Workers' Compensation Facing Current Issues

Comparative Analysis between Japan and Canada

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ABSTRACT

Karoshi, or death from overwork, is a tragic modern work event. Continuous occurrence of karoshi in Japan offers an opportunity to reconsider the contemporary working environment, and especially the workers' compensation system. Strongly bound by the traditional notion of work accident, the Japanese workers' compensation system has shown difficulty handling karoshi cases. This fact calls into question the adequacy of the current workers' compensation scheme in the work environment it is meant to oversee. To analyze the issue, this thesis will use a comparative law method. The basis of comparison will be Ontario, Canada, which shares a system similar to Japan's, but does not produce karoshi cases. Particular emphasis will be put on stress claims and claims from women, since both share some similarities with karoshi claims. The findings from this comparison will offer a valuable basis for discussion of the current and the future of workers' compensation and other protection systems in Japan.

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SOMMAIRE

Le *karoshi*, ou la mort suite à une charge extrême de travail, figure parmi les formes modernes d'accidents de travail les plus tragiques. La répétition de ce drame au Japon offre l'occasion de repenser l'environnement de travail contemporain, et plus particulièrement le régime d'indemnisation des accidents du travail. Lourdement tributaire d'une conception traditionaliste de l'accident de travail, le régime juridique s'est montré inadapté au traitement des cas de karoshi. Cet état de fait met en cause la pertinence du régime japonais dans l'environnement de travail qu'il prétend pourtant encadrer. Pour analyser la question, cette thèse s'appuiera sur une méthode comparative du droit en prenant comme point de référence la province canadienne de l'Ontario. Celle-ci partage avec le Japon un régime similaire d'indemnisation des accidents du travail, sans pour autant donner lieu à des cas de karoshi. Une attention particulière sera portée sur les demandes d'indemnisation fondées sur le stress, de même que sur les demandes faites par les femmes, ces deux catégories présentant le meilleur rapprochement avec les cas de karoshi. Les résultats de cet exercice comparatif serviront de base pour une discussion quant à l'état actuel et l'avenir du régime japonais de protection des travailleurs .

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I. Introduction

According to a report issued by the Ministry of Health, Labour and Welfare, in Japan, 157 people died from overwork within the 2003 fiscal year.[1] The report goes on to state that 312 people became eligible for workers' compensation that year due to brain and heart illness caused by excessive work; of these, 157 were fatalities.[2] The previous year was similar, with 317 workers or their heirs eligible for compensation.[3] The report also states that in the same fiscal year, 40 people became eligible for workers' compensation due to suicide, including attempted suicides, caused by work stress.[4] This figure, however, includes only people who have been recognized as having a work-related illness by the Ministry running the worker's compensation system; this implies that there certainly must be some other suspicious cases.

According to the research done by the Ministry of Health, Labour and Welfare, in the year of 2002, 53% of the people who committed suicide because of psychological problems had done more than 100 hours of overtime every month.[5] Since this research also targeted only those who were officially recognized as having work-related injuries, one can suppose that there are others with similar problems.

Karoshi, a Japanese term combining the words *karo* (extreme fatigue) and *shi*

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[1] Japan, Ministry of Health, Labour and Welfare, *Shinzo shikkan oyobi seishinn shogai toni kakaru rosaihosho jokyo (Heisei 15 nenndo)*, (25 May 2004: Labour Standards Bureau, Compensation Division), online: Ministry of Health, Labour and Welfare < http://www.mhlw.go.jp/houdou/2004/05/h0525-1.html > (date accessed: 24 January 2005). A fiscal year in Japan starts in April and ends in March of the following year. Fiscal year 2003 means from April 2003 to March 2004.

[2] *Supra* note 1.

[3] *Supra* note 1.

[4] *Supra* note 1.

[5] Japan, Ministry of Health, Labour and Welfare, *Jisatu rosai ninntei jian no bunseki, Kajurodo menntaru herusu taisaku no arikata ni kakaru kentoukai, Reference Material No.8, 28 May, 2004 (Ministry of Health, Labour and Welfare, Labour Standards Bureau, Industrial Safety and Helth Department, Industrial Health Division)*, online: Ministry of Health, Labour and Welfare <http://www.mhlw.go.jp/shingi/2004/05/s0528-4.html> (date accessed: 24 January 2005).

(death), and meaning "death brought on by overwork or job-related exhaustion,"[6] has finally been adopted as an English word and acknowledged even by well-respected dictionaries such as the *Oxford English Dictionary Online*, because there is simply no precise equivalent English word to describe this concept.[7]

The problem of karoshi became known around the late 1980s when the Ministry of Labour, which runs Workers' Compensation system in Japan, refused to recognize many suspicious karoshi cases as being work-related deaths.[8] Between the years 1997 and 1999, 1,498 karoshi claims were made against the Ministry.[9] However, only 244 cases were recognized and the approval rate remained at about 16%.[10] Along with the Ministry's extremely strict criteria for deciding whether an injury is work-related, the victims' working conditions have been brought to public attention. Similar incidents are reported year after year, and faced with many cases in which the courts overturned Ministry decisions, the criteria was finally revised with regards to the recognition of karoshi.[11]

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[6] "Oxford dictionary updated for Web" *CNN.com* (17 January 2002), online: Cable News Network <http://www.cnn.com/2002/TECH/internet/01/17/dictionary/> (date accessed: 24 January 2005).

[7] *Supra* note 6.

[8] See *e.g.* Junryo Honda & Koji Morioka eds., *Datu Service Zangyo Shakai: Ima no Nihonn no Hatarakikata wo Kanngaeru, (Free from unpaid overtime work, consider current Japanese way of working* in Japanese*)* (Tokyo: Rodojunposha, 1993) at 112 [translated by author] [*Honda*]. Also, Osaka Karoshi Mondai Renraku Kaigi, (an advocacy group for karoshi victims in Osaka city consisting of lawyers, medical professionals and labour unions) stared its karoshi hotline in 1987. See Osaka Karoshi Mondai Renraku Kaigi, *Q&A Karoshi, Karojisatu, 110 ban: Jirei to Rosainintei heno Torikumi* (*Q&A emergency call for karoshi, suicide due to overwork: cases and efforts toward recognition of karoshi* in Japanese) (Tokyo: Minji Ho Kenkyu Kai, 2003) at 2 [translated by author] [*Karoshi Mondai*] at 2 and preface 2.
Also, the National Defence Counsel for Victims of Karoshi started its hotline in 1988. National Defense Counsel for Victims of Karoshi, "Karoshi Hotline: National Network", online: The National Defense Counsel for Victims of karoshi. <http://www.bekkoame.ne.jp/i/karoshi/english/e-index.htm> (date accessed: 24 January 2005). The Ministry of Labour was merged with the Ministry of Health and Welfare in 2001, and became the Ministry of Health, Labour and Welfare.

[9] Yoshio Sugimoto, *An Introduction to Japanese Society*, 2nd ed. (Cambridge: Cambridge University Press, 2003) at 101.

[10] *Ibid.*

[11] See *e.g.* Osaka High Court, Osaka (21 November 2000) Heisei 12 (Gyo Ko) 9, Judgment overturning the decision of Amagasaki Labour Standards Office; see *e.g. Gihu* District Court, Gihu (14 November 1996) Heisei 03 (Gyo U) 8, Judgment overturning the decision of Seki Labour Standards Office; Administrative ordinance of Ministry of Labour 1063 (12 December 2001) Heisei 13 December 12, Kihatu 1063 Kose Rodosho Rodo Kijun Kyokucho Tutatu, (Administrative ordinance regarding brain and heart conditions) [translated by author][*Administrative ordinance 1063*]; Administrative ordinance of Ministry of

These new criteria have resulted in increased recognition of karoshi as a legitimate issue.

The difficulty pertaining to karoshi stems from the fact that it is hard to characterize it as a work-related injury: the officer can find neither apparent injury, nor clear evidence that death was connected to the worker's occupation. Further, karoshi suffers from a perception problem. When asked to describe the notion of work-related injury, many will first come up with physical injury resulting from an obvious accident. This image of a "proper work-related injury" is still strongly rooted not only among the general public, but also among workers' compensation administrators. This is indeed unsurprising considering the history of workers' compensation.

When Japan's early workers' compensation system was instituted, the country was undergoing its first wave of rapid industrialization. After World War II, when the current system was established, Japan was second rapid industrialization. In both cases, the workers' compensation system was designed to protect male workers from industrial accidents in dangerous workplaces, such as factories using heavy machinery, shipyards, or explosion-prone mines.

Since then, the system has been updated to adjust to an evolving economy and industry. It now covers a much wider range of industries, as well as a wider range of injuries. It covers not only apparent physical injuries, but certain industrial diseases as well. However, extensive social change, especially in the past several decades, has brought rapid and drastic changes to the nature of workplaces, such as the introduction of new technology, the growth of white-collar workers, and women's advancement in the workplace. Accordingly, the nature of the claims made to the workers' compensation

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Labour 544 (14 September 1999) Heisei 9 September 14 Kihatu 554 Rodosho Rodo Kijun Kyokucho Tutatu (Administrative Ordinance regarding suicide, psychological problem cases) [translated by author][*Administrative ordinance 554*].

system also shifted from visible physical injures to injuries more intangible in nature, such as karoshi. Faced with modern work accidents, the Japanese workers' compensation system has showed significant inadequacies, and this fact brings to the fore a significant question to us. Is the workers' compensation system keeping up with social change? Is the current system suitable to constantly evolving modern workplaces?

To seek out answers to this question, this thesis will focus on workers' compensation systems. Since karoshi seems to be particular to Japan, it will be worthwhile to analyze the situation in other jurisdictions that have a similar workers' compensation system and employment standards laws, but that do not produce karoshi problems. Therefore, this thesis will use a comparative method. The workers' compensation system in place in Ontario, Canada will serve as a basis of comparison. The Ontario workers' compensation system and employment protection measures will be chosen as the Canadian model. Workers' compensation systems and employee protection laws fall into the domain of provincial jurisdiction and thus vary from one province to another. However, there are many similarities between the provinces. Ontario possesses the largest population amongst Canadian provinces, and the Ontario Workmen's Compensation Act of 1914 is historical in that it was the first piece of social insurance providing compulsory income protection in Canadian common law jurisdictions.[12] In many senses, Ontario's system is one of the most significant systems in Canada and it is therefore a suitable comparison.

The workers' compensation systems and employment standards in place in Japan and Ontario share many similarities. However, karoshi appears not to be a significant

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[12] *Workmen's Compensation Act,* S.O 1914, c.25 [*WCA 1914*]; Dennis Guest, *The emergence of social security in Canada,* 3rd ed. (Vancouver: UBC press, 1997) at 40 [*Guest*]. However, Quebec, under the civil law system, adopted first workes' compensation system in Canada. See *infra* note 12 and accompanying text.

issue in Ontario. To compare both workers' compensation systems and other issues surrounding the work environment, the key solutions to Japan's karoshi problems as well as answers for the question raised above could be given.

First, the history and current structure of the workers' compensation system of both Japan and Ontario will be presented and discussed. Analyzing their historical development will enable us to discover the fundamental principles and philosophical developments that underlie the current systems. A discussion of the current systems will show us how they handle current working conditions, and the pros and cons of each. In order to specifically analyze karoshi as a work injury under a workers' compensation scheme, stress claims and claims from women will be employed as reference points, since both are new kinds of claims emerging from modern working conditions and are of an intangible nature. Also, relevant issue surrounding karoshi, such as the employment standards in place in both jurisdictions, the role of labour unions, and cultural issues will be presented and discussed.

Workers who are deprived of their income need some form of societal support. Workers' compensation systems play a decisive role in the improvement of working conditions, as well, and are directly connected to working environment. Legal reform has often brought improvement of working standards as well as better prevention measures. It can be said that workers compensation system plays a significant role in overall workers' protection, therefore; the system should keep up to the current situation. Development of this system will certainly be of significant benefit to workers.

II. Development of Japanese Labour Laws

A. Meiji Period

Japanese labour laws began to be instituted after the Meiji Restoration in 1868, which was the turning point of Japanese history from a feudal society to an industrial society.[13] Before the Meiji Restoration, Japan had, for over 200 years, been in national, self-imposed isolation. At that time, there were virtually no laws regulating the work environment. There were also very few real wage workers, since society was mainly operated based on the relations of peasants and the privileged class. In 1854, a United States delegation came to Japan and pressured it to open the country from this national isolation. Japanese government officials came to realize how far Japan was behind the West and began a rapid modernization of the country. Through this modernization, Japan experienced a rapid increase of wageworkers for the first time in its history.

But unlike that of most other Western countries, Japan's modernization was carried out by the government.[14] Therefore, the main sources of the workforce were agricultural farmers, oppressed by the former Tokugawa regime, and certainly unskilled. Accordingly, feudalistic relationships and patriarchy relationships between employers and employees were strongly maintained in the workplaces. This fact, combined with the added lack of awareness, prevented Japanese workers from fostering democratic working conditions between employers and employees.[15] As discussed later, this undemocratic relationship between employees and employers is still deeply embedded in current Japanese situation.[16]

The Civil Code codified in 1896 contains provisions regarding employment, in articles 623 to 631, and introduces a legal relationship between an employer and an

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[13] The "Meiji Restoration", in Japanese *Meiji Ishin*, is a generic term describing a chain of events from 1866 to 1869 that led to a political and social change. The Meiji Restoration was followed by the Meiji Period which lasted from 1868 to 1912.

[14] Noboru Kataoka, *Rodoho (1) Soron Rodo Dantai Ho, (Labour Law vol. 1, Trade Union Law)* 3rd ed. [in Japanese; title translated by author] (Tokyo: Yuhikaku, 1994), at 28 [translated by author].

[15] *Supra* note 14 at 28.

[16] *Supra* note 14. Further discussion of employer and employee relationship in Japan will be found in part VIII below.

employee.[17] However, the Civil Code provisions presupposes that both parties have equal status in the negotiation of working conditions, which was far from the actual reality, as history has shown us in many cases. Usually, workers did not have enough power to discuss their working conditions with their employers. Under the Civil Code, the employers' compensation for a worker's injury was determined by an examination of the worker's claim for damages.[18] The principle of liability for negligence was included in the examination of fault; the worker must prove a causal relationship between employers' negligence and the accident.[19] If the accident occurred due to the acts of fellow workers, the claimant must prove that the fellow workers were agents of the employer in this regard and that the act was done in the course of employment.[20] He or she must also demonstrate actual losses.[21] There were hard thresholds for ordinary workers to overcome, and workers from rural villages did not and could not have such legal knowledge in the first place. These incredibly difficult procedures, together with the workers' lack of knowledge, left the workers in an extremely weak position against employers, and accordingly, poor working conditions prevailed.[22] The tragic story of the silk thread manufacturing industry's young female workers has become a well-known example of such harsh working conditions.[23] This story and others like it have succeeded in raising the awareness of the Japanese public, as well as that of the government officials whose responsibility it is to provide some protection measures for workers.

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[17] Hiroshi Oda, *Japanese Law* (Toronto: Butterworths Canada, 1993), at 317 [*Oda*]; *Civil Code* (Minpo) Law No. 89 (12 July 1896) [*Civil Code*].

[18] Kazuo Sugeno, *Japanese Employment and Labour Law,* trans. by Leo Kanowitz, (Durham, N.C.: Carolina Academic Press, 2002), at 377 [*Sugeno*].

[19] *Supra* note 18.

[20] *Supra* note 18.

[21] *Supra* note 18.

[22] *Supra* note 18 at 5.

[23] *Supra* note 18 at 5, See *e.g.* Mikiko Hane, Peasants, Rebels, women, and Outcastes: The Underside of Modern Japan, 2nd ed., (Lanham, Md.: Rowman & Littlefield Publishers, 1982), in particular the section "The Textile Factory Workers" at 173-204.

The first legislation for the improvement of social welfare was enacted in 1874 to cope with poverty and social instability.[24] However, this law was under the strong influence of feudalism and took for granted help among relatives; thus only people with no relatives could be recipients of government help.[25] If the person could work physically, even a little bit, he or she was excluded from aid, and the amount of aid was sufficient only to buy rice for each day.[26] Several legislations, similar in character, followed.[27] In sum, the overall Japanese labour situation at the time was far behind those of Western countries, and it was characterised in the Gannosuke Yokoyama's famous work, *Nihon no Kaso Shakai, the Lower Ranks of Japanese Society*, by "consistent refusal for labour unions and inadequate legislation."[28]

B. Trade Union Law

After the Meiji Restoration, the labour movements in Japan started to develop. During the initial phases of the Meiji Period, labour movements were considerably weak and accordingly, there was no law to prohibit neither activities of labour unions nor organization of labour unions. As Iwao Ayusawa describes, between the Russo-Japanese war and World War I, Japanese labour movement was immature without proper financial organization, suffering lack of experience and confidence.[29] Moreover, the occurrence of spontaneous strikes brought the enactment of the Public Security and Police Law, in 1899, which punished the promotion and instigation of strikes as well as acts of assault and

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[24] Jukkyu Kisoku (December 1874) Taishokantatu 162; see also Nishihara Michio *Shakai Hosho ho*, 3rd ed. (*Social Security Law*, in Japanese) (Tokyo: Yuhikaku, 1994) at 70 [translated by author].

[25] *Supra* note 24 at 71.

[26] *Supra* note 24.at 71.

[27] See *e.g.* Kanyakunin husyo teate kisoku (1875).

[28] Cited in *Kataoka, supra* note 14 at 4 [translated by author].

[29] Iwao Ayusawa, *A History of Labor in Modern Japan,* (Honolulu: East-West Center Press, 1966) at 104. The outbreak of the Russo-Japan war was in 1904.

intimidation carried out to induce workers to join a trade union.[30] This law did not prohibit workers from organizing a labour union; through its vague wording and stretched interpretation by the authority, and following vigorous enforcement; however, it banned the activity in any practical sense.[31] Because of this regulation, the labour movement lost its momentum. Following World War I, Japan experienced a business boom and the rapid industrial development widened the gap between the rich and the poor even more. While the rich experienced unprecedented prosperity, ordinary people suffered from inflation prices. This social situation brought an active liberal movement in Japan, which is described as *Taisyo democracy*.[32] Together with an effect of the *Taisho Democracy* and the effect of advent of the International Labour Organization, the number of labour unions establishments hiked. For example, in 1917, 14 new labour unions were established, and in 1919, 71 new labour unions were created.[33] The number of labour disputes also increased drastically.[34] In 1914, only 50 labour disputes occurred, however; in 1918, 417, and in 1919, 497 labour disputes were conducted.[35] Under such a situation, enactment of trade union law and legalization of trade unions were called for and several draft legislations were submitted to the Diet.[36] However, despite all the efforts to pass the legislation, and considerable amount of debates in the Diet, the legislations were never passed by the Diet because of vehement resistance of the capitalist class.[37] In 1925, another suppressive law

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[30] *Supra* note 14 at 5, *Public Security and Police Law*, (*Chian keisatu ho)* (1899).

[31] *Supra* note 14 at 29.

[32] *Taisho Democracy*, a liberal movement in Japan between the end of World War I and before the Manchurian Incident; Taisho designates an imperial era between the Meiji period and the Showa period; the Taisho period ran from 1912 to 1926. See *e.g.* David Powers, "Japan: No Surrender in World War Two," *BBC History (6 January 2001),* online: British Broadcasting Corporation, <http://www.bbc.co.uk/history/war/wwtwo/japan_no_surrender_03.shtml> (date accessed: 24 January 2005).

[33] *Supra* note 14 at 31; *supra* note 29 at 157 and 178.

[34] *Supra* note 14 at 31.

[35] *Supra* note 14 at 31.

[36] *Supra* note 14 at 31; the Diet is the national assembly of Japan.

[37] *Supra* note 14 at 31.

to unions, the Maintenance of Public Order Law was enacted and the law was vigorously enforced.[38] Because of the law, all forms of labour movements were subject to strict restrictions and enactment of Trade Union law had to wait for the end of World War II.[39]

C. Employment Standards Law

As described above, most of labour movements were under severe restrictions in Japan before the World War II. However, despite the government's firm attitude, workers did not give up, and several strikes were conducted, three of which, in 1907, were very significant and had a huge impact on both public awareness and the government.[40] These movements as well as the tragic situation of many workers brought about the enactment of the Factory Law in 1911, which was the most advanced legislation before World War II.[41] This law regulates factories that employ more than 15 workers.[42] Based on this limitation, about 40% of Japan's factories were excluded from the application of the law; among other things, this law regulated the minimum working age as 12 years.[43] Females and workers under the age of fifteen were limited to working a maximum of 12 hours per day; as well, they were not permitted to work a night shift; however this prohibition of a night shift was in fact not applied because of the working shift system.[44] Under the law, a government

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[38] *Oda, supra* note 17 317; *Maintenance of Public Order Law* (1925) Law No. 54, nullified 15 October 1945, [*Public Order Law*].

[39] *Oda supra* note 17 at 317.

[40] The Three strikes in 1907 *Ashio dosan*, (Ashio Copper Mine), *Besshi dosan* (Besshi Copper Mine), *Nagasaki Mitubishi zousenjo* (Nagasaki Mitubishi Shipyard). See *supra* note 14 at 30.

[41] See Factory Law, *Kojoho,* (1911)(Kojoho), Kataoka, *supra* note 14 at 29. The Japanese way of naming statutes differs from the Canadian practice. While in Canada it is common to use the word "Act" to name statutes, the titles of many Japanese statutes are followed by the word "ho", which means "Law". This practice will be followed throughout this thesis.

[42] *Supra* note 14 at 30.

[43] *Supra* note 14 at 30.

[44] *Supra* note 14 at 31; *Supra* note 29 at 110. *Ayusawa* explains this flaw as following "[u]nder the Factory Act of 1911, 'nightwork,' which meant work between 10:00 P.M. and 4:00 A.M., was prohibited, but if the work was performed in two or more shifts, the nightwork was allowed to continue for fifteen years. Moreover, the fifteen-year grace period was applicable also to all young persons under fourteen and young women under twenty, on three conditions: (1) that the work in question

agency was authorized to inspect the conditions of factories and to issue orders to preserve safety and sanitation.[45] However, this law did not provide any protections for adult male workers, and no provisions were provided for weekly rest for any worker except that women and minors were to be given at least two days rest period per month.[46] The Factory Law was further amended in 1923.[47] By the amendment, factories that employed more than 10 workers became subjects of the regulation.[48] Workers aged under sixteen became subject to the protection, as opposed to fifteen years in the former Law.[49] Female workers and workers under the age of sixteen were limited to work 11 hours a day, which was also lowered from 12 hours per day in the former Law.[50] A more effective regulation for the prohibition of night shift was also established.[51] However, those regulations lost their effectiveness under wartime militarism.

D. Workers' Compensation Legislation

Before any system of workers' compensation was adopted, an old tradition of paternalism had worked as a substitute.[52] Ayusawa described the system as "[u]nder that tradition, in the absence of any legal compulsion, the worker would receive from his or her

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needed to be finished at one stretch; (2) that the work in question needed to be done at night; (3) that the work in question required continuous day-and-night work, but was performed by workers divided into two or more shifts. With the law so ingeniously worded, the employer had no difficulty in engaging women or young persons. In effect, there was actually no prohibition of nightwork in Japan." See *supra* note 29 at 191.

[45] *Supra* note 18 at 7.

[46] *Supra* note 29 at 110.

[47] The revised Factory Law entered into force in 1926; the delay was due to the Great Kanto Earthquake (Tokyo Earthquake of 1923).

[48] *Supra* note 14 at 30.

[49] *Supra* note 14 at 30.

[50] *Supra* note 14 at 30.

[51] *Supra* note 14 at 30; Ayusawa explains the new nightwork prohibition as "'[n]ightwork' came to mean work between 10:P.M. and 5:00 A.M. Even if performed in two or more shifts, nightwork would be prohibited after only three years' grace. Since the Revised Factory Act came into force in June 1926, the prohibition of nightwork became effective in June, 1929." See *supra* note 29 at 191.

[52] *Supra* note 29 at 111.

employer certain special allowances in case of death, illness, or injury sustained in the course of his or her work."[53] However, in the early Meiji period, government-led industrialization brought many industrial accidents in the government's corporations, where no such system existed. Thus, in 1875, the first legislation of compensation for work related injury was adopted for government workers.[54] Following the legislation, several aid systems for injured private factory and mining workers were also adopted.[55] However, these aid systems were mainly financed by the Emperor's charitable aid, not through public or employers' funding.[56]

The Factory Law of 1911 included some provisions for the compensation of injured workers.[57] The Factory Law established a system to compensate injured or ailing workers as well as their bereaved families.[58] The Factory Law Enforcement Regulations, which was enacted in 1916, regulated the operation of the system.[59] The Regulation set the compensation benefit as, medical benefit, loss of earnings, which was set at more than 50% of previous earnings, and disability benefits survivors' benefit, plus funeral expenses. However, an exculpatory clause saying "unless it was due to serious fault of his own"[60] was included into the Factory Law. With the 1926 revision of the Factory Law, the exculpatory clause was eliminated, but the employer could still appeal to the prefectual governor for workers' negligence.[61] In such a case, the governor could establish an

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[53] *Supra* note 29 at 111.

[54] *Kanyakuninn husyo teate kisoku* (Aid Regulation for Government Workers, translation is mine.) (1875).

[55] See *e.g.* Mine Ordinance, *Kogyo jorei* (1890); Mine Act, *Kogyo ho* (1905); see also C. Arthur Williams, Jr., *An International Comparison of Workers' Compensation*, (Norwel, Mass.: Kluwer Academic Publishers, 1991) at 172 [*Williams*].

[56] *Supra* note 14 at 28.

[57] *Supra* note 18 at 6.

[58] *Supra* note 18 at 7.

[59] *Supra* note 18 at 7, *The Factory Law Enforcement Regulations*, *(Kojo ho seko kisoku)* (1916).

[60] *Supra* note 29 at 202.

[61] *Supra* note 29 at 203.

administrative authority to investigate the matter. If the administrative authority found that there was a serious fault on the worker's side, the employer did not have to pay loss of earnings and disability benefits.[62] In 1931, also, the first legislation mentioning employers' responsibility for the care of injured workers was made, and to assure the employers' responsibility, accordingly, an insurance system was established.[63] The benefit provided by the legislation was similar to the one provided by the Factory Law, however, the funeral expense was excluded from the benefits.[64] Unlike the current system, the recipient of the insurance was not a worker but employers under the system.[65] These regulations underwent minor changes up to the end of World War II.

E. World War II and after the War

The Manchurian incidents in 1931 were a turning point; Japan entered into a long period of war, followed by World War II, and until the end of the war in 1945, these workers' protections became practically meaningless. The Maintenance of Public Security Law especially, which was a replacement for the Public Security and Police Law, was aggressively enforced and harshly suppressed any kind of labour movements.[66]

In 1947, following the Second World War, the Constitution of Japan was enacted under the auspices of the Allied Forces.[67] Article 28 of the constitution guarantees

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[62] *Supra* note 29 at 203.

[63] *Rodosya saigai hujo sekinin hoken ho* (1931) (*Workers' Accident Aid and Liability Insurance law)* [translated by author], see also, Kenichiro Nishimura, et al, *Rodoho Kogi 3rd ed. Rodosha Hogo Ho*, (*Labour Law Lecture, 3rd ed. Worker Protection Law,* in Japanese) [Translated by author] (Tokyo: Yuhikaku, 1993) at 305 [*Nishimura*]. See also, Hiroshi Inoue, *Saishin Rosai Hoken Ho,* 2nd ed., (*Contemporary Workers' Accident Compensation Law*, in Japanese) (Tokyo: ChuoKeizaisha, 1999) at 4 [translated by author] [*H. Inoue*]. But Hiroshi. Inoue points out that the system, which was supposed to cover wider range or workers, covered only construction workers and forestry workers in practice. See *H. Inoue* at 2.

[64] *H. Inoue, supra* note 63at 5.

