman (1894), 21 O.A.R. 633 (explosion in soap factory pressure boiler); Wilson v. Boulter (1898), 26 O.A.R. 184 (explosion in retort not equipped with safety valve).
\textsuperscript{164} Montreal Rolling Mills Co. v. Corcoran (1896), 26 S.C.R. 595.
Taschereau JJ. broke ranks and dissented. The case involved an explosion in a cartridge factory and evidence was introduced that the chemicals were safe if properly dampened. King J. argued that, in the absence of proof of any other cause, the maxim *res ipsa loquitur* allowed and supported an inference that improper dampening of the chemicals was the effective cause of the explosion.\(^6\)

In the next three Quebec cases, the Supreme Court changed its position and upheld the Appeal Court. In the first, *George Matthew Co. v. Bouchard*, the majority wavered but indicated that they wanted to get out of the business of reviewing facts.

> The evidence adduced by him [the plaintiff] is weak, . . . but we are far from being satisfied that the judgment appealed from is clearly wrong; there is some evidence of neglect on the part of the employer, which two courts have considered as having caused the injury sustained, and in such a case, the jurisprudence of this court is well settled that we would not disturb the finding of these two courts.\(^6\)

In two subsequent cases, one involving electricity\(^6\) and the other involving explosives,\(^6\) the court developed the position that where exceptionally hazardous materials or processes were involved, the employer was obliged to exercise the utmost care in preventing accidents. Where there was evidence that that standard of care had not been met, resulting in a dangerous situation, the employer would be liable despite an additional triggering event. Thus, the test for causation was no longer objective, but was more akin to one of probabilities.

However, in an Ontario case heard between these Quebec cases, the court returned to the old rule that, absent direct evidence objectively linking the employer's negligence or breach of the *Factories Act* with the accident, there were only suppositions about legal responsibility and, thus, no case to go to the jury.\(^7\) It is hard to reconcile this decision with the shift that had just occurred in the Quebec cases. The

\(\text{\textit{Dominion Cartridge Co. v. Cairns} (1898), 28 S.C.R. 361.}\)

\(\text{\textit{Dominion Cartridge Co., id. at 372.}}\)

\(\text{\textit{(1898), 28 S.C.R. 580 at 588-9. In \textit{obiter}, the court also indicated some annoyance at employers who provided below average levels of safety and then relied on litigation to avoid liability:}}\)

> Manufacturers should realize that it is in their interest to comply with the precautionary measures adopted by their neighbours in similar establishments or suggested by recognized authority, although their default may only subject them to the penalties or imprisonment; in doing so, however, they may rest assured that they will save often troublesome and expensive litigation, sometimes irreparable injury and in some cases, unfortunately too frequent, valuable lives.

\(\text{\textit{Citizens' Light and Power Co. v. Leptire} (1898), 29 S.C.R. 1.}\)

\(\text{\textit{Asbestos & Asbestos Co. v. Durand} (1900), 30 S.C.R. 285.}\)

facts were gruesome, the breach of the *Factories Act* uncontested, the equipment dangerous and the evidence of causation was as strong (or as weak) as in the later Quebec cases. Perhaps the court felt freer to impose its own interpretation of the facts because the Ontario Court of Appeal had split equally on the issue and there had been a dissent at Divisional Court. Whatever the reason, the Ontario courts followed that approach and denied liability in two subsequent cases at the close of the century.\(^1\)

If the question of causation was allowed to go to the jury, they would find the employer’s breach of duty was the effective cause of the accident. Sympathy for the injured plaintiff was probably reinforced by the view that the employer could, better than the worker, bear the costs of industrial accidents, and that fairness justified the shifting of losses because the employer derived greater benefits from production than did the individual worker. Therefore, controlling jury fact-finding with respect to causation was essential if the courts were to maintain control of the determination of liability. This was done by erecting a legal threshold that there be sufficient evidence to go to the jury. The formulation of this threshold remained as it was prior to 1886 and the issue was frequently litigated.\(^2\) Although it is difficult to judge on the limited evidence of reported cases, there appears to be a decline in the frequency with which appellate courts overruled trial judges’ decisions to allow a case to go to the jury.\(^3\)

In sum, there was a shift away from a set of rules expressing clear policy preferences against compensating injured workers, which could be formally applied to achieve that result, to a set of rules which left it to the court to determine, in each individual case, whether it was appropriate to award compensation. The questions of whether there was a duty of care, whether that duty had been satisfied and whether a breach of that duty caused the injury, were all open-ended and could be manipulated by the courts to arrive at the desired result in a particular case without concern as to its impact on future cases.\(^4\) The dominance of factual issues over legal ones is reflected in the marked decline

\(^{111}\) Carnahan, supra note 110; Young v. Owen Sound Dredge Co. (1900), 27 O.A.R. 649.


\(^{113}\) Changes in the proclivity of trial judges to withdraw cases from juries simply cannot be assessed from these sources.

\(^{114}\) Atiyah notes a similar shift in the English cases after the *Employer Liability Act, 1880*, from deciding cases on strict legal principles to one determined by detailed factual examination. See Atiyah, *The Rise and Fall of Freedom of Contract*, supra note 80, at 707-708.
in rate of successful appeals from pro-plaintiff jury verdicts after 1886.175

4. Summary of Changes in the Rules Themselves, Their Application and Judicial Attitudes

There can be little doubt that the position of injured workers seeking compensation from their employers through the courts was greatly improved after 1886. Of the 43 employer liability cases reported in Ontario between 1886 and 1900, employees won in 23. This compares quite favourably with the pre-1886 experience when employees lost in 17 of the 20 reported cases. Although there are limitations to the inferences that can be drawn from reported cases, they are evidence that the modified employer liability rules, and their application, allowed more employees to sue their employers successfully. Before examining implications for the relationship between social and legal change, it is useful to highlight the dimensions of the changes in the substance and form of the decision rules, the style of application and the attitude of the judiciary toward employers' liability.

Substantively, the most significant shift in decision rules after 1886 was the imposition of external behavioural standards on employers instead of standards determined only by the operation of a capitalist labour market. The legislature and the courts determined what was reasonable conduct on the basis of political and normative criteria as well as economic considerations. As well, the vicarious liability of the employer was extended by restricting the fellow servant defence.

In terms of the formal dimensions of the rules, there was a marked decrease in their realizability, generality and facilitative qualities. Rather than per se rules, which resulted in determinate outcomes based on a few facts, the rules required consideration of a broad range of facts to be weighed in each case. Questions of fact and degree predominated, rather than questions of law. A good example of this change in formal realizability is the transformation of the doctrine of voluntary assumption of risk. Prior to 1886 an employee who worked in hazardous conditions was deemed in law to have assumed the risk of injury. After 1886, it was a question of fact in each particular case.

As well, the generality of the law was lessened. The particular facts of each case were determinative, so that cases had little precedental value. Age, sex, experience and the nature of the production pro-

175 Only eleven out of the 33 appeals from pro-plaintiff jury findings were successful after 1886—a marked contrast to the 9 successful appeals out of 10 prior to that date.
cess were all relevant to the standard of care owed by the employer. Thus, real life situations were given consideration and it was less easy to treat the parties as being abstract and interchangeable. Although a standard of reasonableness applies generally to all human behaviour, its meaning varies enormously, involving particularistic judgments dependent on a wide range of considerations. Finally, the rules were not formalities designed to facilitate private transactions by prescribing forms which individuals had to follow, but were rules to deter wrongful behaviour. The most striking example of this was the provision in the WCIA directing the courts to examine the fairness of a contract which purported to exclude its operation.176

A change in the formal dimensions of rules necessarily requires a change in their application. This was certainly true with respect to employers' liability law in Ontario after 1886. The replacement of per se rules by broad standards undermined mechanical rule application. In order to apply the new rules, judgments had to be made in each case as to the appropriate standard of care, whether a breach of the standard had occurred and whether that breach had caused the injury. Questions of degree became dominant and were resolved by the facts of each case. Since each result depended on particular facts, it became increasingly difficult for judges to maintain a formal style of decision-making, and although scholars attempted to organize tort law on "scientific" principles (in much the same way that Langdell organized contract law), the nature of the subject proved fiercely resistant.177 Thus the style of reasoning in the post-1886 cases is more pragmatic and result-oriented. Judges were not necessarily unconstrained by principles, but they recognized room for greater flexibility and individual judgment in deciding cases.

