ONE

Employment Relationships in Canada

**Having a job usually means** being in an employment relationship. These relationships entail both conflicting interests and unequal power. This dynamic influences who is injured and how they are injured. It also affects whether and how an injured worker will be compensated. As you read this discussion, keep in mind the case of 17-year-old Yvon Poulin.

In January 2004, Poulin was killed after he fell headfirst into a bailer while working near Peace River, Alberta. During his three months on the job, Poulin complained about a lack of training. He was also looking for less dangerous work elsewhere. After his death, inspectors found Poulin’s employer had failed to ensure an alarm system was installed to warn workers when the machine was in operation. Poulin’s employer used a legal loophole to have charges under the *Occupational Health and Safety Act* dismissed.

This situation raises some compelling questions. Why would Poulin continue working at a dangerous job? Why would Poulin’s employer not provide a safe workplace? What does the ability of Poulin’s employer to evade liability say about why and how we regulate and compensate workplace injuries? The context in which work occurs helps us answer these questions.
EMPLOYMENT IN A CAPITALIST ECONOMY

Employment is normally discussed as an economic relationship. Workers trade their time and skills to their employer in exchange for wages. In Canada, this exchange occurs in the context of a capitalist economy. A capitalist economy is characterized by the private ownership of capital. Resources are allocated through market mechanisms. And the profit motive guides employer decision-making.\(^2\)

For workers, this means three things. First, the employer is risking capital by operating a business. To protect this investment, the employer has been given the right to organize and direct work. Consequently, the employer issues orders and workers obey them. As we’ll see below, the employer’s right to manage is codified in the common law. This gives employers significant power in the workplace.

Second, employers must profit or fail. Unprofitable companies go out of business. Less profitable companies cannot attract investors. The profit imperative pressures employers to minimize costs. Labour is expensive and has unique properties. This makes employers want to cheapen and intensify labour. Third, maximizing profitability can run contrary to workers’ interests. Workers typically want to maximize their wages and control how and how hard they work — the opposite of what most employers want.

This description suggests employment is not only an economic relationship, but is also a social one. By accepting employment, workers accept the employer’s authority. That is to say, workers agree to do as they are told, even when this runs contrary to their own interests.\(^3\) The importance of managerial authority is a recurring issue in workplace injury.

THE LABOUR MARKET AND THE WAGE-RATE BARGAIN

Employment begins in a labour market. In a labour market, employers buy and workers sell the workers’ capacity to work.\(^4\)
Historically, labour markets were physical places. For example, in nineteenth-century England, agricultural labour was bought and sold at hiring fairs:

> Just fancy the spectacle of a large concourse of people, of varying ages and both sexes, standing, under every variety of weather, in a public market place, and, like so many cattle, or so much common merchandise, open to the inspection, and too frequently, rude handling, of persons in want of them — the great desiderata being straightness of limb, breadth of shoulder, development of muscle...

 Buyers and sellers negotiated wages based upon what they knew or could find out about one another. Wages were determined by the supply of and demand for workers. That is to say, there was a generally agreed to wage rate for different types of work. But the wage rate could go up if there was a shortage of labourers, such as during harvest or war, or after a plague or famine. Similarly, the wage rate could go down if there was a surplus of labour.

 Today, the labour market is more of a concept than a real place. And modern workers are often screened based upon their education, experience, and the results of standardized tests rather than through poking and prodding. Yet the modern and historical labour markets are not that different. Employers and workers try to strike the best bargain possible. What is sold is the employees’ capacity to work. And the price of work — called the wage-rate — is greatly influenced by supply and demand.

**THE LABOUR PROCESS AND THE WAGE-EFFORT BARGAIN**

When a worker accepts a job, the employer has rented the worker’s time and skills. The employer must then utilize the worker’s capacity to work. But labour has unique properties. It is not concrete and interchangeable like other inputs, such as...
oil or grain. Rather, workers are highly variable in the skills, knowledge, and attitudes they bring to the job. And the characteristics of workers may not be apparent when they are hired. Further, ownership of workers does not pass from the seller to the buyer (anymore). All that an employer has purchased is the worker’s ability to work during the time the worker attends the workplace. Whether the worker actually produces anything and whether the worker produces what the employer wants are uncertain.

