THE INCIDENCE OF SAFETY REGULATION ON COVID-19 COMPENSATION CLAIMS

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1. INTRODUCTION

The Employees' Compensation Act, 1923, (Act), is the first piece of social security legislation towards providing for speedier, simpler, cheaper and efficient machinery for the determination and payment of compensation to the workmen.[2] The Act is modelled on the premise of a no-fault liability principle, and a liability for payment of compensation under the Act does not accrue due to any fault or wrong doing on the part of an employer.[3] Rather, the compensation is contingent on an employee (victim) showing that an injury arose out of and in course of the employment[4] or in certain occupational diseases there exists a rebuttable presumption that the injury arose out of and in course of the employment.[5]

Nearing a decade since its enactment, the provisions of the Act has been subject to a liberal interpretation by virtue of the courts taking a pro victim stance. A testimony to this fact is the notional extension accorded to an employer's premises, which now includes even an area beyond the boundaries of a traditional workspace.[6] An onslaught of COVID-19 compensation claims under the Employee's Compensation Act, would pose yet another challenge before the adjudicatory bodies in determining whether to allow compensation claims under the Act, and if to allow, how to determine liability, given the intervening uncertainty. By affording a similar liberation interpretation to the expression "arising out of and in course of employment" in COVID-related compensation claims, the adjudicatory bodies can entertain such claims, but determining the liability calls for a further enquiry into the question.

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[2] P.L. MALIK, P.L. MALIK'S HANDBOOK OF LABOUR AND INDUSTRIAL LAW | EMPLOYEES' COMPENSATION ACT 4-5 (2011). [hereinafter Malik]
[3] National Insurance Co. Ltd. v. Rahmath, (2012) 3 LW 371 (India).
[4] The Employees' Compensation Act, § 3, No. 8, Acts of Parliament, 1923 (India).
[5] The Employees' Compensation Act, § 3(2), No. 8, Acts of Parliament, 1923 (India).
[6] Malik, *supra* note 1.

In the context of the present pandemic, while certain workspaces may have shifted to online safe-havens, the nature of several businesses does not allow them to operate remotely. Depending on the nature of the work and the prevailing circumstances, the workers employed in these activities may be at a greater risk of contracting COVID than the general public. These activities vary in the degree of risk of exposure to COVID-19. As we move from low-risk to high-risk activities, the onus of establishing a causal connection on the victim (employee) transforms into a rebuttable presumption of causation by the injurer (employer), respectively. The issue becomes pertinent if we introspect the difficulties associated with establishing or denying the causal link of an injury such as COVID-19. The delayed onset of symptoms or lack thereof, multiple potential sources of causation, the lack of technological accessibility to trace COVID, and a general knowledge deficit in the academic sphere pertaining to a novel-coronavirus are few of the variables, which make it increasingly difficult for either of the parties, to show that the injury arose out of employment or to rebut in cases where a presumption over causation exists. The next section of the paper discusses how these problems differ in cases where (a) there exists a rebuttable presumption over causation and (b)when there is no presumption over causation, and aims to resolve it by integrating safety regulations within the liability rule.

The third section of the paper takes an economic approach to redress the externalities which arise in a compensation claim under the Act. The approach is an extension of a liability model as professed by Prof. Steven Shavell in his paper.[7] It considers two determinants i.e. *uncertainty over suit* and *differential knowledge of parties* in order to arrive at an optimal redressal model. These determinants favor a safety regulation and a liability rule, respectively. However, given the inherent externalities which exist in a COVID-19 compensation claim, the model is balanced against these externalities.

2. CAUSATION UNDER THE EMPLOYEES' COMPENSATION ACT, 1923

Under the Act, a victim claiming for worker's compensation has to establish her claim on three grounds , i.e. first, an injury has been sustained; second, that the injury has been inflicted as a result of employment; and third and the most essential element being that the injury arose out

[7] Steven Shavell, *Liability for harm versus regulation of safety*, 13(2) THE JOURNAL OF LEGAL STUDIES 357-374 (1984).