Studies of other jurisdictions in the late nineteenth century have also identified a shift similar to that in Ontario. Atiyah has argued that in the second half of the nineteenth century there was a fundamental shift in English judicial decision-making from a paradigm of principle

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176 Supra note 98.

177 See White, supra note 46, at 20-62, for a discussion of legal science and tort law in the late 19th century. Attempts to structure tort law had minimal impact on the courts themselves: "However much the later scientists may have laboured to preserve coherence and predictability in tort law, the subject was vulnerable to atomistic tendencies." (Id. at 571.) In Gordon's analysis of Holmes' The Common Law, he argues that Holmes was simultaneously trying to build a positive legal science expressed in the external standard thesis, while undermining its basis by recognition of the historical and contingent nature of rules and the need for pragmatic decision-making. Gordon, Holmes' Common Law as Legal and Social Science (1982), 10 Hofstra L. Rev. 719. The tension exhibited in Holmes' work as an academic may well have been reflected by the judiciary in defining their role and deciding cases.
to one of pragmatism. Rather than building or maintaining formal rules, judges concentrated on achieving justice in the particular case, as can be seen in the growth of judicial discretion, the development of flexible standards (such as reasonableness) to replace per se rules, and an emphasis on fact-finding. Gabel, in a study of contract law, notes a restructuring of legal consciousness in this same period. Formalism was replaced by a legal consciousness acknowledging relativity, particular facts, subjective intention, good faith and the legitimacy of using social values to guide results. Similar shifts are identified by Unger and Kennedy, although their periodization varies.

Finally, we come to the question of judicial attitudes towards the new policies selected by the legislature. There is no reason to believe that the personal attitudes of Ontario judges, pre-1886, were not consonant with the policy choices embodied in the common law of employers' liability. If that had been the case, it might be predicted that legislative modification of the common law in favour of workers would be met with judicial resistance. In the case law between 1886 and 1900 there is almost no evidence of sustained, direct judicial resistance to the legislative reforms. The Ontario courts took an unusually wide view of the effect of the legislation in limiting the defence of voluntary assumption of risk. In this they preceded the legislature itself, as well as the judiciary of England and many U.S. states. With respect to problems of statutory interpretation, there is but a single instance in which the court adopted a reading to give a significant limiting effect on their operation. Further, there are almost no disapproving comments to be found in the judgments.

The absence of open resistance to the legislation may only imply that formal definition of role won out over hostile attitudes. Alternatively, the judges may have found ways other than restrictive statutory interpretation to give effect to their personal preferences of statutory interpretation. The shift in the rules led to a greater emphasis on fact-finding and a change in the style of legal reasoning toward more pragmatism. If the judiciary on the whole was still hostile to the claims of

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178 Atiyah, From Principles to Pragmatics: Changes in the Function of the Judicial Process and the Law, supra note 80, at 1249.
179 See Gabel, supra note 80, at 622.
180 Unger, Law in Modern Society (1976) at 192-216.
181 Kennedy, supra note 74, at 1725-1731.
182 See text accompanying notes 113 to 116.
183 Supra note 126.
184 See Garland v. City of Toronto (1896), 23 O.A.R. 238 at 244, where Hagarty C.J. expressed quite mild disapproval.
injured workers, there were many opportunities to give effect to these attitudes in individual cases without openly confronting the legislation.

There are significant methodological problems in attempting to draw inferences about judicial attitudes from the results of reported cases, but one indicator is the propensity of appeal courts to reverse pro-plaintiff jury findings. In deciding whether there was sufficient evidence to go to a jury and whether a jury finding was unreasonable, reviewing courts exercised substantial discretion. The greater respect shown after 1886 for jury verdicts indicates not only the increased importance of fact-finding in deciding cases, but also that judges intervened less actively to deprive workers of compensation.

We might also examine cases in terms of their final result. Of the 43 reported employer liability cases in Ontario, at the end of the day the employer had won 20 and the employee 23 times. This compares favourably with the pre-1886 case law in which the employee lost 17 out of 20 times. This improvement may have resulted from both litigation rules as well as from judicial attitudes that were more favourable to plaintiffs. On the other hand, extreme care must be taken in drawing inferences about judicial attitudes solely on the basis of the percentage of plaintiff wins and losses. According to Professor Priest's recent work, litigation will occur where the difference between the parties' estimations of success, multiplied by the expected judgment, exceeds the mutual gains available from settling. When the parties calculate their chances of success in litigation, they take into account both the litigation rules and any known biases of the judiciary. Litigated cases are selected from the total population of cases precisely because of their indeterminacy. If it was widely perceived that judges were hostile to workers' claims against employers, then those cases would disappear from the courts and only those cases believed to be sympathetic or particularly strong would be litigated. Over the long run, when litigants learned the rules of the game and the attitudes of the judges, one would expect to see the plaintiffs and defendants each win half the time, which is, in fact, the result in the small sample of Ontario employer liability cases.

However, if the figures are disaggregated and the results of litigation on particular issues is examined, it will be seen that a high per-

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185 Supra note 70.
186 Croyle's study, supra note 84, suggests that attitudes and rules have interactive effects.
188 Posner, in A Theory of Negligence (1972), J. Leg. Stud. 29 at 68, looked at a much larger sample of American industrial accident cases between 1875 and 1905, and also found that employees won about half the time.
centage of appeals from pro-plaintiff jury verdicts by employers were unsuccessful, as were a high percentage of worker appeals from non-suits. Priest's hypothesis does not explain this result. The high number of unsuccessful appeals by employers from jury verdicts can be understood as strategic behaviour designed to encourage workers to settle on the employer's terms, otherwise the litigation would be stretched as long as possible. Employee appeals may reflect the unsatisfactory nature of settlement alternatives. Whether Priest's hypothesis is applied to the aggregate data or an attempt is made to explain the results on some other basis, the quantitative results do not confirm the presence or absence of attitudinal bias in the judiciary.

From these indicators (as well as others), it is difficult to say that there was any sustained hostility to the legislation itself, or to the view that employers owed a duty of care to their employees and that compensation ought to be paid when that duty was breached. The standard of care was not set at a level to exclude all but the most egregious cases, nor is it suggested that the judiciary was biased in favour of workers or that the law generally operated in their favour. My major point is that, in light of the chilly reception that workers received in the courts prior to 1886, the changes that rapidly followed the legis-

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89 There is strong evidence that employers did litigate strategically. Risk, supra note 1. See also Gersuny, supra note 151, chapter 4, for a study of the correspondence between manufacturers and their liability insurers re strategies. Litigious employees were likely to be discharged and often were blacklisted.

90 Two studies provide indirect evidence of the public's perception of the judiciary. James Weinstein, writing on the American experience, claims that workers preferred modification of common law defences to no-fault compensation schemes, and that it was the National Civic Federation, dominated by big business, which initiated compensation legislation. (Weinstein, The Corporate Ideal in the Liberal State 1900-1918 (1968) at 40-61.) This leads to an inference that labour did not perceive an anti-worker bias amongst the judiciary, but one should be cautious about drawing conclusions too quickly. First, Weinstein was pressing a thesis on conservative social change throughout his book. Second, he does not deal specifically with organized labour's preference in states that already had legislation similar to the Ontario Act. Third, labour may have been unhappy with the amount of compensation proposed, and preferred to take their chances in the courts, notwithstanding any judicial bias. Ontario workers may not have had as positive a perception of the judiciary as their U.S. counterparts:

In Ontario, however, the CMA (Canadian Manufacturers' Association) certainly did not initiate the agitation for compensation legislation. Labour initiated the agitation and ceaselessly campaigned for the passage of the Act. [Piva, supra note 1, at 55]. In a more recent study, Risk, while not challenging the assertion that business did not initiate the legislation, suggests that employers very quickly accepted the principle of no-fault compensation. He also identifies worker dissatisfaction with the courts as stemming from the delays and uncertainties inherent in a fault system, not from a perception of judicial bias. (Risk, supra note 1, at 459.)

