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# Sentencing the Social Question: Court-Made Labour Law in Cases of Occupational Accidents in Argentina, 1900–1915*

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*Abstract.* This article shows how Argentine judges effectively came to make labour law when ruling in occupational accident cases between 1900 and 1915. During this period, in the absence of a specific occupational accident law, a number of Argentine workers who had been victims of occupational accidents sued their employers for damages according to the Civil Code. By reinterpreting the principles of the Civil Code in these cases, Argentine judges attempted to accommodate aspects of a new social and economic reality to an increasingly outdated legal framework. The article argues that, in doing so, these judges articulated their own solution to one of the central issues of the time: the 'social question'. Furthermore, the article shows how the judiciary's particular solution to the social question effectively defined the kind of citizenship rights workers were able to claim in court.

*Keywords:* Argentina, social question, labour law, judges, jurisprudence, occupational accidents, law and citizenship

## *Introduction*

By the turn of the twentieth century, Argentina had for some time been experiencing the rapid social and economic changes associated with the term 'modernisation': urbanisation, growth in communications, frantic construction and incipient industrialisation, all fuelled by massive immigration and the country's unprecedented economic growth. On the one hand, this was a time of promise, as the modern, urban existence held possibilities of social ascension and freedom from want, as well as opportunities to reinvent

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one's life on a personal level. On the other hand, modern, urban, industrial life – although alluring in its possibilities – also involved new risks. There was the chance of becoming the victim of crime, or of diseases that originated and spread under crowded housing and poor hygiene conditions. The workplace presented its own set of dangers. With the growth of the new industries and the mechanisation of old trades, people were increasingly working with machines that took skill and concentration to operate properly.[1] A moment's inattention could produce accidents resulting in the loss of fingers, hands, or whole limbs, or of life itself. Even occupations that were not industrial or mechanised were potentially dangerous. A bricklayer working on the construction of a building could slip on his scaffold and fall to the ground; a carriage driver could suffer an injury from a horse's kick. For the worker and his family, a temporary or complete incapacitation as a result of an accident was a serious threat to their survival, and the death of the main breadwinner could produce destitution.

The occupational accident[2] was a visible expression of the darker sides of the much coveted state of modernity and one that received considerable attention in contemporary debates about the 'social question'.[3] This amorphous term has, in the words of James Morris, 'broad meaning and refers to all the social, labour, and ideological consequences of emerging industrialisation and urbanisation'.[4] As such, the term's reference is not strictly limited to labour issues, as it also encompasses problems like those

[1] For a recent and innovative history of Argentine industrialisation, see Fernando Rocchi, *Chimneys in the Desert: Industrialization in Argentina During the Export Boom Years, 1870–1930*. (Stanford, California, 2006).

[2] The term 'occupational accident' seems to most accurately represent the phenomenon that in Spanish is referred to as '*accidente de trabajo*' whereas 'industrial accident' would not cover the range of accidents that occurred in the workplace in Argentina in the early twentieth century. In fact, according to the investigations of the National Labour Department, the occupational groups that suffered the highest number of occupational accidents were carriage drivers (*carreros*) and bricklayers (*albañiles*). For numbers from the city of Buenos Aires, see *Boletín del Departamento Nacional del Trabajo* (hereafter *BDNT*), no. 20 (31 July 1912), pp. 153–82.

[3] Significant attention has been paid to these debates in the Argentine historical literature. See especially Eduardo Zimmermann, *Los liberales reformistas: La cuestión social en la Argentina, 1890–1916*. (Buenos Aires, 1995) and Juan Suriano (ed.), *La cuestión social en la Argentina 1870–1943*. (Buenos Aires, 2000). For the case of Chile, see James O. Morris, *Elites, Intellectuals, and Consensus: A Study of the Social Question and the Industrial Relations System in Chile*. (Ithaca, 1966). For an impressive account of how debates on the 'social question' and 'social politics' played themselves out in Europe and the United States, see Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age*. (Cambridge MA and London, 1998).

[4] Morris, *Elites, Intellectuals, and Consensus*, p. 78. Even this broad definition might be considered limited. Juan Suriano argues that, in Argentina, the term also referred to issues involving gender and ethnicity. See Juan Suriano, 'Introducción: Una aproximación a la definición de la *cuestión social* en Argentina', in Suriano (ed.), *La cuestión social*, p. 2.

related to poverty, crime, public health and housing, among others. However, as Juan Suriano has pointed out,

> the worker problem is at the centre of the debate and intersects with the great majority of problems inherent to the social question: poverty, crime, prostitution, disease and epidemics, or crowded housing – not to mention worker conflict – are all issues linked in one way or another to the world of work, as they constituted part of its disorders (low salaries, bad working conditions, unemployment, etc.).[5]

The injustice in a situation where a worker could lose his life or livelihood from performing his job was not lost on either the political elites or on public opinion in general. Nevertheless, a national law of occupational accidents (Law 9688) was not passed until 1915, after a series of bills had been presented in the Argentine Congress without success during the previous decade. Before 1915, then, there existed a 'legal vacuum' in matters of occupational accidents. In the absence of a law to protect them, Argentine workers in certain cases turned to the courts for a redress of their grievances. However, it was impossible for workers to file lawsuits over occupational accidents per se, since – until 1915 – no law existed that could serve as a basis to their claim. Instead, they sued their employers for damages by invoking the general dispositions of the Civil Code.