[65] *H. Inoue, supra* note 63 at 5.

[66] *Public Order Law, supra* note 38. *Public Security and Police Law, supra* note 30.

[67] *The Constitution of Japan*, Nihonkoku Kenpo, Promulgated on November 3, 1946, Came into effect on May 3, 1947 [*Constitution*]. See also, Carl F. Goodman, *The Rule of Law in Japan: A comparative Analysis* (The Hague, Netherlands:

the right of workers to organize, bargain, and act collectively.[68] Also, article 27 guarantees the right and obligation of people to work.[69] Article 27 Paragraph two, states, "[s]tandards for wages, hours, rest and other working conditions shall be fixed by law."[70] This provision gives the Diet the right to intervene in matters related to working conditions, which are basically contractual, private relationships.[71] Accordingly, several legislations regarding working conditions were made, such as the Labour Standards Law,[72] the Workers' Accident Compensation Insurance Law,[73] the Minimum Wage Law,[74] the Pneumoconiosis Law,[75] and the Industrial Safety and Health Law.[76]

The Labour Standards Law and the Workers' Accident Compensation Insurance Law were both enacted at the same time, in 1947.[77] In Chapter eight of the Labour Standards Law, there are 14 provisions regarding work-related injuries and the treatment thereof.[78] Set by these articles, employers are responsible for the compensation of workers who are injured or die in the course of work.[79] The Labour Standards Law establishes employers'

Kluwer Law International, 2003) at 29-33.

[68] *Constitution, supra* note 67, art. 28 "The right of workers to organize and to bargain and act collectively is guaranteed," trans. by the Office of Prime Minister of Japan and Cabinet, online: <http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html> (date accessed: 24 January 2005).

[69] *Constitution, supra* note 67, art. 27, "All people shall have the right and the obligation to work. Standards for wages, hours, rest and other working conditions shall be fixed by law. Children shall not be exploited."

[70] *Constitution supra* note 67, art.27.

[71] *Constitution supra* note 67, art.27.

[72] *Labour Standards Law* (Rodo kijun ho) Law Number 49 (7 April 1947). , trans. by Japan Institute for Labour Policy and Training, (an independent administrative research institution) online <http://www.jil.go.jp/english/laborinfo/library/Laws.htm> (date accessed: 24 January 2005) [*Labour Standards Law*]. The Law has been amended many times since its enactment.

[73] *Workers' Accident Compensation Insurance Law*, (Rodosha Saigai Hosho Hoken Ho) Law No. 50 (7 April 1947) trans. by the Japan Institute for Labour Policy and Training [*WACIL*].

[74] *Minimum Wage Law*, (Saitei Chingin Ho) Law No. 137 (15 April 1959).

[75] *Pneumoconiosis Law* (Jinbai Ho) Law No.30 (31 March 1960).

[76] *Industrial Safety and Health Law* (Rodo Anzen Eisei Ho) Law No.57 (8 June 1972), art. 99. Several amendments have been made to the Law since its enactment.

[77] See *Labour Standards Law, supra* note 72 and *WACIL, supra* note 73.

[78] *Labour Standards Law, supra* note 72, c. VIII. Accident Compensation (arts.75- 88).

[79] *Labour Standards Law, supra* note 72, art. 75 "In the event that a worker suffers an injury or illness in the course of

responsibilities in regards to medical compensation, compensation for lost time, compensation for disabilities, survivors' compensation, and funeral expenses.[80] The same chapter also states workers' rights in terms of compensation as well as the denial of compensation when the worker commits gross negligence, investigation and arbitration proceeding.[81] Although the Labour Standards Law makes the employers liable for the compensation of injured workers, the law does not establish any practical compensation system. To remedy this situation, the Worker's Accident Compensation Insurance Law was enacted to ensure prompt compensation.[82] Article 84 of the Labour Standards Law now states that if compensation is paid through the system established by the Workers' Accident Compensation Insurance Law, the employer will be held harmless from liability as determined under the Labour Standards Law (except for the first three days).[83] In the Japanese system, run by the Ministry of Health, Labour and Welfare, employers pay compensation premiums. According to article one of the Workers' Accident Compensation Law, the purpose of this system is "to grant necessary insurance benefits to workers in order to give them prompt and equitable protection against injury, disease, disability or death *inter alia* resulting from employment or commuting and to promote the rehabilitation

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employment, the employer shall furnish necessary medical treatment at his expense or shall bear the expense for necessary medical treatment". For further discussion of this provision, see part III.E, below.

[80] *Labour Standards Law, supra* note 72, c. VIII, Accident Compensation, arts.75-88.

[81] *Labour Standards Law, supra* note 72, art. 83. Art. 78 states "In the event that a worker suffered injury or illness in the course of employment as a result of grave negligence, and the employer has received acknowledgment of such negligence from the administrative office, the employer is not obligated to pay compensation for lost time or compensation for disabilities."

[82] *Labour Standards Law, supra* note 72, art. 84 states "(1) In the event that payments equivalent to accident compensation under this Law are to be made under the Workmen's Accident Compensation Insurance Law (Law No. 50 of 1947) or under some other law as designated by Ordinance of the Ministry of Health, Labour & Welfare, for matters that would give rise to accident compensation under the provisions of this Law, the employer shall be exempt from the responsibility of making compensation under this Law. (2) In the event that an employer has paid compensation under this Law, the employer shall be exempt, up to the amount of such payments, from responsibility for damages under the Civil Code based on the same grounds."

[83] *Labour Standards Law, supra note* 72 art.84. But see part VI.D below.

of workers who have suffered injury or contracted a disease resulting from employment or commuting, assist those workers and their survivors and secure proper working conditions *inter alia* and thereby to contribute to the promotion of the welfare of workers."[84]

III. The Japanese Workers' Compensation System

A. The Law

Workers' Compensation in Japan is based on the Workers' Accident Compensation Insurance Law.[85] Determination of premiums is based on the Law Concerning the Collection of Labour Insurance.[86] According to the Workers' Accident Compensation Insurance Law, if an enterprise hires a worker, the employer is obliged to submit this information to the Ministry of Health, Labour and Welfare which runs workers' compensation system.[87] Enterprises covered by the regulation used to be any which hired more than 5 workers. Changes have gradually occurred, however, and by the year 1972, all enterprises that hired a worker were bound by this law except for government workers as well as some agricultural workers and mariners.[88] The obligatory undertaking begins the day an enterprise hires a worker; within 10 days the appropriate Labour Standards Office, which is a branch office of the Ministry of Health, Labour and Welfare, must be notified.[89]

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[84] *WACIL, supra* note 73, art.1.

[85] *WACIL, supra* note 73.

[86] *Law Concerning the Collection of Labor Insurance Premiums* (Rodohoken choshu ho) Law No.84 (9 December 1969) [*Premium Collection Law*], also *WACIL, supra* note 73, art. 30: "The premiums to be collected by the Government for the purpose of meeting the expenses necessary for workers' accident compensation insurance undertakings shall be governed by the provisions of the Premiums Collection Law."

[87] *WACIL supra* note 73 , art. 3: "In this Law, undertakings that employ a worker or workers shall be covered undertakings, Notwithstanding the provisions of the preceding paragraph, this Law shall not apply to undertakings managed directly by the State, undertakings managed by government offices or local public bodies (excluding the undertakings listed in Annexed Table No. 1 of the Labor Standards Law (Law No. 49 of 1947)) and persons insured under the mariners' insurance provided for in Article 17 of the Mariners' Insurance Law (Law No. 73 of 1939)."

[88] *WACIL, supra* note 73, art. 3. See also *supra* note 18 at 379.

[89] *WACIL, supra* note 73, art. 6 "The commencement and termination of the insurance relationship shall be governed by the provisions of the *Premiums Collection Law*" Also, *Premium Collection Law, supra* note 86 art. 3.

B. The Funding

Insurance premiums are calculated based on the formula that multiplies all workers' wages by Workers' Accident Insurance rate.[90] The rate differs from each group of industry and is decided by the Ministry based on frequency of accidents in each industrial group. For example, most of the service sector industries are classified as category of the business No. 94, "other enterprises," and the insurance rate is fixed at 0.6% a year, which includes 0.1% of commuting accident rate.[91] If an employer does not report its business to the Ministry and an accident happens, compensation will be paid and the employer must then pay maximum of two years of insurance premiums backlog plus 10% penalty.[92] In such cases, the government is also entitled to collect all or part of the expenses from the employer.[93]

C. Covered Workers

The definition of a worker in the Workers' Accident Compensation Insurance Law is the same as in the Labour Standards Law.[94] According to the article nine of the Labour Standards Law, a worker means "one who is employed at an enterprise or place of business... and receives wages therefrom, without regard to the kind of occupation."[95]

The law does not make any distinction between a part-time worker and a full-time worker. A day worker will be treated in the same manner as a full-time worker.[96] Foreigners are also covered by the law as long as they are working in Japan, however,

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[90] *Premium Collection Law, supra* note 86, art. 11. Currently, it varies from 0.5% to 12.9% depending on the nature of the industry. See also supra note 18 at 383.

[91] *Premium Collection Law, supra* note 86, art. 12.2.

[92] *Premium Collection Law, supra* note 86, art. 21.

[93] *Supra* note 18 at 382; *WACIL, supra* note 73 art. 31.

[94] *Supra* note 18 at 382.

[95] *Labour Standards Law, supra* note 72, art. 9.

[96] *Nishimura, supra* note 63 at 38.

Japanese workers who are working outside of Japan are not covered, regardless of whether they are hired by a foreign company or dispatched by a Japanese company. The law is interpreted according to actual relationship, which means the law will see if there is a practical existence of subordinate employment relations between the company and employee, rather than a legal formality.[97] In a small enterprise, in cases where the "directors" or "co-directors" are working under the chief operating officer's control, and if their payment are paid under the name of "wages," they are treated same as the workers and paid the compensation of the amount based on their wages. Their director's fees are not included in the calculation of the compensation.

For certain persons who are not under coverage of the scheme, such as owners of small enterprises, directors or co-directors of small businesses paid only with a directors' fee, self-employed persons, and workers who have been dispatched overseas, there is a voluntary compensation system, also run by the Ministry.[98]

D. Benefits

The system covers on-the-job accidents as well as commuting accidents[99] Compensation extends to medical treatment, temporary absence, disability pension and lump sum payment, survivors' pension and lump sum payment, funeral expenses, injury and disease pension, and nursing care.[100] Temporary absence benefits are paid from the fourth day of a worker's absence from work due to medical treatment; the first three days

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[97] *Oda, supra* note 17 at 323.

[98] *WACIL, supra* note 73, c. IV-2, Specially Insured Persons (arts. 33-37).

[99] *Supra* note 18 at 383.

[100] *WACIL, supra* note 73, arts. 12-8. Disability benefits come in two kinds: they can be paid in a lump sum or periodically as a pension. The method depends on the degree of disability left to the worker. Survivors' benefits may also be paid in a lump sum or as pension. Note that for survivors' benefits, only relatives specified in art.16-2 of *WACIL* are eligible to receive the pension. Lump sum payments are made in all other cases.

are covered by the employers, based on the responsibilities outlined in the Labour Standards Law.[101] Except for funeral and medical expense compensation, all benefits are calculated based on "average daily wage" based on Article 12 of the Labour Standards Law.[102] For the temporary absence benefits, daily calculation of benefits is equal to 60% of the worker's average daily wage.[103] In addition, the Labour Welfare Service provides additional 20% for all the temporary absence benefits as a special benefit for temporary absence from work.[104] Therefore, practically, workers can get about 80% of their daily average wages as a temporary absence compensation benefit.[105] The minimum insured benefits are currently set as 4,160 Japanese yen per a day.[106] This amount is reviewed by the Ministry if necessary.[107] The Labour Welfare Service also provides additional benefits in the form of injury and disease pensions, disability benefits and survivors' benefits.[108]

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[101] *WACIL, supra* note 73, art. 14; See also, *supra* note 18 at 389.

[102] *Labour Standards Law, supra* note 72, Article 12; see also *WACIL, supra* note 73 art. 8.

[103] *Labour Standards Law, supra* note 72, Article 76; see also *WACIL, supra* note 73 art. 14.

[104] *Supra* note 18 at 389. See also *Administrative Ordinance of Ministry of Labour* (31 July 1965) kihatu 901. The Labour Welfare Service is run by the Japan Labour Health and Welfare Organization, an organization affiliated with the Ministry of Health, Labour and Welfare. The Organization manages the surplus of insurance premiums. See also *H. Inoue, supra* note 63 at 229. See also Kaiulani Eileen Sumi Kidani, "Japanese Corporate Warriors in Pursuit of a Legal Remedy: The Story of Karoshi, or "Death From Overwork" in Japan" (1999) 21 U. Haw. L. Rev. 169 at 189 [Kidani]. Kidani distinguishes this labour welfare portion of the benefits as being a "social security type benefit, (i.e. benefits which focus more on providing necessities to the accident victim)." Nishimura points out that the Japanese workers' compensation system has shifted from a compensation scheme to more of a social welfare scheme as typified by the rich Labour Welfare Service. See *Nishimura, supra* note 63 at 308. *WACIL, supra* note 73, specifies the role of the Labour Welfare Service at art.29.

[105] The Labour Welfare Service provides an additional 20% in special benefits for all claims qualifying as temporary absence benefits. The benefits are provided under the *Rodosha saigaihosyohoken tokubetushikyukin sikyu kisoku* (Workers' Accidents Compensation Insurance Special Benefits Regulation), 28 December 1974 (Ministry of Labour, Ministerial Decree No.30) [*WACISBR*, title translated by the author]. The provision specifying the additional 20% in special benefits for a temporary absence from work will be found at article 3.

[106] Kokuji (Administrative announcement) (9 July 2004) *Rodosha saigai hosho hoken ho Seko kisoku Dai 9 Jo Dai 2 Ko Oyobi Dai 3 Ko no kitei ni motoduki jidohenko taishogaku wo henko suru ken* (as of 23 September 2004, 100 Japanese yen were worth $1.17 Canadian).

[107] *Workers' Accident Compensation Insurance Law Regulation* (1955, 022 Ministerial decree), art. 9.

[108] The Labour Welfare Service provides additional benefits for both survivors' benefits and disability benefits. In the case of disability benefits, the amount paid depends on the degree of disability, whether the amount is paid in a lump sum or as a pension. As for survivors' benefits, since only relatives specified in art.16-2 of *WACIL* are eligible to receive a pension, other survivors are eligible for a lump sum payment. The amount of a lump sum payment is fixed irrespective of the number of

E. Accidents

The first article of the Chapter VIII of the Labour Standards Law, Accident Compensation, states that injuries resulting from employment will be compensated.[109] However, since this definition is vague, administrative interpretation has a great impact on the decision of whether the accident is one "resulting from employment" or not.[110] Kazuo Sugeno explains the administrative interpretation as "'resulting from employment' means 'caused by duties,' and the 'initial test for determining' whether it is 'caused by duties' is whether it occurs in the course of employment."[111] Based on this interpretation, Sugeno further elaborates the concept as "[f]rom this perspective, it must be both 'caused by duties' and occur 'in the course of employment' for one to be able to say that it 'results from employment.'"[112] More specifically, Sugeno describes that "in the course of employment" means that "'the worker is under the employer's control and management'," and caused by duties means that "hazard inherent in the worker being under an employer's control under a labour contract, including the execution of his or her duties, is realized."[113] To be an incident that "hazard inherent in the worker being under an employer's control is realized...", as Hiroshi Inoue explains there must be a considerable causal relationship between the illness and the work.[114] However, as Inoue also argues that according to the interpretation of the Ministry, which requires considerable causation, especially in case of

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survivors. In case of a pension, the amount paid depends on the number of survivors. See *WACIL, supra* note 73, art. 15-16. See also *WACISBR, supra* note 105, art.4-5.

[109] *Labour Standards Law, supra* note 72, art. 75 (1) "In the event that a worker suffers an injury or illness in the course of employment, the employer shall furnish necessary medical treatment at his expense or shall bear the expense for necessary medical treatment."

[110] *H. Inoue, supra* note 63 at 63.

[111] *Supra* note 18 at 384.

[112] *Supra* note 18 at 384; [footnotes omitted].

[113] *Supra* note 18 at 384.

[114] *H. Inoue, supra* note 63 at 67. *Supra* note 18 at 384.

industrial diseases, eggshell claimants can be left without compensation.[115]

In addition, rather abstract definition of "resulting from employment" often becomes the focus of an argument when it comes to a death or suicide case caused by excessive work, as well as a psychological injury. It is often difficult or impossible for the investigating officer to see any physical relationship between the injury and its possible causes, and this has led to some serious disagreements as to the acceptability of this type of claim.

F. Stress Related Claims

The issue of karoshi or suicide cases caused by excessive work began to be recognised around the late 1980s. There were several incidents that were instrumental in creating public notice. One of them was the death of a branch manager of an electric components company.[116] He was hired by the company on February 1982, and in 1985 became a manager in the company's Tottori prefecture branch.[117] He often had to go back and forth between the Kyoto main branch and the Tottori branch by car, which are approximately 500 km apart and in February 1985, he was compelled to go on business trips for 18 days and was given only 2 days off per month.[118] Likewise, his business trip days in March of the same year totalled 19, and the number was the same for April. From May to June 4th, he was on business trips for 27 days and took only two days off.[119] On June 4th, 1985, driving on his way to the Tottori Branch for a business trip to the Kyoto

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[115] *H. Inoue, supra* note 63 at 68. Inoue suggests a review or revision of the law. He also points out the fact that in respect of the operation of Workers' Accident Compensation Insurance Law, administrative ordinances, which provide nothing but administrative guidance, exercise an overwhelming influence: See *H. Inoue, supra* note 63 at 63.

[116] *Honda, supra* note 8 at 113.

[117] *Honda, ibid.*

[118] *Honda, ibid.*

[119] *Honda, ibid.*

main office, he died of heart failure.[120]

Another well-publicised incident occurred when the employee of a publishing company died of heart failure at the age of 24. He usually went to his office around noon and worked until 2 am or 3 am on weekdays. On Fridays, before the deadline for publication, he often worked until 7 am. On weekends, he gathered material. In practice, he did not have any days off. Prior to his death, his monthly hours had ultimately reached between 240 hours and 290 hours.[121]

In both cases, it seemed that the victims were under harsh working conditions and under unreasonable stress due to the heaviness of their respective workloads. However neither case was recognized as a work-related injury when their survivors made their first claims against the Ministry. The cases were rejected as they did not meet administrative criteria.[122] Since about one-third of deaths in Japan result from brain and heart disease, the Ministry maintained a cautious attitude when deciding if death was triggered by aging or day-to-day unhealthy practice, or "resulting from employment."[123] According to the administrative guidelines of the time, in order to be recognized as "resulting from employment," Sugeno explains the guideline as:

> [O]ne must show that it suddenly took an appreciable turn for the worse beyond the deterioration it may have undergone as a result of aging and normal activities[.] In order for it to be recognized as such, it indicated that, first, the worker must have engaged in especially heavy duties beyond what he or she ordinarily engages in before falling ill and, second, that the heart or brain disease (*e.g.*, a brain hemorrhage or obstruction) came within one week's continuous strenuous duties or several days' excessively heavy burdens (*i.e.*, that the heavy duties must have been added to the worker's

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[120] *Honda, ibid.*

[121] See *e.g.* Karoshi saibann wo sasaeru kai, online: <http://www001.upp.so-net.ne.jp/wackey/sub-sasaerukai.htm> (date accessed: 24 January 2005), a website for a support group devoted to Karoshi victim Tatu Wakiyama, see also decision of Chuo Labour Standards Office (15 January 2000)[*Chuo Labour Standards Office Decision of 2000*].

[122] *Chuo Labour Standards Office Decision of 2000, ibid.;* see also *Honda, supra* note 8 at 112-116.

[123] *Supra* note 18 at 387. In 2001, 970,331 people died in Japan. Among those, 280,141 had died from brain and heard disease: Statistics from the Ministry of Internal Affairs and Communication, Statistics Bureau, online: <http://www.stat.go.jp/data/nihon/21.htm#n21-07> (date accessed: 24 January 2005).

> load no more than one week before the occurrence of the disease)[.] The excessive heaviness of the work had to be such not only for the victim but 'also for his or her co-workers and the same type of workers...[124]

According to these criteria, the heavy burden the worker carries has to be added for the past several days and if the worker has been excessively heavy burdened on a steady basis, the death is not recognized as work-related. In many karoshi cases, workers are indeed continuously under heavy duties, and those are not recognized as work-related injury, as in the aforementioned cases.

Suicide due to excessive work was also not usually recognized as a work-related accident, since article 12-2-2 prohibits compensation when the injury is the worker's willful act.[125] The main exception to this prohibition would be a case in which the worker sustained a work-related injury or illness and developed a mental disability as a result of being struck by the injury, and the resulting suicide is as a result of this mental disability.[126] The general suicide cases would be rejected since the act of suicide was not an accident but a deliberate act. However, this strict condition for recognition has received harsh criticism from the public as well as the courts. Several administrative decisions have begun to be overturned by the courts decisions.[127] Faced with harsh criticism, the Ministry has changed its guidelines both for deaths from overwork and suicide because of overwork or work stress.[128]

Based on the new guidelines, death from excessive work as well as suicide due to overwork or work stress is more likely to be officially recognised as a legitimate scenario.

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[124] Administrative Ordinance, Ministry of Labour, Kihatu No. 620 (26 October, 1987), cited in Sugeno, *supra* note 18 at 387, n. Recognition of Brain and Heart Disease as Caused by Duties.

[125] *WACIL, supra* note 73, art. 12-2-2 "When a worker has, by a willful act, caused an injury, disease, disability or death, or the accident that was the direct cause thereof, the Government shall not pay an insurance benefit."

[126] *Supra* note 18 at 392.

[127] See generally, Setuko Kamiya "Redress for 'karoshi' suicides eased," *The Japan Times* (25 March 2000), online: The Japan times online < http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20000325a9.htm > (date accessed: 24 January 2005).

[128] *Administrative ordinance 1063, administrative ordinance 544 supra* note 11.

Concerning sudden death from overwork, these new guidelines consider the accumulation of fatigue over a long period of time, or a prolonged workload that is too heavy.[129] When deciding whether the work is too heavy objectively, the guideline employs a comparison of an injured worker and his or her colleagues or workers who are working in the same industry.[130] These targeted workers should have similar experience, be healthy, and similar age to the injured worker.[131] A worker who has certain conditions but can work as normal can be included into the comparison subject.[132] The criteria also accept the fact that an overly heavy workload affects development of symptoms in brain and cardiac diseases.[133] Also, new guideline adds the six month of reference for the period of heavy duty before the development of symptoms, in addition to previous guidelines which began the evaluation a week before the development of the symptoms.[134] Besides working hours, the new guidelines consider irregular working hours, long shifts, number of business trips, shift operations, a late night shift, work environment, such as temperature, noise, time difference, mental strain as possible causes of these illnesses.[135] Moreover, overtime work of 100 hours for one month, 80 hours for six months before the development of illness is regarded as being too heavy, and more than 45 hours of overtime is considered as being detrimental to health and have strong causal nexus to the development of disease.[136] This new guideline is only applicable for certain kinds of brain and heart disease.[137] The Ministry

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[129] *Administrative ordinance 1063, supra* note 11; *Karoshi Mondai, supra* note 8 at 32-34.

[130] *Administrative ordinance 1063, supra* note 11, *Karoshi Mondai, supra* note 8 at 34.

[131] *Ibid.*

[132] *Ibid.*

[133] *Administrative ordinance 1063, supra* note 11.

[134] *Administrative ordinance 1063, supra* note 11, *Karoshi Mondai, supra* note 8 at 37-38.

[135] *Administrative ordinance 1063, supra* note 11, *Karoshi Mondai, supra* note 8 at 35-36.

[136] *Administrative ordinance 1063, supra* note 11. See also Japan Center for Health of Working People for more information, online: <http://www.inoken.gr.jp/> (date accessed: 24 January 2005); *Karoshi Mondai, supra* note 8 at 37-38.

[137] *Administrative ordinance 1063, supra* note 11. The Ministry specified several brain disease and heart disease as well as conditions. Those are cerebro-vascular disease, brain hemorrhage, cerebral infarction, hypertensive encephalopathy, ischemic

takes a stance that brain and heart diseases other than specified by their new guidelines are unlikely to be work related; however, if a worker develops conditions other than specified a disease, the Ministry considers the matter on a case-by-case basis and accordingly, the officer of a Labour Standards Office has to report these cases to the Ministry.[138]

Also, the guidelines for recognising suicide due to work stress or excessive work have been relaxed. In principle, for suicide to be recognized as work-related, there must be some form of mental illness.[139] Under the new guidelines, in evaluating suicide cases, criteria for mental disorders have been expanded.[140] The old criteria classified mental disorders as having an external cause, an inner cause or a psychological cause.[141] Among these mental disorders, the ones with so-called "inner causes," such as schizophrenia and bipolar disorder, were not recognized as work related injuries.[142] The new guidelines adopted the international illness classification (ICD-10) recommended by the World Health Organization, and as a result, the range of mental disorders has been expanded.[143] Specifically, schizophrenia, or disorders characterised by illusion, feeling, neurosis, or stress, are newly recognized.[144] In addition, the new standards accept not only suicide caused by serious mental illness, but also suicide caused by certain serious mental states, such as strong anxiety, desperation and recognize a suicide act under such mental state as

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heart disease, cardiac arrest, angina pectoris, myocardial infarction, and dissecting aneurysm of the aorta. See also *Karoshi Mondai, supra* note 8 at 31.

[138] *Administrative ordinance 1063, supra* note 11.

[139] *Administrative ordinance 544, supra* note 11.

[140] *Ibid.*

[141] *Administrative ordinance 544, supra* note 11; *Karoshi Mondai, supra* note 8 at 56.

[142] *Ibid.*

[143] See generally, World Health Organization, *ICD-10, the ICD-10 classification of mental and behavioural disorders : diagnostic criteria for research"*(Geneva: World Health Organization, 1993); *Administrative ordinance 544, supra* note 11; *Karoshi Mondai, supra* note 8 at 56.

[144] *Karoshi Mondai, supra* note 8 at 56.

an act without deliberate intent.[145] When considering the mental illness and the relation to work, there must be a strong psychological pressure or burden from work before the development of mental illness.[146] The new guideline classifies examples of incidents which could cause psychological problems into three categories. The mental illness will be considered when the situation of the work falls under category III, recognized as too heavy of a psychological burden and when the situation is stressful enough to cause mental illness, or when it falls under Category II, which causes less psychological burden but when the situation is significantly stressful.[147] However, in either case, there must not be external factors causing mental illness from the worker's personal life or those factors should be significantly small.[148] Also, incidents inherent to the workplace, such as promotion or transfer are not recognized as factors unless these incidents are done in an unreasonable manner.[149] In case of excessive overwork, such as when a worker cannot get minimal sleeping hours for several weeks, needed for a normal human life, the fact may be recognized as heavy psychological burden.[150]

While decisions of Labour Standards Offices are all bound by these administrative guidelines, the court takes a stance that these administrative guidelines do not bind them.[151]

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[145] *Administrative ordinance 544, supra* note 11; *Karoshi Mondai, supra* note 8 at 81.

[146] *Administrative ordinance 544, supra* note 11; *Karoshi Mondai, supra* note 8 at 49.

[147] *Administrative ordinance 544, supra* note 11; *Karoshi Mondai, supra* note 8 at 48-51. Examples in Category III include an experience of serious disease, injury, a particular type of failure of work duty, such as serious traffic accident resulting in physical injury to other people, involvement in a serious work accident, an experience of coerced early retirement, which does not have to have materialized. Examples in Category II include an experience of being a witness of tragic accident, failure to meet one's quota, unreasonable transfer, and sexual harassment. Mental disease attributed to causes under Category I are not recognized as work-related illness. Examples of incidents included in Category I include trouble with a customer, colleagues, and junior staff, and the introduction of new technology into one's office. When deciding the degree of stressful condition, the degree of seriousness of the incident, the toughness of one's quota, the degree of coercion, the seriousness of one's failure will be also considered.