Converting the capacity of work into actual work is known as the labour process. Employers do this by defining the nature of the job, matching workers to the job, and regulating workers’ performance and behaviour. As we saw above, the interests of employers and workers may differ when it comes to just how hard and in what ways a worker will work. In this way, the wage-rate bargain is supplemented by a wage-effort bargain. An understanding emerges about how hard and productively a worker is going to work. The wage-effort bargain is a far more intangible and problematic bargain than agreeing on a wage-rate.

**POWER AND RULES IN EMPLOYMENT**

One has power when one possesses or exercises influence or authority. For example, if an employer gets a worker to complete a distasteful task at work, the employer has likely exercised some form of power. Perhaps the employer bribed or threatened the worker. Both workers and employers possess power. They differ, though, in the source and strength of their power, the perceived legitimacy of their power, and how they exercise that power.

The labour-market power of workers and employers shapes the wage-rate bargain. When there are more workers than jobs (the usual situation), employers gain power. They can be fussy about whom to hire. They can drive down wages by
pitting prospective workers against one another. Employers can threaten to replace workers who resist their demands while on the job.

Workers, of course, can refuse to work if they believe the employer is being unfair. This source of worker power is mitigated, however, by workers’ need for wages to buy food, shelter, and clothing. In this way, employers’ labour-market power can be used to affect the wage-effort bargain. In the short-term, the supply of and demand for workers is usually beyond the control of employers. But employer power has roots in both the labour market and the law.

THE COMMON LAW

When an employer and a worker strike a wage-rate bargain, the employer and worker have entered into a contract. A contract is a legally enforceable set of promises. Employment contracts are known as common law contracts of employment. When there is a dispute about what precisely has been agreed to between an employer and a worker, the courts turn first to the written employment contract. When there is a written contract (and there often isn’t), the contract usually contains only the barest information. When the terms of an employment contract are silent or ambiguous, the courts use certain common law rights and obligations to interpret the contract. An employer’s common law obligations include the duty to provide:

**Work and remuneration:** An employer is required to provide a worker with the wages (often called consideration) the two parties negotiated. Indeed, there can be no contract of employment without consideration. An employer is also required to provide the worker with an opportunity to work as per their agreement.

**Notice of termination:** Employment relationships are normally considered to be for an indefinite period of time
unless otherwise specified. Assuming the employment is indefinite, an employer wishing to terminate the contract must normally give the employee reasonable notice of termination (or pay in lieu of the notice). Employers who find they have just cause for terminating the worker (e.g., they catch the worker stealing from them) do not have to provide reasonable notice.

**A safe worksite:** Employers are required to provide a reasonably safe system of work.

Employers are also vicariously liable for their workers’ actions. That means that the employer is responsible for negligent acts or omissions of workers when workers are carrying out job-related duties.

By contrast, a worker’s common law obligations include:

**Obligations of good faith and fidelity:** A worker must act in a manner that is consistent with advancing the employer’s business interests. For example, a worker cannot normally operate a business on the side that competes with the worker’s employer. Nor can a worker act in a way that undermines the fundamental trust relationship that exists by, for example, stealing from the employer.

**The duty to obey:** Once employed, the worker is the employer’s to command. While there are limits on what an employer can demand of a worker, generally speaking, the worker must obey lawful commands of the employer.

**The obligation to perform work competently:** A worker must competently perform the duties assigned by the employer.

**Requirement to provide resignation notice:** Workers are required to provide the employer with notice of their intent to terminate the employment contract.8
A contract is (notionally) a voluntary agreement between two free and equal parties. Yet the common law rights and obligations attached to employment suggest otherwise. Workers must advance their employer’s interests, even when the employer is not paying them. And workers reap no benefit from their work other than their wage. By contrast, the key enforceable obligation of employers is simply to pay for work done.