This article examines how Argentine judges ruled in cases of occupational accidents between 1900 and 1915 and how, in the absence of specific labour legislation, they effectively came to make labour law. It also discusses the consequences of this kind of court-made labour law for workers, victims of occupational accidents. I argue that judges presented their own solution to the 'social question', one that consisted in channelling social conflict through institutional structures with the intention of preventing worker discontent from taking on more radical expressions, such as, for example, an adherence to the Anarchist organisations that were flourishing in Argentina during the first decade of the twentieth century.

My analysis suggests that we should be careful to make the categorical assumption that judges in civil law systems are automatically more 'passive' and their decisions less important than those of their common law counterparts. In truth, this is something of a paradox given that one of the basic tenets of the French civil law system, which Argentina had adopted, was the limitation of judges' power. In the French civil law system, a judge's role was confined to the *application* of law made by the legislature, and the judiciary's freedom of interpretation and possibilities for independent action should be kept to a minimum.[6] While there is a growing literature that re-evaluates

[5] Juan Suriano, 'Introducción', in Suriano (ed.), *La cuestión social*, pp. 2–3. All translations from Spanish are mine.

[6] See John Henry Merryman, David S. Clark and John O. Haley, *The Civil Law Tradition: Europe, Latin America, and East Asia* (Charlottesville VA, 1994).

the importance of judges and the judiciary in contemporary Latin America,[7] the present article suggests that this importance should not be considered a completely new phenomenon. In short, this work situates itself at the intersection of labour history and what has been termed 'the new legal history'.[8] In addressing both of these large fields, the article challenges some of the previous assumptions that have been made about state-labour relations and nation-state formation in Argentina in this period.

## *The Context*

Much of the existing literature on state-labour relations has focused predominantly on the relationship between organised labour and the executive branch of the state, and has concentrated particularly on moments of crisis, such as strikes and subsequent state repression. Not surprisingly, the main conclusions have been that the state acted primarily as a disciplinary force in its relationship to labour and that the executive branch had almost exclusive initiative in mediating social conflict.[9] One work to have challenged these presumptions is Eduardo Zimmermann's 1996 study of Argentine politicians' first efforts to pass labour and social legislation.[10] Nevertheless, although legislators presented many bills, few were passed. Zimmermann's study therefore, despite making a convincing argument that the Argentine political elites did not exclusively opt for repression as their response to new social problems, does not alter significantly the perception that the legislature, in the end, largely failed in confronting the social question.

[7] See Siri Gloppen, Roberto Gargarella and Elin Skaar (eds.), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (London, 2004); Matthew M. Taylor, *Judging Policy: Courts and Policy Reform in Democratic Brazil* (Stanford CA, 2008), and 'Veto and Voice in the Courts: Policy Implications of Institutional Design in the Brazilian Judiciary', in *Comparative Politics*, vol. 38, no. 3 (April 2006); Rachel Sieder, Line Schjolden and Alan Angell (eds.), *The Judicialization of Politics in Latin America* (New York, 2005); and Juan Manuel Palacio and Magdalena Candioti (eds.), *Justicia, política y derechos en América Latina* (Buenos Aires, 2007).

[8] The term is taken from Ricardo Salvatore, Carlos Aguirre and Gilbert M. Joseph (eds.), *Crime and Punishment in Latin America: Law and Society since Late Colonial Times* (Durham NC, 2001).

[9] For the first point see Osvaldo Bayer, *La Patagonia Rebelde* (Buenos Aires, 1992); Juan Suriano, *Trabajadores, anarquismo y Estado represor: De la Ley de residencia a la Ley de defensa social (1902–1910)* (Buenos Aires, 1988) and 'El estado argentino frente a los trabajadores urbanos: Política social y represión, 1880–1916', *Anuario Escuela de Historia, Rosario*, no. 14 (1989–90), pp. 109–36. The second has been persistent in much of the literature since David Rock published his *Politics in Argentina 1890–1930: The Rise and Fall of Radicalism* (Cambridge, 1975).

[10] Zimmermann's focus on the legislative rather than the executive branch brought a fresh perspective to the debates about state-labour relations and showed that Argentine political elites sought other solutions to social conflict than just state repression.

In the same way that the attention in the literature has been skewed toward the executive branch of the state, much of the attention given to labour has focused on the organised labour movement. A prevalent tendency in this regard has been to write labour history as a political chronology of organised labour, focusing on the emergence, development, politics and ideological orientations of the different labour unions.[11] The prevailing view is that from the turn of the twentieth century and until the early 1910s, when the Anarchists dominated the organised labour movement, workers preferred to confront employers directly through strikes rather than to seek an institutional response from the state to their grievances.[12] While there are exceptions to the predominant focus on organised labour for this period, most notably Mirta Lobato's excellent case study of the workers in the meat-packing plants in Berisso,[13] they have not taken issue with that perception of state-labour relations.