[148] *Administrative ordinance 544, supra* note 11; *Karoshi Mondai, supra* note 8 at 50-51.

[149] *Administrative ordinance 544, supra* note 11; *Karoshi Mondai, supra* note 8 at 64.

[150] *Administrative ordinance 544, supra* note 11; *Karoshi Mondai, supra* note 8 at 71.

[151] *Karoshi Mondai, supra* note 8 at 39-41.

In principle, to be accepted as a work related illness, the court requires a considerable causation between the development of illness and work.[152] If a worker had a certain medical condition before the development of the disease, such as hypertension, the work must be the main reason to worsen the condition, more than other factors such as natural aging.[153] While the administrative guidelines require that the work considerably worsen the condition, the courts take more relaxed approach, which only requires the work to worsen the condition more than natural cause.[154] Also, in deciding the toughness of the situation, courts tend to take a more relaxed approach. For example, the decision of Nagoya District court suggests that when comparing the degree of toughness of the work, considering the worker's diversified personality, the weakest worker should be the standard of comparison.[155] Also, Tu district court decision states that comparison among other workers should not be overemphasized, since it will lack the fairness, criticizing the administrative guidelines that consider the worker's illness is not work-related if under the same situation, a worker develops an illness and others do not.[156]

Some of the cases initially rejected by the Ministry have been accepted as work-related injuries based on the new criteria.[157] Although recognition is still small considering the number of claims, these revisions of criteria can be seen as a significant improvement in the field of workers' compensation. Still, in many cases, the victim has much more to overcome in order to gain compensation, because when it comes to the establishment of extraordinarily heavy work, the issue of "unpaid overtime" work will

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[152] *Ibid.*

[153] *Ibid.*

[154] *Ibid.*

[155] Nagoya District Court, Nagoya (18 June 2001), Heisei 07 (Gyo U) 11; *Karoshi mondai, supra* note 8 at 59-60.

[156] Tu District Court, Tu (17 August 2000), *Karoshi Mondai, supra* note 8 at 41-42.

[157] For example, above mentioned publishing company's victim case was reconsidered and accepted as work-related death 15, January, 2004 by Chuo Labour Standards Office.

always come out.

G. Unpaid Overtime

Unpaid overtime work is a common practice in Japan. According to an article in the *Japan Times*, labour standards inspectors have found that 18,511 business establishments failed to pay overtime in the year 2003.[158] One company, for example, failed to pay 6.5 billion yen for overtime.[159] Labour inspector found that roughly 15 percent of Japanese establishments had failed to pay overtime wages to their workers.[160] Kaiulani Eileen Sumi Kidani , based on a survey conducted by the International Labour Organization, states that if the amount of unpaid overtime is included into the total number of hours worked per year, some Japanese employees may work as many as 3,000-3,500 hours per year.[161] "Overtime work at home without pay" is also a common practice in Japan. How much of this "overtime at home without pay" is done cannot be measured and it is uncertain how much overtime at home is done routinely.

Unpaid overtime is a problem in both the public and private sectors. Even officers of the labour standards office are doing unpaid overtime work routinely. Since this unpaid overtime work is not recorded, the worker must rely on witnesses or other co-workers' testimony to establish working time, which is sometimes very difficult to obtain. It is obvious, then, why the Labour Standards Law cannot prevent this unpaid overtime work. However, this fundamental problem has not been getting very much attention by the Japanese public in comparison to notice it has received from the Ministry of Health, Labour

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[158] "Number of firms ducking overtime payments soars" *The Japan Times* (16 June 2004), online: The Japan Times online <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20040616a4.htm> (date accessed: 24 January 2005). See Part VIII, below, for more on this topic.

[159] *Ibid.*

[160] *Ibid.*

[161] Kidani, *supra* note 104 at 179.

and Welfare regarding workers' compensation. In the following section, a law regulating working condition, the Labour Standards Law and the role of unions will be discussed.

IV. Weak Worker Protection Measures

A. The Labour Standards Law: Working Hour Provisions

Japanese working conditions, including the number of hours worked, are set by the Labour Standards Law.[162] The Labour Standards Law, article 32, Paragraphs 1 and 2, sets an eight- hour work per day and forty-hour work per week.[163] Accordingly, an employer cannot ask his or her employee to work more than eight hours a day.[164] However, there are many exceptions to this provision. Article 36 provides that in the case where an employer has a written agreement with a trade union organized by a majority of the workers at the workplace, or if a union does not exists, with a person representing a majority of the workers, and submits the aforementioned agreement to the Director of the Labour standards Office, the employer may ask for extended working hours of employees.[165]

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[162] *Labour Standards Law, supra* note 72.

[163] *Labour Standards Law, supra* note 72 art. 32.

[164] *Labour Standards Law, supra* note 72 art. 32 (Working Hours) "An employer shall not have a worker work more than 40 hours per week, excluding rest periods. 2. An employer shall not have a worker work more than 8 hours per day for each day of the week, excluding rest periods."

[165] *Labour Standards Law, supra* note 72, art. 36 (1) "In the event that the employer has entered a written agreement either with a trade union organized by a majority of the workers at the workplace concerned where such a trade union exists or with a person representing a majority of the workers where no such trade union exists and has filed such agreement with the administrative office, the employer may, in accordance with the provisions of such agreement, and regardless of the provisions of Articles 32 through 32-5 and Article 40 with respect to working hours (hereinafter in this Article referred to as "working hours") and the provisions of the preceding Article with respect to rest days (hereinafter in this paragraph referred to as "rest days"), extend the working hours or have workers work on rest days; provided, however, that the extension in working hours for underground work and other work specified by Ordinance of the Ministry of Health, Labour & Welfare as especially injurious to health shall not exceed 2 hours per day. (2) The Minister of Health, Labour & Welfare may, in order to ensure that the extension of working hours be appropriate, prescribe standards for the limits on the extension of working hours set forth in the agreement stipulated in the preceding paragraph, and other necessary matters, taking into consideration the welfare of workers, the trends of overtime work, and any other relevant factors. (3) The employer and the trade union or the person representing a majority of the workers who conclude the agreement stipulated in paragraph 1, when setting an extension of working hours in the said agreement, shall ensure that the particulars of the said agreement conform with the standards stipulated in the preceding paragraph. (4) With respect to the standards stipulated in paragraph 2, the administrative office may provide the necessary advice and guidance to the employer and the trade union or the person representing a majority of the workers who conclude the agreement stipulated in paragraph 1"; Agreement under Article 36 is sometimes referred as *saburoku kyotei, (Japanese term).*

Through this agreement between the employer and the labour union, the employer may ask the employees to work more than 40 hours per week or more than 8 hours a day. The overtime hours have to be paid a higher wage, which is more than 25% for regular overtime work and more than 35% for work on a holiday.[166] Under the Article 36, except underground work and other work especially injurious to health that is limited to 2 hours of overtime a day, no other time limitation is mentioned.[167] Although this agreement has to be submitted to the appropriate Labour Standards Office, sometimes 6 to 10 hours of overtime, or overtime work until midnight, were allowed.[168] The Article was amended in 1998, and by the amendment, Article 36 (2), Article 36(3), and Article 36(4) were added.[169] Under the new articles, the Ministry can prescribe an appropriate overtime limit, and also necessary compliance of employer is mentioned.[170] Regarding the new article, the Ministry of Health, Labour and Welfare issued an administrative guidance,[171] which sets the desirable limitation of overtime. However, Labour Standards Offices tended to accept the agreement which specified over time in excess of the limit set by the Administrative guidance, because the administrative guidance itself is not legally binding.[172] In response to the new administrative standard for the recognition of karoshi, the Ministry issued a new

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[166] *Labour Standards Law*, *supra* note 72 art. 36.

[167] *Ibid.*

[168] Kouji Morioka, *Kigyotyusin shakaino Jikan Kozo* (*Time Structure of a Corporation Centered Society,* in Japanese) (Tokyo: Aokisyoten, 1995) at 146 [translated by author].

[169] *Law to amend the Labour Standards Law*, Law No. 112, (30 September, 1998), arts. 36(2), 36(3), 36(4) were added; see also International Labour Organization, NATLEX, Japan, online: < http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=JPN&p_classification=01.02&p_origin=COUNTRY > (date accessed: 24 January 2005).

[170] *Ibid.*

[171] Notification of the Ministry of Labour [Notification No. 154 of 1998] concerning the limitation of increases in working hours under the Labour Standards Law [Law No. 49 of 1947], 28 December 1998. The notification suggested an appropriate overtime limit. Examples of those limitations are: a 15-hour upper limit for a week, and a 27-hour upper limit for 2 weeks.

[172] *Karoshi Mondai, supra* note 8 at 188.

administrative guidance.[173] Under the Administrative guidance, the Ministry tries to promote more efficient working hour reduction measures and now, the officers of Labour Standards Offices have to direct employers to control overtime works within the limit set by the administrative guidance.[174] In addition, even when the agreement admits overtime in excess of 45 hours a month, the officers of the Labour Standards Office have to direct employers to control actual practice under 45 hours a month.[175] However, again, the new administrative guidance and officer's direction is not legally binding.[176] The enforcement of the administrative guidance depends on employers' good will; therefore, the effectiveness is still uncertain. Under an agreement signed under Article 36 of the Labour Standards Law, although an employer is still obliged to pay the extra wage, such agreement certainly creates many cases of long working hours. Regular overtime created by this agreement may lead to unrecorded overtime and unpaid overtime. Further, this agreement allows an employer to adopt flexible time on a one-month basis, in one-year basis, and flexible working hours for everyday work.[177] In the latter case, if the total working hours within the unit does not exceed the total legal working hours within the unit, an employer does not have to pay any extra wage.[178] Also, based on this agreement, an employer and an employee can agree upon discretionary working hours.[179] Currently, these discretionary working hours are only applicable to certain kinds of work, such as research and

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[173] *Administrative ordinance 1063, supra* note 11 kaju rodo ni yoru kenkohigai boshi no tameno sogotaisaku, (Total Plan for preventing over excessive work and following ill health, translation of the title is mine), Kihatu 0212001, 12 February 2002.

[174] *Ibid.*

[175] *Ibid.*

[176] Kidani describes administrative guidance in the following terms: "called the 'backbone of Japanese administration,' administrative guidance is a system of coercion regularly relied upon by Japanese officials to ensure compliance with administrative guidelines based on the voluntary choice of the affected parties."[footnote omitted] Kidani, *supra* note 104 at 184.

[177] *Labour Standards Law, supra* note 72, arts. 32-2, 32-3, 32-4.

[178] *Labour Standards Law, supra* note 72, art. 32-4-2.

[179] *Labour Standards Law, supra* note 72, arts. 38-2, 38-3, 38-4.

development, information processing systems analysis, design, journalism, editing, producing, and directing; these professions require a worker's discretion regarding his or her work, and therefore it is considered that an employer cannot or should not control their working hours.[180] This system assumes the worker works within the working hours upon which an agreement has been made, but in reality, the worker could have to work far more than eight hours a day and this overtime is not recognized as overtime. Although an employer is responsible to monitor the number of hours worked, must also have the consent of the worker, these discretionary working hours can be a breeding area for unpaid overtime work. A perfect example is the incident of the aforementioned young man, who died under the employ of a publishing company. Since under discretionary working hours, a worker is supposed to control his or her own working hours, this system could provide a good excuse for employers who do not comply with the law and encourage more voluntary unpaid overtime for a worker. This discretionary working hours system has become a focus of criticism.[181] However, contrary to these opposing voices, pushed by business community, the Ministry is now also trying to expand the criteria of discretionary working hours.[182] It must be said that the Ministry's stance is inconsistent. The many exceptions in ordinary regulations pertaining to working hours and the inconsistent Ministry's approach contribute greatly to this phenomenon. Moreover, there remains the problem of the actual

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[180] *Ibid.*

[181] For example, the Japan Federation of Bar Associations, the Tokyo Bar Association, and the Daini Tokyo Bar Association issued an statement opposing to the maintenance and an expansion of discretionary working hours: "'Rodo kijunho no ichibu wo kaiseisuru hourituann' ni taisuru ikensyo" *Tokyo Bar Association* (March 1993), online: Tokyo Bar Association <http://www.toben.or.jp/abouttoben/opinion/1997/9803.html> (date accessed: 24 January 2005); Akio Kizuchi, "'Rodojikanhosei oyobi Rodokeiyakutouhousei no seibi ni tuite (kengi)' ni taisuru kaicho seimei," subject: 97-12-11, *Japan Federation of Bar Associations* (11 December 1997), online: Japan Federation of Bar Associations <http://www.nichibenren.or.jp/jp/katsudo/sytyou/kaityou/90/1997_27.html> (date accessed: 24 January 2005); Yoshio Kuroki, "'Rodokijunho no ichibu wo kaiseisuru hourituann' ni hantaisuru kaicho seimei" *Daini Tokyo Bar Association* (11 May, 1998), online: Daini Tokyo Bar Association <http://www.niben.jp/13data/1999data/roukihoukaiseihantai.html> (date accessed: 24 January 2005).

[182] *Honda, supra* note 8 at 178.

enforcement of the law.

B. Weak Enforcement of the Labour Standards Law

To aid with the enforcement of the Labour Standards Law, Labour Standards Offices are placed in each prefecture, and labour standards inspectors are given authority to maintain these standards.[183] Labour standards inspectors are authorized to inspect workplaces and associated facilities to check on working conditions, and they are also allowed to request or even seize documents relating to working conditions.[184] Labour standards inspectors can also interrogate both employers and employees, and if the working conditions are clearly below the standards set by law, or if the situation presents imminent danger, a director of a Labour Standards Office has the capacity to order the suspension of operations pending a change in working conditions.[185] Labour standards officers can act as judicial police with respect to labour related issues.[186] The law also includes provisions for punishment as a means to ensure employers' obedience to the law. Article 114 states that if an employer does not pay the extra wage for overtime and nightshift work, the court can order him or her to pay an additional payment of the identical amount.[187] When a worker thinks his or her employer's practice is against the law, the worker can report such violation to the appropriate Labour Standards Office.[188] Employers are prohibited from giving

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[183] *Labour Standards Law, supra* note 72, art. 97.

[184] *Labour Standards Law, supra* note 72, art. 101.

[185] *Industrial Safety & Health Law, supra* note 76, *Labour Standards Law, supra* note 72, art. 101.

[186] *Labour Standards Law, supra* note 72, art. 102.

[187] *Labour Standards law, supra* 72, art. 114: "A court, pursuant to the request of a worker, may order an employer who has violated the provisions of Articles 20, 26 or 37, or an employer who has not paid wages in accordance with the provisions of Article 39, paragraph 6, to pay, in addition to the unpaid portion of the amount that the employer was required to pay under those provisions, an additional payment of that identical amount; however, such a request shall be made within two years from the date of the violation."

[188] *Labour Standards law, supra* note 72, art. 114.

disadvantageous treatment because of the report.[189] Following the report, the labour standard officer can use aforementioned authority to redress these illegal practices. However, despite these safeguards, as Knapp points out, the law is never vigorously enforced and accordingly, it has been quite ineffective at regulating working hours.[190] With respect to unpaid overwork, the ineffectiveness is partly due to the unrecorded nature of unpaid overtime work in Japan, as well as the haphazard recording of working hours in general. For example, new employees are often required to come to work more than 30 minutes early in order to do office chores, such as cleaning or preparing tea and coffee for other employees. During break times, if a worker in the service industry sees that a customer is coming to their store, she or he is required to deal with the customer. These extra working hours are seldom recorded. Even though labour standards inspectors may wish to correct these practices, he or she often has no documents on which to rely. In similar fashion, if workers hope to get an additional payment granted by the law, they often have no official documentation with which to prove their working hours. This loose recording of working hours is a typical example of problematic Japanese labour management. The further discussion of problematic points of Japanese management as well as cultural problems particular to Japan will be discussed at a later point.

C. Labour Unions: Capital-Labour Harmonization

Labour unions are regulated by Trade Union Law, which provides criminal and civil immunity for the legitimate actions of a trade union.[191] The history of labour unions in Japan has many twists and angles. Before World War II, labour unions were practically

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[189] *Labour Standards law, supra* note 72, arts. 104(1) (2).

[190] Kidani, *supra* note 104 at 170.

[191] Trade Union Law (Rodo Kumiai Ho) Law No. 174 (1 June 1949); *Oda, supra* note 17 at 334.

prohibited.[192] After 1945, however, the Allied Force welcomed and encouraged the organization and activities of labour unions. But with the onslaught of the Cold War against the Soviet Union and the frequency of labour disputes, together with the Allied forces' anti-communist strategy, eventually prohibition of public sector employee strikes was brought about through an amendment of the National Public Servants' Act in 1948.[193] Up to that point, public sector unions had been some of the strongest and most active in Japan; this prohibition thus had a considerable influence on later developments to the Japanese labour union scene.[194]

About 90% of Japanese labour unions organize workers according to the specific enterprises specific to themselves, not to the industry as a whole.[195] Japanese style enterprise unionism could be one of the many obstacles to a reduction in working hours. Yoshio Sugimoto considers this problem as follows:

> Each enterprise union engages in decentralized, firm based negotiations with company management, but no firm can find it easy to shorten working hours without knowing what competing firms might decide about the issue. Since a one-sided reduction may weaken the company's competitive edge...[196]

Also, closely related to the business-run welfare service, which is discussed at a later point, Japanese labour unions tend to promote and maintain the Japanese style with customs such as lifetime employment.[197] The relationship between employers and labour unions is usually not a hostile one. Labour unions try to harmonize with employers. Based

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[192] See Part II.B above for more on the history.

[193] *Supra* note 18 at 9, *National Public Servants' Act* (Kokka komuinn ho) Law No. 120 (21 October 1947), it was amended December 1948.

[194] *Oda, supra* note 17 at 318.

[195] *Supra* note 18 at 498. See also David E. Weinstein, "United We Stand: Firms and Enterprises Unions in Japan" (1994) 8 Journal of The Japanese and International Economics 53 at 53 [Weinstein].

[196] *Supra* note 9 at 107.

[197] Toshimitsu Shinkawa and T.J. Pempel, "Occupational Welfare and the Japanese Experience" in Michael Shalev ed., *The privatization of social policy? : Occupational welfare and the welfare state in America, Scandinavia, and Japan* (New York: St. Martin's Press, 1996) 280 at 318.

on such a fact, David E. Weinstein acknowledges that "[t]he relatively unconfrontational stance of Japanese unions over the last quarter century and their seeming acceptance of the goals of their firms have prompted many scholars to argue that Japanese unions are still in a formative stage and are thus weak relative to their U.S. counterparts."[198] When a company's financial situation is bad, a labour union will tend to ask only for minor wage increases, or even no increase at all.[199] Since they are mainly trying to promote secure employment, including lifetime employment and wage increases, labour unions do not involve themselves much in issues related to the number of working hours.[200] Kyoko Kamio Knapp argues citing from the word of Shinsuke Miyano, Secretary of Japan Federation of Newspaper Workers' Unions, that "it is no exaggeration to say that they act as if life can be exchanged for money."[201] Tatsuo Inoue also points out the failure of labour unions to address working hour issues saying "Japanese labour unions have not zealously addressed the problems raised by karoshi. In fact, the labour unions have contributed to the problem because they often join management in legitimizing the conditions leading to overwork by entering into *saburoku kyotei*."[202] Since the beginning of the economic slowdown, unions have made even more compromises and tried mainly to work for harmonious labour relations. These days, hardly any strikes are conducted, even for important issues such as wage increases and job security. Strikes have been decreasing since the late 1970s and continuously throughout the 1980s and 1990s. Today, Japan is a

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[198] Weinstein, *supra* note 195 at 53 [footnotes omitted]. But he offers a refuting argument against this view in his article.

[199] *Supra* note 9 at 107.

[200] *Supra* note 168 at 147.

[201] Cited in Kyoko Kamio Knapp, "Warriors Betrayed: How the 'Unwritten Law' Prevails in Japan" (1996) 6 Ind. Int'l & Comp. L. Rev. 545 at 555 .

[202] Tatsuo Inoue, "The Poverty of Rights-Blind Community: Looking through the Window of Japan" (1993) B.Y.U.L. Rev. 517 at 536 [footnote omitted] [T. Inoue]. See also *supra* note 165 for the word *sabroku kyotei.*

country with almost no labour disputes.[203] Partly due to this tendency to work for harmony with employers, labour unions might as well not even exist when it comes to the questions of unpaid or extreme overtime.[204] According to the *Japan Times*, 51% of unionized workers have done unpaid overtime work an average of 29.6 hours per month. 25% of them do overtime work occasionally, 19% said frequently, and 7% of them say they do overtime for "half the month."[205] Sugimoto also describes this situation as follows:

> On the whole, unions of large companies have accepted the management's reasoning that an increase in productivity would lead to the enlargement of the 'size of the pie,' that would eventually lift wage levels and improve the living standards of workers...With the downturn of the economy in the 1990s and the early 2000s, cooperation between capital and labour intensified, with unions prioritizing job security over wage increases and most employer groups willingly complying with their demands. With individual workers fearing job cuts, job-sharing and the curtailment of overtime income, along with other forms of salary stagnation or reduction, have become the centerpiece of a labour strategy which has only increased the workers' docility.[206]

People are losing any expectations toward their trade unions, and unsurprisingly, the ratio of organized labour against the total labour force has fallen to 19.6 percent in the year 2002.[207]

While the recognition of karoshi has been eased, working hour regulations in Labour Standards Law are practically not working and left ineffectual. In the following section, the Ontario workers' compensation system will be presented as a comparative source for further analysis of the Japanese system.

V. Development of Ontario, Workers' Compensation

A. Pre-Workers' Compensation: The Unholy Trinity of Defenses

In Ontario, employment contracts were once treated in the same way as other

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[203] *Supra* note 168 at 48.

[204] *Ibid.* at 149.

[205] "51% of workers in union doing unpaid overtime" *The Japan Times* (16 March 2003), online: Japan times online, <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20030316a2.htm > (date accessed: 24 January 2005).

[206] *Supra* note 9 at 108-109.

[207] The Ministry of Health, Labour and Welfare, *Huhyo 1, Rodokumiai shuruibetu rodokumiaisu, rodokumiaiinsu oyobi suiteisosikiritu no suii*, online: Ministry of Health, Labour and Welfare <http://www.mhlw.go.jp/toukei/itiran/roudou/roushi/kiso/03/fuhyo1.html> (date accessed: 24 January 2005).

contracts, which were based on the "employment-at-will doctrine."[208] This doctrine presupposed that employers and employees possessed equal bargaining power when they discussed working conditions, which was not the case. Workers usually could not afford to leave their jobs, nor could they negotiate freely with employers because, in most cases, their only income was the payment from their employers.[209] A society based on the laissez faire model worked well for employers, but faced with deteriorating working conditions, the society started to feel the need for some form of rules regulating the working environment.

The province of Ontario enacted its first Workers' Compensation Act in 1914.[210] Prior to the Act, compensation for injured workers was awarded through court procedures under the common law rules.[211] The common law imposed on employers several duties regarding employment and workplace safety. P. Blake Keating enumerates these duties as following:

> (1) [P]rovide a reasonably safe place to work; (2) use ordinary care in providing a sufficient number of competent fellow servants to permit safe performance of work; (3) use ordinary care and diligence in inspecting and repairing the plant and equipment; (4) warn employees of any unusual defects or dangers; and (5) make and enforce safety rules so as to instruct the workers on how to avoid these hazards.[212]

However, even though employers were given these duties, they were required to take only 'reasonable and prudent care.'[213] In addition, in case of an employer's breach

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[208] Richard U'Ren & Matthew U'Ren, "Workers' Compensation, Mental Health Claims, and Political Economy" (1999) 22 Int'l J.L. & Psychiatry 451 at 458 [U'Ren].

[209] *Ibid.*

[210] *WCA 1914, supra* note 12. See also Douglas G. Gilbert & L.A. Liversidge, *Workers' Compensation in Ontario: A Guide to the Workplace Safety and Insurance Act* (Aurora, Ont.: Canada Law Book, 2001) at 1 [*Gilbert*].

[211] *Guest, supra* note 12 at 40.

[212] P. Blake Keating, "Historical Origins of Workmen's Compensation Laws in the United States: Implementing the European Social Insurance Idea," Workers' Comp. L. Rev. (2002) 135 at 136 [footnotes omitted] [Keating]; see also, Jack B Hood et al, *Workers' Compensation and Employee Protection Laws*, 3rd ed, (St. Paul, Minn.: West Group, 1999) at 1-2 [*Hood*].

[213] Keating, *ibid.*

of these duties, there were still three defenses against workers at the employers' disposal, which were sometimes referred as the "unholy trinity of common law defenses."[214] This "trinity" was made up of the following principles: first, 'fellow-servant' doctrine; second, 'contributory negligence;' and finally, 'assumption of risk.'[215] Under the 'fellow-servant' doctrine, although injured workers could still sue the other workers, the employer was not liable for any injury of the worker that was caused by negligence of other workers.[216] This doctrine was based on the notion that an employee was thought to have had assumed the risk of negligence of fellow employees.[217] Jack B. Hood, Benjamin A. Hardy Jr. and Harold S. Lewis, Jr. explain the common beliefs supporting the notion in this way: "the negligence of a fellow servant was one of the risks incident to employment, and the risk was assumed by the servant as an implied term of the employment contract."[218] They also point out the fact that public policy tended to support this doctrine because the fellow-servant rule "would make servants careful and watchful with regard to each other, thus, promoting greater care in the performance of their duties."[219] One exception of the fellow-servant doctrine which developed gradually was a "vice principle exception."[220] Under the vice principal exception, a supervising employee was not recognized as a

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[214] *Hood, supra* note 212 at 2; see also John Fabian Witt, "The Transformation of Work and the Law of Workplace Accidents, 1842-1910", Workers' Comp. L. Rev. 21 (1999) 3 at 3[Witt]; The expression " unholy trinity of common law defences" is mentioned, for example by *Hood, supra* note 212 at 2, *Keating supra* note 212 at 135, *Witt* at 3, Garth Dee et al., *Workers' Compensation in Ontario* (Toronto: Butterwords, 1987) at 4 [Dee, *WC in Ontario*] *and* Theresa Jennissen, "The Development of The Workmen's Compensation Act of Ontario, 1914" (1981) 7 Canadian Journal of Social Work Education, 55 at 58 [Jennissen].

[215] See e.g., *Hood, supra* note 212 at 2-5; see also Michael J. Piva, "The Workmen's Compensation Movement in Ontario" (1975) LXVII Ontario History 39 at 43 [Piva].

[216] See generally, Hood, *supra* note 212 at 4.

[217] *Hood, supra* note 212 at 4.

[218] *Hood, supra* note 212 at 2-3.

[219] *Hood, supra* note 212 at 3.

[220] Keating, *supra* note 212 at 138.

fellow servant, but rather recognized as vice principal of the master.[221] Since the duties of the employer could not be delegated, the negligence of a supervisory employee or vice principle was treated as employer's own negligence.[222] Thus, if the injury was caused by the negligence of a vice-principle, it was treated as though it were the employer's negligence and did not bar a worker from compensation.

Under the 'contributory negligence' doctrine, employees or servants were required to exercise reasonable care for their own safety, and the failure to use ordinarily required precautions barred workers from any recovery under the contributory negligence defense.[223] In other words, if the worker had contributed to the accident in any way, the employer would not be held liable.[224] While, in Japan, based on the system of France, where the civil law system has been adopted, instead of 'contributory negligence' doctrine, a 'comparative negligence' doctrine is used to assess compensation amount and allows the split of liability, in Ontario, where the common law rule has been adopted, 'contributory negligence' is a complete bar for the compensation for workers.[225]

Under the 'assumption of risk' defense, a worker could not sue his or her employer if the work was of a hazardous nature.[226] As Hood, Hardy, and Lewis explain it is thought, "the servant or employee had voluntarily agreed to assume the dangers normally and

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[221] Keating, *supra* note 212 at 138.