91 A similar conclusion was reached with respect to the House of Lords' treatment of English workmen's compensation legislation. See Stevens, Law and Politics (1978) at 164-170.

92 Risk, supra note 1, has found that, if there was any bias, it was slightly pro-worker. While the post-1900 case law may provide support for this conclusion, the pre-1900 data, in my view, does not support such an inference for this period.
relative intervention were startling. In the final section of this paper I will attempt to develop some hypotheses about the relationship of the courts to social change that may explain this.

II. THEORIES ABOUT SOCIAL AND LEGAL CHANGE

It is against the preceding description of the development of the law of employers' liability in nineteenth century Ontario that I will test the adequacy of a number of theories that have been developed to explain the relationship between changes in the social, economic, political and economic environment, and changes in the common law during the industrial revolution. Although the proponents of some of these theories developed them in contexts other than employers' liability, and in jurisdictions other than Ontario, they have frequently articulated their theories as being of general application. By testing the predictions of these theories against developments in Ontario we can evaluate the broad validity of the theories and, as well, identify distinguishing characteristics of the legal system in Ontario in the nineteenth century.

The general structure of these theories can be divided on one major axis: the extent to which law is regarded as adoptive in the sense that it develops largely in response to social change broadly defined.\(^{193}\) At one end, reductionists tend to see law primarily as a reflection of social interests and, at the other extreme, autonomists assert that the law develops independently of economic, political and cultural developments external to the legal system. Between these two extremes, relative autonomists maintain that legal developments are distinct from, yet causally related in complex ways to external social and political forces. Generalizing about the conditions under which law develops autonomously and when it is likely to reflect social forces engages this group of scholars. Another group, who might be described as eclectics, suggest that the facts that influence judicial decision-making are so variable it is impossible to generalize about them.

\(^{193}\) The categories I use will, to a large extent, correspond with those developed by Gordon, *Historicism in Legal Scholarship* (1981), 90 Yale L. J. 1017. There is frequently a divergence between the theoretical programme articulated by a writer, and the actual exposition of the historical development of legal and social change. I have focused on the theory in order to test the fit between a theory and the data from Ontario. To the extent that the writer's own data does not fit his theory, there is internal inconsistency which should, but often does not, lead to refinement or at least more modest claims about the predictive and explanatory power of the theory.
A. Reductionists

1. Instrumental Reductionists

In their most extreme form, reductionist theories treat law as entirely reflective; they argue that law precisely mirrors external social and political forces and is not at all shaped by forces internal to the legal system which are substantially independent of external forces. Indeed, they deny the existence of internal, independent forces in the law. Lawrence Friedman, a leading proponent of this perspective, premised his book, *A History of American Law*, on this assumption. From such a perspective, the rate and contours of legal change can only be understood by examining changes in the balance of social, economic and political forces that exist outside the legal system itself.

Although reductionists agree that law is entirely adoptive, they disagree about the actual forces to which law responds. One group — instrumentalists — sees the judiciary as rule selectors consciously acting on behalf of some powerful group by selecting legal rules that will advance that group's interests. Instrumentalists, in turn, can be divided between those who think that power is held in society by a small elite and those who think it is widely shared.

Morton Horwitz has been the strongest advocate of an instrumentalist view of legal history based on the elite capture theory. In his *The Transformation of American Law*, he argues that an instrumentalist conception of the role of the judge emerged in the first half of the nineteenth century which "allowed judges to formulate legal doctrine with the self-conscious goal of bringing about social change." He argues further that the legal profession forged an alliance with entrepreneurs and merchants to advance their interests at the expense of weaker segments of society. The common law courts were deliberately selected as

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194 Friedman, in *A History of American Law* (1973) at 10, states:

This book treats American law . . . not as a kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but as a mirror of society. It takes nothing as historical accident, nothing as autonomous, everything as relative and molded by economy and society. This is the theme of every chapter and verse.

195 Thus Friedman argues that even when apparently archaic or maladaptive rules survive, they are in fact retained by the legal system because they suit the needs of some group that has kept its hands on the levers of power. *Id.* at 14.

Also, see Friedman and Ladinsky, *Social Change and the Law of Industrial Accidents* (1967), 67 Col. L. Rev. 50 at 72-77, where the concept of cultural lag in the legal process is attacked. The authors assert that what is more likely occurring during periods of "lag" is that new compromises are in the process of being negotiated. In fairness, it should be noted that Friedman does acknowledge that, in some cases, the facts do not fit the theory. Yet he believes that it is more illuminating to examine the problem from this perspective than from others. See Friedman, *supra* note 194, at 14.

196 Horwitz, *supra* note 80, at 30. The hypothesis is developed generally in Chapter I.
the instrument through which legal rules giving business enterprises substantial immunity from liability would be imposed in order to conceal what, in effect, amounted to a subsidy.\textsuperscript{197} Once substantive common law doctrine had been transformed to serve the interests of these groups, the courts adopted a posture of formalism so that the newly formulated rules would appear to be validated independently of the underlying policy choices.\textsuperscript{198}

To at least some extent the development of Ontario's employers' liability law fits the pattern predicted by Horwitz's theory. In the period from 1860-1886, Ontario courts were in a formalist phase that served the interests of capitalist entrepreneurs. The insistence of the courts that terms and conditions of employment were to be determined exclusively through the contract of employment undermined the customary bases on which many aspects of pre-capitalist labour relations were founded.\textsuperscript{199} Voluntary assumption of risk was the ultimate expression of freedom of contract in a capitalist labour market which "served to ratify those forms of inequality that the market system produced,"\textsuperscript{200} and to limit the liability of employers for injuries to their workers.

The failure of Ontario judges to depart from English law, both in its formulation and its strict application, on the basis that different local conditions prevailed, would be explained on the basis of the class affiliations and alliances of the judiciary. However, from Horwitz's perspective, the judicial response to legislative reform of the common law is aberrant. On the assumption that the creation of minimum safety standards and rights of action independent of the employment contract was contrary to the interests of employers,\textsuperscript{201} one would predict, using Horwitz's framework, that judges aligned with those interests would shift into an instrumentalist mode in order to obstruct (or at least

\textsuperscript{197} Id. at 101, 253. The subsidy hypothesis has been vigorously challenged. See Schwartz, \textit{Tort Law and the Economy in Nineteenth Century America: A Reinterpretation} (1981), 90 Yale L. J. 1717. For a critical review of both Horwitz, and Horwitz' critics, see Holt, \textit{Morton Horwitz and the Transformation of American Legal History} (1982), 23 Wm. & Mary L. Rev. 663.

\textsuperscript{198} Horwitz, supra note 80, at 258-59.

\textsuperscript{199} Hobsbawm, "Custom, Wages and Workload in Nineteenth Century Industry," in \textit{Labour Men} (1967) 405-435, where he argues that the first watershed of nineteenth century labour history was marked by workers learning to regard labour as an ordinary commodity. For a general history of the process of proletarianization in Canada, see Pentland, \textit{Labour and Capital in Canada 1650-1860} (1981) and Kealey, supra note 5.

\textsuperscript{200} Horwitz, supra note 80, at 210.

\textsuperscript{201} In the absence of studies of the politics of \textit{Factory Act} legislation in 19th century Ontario, we can only speculate about the positions taken by employers. In the U.S. it has been noted that the principal opposition to such legislation in the period prior to World War I was provided by employer organizations. See Nelson, \textit{Managers and Workers: Origins of the New Factory System in the United States}, 1880-1920 (1975) at 128.
limit) legislative change. The failure of the Ontario courts to respond in the predicted manner undermines this version of the instrumentalist-reductionist theory.