The current article makes several claims that both contribute to and challenge the literature on state-labour relations outlined above. First, it asserts that the judiciary, which has been largely ignored in the study of state-labour relations in this period, was actually the most important branch of the state in articulating an institutional response to the social question that went beyond immediate crisis management during strikes. Second, the kind of solutions the judiciary was able to offer to the social question effectively defined the kind of citizenship rights that workers were able to claim. In this respect, one implication of the research is that workers at this time invoked citizenship rights in the judicial arena that were of an economic and social nature, and that were intrinsically linked to their condition as workers. Daniel James, making use of T. H. Marshall's theory of citizenship in his landmark study on Peronism, claims that one of the explanations for Perón's political success with workers lay in his capacity to expand the notion of citizenship from one that was exclusively political, to one that was 'now redefined in

[11] The examples of this current in the historiography are abundant: Diego Abad de Santillán, *La FORA: Ideología y trayectoria* (Buenos Aires, 1971); Jacinto Oddone, *Gremialismo proletario argentino:* [*Su orígen, su desarrollo, sus errores, su ocaso como movimiento democrático libre*] (Buenos Aires, 1975); Sebastián Marotta, *El movimiento sindical argentino: Su génesis y desarrollo* (Buenos Aires, 1960); Iaácov Oved, *El anarquismo y el movimiento obrero en Argentina* (México, 1978); Alberto Pla, *Socialismo y sindicalismo en los orígenes del movimiento obrero latinoamericano: México, Argentina* (Puebla, 1985); Rubén Zorrilla, *El liderazgo sindical argentino: Desde sus orígenes hasta 1975* (Buenos Aires, 1983); Julio Godio, *El movimiento obrero argentino*, 3 vols. (Buenos Aires, 1987–1989).

[12] Labour unions did sometimes seek state mediation of labour conflict at the beginning of the twentieth century. See Roberto P. Korzeniewicz, 'The Labour Movement and the State in Argentina, 1887–1907', *Bulletin of Latin American Research*, vol. 8, no. 1 (1989), pp. 25–45.

[13] Mirta Lobato, *La vida en las fábricas: Trabajo, protesta y política en una comunidad obrera, Berisso, 1904–1970* (Buenos Aires, 2001).

terms of the economic and social realm of civil society'.[14] This article, however, suggests that workers' own notion of 'social citizenship' antedated Perón and was – under certain circumstances – recognised by the state in the shape of its judicial branch.[15] Indeed, the judiciary after 1905 recognised wider citizenship rights for workers than did both the legislature and the executive, and the rights were intrinsically linked to the plaintiffs' condition of being workers, victims of occupational accidents. This throws new light on the argument made by Matthew Karush in his book, *Workers or Citizens*, that Argentine ruling elites in their hegemonic project for nation-state formation sought to deny workers any class-based identity and thereby create a 'de-classed' citizenry in order to preserve social order.[16] The court cases examined in this article suggest a different elite vision of how to incorporate workers into the nation-state and thereby preserve social order: By recognising rather than denying the legitimacy of workers' claims, judges hoped there would be less need for workers to make their demands in other arenas, such as in Anarchist unions or through strikes.

This article makes two additional contributions to the literature on state-labour relations in Argentina at the turn of the twentieth century. By focusing on individual workers' court actions, it provides a glimpse into the world of work that renders particularly well the heterogeneous nature of work and of workers in Argentina at this time. The legal sources forming the basis for this article make workers visible as carriage drivers, railroad workers and commercial employees, all sharing the insecurities of that heterogeneous world of work they inhabited. This heterogeneity is often missed in studies that focus on factory workers. Secondly, these court cases show an important area of state-labour interaction that has been lost in studies that look predominantly at organised labour. Indeed, they show that individual workers were not as averse to resorting to the state for a redress of their grievances at this time, as studies of the Anarchist labour movement have previously led us to believe.

The other main historiographic field that informs the present article is that of legal history, or more specifically, the 'new' legal history.[17] Inspired by the

[14] Daniel James, *Resistance and Integration: Peronism and the Argentine Working Class, 1946–1976* (Cambridge, 1988), p. 16.

[15] This fact does not rest power from James's argument that the novelty and appeal of Perón with workers was rooted in his making the social dimension of citizenship a *political* concern. In other words, when Perón put the social dimension of citizenship on the political agenda, he framed it as *rights* that ought to be politically guaranteed for all workers. This was a very different kind of social citizenship from that which workers could invoke in the courtrooms at the beginning of the twentieth century.

[16] Matthew B. Karush, *Workers or Citizens: Democracy and Identity in Rosario, Argentina (1912–1930)* (Albuquerque, 2002).