[222] Keating, *supra* note 212 at 138.

[223] See generally, *Hood, supra* note 212 at 4; Keating, *supra* note 212 at 137.

[224] See generally, *Hood, supra* note 212 at 4.

[225] *Civil Code*, *supra* note 17, Article 418 (Compensational fault) "If there has been any fault on the part of the obligee in regard to the non-performance of the obligation, the Court shall take it into account in determining the liability for and assessing the amount of the compensation for damages." Article 722 (Manner of compensation, fault in common) "1, The provisions of Article 417 shall apply mutatis mutandis to the compensation to be made for the damage which has arisen from an unlawful act. 2. If there is any fault on the part of the injured party, the Court may take it into account in assessing the amount of damages." Under Authorization of the Ministry of Justice & the Codes Translation Committee, *The Civil Code of Japan* (Tokyo:Eibun-Horei Sha, 1979).

[226] Jennissen, *supra* note 214 at 57.

ordinarily incident to the work. Risks were covered which a mature worker was presumed to know, regardless of whether one had actual knowledge."[227] Also, this common law rule was based upon the assumption that the wage included risk and provided compensation for workers.[228] The only exception of this assumption of risk rule was when an employer failed to properly guard dangerous machinery.[229]

Under the defenses used by employers, injured workers and their heirs, whose sole remedy was available through court procedures, could virtually never recover damages, because most of the accidents involved some fault of the victim, actions of another employee to some degree, or could be said to have resulted from one of the normal or assumed risks of the particular job. Also, in court procedures, workers had to present strong evidence which could very often be provided only by other co-workers, who were quite reluctant to testify against their employers for fear of retaliation.[230] In addition, the cost of litigation was too expensive for an ordinary worker who had been deprived his or her income to afford.[231] Even if a worker won his or her case, the litigation expenses consumed a substantial portion of the benefits awarded.[232] The employers' defense was often largely a reflection of society's desire to encourage more industrial expansion, maximum profit, and development at the least financial cost.[233]

However, due to rapid industrialization, workers were being forced to work in even closer proximity to machinery that was heavier, faster, and considerably more endangering

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[227] *Hood, supra* note 212 at 4.
[228] Piva, *supra* note 215 at 43.
[229] Piva *supra* note 215 at 42.
[230] Keating, *supra* note 212 at 136.
[231] Keating, *supra* note 212 at 136.
[232] Jennissen, *supra* note 214 at 58.
[233] *Hood*, *supra* note 212 at 4.

to their lives, leaving them helpless in unsafe conditions.[234] These conditions were aggravated by a lack of employers' sense of responsibility and necessity for the implementation of better safety measures was called.[235] Michael J. Piva describes the situation citing the word of one factory inspector Robert Hungerford of Ontario: the "wonderful advancement of industry' was 'resulting in the maiming and injury of many men and women."[236]

B. First Attempt to Improve Common Law Rules

Partly due to Federal inquiries and demands from trade unions, in 1884, Ontario became the first province to create an act that aimed to protect workers.[237] This act was entitled the Factory Act, and required the use of safety equipment, limited working hours, restricted employment of minors, and established an accident reporting system for manufacturing establishments that employed more than five workers.[238] Because the Act required such reporting only from manufacturing establishments that employed more than five workers, accidents that happened in small shops or high risk jobs such as those in the mining industry, went unreported.[239] Furthermore, the act did not solve the problems of injured workers, such as loss of income.[240] In 1886, again, ahead of other provinces, Ontario enacted an Act entitled the Workmen's Compensation for Injuries Act; however, the name of this act did not represent the real nature of the Act, which was still the type of "employers' liability act" modeled on the British legislation of 1880.[241] In Ontario, the

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[234] *Guest, supra* note 12 at 41.

[235] *Guest, supra* note 12 at 41.

[236] Cited in Piva, *supra* note 215 at 40 [footnote omitted].

[237] *Guest, supra* note 12 at 41.

[238] *Guest, supra* note 12 at 41; Piva, *supra* note 215 at 40, *Ontario Factories Act*, S.O. 1884, c. 39.[*Factory Act 1884*]

[239] Piva, *supra* note 215 at 40.

[240] Guest, *supra* note 12 at 41.

[241] *Workmen's Compensation for Injuries Act of Ontario*, S.O. 1886, c. 28; see also, Dee, *WC in Ontario, supra* note 214 at 5,

Workers Compensation for Injuries Act aimed to lessen the difficulties of common law remedies; however, the so-called "unholy trinity" was not impacted in any significant way.[242] As Piva describes, under the Act, an injured workman could sue for damages when the accident was caused by

> 1)the employer's negligence, 2) defective 'ways, works, machinery, plant buildings, or premises,' 3) negligence on the part of another employee who had supervision over the work of the injured employee, or 4) the failure of the employer to maintain proper guards for machinery.[243]

However at the same time, the Act imposed high thresholds for workers. As Piva describes:

> Negligence was strictly defined, and, in the case of defective machinery, the workmen could only bring suit where the defect resulted from negligence and where the employee had no knowledge of the defect. If the employee knew the machine was defective, common law assumed that the employee 'voluntarily incurred the risk' and the employer was not liable.[244]

However, in Ontario, the gradual introduction of the 'vice principle exception' weakened the strict 'fellow-servant' rules to some degree, and by the new Act, another common law defense, 'assumption of risk' was also weakened.[245] For employers, this new act brought with it higher chances of large damage suits, and labour management bitterness ensuing from legal actions.[246]

Around the same time, in Britain, the limitations of the employer's liability system began to obtain recognition.[247] The amended bill of 1880, introduced by Joseph Chamberlain in 1897, became the 1897 Workmen's Compensation Act.[248] This act

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Employers Liability Act, 1880 (U.K.), 43 & 44 Vict., C 42; *Piva, supra* note 215 at 41- 42.

[242] *Dee, WC in Ontario, supra* note 214 at 5.

[243] Piva, *supra* note 215 at 42 [footnotes omitted].

[244] Piva, *supra* note 215 at 42 [footnotes omitted].

[245] *Guest, supra* note 12 at 41.

[246] *Guest, supra* note 12 at 41.

[247] Piva, *supra* note 215 at 44

[248] Robert Asher, "Experience Counts: British Workers, Accident Prevention and Compensation, and the Origin of the Welfare State" (2003) 15 The Journal of Policy History 359 at 368 [Asher], *An Act to amend the Law with respect to Compensation to Workmen for accidental Injuries suffered in the course of their Employment, 1837* (U.K.) 60&61 Vict. Chap. 37, [*Workers Compensation Act 1897*].

strengthened the state control of the workers' compensation system; both a lawgivers and unions believed this to be an effective way to maximize employers' accident prevention efforts.[249] The amended Act prohibited contracting out between an employer and an employee. It also mandated that payment to injured workers who were not grossly negligent provided about 50% of lost wages, and established maximum and minimum payment amounts. Indeed, this amount was about twice the amount that is typically granted under the previous liability court procedures.[250] Britain's move had a great deal of influence on Canadian practices as well.[251]

In the province of Quebec, the compulsory reporting system of work-related injuries in manufacturing industries had been implemented since 1893, and the report showed a great hike in death and disability[252] This mandatory reporting system and the rising toll of death and disability led to the establishment of the Commission on Labour Accidents, and eventually made Quebec the first province in Canada to establish a workers' compensation system.[253]

In Ontario, the accident reporting system which had been put into place by the Ontario Factory Act revealed a rapid increase of accidents.[254] Although, under the Act, only manufacturing establishments employing more than five workers were required to report all accidents, and furthermore, noncompliance by employers was a common practice, this report did reflect some trends, such as a 300 percent increase of work-related injuries

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[249] Asher, *supra* note 248 at 368, *Workers Compensation Act 1897, supra* note 248.

[250] Asher, *supra* note 248 at 369- 370. *Workers Compensation Act 1897, supra* note 248.

[251] *Guest, supra* note 12 at 42.

[252] But see Guest, *ibid.* Guest suggests that Guyon, a factory inspector who played a great role establishing workers' compensation system in Quebec, suspected that even under the compulsory system, at least one in three accidents went unreported.

[253] Guest, *supra* note 12 at 42. See *An Act Respecting the Responsibility for Accidents Suffered by Workmen in the Course of their Work, and the Compensation for Injuries Resulting Therefrom*, S.Q.[1909] c. 66. See also *supra* note 12.

[254] Piva, *supra* note 215 at 41; *Factory Act 1884, supra* note 238.

between 1900 and 1904.[255] Although the increased number of accidents is often explained by greater compliance by employers to the reporting system, Piva argues that while this explanation has a certain validity, the tremendous increase cannot be simply explained by more compliance on the part of employers, because unreported accidents were usually of a minor nature; the number of fatal accidents during this period, however, also increased from 2.8% to 4.4%.[256] According to Piva, this increase was not only due to more compliance by employers; there must have been a rapid increase of industrial accidents.[257] The Ontario government became responsive to the situation and in 1904, finally amended the Factory Act. Under this new Act, clauses relating to guarding machinery were strengthened, which meant that if an employer did not comply with the order of an inspector regarding machine guards, the employer would be held liable in the case of an accident.[258] This provision was seen as somewhat effective, since the number of accidents showed a slight decrease.[259] However, the efficiency and actual effect of the Act was considerably doubtful. While Piva acknowledges that the 1904 amendments had some effect, he points out the inefficiency of the Act because of the wide spread non-compliance, and a lack of ability of a factory inspector to enforce his decisions.[260] As if to verify Piva's position, the reported number of accidents showed a drastic increase between 1905 and 1906.[261]

Initially, business interests typified by those, such as the Canadian Manufacturers Association, were reluctant to introduce no-fault insurance; at the time, about 90% of

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[255] Piva, *supra* note 215 at 40; *Factory Act 1884*, *supra* note 238.

[256] Piva, *supra* note 215 at 40.

[257] Piva, *supra* note 215 at 40.

[258] Piva, *supra* note 215 at 40; *An Act to amend The Factories Act, 1904*, 4 Edw. VII, Chap 26, [*Amended Factory Act 1904*].

[259] Piva, *supra* note 215 at 41; *Amended Factory Act 1904*, *supra* note 258; see also, Jennissen, *supra* note 214 at 57.

[260] Piva, *supra* note 215 at 40- 41.

[261] Jennissen, *supra* note 214 at 57, states that there was a 566% increase accidents between 1905 and 1906.

industrial accidents were thought to be attributable to the injured worker.[262] After the Factory Act amendment, however, assisted by the growing strength of unions and fraternal societies, the number of cases brought to court against employers increased.[263] Cases involving the clear negligence of an employer were brought to the courts and a large number of these cases were won by workers.[264] Accordingly, rates for privately insured employers against accidents also increased.[265] The high costs of insurance and the probability of high litigation costs began to give employers cause for concern.[266] The fact that the liability system was wasteful, more expensive than pooling the money for both workers and employers, and an understanding that the system tended to promote hostile relationships between employers and employees began to come into view.[267] In addition, a few successful lawsuits had brought an unexpected level of expenses to employers, and in certain cases, even led to bankruptcy.[268]

C. Ontario's Adoption of First Workers' Compensation Scheme

Business interests started to realize the possible benefits of a collective liability system which could stabilize the costs and spread the coverage arrangements.[269] In addition to the building pressure from unions, which had been rallying for an accident compensation system for years, business interests and a certain amount of influence from Quebec and Britain brought the creation of the Commission of Inquiry under Chief Justice William

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[262] *Guest, supra* note 12 at 43.

[263] Jennissen, *supra* note 214 at 58; Guest, *supra* note 12 at 41.

[264] Jennissen, *supra* note 214 at 59.

[265] Jennissen, *supra* note 214 at 60.

[266] Jennissen, *supra* note 214 at 60.

[267] *Guest, supra* note 12 at 41- 42.

[268] See generally, Jennissen, *supra* note 214 at 60 and *Guest, supra* note 12 at 41.

[269] *Guest, supra* note 12 at 43.

Meredith.[270] As Dennis Guest cited, The CMA suggested an introduction of "some form of accident insurance, whereby those who were injured in the course of their employment would receive a reasonable compensation without having to have recourse to legal process..."[271] at the hearings before the commission. Sir. Meredith stressed "the need to abolish costly delays and nuisances of litigation in an effort to bring quick and effective coverage to injured workers..." claiming that "compensation for workers should be considered a cost of business, with compensation to be paid from a public fund established on a collective basis."[272]

In March 1914, the Ontario government introduced the Workmen's Compensation Act, which was subsequently passed in the Ontario Legislature.[273] It was based on the British system, the German system and the state run insurance system previously adopted by the State of Washington.[274] The Act came into force on January 1, 1915.[275] As Sir Meredith indicated, two main goals of this Act were "to ensure the worker certainty of entitlement to compensation and to prevent the disabled worker from becoming financially dependent upon family, friends, or the wider community."[276] The act divided the employers into two groups. One group, the Schedule I employers, was required to contribute to state insurance. Schedule II employers, were kept individually liable.[277] Under the Act, the compensation was paid automatically in cash, regardless of the employers' financial situation, and

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[270] Jennissen, *supra* note 214 at 60; *Guest, supra* note 12 at 43.

[271] Cited in *Guest, supra* note 12 at 43.

[272] Jennissen, *supra* note 214 at 64 [footnotes omitted].

[273] *Guest, supra* note 12 at 44; Piva, *supra* note 215 at 39; *WCA 1914, supra* note 12.

[274] Piva, *supra* note 215 at 51; *Guest, supra* note 12 at 43; Piva explains each system as "The British system made employers individually liable while the German system grouped industries according to risk, thus providing collective liability, but under private insurance auspices." See also Piva, *ibid.* at 50.

[275] Piva, *ibid.* at 52.

[276] *Guest, supra* note 12 at 45.

[277] Piva, *supra* note 215 at 52-53; *WCA 1914, supra* note 12, ss. 4-5.

workers were not required to contribute to the funding.[278] Deduction of the contribution from the worker's wages was also made illegal.[279] There was a seven day waiting period, and if the accident had been caused by the serious and willful misconduct of workers, no benefit was given; however, as it is seen in the current Act, this provision was later amended to grant benefit to the worker or his or her heirs, in case of death and serious injuries even the accident was so caused.[280] Industrial diseases due to the nature of any employment, such as anthrax, lead and arsenic poisoning, were included in the compensation scheme and the Board was granted the authority to add new diseases to the list.[281] The Workmen's Compensation Board was granted exclusive powers to examine, hear, and determine all matters and questions regarding the administration of the system.[282] The Act was different from the so-called "employers' liability act," since it employed a no-fault liability, described by Guest as, "compensation for injury or death was to be paid as a right without the necessity of a lengthy court procedure to determine negligence...", and it shows a "sharp contrast to the prevailing system of poor relief".[283]

The 1914 Workmen's Compensation Act was not only a major improvement over the employer's liability law; it was also seen as one of the most significant pieces of social legislation in Canadian history.[284]

In Ontario, workers' compensation was established in response to inadequate tort remedies for both employers and employees. The provincial legislatures created the system

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[278] *Guest, supra* note 12 at 45.

[279] Piva, *supra* note 215 at 53; *WCA 1914, supra* note 12, s. 18 (1).

[280] *Guest, supra* note 12 at 44; *Workplace Safety and Insurance Act,* S.O. 1997, c. 16, Sch. A, s. 17 [*WSIA*]; *WCA 1914, supra* note 12, ss. 3 3(1) b.

[281] Piva, *supra* note 215 at 53- 54; *WCA 1914, supra* note 12, s.2(h).

[282] Piva, *ibid.* at 53.

[283] *Guest, supra* note 12 at 45.

[284] See generally, *Guest, supra* note 12 at 40; Piva, *supra* note 215 at 39; *Gilbert supra* note 210 at 1.

to ensure compensation to employees who were injured while they were on duty and to protect the business from unexpected costs. For workers, the system is meant to provide relief for loss of income, in addition to medical treatment, while simultaneously promoting rehabilitation and a quick return to work. For employers, the system provides limited liability and foreseeable costs which can be planed for. Overall, the workers' compensation system is to promote balance between the employee and the employer; while employers have given up common law defenses and accepted no-fault liability, they have also gained limited liability, and workers have also given up the right to sue employers in exchange for receiving automatic, prompt compensation.[285]

VI. Comparison between Ontario's and Japan's Current Systems

A. 1997 Amendment

Since 1914, the Ontario legislation has undergone several amendments, including its most noteworthy change in 1997, when the act underwent the most significant revision in 80-year history.[286] Bill 99, introduced by the Ontario Conservative government, brought substantial changes to the Ontario workers' compensation system.[287] This legislation caused the former Act to be repealed and replaced by the Workplace Safety and Insurance Act of 1997 [WSIA]; the new act came into force January 1, 1998.[288] As expressed in its name change, the new legislation made the momentous transformation from a compensation format to an insurance structure.[289] The new Act also replaced the Workers' Compensation Board and Workers' Compensation Appeals Tribunal with the Workplace

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[285] See generally, Natalie D. Riley "Mental-Mental Claims – Placing Limitations on Recovery Under Workers' Compensation for Day-to-Day Frustrations: Williams v. Depaul Health Center," (2001) 23 Workers" Comp. L. Rev. 397 at 403. See also *Guest, supra* note 12.

[286] Brian Shell, et al, *Understanding the Workplace Safety and Insurance Act*, (Aurora, Ont.: Canada Law Book, 1999) at 3 (preface).

[287] *Workers Compensation Reform Act*, 1997, S.O. 1997, c. 16; *Gilbert, supra* note 210 at 1.

[288] *Supra* note 286 at 3 (preface), *WSIA, supra* note 280.

[289] *Supra* note 286 at 1.

Safety and Insurance Appeals Board, as well as the Workplace Safety and Insurance Appeals Tribunal.[290]

Douglas G. Gilbert and L.A. Liversidge explain that the principle of the new act and its main objectives remain mostly unchanged, which are to "relieve the injured worker of the delay, cost and difficulty of suing an employer in a tort action, ...[e]mployers in turn were relieved of the uncertainty of civil litigation."[291] However, Garth Dee argues that while financially motivated reform contributed to lessening the employers' financial obligations and the improved Board's balance sheet, it ended up minimizing and even ignoring a number of legitimate expectations that workers have of the worker's compensation system.[292] The basic operation under the Workplace Safety and Insurance Act will be discussed in the following section.

A. Objectives of the Act

The current Workplace Safety and Insurance Act of 1997 sets four main objectives and claims to achieve these objectives in a financially responsible and accountable manner.[293] These objectives are: (1) the promotion of health and safety as well as prevention and reduction of injury; (2) facilitating a return to work; (3) labour market re-entry; and (4) benefits to injured workers.[294] Edward M. Hyland points out that the objective shows the legislation's perspective "away from the compensation of injured workers, and towards safety in the workplace and the establishment of an insurance system."[295] Dee also points

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[290] *Supra* note 286 at 1, *WSIA, supra* note 280 ss. 118, 123.

[291] *Supra* note 210 at 1.

[292] Garth Dee, "Dealing with the Aftermath of the Workplace Safety and Insurance Act, 1997" (1999) 14 J.L. & Soc. Pol'y 170 at 190.

[293] *WSIA, supra* note 280 s.1.

[294] *WSIA, supra* note 280 s.1.

[295] Edward M. Hyland, "The International Labour Organization and the *Workers' Compensation Reform Act*: Conflict Between International Responsibility for Human Rights and Divided Jurisdiction" (1998) 13 J.L. & Soc. Pol'y 188 at 193.

out that under those objectives; less emphasis is placed on the role of compensation as a method of protecting workers.[296]

When compared with its Japanese counterpart, the objectives show some interesting contrasts. Whereas the Japanese Workers' Accident Compensation Insurance Law's main objectives are prompt compensation, protection, rehabilitation and promotion of social welfare, the Ontario system sets the first objective as prevention of the injury. While Japanese labour standards offices do deal with both prevention and workers compensation, prevention is not an aim of the law itself.[297] Prevention is dealt with by the Industrial Safety and Health Law, and effectively separated from compensation.[298]

B. Funding, Covered Industries and Workers

The system in Ontario is funded solely by employers, and neither the provincial government nor the workers contribute to its operation, whereas in Japan, The National Treasury may subsidize any necessary expenses.[299] Under the Ontario system, employers are divided into two main groups and Schedule I employers are required to pay annual premiums.[300] Schedule II employers are basically responsible for paying compensation on their own.[301] There are some industries which are not classified as either Schedule I or Schedule II, and thus these industries are excluded from the compensation scheme.[302] These major industries are financial institutions, recreational and social clubs, broadcasting stations, motion picture productions, trade unions, law firms, barber shops, educational

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[296] *Supra* note 292 at 171.

[297] *WACIL, supra* note 73 art. 1.

[298] *Supra* note 76.

[299] *Gilbert, supra* note 210 at 2, *WACIL, supra* note 73 art. 32.

[300] *WSIA, supra* note 280 s. 88.

[301] *Gilbert, supra* note 210 at 2, *WSIA, supra* note 280 ss. 88, 90.

[302] *Gilbert, supra* note 210 at 7.

institutions, veterinary medicine and dentistry offices.[303] However, these industries may still join the scheme on a voluntarily basis.[304] This shows a clear distinction between the Japanese system and the Ontario system, since the Japanese system, which defines covered undertakings as "undertakings that employ a worker or workers," requires practically all the industries to join the compensation scheme.[305] The difference in funding, as well as the number of business establishments required to join the system, could be one explanation for the differences with respect to the system's financial situation.[306]

C. Workplace Safety Insurance Board, Workplace Safety Appeal's Tribunal

The Workplace Safety and Insurance Board was re-created from the Workers Compensation Board, under article 159 of the Act.[307] The Board's mission is to promote safe and healthy workplaces, to provide a comprehensive and viable support and insurance system for injured workers and employers.[308] It is responsible for all administrative aspects of the scheme, namely, the administration of the Act, which Gilbert and Liversidge elaborate "the determination of compensation claims; workers' rehabilitation and re-employment; determination, collection and investment of employer's premiums; and internal review of Board directions."[309] Brian Shell, Kevin Coon, and Shameem Rashid describe the Board's decision making power:

> The Board cannot make decisions arbitrarily. Rather, the Act requires the Board to make all

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[303] *Gilbert, supra* note 210 at 7.

[304] *Gilbert, supra* 210 at 7.

[305] *WACIL supra* note 73, art. 3 "In this Law, undertakings that employ a worker or workers shall be covered undertakings."

[306] Indeed, Japanese workers compensation system is well operated in terms of funding. It recorded surplus of 340,100,000,000 Japanese yen in the fiscal year 2003, Ministry of Health, Labour and Welfare, *Budget for the year 2003*, online: Ministry of Health, Labour and Welfare <http://www.mhlw.go.jp/shingi/2003/02/s0219-9e.html> (date accessed: 24 January 2005).

[307] *WSIA, supra* note 280 s. 159.

[308] The Workplace Safety and Insurance Board, *Our Mission*, online: The Workplace Safety and Insurance Board <http://www.wsib.on.ca/wsib/wsibsite.nsf/public/ReferenceQuickGuide> (date accessed: 24 January 2005).

[309] *Gilbert, supra* note 210 at 8; *WSIA, supra* note 280 s. 4(1).

> decisions based on the principles of merit and justice. It is unclear as to what the Act means by 'merits and justice', though it does stipulate that the Board is not bound by legal precedent. This means that the Board will decide all matters on a case-by-case basis and that each case will be decided on its own merits. Although past decisions of the Board will be able to serve as a guideline, the Board is not bound by those decisions...[310]

The Board is empowered to create policies regarding the application and interpretation of the Act.[311] Its board of directors is responsible for the administration of the Board and interpretation of the Act, and they do so by making policies.[312] It is worth noting that the Board has exclusive jurisdiction over decisions as to whether personal injury or death has been caused by an accident, and whether an accident arose out of and during the course of employment.[313] However, according to Dee, the Board's operation is problematic because:

> The Board has never been a tremendously worker-friendly place and has never been completely free of the political agenda of the government of the day, However, prior to the present administration, the Board always maintained a certain civility in responding to worker concerns and always at least tried to maintain the appearance of neutrality in its dealings between workers and employers.
>
> A number of separate incidents that have occurred in the last year or so that have left me with the very strong impression that the Board has become a very corporate kind of place and is completely consumed by a corporate agenda. The pretext of neutrality appears to be gone.[314]

Dee offers examples of such incidents. One example is the fact the Board defined the "customer" as employers.[315]

The Appeals Tribunal, which was created in 1985, was also renamed as the Workplace Safety and Insurance Appeals Tribunal under the new Act.[316] The function of the tribunal is limited to hearing and determining appeals from the Board regarding certain matters, such as benefits, re-employment, as well as healthcare and employer premiums.[317]

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[310] *Supra* note 286 at 91.

[311] *Supra* note 286 at 95.

[312] *Gilbert, supra* note 210 at 8; *WSIA, supra* note 280 s. 6(2).

[313] *WSIA, supra* note 280 s. 118(2).

[314] *Supra* note 292 at 177.

[315] *Ibid.*

[316] *Gilbert, supra* note 210 at 10; *WSIA, supra* note 280 s.173.

[317] *Gilbert, supra* note 210 at 10; *WSIA, supra* note 280 s.123, (1) "The Appeals Tribunal has exclusive jurisdiction to hear

Under the article 123(2), some matters are specifically excluded from the jurisdiction of the Appeals Tribunal, such as matter related to right of action or health examination.[318] It is empowered to confirm, modify or reverse any decision of the Board on the matters mentioned above as well as to reconsider, confirm, amend or revoke its own decisions.[319] However, under the new Act, the power of the Appeals Tribunal is now much more limited than it once was. The Tribunal used to decide a matter freely according to its own interpretation of the Act, however; the Tribunal is now required to adhere to the Board policy, which means that the Appeals Tribunal cannot interpret the Act freely and must respect and apply the Board's interpretation of the Act.[320] D ee explains the Board's stance regarding this limitation: "[t]he Board has taken the view that the Tribunal must adhere not only to officially minuted Board policy but also must adhere to any position that the Board solicitor says is a Board policy".[321] H yland argues this move as "these changes will strip the Tribunal of much of its independence, rendering it subservient to the Board..."[322] As will be discussed later, the Tribunal tends to take a more flexible approach than the Board; thus, the aforementioned limitation of the Appeal Tribunal's jurisdiction could have a

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and decide, (a) all appeals from final decisions of the Board with respect to entitlement to health care, return to work, labour market re-entry and entitlement to other benefits under the insurance plan; (b) all appeals from final decisions of the Board with respect to transfer of costs, an employer's classification under the insurance plan and the amount of the premiums and penalties payable by a Schedule 1 employer and the amounts and penalties payable by a Schedule 2 employer; and (c) such other matters as are assigned to the Appeals Tribunal under this Act." See also *supra* note 286 at 92.

[318] *WSIA, supra* note 280 ss. 123 (2), provides: "For greater certainty, the jurisdiction of the Appeals Tribunal under subsection (1) does not include the jurisdiction to hear and decide an appeal from decisions made under the following Parts or provisions: 1. Part II (injury and disease prevention). 2. Sections 26 to 30 (rights of action) and 36 (health examination). 3. Section 60, subsections 62 (1) to (3) and sections 64 and 65 (payment of benefits). 4. Subsections 81 (1) to (6), 83 (1) and (2) and section 85 (allocation of payments). 5. Part VIII (insurance fund). 6. Part XII (enforcement), other than decisions concerning whether security must be given under section 137 or whether a person is liable under subsection 146 (2) to make payments."

[319] *WSIA, supra* note 280 ss. 123, 129.

[320] *Supra* note 286 at 9, 95; *WSIA, supra* note 280 s. 126.

[321] *Supra* note 292 at 180.