Historians who rely on a theory of judicial decision based on class alliance might explain the judicial treatment of the legislation by showing that the old alliance had broken down, and that the judges had forged new links with different factional or fractional interests within the capitalist class, or that the interests of the capitalist class had shifted, or that the judiciary had become more pluralistic in composition so that at least some judges were sympathetic to the interests of the working class. However, the difficulty with such explanations, aside from the lack of empirical evidence, is that if such a shift had occurred prior to the legislation, why was it not reflected in the judicial relaxation of the common law rules? Why were the courts formally applying the common law rules in all their rigour at one moment and, following their statutory modification, interpreting the extent of that modification in a liberal manner rather than exercising their discretion consistently against employees? If reform was in the interest of the judiciary's new class allies in 1886, why not in 1885?

Friedman takes a more pluralistic view of the distribution of power in society, seeing judges and the law responding to a broader range of interests. With respect to employer liability rules, for example, in an article he co-authored with Jack Ladinsky, he argued that felt social needs, not merely the interests of a particular class, motivated judges to select liability rules that denied recovery. By "charging the welfare cost of industrial accidents to the public generally, rather than to the particular enterprise involved" the courts were seeking to promote economic growth which they believed to be socially desirable, and not just the interests of an elite. However, a social consensus failed to crystallize around the common law employer liability rules and pressure for change mounted. Hard cases tempted judges and exceptions to the rules began to develop until the common law system became so complex and unwieldy that legislation was required to implement the emerging consensus around the workers' compensation solution.

Friedman's and Horwitz's respective views of instrumentalism may thus be distinguished by their analyses of the power structure of society, and the location of the judiciary within that structure, rather than their analyses of what judges do. In Horwitz's world there are fundamental social conflicts, but one fraction of society dominates others.

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202 Friedman and Ladinsky, supra note 195, at 56.
203 Id. at 59-72.
The elite Bar, from which judges were presumably drawn (at least in the first half of the nineteenth century), was aligned with that dominant group. In Friedman's world there are conflicts, but instead of domination there is bargaining and consensus between a variety of groups; both the judicial and legislative process are means through which consensus is achieved. The felt needs to which judges adapt the law were truly societal needs, not narrow class or fractional interests. Friedman does not rule out the possibility that at particular times judges may act on behalf of a particular segment of the power structure but, on the whole, he seems to view the judiciary as acting more neutrally as consensus seekers.204

In some respects Friedman's theoretical perspective seems more capable of accounting for the development of employers' liability law in Ontario than does Horwitz's. The ready acceptance of the statutory reforms might be characterized as an instance of the responsiveness of the courts to a new external consensus. However, Friedman's theory predicts that, in the face of a shifting consensus, the courts would, of their own initiative, reform the common law. The failure of Ontario's courts to do so is difficult to explain from Friedman's reductionist perspective. What is missing from the theory is an account of the judicial law-making process that would explain discrepancies in its output from that of the legislative process. If the existence of discrepancies between the common law and legislation is explained solely on the basis that one external group dominated the judiciary while another dominated the legislature, then one would expect judicial resistance to legislative change. The absence of such significant resistance in Ontario undermines the plausibility of this explanation, leaving the pattern observa-

204 It should be noted that, within the reductionist-instrumentalist group of scholars, there is also some disagreement about the rate of legal change to social change. Friedman and Ladinsky, consistent with their extreme reductionism, have attacked the view that the law lags behind changes in the external world, but argue that the rate of legal change reflects the balance of forces existing in the outside world. Id. at 73.

This view has been disputed by a recent study of the English law of employers' liability. See Smith, *Judges and the Lagging Law of Compensation for Personal Injury in the Nineteenth Century* (1981), 2 J. Leg. Hist. 258, who argues that 19th century English judges attempted to act as consensus formulators in response to generally felt social needs, but were bound to work within the case law method because of the principle of *stare decisis* which is, essentially, backwards looking. Thus they applied yesterday's consensus to current problems, resulting in a tendency for the law to lag behind contemporary requirements. In the Victorian era the lag was one of at least 20 years. From this perspective, the strict reductionism of Friedman is mediated by characteristics internal to the legal system. To understand the adaptive nature of judge-made law, not only must shifts in the outside world be studied, but account must be taken of the peculiarities of the transmission mechanism itself. Although such a view leads to a broader challenge to reductionism, Smith suggests that the only role internal factors play relate to timing, not content, of legal change. Thus he remains primarily within a reductionist-instrumentalist framework.
ble in Ontario unaccounted for by Friedman’s theory.206

In sum, the instrumental-reductionist theories of both Horwitz and Friedman do not adequately explain the development of the law of employers’ liability during this period. This does not deny that external forces significantly influence legal developments, but does suggest that those forces may be mediated in a more complex fashion than suggested by the theoretical perspectives of instrumental-reductionism.207

2. Non-Instrumental Reductionists

Another body of reductionist theorists agree that the law is largely shaped by external forces, but reject the view that this is because judges act instrumentally as rule selectors. Broadly speaking, these theorists may be grouped under the category of non-instrumental reductionists. They offer widely divergent views, however, of the external factors to which the law responds, and the transmission mechanism by which external events shape legal doctrine.

A recent version of this perspective developed from Posner’s attempt to demonstrate that common law rules are economically efficient, including the common law of employers’ liability.208 One difficulty encountered by this thesis was that it lacked an adequate explanation of why common law rules tended to be efficient. The phenomenon could have been explained instrumentally on the basis that common law judges preferred efficient rules to inefficient ones, but empirically it would be difficult to demonstrate that such a judicial preference was consistent over time and, even if true, that judges had the uncanny ability to identify the legal rules which would promote efficiency. Followers of Posner searched for a selection mechanism that was analogous to the principle of natural selection and found one by focusing on

206 Friedman is prepared to concede that not every case will be explained by his theory:
At any rate, the theory of this book is that law moves with its times and is eternally new.
From time to time, the theory may not fit the facts. But more light can be shed on legal history if one asks: Why does this survive? than if one assumes that law, unlike the rest of social life, is a museum of accidents and the mummified past.
[Supra note 194, at 14]. While this additional instance is certainly not devastating to the theory, to the extent a theory must regard facts as aberrational its explanatory power is weakened and, at some point, modification of the theory becomes necessary.


the impact of private decisions to litigate or settle disputes on the basis of precedent. Rubin and Priest independently argued in support of the view that, under certain conditions, private litigation-settlement decisions would lead to the survival of efficient precedents regardless of judicial preferences or their ability to select efficient rules. As conditions in the external world changed, rendering old rules less efficient, the pattern of private litigation-settlement decisions would also change and, as a result, a more efficient rule would be selected. This theory is reductionist since it sees the law responding to the criterion of economic efficiency which is determined by economic forces entirely exogenous to the legal system. At the same time it is not instrumental because it does not depend on conscious rule selection by the judiciary or, for that matter, any other group.

This theory, too, only partially succeeds in accounting for the development of Ontario's law of employers' liability. The proponents of these theories would view the selection of the common law employer liability rules as consistent with their predictions, either on the basis that employers had a strong interest in the production of favourable precedents while the individual worker did not, or on the basis that the rules were efficient and, therefore, less likely to be re-litigated regardless of the parties' long-term interests in the production of favourable precedent. However, the judicial response to the legislative modification of the common law rules presents some difficulties for these views too. Assuming that economic analysis would show that the legislation introduced less efficient rules than those of the common law, the evolutionary hypothesis would predict that, over time, the legislation would be interpreted in a manner minimizing its detrimental impact on allocative efficiency by, for example, preserving a stronger version of the voluntary assumption of risk defence. The failure of the

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209 Several studies have been published which cast doubt on the claim that these models of litigation decisions generate efficient rules. E.g., see Landes and Posner, Adjudication as a Private Good (1979), 8 J. Leg. Stud. 235 at 284; Priest, Selective Characteristics of Litigation (1980), 9 J. Leg. Stud. 399, 409-415.

210 Rubin, supra note 208, at 55-56.

211 Priest, supra note 208.

212 Posner himself argued that the legislatures expressed a preference for inefficient rules when they enacted safety legislation. See, supra note 207, at 73.

213 Priest explicitly argued that the tendency towards efficiency should operate with respect to legal interpretation of statutes and constitutions. Supra note 208, at 65. While arguments could be generated to explain why common law is more prone to judicial modification than is statute law, such arguments lead to implicit recognition of legal autonomy, at least with respect to a large area of the courts' work — the interpretation and application of legislation.
courts to do so poses a challenge to the explanatory powers of this evolutionary reductionist theory.