of and in course of employment.[8] For the purposes of this paper, the third element is broadly referred to as causation. The word "injury" under the Employees' Compensation Act, 1923, is of a wide connotation and includes a disease as well.[9] When a disease is contracted as the result of a virus, the circumstances create a physiological condition which in the medical parlance can be described as a disease, i.e. the consequential result of an injury, namely the travelling of bacillus.[10] The requirement of causation serves the purpose of tying the injury to the workplace. The conjunctive phrases 'arising out of' and 'in course of employment' signify that there should be some connection between the employment and the injury, and that the injury must be caused during the currency of the employment.[11]

In COVID-related workers' compensation claims, the standard (arising out of and in course of) would be difficult to satisfy. The delayed manifestation of the disease alongside the existence of multiple potential causes of contracting the virus, makes it difficult for the victim to establish this causal connection. Therefore, to avoid such an uncertainty over causation, the Act advocates for a rebuttable presumption over causation in cases where the employment carries a risk of contamination.[12] A rebuttable presumption for occupational diseases nullifies the requirement of establishing that the injury arose out of employment, but affords an opportunity to the employer to rebut that the injury in-fact did not arise out of the employment.

While, this may be a perfect solution to bypass the requirement of a causal connection for infectious diseases, it however, generates another set of externalities, i.e. the employer's inability to rebut the presumption in the absence of a pre-determined standard, hence, a looming uncertainty over the liability of employer. On the other hand, the Act does not afford the same presumption to victims not engaged in activities which have an inherent risk of contamination. However, they can still harp upon the broad contours of establishing an "injury" under the Act, on the condition precedent that requires them to prove the injury arose out of and in course of the employment. However, the uncertainty over causation results in an unreasonably high burden on the employer to establish this causal connection, and as a result, an employer might

[8] *supra* note 3; Municipal Corporation of Greater Mumbai v. Sulochanabai Sadashiv Joil, (1978) ACJ 208 (Bom) (India).
[9] General Manager, Western Coal fields v. Kalasia Bai, (1988) 56 FLR 455 (MP) (India).
[10] Mariambai v. Mackinnon Mackenzie & Co., (1967) 1 LLJ 610 (India).
[11] Mackinnon Mackenzie & Co.(P) Ltd. v. Ibrahim Mohd. Issak, (1969) 2 SCC 607 (India).
[12] *supra* note 4.

escape liability or would have very less incentives to take care. The following sections analyze this problem in greater detail.

2.1 When there exists a rebuttable presumption over causation

Section 3(2) of the Employees' Compensation Act, 1923,[13] provides that if any employee specified in Part A of Schedule III of the Act contracts a disease therein, the disease shall be treated as an occupational disease, and he shall be entitled to avail the benefit of a presumption that the disease arose out of and in course of employment, 'unless proven otherwise' by the employer. Schedule III not only mentions that all health or laboratory related work is to be treated as an occupational disease, but, it also includes any other work which carries a particular risk of contamination. The phrase 'unless proven otherwise' allows the employer to draw up a rebuttable presumption that the injury did not arise from the employment.

The existence of such a rebuttable presumption preserves the idea of restricting an employer's liability, however, this notion gets blurred due to the problems which stem from the uncertain nature of COVID-19 claims. While, there is no onus on the employee to establish a causal connection in this case, the presumption of causation amidst an employer's difficulty to rebut may have undesirable consequences. Thus, there is uncertainty as to whether the court would hold the injurer to be liable. The standard of rebuttal cannot be uniform in all cases, as some activities pose a threat greater than that of its counterpart. For example, a laboratory worker and a worker at a healthcare facility would not be exposed to the same amount of risk. Similarly, the degree of precaution on the part of an employer would also vary, to successfully rebut the presumption over causation. The question as to what level of precautions shall enable an employer to rebut, leaves her liability unrestricted, until an *ex ante* determination is made by a court. Even the courts cannot be presumed to possess a greater knowledge of the risk in COVID-19 cases, thereby a risk of erroneous judgment can set a bad precedence for future cases. In such situations, the employer might take excessive care, minimal care, or no care at all. Therefore, a safe-harboring provision can optimally restrict the employer's scope of liability.

[13] *Id.*

A safe-harboring provision in the form of safety regulations over and above a liability to compensate can considerably resolve this issue, as it can function as a standard against which the employer can rebut the presumption as well as incentivize an employer to take precautions. This would also rule out any possibility of willful misconduct on the part of the employer. The economic model discussed in the latter sections of the paper translates these externalities into *differential knowledge of parties* and *uncertainty over suit* in order to ensure that social welfare aspect of a 1923 Act is preserved.