[322] *Supra* note 295 at 200.

significant impact on the workers' claims.[323]

D. Rights of Action

Injured workers under both Schedule I and Schedule II employers coverage cannot sue their employers for any injury or occupational diseases arising out of the course of employment into a civil court.[324] Shell, Coon, and Rashid explain this limitation as "[t]he 'trade-off' for automatic coverage for work-related injuries is that the worker's rights are subrogated to the Board."[325] Unlike the Ontario system, the Japanese system allows for a worker to bring a claim to the Ministry, and at the same time to file a claim based on the Civil Code alleging the employer's negligence in failing to take adequate safety measures, and asking damages above and beyond those paid by the government controlled compensation scheme, such as wage losses not covered under the governmental worker's compensation scheme, as well as damages for pain and suffering.[326] Claims can be made without any third person's involvement. *Osaka Karoshi Mondai Renraku Kaigi* [the Osaka Karoshi Council] indicates the importance of bringing a claim to court and revealing a company's responsibility, especially in the case of *karoshi*; this is because even if the Labour Standards Office accepts a claim, this by itself does not mean that the employer will be liable for its faulty practices since the compensation system is based on the no-fault principle.[327] The council points out that revealing the company's responsibility and illegal

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[323] See. *e.g.* s. VI.H. below for more on this topic.

[324] *WSIA, supra* note 280 s.28; *Shell, supra* note 286 at 75; About arising out of the course of employment, see s. VI.E below.

[325] *Supra* note 286 at 75.

[326] See *Williams, supra* note 55 at 165. See also *Labour Standards Law, supra* note 72, art. 84 When compensation is paid under the WACIL, the employer will be exonerated from liability under the Labour Standards Law. Also, an employer will be exempt exonerated from liability under the Civil Code up to the amount paid by the system. There are no other clauses preventing a worker from suing employers for an additional benefit or for negligence under both the Labour Standards Law and the WAICL. Also, there is no clause preventing a worker from bringing his or her claim to a court under the Japanese system.

[327] *Karoshi Mondai, supra* note 8 at 164; [the title of the Council, translated by the author].

practices will increase public more awareness of the problem, thereby making it necessary for the company to take adequate preventative measures.[328]

This considerably differs from the Ontario system, which based on the notion of "historic compromise" between workers and employers. Accordingly, workers in Ontario are not, in principle, entitled to take their claims to a civil court unless the incident was caused by a third party.

Judicial review of decisions by administrative body in both systems also differs. In Ontario, section 123 (4) of the Act states that decisions of the Appeals Tribunal are final, and not subject to a review by the courts.[329] However, this does not mean decisions of the Appeal's Tribunal are never reviewed by the judicial body. As is the case with other administrative procedures, courts are granted power under the Constitution to review the Board's decision if the Board's action in question was *ultra vires*.[330] Courts will examine only the reasonableness of the Board actions' and whether the Board acted within its jurisdiction. If those conditions are fulfilled, the court will not interfere with the Board's decision, even if it may not agree with it. Gilbert and Liversidege explain this courts' role as "confining the scope of the review to errors made by the Tribunal that are of a

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[328] *Karoshi Mondai, supra* note 8 at 164. This huge difference regarding rights of action could be attributed to the history of the Japanese system. Unlike Ontario, Japan did not use the notion of "compromise" between employers and employees as a way to set up and develop its system. As Ayusawa explains, even before any system was created, an informal mutual support system existed in Japan. Due to rapid government-led industrialization, the mutual support system collapsed, leading to an urgent need to find a different way of protecting workers. As a result, the new system was created for government workers first. It can be said that the Japanese system was meant to protect workers more than employers. However, in practice, it remains extremely hard for workers to sue their employers under any circumstances in Japan. It is still strongly believed that law suits should be avoided in any costs. Also, suing an employer is seen as an act of betrayal. The bad reputation given to the worker could prevent him or her the worker from finding another job.

[329] *WSIA, supra* note 280 s. 123 (4).

[330] David Phillip Jones & Anne S. de Villars, *Principle of Administrative Law: A Carswell Student Edition* (Toronto: Carswell, 1985) at 6-10.

'jurisdictional' nature."[331] An error of jurisdictional nature could include "serious flaws in the administrative tribunal's procedure, amounting to the denial of natural justice."[332] Gilbert and Liversidege point out that this "high standard of review reflects the reluctance of the courts to interfere with the decisions of a tribunal constituted to bring expertise and expedition to a particular area of law."[333]

In addition to the limited role of court review, a worker can bring a complaint to the Ombudsman Ontario Office.[334] Although, the recommendations of the Ombudsman are binding on neither the Board nor the Appeal's tribunal, the Board and the Tribunal are required to consider the recommendations, which could make a difference.[335] According to the Annual Report of Ombudsman Ontario, during the fiscal year of 2003, the number of complaints received by the office regarding Workplace Safety and Insurance Board occupied 12.29% of all complainants. The total number was 790, second only to the Family Responsibility Office.[336]

Under the Japanese system, if a worker is not satisfied with the initial decision of the Labour Standards Office, he or she may appeal to the administrative tribunals, which has two levels. When these administrative procedures are exhausted, the worker may then seek redress in a civil court.[337] Although their number is small compared to the number of

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[331] *Gilbert, supra* note 210 at 191.

[332] *Gilbert, supra* note 210 at 191.

[333] *Gilbert, supra* note 210 at 191.

[334] *Supra* note 214 at 371.

[335] *Ibid.*

[336] Ombudsman of Ontario, *2002-2003 Annual Report* at 44.

[337] The procedure regarding a decision rendered by the Labour Standards Office goes as follows. A worker who is dissatisfied with can file a request to Workers' Accident Compensation Insurance Referee, and if the worker is still dissatisfied with the Referee's decision, the worker can request further review by the Labour Insurance Appeal Committee. Only after the decision by the Labour Insurance Committee is given can a worker bring a law suit to courts, however, if the decision by the Labour Insurance Appeal Committee is not given within 3 month after the request, the limitation is lifted. See also *WACIL, supra* note 73, arts. 38-40. *Sugeno, supra* note 18 at 392; Williams, *supra* note 55 at 170; but see Kidani, *supra* note 104 at 181, Kidani

claims brought to the court, court decisions have overturned some of the Ministry's decisions regarding karoshi which contributed in making the issue known to the public. Despite this fact, most administrative tribunal decisions have upheld the Labour Standard Office decisions. In Japan, therefore, courts have played a significant role on this issue.

Katherine Lippel suggests that courts tend to interpret the matter in a more flexible manner by using the American and Canadian precedent, stating the courts' decisions are "rendered by judges who had no responsibility for the administration of a fund destined to compensate injured workers. They were thus free to apply the law, without any self-imposed constraints of evaluating the economic impact of their decisions."[338]

However, many possible appeal procedures are not necessarily advantageous to workers, since employers and decision makers can also bring an issue to further appeal procedures. A worker's condition could possibly deteriorate during the lengthy bureaucratic procedure and court procedures before compensation would occur. In this case, the limitation of appeal procedures can sometimes bring a quick decision and quick compensation for workers, and therefore could be advantageous to workers.[339]

E. Entitlement to the Benefits

The worker is defined in Article two of the Act, as "a person, who has entered into or is employed under a contract of service or apprenticeship," which includes students, learner,

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points out the fact that these administrative tribunals are supposed to be independent of the Ministry, however: many of the referees are former Ministry officials.

[338] Katherine Lippel, "Workers Compensation and Psychological Stress Claims in North American Law: A Microcosmic Model of Systemic Discrimination" (1989) 12 Int'l J.L. & Psychiatry, 41 at 54.

[339] Indeed, Kidani points out how extremely time- and resource-consuming the Japanese judicial system is: he notes that judicial procedures usually take two to four years in district court and another one to three years in high court. See Kidani, *supra* note 104 at 192.

and volunteer members.[340] Major uncovered workers are self-employed workers, executives of a company, who has voluntary joined coverage, and outworkers who work at home, domestic workers and casual workers, who are hired not for the purpose of employer's main business.[341] This range of uncovered workers is quite similar to the Japanese counterpart, however in Japan workers who do not receive wages, such as volunteers, are also excluded from the coverage.[342] When deciding whether the injured person is a worker or an independent operator, the Board has adopted the "organizational test."[343] As Gilbert and Liversidge explain, this test is based on whether the person is part of an employer's organizational structure or not, allowing the Board to evaluate a wide range of issues.[344] Gilbert and Liversidge further describe the main points the Board looks at when determining if the person is a worker or an independent operator as: "(i) the degree of control that the person is subject to in doing the work; (ii) the opportunity the person has to make a profit or suffer a loss in doing the work; and (iii) other applicable criteria that characterize the work relationship."[345]

With respect to commuting, according to the Board policy, "[a] worker is generally not considered to be in the course of the employment when travelling to or from the

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[340] *WSIA, supra* note 280 s. 2.

[341] *WSIA, supra* note 280 s. 11. See also *Gilbert, supra* note 210 at 5-6; *WSIA, supra* note 280 s. 12. *Labour Standards Law, supra* note 72, art.9.

[342] *Labour Standards law, supra* note 72 art. 9 states: "In this Law, worker shall mean one who is employed at an enterprise or place of business (hereinafter referred to simply as an enterprise) and receives wages therefrom, without regard to the kind of occupation." (emphasis added) Labour Standards Law does not cover domestic workers and business that hires only family members." See also *Nishimura, supra* note 63 at 12-13.

[343] Workplace Safety and Insurance Board, Operational Policy, 12-02-01, Workers and Independent Operators, Independent Operators (published 12 October 2004) *Operational Policy Manual,* online: Workplace Safety and Insurance Board < http://www.wsib.on.ca/wsib/wopm.nsf/Public/120201>. (date accessed: 24 January 2005) See also *Gilbert, supra* note 210 at 4-5.

[344] *Gilbert, supra* note 210 at 4-5.

[345] *Gilbert, supra* note 210 at 4-5.

workplace..."[346] Whereas in Japan, all means of transportation for a commute are under coverage; in Ontario, compensation for commuting is more restrictive. However, Hyland argues this exclusion of commuting from the coverage in Ontario as inadequate by citing ILO convention as "the Convention requires of states parties that their national legislation include a definition of what constitute an industrial accident, and that such definition include the conditions under which commuting to and from work is considered an industrial accident."[347]

Compensation is made when the accident is arising out of and in the course of employment.[348] An accident includes "(a) a willful and intentional act, not being the act of the worker; (b) a chance event occasioned by a physical or natural cause; and (c) disablement arising out of and in the course of employment."[349] According to the Board policy, "disablement" is defined as "a condition that emerges gradually over time," also, "an unexpected result of working duties."[350] To be recognized as this category, as Gilbert and Liversidge explain, the work itself must be considered as a cause of the disablement to

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[346] Workplace Safety and Insurance Board, Operational Policy, 15-03-03, On/Off Employers' Premises, In the Course of and Arising Out of (published 12 October 2004) (date accessed: 24 January 2005) in *Operational Policy Manual,* online: Workplace Safety and Insurance Board < http://www.wsib.on.ca/wsib/wopm.nsf/Public/150303 > (date accessed: 24 January 2005). The Policy goes on to explain that some exceptional case the Board consider entitlement in claims where a worker is injured when (1) going to or from work in transport under the control and supervision of, or chartered by, the employer; (2) obtaining pay or depositing tools, etc., on the employer's premises after actual work hours; (3) participating in a work-related sports activity, for example, school teachers and camp counselors, when the employer condones these activities by making the premises available and/or exercising a form of supervision and control; (4) attending compulsory evening courses; (5) travelling on company business, by the most direct and uninterrupted route, under the supervision and control of the employer; (6) travelling to or from a convention and/or participating in convention activities; and (7) on a lunch, break, or other non-work period (period of leisure) by ordinary hazards of the employer's premises. See also *Gilbert, supra* note 210 at 23.

[347] Convention: Employment Injury Benefits, 8 July 1964, 07108,602 UNTS259 108718. See *supra* note 295 at 207 [footnotes omitted]. While Hyland acknowledges the fact that Canada has not ratified the convention yet, he still argues that as a founding member of the ILO, Canada should at least follow the standard set by the convention for the sake of protection of internationally guaranteed human rights. See *supra* note 295 at 223. Japan ratified the convention 7 June 1974.

[348] *WSIA, supra* note 280, s.13.

[349] *WSIA, supra* note 280 , s. 2,(Definition, 1). Regarding Japanese system, see Part I. 2 a5) above.

[350] Workplace Safety and Insurance Board, Operational Policy, 15-02-01, Definition of an Accident, Work - Relatedness (published 12 October 2004) *Operational Policy Manual,* online: Workplace Safety and Insurance Board < http://www.wsib.on.ca/wsib/wopm.nsf/Public/150201 > (date accessed: 24 January 2005).

some degree and the fact that the disablement developed during work is not enough.[351]

The accident has to be both arising out of employment and in the course of employment. The term "arising out of employment" refers to how the accident happens, such as the cause or origin of the accident.[352] As Gilbert and Liversidge cite, according to decision number 72, the Appeals Tribunal stated that to be recognized as an accident that arose out of employment, it should be shown that "some employment-related circumstances has in fact made a significant contribution to the occurrence of the injury," however; the Tribunal also said that this does not mean that the employment has to be the sole cause of the injury.[353] Gilbert and Liversidge also explain the term "in the course of the employment," which refers to the location or time of the accident, for example, when, where, and what of the injury; for an accident to be in the course of employment the injury must happen due to an activity that is necessary to carry out the duties of employment; this includes the time of arrival to the time of departure at the workplace, and can also include some activities incidental to work, such as going to the washroom.[354] Article 13 of two of the Act states that "[i]f the accident arises out of the worker's employment, it is presumed to have occurred in the course of the employment unless the contrary is shown."[355] This clause gives workers easy way to prove the relation of their injury and work, however, this presumption is not applicable for the disablement category.[356]

While both the Japanese and the Canadian systems adopted similar language that work must be a considerable or significant contribution to the development of illness,

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[351] *Ibid.*

[352] *Supra* note 350. See also *Gilbert, supra* note 210 at 14 and 19.

[353] Cited in *Gilbert, supra* note 210 at 20; Decision No. 72(1986), 2 W.C.A.T.R.28.

[354] *Ibid.*

[355] *WSIA, supra* note 280, s. 13.

[356] *Gilbert, supra* note 210 at 14-15.

Ontario system accepts diseases not solely caused by work, therefore, Ontario system could be seen as having wider definition of acceptable diseases.

The Workplace Safety and Insurance Act sets out no-fault compensation, and neither worker nor employer can agree to waive or forgo benefits.[357] However, as the Article 17 of the Act states if the sole cause of the accident is the worker's willful act, the compensation will not be paid, except when the accident causes death or fatal injury to the worker.[358] Gilbert and Liversidge explain that to be recognized as a serious and willful misconduct, there must be an obvious deliberate violation of a well-publicized employer rule.[359] As Gilbert and Liversidge observe, the Tribunal has been reluctant to apply this exception shown by decision number 432 or 235/98.[360] This is also an interesting difference between Japanese system since, in Japan; the Workers' Accident Compensation Insurance Law clearly states that if the accident is caused by the worker's willful act, including the case of death, the government does not have a responsibility to pay the benefit.[361]

F. Benefits

Insurance benefits include healthcare costs, replacement of lost earnings for temporary injury, and replacement of lost earnings due to permanent injury, non economic loss benefits for workers who suffer a loss of quality of life due to permanent impairment, and a medical and labour market reentry program when the worker is not able to return to his or her former work.[362] The loss of earnings benefits start when the loss of earnings

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[357] *WSIA, supra* note 280, ss.13, 16, 17.

[358] *WSIA, ibid.*, s. 17.

[359] *Gilbert, supra* note 210 at 26.

[360] *Ibid.*. See also Decision No. 432 (1987), 4 W.C.A.T.R. 137; Decision No. 235/98 (1998) W.S.I.A.T.

[361] *WACIL, supra* note 73, art. 12-2-2. "When a worker has, by a willful act, caused an injury, disease, disability or death, or the accident that was the direct cause thereof, the Government shall not pay an insurance benefit."

[362] *WSIA, supra* note 280, ss. 32 - 48, 40 - 42.

actually begins.[363] The amount of loss of earnings benefits is "85 per cent of the difference between his or her net average earnings before the injury and any net average earnings the worker earns after the injury..."[364] The amount is reduced from 90% under the previous Act.[365] The payment of benefits is based on an annual wage ceiling, and wages above the ceiling are not covered.[366] The kinds of benefits available in Ontario are quite similar to their Japanese counterparts, although there are differences in the amounts paid. However, the Japanese system is not emphasizing a return to work since as discussed later, in principle, Japanese workers are expected to return to their original workplace.[367]

G. Return to work, Employer and Employee Co-operation

A distinct feature of the Ontario Workplace Safety and Insurance Act when compared with the Japanese version is the worker's co-operation and return to work. Throughout the Act, the worker's co-operation is mentioned and also, the return to work is one of the principles of the Act.[368] Failure to co-operate could result in fewer benefits for employees and a fine for employers.[369]

In Ontario, early return to a safe work is primarily carried out by both employee's and employers' self-reliance.[370] The responsibility of the board is limited to things such as managing the claim, monitoring, and assistance to the worker and employer.[371] The

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[363] *WSIA, supra* note 280, s. 43(1). See also *supra* note 210 at 7.

[364] *WSIA, supra* note 280, s. 43(3).

[365] *Supra* note 286 at 27.

[366] The annual wage ceiling is based each year on the average industrial wage (AIW). For 2005 it is set as $67,700. Workplace Safety and Insurance Board, *Benefit for Loss of Earnings (LOE)*, online: Workplace Safety and Insurance Board <http://www.wsib.on.ca/wsib/wsibsite.nsf/public/BenefitsLOE> (date accessed: 24 January 2005).

[367] Japanese coverage, see Part III.D above. Regarding return to work Japanese situation, see accompanying text note 388-89.

[368] See *e.g. WSIA, supra* note 280, ss. 34, 40.

[369] *Ibid.* at 21.

[370] *Ibid.* at 43.

[371] *Supra* note 210 at 73.

process of returning to work is carried out through communication between the worker, health care providers, and the employer; all parties are informed of the degree of recovery.[372] Through this communication, employers are supposed to identify any available work suitable for a worker who is either still in the process of recovery or has recovered.[373] The work should be consistent with the injured worker's functional abilities, and restore pre-injury earnings when possible. The work also should be safe and within the physical capabilities and the skills of the worker.[374]

An injured worker has a right to be offered re-employment if he or she is medically fit to do the essential duties of the job or suitable work, but this right is granted only to a worker who has worked for a company which hires 20 or more people continuously for at least one year.[375]

If there is a dispute between the employer and the injured worker regarding the return to work, both parties can request return to work mediation to the Board.[376] If the employer does not meet its responsibility, it can be fined up to the 100% of compensation benefits and labour market re-entry costs.[377] If the worker does not meet his or her obligations, the loss of earnings benefits may be reduced, suspended, or stopped.[378]

As described above, in Ontario, an injured worker is expected to return to his or her own workplace as soon as possible, sometimes even if the injury has not completely healed.

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[372] *Gilbert, supra* note 210 at 67. *WSIA, supra* note 280, ss. 23, 37.

[373] *Gilbert, supra* note 210 at 67. *WSIA, supra* note 280, s.40 (1)(b).

[374] *WSIA, supra* note 280, s.40 (1)(b). See also, Dee, "WSIA 1997," supra note 292 at 185. See also, Workplace Safety and Insurance Board. Occupational policy 19-04-06. Suitable Employment, Re-employment Provisions, (published 12 October 2004) *Operational Policy Manual,* online: Workplace Safety and Insurance Board < http://www.wsib.on.ca/wsib/wopm.nsf/Public/190406> (date accessed: 24 January 2005).

[375] *WSIA, supra* note 280, ss 41(1) ,41(2).

[376] *Gilbert, supra* note 210 at 69. *WSIA, supra* note 280, ss. 40(6), 40(7).

[377] *WSIA, supra* note 280, s. 81.

[378] *Ibid.*, s. 43(7).

Dee argues this process could force a worker to accept "physically, but not otherwise, suitable work."[379] Dee offers possible examples of the "physically, but not otherwise suitable work" such as when a high skilled worker is offered a job a low status menial job, or single parent is offered a job on the night shift.[380] Dee points out that "[t]here are no negative consequences to an employer for making a bogus job offer."[381] Dee further argues the system as "[t]he lack of an option to obtain alternative work at similar wages leaves the worker vulnerable to abuse from both the accident employer and co-workers."[382]

Under the Japanese system, to obtain benefits, the worker has to be in a condition that renders him or her unable to or not suitable to work.[383] However, the Minister's position regarding what constitutes the "work" includes not only the work previously done by the worker, but other kinds of work.[384] This means that a worker could have to come back to a work which is not suited to their skill. Hiroshi Inoue argues this point using the example of a machinist who ends up working as a general worker and calls for a question into the practical functioning of the system.[385]

As well, in Japan, when a worker is considered cured, injured worker benefits will not be given.[386] The Ministry recognizes a cured condition as the condition when even if medical treatment, which is generally recognized in the medical field, is carried out, the positive effect cannot be expected, as well as the remaining condition is considered as the

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[379] *Supra* note 292 at 185.
[380] *Ibid.*
[381] *Supra* note 292 at 184.
[382] *Ibid.* at 188.
[383] *H. Inoue, supra* note 63 at 160. See also *Nishimura, supra* note 63 at 324.
[384] *Ibid.* at 160.
[385] *Ibid.* at 161.
[386] *Ibid.* at 217-218.

last state (fixed condition).[387] Throughout the Japanese Act, return to work is rarely mentioned, since the Labour Standards Law prohibits a company from dismissing a worker within 30 days from the worker's condition is decided as fixed or cured.[388] However, injuries caused by commuting are not subject to these discharge restrictions.[389] Furthermore, the law does not guarantee that the worker will be given the same quality of work, or the same amount of money. It is a field in which sufficient research has not been done and is rarely discussed in the Japanese literature of workers compensation, leaving the realities of the situation uncertain.

H. Controversial Claims: General Mental Stress

Under both the Japanese and the Ontario system, it could be said that handling of mental stress is one of the most controversial area, because contrary to the traditional work-accidents, stress claims are arising from seemingly safe and strain-free workplaces and intangible in nature. However, since stress claims share similarities with karoshi, it is important to address how stress claims are handled under both jurisdictions.

In Ontario, under the previous compensation system, as Shell, Coon and Rashid observe, there was a growing tendency to accept workers mental stress claims, especially as ruled on by the Appeals Tribunal.[390] The Appeals Tribunal had expanded the boundaries of the Board policy and, as Gilbert and Liversidge explain, it took the view that "chronic stress claims should be compensated in the same way as any other gradual process

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[387] *Ibid.*at 218 [translated by the author]. See also Administrative Ordinance 565 (30 September 1975) Kihatu 565. If a worker remains disabled, disability benefit, either in the form of a lump sum payment or as a pension, will be paid.

[388] *Labour Standards Law, supra* note 72 art.19.

[389] *Ibid.* Article 19 of the Labour Standards Law prohibits dismissing only injuries that happened in the course of employment. See also *Nishimura, supra* note 63 at 363.

[390] *Supra* note 286 at 12. See also *Gilbert, supra* note 210 at 38.

injury."[391] Accordingly, the Appeals Tribunal tended to accept claims for stress due to normal workplace events, based on the, as Gilbert and Liversidge describe, "reasonable person test," of which the basis is that which a "'reasonable person' could plausibly find stressful."[392] The decision 918 rendered by the Workers' Compensation Appeal's Tribunal is especially praised by Lippel, as "[t]he judgment may be qualified as a breakthrough in Canadian compensation law relating to stress, as it lays down clear cut ground rules that appear at first blush to be well thought out and rational..."[393] According to the decision No. 918, "[f]or a gradual onset of a mental condition from workplace stress, the pressures experienced by the worker must be greater than those experienced by the average worker, but in a particular case, entitlement will be recognized where the workplace stress is not unusual, provided it can be shown by clear and convincing evidence that the ordinary and usual work-related pressures in fact predominated in producing the injury."[394] Lippel states:

> This test creates objective criteria for the recognition of a claim, while protecting eggshells, who would be penalized if deprived of the opportunity to demonstrate that work really was a significant contributing factor in the development of the disability. It seems to make a serious effort towards coherence and fairness, and does not rely on arbitrary factors such as existence of a specific incident. Nor does it necessitate a strained construction of the Workers' Compensation Act.[395]

However, the new Act introduced specifically states that only in exceptional cases a worker is entitled to get compensation based on his or her mental stress claim. Article 13(4) clearly states that generally, a worker is not entitled to benefits for mental stress, except in the case described in 13(5), when the mental stress is caused by "an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her

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[391] *Gilbert, supra* note 210 at 38.

[392] *Ibid.*

[393] *Supra* note 338 at 56-57 [footnotes omitted].

[394] Decision No. 918 (8 July 1988) 9 W.C.A.T.R. 48.

[395] *Supra* note 338 at 57.

employment."[396] A worker is also not entitled to benefits when the stress is caused by the employers' action such as change of work, a termination of employment.[397] According to the Board policy, established together with the new Act, the cause must be acute; a worker who gradually develops mental stress because of work conditions is not entitled to benefits.[398] However, this does not mean the stress must have occurred directly after an incident.[399] Delayed acute reactions are also acceptable; however, these cases require "clear and convincing" evidence, which is a higher standard of proof, such as a specialist doctor's report.[400]

As Gilbert and Liversidge explain, the Board adopted its "reasonable person" standard to determine if the event is "traumatic," defining a traumatic event as "an event that would generally be recognized as traumatic."[401] The events must be usually horrific, or have some elements actually threatening the worker.[402] In addition, they must be uncommon in a normal employment situation, thus, ambulance workers, paramedics and police officers have a higher threshold at which their claims will be accepted.[403] As previously stated, the Board policy defines a "traumatic event" as "an event that would generally be recognized as traumatic," as well as "usually horrific, or have elements of actual or threatened violence to the worker."[404] There is no application of the "thin skull"

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[396] *WSIA, supra* note 280, ss. 13(4) 13 (5).

[397] *Ibid.*, ss. 13 (5).

[398] *Supra* note 286 at 12.

[399] *Supra* note 286 at 12.

[400] *Ibid.*

[401] *Gilbert, supra* note 210 at 39.

[402] *Ibid.*

[403] *Ibid.*

[404] Workplace Safety and Insurance Board. Occupational policy 15-03-02 Traumatic Mental Stress, In the Course of and Arising Out of. (published 12 October 2004). See also Workplace Safety and Insurance Board, *Operational Policy Manual,* online: Workplace Safety and Insurance Board < http://www.wsib.on.ca/wsib/wopm.nsf/Public/150302> (date accessed: 24 January 2005) [*Board Policy 15-02-02*].

principle.[405] If a worker reacts strongly to an innocuous event due to his or her personal history, he or she is not entitled to compensation.[406] On the other hand, an event can be recognized as traumatic even if other workers do not develop disabilities, or a worker has had a similar experience in the past with no symptoms.[407]

In 2002, the Board revised its policy and widened the category of mental stress.[408] According to the revised policy, traumatic mental stress due to harassment can be accepted if the harassment involves a traumatic event, or the cumulative effect thereof, taking into account any cases in which cumulative traumatic events have triggered a psychiatric/psychological response.[409] Before the new policy came in, to have a recognizable claim, the worker had to witness a sudden and unexpected traumatic event, or had to actually be harmed or threatened, however; with its revision, the entitlement has been expanded to include being the object of harassment, which involves physical violence or the threat of physical violence, or being placed in life-threatening events or a potentially life-threatening situation.[410] However, to be recognized as a compensable disability, the events must be clearly and precisely identifiable, objectively traumatic, and unexpected in the normal course of work.[411] The worker must have suffered, witnessed or heard the traumatic event first hand, which means the event can be established by the Workplace Safety and Insurance Board through information or knowledge of the event provided by

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[405] *Gilbert, supra* note 210 at 39.