[17] This term generally applies to the body of historical literature written mainly from the 1990s, which has focused on studying 'the law' in a wide sense as a system that both 'shapes and is shaped by larger processes of political, social, economic, and cultural

writings of Michel Foucault, much of the new legal history has focused on criminal law and has covered in detail the development of a modern prison system; how notions of race, gender and class served to define social deviance, and the relationship between crime, punishment and social control.[18] Even if many of these studies are careful to stress that law is not exclusively an instrument of social control, but a space where power is contested and negotiated,[19] it is unsurprising that they have tended to accentuate the law as one of the state's major disciplinary tools. In short, studying the law from a criminal perspective highlights the law as a powerful and often repressive instrument of nation building. Studying nation building and the relationship between state and society through criminal law, however, runs the danger of focusing too much attention on the deviant. After all, civil and commercial law defines a greater part of the legal relationship between the state and civil society than criminal law.

Little attention has been devoted to the workings of Argentine civil and commercial law, with some notable exceptions. Jeremy Adelman's *Republic of Capital* analyses the institutional transformation from mercantilism to commercial capitalism that occurred in Argentina in the nineteenth century.[20] Focusing on the development of commercial law, it is consequently also a legal history of state-market relations, which, according to Adelman, constituted a key element of nation-state formation in Argentina in the nineteenth century. Another exception to the dominant preoccupation with criminal law is Juan Manuel Palacio's case study of the *Jueces de Paz* in Coronel Dorrego, a department in the province of Buenos Aires.[21] The

change'. Carlos Aguirre and Ricardo D. Salvatore, 'Introduction: Writing the History of Law, Crime, and Punishment in Latin America', in Salvatore, Aguirre and Joseph (eds.), *Crime and Punishment in Latin America*, pp. 1–2.

[18] See, for example, Ricardo Salvatore and Carlos Aguirre (eds.), *The Birth of the Penitentiary in Latin America, 1830–1940* (Austin, 1996); Robert Buffington and Carlos Aguirre (eds.), *Reconstructing Criminality in Latin America* (Wilmington, 2000), and the majority of the essays in Salvatore, Aguirre and Joseph (eds.), *Crime and Punishment in Latin America*. For a work that focuses specifically on Argentina, see Lila Caimari, *Apenas un delincuente: Crimen, castigo y cultura en la Argentina, 1880–1955* (Buenos Aires, 2004).

[19] Aguirre and Salvatore, 'Introduction', in Salvatore, Aguirre and Joseph (eds.), *Crime and Punishment in Latin America*, p. 14.

[20] Jeremy Adelman, *Republic of Capital: Buenos Aires and the Legal Transformation of the Atlantic World* (Stanford, 1999).

[21] Juan Manuel Palacio, *La paz del trigo: Cultura legal y sociedad local en el desarrollo agropecuario pampeano, 1890–1945* (Buenos Aires, 2004). Palacio uses civil and commercial lawsuits to show how conflicts that arose in the insufficiently regulated wheat economy found resolution in the local courts. Because central elements of the wheat economy, such as credit, land tenancy and labour arrangements were either insufficiently or ineffectually legally regulated, a range of informal arrangements emerged between creditors and debtors, landlords and tenant farmers, employers and rural labourers. One of Palacio's main arguments, is that the myriad of conflicts that arose from these precarious arrangements found their peaceful resolution in the local *Juzgados de Paz*, thereby insuring the relatively smooth

present article adds to this relatively scant literature on how non-criminal law has constituted a central element of the institutional nature of state-society relations in Argentina and Latin America in general.

It has been well documented that underprivileged groups at different moments in history have resorted to the courts to resolve conflicts and redress their grievances.[22] Showing that workers did so too is not the principal contribution of this article. Rather, its contribution lies in showing how 'the law' – including the absence of law and the judicial decisions intended to fill it – formed an intrinsic part of the relationship between workers and the state, between workers and employers, and between the state, workers and employers. Finally, while conceptually the article departs from the conviction – shared by the great majority of works in the new legal history – that 'the law' should be considered an arena for negotiation of power, I focus particular attention on how legal doctrines and principles defined both the terms and the possible end results of that negotiation. In other words, although the law must certainly be understood as embedded in – and responsive to – the larger social, economic and political order of which it forms a part, it is also in part autonomous. As this article will show, the legal framework available to judges and workers, as well as the procedural workings of the court system, ultimately decided the kind of citizenship workers were able to claim in court.

### *Interpretations of the Civil Code in Cases of Occupational Accidents, 1900–1915*

During the 15 years before the passage of the first Argentine occupational accident law in 1915, Argentine courtrooms were confronted with the new social and economic reality brought about by the changes in the world of work inherent to the process of modernisation. With a work environment characterised by precarious working conditions and increasing mechanisation, occupational accidents were frequent and of serious consequences for the workers involved and their families. In an attempt to receive financial compensation from their employers for the temporary or permanent loss of

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functioning of the wheat economy and preventing social conflict from assuming greater proportions that could possibly have resulted in large-scale rebellions.