A second version of non-instrumental reductionism has developed from a Marxist perspective. Marx argued that the economic structure of society, consisting of the sum total of relations of production, provides "the real foundation, on which rise legal . . . superstructures and to which correspond definite forms of social consciousness." The "mode of production in material life" conditions the political, legal and intellectual life processes in general.  

Building from this insight, Gabel has argued that there is a unity of the legal and economic processes which goes much deeper than some instrumental connection: "Rather, the law is literally the effected voice of relations of production; it allows these relations to be seen." The structure of the relations of production generates organizing principles which govern both the way in which people behave and the way in which interpretative consciousness understands the world. Thus, the selection of a legal rule, such as voluntary assumption of risk, reflects the interpretative consciousness of the judge and, in turn, makes visible the structure of the relations of production of that society. This explanatory model is highly reductionist in its implicit denial of distinctive characteristics of judicial interpretative consciousness which might break the unity between the structural requirements of the relations of production and the development of common law doctrine.

Gabel's theory suffers from some of the same defects as Friedman's, since neither can adequately account for discrepancies between judicial and legislative output. Gabel would predict the absence of judicial resistance to legislative change on the basis that the interpretive consciousness of judges and legislators were simultaneously making visible a new structure of economic relations: monopoly capitalism. It does not explain the failure of the courts in Ontario to begin modification of the common law prior to 1886 and its complete dependence on legislative initiative. Why did the interpretive consciousness of legislators, not judges, first make the restructuring of economic relations visible?

B. Autonomists

At the other end of the continuum of theories concerning the degree to which law is adaptive to external social, economic and political forces, is the small, but persistent, group of scholars who maintain that

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215 Gabel, supra note 80, at 622.
changes in law can best be explained by forces internal to legal institutions, the primary one being legal ideas. The history of legal change, they argue, is the history of the shifting ideas of legal scholars and judges, not the history of changing social, economic and political conditions. It is not that these external changes are irrelevant to legal change, but that the impact of these external forces is so heavily mediated by the special characteristics of legal culture, traditions and institutions that they fade into the general background and are incapable of explaining legal change adequately. To paraphrase conversely the view of Friedman, autonomists would argue that patterns of legal change can be most clearly illuminated by focusing on the internal features of the judicial process and legal culture.

Roscoe Pound and G. E. White are two representatives of this tradition who have written on the development of tort law in the nineteenth century. Pound, responding to the efforts of the Realists to explain the development of nineteenth century tort law in terms of the class affiliations of judges, argued that the “taught tradition of logically interdependent precepts and of referring cases to principles” provided a basis for neutral adjudication. External developments are mediated through this taught tradition resulting in a slow evolution of the law. Further, the taught tradition is not the product of class interest, but “an ideal of adjustment of human relations and ordering of human conduct.” “It is experience developed by reason and reason checked and directed by experience.” Thus, for Pound, legal tradition is the embodiment of human reason in a Burkean sense.

A different version of autonomy theory was articulated by White who emphasizes the importance of legal theorists in the development of tort law, rather than the judicial elaboration of precedent in the light of contemporary experience. According to White, “the emergence of torts as a distinct branch of law owed as much to changes in jurisprudential thought as to the spread of industrialization.” White does not assert that legal theorists remain unaffected by contemporary events, but assigns to them the role that Pound assigned to common law judges: they mediate between external events and legal developments. Because the complexity of the mediation is so great, legal developments can best be explained by the impact of the legal theorists rather than the direct

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217 Id. at 368.
218 Id. at 367.
219 White, supra note 46, at 3.
impact of external events themselves.

The development of the case law in Ontario relating to employers' liability would not be troubling to an autonomist who might argue that, when the problem of injuries to employees first arose in the nineteenth century, courts tried to work out solutions that were consistent with trends in the slow evolution of the legal tradition favouring liability only where a defendant was personally culpable. After the legislature modified the common law, the courts sought to resolve the problems inherent in the new scheme in a manner consistent with both the words used in the legislation itself and the attempt by legal theorists to develop a general theory of tort liability in the common law. The problem is that almost any outcome can be explained by this approach. If the answer to the question of why one legal solution to a problem was chosen over another is “because that’s what seemed consistent with an evolving tradition at the time,” then at least two further questions spring to mind. First, to what extent could alternative legal solutions be accommodated within the tradition and, second, why was the tradition evolving in one direction rather than another? Experienced practitioners, employing conventional legal reasoning, can usually demonstrate that a variety of alternatives are consistent with the body of decided cases. Therefore, doctrinal consistency provides an insufficient explanation of the selection of legal rules. Further, autonomists do not explain the dynamics of changes occurring within the tradition. There is little attempt to explore the relationship between dominant legal modes of thought and broad social, economic or even cultural developments.

C. Eclectics and Relative Autonomists

If the development of legal doctrine cannot be explained exclusively as a reflection of external forces, or purely in terms of the internal characteristics of legal systems, one alternative strategy is to abandon the attempt to develop a strong theory of the dynamics of legal change. Instead, an eclectic approach might be adopted. The shape and rate of legal change can be described, as can the social, economic, political, intellectual and cultural background against which these

220 Oddly, in an essay that preceded the publication of his book, White appeared to recognize the need to do this. He acknowledged the importance of external factors, but rejected the reductionist theory because it under-emphasized the legal-intellectual context through which those external events were mediated. However, he added: “[w]e need to know much more about the origin of these patterns of thought, whose primary function seems to be that of shaping and limiting the interpretation of the changing source materials of the legal profession.” See White, The Intellectual Origins of Torts in America (1977), 86 Yale L. J. 671 at 693. The failure of his book to fulfill this task has been noted by Gordon, Review (1981), 94 Harv. L. Rev. 903.
Employers’ Liability changes occur. The causal relations that exist, if any, between these factors can be left open. This was the approach chosen by Atiyah in *The Rise and Fall of Freedom of Contract.*\(^2\) He brought together a wealth of information on the legal system, political trends, intellectual movements and economic developments in England between 1770 and 1970, but has not provided an underlying theory to explain how these different aspects of social life interact.\(^2\)

An alternative theory that responds to the failure of reductionism and autonomist theory to provide an adequate account of the dynamics of legal change is relative autonomy. This theory is built on the view that, although external forces significantly shape legal change, characteristics peculiar to legal institutions play a significant role in mediating those forces so that the pattern of legal development cannot be explained solely as a reflection of those forces. Relative autonomists may be distinguished from eclectics chiefly by their commitment to developing a theoretical framework to illuminate the causal links social and economic changes have with legal change. On the other hand, relative autonomy theory must also acknowledge its limitations. It cannot provide a basis from which strong predictions can be made on how elements in a complex social formation will interact at a particular historical juncture and produce a particular outcome. Although it can develop a logic of the relationship between legal and other phenomena, it recognizes that inherent in any complex social interaction there is a significant degree of contingency which must be acknowledged.

In the section that follows, I will elaborate upon the theory of the relative autonomy of the law, and demonstrate the contribution it can make to the study of legal change, by applying it to the development of Ontario’s law of employers’ liability in the nineteenth century.

III. RELATIVE AUTONOMY THEORY: ITS POSSIBILITIES AND LIMITS

A. Introduction

Marxist theory offers a promising point of departure for the development of the theory of the relative autonomy of the law because one of its central themes is the relationship between the economic base of society and its political, legal, cultural and ideological superstructure. While many Marxists have adopted a reductionist theory which treats

\(^{221}\) Atiyah, *supra* note 80.

the superstructure as entirely determined by and reflective of the society's economic base, a growing number of theorists have suggested that the relationship is more problematic and that superstructures develop, to varying degrees, relatively autonomously from the economic base. One attempt to develop models of determination that reflect this more complex view is that of Erik Olin Wright. His analysis is particularly useful, in that it emphasizes the relative contingency of historical developments and at the same time lays out an explicit logic of causal relations between elements of an historical process. I will build on that logic by setting out the structure of an argument that supports the relative autonomy of the law and, at the same time, identifies the forces which tend to expand or constrict that autonomy.