2.2 When there is no presumption over causation

Claims of personal injury which are not treated as occupational diseases under the Act, can be brought in the form of an "injury arising out of and in course of employment".[14] In such cases, the victim has to show a causal link that an injury in the nature of COVID arose at workplace, however, the traditional notions of causation such as cause-in-fact and proximate cause test[15] makes the task increasingly difficult for the victim as well as the courts. For an employee to say that "but-for the employee engaged in his duty, the injury would not have arisen" cannot be substantiated by way of evidence.

An injury in the nature of COVID involves a risk to which all the members of public are exposed. Therefore, the statute does not contemplate about compensating the victim for diseases which constitute a risk to the general public, and the liability of the employer has been reasonably excluded in such cases.[16] This exclusion from liability, however, does not extend to cases when there is a greater peril at play, notwithstanding the fact other members outside the work may be equally exposed to the disease. Thus, in such cases, it might not be sufficient for the employee to simply say that had he not been in the employment, the injury would not have arisen. He must go further and be in a position to say "the accident arose because of something I was doing in the course of my employment or because I was exposed by the nature

[14] *supra* note 3.
[15] Omri Ben-Shahar, *Encyclopedia of Law & Economics – 3300 Causation And Forseeability*, Tel Aviv University (1997).
[16] Ravuri Kottayya v. Dassari Nagavardhanamma, AIR 1962 AP 42 (India).

of my employment to some peculiar danger."[17] Clearly, when this added peril can be attributed to the conduct of an employee, the employer is relieved of any liability, and vice-versa.[18]

Lord Parkar's observation in Dennis v. A.J. White & Co., comprehends a similar situation comprising of a risk that is common to all but not incidental to employment. He states that when the risks are so general that an inference cannot be drawn without further evidence, it would be necessary to establish the causal relationship implied in the expression 'injury by accident arising out of the employment' by positive evidence, such as, by proving that the circumstances of the employment exposed the employee to a greater risk than that run by persons not so employed under the same conditions, or in other words, establish that the prevailing circumstances created a special exposure to risk.[19] Therefore, the expression 'arising out of employment' can be substituted by a special exposure at the workplace.

Hence, for COVID-related claims in low-risk cases, a victim, to begin with, cannot reasonably claim that the injury would not have arisen had he not been in his employment. Further, in the absence of any standard to gauge the conditions of employment constituting a special exposure, an otherwise genuine case may go uncompensated. This makes it difficult to establish a special exposure that arose at the workplace, in order to satisfy the requirement of a causal connection under the Act. This uncertainty, thus, results in an increased burden of employee and reduced burden of employer. In such circumstances, uncertainty over liability creates no incentives for the employer to take precaution. There may also be cases where the circumstances are extremely remote and the employer should also be enabled to contradict a compensation claim in such cases.

Therefore, the incidence of safety regulations in the existing compensatory model can serve as a standard for an employee claiming that the workplace exposed her to a risk of special exposure. The role of safety regulations in such cases can thus, help the employee to satisfy the need of a causal connection, as well as allow an employer to rebut his position that the injury need not necessarily arise at the workplace.

3. THE ECONOMIC MODEL

[17] *Id.*
[18] *Id.*
[19] Dennis v. A.J. White and Company, [1917] UKHL 517 (United Kingdom).

Adopting an *ex post* liability rule to compensate under the Employees' Compensation Act, 1923, poses several inefficiencies, as observed in the previous sections. Uncertainty over causation creates an uncertainty over the court's decision in finding an injurer to be liable. In an *ex post* situation, assuming that the courts adopt a retrospective causal enquiry to determine the liability of parties, it would be illogical to determine "but-for the common touch surfaces being sanitized *n* times", the risk of harm would not have arisen. This attribution or causal connection will be impossible to satisfy or deny when the onus of proof is on the employee and an onus of rebuttal on the employer, respectively. Further, the risk of harm that a victim otherwise faces from natural sources can also make it unattractive for her to litigate. The uncertainty, ultimately leads to a dilution of incentives to reduce risk, otherwise created by liability when determination is certain.