[22] The literature has amply documented how indigenous communities and women have used the courts to resolve conflict, both in the colonial and modern period. See Steve J. Stern, *Peru's Indian Peoples and the Challenge of Spanish Conquest: Huamanga to 1640* (Madison, 1982); Idem., *The Secret History of Gender: Women, Men, and Power in Late Colonial Mexico* (Chapel Hill, 1995); Sergio Serulnikov, *Subverting Colonial Authority: Challenges to Spanish Rule in Eighteenth-Century Southern Andes* (Durham, 2003); Charles Cutter, *The Legal Culture of Northern New Spain, 1700–1810* (Albuquerque, 1995); Arlene J. Díaz, *Female Citizens, Patriarchs, and the Law in Venezuela, 1786–1904* (Lincoln and London, 2004); Christine Hünefeldt, *Liberalism in the Bedroom: Quarrelling Spouses in Nineteenth-Century Lima* (University Park, 2000).

income, workers – or their relatives – in some cases took their employers to court.

In the absence of a specific occupational accident law, plaintiffs invoked the general dispositions of the Civil Code pertaining to damages. The right to damages established in the Argentine Civil Code was embodied primarily in its Article 1109, which states: 'Any one who performs an act, and whose fault (*culpa*) or negligence (*negligencia*) causes a damage to someone else, is under the obligation to compensate the damage … '.[23] This part of the article examines how judges' interpretations of the Civil Code in cases of occupational accidents changed during the course of these 15 years. The changes and developments in interpretations can roughly be divided into two periods: The first lasted until 1905 and can be called the period of 'restrictive' or 'classical' interpretation. The second period, from 1905 and until the passing of the Occupational Accident Law in 1915, is referred to as the period of 'sociological' interpretation.[24]

### *The Restrictive or Classical Interpretation, 1900–1905*

The right to damages embodied in the Argentine Civil Code's Article 1109 centred on the notion of fault. In short, it was necessary for anyone suing a person for damages to prove that the defendant had been either directly at fault in producing the damage, or that the damage was due to the defendant's negligence. The main problem in applying the principle of fault to cases of occupational accidents, however, was that most such accidents did not occur because the employer caused them directly through fault or negligence. Rather, they were accidents inherent to the nature of work, especially industrial work. Working with machinery was potentially dangerous in itself and became even more so when one considers the long hours and the often deplorable working conditions the Argentine workers were subject to at the turn of the twentieth century.

Only about 25% of all occupational accidents could be attributed to the direct negligence or fault of the employer. Another 25% were estimated to have been caused by the worker's own imprudence, and the remaining incidents occurred without anyone being directly responsible. Thus, approximately 75% of all occupational accidents fell outside the dispositions for damages in the Civil Code.[25] With a literal interpretation of the notions of

[23] *Código Civil de la República Argentina* (*con las notas de Vélez Sarsfield*) (Buenos Aires, 1939).

[24] The terms are taken from Federico Figueroa, 'La jurisprudencia nacional sobre accidentes del trabajo', *BDNT*, no. 20 (31 July 1912), p. 35.

[25] Gonzalo Figueroa Gacitúa, 'La culpa en materia de accidentes del trabajo. Su estudio en el derecho argentino', doctoral thesis, Universidad Nacional de Buenos Aires – Facultad de Derecho y Ciencias Sociales, 1918, p. 40.

fault and negligence, workers had little hope of obtaining compensation, and the first cases of occupational accidents tried in the courts confirm this statement. The Capital's Civil Court of Appeals ruled uniformly during these years, establishing the doctrine that, to be eligible for compensation for damages, it was necessary to prove that the occupational accident had been caused by the direct fault or negligence of the defendant.[26]

In 1903, however, Judge Ernesto Quesada in the Capital's Civil Court challenged this restrictive interpretation for the first time in a ruling of the first instance. On 27 June Quesada ruled that the worker Bautista Lenardón was entitled to a compensation of 5,000 pesos from his employers Del Piano and Lucas, the owners of the mill Solís. Lenardón had broken his leg when the scaffold on which he was standing collapsed. He initially sued Del Piano and Lucas for 15,000 pesos for the damages produced by the accident, but Judge Quesada reduced this to 5,000 pesos. It should be noted that, even if the amount was reduced from the plaintiff's initial claim, 5,000 pesos was still a significant amount of money in 1903. According to statistics from the National Labour Department, the average monthly salary for an experienced bricklayer ranged between 70 and 120 pesos at this time. Even if we operate with the maximum range of this scale; i.e., a salary of 120 pesos per month, Lenardón's compensation still amounted to three and a half times the annual salary of a skilled bricklayer.[27]

Quesada's rationale for his decision illustrates a new way of interpreting the notion of fault in cases of occupational accidents:

> The carelessness attributed to the plaintiff thus dismissed, and confirming the common use of the scaffold and that this collapsed because it was not sufficiently sturdy, the carelessness is attributable to the defendants as owners of the establishment. Not only were they negligent in ordering the plaintiff to perform a job that was not within [the range of] his skill …, but they were careless in failing to assure the good conditions of their equipment. Their fault is evident …. [I]t is current doctrine that, however modest the fault, it is enough to establish the responsibility of he who causes a damage through an act or who, by negligence, fails to adopt the measures called for by the simplest notion of caution in order to prevent an accident ….[28]

According to Quesada, fault was not only attributable to someone who through a direct action caused a damage, but also to someone who failed to take the necessary precautions in order to insure the prevention of an accident. In his interpretation, the notion of fault not only embodied action, but also an *omission to act*, which considerably extended the meaning of the term

[26] Figueroa, 'La jurisprudencia nacional', p. 38.