[406] *Ibid.*

[407] *Ibid.*

[408] *Board Policy 15-02-02, supra* note 404.

[409] The Workplace Safety and Insurance Board, *Policy report No2(* December 2002), online: Workplace Safety and Insurance Board <http://www.wsib.on.ca/wsib/wsibsite.nsf/LookupFiles/DownloadableFilePolicyReport15_2/$File/PR1502.pdf> (date accessed: 24 January 2005). See also, *Board Policy 15-02-02, supra* note 404.

[410] *Board Policy 15-02-02, supra* note 404.

[411] *Ibid.*

co-workers, supervisory staff, or others.[412] Also, the new policy requires an Axis I diagnosis, in accordance with the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).[413] Indeed, for all mental claims, an Axis I diagnosis by regulated health care professionals is required, while for delayed onset or cumulative effect cases, there must be an Axis I diagnosis in accordance with DSM-IV, by a psychiatrist or psychologist and .[414] The Act also states that mental stress resulting from an employer's decision or actions relating to the workers' employment is not compensated, including a decision to change the task to be performed or the working conditions, to discipline the worker or to terminate the employment, except in the case where the employers' actions or decisions are not a part of the employment function.[415] Workers who develop mental stress gradually over time due to general workplace conditions are not entitled to benefits. In bringing about these revisions, concerns from the employers' side have been raised. Employers argued that the interpretation distorts the wording of the Act and will be yet another heavy financial burden for the employers, whereas on the workers' side, it is felt that the policy proposal is still too narrow and requirements are too harsh.[416]

K. Mental Stress Caused by Sexual Harassment

The Board has also started to recognize sexual harassment as a cause of mental stress

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[412] *Ibid.*

[413] American Psychiatric Association, *Statistical Manual of Mental Disorders : DSM-IV,* 4th ed.,(Washington D.C., American Psychiatric Association, 1994)[*DSM-IV*].

[414] *Board Policy 15-02-02, supra* note 404. AXIS I diagnosis: Clinical Conditions and other conditions that may be a focus of clinical attention, except for the Personality Disorders and Mental Retardation (which are reported on Axis II). See *DSM-IV, supra* note 413.

[415] *WSIA, supra* note 280, ss. 13(4) 13 (5). See also, *Board Policy 15-02-02, supra* note 404.

[416] Workplace Safety and Insurance Board, Mental Stress Consultation Report (10 May 2002).

under the previous act.[417] According to the new Act and the Board policy, as Gilbert and Liversidge state, "a victim of a single 'intense' episode of sexual harassment would be compensated, a worker who was 'subjected to daily sexual innuendoes, humor in poor taste, practical jokes and other forms of unwanted attention from co-workers' would not have been entitled to benefits for mental stress because the stress was not due to a sudden and unexpected event."[418] However, as Gilbert and Liversidge also point out, sexual harassment may be compensable under new Act using the category of a "willful and intentional act, not being the act of the worker."[419] Gilbert and Liversidge present a decision of the Appeal's Tribunal, Decision No. 324/98, in which a crime scene draftperson was subjected to a series of incidents of harassment by a police detective from whom she took direction.[420] The worker was subsequently diagnosed with reactive crisis anxiety and post traumatic stress disorder.[421] The Appeal's Tribunal was satisfied that the worker had suffered an emotional disability, which was direct consequence of the willful and intentional acts of the detective; as such the facts of the case fit within the definition of disability and accident.[422] The decision further added that even if the most stringent requirement of sudden shocking and/or life threatening was to be applied the worker would still be entitled to benefits, because the individual harassment incident was sudden shocking and/or life threatening because of the detective's power, his ability to control the timing of the events, and the worker's terror in their encounters.[423] This flexible interpretation of "shocking events" is worthy of attention. It could be an implication that

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[417] *Supra* note 286 at 13.

[418] *Supra* note 210 at 40 [footnotes omitted].

[419] *Ibid.*

[420] *Ibid.* See also Decision No. 324/98 (31 July 1998) W.S.I.A.T.

[421] *Ibid.*

[422] *Ibid.*

[423] *Ibid.*

Appeal's Tribunal still keeps the stance that wider recognition of mental stress is necessary. It could also bring about more flexible approaches for other mental stress claims. However, at the moment the situation is still uncertain.

I. Evaluating Ontario's Handling of Mental Claims

Based on the Act and the Board policy, it can be seen that Ontario takes a relatively restrictive approach regarding mental claims, providing, in principle, that compensation payable for mental claims must be reserved only for the cases caused by unexpected traumatic events. This strict policy on the acceptance of mental claims is widely praised by employers, while workers remain dissatisfied.[424] On the workers' side, it is suggested that a "burn-out" should be recognized, and the so called "Thin Skull" principle should be strengthened to ensure more vulnerable workers are not denied entitlement.[425]

Lippel, who has done research on American and Canadian workers' compensation practice regarding the handling of mental stress, also points out that to limit compensation for mental disability only when it is caused by an unforeseeable, traumatic event could create legal incoherence, showing the existence of apparent double standards, since in case of physical accidents, even if the injury is caused by a usual event, compensation is given.[426] Lippel warns that this double standard could lead to a more restrictive approach in the recognition of traditional style accidents.[427] Indeed, according to the research done by Lippel, some decision rendered in Quebec refused claims for physical injury because they were usual events in that particular workplace.[428]

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[424] See *supra* note 416.

[425] *Ibid.*

[426] *Supra* note 338 at 66.

[427] *Ibid.* at 67.

[428] *Ibid.*

Lippel also points out incoherence of a medical nature in such treatment; stating, it is highly improbable that any valid distinction of the condition of the anxiety reaction of the overworked hospital worker and an ironworker witnessing a co-worker fall can be made.[429] She also points out the contrasting natures of lawyers and the medical professional's role. The same word may often mean different things in law and medicine. Accordingly, as she states "[o]ften, a claimant's success seems to depend on finding a lawyer-psychiatrist tandem who speak the same language."[430]

Furthermore, Lippel states that "[m]any cases are nothing other than a question of nomenclature..." pointing out the word "unusual" or "unforeseen" can be interpreted according to decision makers' desires as to the result of claims.[431] According to the Lippel's research, "[s]taff cut-backs are considered and/or presented as a specific event when compensation is to be promoted. They are ignored or considered to be non-events when compensation is to be denied."[432] Lippel also points out that the decision maker's perceived view could make a difference in terms of acceptability, since each person's understanding of stress is different.[433] While she was pursing her research, she often heard the stories of how stressful the workers compensation adjudicators are, and they are capable of handling that stress.[434] This demonstrates how decision makers might think that claimants of stress claims are those who cannot cope, who are thus neither brave, nor macho - the eggshells, unworthy claimants.[435]

Lippel suggests these harsh, incoherent measures are the Board's panicky reaction or

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[429] *Supra* note 338 at 68.

[430] *Ibid.*

[431] *Ibid* at 67-68.

[432] *Supra* note 338 at 68.

[433] *Ibid* at 69.

[434] *Ibid.*

[435] *Ibid.*

an emergency measure to close the door on the flood of stress claims.[436] Since, in Ontario, the determination of compensability for workers' compensation is decided by an administrative body, as Lippel suggests as a tendency of administrative body, they could have at times "interpreted the relevant legislation bearing continually in mind the importance of minimizing the costs of their decisions. They thus construed their Acts in the most restrictive manner possible to avoid paying for the maximum number of stress claims."[437] Furthermore, as Lippel suggests, administrative decision makers tend to think they are not bound by legislation but by the policy, and those rules come from their superiors, not from the law.[438]

J. Suicide Claims

The Board Operation Policy, 15-05-01, "Resulting from Work-Related Disability, Secondary Conditions" states that

> Workers sustaining secondary conditions that are causally linked to the work-related injury will derive benefits to compensate for the further aggravation of the work-related impairment or for new injuries. If a worker commits suicide following a work-related injury, the WSIB must pay benefits to the worker's dependants if it is established that the suicide resulted from the work-related injury.[439]

The policy goes on to say that "[i]f a worker suffers a second accident, benefits are payable only if it is established that the work-related impairment caused the second accident."[440] It further explains the application, as in a case of suicide, by examining all surrounding circumstances.[441] The decision makers then determine whether the suicide resulted from

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[436] *Ibid.* at 66.

[437] *Ibid.* at 54.

[438] Ibid. at 65.

[439] The Workplace Safety and Insurance Board, Operational Policy 15-05-01 (12 October 2004). Resulting from Work-Related Disability, Secondary Conditions (published 12 October 2004). See Workplace Safety and Insurance Board, *Operational Policy Manual,* online: Workplace Safety and Insurance Board < http://www.wsib.on.ca/wsib/wopm.nsf/Public/150501> (date accessed: 24 January 2005).

[440] *Ibid.*

[441] *Ibid.*

the work-related injury.[442] If, as a result of the injury, the worker developed psychosocial problems that led the worker to commit suicide, it may be compensable as a work-related injury.[443] When examining the evidence, non-work-related factors are also assessed to determine whether their effect on the worker was so great that the suicide was really the result of factors connected to the injury.[444] When examining the evidence, psychiatric reports concerning the worker's mental and emotional condition, both before the occurrence of the work-related injury and during the period between the occurrence of the injury and the suicide, will be considered.[445] When such a report is not available, evidence such as the clinical history of the worker both before and following the injury, the labour market re-entry history of the worker, including the worker's attitude towards rehabilitation, psychosocial reports about the worker's psychological state and personal life, the worker's employment history, and reports from the worker's family members, friends and co-workers will be examined.[446]

According to the policy, Ontario takes the position that so-called physical-mental stress and subsequent suicide will be in theory compensable. But such case requires an initial work-related injury. Under the Act, a stress claim is to be recognized as a work related injury when there is definite, acute stress. Thus, the Ontario's approach could be seen as even stricter than its Japanese counterpart.

While the Ontario Board takes a more restrictive approach to mental stress than its Japanese counterpart, if an original injury exists, subsequent suicide claims are handled in a similar fashion in both jurisdictions. As criticized, it is also uncertain that Ontario's system

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[442] *Ibid.*
[443] *Ibid.*
[444] *Ibid.*
[445] *Ibid.*
[446] *Ibid.*

is adhering to the principle of workers compensation and can fully protect its workers.[447]

Currently, the Japanese Labour Standards Law practically does not protect workers. Therefore, workers toil in extreme conditions and consequently, the need for increased recognition of karoshi has been stressed. However, worker protection measures should be the first tool to protect workers before they become ill. If such measures are properly enforced, the possibility of karoshi should be much lower. To fully compare the situations in Japan and in Ontario, the following section examines the enforcement of employment standards in Ontario, especially in respect of working hour regulations.

VII. Ontario Workers Protection Measures

A. The Law

The Employment Standards Act sets out the working hours principle as eight hours in a day and 48 hours a week with several exceptions.[448] An employer and an employee can agree to work more than eight hours a day or 48 hours a week. Even though they make an agreement, an employee cannot work more than 60 hours a week and the employee can revoke the agreement with a two weeks written notice.[449] Workers are also entitled to take at least 11 consecutive hours of free time from work each day. This means a worker can work at most 13 hours a day.[450] Also, in the case of shift work, workers are entitled to take eight hours of free time from work between shifts, and likewise, the successive working hours cannot exceed 13 hours.[451] There are also weekly and bi-weekly requirements. Workers are entitled to take 24 hours of consecutive free time from work in every week or

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[447] See *e.g. supra* note 292 .

[448] *Employment Standards Act 2000, S.O. 2000.* s. 17 (1) [*Employment Standards Act*].

[449] *Supra* note 448.s.17.

[450] *Ibid.*, s.18.

[451] *Ibid., s.* 18 (3).

48 hours of consecutive free time in the period of consecutive two weeks.[452] Those regulations can be revoked only in the case of an unforeseen emergency event.[453] Workers are also entitled to take 30 minutes of un-paid meal breaks every five hours, which may be divided into 2 periods by an agreement.[454] After 44 hours of work per week, workers are entitled to receive an overtime payment rate that is at least one and a half times the workers' regular salary.[455] This overtime pay can be substituted for time off or averaging working hours over a period of four weeks, under a written agreement.[456] Workers are also entitled to take 2 weeks of vacation time each 12 month.[457] Employers are also required to record each employee's working hours each day and each week and prohibited from keeping false records.[458]

The Ministry of Labour is responsible for the enforcement of the law in Ontario.[459] The Ministry of Labour employment standards officers can, without a warrant, enter and inspect any place in order to investigate a possible contravention of the Act.[460] When conducting an investigation, an officer may examine documents, require the production of documents, remove and copy the documents, use data storage, and ask any question he or she thinks is relevant.[461] The person in charge of the documents is obliged to produce and assist, and may not hinder, interfere with, or refuse to answer the questions of the officer.[462] If a worker discovers that an employer is not complying with the Act, said worker can file a

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[452] *Ibid.*, s. 18(4).
[453] *Ibid.*, s. 19.
[454] *Ibid.*, ss. 20, 21(1)
[455] *Ibid.*, s. 22.
[456] *Ibid.*, s. 22.
[457] *Ibid.*, s. 33.
[458] *Ibid.*, s. 15and 131.
[459] *Ibid.*,s.84.
[460] *Ibid.*,ss. 86 (1),89 (1), 91(1).
[461] *Ibid.*, s. 91 (6).
[462] *Ibid.*,s. 91(8), 91(11), (12).

claim of complaint with the Ministry of Labour.[463] If the employer is bound by a collective agreement, the claim must go through the union first.[464] However, a worker who thinks that the trade union has treated him or her unfairly may still file a complaint with the Ministry.[465]

This is an interesting difference between the Japanese and Ontario systems. In Japan, a worker may directly make a claim with the Labour Standards Office, irrespective of the existence of labour unions.[466] This difference could be an indication of weak Japanese labour unions, which often give more priority to harmonized relationships between capital and labour.

Returning to Ontario's system: if an employer fails to comply with an order, or a requirement of the Act, they are guilty of an offence and conviction is possible.[467] The penalty will be up to $50,000 and/or a maximum of 12 months in jail.[468] If it is a corporation, the fine will be up to $100,000, and if previously convicted, the amount of the fine will be higher.[469]

B. Evaluating Ontario Employment Standards Act

The adoption of a 60 hour working week in Ontario makes for a considerably long work week limit. As a comparison, Judy Fudge brings the examples of Quebec, which has set a 40-hour work week, as well as the 35 work week in France.[470] The Ontario Federation

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[463] *Ibid.*, s. 96.

[464] *Ibid.*, ss. 96 (1), 99(2) 99(3).

[465] *Ibid.*, s. 99 (5).

[466] *Labour Standards Law, supra* note 72 art. 104.

[467] *Supra* note 448 s 132.

[468] *Ibid.*

[469] *Ibid.*

[470] Judy Fudge, "Flexibility and Feminization: The New Ontario Employment Standards Act" (2001) 16 J.L. & Soc. Pol'y 1 at 17.

of Labour criticizes the controversial 60 hours work as "a throwback to World War II."[471] Judy Fudge also argues the employer and employee agreement regarding 60 hours of working hours may be very problematic:

> Employees can refuse to work more than 48, but that presumes a balance of power between employer and employee that simply does not exist in most workplaces. While only the most precarious are likely to be dismissed if they refuse to work long hours, promotions and favourable treatment often depend upon an employee's willingness to do what the employer asks.[472]

The four week period used for averaging working hours is also a problematic point of the Act. Fudge goes on to argue about this practice of averaging working hours: "one has to ask, 'Why would any workers ever agree to average overtime, since they will be paid less for working the same number of hours?' One answer is that there are many vulnerable workers who will not be able to say no without fear of repercussions."[473]

Currently, possible amendments of the Employment Standards Act are being discussed in Ontario. These amendments include the abolition of the 60 hour working week. An employer would then be required to apply to the Minister when making a written agreement with an employee regarding a work week of more than 48 hours.[474]

VIII. Japanese Problems Found from the Comparison

When compared with its Japanese counterpart the Ontario, working hours are set even higher than Japan. However, upon looking at the exceptions allowed, Ontario's system restricts the work week to a maximum of 60 hours per week and 13 hours a day. This maximum can be exceeded, neither by paying extra wages nor with an employer-employee

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[471] The Ontario Federation of Labour, *Guide to the Ontario Ministry of Labour's proposed changes to the Employment Standards Act,* (October 2000) at 3 online : The Ontario Federation of Labour, Library Archives, <http://ofl.ca/uploads/library/employment_standards/esa.pdf> (date accessed: 24 January 2005).

[472] *Supra* note 470 at 16.

[473] *Ibid.*

[474] News Release, Ministry of Labour, Ontario, McGuinty Government Acts to Protect Workers *New Legislation and Beefed Up Enforcement Reaches Out to Vulnerable Workers* (26 April 2004) 04-53. Also available online, Ministry of Labour < http://www.gov.on.ca/LAB/english/news/2004/04-53.html > (date accessed: 24 January 2005).

agreement, while Japanese Labour Standards Law has an exception which may allow for a much longer week than the default 40 hour week. Also, the actual limitation of working hours in Ontario are set by the law, while in Japan, the law sets a 40 hour working week in principle; however, many exceptions are allowed and the desirable upper limit of those exceptions is not legally binding, although the Ministry has issued administrative guidance. In one sense, the Ontario Employment Standards Act, even though allowing more working hours on its face, has more enforceable power regarding the restriction of working hours.

Also, in Ontario, overtime pay, at least one and one-half times, is higher than its Japanese counterpart. Kidani suggests this difference in amount is significant. In Japan, as Kidani argues, employers feel better forcing employees to work overtime, because overtime pay is 1.25%, much less than for employers to hire additional employees.[475]

A. Factors Beyond the Law

Though it is true that Ontario has more restrictions regarding working hours, Japan and Ontario's Employment standards are not different in any significant way. However, in Ontario, unpaid or excessive overtime has not been raised as an urgent issue. As discussed in the previous chapters, in Japan, the relatively weak enforcement of the Labour Standards Law and weak labour unions are contributing to employers' illegal practices. Furthermore, there are number of factors outside the law that could explain the differences between Japan and Ontario with respect to legal working hours.

When compared with Ontario, the most prominent problem in Japan is the fact that, practically, workers cannot exercise the rights granted to them under the law, and they are therefore cooperating, either voluntarily or under compulsion, with their employers' illegal

[475] Kidani, *supra* note 104 at 187.

practices.

One revealing example is that even workers in the Ministry of Health, Labour and Welfare, are maintaining the illegal practice of unpaid overtime work. A worker who worked for one of the branch office of the Ministry, doing huge amounts of overtime, never received the overtime pay equal to the amount of what she had actually done. It was not only happening to this particular worker, but to all the workers in the office. One of the responsibilities of the worker was to make an artificial overtime record that matched the budget allocated by the central office. The worker made up the draft fictional working records by using a pencil and all other workers ink on the draft regardless of the real overtime work they did. The part written in pencil would be erased after all the signatures were taken. The record would then appear as though all the workers signed themselves in their own will.[476]

More than half of the workers in the office were university graduates and knew what rights were granted to them by law. They were aware that the practice was illegal. However, most of them had never thought of complaining about the practice to their employers or even amongst themselves. This was because every worker knew that if a worker complained about the practice, he or she would be sanctioned from the organization for breaking unwritten organizational rules. If he or she made an official claim, the likelihood of being forced to leave the office by unofficial means created by employers and co-workers would be high. Furthermore, everybody is aware that it would be very difficult to find a job that provides the same benefits.

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[476] Author's personal knowledge of work situation in the Japanese Ministry. This situation has been never been studied or officially reported. Although, it could be discounted as anecdotal, the author's personal experience and informal inquiries led her to believe that this situation is prevalent and far from being simply anecdotal. There is certainly an urgent need for further serious inquires and studies in this area.

This example shows how deeply rooted the custom of unpaid overtime work is in Japan, and we can learn several important things from the preceding example. The difficulty of changing careers, the presence of strong unwritten rules, weak recognition of individual rules, and importance of group harmony all contribute to the problem. In the following section, the forces preventing Japanese workers from claiming their rights will be discussed.

B. Japanese Labour Management

1. Lifetime Employment

Some answers can be found in the Japanese style of labour management as it is realised though the practise of lifetime employment. This unique Japanese system is said to be fading away, which is partly true. Due to the current prolonged economic downturn, many middle aged workers are being forced to leave their companies due to financial restructuring. However, this is only a partial collapse of the life employment system. In fact, Japanese companies still maintain the system quite firmly. Due to financial difficulties, companies have started to dismiss redundant workers, many of whom they used to keep in their organization under the lifetime employment system commitment. But good workers whom companies want to keep are still under the life-employment system. Furthermore, public servants and workers of semi governmental organizations still work under lifetime employment. Accordingly, the lifetime employment system and the elements of which it is constituted are still strong factors in the Japanese job market, practically running workers' lives from hiring until retirement. This custom of the lifetime employment, which could also be seen as a "modern" legacy of the feudal Japanese system, makes it very difficult for workers to make a change in career for several reasons.

2. Hiring and Company Delivered Welfare under Life time Employment

In Japan, under life-time employment, big companies tend to hire only new graduate students or workers under age 30 to make up the main part of their workforce. The bulk of newly graduated students and young workers are hired to be educated with the company's philosophy. Those workers will be transferred to various sections within the organization every three to five years until they retire. This means that if a worker wants to get into the job market after several years of another employment, especially after age 30, there will not be many opportunities open to the worker, especially from big companies.

Another side of the life employment system is company delivered social welfare. Many Japanese firms spend significant amounts of money to provide social welfare services to their employees, including things such as a commuting allowance, subsided housing, housing allowances, in-plant canteens, child care allowances, marriage allowances and better retirement plans for their employees.[477] This is described by Toshimitsu Shinkawa and T.J. Pemple as "if not cradle-to-grave socialism, at least its hiring-to-retirement equivalent."[478] Company-delivered welfare sometimes occupies the significant portion of workers' earnings. At first glance, this is a generous benefit to employees from a company. However, once a worker leaves the company, it can make her or his financial situation very unstable. Also, another dark side of company-delivered welfare is that it has led to an unevenness of social benefits in mainstream society, since big firms, which have more financial power, can deliver more services than smaller ones.[479]

Furthermore, in Japan, a person's social status, especially a man's, is often determined by the company to which he belongs. As Inoue describes it: " [t]he fact that a person is

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[477] *Supra* note 197 at 281.

[478] *Ibid.*

[479] *Ibid.*

working for Nissan, for example, is not just information about his job, but is usually a dominant part of who he is. A person's job is a vital source of his self-respect, a firm basis for his self-interpretation, and a prime determinant of the social recognition he gains."[480] A person working for a well-known company tends to have a higher social status.

Therefore in Japan, whether a newly graduated student from a university will be hired by a big firm is an important issue, since it could change his or her status for life. Besides this, changing jobs is a very risky business in Japan, as mentioned above. This means that a worker usually plans to remain with a company as long as possible, usually until retirement. This situation gives the worker very little leverage compared to the position of the employer; subsequently, workers are often forced to accept employer's unreasonable demands.

Yet another question can be raised. Why must the worker consider leaving a company instead of simply not accepting the unreasonable demands of an employer and claiming legitimate rights? The answer can be found in other aspects of Japanese society.

C. Group-Oriented Japanese Society

It has often been noted that Japan is a society built on mutual trust, harmony, and operates on a system of interdependency. As Micheal Weiner defines, the Japanese society is a "collective personality, characterized by uniformity and homogeneity, the family state...."[481] Accordingly; often people are defined by the social roles of the group to which they belong. As Richard P. Baker puts it: "[t]he self-identity of the average Japanese, as

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[480] T. Inoue, *supra* note 202 at 528.

[481] Michael Weiner, "The Invention of Identity: 'Self' and 'Other' in prewar Japan" in Michael Weiner, ed., *Japan's Minorities: the Illusion of Homogeneity* (London: Routledge, 1997) 1 at 8.

compared to the average American, is more a function of his or her social roles..."[482] In such a communitarian society, the necessity of written law is ambiguous, and it is often unspoken, unwritten community rules that prevail over written rules. Knapp points out that:

> Harmony and consensus flows from the group of people who share similar values and experiences. The resulting uniformity of behavior and thought diminishes the need to use law. Preservation of wa (the spirit of harmony) motivates action. In the Japanese mind, the warmth of human relations prevails over the cold eloquence of logic or rhetoric. Logic can be defined as a set of rules that enables anyone to arrive at a similar conclusion and rhetoric the art of persuasion.[483]

In such a society, collective group goals often prevail over individual rights and breaking this harmony by disobeying unwritten group rules will bring a person harsh sanction from other members of the group. This form of penalization is what the average Japanese person is most afraid of. Baker points out that "[w]hat Japanese fear most is not the oppression or stifling of individuality by the group, but separation from the group which, for Japanese, is equivalent to a loss of self."[484] A company, as a group, functions the same way, therefore, it is difficult or even impossible for a worker to act differently than other workers, even if it means simply exercising rights. Inoue describes the situation accurately as "an individual employee who refuses overtime work to spend more time with his family or on personal pursuits would be censured as *wagamama* (selfish) not only by his boss but also by his colleagues."[485] In Japan, the watchers are not only employers, but colleagues as well.

Likewise, companies also try to promote a feeling of belonging to the company, as though the employers and employees form a kind of family. They try to promote the feeling

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[482] Richard B. Parker, "Law, Language, and the Individual in Japan and the United States" in Koichiro Fujikura, ed., Japanese Law and Legal Theory (New York: New York University Press, 1996) 475 at 480.

[483] *Supra* note 201 at 565-566 [footnotes omitted].

[484] *Supra* note 482 at 488 [footnotes omitted].

[485] T. Inoue, *supra* note 202 at 537 [footnotes omitted].

that both the employers' and employees' final objective is the same; they all seek the prosperity of the company, which should bring benefits to the workers as well as the employers. Shinkawa and Pempel describe the labour management traditions of Japan as a "beautiful custom," saying, through this system, both business and government are seeking to "promote a version of labour-management harmony linked to Japan's allegedly historical 'beautiful customs' (bifu) involving close, paternalistic relations between worker and employer"[486] Sugimoto names this practice as "corporate capitalism"[487] and describes the Japanese style management as follows:

> In corporate capitalism, each corporation becomes a substantive and personal entity as though it had a personality of its own, with its interests overriding those of individuals connected with it. Since companies are thus anthropomorphized and deified, they become omnipotent and omnipresent in the lives of their members, executives, managers, and regular employees alike, compelling them to dedicate themselves to the companies' 'needs' and 'commands.' Thus, these 'corporate warriors' are expected, in an almost military fashion, to devote themselves to the requirements of the enterprise at the expense of individual rights and choices... To maintain these semi-totalistic characteristics, Japan's large companies use diffuse and nebulous rhetoric in evaluating employees' ability in terms of their personal devotion to the company, and likening the firm to the family.[488]

Accordingly therefore, if the company's financial situation is in trouble, workers are expected to sacrifice their personal interests for the good of the enterprise, since they share a common destiny with the company. This "common destiny" rhetoric is often the justification for unpaid overtime work on the side of both employers and workers, and accordingly, workers are hesitant to ask for extra money or to report their overtime. In view of this attitude, the enterprise will often set an upper limit for overtime pay and justify this unlawful practice by implying that if the company must go through tough times, the workers should also be expected to sacrifice themselves.

Together with the requirement for extreme loyalty to the company, a feudalistic or

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[486] *Supra* note 197 at 288.

[487] *Supra* note 9 at 96.

[488] *Ibid.*[footnotes omitted].

patriarchal relationship between senior workers and junior workers as well as between employers and employees is well maintained. If a senior employee is still working, junior workers are expected not to go home, even if they finish work. Junior workers are also expected to join in social drinking with their seniors after work. This social drinking after work sometimes happens almost every day. Sugimoto describes this situation together with the required loyalty to a company as the reason that "many Japanese employees find it difficult to leave the office before their bosses, because they are under constant pressure to demonstrate their loyalty to the company and their senior staff by staying late."[489] Also, employees are sometimes valued based on how much they did this unpaid overtime, or how much loyalty they have to the company.