My efforts in this also draw heavily on the work of Mark Tushnet, who has developed a preliminary version of the theory of the relative autonomy of the law. In a series of articles beginning with a study of the American law of slavery, Tushnet has argued that although there is a material basis for both the form and ideological content of the law, they remain relatively autonomous in the sense that they are not "direct expressions of the interests, narrowly defined, of the bourgeoisie." The connection between class power and law is viewed as being "indirect and complex" and that law is "one form of the incomplete hegemony of the ruling class." While in earlier work Tushnet focused on Weber's theories about the link between capitalism and formally rational law, and the structure and ideology of the legal profession, to explain the relative autonomy of the law, more recently he

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222 Marx' own writings contain support for this position. E.g., see the commonly quoted passage from "A Contribution to the Critique of Political Economy" in Fever, ed., supra note 214.

224 One of the seminal articles raising this issue was Williams, "Base and Superstructure in Marxist Cultural Theory," reprinted in Dale et al., eds., Schooling and Capitalism (1976) at 202-210.

225 See Wright, Class, Crisis and the State (1978).

226 My views are also heavily influenced by Cohen, Karl Marx's Theory of History (1980) esp. Chapters VIII and X.


228 However, it appears that Tushnet has become somewhat less optimistic about the possibility that Marxist theory can illuminate the form and particularly the content of the law. See Tushnet, Review: Collings, Marxism and Law (1983), 68 Cornell L. Rev. 281.

229 Tushnet, A Marxist Analysis, supra note 206, at 96.


has developed an approach based on the Marxist theory of ideology.\textsuperscript{232} From this perspective, the relative autonomy of the law can be seen as a function of competing ways of understanding the world that are generated by the contradictions within the capitalist mode of production. Its relative autonomy also results from the contradictory role of the capitalist state which must facilitate the reproduction of capitalist relations of production and, at the same time, legitimate those relations. It performs this legitimating task by appealing to popular ideas of justice and ensuring that minimal levels of welfare are maintained.

B. Structural Limitation

The common law of employers’ liability developed during a period in which major changes were taking place in the economic organization of England, the United States and Canada. To generalize: the first half of the nineteenth century was a period in which capitalist relations of production were rapidly supplanting older forms of labour organization.\textsuperscript{233} The essence of the capitalist organization of production is that the owner of the means of production (the employer) purchases labour power from its owner (the employee) for a wage, on the understanding that the finished product is the property of the employer. For this kind of economic organization to exist on a widespread basis, legal principles supporting private property and freedom of contract must be recognized. More specifically, for a capitalist labour market to exist, the legal system must assign to individuals the ownership of their own labour power and recognize their freedom to sell it as a commodity that is distinct from its bearer. Without this minimal compatibility between the social organization of production and the legal system, a structural crisis would ensue, leading either to the failure of capitalism to develop or, more likely, to a transformation of the legal system itself.

A Marxist analysis goes beyond the stipulation of a minimal level of compatibility between elements in a social formation and attempts to clarify their causal relationships. Implicit in the base-superstructure metaphor is a claim of causal primacy of the base over the superstructure. The thesis is that the forces and relations of production (the base) are more fundamental than legal relations (superstructure) and therefore, in most cases, it is the economic base that imposes a structural

\textsuperscript{232} In particular, see Tushnet, \textit{Truth, Justice and the American Way}, \textit{id.} at 1346-1352.

\textsuperscript{233} For an overview of the development of capitalist production relationships in Canada, see Pentland, \textit{supra} note 199. For the U.S., see Gordon \textit{et al.}, \textit{supra} note 19, esp. Chapter 3. For England, see Thompson, \textit{The Making of the English Working Class} (1963).
limitation on the legal superstructure. As a result, the development of the law is not fully autonomous, but is constrained by the structural requirements of the base.

Within the boundaries of structural limitation, however, there is no necessity that there be an ideal fit between the content of the law and the social and economic organization of society. Thus, the range of structurally possible outcomes is greater than the subset of outcomes which would be optimal for the reproduction of capitalist social relations. For example, although capitalism could not exist, as we know it, without legal wage labour, there is no structural necessity that the law require all aspects of relations between owners and workers to be resolved through the employment contract. Capitalism has survived quite well with the presence of no-fault workers' compensation, employment standards legislation and wage controls. This suggests at least the structural possibility of a zone within which some autonomy in the judicial and political spheres is possible.

It has also been suggested that there is a structural relationship between the form of the law and the economic organization of society. Weber believed that one reason capitalism emerged in Europe was that European states developed a legal form characterized by a high level of logically formal rationality. This legal form was necessary to the development of capitalism because it provided the greatest possible degree of calculability in economic action. From a Marxist perspective it has also been argued that the commodity form and the legal form bear a close structural relationship, either in the sense that the former generates the latter, or that they are homologous. Again, one must be wary of formulations which suggest that there will necessarily be an ideal fit between a particular legal form and the economic organization of society. The case of England, so troubling to Weber, is a good example of this. Capitalism developed and flourished without either being preceded by, or subsequently developing, a legal order that attained the level of logically formal rationality that Weber observed on the Continent. Just as with the substantive content of the law, so, too, with its form, it is impossible to explain it fully by just pointing to the develop-

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234 Thus, in Wright's models of determination, supra note 225, structural limits only emanate from the economic base, never from the other elements of the social formation.


ment or logic of capitalism. The range of structurally possible forms will be greater than the subset of legal forms which are ideal for the development and reproduction of capitalist economic relations.

C. Functional Compatibility

So far I have argued that bases limit superstructures, but that there may not be an ideal fit between the two because some structurally possible legal outcomes will be less functionally compatible with the economic base than will others. Nevertheless it might be argued that selection mechanisms operate in such a way to assure that a high level of functional compatibility will be consistently maintained. For example, Horwitz might point to class alliances and Gabel might point to a theory of ideology to explain why some structurally possible alternatives are almost never selected. The argument I make in this section is that the functional compatibility between base and superstructure will, in a capitalist social formation, be extremely difficult to appraise because of the contradictory functions which legal systems play in supporting the base and because of contradictions within the base itself. Therefore, even if some structurally possible alternatives which clearly exhibit low levels of functional compatability are very unlikely ever to be selected, there still remains a range of alternatives which might be selected, but which are compatible with the base in different ways. Thus, even when we move from a structural to a functional analysis, we still preserve the basis for an argument in favour of the relative autonomy of the law. I argue, further, that it does make a difference in many cases which legal alternative is selected because that choice can influence the direction in which conflict is resolved.

This functional argument proceeds from the assumption that bases need superstructures and, in particular, that capitalist relations of production are both facilitated and legitimated by the sanctioning of private economic power that occurs when the legal system matches that power with a legal right. With respect to facilitation, I think the claim is relatively unproblematic. Assume as a fact that capitalists as a class had the economic power to compel the proletariat to work in unsafe conditions or face starvation. If that power is not sanctioned by a legal right, then the power may be impossible to exercise (as would be the case if exercise of the power was prohibited and the prohibition was enforced) or inefficiently exercised because of the absence of means for its realization in practice. In sanctioning the power of the capitalist class, by matching it with a legal right to employ workers in unsafe conditions on the basis that the worker “voluntarily” assumed the risk of injury, the common law courts facilitated the development and
perfection of capitalist relations of production. Terms and conditions of employment were to be set by the labour market, not by tradition.\textsuperscript{237} It has also been argued that the selection of the common law employer liability defences facilitated industrialization by restricting the liability of entrepreneurs so that the cost of their activities was socialized.\textsuperscript{238} As well, the formal dimensions of the law may also be said to perform a facilitative function. Rules that exhibit a high degree of logically formal rationality allow for a high level of predictability which facilitates rational, profit-maximizing economic behaviour.

A more problematic claim is that bases need to be legitimated by superstructures, and that one function of the law is to legitimate capitalist relations of production. The stability of those relations could be achieved through ruthless suppression of dissidents, unreflective obedience to orders or individual calculations of self-interest.\textsuperscript{239} The base can be, and frequently is, stabilized when people believe that, in general, the practices associated with that order are just and therefore deserving of obedience. The legal sanctioning of those practices can have the effect of fostering a 'belief in their justness.'