Further, workers’ rights only exist if the employer recognizes them or the worker is prepared to enforce those rights in court. Suing one’s employer is expensive, slow, and often career limiting. This fundamental asymmetry in common-law obligations “is only explicable on the basis that courts do not see the contract of employment as one of cooperation or mutuality, but rather as one between a superior and an inferior or, if you will, a master and a servant.”

The legal rights and obligations associated with employment also suggest that the law is not neutral. Instead, it enhances the labour market power of employers. Not only do workers need a job to feed themselves, but also the law requires them to do as they are told by their employer, on pain of immediate termination. By contrast, if contested, worker rights can only be asserted through costly litigation. In this way, employment is a relationship of power, wherein power is distributed asymmetrically.

Questioning the impartiality of the law can seem heretical, especially if you believe the law is created and administered by a neutral state in the public interest. Nevertheless, procedural impartiality (e.g., due process in the judicial system) does not require the substantive content of the laws be balanced or fair. The marked power imbalance between those who own and control the means of production (capitalists) and those who do not (labour) is clearly reinforced in the law of employment. Employers decide when, where, and how to produce something. Workers just do as they are told.
CHANGING DEFINITIONS OF WORK

Whatever your thoughts about the fairness of employment, it is difficult to image a world without it. Our job is how we pay our bills. Many of us also identify with our occupation—we’re welders, daycare workers, salespeople. But we are also all simply workers. That is to say, we trade our time, effort, and skill to someone else for money. Those who do the work, however, have not always been “workers.”

Prior to 1850, most Canadian “jobs” were in agriculture, fishing, and fur trading. Families completed much of this “work,” often on a subsistence basis. What manufacturing existed occurred in small workshops. Waged work certainly did exist—in canal construction, logging, shipbuilding, and domestic service—but it was not the norm and might be seasonal. After 1850, farm debt, investment in manufacturing, and increasing costs associated with self-employment began to create both a pool of unskilled workers and waged employment opportunities for them. In this way, waged work increased and, in doing so, created demand for products (and the infrastructure to meet these demands). This led, in turn, to more waged work.10

Over time, employers have used their power to implement many of the defining features of the modern employment experience. For example, manufacturing and other forms of work were often concentrated in factories. This allowed employers to better control workers.11 From this change comes our experience of work as normally done away from home and under the direct supervision of our employer. Similarly, the introduction of scientific management saw employers (instead of workers) determine how production occurs.12 This pattern continues in modern systems of job design and performance evaluation. The introduction of the assembly line further increased the employer’s control over how and how fast work was done. Workers were rooted to the spot and their work
paced by the speed of the line. These changes all seek to, in part, cheapen and intensify labour—goals consistent with the profit motive of capitalism.

**WORKPLACE SAFETY AND THE PROFIT MOTIVE**

Most people recognize that one outcome of work is the injury of workers. Fewer people accept the notion that employers intentionally harm workers to make a buck, in part because this assertion appears to paint (inaccurately) all employers as amoral, malevolent, and greedy. Yet, before dismissing the notion that employers may knowingly injury workers because it is distasteful, let’s take a moment to consider the incentive and opportunity employers have to transfer costs to workers, their families, and communities via injury.

Capitalism pressures employers to maximize their profitability. Profitability is an important criterion when employers decide what sort of work to do or which inputs or processes to use. One way to increase profitability is to externalize costs. For example, if a company can pass on the cost of pollution to the environment or the state, rather than building it into the cost of the product, the company can gain a competitive advantage. They can price their goods lower and thus be more profitable. There is significant evidence that corporations seek to minimize regulation and liability for the health effects of their products and production processes. And, if a company’s competitors can also externalize costs in this way, the pressure on every company to do so will be almost overwhelming.

Injuring or killing a worker is one way of externalizing cost. For example, increasing the pace of production may increase profitability. Workers can be made to work faster. Or, production processes can be re-organized to minimize the distance materials are moved. Or volatile chemicals can be used to speed up processes or cut supply costs. These decisions may increase the chance and/or severity of a work-related injury. Working
faster can cause or exacerbate repetitive strain injuries (RSIs) or result in worker error. Using cranes to move materials over or through workspaces can increase the risk of a worker being struck by an object. Chemicals can leak, off-gas, or explode, causing burns or occupational diseases.