[27] For a list of average salaries for various occupations in 1903, see *BDNT*, no. 5 (30 June 1908), pp. 245–51.

[28] Sentence cited in Figueroa, 'La jurisprudencia nacional', p. 39.

fault in comparison to the previous sentences. Ernesto Quesada was therefore the first judge to uphold the doctrine that Rafael Bielsa later summarised in the following way: '[W]here there is fault, whether this consists of carelessness or negligence, action or omission, the legal principle [of fault] is applicable ....'[29] Quesada's sentence was not upheld in the court of appeals, however, where the traditional and restrictive interpretation of the Civil Code was reiterated. The court ruled that 'if the accident is caused by the worker's own lack of foresight, compensation for damages is not admissible', and that 'the owners or employers of the factory are not obliged to personally supervise the state of the equipment commonly used by the worker'.[30] Although the classical or restrictive interpretation of the Civil Code was upheld by the court of appeals in this case, it turned out to be challenged more decisively shortly afterwards.

### *The Sociological Interpretation, 1905–1915*

A second sentence pronounced by Ernesto Quesada on 10 May 1905 initiated a whole new phase in Argentine jurisprudence in the field of occupational accidents. In the case *Olivera v. Mareyra y Othacché*, Carmelo E. Olivera sued the employers of his son, José Mareyra and José Othacché, for the damages the son had suffered in an occupational accident in their textile factory. Olivera Junior, who was a minor, had lost his hand when it got caught in a machine in the factory on 10 December 1902, and Judge Quesada sentenced Mareyra and Othacché to pay the minor's father 3,000 pesos. In his rationale this time, Quesada went even further than in his 1903 sentence in reinterpreting the principles of the Civil Code and their application to cases of occupational accidents.[31] In an analysis of the sentence, Federico Figueroa synthesised the three important principles it established:

1. That the action for damages in these cases (of occupational accidents) is not only appropriate when one can prove the fault or negligence on behalf of the employer. What constitutes the ground for action is the damage suffered without reason, whatever may be the cause, however good the machinery used, and however thorough the supervision of employers and foremen may be.
2. That our Civil Code, without awaiting special labour laws, has legislated the matter with such ample criterion that nothing escapes its regulations; this has also been established by the jurisprudence of the Supreme Court ....

[29] Rafael Bielsa, *La culpa en los accidentes del trabajo. Su estudio y crítica en la ley argentina* (*aspecto jurídico de la cuestión*) (Buenos Aires, 1919), p. 43.
[30] Sentence cited in Figueroa, 'La jurisprudencia nacional', pp. 39–40.
[31] The sentence and its rationale is reproduced in its entirety in *ibid.*, pp. 44–9.

3. That it does not fall to the worker to prove fault; instead, that proof, on inverted terms, falls to the employer. With this established, … there is no reason to consider the responsibility or intention of the immediate agent in the act. One only considers the act that has produced the damage, because the employer answers for the acts of industry whether or not these are produced by the workers, by the objects forming part of or intervening in the industry, whether they are due to proper fault or the object's risk, whether they are acts of nature or they result from the industry itself. [The employer is responsible] in all cases where the damage suffered by the worker or employee cannot be attributed to his [the worker's] own fault or intention.[32]

Each one of these points established important juridical principles and precedents that are worthy of a more detailed analysis.

Maybe the most significant and innovative interpretation by Quesada in this 1905 sentence was his dismissal of the relevance of the traditional notion of fault, on which all previous sentences had been based. Instead of needing to prove fault or negligence on behalf of the employer, Quesada stated that 'the employer is responsible for whatever damage the worker or employee may suffer … due to the nature of his work or on the occasion of work, and for whatever damage he would not have suffered, had he not accepted the job, even if it is accidental or produced by *force majeure* (*fuerza mayor*)'.[33] The notion that the employer was inherently responsible for any and all kinds of accidents suffered by a worker while performing his job is usually referred to as the principle of 'occupational risk'.

The legal doctrine of occupational risk was not Quesada's innovation, however. According to Alejandro Ruzo, the doctrine originated in France in the nineteenth century and should be attributed to the jurist Julio [Jules] Favre. From France, it then spread to other European nations to form the basis for legislation pertaining to occupational accidents. The doctrine had three fundamental principles: First, that there is an inherent risk to all industry, especially large industry. Second, that the employer, as the representative of industry, has to assume the responsibility for this risk. This applies in all cases, regardless of whether the employer is at fault, whether precautions have been taken, in short, regardless of all circumstances. Third, that the compensation received should be equivalent to the damage occurred.[34] By 1905, the following European countries had already passed occupational accident laws that adopted the doctrine of occupational risk: Denmark,

[32] *Ibid.*, p. 44.
[33] *Ibid.*, p. 46.
[34] Alejandro Ruzo, 'Fundamentos jurídicos del riesgo profesional', *BDNT*, no. 20 (31 July 1912), p. 17.