The first part of the argument consists of two claims: That the long term stability of a social system requires a reasonable level of congruence between normative world views and social practices (although, in the short run, it may be possible to maintain stability through force of habit where that congruence is lacking); secondly, the principle of social organization of capitalism, the separation of capital and wage labour, and the exchange of equivalents in the marketplace, is not self-legitimating since the dominance of its practices, by itself, does not entirely obliterate alternative normative conceptions of social relations and organization. Nor will it be in everyone's rational self-interest to support the dominance of capitalist social organization. Rather, the legitimacy of the practices of capitalism needs to be consciously defended and superstructural elements of the social formation developed to fulfill that need.

The second part of the argument requires a demonstration that the common law can perform a legitimating function. Again, my aim here is not to prove or disprove the claim, but to set out the structure of the argument. One line of argument suggests that common law decisions

\textsuperscript{237} Hobsbaum, supra note 199.
\textsuperscript{238} See Friedman and Ladinsky, supra note 195, at 56.
\textsuperscript{239} For a provocative attack on the use of legitimation see Hyde, The Concept of Legitimation in the Sociology of the Law (1983), Wisc. L. Rev. 379. Although I do not agree with the author's conclusions, I found his clarification of the uses of the concept extremely valuable. As well, his criticism forced me to reconsider some earlier views.
can legitimate social practices only to the extent that the legal institutions themselves are perceived as legitimate. The legitimacy of legal institutions can rest on both formal and substantive grounds. According to the formal hypothesis, modern legal institutions are legitimate when they decide cases through formal legal reasoning from a set of principles which are independently legitimate, either because they have been derived from an accepted legal tradition generated over time, or because they are selected through a democratic political process. Thus, the form of the derivation of the legal result, not its substantive content, determines its legitimacy. A second theory is that legal institutions are able to identify changes in a social consensus constructed outside the law and to select decision-rules which identify and express that consensus. To maintain its legitimacy, therefore, the law must choose and project a vision of justice which is held by significant elements of the population. Thus the law both constructs and legitimates that vision, but when it departs significantly from such views, it will fail to legitimate the practice and will lose its legitimating power.

To some extent the two theories can be linked — formal legitimation has its substantive limits and substantive legitimation has its formal limits. Formal legitimation will fail when the substantive principles, from which legal reasoning begins, are visible and subject to extensive criticism; substantive legitimation will be weakened if courts must continuously engage in instrumental reasoning to derive the desired outcome. At that point legal institutions cease to appear as neutral arbiters of disputes, but can be viewed as political institutions serving particular interests. According to this integrated view, although legal institutions may move back and forth between formalism and instrumentalism, they are unlikely to consistently adopt an extreme version of one mode or the other for a lengthy period, as their legitimacy depends on their ability to juggle demands for both formal and substantive justice.

On the assumption that legal institutions both facilitate and, in some way, legitimate, it may be argued that these functions are potentially contradictory, providing a further basis for supporting and developing the theory of relative autonomy. If, for instance, a question is raised in the common law courts respecting the legality of a certain activity, and that activity will promote the development or expansion of capitalist enterprise, then if the court sanctions the activity, it will facilitate that development. In that sense, the outcome can be termed
functionally compatible with capitalist social relations. On the other hand, judicial sanctioning may entirely fail to legitimate the activity, if the court must strain against the weight of legal tradition, or if there is no broad-based external consensus in favour of its sanctioning. Not only may legitimation of this particular activity fail, it may also undermine the general legitimating power of the courts if the common law becomes viewed as the coercive instrument of a powerful class rather than as an expression of shared values. Conversely, if the practice is not sanctioned, then the general legitimating power of the legal sanctioning may be enhanced, but the law may impede the conduct of capitalist production in that instance.

This analysis suggests that, even if selection mechanisms operate to maintain a high level of functional compatibility between the law and the capitalist social formation, the legal outcome would still be indeterminate as there is a range of outcomes more or less equally compatible with a base containing within itself its own contradictions. Internal contradictions in the system of production generate conflicting world views and demands, and a class struggle pushes those demands into the public arena. Ironically, the incomplete dominance or hegemony of the ideas of the capitalist class, which creates the need for legitimation, also imposes substantive limitations on what can be legitimated. In turn, this generates the potential for contradictions to exist between the need for facilitation and legitimation, since some practices which would facilitate cannot be legitimated even if legally sanctioned. Further, it suggests that it makes a difference whether the law facilitates or legitimates, because legitimation may require concessions to deviant world views:

A reform essential to capital's survival can also qualify as a 'victory of the political economy of labour over the political economy of property'. There is victory when capitalism is able to sustain itself only under the modification the reform imposes on it. [Footnotes omitted]

However, it will rarely be clear at the outset whether the long term interests of capitalism will be better served by reform or resistance. If this is the case, then we cannot derive the specific content or form of the law either from the analysis of structural limitation or functional

\[240\] The number of instances in which a decision will have such clear cut impact is likely to be smaller than is frequently imagined. See Epstein, The Social Consequences of Common Law Rules (1982), 95 Harv. L. Rev. 1717, who has argued that in many situations the selection of common law rules will have an insignificant or uncertain impact on allocative efficiency or wealth distribution. In such situations one set of external factors influencing the selection of rules will be removed, thereby expanding the autonomy of the law from those economic constraints. However, Epstein concedes that employer liability rules did have significant economic effects.

\[241\] Cohen, supra note 226, at 295-296.
compatibility.

In sum, the thrust of this argument is that, from a Marxist perspective, it is impossible to treat legal development either as a simple reflection of more fundamental forces, or as something that takes place independently of those forces. Neither does this argument lead to an eclectic approach to history, as it also outlines a logic of causation between legal and other elements in a social formation. It remains now to apply this analysis to the development of Ontario's law of employers' liability, and to examine how specific selection mechanisms operated at a particular historical juncture to produce a particular outcome.

IV. EMPLOYER LIABILITY LAW IN ONTARIO RECONSIDERED

By the mid-nineteenth century, capitalist relations of production were expanding in Ontario. Wage labour was dominant and employers as a class, having the economic power to hire labourers as a class to work in unsafe conditions, did so. This fact presented itself to the courts in the context of workers' claims that there should be no right to employ persons in such conditions without a concomitant duty to pay ex post compensation in the event that a worker was injured as a result of an unsafe condition. By the time the issue reached the Ontario courts, English and American courts had already chosen to sanction that power by matching it with a legal right. There was no structural necessity for them to do so since capitalist relations of production could still have developed even if the law of employers' liability had evolved in a manner more favourable to injured workers. However, it can be argued that the rules the courts selected did facilitate the development of a capitalist labour market and encouraged industrial enterprise. In that sense it can be said that the law attained a high level of functional compatibility with the capitalist social formation emerging at the time.

While I have not studied the process of judicial selection in England and the United States, there is strong evidence that leading judges, responsible for seminal decisions in the area (such as Shaw and Bramwell), were unabashedly ideological and openly instrumental in fashioning the law to fit their laissez-faire convictions. Although many other judges were more reticent in expressing their views and manipulating the law accordingly, the widespread acceptance of the newly developed law of employers' liability is evidence of the initial general ju-

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242 For an excellent discussion of the language of matching of powers and rights, see Cohen, id. 216-248.
dicial support for its principles. Why those views predominated on the
bench requires further research, but recruitment patterns, class back-
grounds and professional associations of the judiciary would be useful
starting points. Further, the cases that arose were often ones of first
instance and, although the employer liability rules were not dictated by
existing common law precedents, those precedents did not impose a se-
rious impediment requiring tortured manipulations to justify their
selection.

In Ontario, the courts adopted English employer liability law be-
cause they considered themselves constitutionally bound to do so. Fur-
ther research is required to determine whether, in other areas of the
common law during this period, Ontario courts behaved differently
with respect to English precedents. However, because of the rigour with
which they applied the law in this area, it seems fair to conclude that
their personal views were not in conflict with the dictates of their role.
Again, it would be interesting to study such factors as recruitment pat-
terns to explain why such attitudes were prevalent amongst the
judiciary.