To make matters worse, in such a group-oriented society, companies occupy one of the superior positions within a variety of groups in Japanese society; they are given much more importance even than family. In Japan, the industrial situation is sometimes referred to as "the economy everybody in the nation joins," meaning that all people are responsible for trying to promote "economic development" as a number one priority, even at the cost of their lives.[490] Knapp also points out that "[c]ritics often portray Japan as a kigyo-shakai (corporate-dominant society). Similarly, noting the spiritual dimensions in the Japanese workplace, one observer asserts that the most widespread religion in Japan is kigyo-kyo (corporate religion)."[491]

The preference given to companies means that many people believe success of the company as the principle priority of each individuals, and even the society as a whole gives

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[489] *Supra* note 9 at 101.

[490] *Supra* note 168 at 48 [footnotes omitted].

[491] *Supra* note 201 at 570-71.

employers a reasonable excuse to ask overtime from workers as well as a responsibility on the part of employees to work the overtime, sometimes unpaid. However, still there is a question that has not been answered: why, when a whole group of people are facing real difficulty, the group members as a whole do not exercise their legitimate rights? Why exercising legitimate rights seems to provoke a backlash even from co-workers?

D. Sense of Responsibility and Duty

Buddhist teaching and Confucian philosophy both have a real influence on Japanese mentality. Mi Kim explains the influence: "[t]wo sources of the Japanese cultural view are the Buddhist teaching that embrace submission to fate as the key to happiness and the Confucian teachings which emphasize filial piety, hierarchy, and reciprocal obligations."[492] Kim goes on to say that "[i]n the Confucian tradition, duties, not rights, form the basis for human action."[493]

Indeed, a sense of duty and responsibility has considerable effect on the Japanese worker's mind. Many people do overtime work because of this sense of responsibility. Workers who do not fulfill or complete their duty tend to be seen as selfish or even incompetent. Together with the above-mentioned group-oriented society, this sense of responsibility encourages workers to work harder and longer. Knapp also points out the fact that "[s]ocial order and control in Japan is derived from a concept of duties, not rights."[494] Survey done by Keio University, cited in Kidani, shows the typical answers why Japanese

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[492] Mi Kim, "Lay Down and Wait for Good News Unless You are Bowling Alone: A Comparison of Identity Crisis Confronting the Japanese Corporate Warrior and the American Corporate Law Firm" (2003) 11 U. Miami Int'l & Comp. L. Rev. 73 at 77 [footnotes omitted].

[493] *Ibid.*

[494] *Supra* note 201 at 568 [footnotes omitted].

workers are reluctant to take a vacation.[495] Answers provided from workers are "1) 'because my work load doesn't permit it;' 2) 'taking time off causes other people trouble' and 3) 'tacit pressure from management not to take vacations."[496]

E. Weak Recognition towards Laws as well as Human Rights

Consequently, Japanese society tends to undervalue individual rights and human rights as a whole. Knapp describes the situation as;

> The Japanese do not perceive rights as rigidly as Westerners do; they tend to feel more comfortable with duties. In the Japanese mind, the distinction between legitimate exercise of rights and extortion remains blurred. Concepts such as individual freedom and equality have remained foreign to the traditional Japanese value system. In fact, kojin-shugi, the Japanese word for individualism, often suggests selfishness to the Japanese.[497]

Also, Inoue argues that "the primacy of group loyalty, said to be a basic feature of the Japanese mind, results in a weak commitment to such universal principles as human rights, justice, and fairness – principles that theoretically do not discriminate between insiders and outsiders."[498] Indeed, this tendency is often found in Japanese Supreme Court various rulings. As for workers' rights, a 1991 Japanese Supreme Court ruling states that when an agreement is concluded according to the article 36 of the Labour Standards Law, extending working hours, as long as the rules concerning working hours are rational, workers assume the duty to carry out overtime work[499] On this occasion, a worker was working for the Hitachi, a large scale company in Japan. This ruling construed an individual worker's rights narrowly and allowed the companies' ambiguous excuse for forcing a worker to do overtime. Kim presents this ruling as "the Hitachi court upheld the

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[495] Kidani, *supra* note 104 at180.

[496] *Ibid.*

[497] *Supra* note 201 at 567-68 [footnotes omitted].

[498] T. Inoue, *supra* note 202 at 527 [footnotes omitted].

[499] Supreme Court of Japan, Tokyo, (28 November 1991) H. 03 11. 28 Daiichi Sho hotei, Hanketu Showa, 61 O, 840, (Dai 45 kan 8 go, 1270 page).

firing of a worker for refusing to work overtime on just one occasion despite the fact that the Hitachi 'three six agreement' mandated overtime work for widely broad and ambiguous reasons like 'attain[ing] production targets."[500] This reveals the nature of Japanese society, which typically gives more priority to the company's' convenience over individual rights, and gives only a weak recognition of worker's individual rights.

Supported by the Supreme Court, the collective nature of Japanese society is reinforced. Not only workers' rights in Japan, but also various individual rights are subject to the restriction of public welfare. The United Nations Human Rights Committee has repeatedly expressed its concerns about Japanese government's use of the notion of public welfare, which is not precisely defined. The committee noted in their concluding observations such as the following:

> The Committee reiterates its concern about the restrictions which can be placed on the rights guaranteed in the Covenant on the grounds of 'public welfare', a concept which is vague and open-ended and which may permit restrictions exceeding those permissible under the Covenant. Following upon its previous observations, the Committee once again strongly recommends to the State party to bring its internal law into conformity with the Covenant.[501]

Furthermore, restriction of individual rights in the name of the common good is largely practiced in Japanese public schools, where most junior high schools and high schools have detailed regulations over the students' personal lives. Those rules regulate everything from the students' hair style to uniform, all personal belongings, and even attempt to control the freedom of thought.[502] These unreasonable regulations are carried out under the name of the common good - the interest of whole school. Especially in junior

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[500] *Supra* note 492 at 85 [footnotes omitted].

[501] Human Rights Committee, Consideration of Reports Submitted by State Parties under Article 40 of the Covenant, Concluding Observations of Human Rights Committee, Japan, UN HRC 64. Sess. CCPR/C/79/Add.102 19 (1998) C. Principal subjects of concern and recommendations. 8.

[502] 15 July 1988, Supreme Court ruled the reporting system as constitutional., 5 July 1988, Supreme Court of Japan, Daini Sho hote, Showa 57 O 915, Hanji 1287, p. 65, Han ta 675, p. 59.

high schools, the enforcement of these rules is reinforced by a school report system that has a huge impact on high school admission.[503] These micromanaged rules create students with little personality. In addition, students are forced to become acclimated to an oppressive situation, learning to endure unreasonable rules that are not in accord with the principles of human rights.

IX. Possible Solutions

The value of leisure, vacation, and workers' pursuit of their own pleasure has long been disregarded in Japan. More value has been put on group interests, especially the pursuit of economic prosperity which will subsequently lead to the success of the corporation. In such a society, individual rights are undervalued and sometimes sacrificed in the name of the common good. As a result, workers are exploited and even voluntarily forced to join in the exploitation. Inoue argues that with such a society, "[t]his social structure has proved its remarkable efficiency in mobilizing people to attain collective goals, such as economic growth, without extensively resorting to legal coercion backed by state power. But the cost for this structure has also been great in terms of individual rights."[504] Kim also describes such a Japanese society by citing Baba, Inoue, and Isida's words as "an exquisite combination of capitalistic competition with communal or socialistic relations."[505]

As many scholars have already written, Japanese workers are described as corporate

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[503] If a student calls a question for rules, the student tends to be seen as trouble-maker by teachers, which could result in a negative evaluation in the school report. The school report is written by a junior high school teacher and no student has access to the information written in the report. The report is used for evaluating the student for high school admission. See also <http://www.nichibenren.or.jp/jp/katsudo/sytyou/jinken/80/1985_1.html>(date accessed: 24 January 2005) Gakko Seikatu to Kodomono Jinnken ni Kansuru Sengen, Subject: 85-10-19 (declaration for school life and rights of the child, translation is mine) declared by Japan Federation of Bar Associations).

[504] T. Inoue, *supra* note 202 at 541.

[505] *Supra* note 492 at 88. [footnote omitted].

warriors.[506] Those corporate warriors are appraised and their total devotion to the company is recognized and given praise by society. This could explain why, in Japan, workers' compensation has received more attention than the Labour Standards Law when it comes to karoshi. Japanese society feels uncomfortable about the situation because these corporate warriors have been denied the praise they deserve. This could also explain why the relaxation of karoshi recognition by the Ministry was seen as a significant step, while ineffective enforcement of the Labour Standards law has not been properly addressed in Japan. Continuing with this metaphor, the Ministry has not taken decisive action to reduce working hours while trying to solve the problem by compensating the corporate warriors, namely giving them prizes they deserve.

The Japanese Labour Standards Law is certainly weak. This is clear when we compare it with Ontario's Act. To make the situation worse, the enforcement of this law is further weakened by Japanese culture. No matter what the law is supposed to regulate, it becomes meaningless if people cannot exercise their rights or if the law is openly ignored, or not enforced. In Japan, if one tries to regulate working hours merely through the law and its enforcement, each company will have to be monitored by an officer. As Inoue puts it, "[u]nless the excessive communal cohesion of *kaisha* [company(s)] is loosened, Japan's society will not stop reproducing corporate persons or corporate warriors whose individual lives are impoverished and deformed."[507] This argument begins to get at the heart of the problem. It is the society that forces people to do more work than is reasonable. More recognition of human and individual rights is urgently needed in Japan today. Inoue also urges the importance of more recognition for individual rights, suggesting that

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[506] See *e.g.* T. Inoue, *supra* note 202 at 528. See also *supra* note 492; *supra* note 201.

[507] T. Inoue, *supra* note 202 at 539.

"[r]eorientation toward individual rights does not necessitate the sacrifice of all the positive aspects of human community to individualism. Rather the Japanese experience shows that individual rights are needed in order to enjoy a richer form of human community. The tyranny of intermediary communities impoverishes both the communal and individual dimensions of human existence."[508]

Education can play an important role here. As discussed above, education for youth in Japan tends to be oppressive, with schools ignoring human rights in the name of working for the common good. This oppressive education must be reviewed, and replaced with a less restrained education. Furthermore, as Knapp points out, in Japan, people's exposure to various laws is considerably low.[509]

Much the same is true in the field of labour laws. Some workers and employers simply do not know what the law requires. One nurse working for a private clinic was not given any paid holiday over 10 years and she simply believed the employer's word that the system of paid holiday does not exist in the clinic, contrary to what the Labour Standards law grants.[510] Thus, more education for the people is certainly desired. Knapp also suggests that;

> The more people become informed of their legal rights, the more likely that they will exercise them. The Japanese need to be taught that they are entitled to fight for their beliefs and that participation in the adversarial process is not a shameful act. For this purpose, education should help increase societal awareness of legal rights.[511]

The Labour Standards Law needs absolute maximum working hours, higher overtime wages and more powerful enforcement measures. Maximum working hour legislation can

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[508] T. Inoue, *supra* note 202 at 545.

[509] *Supra* note 201 at 577.

[510] *Labour Standards Law, supra* note 72, art. 39. Art. 39 provides the right to take a paid holiday, if a worker has worked six months and has not been absent for more than 80% of the business days in the period.

[511] *Supra* note 201 at 577.

solve the problem produced by the exception clauses given in the various articles.[512] Correspondingly, the article 36 as well as 32-2, 3, and 4 should be reviewed and amended to further strengthen the working hour regulation. As discussed, legal amendment alone is unlikely to solve the problem, but the government's strong commitment to reduce working hours may have some effect on people's way of thinking. Knapp suggests that there is a need for a firm attitude on the part of the government, saying, "[v]igorous enforcement of the law, which appeals to the public sense of justice, will direct the community to move toward declared goals."[513]

Japan's corporate-oriented society has also created a sharp division of labour along gender lines. As for women's working condition in Japan, the Osaka Karoshi Council alarms, karoshi among women has also been increasing.[514] Cases accepted by the Ministry as being work-related illness, however, are significantly low.[515] Considering the stress women often have to carry in the current labour market, the fairness of workers' compensation is open to question. Is Workers Compensation fair to women? It is supposed to be a practice that is fair to both men and women, since both in Japan and Canada, workers compensation is run by an administrative body. While it has been hardly constituted an argument in Japan, it has been discovered that a woman's claim for workers' compensation is more likely to be refused than that of a man's. The following pages, based largely on the study done by Quebec researchers Katherine Lippel and Karen Messing, will address women's issues such as occupational health, job stress, access to compensation, and the general background of these issues. Women's issue within workers' compensation

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[512] For more on this topic, see Part IV.A above.

[513] *Supra* note 201 at 575.

[514] *Karoshi Mondai, supra* note 8 at 100.

[515] *Karoshi Mondai, supra* note8 at 100. The year 2001, 143 karoshi cases were accepted by the Ministry, and among them, 133 cases were men.

scheme will allow us to pursue and conclude analysis of the adequacy of workers' protection in today's society, both in Japan and Canada.

X. Women and Occupational Health

A. Women's Job and Stress

1. Job Segregation

Women have recently entered occupations traditionally considered suitable for men only. In Japan, we have begun to see women working as airplane pilots and bullet train drivers. While this is a great step for the social advancement of women, it is still far from the norm. We have also seen legislation that creates equal opportunities for women in the workplace regarding hiring and promotion in both North America and Japan. The reality of job segregation by gender remains, however, mostly unchanged.[516] The advancement of technology as well as a change of industrial structures has not necessarily brought a new social order, but it has created a new pattern of segregation: new "woman's work," such as sales and data entry.[517] As Karen Messing states in her book *One-eyed Science*, in order for men and women to be evenly distributed across the job market, about three-quarters of women would have to change careers.[518] This is a considerably large number and it demonstrates that segregation by gender remains strong in the workforce. The reality is that women and men occupy very different places in the labour market.

This kind of jo' segregation is common in Japan as well. Office assistants, for example, are occupying what is strongly believed to be a woman's place. Even the Ministry of Health, Labour and Welfare, or other public organizations supposed to

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[516] See *e.g.* Jeanne Mager Stellman, *Women's Work, Women's Health: Myths and Realities* (New York: Pantheon Books, 1977) at 70.

[517] Harriet Bradley, *Men's Work, Women's Work: A Sociological History of the Sexual Division of Labour in Employment* (Minneapolis, Minn.: University of Minnesota Press, 1989) at 223.

[518] Karen Messing, *One-Eyed Science: Occupational health and Women Workers* (Philadelphia: Temple University Press, 1998) at 1.

promote gender equality, have been known to fall into the trap. For instance, the Osaka Labour Bureau, which is in charge of workers' compensation and the enforcement of employment standards, hires more than 30 temporary workers to aid the annual transactions of workers' compensation each spring. Almost every year, those temporary workers are all women. When a man applied for this section, the human resource manager in charge of hiring temporary workers laughed and wondered what he was thinking. Again, the Kurayoshi Taxation Office, which hires many temporary workers during tax return season, hires almost exclusively women for these temporary jobs each year. It is almost as though an unspoken rule exists that prohibits the hiring of a man for the position.

The International Labour Organization has also pointed out that, globally, the labour force is still highly segregated on the basis of gender and most women have few choices as to where they can work.[519] The possible reasons why women still occupy certain limited occupations are many. One explanation is that women tend to have more domestic responsibility. This additional burden prevents women from entering a professional occupation if it interrupts the household duties that fall primarily to them.[520] As Harriet Bradley suggests, even the traditional nine to five, Monday to Friday working hours are made to fit the traditional male schedule, which ultimately means a long workday with few household duties.[521]

Another possible rationale for this trend is that both male and female employers, guided by their commonly held beliefs and stereotypes, are still assigning women to do

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[519] Valentina Forastieri, "Safework: Information Note on Women Workers and Gender Issues on Occupational Safety and Health" (Geneva: International Labour Office Geneva, 1999) at 2, online: International Labour Organization <http://www.ilo.org/public/english/protection/safework/gender/womenwk.htm> (date accessed: 24 January 2005).

[520] *Supra* note 517 at 227.

[521] *Ibid.* at 232.

"woman's work." There are certain occupations that the general public still strongly believes are more suitable for women than men. Behind this belief, however, is the very distinct possibility that sometimes these occupations are simply thought to be too insignificant for a man. This disregard for women's work may have a real impact on the stress problems to which it can be related; this will be discussed at a later point. These occupations include: nursing, secretarial work, receptionist work, garment work, nannying, personal care work and part of food processing. Industries related to these occupations are more likely to hire women. In a big company, if a woman is hired, she is most likely to be assigned to a "women's section." Messing provides an example of job segregation in the janitorial field in Quebec, which divides the work into "light" and "heavy."[522] She concluded that women are most likely to be assigned "light jobs" which seem, on the face, lighter than men's "heavy jobs."[523] Furthermore, women themselves tend to think these "female" occupations are more suitable and tend to apply for them at a higher rate.

As Bradley suggests, one of the primary reasons for job segregation is the workers' own desire for a reaffirmation of manhood or womanhood in the workplace, since they want to be seen as men and women through their role and occupation even in the workplace.[524] This way of thinking is continuously being nurtured and reinforced through education; Bradley also points out that "this continues to be a 'force' today in steering boys and girls into 'appropriate' career choices, especially in the teenage phase when sexual identity appears very fragile."[525]

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[522] *Supra* note 518 at 7.
[523] *Ibid.* at 7.
[524] *Supra* note 517 at 229.
[525] *Ibid.* at 229.

However, even a woman who hopes to pursue a non-traditional field will most likely find these jobs stressful. A woman's choice to remain in a traditionally female area may stem partly from the idea that going into a "male" occupation involves more hardship. Jeanne Mager Stellman states:

> Suffice it to say that the vast majority of women students are enrolled in programs that destine them to 'woman's work' or that give them no vocational skills at all. On the other hand, when women have gained diversified skills and training, they have found it very difficult, if at all possible, to gain prestige and rewards in fields outside the areas of women's work.[526]

Another reason for job segregation is found in the biological differences between women and men, especially that of the woman's capacity to reproduce. Accordingly, women tend not to be assigned to work that involves any apparent danger. As typified by the aforementioned example of cleaning jobs provided by Messing, work for women is thought to be safer and lighter, or sometimes easier than the male-dominated occupations. This thought can be traced back to the times when women were prohibited from working in mines or as soldiers. The exclusion of women from certain occupations is mostly based on the desire to protect their reproductive function, as well as being motivated by the thought that women are weaker than men. Although the relative suitability and safety of the traditional female fields can be called into question, society continues to assign women to these particular occupations.

However, contrary to this perceived view of women's labour as being safer and lighter, the statistics have found that although women have fewer accidents, they incur more occupational illnesses.[527] Also, it has been found that access to compensation

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[526] *Supra* note 516 at 56.

[527] Karen Messing at el., "Equality and Difference in the Workplace: Physical Job Demands, Occupational Illness and Sex Differences" (2000) 12 (3) NWSA Journal 21 at 29.

for women is more difficult than for men.[528] Considering these facts, some questions must be raised. The first is whether "woman's work" is really easier or less stressful, and the second is why women have harder time getting compensation under what is a seemingly gender-neutral system. In the following section, based on the research done mostly by researchers in Quebec, these two issues will be discussed.

2. The Reality of Women's Work

Work traditionally done by women can be classified as "white-collar" and "blue-collar" in the same way as that work which is traditionally done by men. Some common white-collar jobs mostly occupied by women take place in the service sector, including secretarial positions, data entry, waitressing, flight stewarding, clerical work, low-level banking positions and teaching. Examples of blue-collar work in the same category include assembly line jobs or operating sewing machines. All jobs have certain special requirements. But in women's work especially, the prominent and common requirements are repetitive, simple, rapid hand movement, visual acuity, standing at a fixed position for a long period of time, and careful attention to detail and particularly in the service sector, there are also emotional requirements, such as the ability to present calm, smiling demeanour and present a loving persona.[529]

Nicole Vezina, Daniel Tierney and Messing provide research on a typical blue-collar worker's occupation, sewing machine operator's work. This work is done while sitting, and is therefore officially classified as "light work" according to energy expenditure criteria.[530] Despite the initial appearance of ease and its classification as light work,

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[528] *Ibid.* at 33.

[529] See *e.g. supra* note 518 at 6 and 111.

[530] Nicole Vézina, et al., "When is light work heavy? Components of the Physical Workload of Sewing Machine Operators Working at Piecework Rates" (1992) 23 (4) Applied Ergonomics 268 at 268.

occurrences of musculoskeletal disease and other health problems are high, in fact, this occupation requires a huge amount of power exertion; for example, the time given to sew one seam is only 10-15s per trouser leg and this short cycle is repeated more than 1500 times in one day.[531] Operators are required to exert a total force of 17,543kg with their lower limbs within a single day.[532] Furthermore, this occupation requires an extreme number of repetitions in what is a very awkward position, and this kind of physical load is typical of many assembly line jobs, which often require repetitious movements in an uncomfortable position.[533] Vezina, Tierney and Messing conclude, "In fact this job, officially classed as 'light work' requires an enormous amount of exertion in a constrained position. It is possible that other typical women's jobs classed as light work also require this kind of effort."[534]

Office work is highly demanding for women as well, sometimes because of the physical requirements and sometimes because of the mental requirements. Office jobs can be characterized in two ways. In a way, they can be like the above-mentioned sewing operators due to the repetitive and simple nature of the work. Even in an office, repetitive and simple work requires a lot of physical strain and expenditure.

One example typically shows the reality; a woman working for a taxation office in the tax return season as a temporary worker. She was assigned to make photocopies of small cards throughout the day. She had to stand in a fixed position in front of the photocopy machine and change papers, push a single button, and collect papers, repeating the same movement again and again all day. She had to work from 9am to 4pm including

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[531] *Supra* note 530 at 268.

[532] *Ibid.* at 275.

[533] *Ibid.*

[534] *Ibid.*

one unpaid hour of lunchtime and a fifteen minute coffee break. This seems like an easy job. In fact, however, she had to lift up the cover of a photocopy machine for enormous amounts of time. When she finished work for the day at 4 pm, she felt the pain in her shoulder and back, even after the first day. She was not sure if she could endure this situation if she had been compelled to do this job indefinitely.[535] Both women and men can be found in these occupations. However, women are much more likely to be confined into this kind of job, since men are often quickly promoted and women are more likely to be hired on a temporary, part-time basis.[536]

The nature of some kinds of office work, however, also requires a nurturing and loving attitude. Arlie Hochschild describes this kind of work requirement as "emotional labour."[537] Men are also required to display calmness and patience, especially in the service industry. In the case of women, however, these characteristics are sometimes seen as part of a woman's natural demeanour. Bradley explains this situation in the following assessment: "women practice their 'inbuilt' feminine skills for the public good."[538]

But at the same time, if a woman cannot keep smiling when she performs her work, people tend to think this is because she is a woman, or she is menstruating. Her emotions are put down to a biological problem, whereas the failure of a man to do so is certainly not ascribed to some innate biological inferiority. Only women have to fight with this discriminatory and disdainful attitude. Also, these kinds of "caretaker jobs" involve an additional kind of pressure, as suggested by Stellman, "*[w]hen responsibilities involve the*

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[535] Personal knowledge of the author of a situation which occurred in Japan.

[536] Janet Sprout and Annalee Yassi, "Occupational Health Concerns of Women Who Work with the Public" in Karen Messing et al, ed., *Invisible: Issues in Women's Occupational Health* (Charlottetown: Gynergy books 1995) 104 at 110.

[537] Cited in *supra* note 518 at 117.

[538] *Supra* note 517 at 230.

welfare and supervision of human beings, then the stress is even greater."[539]

A job which is highly demanding with little control is considered to be the most stressful job. Most of the typical jobs assigned to women, whether white or blue collar, fit this description.[540] Stellman gives us the example of assemblers, stating that assemblers who have control over the speed of their work have far less stress than those with no control over the speed of their work.[541] Constant repetition in work is also an underutilizing of workers' abilities, which can lead to stress.[542] As Stellman suggests,

> The human ego needs challenge and pride just as the human body needs nourishment and rest. Failure to obtain such challenge and self-esteem is stressful. Control of one's working conditions is a crucial factor in job satisfaction as are the utilization of one's skills, and adequate financial and social rewards.[543]

Women's work often lacks both adequate challenges and pride. Stellman points out if workers can be satisfied with their jobs and have enough control over their jobs, the health effects of job stressors, such as long hours or excessive responsibility, can be lessened; because much of the work that women do, however, is lacking these factors, a more stressful environment can be the resulting condition.[544]

When women are in a traditionally male-dominated line of work, they are going to face other pressures, partly because of their minority status and high visibility, and partly because they are supposed to be able to work as much as men have done in the work place.[545] To be regarded as being equally as useful as somebody who has been already there, newcomers are usually required to perform to a higher degree than the people

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[539] *Supra* note 517 at 74 [emphasis in original].

[540] See *e.g.* Ellen Balka, "Technology as a Factor in Women's Occupational Stress: The Case of Telephone Operators" in Karen Messing et al, ed., *Invisible: Issues in Women's Occupational Health* (Charlottetown, P.E.I.: Gynergy books 1995) 75.

[541] *Supra* note 517 at 66.

[542] *Ibid.* at 55.

[543] *Ibid.* at 54.

[544] *Ibid.*

[545] *Supra* note 518 at 9.

already there. Accordingly, women, who are relatively newcomers, are required to perform as well as people who are already conditioned to the working environment. In many of these jobs, the equipment is designed only for men who are usually taller and sometimes stronger than the average woman.[546] In addition to the emotional pressure put on them to perform well, women usually have to cope with this unfit equipment. On the other hand, as Messing also points out, even in the traditionally male-dominated jobs that women have begun to enter; only half of these women perform the same jobs as men, even if they are given the same job title and seniority and This means even under the same job title, women and men are exposed to different kind of risk.[547] It could therefore be assumed that the use of physical force would be totally different and consequently the physical problems experienced by men and women in the same position could be totally different.

3. Stress Caused by Women's Work

There are several reasons why women could feel more stress than men in the work environment. First of all, there is the reward factor. Women's jobs are most likely to be low-paying. Stellman suggests, "[i]nsufficient financial reward is an obvious source of stress and dissatisfaction."[548] It is easy to understand that if two people do the similar jobs and one is paid less than the other, it would be a stressful situation.[549] Women tend to be paid less because of their employment status, which is mostly part-time.

Job segregation can bring on another cause of stress; the situation is, as Stellman

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[546] *Ibid.*

[547] *Ibid.*

[548] *Supra* note 517 at 76.

[549] *Ibid.*

defines it, "unfilled expectations."[550] In general, a person with a high education expects to find an interesting or fulfilling career suitable to his or her education.[551] However, women often end up finding clerical or secretarial positions, which require by far fewer skills than the level they could earn according to their education. This disappointment and dissatisfaction towards the job situation can also create the conditions for added stress.[552]

Furthermore, women are more likely to work on a part-time basis. Some women can find only part-time positions and others cannot work in a full-time position due to their household duties and child rearing responsibilities. Part-time work is certainly less well paid and a less stable form of employment. If a company's financial situation is in trouble, part-timers are the first people who are likely to be let go. Part-time jobs also tend to have fewer benefits, in addition to which they are most likely to be repetitive, simple, so-called high demand, low control jobs. Studies found that these jobs are the most stressful, and increase the risk of spontaneous abortions, low birth weight infants, depression, and coronary heart disease.[553] As well, opportunities to participate in decision-making processes, thought to reduce stress, are much less likely to be afforded to part-time workers.[554]

Working women tend to have less variation in assigned tasks, less independence, fewer opportunities for promotion and lower prestige. These can all be related to job dissatisfaction, which causes stress.[555] Regarding dissatisfaction, as it was discussed earlier; women's jobs tend to be seen as "too insignificant for a man." This kind of

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[550] *Supra* note 517 at 56.