Spain, Belgium, France, England, Greece, Russia, Italy, Finland, Holland, Germany, Austria, Luxemburg, Sweden and Norway.[35]

Quesada was undoubtedly familiar with European occupational accident legislation and the legal principles on which it was founded. The Argentine intellectual elite's intimate familiarity and preoccupation with European ideas – and especially French ideas – has been amply documented,[36] and legal scholars were no exception. Legal commentaries usually dedicated substantial space to European, and sometimes North American, legal precedents and doctrines, as was the case in the special issue of the *Boletín del Departamento Nacional del Trabajo* dedicated to the topic of occupational accidents.[37] Indeed, such knowledge seems to have been taken for granted among the experts in the field. Miguel Angel Garmendia, in a 1918 monograph, mentions in a footnote a few of the most important French works on labour legislation: [Léon] Duguit, [Adrien] Sachet, and Paul Pic. Matter-of-factly he states that the new directions in the field of private law have given rise to a copious literature, and that '[t]hese doctrines are familiar to all of those who dedicate themselves to the study of such important subjects'.[38]

Nevertheless, Argentine judges could not freely borrow from foreign legislation or foreign legal doctrine and apply principles to national cases that did not have a basis in Argentine law. In fact, Quesada makes no reference to foreign legal precedents in his 1905 decision, but rather goes to great pains to show that the foundations for the doctrine of occupational risk could actually be found in several articles of the Argentine Civil Code itself. Consequently, Quesada found sufficient rationale to put aside the notion of fault in his ruling.

To claim that the employer's responsibility in cases of occupational accidents was a given, regardless of whether or not he was at fault, was doubtless bold and innovative – not to mention controversial – interpretation of the Civil Code. To understand Quesada's radical decision, it is important to pay careful attention to the historical moment in which he pronounced his ruling. The first time he made room for the plaintiff's claim to damages was in 1903, the year after the first big general strike had taken place in Argentina. The strike was headed by the growing Anarchist organisations that dominated the labour movement at the time and had caused considerable concern among the governing elites, who had responded by declaring a state of siege and promulgating the repressive Residence Law. In addition to repressive measures,

[35] *Ibid.*, pp. 37–8 (footnote) and Alejandro M. Unsain, 'Principios generales de la legislación de accidentes', *BDNT*, no. 20 (31 July 1912), pp. 21–31.

[36] For a fairly recent example, see Julia Rodríguez, *Civilizing Argentina: Science, Medicine, and the Modern State* (Chapel Hill, 2006).

[37] *BDNT*, no. 20 (31 July 1912).

[38] Miguel Angel Garmendia, *Jurisprudencia del trabajo: Exposición y crítica* (Buenos Aires, 1918), p. 12.

however, the government realised the need to propose long-term institutional solutions to the social question, which had so forcefully made its entrance on to the Argentine political stage. An important legislative response was to present a Labour Code bill in 1904.[39]

The need to channel social conflict through institutional structures to prevent it from assuming more radical expressions was not just perceived by the legislators, but also by judges. As Eduardo Zimmermann has pointed out, jurists at the time engaged in an active debate about how juridical institutions could best adapt to the new social phenomena.[40] Quesada himself expressed this concern in a talk he gave in the city of La Plata in 1907. He worried that, if the indifference among intellectuals to the antagonism between labour and capital continued, the class struggle and its 'Marxist Gospel' was threatening to make into a 'terrifying problem' something which 'appropriately directed could be just a more or less normal accident in the Argentine development'.[41]

Quesada took it upon himself to provide this 'appropriate direction' when ruling in labour cases in his courtroom. Oscar Terán, in his detailed analysis of Quesada's writing and ideas, explains that his treatment of the social question can be seen as a typical intervention from a reformist member of the elite, steeped in scientific culture. Quesada advocated a moderate state intervention in the form of social reformism as the appropriate government response to the new, conflictive, relationship between labour and capital, and that this state intervention should be based on scientific criteria of social analysis.[42] With this kind of state intervention, it would be possible to prevent workers' discontent from assuming more radical expressions, such as adherence to the Anarchist organisations that were flourishing in Argentina – and especially in Buenos Aires – at the time.[43]

In the extension of his radical introduction of the principle of occupational risk, Quesada established another juridical principle that would prove even more important in terms of its influence on future jurisprudence. This was the principle of 'the inverted burden of proof', or *inversión de la prueba*. According to the classical interpretation of the Civil Code, it was the worker who had to provide proof of the employer's fault or negligence. However, the core of the doctrine of occupational risk was the automatic

[39] For a treatment of the Labour Code bill and its reception, see Zimmermann, *Los liberales reformistas*, pp. 178–87.

[40] *Ibid.*, p. 91.

[41] Ernesto Quesada, 'La cuestión obrera y su estudio universitario', *BDNT*, no. 1 (30 June 1907), p. 112.