In theory, injuring or killing workers should entail an offsetting cost for employers. Injured workers might sue the employer. The workplace might be shutdown to remove a body, repair damaged equipment, or investigate an accident. Other workers might demand higher wages, become de-motivated, or quit. Workplace injury, however, does not occur in a perfect world. Temporarily halting production and the psychological effects of injuries on workers do seem to have a negative effect on profitability. But the continued occurrence of such events suggests the costs of such injuries are lower than the benefits employers reap. Otherwise, employers would take steps to reduce the number of accidents further. Costs of prevention may exceed the benefits of prevention, which may reflect that, in part, the ability of workers to refuse work (which might get them fired) or quit is limited by their need to earn a wage. In this way, workers must trade their need for wages against their desire for health. And workers’ ability to gain compensation for their injuries has been limited.

COMpensation THROUGH THE COURTS

Prior to the development of industrial capitalism, families bore and mitigated the effects of work-related injuries — most of which occurred in the course of operating a family workshop or farm. The shift to industrial capitalism resulted in more injuries occurring in more clearly delineated employment relationships. Setting aside the unique properties of labour, within a capitalist framework, labour is simply a commodity that is exchanged through contract. So how does one handle a workplace injury or fatality in such a framework?
The employers’ obligation to provide a safe workplace has been firmly rooted in English common law for many years. The 1837 appeal case of *Priestley v Fowler* was heard by the English Court of the Exchequer. The court determined that only where an employer was negligent could an injured worker recover damages. This decision adopted the view that workers consent to employment-related risks, other than those caused by negligence. Canadian judges were bound by the constitution, habit, and convenience to follow this lead.

Consequently, injured workers seeking compensation in the courts had to demonstrate that an employer had failed to exercise due care — the standard of care that would be exercised by a reasonable person. Even when employers were found guilty of failing to exercise due care, they could still put forward three arguments, or “common law defences,” to escape liability:

**Contributory negligence:** If it could be shown that the injured worker failed to exercise reasonable care, and thereby contributed to the accident, the worker would assume full liability for the injury, and no compensation in the form of damages would be awarded.

**Fellow-worker doctrine:** Under this doctrine, employers could not be held liable for accidents caused by co-workers; the focus of any action for damages would therefore have to shift to that worker.

**Assumption of risk:** This doctrine assumes that workers are compensated for accidents via a wage rate. That is to say, high-risk occupations are better paid and, in accepting this, workers knowingly and voluntarily assumed the greater risk.

There are problems with the “ unholy trinity” of defences. For example, it is unclear how workers can know the risks of a job before accepting it or whether they can reasonably be expected...
to act without error. A lack of knowledge about risk and the need to earn a wage suggests workers’ ability to negotiate a risk premium or seek other work may be largely notional. And the ability of injured workers’ to recover damages from fellow workers or the employer is limited by the cost and time involved in an unpredictable civil action.21

Even a successful suit might not result in compensation as an employer might simply go bankrupt.22 It is not possible to determine the success rate of cases brought under the tort system. Morley Gunderson and Douglas Hyatt suggest that between 15 percent and 30 percent of suits were successful, but do not substantiate this claim.23 For the most part, the cost of legal counsel, the time involved, and the slim prospects of success meant that injured workers either did not bother or were unable to pursue claims. Consequently, employers were able to transfer production costs onto injured workers, their families, charities, and in rare cases, government.

ALTERNATIVES TO LITIGATION

When discussing the legalities of workplace injuries, it is easy to lose sight of the fact that society and workers grappled with workplace injuries in a variety of ways. Often it fell to families to pay for medical treatment and burial expenses. Families might also be forced to support injured workers and their families until and unless a worker recovered. In the United States, co-operative insurance schemes were a popular option at the turn of the twentieth century.24

Workers also developed mutual aid societies (often under the auspices of trade unions) to pay for medical care, wage loss, and burial costs.25 One of the more elaborate efforts was by coal miners in the Pacific Northwest, who set up their own hospital in the late nineteenth century.26 Some employers took to providing medical care and injury compensation to workers. This strategy was more common among large employers, such
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Such benefit schemes — often funded by deductions from worker salaries — also increased employer power over workers. In Canada, most of these strategies were superseded by state-run workers’ compensation and medical systems.