Although the common law sanctioned the economic power of em-
ployers to have workers employed in unsafe conditions, it failed to per-
suade many groups and individuals of its legitimacy. A strong source of
evidence for this conclusion is the propensity of juries to find employers
liable whenever cases were left to them. Further evidence is the fact
that legislative intervention quickly imposed statutory limits to the ex-
ercise of judicially sanctioned powers. Employer liability rules could
not be defended on the grounds that they were logically dictated by the
legal tradition, because competing precepts were available, such as re-
spondeat superior, drawn from a very different conception of human
relations than that of laissez-faire capitalism. Assuming that such con-
ceptions had not been eradicated from the popular mind, and that no
external consensus crystallized around the solution selected by the
court, their power to legitimize the practice was weak. In the absence
of strong traditional support or a new external consensus, the common
law may appear to have little effect other than that of reinforcing eco-
nomic power by legal coercion. Again, further research is needed on
the question of the popular and, especially, the working class percep-
tion of the common law courts in general, as well as to specific develop-
ments in employer liability law. In addition, it would be fruitful to
study the impact of the selection of the common law liability rules on
the working class. Is there any evidence of bargaining over health and
safety issues including demands for wage premiums or contractual
rights to compensation? To what extent did workers self-insure through
their own organizations? Did workers’ organizations seek law reform by supporting litigation? To what extent was legislative change in this area emphasized in workers’ political action?

Assuming that judicial sanctioning failed to legitimate the practice of hiring people to work in unsafe conditions without a concomitant obligation to pay compensation in the event of injury, an interesting question arises as to why courts in different jurisdictions responded in such different ways. The English and Ontario courts refused to ameliorate the harsh consequences of the common law by modifying it, while courts in many American jurisdictions did. As to the differences between England and those American jurisdictions which did judicially modify employers liability, there are a number of factors which also require further research. First, there may have been differences in the acceptability of openly instrumental or consensus-seeking behaviour by the judiciary. The legitimacy of judicial decisions in England may have rested more strongly on formal appeals to an historical legal tradition whereas in the United States the legitimacy of judicial decisions may have been judged to a greater extent according to the courts’ responsiveness to shifting social and political pressures. A second factor to be examined is possible differences in recruitment patterns. Was the social composition of the American bench more diverse? Did election of judges in some American jurisdictions encourage greater responsiveness to popular political demands? Thirdly, patterns of litigation may have been affected by contingent fees or the availability of other resources which might assist plaintiffs in bringing their claim before the courts. This leads to a fourth factor: the response of those who were adversely affected by the initial selection of common law rules. The strength of that reaction and the forms it takes may also affect the way the court responds when faced with a contradiction between facilitation and legitimation.

With respect to the Ontario cases, at least one specific factor helps to explain its failure to modify the common law, or even to apply it in a more relaxed way to avoid the harshest results. The rules formulated in England were simply accepted and applied without adaptation to local conditions. This pattern of passive reception typified the Ontario courts in the mid-nineteenth century. To the extent that the judiciary favoured these rules, there was no need to depart from a formal role in order to adopt them. A colonial mentality, placing responsibility for developing the content of the law with the English courts, reinforced

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adherence to a formal model of the judicial role. The lack of legitimacy achieved by legal sanctioning, and even personal discomfort with the outcome of cases, raised a problem which was perceived as being outside the legal powers of the courts to resolve. So long as English courts did not modify the law, it was unlikely that Ontario courts would.

Finally, there is the problem of explaining the response of the Ontario courts to local legislation modifying the common law rules. Part of the answer has already been given. Legal sanctioning of economic power failed to legitimate its exercise and the common law appeared to many to be operating coercively in denying compensation. To those Ontario judges who felt discomfort with this situation, the legislation would have come as a relief. Responsibility for the development of public policy in this contentious area was clearly removed from the court, leaving the less controversial task of case by case dispute resolution. Moreover, the law itself gave them discretion to arrive at the result they thought reasonable in the circumstances of each case and, to the extent that the judiciary’s behaviour is explained by passive acceptance of English precedent, the same attitude would make their transition to a substituted set of legislatively imposed rules all the easier.

Conversely, the appearance of modifying legislation would undoubtedly generate tension in a judge who actively endorsed the common law position, but who was committed to a formal definition of the judicial role as one of applying valid laws. There were small acts of resistance to the legislation, but on the whole it was interpreted and applied in a fair, even liberal, manner. Aside from pointing to the strength of formal attitudes, the modifications themselves should be reviewed. First, the limitations placed on the economic power of employers were rather small when placed in perspective. The imposition of minimal standards and expansion of the right to compensation in the event of injury did not challenge the institution of wage labour and therefore did not strain the limits of structural compatibility. Although the legislation may have imposed additional costs, it is unlikely that they were substantial, and the impact of the development of employer liability insurance may also have had an impact worth further research.244

Secondly, the legal regime which replaced the contractual bar of deemed voluntary assumption of risk was founded on the notion of fault. In that regard, the law of employers’ liability was being brought

244 The study of Gersuny, supra note 151, is pioneering in this regard.
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into line with the more general notions of tort then emerging. This scheme hardly presented a challenge to the liberal project of reconciling conflicts arising between individuals exercising broad, legally sanctioned powers. Courts were put in the position of adjudicating individual claims on the basis of standards of reasonableness, reflected in the language of the Factories Act. Only the most committed laissez-faire ideologue would strongly resist this change, and most of Ontario's judges did not fit this description. Further, because determinations of reasonableness are not amenable to being tightly constrained by principles, judges were left with substantial discretion to "do justice" in each case according to their own values. To the extent that there was resistance to the expansion of employer liability, it was more easily and safely expressed at the level of the individual claim than through statutory interpretation. To test the hypothesis that judicial response to the legislation depended on the degree to which it was reconcilable with the premises of the common law, it would be useful to examine the response of the courts to legislation respecting collective worker activity, which was far more threatening than factory act or compensation legislation. An examination of the behaviour of individual judges at the trial and appeal levels might reveal the extent to which judges expressed their own preferences in individual claims.

V. CONCLUSION

In reviewing the reported case law on employers' liability in Ontario between 1860 and 1900, the seemingly frictionless transition of the courts from the common law rules to legislative ones is extremely noteworthy. The data did not fit, nor seem to be explained by historiographic approaches premised either on the view that the law was a reflection of external forces, or that it operated autonomously of them. The alternative, relative autonomy, seemed attractive, but the concept needed a more careful articulation if it was to provide a useful guide for further historical research.

I have tried to show that there were structural limits on the content and form of the law, but that these limits were broad enough to accommodate a wide range of specific outcomes without triggering a crisis. I then moved to a less abstract level of analysis, that of functional compatibility, to show that, although it is useful to analyze judicial outcomes in terms of their facilitative and legitimating effects, contradictions between these two functions lead to the conclusion that a variety of outcomes can be viewed to be more or less equally compatible, albeit in different ways, with an economic base which itself contains contradictory forces. Thus, again, at this lower level of analysis,
we have found a basis for the autonomy of the law while still recognizing important external factors that limit it. On moving to the analysis of judicial decision at the most concrete level, what emerges is a paradoxical sense of their contingency. That is, numerous chains of causation came together at an historical moment to determine a specific result, but the number of determinants is so great that the outcome cannot be explained by a few principles operating at a high level of abstraction. The failure to recognize this leads to the danger that fruitful areas of inquiry will be foreclosed prematurely.

See Jessop, The Capitalist State (1982) at 212-13. He states what he considers a proper goal for critical state theory:

Instead it attempts to explain the 'contingent necessity' of specific conjunctures and their outcomes in terms of their various determinants. The concept of 'contingent necessity' with its apparent *contradictio in adjecto* highlights the fact that, while the combination or interaction of different causal chains produces a determinate outcome (necessity), there is no single theory that can predict or determine the manner in which such causal chains converge and/or interact (contingency).

Such an approach excludes all pretence to the construction of a general theory and aims at producing the theoretical tools with which particular conjunctures can be examined.