On the contrary, adopting an isolated *ex ante* regulation model to counter the uncertainties generated out of litigation would not result in the desired effect. Assuming that the regulator possesses a superior information than private parties for regulating COVID-related safety, the challenges in the enforcement of safety regulation makes the information imperfect. This is due to the reason that the private parties would be better assessors of the risk and they would conform with safety regulations only when socially desirable. Further, the regulator cannot comprehend a communicate every aspect of the risk that may arise when the private parties engage in their respective activities. Therefore, the businesses will always run a risk of over-regulation or under-regulation in order to ensure deterrence.

From the discussion, it follows that the first factor to determine the social desirability of adopting safety regulation or a liability rule is *uncertainty over suit.*[20] The second determinant can be termed as *differential knowledge between parties and regulator.* Uncertainty over suit favors safety regulation to overcome the challenges that an *ex post* liability rule might pose. However, as observed, the shortcomings of regulating when the regulator has superior but imperfect information, poses yet another challenge. Similarly, when there is a differential knowledge between the parties and regulator, a liability rule would be preferred. In an *ex post*

[20] *See* Shavell, *supra* note 6 at 363, (describes it as parties escaping suit but we assume that the parties will not always escape suit but be held over liable in certain cases).

situation, the courts and parties would be better assessors of the risk of harm that an activity generated, but, the shortcomings of an uncertainty over suit, as observed in the liability rule, poses a major hurdle.

To address this conundrum, liability rules and safety regulation should not be seen as mutually exclusive solutions to the existing problem. It cannot be said that safety regulation can be relied upon where a liability rule fails. The disadvantages of exclusively relying on a liability rule or safety regulation would not adequately deter risks and generate social welfare. Therefore, a joint use of liability and safety regulations to remove each other's deficiencies would be a complete solution to the problem of controlling risk. The deficiencies of safety regulation, that is the inferior knowledge of regulator to specific cases and administrative costs, and the deficiency of litigating that is uncertainty can be addressed by the joint use of both safety regulation and a liability rule. In such a situation, *ex ante* safety regulation as a standard of causation absorbs the inefficiencies arising during litigation and the provision for an *ex post* liability nullifies the administrative costs of safety regulation and covers up for the imperfect knowledge of regulator. Therefore, it would be desirable that the regulations were set at a *sub-optimal*[21] level and not be as rigorous as if it were the only means of controlling liability.

The model assumes that the parties would not always be absolved of an *ex post* liability to compensate when their precautions are in conformity with safety regulation. If the parties were to be absolved of their liability, they would not be incentivized to do more than to meet the regulatory requirement.[22] Given the inferior knowledge of regulator, there may exist certain businesses which pose a greater peril than those in the same category. Similarly, non-conformity with safety regulations shall not always result in a liability to compensate. There may be certain businesses which pose a lower-than-usual risk of harm, or businesses which face a higher than usual cost of precautions, that requiring them to conform to safety regulations might lead to wasteful precautions. In such cases they should be allowed to escape liability, as this model does not assumes the possibility of neutralizing in each case. Assuming that safety regulations are enforced by using state powers and not through monetary penalties, conformity with safety regulations would be socially desirable only when reduction in expected losses in the form of liability costs would be greater than the cost of regulation.

[21] Thomas S. Ulen, Gary V. Johnson, *Ex-post liability for harm vs. ex ante safety regulation: substitutes or complements?",* The American Eco. Rev. 888-901 (1990); *See also* Shavell, *supra* note 6.
[22] Shavell, *supra* note 6 at 365.

3.1 Optimizing scope of liability where a rebuttable presumption exists

The cases where a rebuttable presumption is afforded to the injurer (employer) are cases where COVID-19 would be presumed to be an occupational disease arising out of and in course of employment. This would involve situations including but not limited to high risk work environments involving exposure to known or suspected cases of COVID in healthcare settings.[23] These are the cases where the inherent nature of workplace is at a high risk of contamination. Depending on the nature of work, the employer can adequately ascertain the degree of precautions that need to be taken in accordance with the *sub-optimal* safety regulation.