**DO EMPLOYERS INTENTIONALLY TRANSFER COSTS?**

So far, we’ve seen employers can transfer costs to workers. But do they? The short answer is yes, at least sometimes. For example, employers have hidden the health effects of hazardous substances resulting in asbestos-, uranium- and silica-related diseases in the mining industry. Similar behaviours can be seen in the chemical industry. Employers have also sought to resist regulation designed to protect worker health. This behaviour is canvassed in Chapter 2.

Most times, though, things are not so clear-cut. Workers may, for example, be struck by lightning or injured when a component fails. Are these freak and unavoidable accidents? Perhaps. Yet the injury occurred only because the worker was doing work. And the employer — who controlled what was produced, when, where, and how — could have stopped work when the thunderheads built up. Or could have inspected the machine more frequently.

Such suggestions are often dismissed as not being cost effective. This may be true. But, in making the argument that it is more cost effective to work unsafely, employers are admitting two things. First, it is possible to work more safely. And, second, employers choose to transfer risk to workers because it is cheaper to do so than remove the source of the risk. This cost-benefit analysis reflects an economic perspective on the risk of injury — something we’ll also discuss at length in Chapter 2.

Risks are also sometimes discussed as being unavoidable. But almost every workplace risk could be avoided by organizing work differently or simply not engaging in risky work. The decision about what to produce and how to do it is one taken
by employers, with an eye to making a profit. Passing off responsibility for the resulting injuries by saying risk is “just the nature of the job” simply deflects responsibility away from the employer. Again, we see the economic perspective on risk lurking in the background: risk of injury is minimal, unavoidable, and acceptable.

Employers may legitimately not know about certain workplace risks. This can be a particular issue with hazardous substances. The effects of the workplace exposure may not be immediately apparent. Or there may appear to be multiple causes (some not work-related) of an illness. Yet, governments choose to allow employers to introduce substances without any testing of their hazards (thereby making workers guinea pigs), a political decision that prioritizes employer profitability over worker health. And that employers do so is a choice to pursue profit at the expense of workers.

CONCLUSION

So let’s go back to the case of Yvon Poulin. Why did he work at a dangerous job? Like most of us, he had a job so that he could feed, clothe, and house himself. In return for wages, he agreed that his employer could tell him what to do and how to do it. In this, we see that employment is a relationship of power. Employers’ power has both legal and practical limits — workers pushed too hard resist in a variety of ways. Yet, when the whip of hunger is combined with the legal right to manage, workers mostly fall into line.

Why did his employer not provide a safe workplace? Likely, his employer used power to respond to the profit imperative. Labour is a significant cost that employers have sought to cheapen over time. Organizing work in a dangerous manner usually increases profitability by externalizing costs to workers, their families, and society. Not installing a warning device or providing adequate training saved the employer money and facilitated
faster work, by allowing workers to work while the machine was in operation.

What does the ability of Poulin’s employer to evade liability say about why and how we regulate and compensate workplace injuries? In theory, the savings employers realize by injuring or killing workers are offset by the cost of those injuries. But the common law has historically allowed employers to transfer costs to workers, their families, and communities. In this case, Poulin’s employer sought exemption from prosecution on the grounds that, as an agricultural operation, it was outside the ambit of occupational health and safety laws. This cost transfer is a source of significant social instability because injury and death reveal so clearly where the interests of workers and employer conflict.

The state has sought to prevent open conflict over workplace injury in two main ways. First, it began regulating working conditions in the late nineteenth century, with an eye to remedying the worst excesses of employers. When that proved ineffective, it created a workers’ compensation system in the early twentieth century to limit the financial effects of injury. Further regulation efforts followed in the late twentieth century. In these ways, the state has attempted to address (or at least paper over) the political problems created by workplace injury. In Chapter 2, we’ll examine how the state tries to prevent workplace injuries.