[551] *Supra* note 516 at 55.

[552] *Ibid.*

[553] *Supra* note 536 at 111.

[554] *Ibid.*

[555] *Ibid.*

thinking can deprive women of self-respect, which can also bring on stress. Apart from job conditions, women usually have much greater domestic responsibilities and child-rearing responsibilities than men. These responsibilities often require them to use completely different skills than those they must apply to their outside jobs. In addition, the dilemma of being forced to choose between work and family is more likely to happen to a woman.

If a worker has control over his or her conditions of employment and the tasks he or she must accomplish, the job will be more satisfying. However, the vast majority of women have no meaningful control over their work environment. Stellman succinctly puts it this way: "[t]ypists, keypunch operators...are virtually human extensions of the equipment they operate."[556] In addition, even in traditionally female fields, such as social work and teaching, the administrative posts are most likely still held by men. Futhremore, even in professional fields, men tend to hold the more prestigious positions, which effectively means that women are not in control of the direction of their professions.[557] This lack of control over their conditions can have a very negative effect on the stress level of the work.

The Canadian Advisory Council on the Status of Women describes the situation in this way: "the majority of female employees are concentrated in low-status, low-paid, dead-end 'job ghettos'..."[558] They also point out that

> Occupational sex segregation concentrates women into a narrow range of occupations. Many female job ghettos in offices, stores, and factories have stressors typical of any low-status, poorly rewarded, routine job. The fact that these job ghettos account for most of women's paid employment suggests that, more so than men, women risk the harmful effects of occupational stress.[559]

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[556] *Supra* note 517 at 67.

[557] *Ibid.* at 67-68.

[558] Canada, Canadian Advisory Council on Status of Women, Graham S. Love, *Back Ground Paper, Women, Paid/Unpaid Work, And Stress: New Directions for Research,* (Ottawa: Canadian Advisory Council on the Status of Women, 1989) at 4.

[559] *Ibid.* at 12.

Also, women are generally more likely to face sexual discrimination in the workplace. Facing discrimination is a certainly a stressful situation. Simply by virtue of being a woman, the worker has to face unreasonable treatment from others. Legislation ensuring equal opportunities and affirmative action programs can eliminate discrimination in terms of hiring or formal form of promotion. However, these systems or laws cannot ensure equal treatment, especially in the day-to-day informal work situation after hiring has taken place.

As has already been discussed, contrary to the perceived view, a women's job is not necessarily an easy and safe job. In addition, women sometimes have to face the additional stressor of their status. All of this is not to imply that men do not face any of the particular situations mentioned in connection with women's work. It is quite certain that men also face repetitive, heavy work, and a certain amount of physiological stress. However, oddly enough, when it comes to workers' compensation, women tend to be recognized much less than men. In the following section, the issues surrounding women's access to compensation, and possible reasons for the relatively less recognition they are afforded will be discussed.

B. Women and Workers' Compensation

Recently, studies have been performed about women and occupational health as well as their access to compensation. Katherine Lippel, a professor of University of Quebec at Montreal, has done comprehensive research over Quebec Workers' Compensation system and has found that under the current system, women's claims, specifically mental stress claims, chronic pain claims and musculoskeletal disease, have been accepted significantly less often than those of men's.[560] According to her research, the different success rates

[560] *Supra* note 527 at 33.

cannot be explained by personal circumstances, previous psychiatric problems, or differences in the nature of the stressful situations invoked or quality of representation.[561] It is concluded that the difference in outcome could only be explained by a different attitude of both the decision-makers and the medical witnesses with regard to women's work.[562]

According to the study done by Lippel, although the difference is not significant, women claimed chronic stress slightly more often than men, however; the important finding is that when women and men both complained of chronic stressors, men fared significantly better than women.[563] Regarding the content of claims, based on the findings, claims involving personal problems are not alleged significantly more by women, but if it is done, women loose more often than men.[564] This means decision makers could possibly think that women's problems tend to come from their personal lives and not from the working environment. When claims regarding negative evaluations are raised, usually those claims are refused based on the legislation, however; despite the fact that men significantly more often make claims involving negative evaluations, when compared by gender, women's overall successful rate is lower than men.[565] Regarding prior consultation with a professional prior to the problems claimed, the numerical difference between men and women is not significant.[566] This means mental problems claimed by women are neither inherently female problems, nor are women mentally more fragile than men.

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[561] *Ibid.*

[562] *Ibid.*

[563] Katherine Lippel, "Workers' Compensation and Stress: Gender and Access to Compensation" (1999) 22 (1) Int'l J.L.& Psychiatry 79 at 82.

[564] *Supra* note 563 at 85.

[565] *Ibid.* at 83.

[566] *Ibid.* at 85.

At the appeal level, the successful claims by women are more likely "good cases," whereas many cases of men, which lost at the appeal's level, are cases against case law.[567] According to this finding, Lippel speculates that

> It is likely that if the review board unjustly refuses more 'good cases' of women than it does those of men, then those 'good cases' will reappear in appeal, while those of men will have already been compensated. This could explain why issues raised by women before the C.A.L.P. sometimes appear to be more obviously compensable than those raised by men.[568]

Overall, these differences cannot be explained by the nature of the claims, such as the level of personal problem involvement, previous psychiatric history, or nature of stressful situations regarding the claims.[569]

Based on those findings, Lippel offered several possible explanations for this difference in compensation success rates. The first is the gender distribution of the decision-makers. According to her study, the composition of the tripartite review board (B.R.P.) is overwhelmingly male.[570] She states, "[w]hile 57.3% of compensation board representatives were men, 83.5% of union representatives were men and 97% of employer representatives were men."[571] As she also acknowledges, this overwhelming male domination in the Board does not directly mean the decisions are gender biased. However, it may be also assumed that those male representatives may have a difficult time imagining why seemingly easy women's jobs give them such injuries.[572] As well, due to the fact that responsibilities at home are often carried mostly by women may lead decision makers to think that home stressors are the source of disability rather than examining the work situation.

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[567] *Ibid.* at 86.

[568] *Ibid.* at 86 [Lippel] CALP, Commission d'appel en matière de lésions professionnelles, Now, replaced by CLP (Commission de lésions professionnelles) The final appeal tribunal.

[569] See *supra* note 563.

[570] *Supra* note 563 at 87.

[571] *Ibid.*

[572] Supra note 563 at 87.

Furthermore, Lippel demonstrates the problematic nature of trying to interpret the Act. Historically, the workers' compensation system was constructed to compensate visibly obvious work accidents. Less visible conditions were not even considered until recently, when a change of industry created a need to provide compensation for these very real problems. In order to cover these "new" conditions, some jurisdictions have stretched the actual meaning of the Act, and other jurisdictions have adopted the notion of "unusual stress" as more often used in American jurisdiction.[573] Lippel points out in both cases, there is a necessity for discretion on the part of decision makers and this discretion could be a fertile ground for discrimination.[574] She states that the "fuzzy concept of 'unusual stress' can be interpreted in many ways, and that gender of the claimant seems to influence the interpretation," offering examples of cases in which the term was interpreted in a relatively more flexible way for men, who were then given compensation whereas women were not compensated in similar cases.[575] To name a few examples, men were compensated after (1) complaints of sexual harassment; (2) working with incompetent co-workers; (3) having vacations rescheduled without prior notice; and (4) being obliged to produce an important report within a deadline without a secretary.[576] Women who were not compensated made similar complaints, such as (1) being forced to work compulsory overtime; (2) being overburdened with patient responsibilities; and (3) being sexually harassed by prison inmates when on duty as guards.[577] Lippel states that unusual stress works against women in another way, since women's work is more likely to be

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[573] *Supra* note 563 at 79. See *e.g.* supra note 285.

[574] *Supra* note 563 at 79.

[575] *Ibid.* at 88.

[576] *Ibid.* at 87.

[577] *Ibid.* at 88.

perceived as being banal or unimportant.[578] She also presents the dilemma of women's' work by saying that "when women do a job that is usually done by a man, their stress claim will often be refused because they are 'not tough enough for the job'...."[579] She also points out the term "work-related event" could be open to gender biased interpretation, offering an example which when a male worker was insulted, the events were deemed to have happened in the course of employment, whereas when a women supervisor was sexually assaulted by employees on the job site during working hours, compensation was refused because the event was not in the interests of the employer.[580]

The situations are not exactly the same between women and men, and there is thus some difficulty when one compares them simply by looking at gender. Even so, at first glance, it is hard to understand why the men's cases were approved while women's cases were not. It is possible that, one underlying reason for this phenomenon is that when decision makers are interpreting these vague concepts, there is an embedded belief that men's work is more important than women's work, or that women's work is easier than men's work.

Other researchers also give several possibilities for the discrepancy in worker's compensation. Messing, Lippel, Demers and Mergler suggest that "[w]omen's occupational illnesses maybe thought to be due to their physical and psychological specificity rather than to their jobs..."[581] The attitude of the medical professional may also give a clue. Citing Dembe, they suggest "cultural stereotyping based on class, gender, and ethnicity can distort medical opinion about the relationship between occupation and

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[578] *Ibid.* at 87.

[579] *Ibid.* at 88

[580] *Ibid.*

[581] *Supra* note 527 at 21.

disease"[582] saying "[p]hysicians often forget to inquire about work when the patient is a woman, and may discontent allegations of work-relatedness either because of lack of knowledge of working conditions, or stereotypes as to probable causes of disability."[583] They acknowledge that this could happen to anyone. However, when a woman is making the allegations, the common view that women's work is easier or safer may exacerbate the situation, resulting in a disproportionate number of refused claims.[584] They provide some concluding reasons which give us an explanation of why women's occupational diseases may not be well recognized. These reasons are given as following: "1)sexism resulting in lack of credence given to women's reports of illness; 2) incomplete understanding of women's physiology; and 3) inadequate understanding of women's work."[585] Stellman also points to the lack of research on women's occupational health.[586] This lack of research and data could possibly contribute to the inferior recognition of women's compensation claims.

Indeed, since women's jobs are considered safer, not involving any apparent danger, they have not been studied in depth.[587] Women's issues tend to be included in research focused primarily on men; therefore, the particular problems faced by women have not been well studied either.[588] Studies relating to workplace safety have tended to exclude the female perspective.[589]

The European Agency for Safety and Health at work also points out that workers'

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[582] Cited in Messing et al., *supra* note 527 at 32 [in text references omitted].

[583] *Ibid.*

[584] *Ibid.*

[585] *Ibid.* at 34.

[586] *Supra* note 516 at 56.

[587] *Supra* note 536 at 107.

[588] Karen Messing & Sylvie de Grosbois, "Women Workers Confront One-Eyed Science: Building Alliances to Improve Women's Occupational Health" (2001) 33 (1/2) Women & Health 125 at 125.

[589] *Supra* note 527 at 23.

compensation coverage is better prepared for traditional kinds of accidents and the injury or accident risks found most often in male-dominated jobs. [590] They offer three possible reasons. The first is based on the historical aspect of the problem. Throughout the development of workers' compensation, the system has focused on male-dominated workplaces where the danger is more apparent, and therefore the system is not well equipped to deal with problems particular to women.[591] The second reason is that the aim of workers' compensation is to ensure the well being of the worker or the worker's family.[592] In the past, the significant (or often, the only) wage earner of a family was a man, and so the system presupposes that the sole breadwinner of a family will be a man.[593] However, at the present time, women are often the only wage earners in a household. This antiquated mode of thought should not be an excuse for the difference in access to workers' compensation. The third reason offered by the Agency is that injuries from male-dominated jobs are often caused by a single factor and are thus more easily explained by the nature of the work.[594]

The Agency also points out that rehabilitation programs after the injury may also be discriminating against women. According to their report, occupational health scientist felt that rehabilitation into work was more important for men than for women.[595] Employers are also generally more positive and active in their approach to the rehabilitation of men.[596] Older women particularly are getting less attention when it comes to vocational

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[590] European Agency for Safety and Health at Work, A Review, Gender Issues in Safety and Health at Work, (Luxemburg: Office for Official Publications of the European Communities, 2003) at 107.

[591] *Ibid.*

[592] *Ibid.*

[593] *Ibid.*

[594] *Ibid.*

[595] *Ibid.*

[596] *Ibid.*

rehabilitation.[597]

The nature of the workers' compensation procedures, which is a highly administrative process, could also contain a reason for some of the problems. Administrative procedures tend to be less public than legal proceedings. Whereas court procedures are kept completely open to the public except in rare cases, some administrative procedures are not even published. When publicity is lacking, it is by definition difficult to get public attention, and consequently, the underlying problems in the procedure may easily be left unresolved.

All of this discussion is not to imply that women are unfit for work. Messing points out the danger of over-protecting women, stating that "[w]omen's reproductive specificity is considered to render them unfit to work more often than men, making it risky and expensive to hire women," and this notion leads to the consequences, reluctance to compensate women for workplace injury, to include them in prevention programs, particularly blue-collar jobs but also 'light work'.[598] Protection and equal opportunity have long been issues in the continuing evolution of women's employment. Women's reproductive capacity should be protected in sensible ways such as a guarantee of women's maternity leave with guarantee of return to the work.

Women are asked to choose between family and a career in Japan; workplace equality between the sexes is oversimplified with the explanation that women have to work as hard as men. Women are hesitant to take maternity leave or other protections for women, and consequently, the birthrate is declining rapidly.[599] By citing Randall, Bladley

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[597] *Supra* note 590 at 108.

[598] *Supra* note 527 at 21-22.

[599] In 2003, the total fertility rate in Japan was 1.29. The rate has been declining since 1973. Survey information is cited from National Institute of Population and Social Security Research, online: < http://www.ipss.go.jp/syoushika/seisaku/html/111b1.htm > (date accessed: 24 January 2005).

states, "any sex equality policy which ignores the impact of family responsibilities on women's economic chance is doomed to failure".[600]

Women can adapt to many jobs if the equipment is properly designed for women and they are given some discretionary power over the way of their work. In Japan, the phrase "equal working conditions" sometimes refers to the supposition that women should have to work as hard as men do, consequently deteriorating working conditions for both genders. However, an improvement in working conditions will not only benefit women. Proper working conditions will help both women and men. Not over-protecting of women, but an overall improvement of workplace conditions will certainly bring great benefits for everybody, since poor working conditions lead to poor efficiency at work, and in the process, damages the employer as well. As Messing suggests, good working conditions for everybody are "family friendly."[601]

Administrative procedure also should be well monitored by the public. As was mentioned earlier, some administrative decisions are not even published, and never known to the public. Gender stereotyping is deeply rooted and decision makers may make a biased decision unconsciously, therefore, decision makers should be made well-aware of the potential pitfalls of gender biases in both science and the decision making process.[602] The establishment of a proper watchdog body is much to be desired.

The role of unions is also important. In Quebec, as Messing tells us, more than 40% of the workforce is unionized and unions play a significant role in the development of labour policies as well as legislation for prevention and compensation of workplace

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[600] Cited in Bladley, *supra* note 517 at 234 [in-text references omitted].

[601] *Supra* note 527 at 49.

[602] *Ibid.* at 35.

disabilities.[603] According to Sprout Yassi, Bell Canada and its unions have a stress reduction program, which has considerably improved the stress level of telephone operators.[604] In reality though, unions can sometimes work against women, since union executives tend to be dominated by men. Bradley emphasizes, "there is considerable evidence of entrenched sexism in trade unions,"[605] and not many women are in the governing structure or hold union executive positions.[606] Unions play a significant role in the improvement of working conditions, and it is thus imperative that women's voices be heard in the unions. As Messing and Tissot suggest, women's committees in unions should work with health and safety committees to ensure the participation of women and that women's issues are properly considered.[607]

Distinct segregation on the job by gender has led people to believe that women's jobs are easy and safe. This has resulted in the women's health being excluded from many occupational health studies. In the same vein, the worker's compensation system seems to focus mainly on the more apparent dangers in the workplace, which are most likely to be found in male-dominated jobs. Decision-makers have a difficult time recognizing the hardship of women's jobs. These factors have a cumulatively negative effect on the compensation claims of female workers. All of the parties involved in the supervision of the working environment of women, such as occupational health researchers and decision-makers, workers' compensation officials, employers, and women themselves should be aware of the problems particular to women. As Lippel pointed out, women themselves tend to underestimate their work since they are frequently underpaid and

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[603] *Ibid.* at 22.

[604] *Supra* note 536 at 113-14.

[605] *Supra* note 517 at 237 [in-text references omitted].

[606] *Supra* note 517 at 125.

[607] *Supra* note 527 at 34.

underestimated.[608] This can result in a lowering of self-esteem, therefore; the recognition toward women's labour as being valuable and meaningful should be developed.

Women often have greater responsibilities at home; stress, as well as illness due to domestic work, should not be handled by workers' compensation; however, considering the reality of the work that many women do, there will be a significant number of cases in which the stressors result purely from work. The fact that child-free women are also suffering stress from work must also be taken into account.[609] No worker can separate this or her job and personal life completely. Even a physical accident at work could in some way be related to personal problems. Decision makers should not simply decide that because she is a woman, the illness is not related to her work.

In Japan, research in this area is not well developed. The situation must be similar to that of Quebec since, in Japan, job segregation by gender is also consistent and women's jobs tend to be seen as safer and easier. The development of research regarding gender issues of workers' compensation is also required.

XI. Conclusion

Karoshi is one of the worst forms of work accident in contemporary society. It is regrettable that Japan could not prevent karoshi from happening. However, the phenomenon offers us an opportunity to think anew the modern working environment, and particularly the workers' compensation system. The comparison between the Japanese and Ontarian systems offers several interesting points to consider.

Both the Japanese and the Ontarian workers' compensation systems are based on similar conceptual frameworks, although they present different historical developments

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[608] *Supra* note 563 at 80.

[609] Louise Morley, Book Review of *Women's Work and Coping: A Multidisciplinary Approach to Workplace Stress*, ed., by Bonita C. Long & Sharon E. Kahn (1996) 19 Issue 3 May-June. Women's Studies International Forum 349 at 350.

and different core issues, resulting in different current structures. Both systems share the principle of protecting workers from a sudden loss of income. Further, both systems continue to play a significant role in present-day society. In fact, it could be said that their role is now even more important as income dependency is an inescapable fact of most people's lives. However, both systems also share the difficulty of letting in new kinds of injury emerging from modern workplaces, such as stress claims, women's claims and karoshi claims in Japan, all of which arise from seemingly safe and strain-free workplaces.

Since the advent of the system, or possibly even before, people have likely suffered from mental illness in such workplaces. However, in the past, these people were passed over because of a lack of recognition for mental illness in the system. Only recently has the system allowed mental illness claims, as modern society recognizes mental illness as a *bona fide* illness and not as a personal problem. Accordingly, it is now widely recognized that such illness should be considered on a par with physical illness.

Much the same is true of women's work issues. Women used to be able to work only as domestic workers or in certain limited occupations; these kinds of occupations were regarded as easy and safe jobs. But even today the legend persists; and even if women now work in a considerably greater variety of occupations than they used to, the positions they fill still tend to be seen as easy and safe. As a result, women themselves have been reluctant to make worker's compensation claims, and their claims have tended to be treated as unworthy.

In contemporary society, a majority of people have to sell their labour in exchange for income. The wage they get from their workplace is in many cases their only source of income. The level of hardship a worker has to bear due to loss of income is no different

whether the worker is a woman or suffers from mental illness. Downplaying stress claims and women's claims not only leaves sick workers behind, but also delays the improvement of their condition. This is exactly what happened in Japan, as evidenced by karoshi cases.

Karoshi, death from overwork, is representing current Japanese society, which puts far greater emphasis for economic growth and prosperity over workers' and their family's well-being and basic rights. Karoshi victims are the victims of Japanese society. While the Labour Standards Law, article one, objective clearly states that "[w]orking conditions shall be those which should meet the needs of workers who live lives worthy of human beings", it practically protects more of company's convenience rather than worker's life.[610] Yagi, a victim of karoshi, who died in February 1987 at the age of 43, considered his life was even worse than slaves in an ancient time.[611] The note he left says:

> Let's think about slavery, then and now. In the past, slaves were loaded onto slave ships and carried off to the new world. But in some way, aren't our daily commuter trains packed to over-flowing even more inhumane? And, can't it be said that today's armies of corporate workers are in fact slaves in almost every sense of the word? They are bought for money. Their worth is measured in working hours. They are powerless to defy their superiors. They have little say in the way their wages are decided. And these corporate slaves of today don't even share the simplest of pleasures that those forced labourers of ages past enjoyed; the right to sit down at the dinner table with their families.[612]

Yagi's tragic note exemplifies the urgent need to devote attention to the current work environment, especially workers' protection measures in Japan. While Japan is often seen as an economic giant, in the seemingly rich country, workers are questioning quality of their daily life, putting to the forefront the daunting question whether their life is better than the one once slaves had to endure. Those questions have been not properly answered and Japan has kept being an economic giant at the expense of these workers' life.

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[610] *Labour Standards Law, supra* note 72 art.1.

[611] Kidani, *supra* note 104 at 169.

[612] Cited in Kidani, *supra* note 104 at 169.

Japan experienced rapid economic growth after the World War II, however, behind the glorious achievement, partly thanks to its unique labour management style, the society also produced negative by-products, karoshi, death from overwork and burn out suicide. Under the Japanese style labour management, workers, or they are better to be called corporate warriors, have been subjected to extreme working conditions.

The Ministry of Health, Labour and Welfare, which runs workers' compensation, initially reacted with a restrictive approach to victims of karoshi.[613] However, faced with harsh criticism both from the public and the courts, the Ministry revised the criteria.[614] With the revision, the acceptability of karoshi has been widened.[615] The Ministry, also in charge of regulating working hours, however; had not introduced any truly effective measures against extreme overtime work. The Labour Standards Law, which regulates working hours in Japan, while setting 40 hours work week, comes with too many and open-ended exceptions.[616] Therefore, the working hours in Japan are, virtually regulated by administrative guidance, relying on companies' voluntary submission.[617] The Ministry is even trying to widen the working hour exception, suggesting the wider application for discretionary working hours.[618]

In Ontario, following the revision of the original 1914 workers' compensation scheme, the new Act, the Workplace Safety and Insurance Act also takes a restrictive approach toward stress claims, accepting only acute stress claims.[619] The new Act overall, is reflecting the political agenda of former Conservative government, and as Dee

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[613] See s. III.F above for this topic.

[614] *Ibid.*

[615] *Ibid.*

[616] *Labour Standards Law, supra* note 72. See s. IV.A above for the topic.

[617] *Ibid.*

[618] *Ibid.*

[619] *WSIA, supra* note 280, See s. VI.H above for detail of discussion.

questions, could undermine worker's basic expectations towards the system.[620] Likewise the Employment Standards Act, which was also created under the former government, allows up to 60 hours of work for a week, and average working hours. It has been open to criticism.[621] As the Workplace Safety and Insurance Board has expanded its operational policy for stress claims, the current Ontario government is also considering an amendment of the Employment Standards Act. Both of these actions aim at protecting workers. It could be said that Ontario, once headed to the opposite direction, is now taking a more worker-oriented approach.[622]

Japan and Ontario both share, on their face, similar workers' compensation systems and employment regulations. However, one deals with problems of karoshi and the other does not. When these two jurisdictions are compared and analysed at a deeper level, one can see significant differences between the two jurisdictions, which may indeed have created the different situations. Most importantly, from the comparison of the two systems, one can find that working hour regulations in Japan are weaker than in Ontario. Further, additional factors render the law unworkable in Japan. This is because Japanese society is not operated through a sense of rights, but by a sense of duty. In addition, Japan maintains a communitarian society which values group interests well attuned to big corporations' interests as opposed to individual rights. Accordingly, company's success prevails over individual worker's rights, as it is called *kaishashugi*.[623] This deep-seated culture forces workers to work harder and renders the enforcement of the Labour Standards Law extremely difficult. This cultural situation may explain why it is so difficult in Japan to

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[620] *Ibid.*

[621] See s. VII.B. above for more detail. *Employment Standards Act, supra* note 448.

[622] *Ibid.*

[623] *Kaishashugi*, Japanese term combining *kaisha* (company) and *shugi* (ism). See T. Inoue, *supra* note 202 at 530.

regulate working hours, leading to prevent over excessive working hours throughout Japanese society in all corner of the workplace from big corporations to public institutions.

Also, when comparing the situation in Japan and Ontario, one can see a significant difference in the role of labour unions. While in Ontario labour unions still occupy an important position regarding work standards, labour unions in Japan try to harmonize with employers and do not adequately protect workers.

This comparison shows the urgent need for tighter working hour regulations in Japan. However, to make the law effective, Japan needs not only legislative amendment, but also social change. As Inoue urges, loosening the excessive communal cohesion of *kaisha* is required.[624] In addition, as Knapp urges, more education for the public is desired.[625] Furthermore, a more aggressive stance on the part of labour unions should also contribute in making a difference. Although the Ministry should not try to solve the problem by compensating the corporate warriors, Workers' Compensation System, moving towards wider acceptance of the karoshi, should maintain its stance.

In both jurisdictions, the handling of stress claims and women's claims, both of which share similar grounds with karoshi, is problematic. However, while the handling of stress claims is often discussed and displays a clear sense of administrative clarity both in Japan and Ontario, problems involving claims from women are more obscure and less known to the public. However, since women's claims share similarities with stress claims (arising, as they both do, in the context of seemingly safe and strain-free working conditions) the difficulty seems to lie more with the decision makers themselves, and

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[624] See *supra* note 507 for the term *kaisha*. See also T. Inoue, *supra* note 202 at 527.

[625] Knapp, *supra* note 201 at 577.

appears to be grounded in prejudice or preconceived notions.

In Quebec, where substantial research has already done on the issue, it has been found that women's compensation claims are more difficult than men's. The reasons for this difference relate mostly to job segregation, stereotyped views and prejudice towards women's jobs. Although lack of research prevents applying this finding to Japan or Ontario, it is nevertheless highly likely that both systems are falling into the same pattern and problematic situation discovered through extensive research in Quebec.

Toughness of all kinds of work, even if it seems easy and safe on its face, should not be underestimated. This is particularly true for women's work. As Messing and Tissot state, "action to prevent illness should be initiated based on complaints from a substantial number of workers rather than waiting until all the evidence is in or looking for too-high levels of known chemicals."[626] Disvaluing women's work will delay improvement of women's working conditions, and will have negative effects on many other aspects of human life such as overall family life.

Overall protection of a worker's life requires both employment standards regulation and a workers' compensation system. If one does not function well, workers will not be adequately protected. Again, by recognizing a condition as a work-related illness, a workers' compensation system can call public attention to a given work situation and can bring better protection measures for workers. It is in this sense that workers' compensation systems are part of the bedrock of overall workers' protection.

Workers' Compensation is not only a means of remedying a difficult situation for injured workers but also one of real solutions against poor working conditions. More compensation claims certainly bring more protective measures from authority to prevent

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[626] Cited in *supra* note 527 at 34.

the condition to occur in the first place. Lippel brings our attention to the fact that quick access to compensation tends to aid in a more timely recovery.[627] Also, as Lippel suggests, it should be emphasized that even though risking compensating occasional unworthy claims, it is better than refusing all legitimate claims.[628] Therefore, as society evolves, the system is also expected to adapt. Currently, the system in Japan is not keeping up with the pace of social change, and does not adequately protect workers. Neither law reform nor system reform can be a cure-all. However, they certainly will have a certain impact. Japan should maintain its stance towards compensation, which has relaxed the acceptability of claims. Comparison between Japan and Ontario shows us inadequacy of current workers' compensation system in both jurisdictions in the modern society. Comparison of both systems also offers some key answers for solutions of karoshi. To prevent from producing another karoshi victim in Japanese society, a revision of the Labour Standards Law and a change of Japan's legal culture are both certainly needed.

[627] *Supra* note 338 at 45.

[628] *Ibid. at* 70.

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