Let us assume that the regulator sets the *sub-optimal* safety regulation at a threshold, which would be socially desirable for 'some high risk activities' based on its knowledge, meaning that reduction in expected losses by complying with safety regulation would be greater than the cost of care in certain cases. Private parties, based on their personal information where they pose a greater than usual risk, might set this threshold at a higher level due to an additional liability rule. Thus, it would not be efficient to restrict the *ex post* liability simply where the employer conforms to the *sub-optimal* regulatory standard, as the information of regulator is not based on perfect knowledge of parties. If liability is to be restricted when an injurer complies with safety regulation, then businesses which pose a greater risk would escape liability by taking precautions only till the extent of the regulatory requirement.[24]

An additional liability to compensate under the Employees' Compensation Act, 1923 would incentivize employers to take beneficial precautions where they pose a greater-than-usual exposure of risk. However, the exercise of precautions above the safety regulation by private parties would also be socially desirable only when the reduction in expected losses is greater than the cost of care for those businesses which pose a greater than usual risk. When a claim is brought against an injurer (employer) by a victim (employee) when there is a presumption rebuttal, the beneficial precautions above the safety regulation can be used to successfully rebut

[23] Guidance on Preparing Workplaces for COVID-19, OSHA (No.3990-03, 2020) (US).
[24] Shavell, *supra* note 6 at 365.

the presumption *ex post* that the injury did not arise out of and in course of employment. But there would also be certain parties, which face a higher than usual cost of care above the *sub-optimal* safety regulation. In these cases, the risk of liability would not incentivize the injurer to take additional precautions. Therefore, in such cases a rebuttal shall succeed only when the injurer can sufficiently establish that precautions above the safety regulation would not have been socially desirable. An incidence of safety regulation in such cases cannot completely neutralize the risk of threat, but it can substantially reduce the probability of causation. In all other situations where the injurer does not take precautions equivalent to the safety regulation, the rebuttal would fail to succeed and the victim shall be entitled to compensation.

3.2 Establishing Special Exposure in all other cases

As noted in the previous section, the requisite standard for proving that the injury arose out of and in course of employment for low-risk cases is satisfied by introducing the concept of special exposure. The level of safety regulations followed can be used to determine whether the exposure at the workplace constituted to be special or whether it was the same as the general public, in which case the liability of the employer is excluded.

Let us assume, that the employer sets the *sub-optimal* safety regulation at threshold, which would be socially desirable for 'some low risk activities' based on its knowledge, meaning that reduction in expected losses by complying with safety regulation would be greater than the cost of care in certain cases. For an employee claiming a special exposure, he could rely on the level of safety regulation followed at the workplace, to show that the injury arose out of and in course of employment. When the level of precaution would be lower than safety regulation for low-risk businesses, special circumstances resulting in a risk of special exposure can be established. In such cases, the employee would be at a greater risk when compared to the general public, and the risk can be attributed to the business. A victim, litigating for workers' compensation can thus establish the causal link that the injury arose out of and in course of employment.

Non-conformity with safety regulations does not necessarily mean that an *ex post* liability to compensate would always arise, as there might be businesses which pose a risk too remote, that a special exposure cannot be said to arise. If the facts also suggest that an employee's duty

at a job was of the nature in which the risk involved was the same as a member of the public would face, the liability shall not arise. In these cases conformity with safety regulations would not be socially desirable, and the existence of a liability would not incentivize the employer to take precautions more than requisite standard, as it would amount to a wasteful precaution. However in low-risk cases, conformity with safety regulations should always be allowed to relieve any liability of the employer as the special exposure which would otherwise arise from the business, would then to restored to a level of ordinary risk faced by the general public.

4. CONCLUDING REMARKS

From the discussion, it flows that a pre-existing liberal interpretation of the Employees' Compensation Act, 1923, with the benefit of a joint-liability model, comprising of safety regulations and a liability rule can accommodate a compensation claim arising out of COVID-19. The model, undoubtedly gives an impression that there is a departure from an established social security legislation, towards a model based on employer's liability for harm. This can be considered to be the latent effect of introducing safety regulations. While, the intent is to introduce safety regulations for the purposes of facilitating the causal enquiry, this observation highlights that the existing social security model, might not be sustainable without the help of external aids, as in the present case. The primordial objectives of the Act are based on the presumption that an employee's harm can be best mitigated by the State. However, the rise of insurance has changed this notion to an extent where private parties are better assessors and mitigators of risk. Thus, an alternate model might be a temporary fix but not a permanent remedy with the changing liability landscape.