[42] Oscar Terán, *Vida intelectual en el Buenos Aires fin-de-siglo (1880–1910): Derivas de la 'cultura científica'* (Buenos Aires, 2000), p. 267. See especially Chapter IV.

[43] For an analysis of the Anarchist movement in Argentina at the turn of the century, see Juan Suriano, *Anarquistas: Cultura y política libertaria en Buenos Aires, 1890–1910* (Buenos Aires, 2001).

*presumption* of the employer's responsibility. If the employer's responsibility were automatically presumed, it would no longer fall to the worker to prove the employer's fault; rather, it would fall to the employer to prove the existence of special circumstances absolving him of his responsibility to compensate. In short, an automatic presumption of the employer's responsibility shifted the burden of proof from the worker to the employer.

There can be no doubt about the transcendental importance of Quesada's sentence. As Miguel Angel Garmendia stated:

> Dr. Quesada boldly established, as seen [in this sentence] the doctrine of occupational risk embodied in Law 9688, ten years before this was passed. He is the first judge in Argentina to have studied scientifically the question of the employer's responsibility and to have resolved it according to the criterion that prevails today in all the civilised world ….[44]

Quesada's decision was far from uncontroversial, however. When the Court of Appeals upheld the sentence, the judges conveniently confirmed its outcome, but refrained from commenting on its rationale. That is, they upheld the decision that Olivera was entitled to damages from his son's employers, but justified their decision by claiming that Mareyra and Othacché had shown carelessness in employing a child to perform a dangerous factory task. They had therefore been at fault.[45] Thus, the Court based their decision on an expanded definition of the traditional concept of fault and not the principle of occupational risk invoked by Quesada.

In fact, few judges were willing to go as far as Quesada in claiming that the doctrine of occupational risk was actually embodied in the Civil Code. Rather than automatically presuming the employer's responsibility, judges after 1905 stretched and bent the dispositions of the Civil Code in an attempt to *prove* it. Just like the Court of Appeals, they based their rulings on the traditional, albeit expanded, notion of fault. This expanded notion of fault was invoked in different ways and under different circumstances in the cases presented between 1905 and 1915. If the worker and his counsel were able to show that the accident was due to the omission of even the most minimal precaution to ensure worker safety, there was a good chance the judges would rule in their favour. The same was the case when the accident was produced by the failure of any of the equipment used.

As such, these were analogous cases to Quesada's 1903 sentence, which had established that it was the employer's responsibility to take all possible measures to prevent the occurrence of accidents. This included insuring the good condition of his establishment's equipment. In *Antonio Messina v. Medici*

[44] Garmendia, *Jurisprudencia del trabajo*, p. 29.
[45] Figueroa, 'Jurisprudencia nacional', p. 40.

*y Lacaze*, a federal judge of the capital, Agustín Urdinarrain, on 14 September 1909, sentenced the company of Medici and Lacaze to pay Antonio Messina 12,000 pesos in damages for an accident his son had suffered on board their ship 'Beatriz Amanda P'. The accident occurred when the chain of a loading crane broke and the load came down on the minor's left leg, shattering it completely below the knee. The Court of Appeals confirmed the sentence on 30 September 1909, upholding Urdinarrain's ruling that the employer is responsible for the damages caused in an accident produced by the faulty equipment that is his property.[46]

Another example of this principle can be seen in the case *José Orlando v. Enrique Fynn*, sentenced by Judge Jorge de la Torre of the Capital's Civil Court in the first instance on 31 December 1909.[47] In this case, the blacksmith José Orlando had been injured when he fell down the stairs to the basement of Enrique Fynn's workshop. According to Orlando, the accident had occurred because of the dangerous conditions of the basement entrance. The only access to the basement was through an opening in the floor, an opening that was partially obstructed by an iron beam. In order to descend into the basement, it was necessary for the blacksmith to bend under the beam to reach the movable staircase leading from the opening in the floor and down to the workshop. The staircase was without handrails. As Orlando approached the opening, he did not bend down far enough, hit himself on the beam and fell into the basement. Judge de la Torre, basing his sentence on the responsibility of the employer to compensate an accident provoked by the omission of safety precautions, ruled that Enrique Fynn should pay the accident victim 15,000 pesos in compensation. An interesting aspect of this sentence is that the judge dismissed the defendant's argument that the accident had been caused by the plaintiff's own carelessness, and that this should absolve him of any responsibility for the incident. De la Torre declared that 'even in the case that the plaintiff should have proceeded thoughtlessly or carelessly, which has not been proved, this would not exempt the defendant from responsibility … '.[48] His ruling was upheld in the Court of Appeals on 3 December 1910, though the compensation was reduced to 6,000 pesos.[49]

Where the victims of occupational accidents were minors, their age could constitute an advantage for the plaintiff in proving the employer's fault. As seen in Quesada's 1905 sentence, the Court of Appeals that upheld his ruling founded its decision on the claim that the employer had been at fault when employing a minor to perform a potentially dangerous factory task. This was

[46] *Ibid.*, pp. 41–2.

[47] The sentence is published in its entirety in *BDNT*, no. 16 (31 March 1911), pp. 56–61. See also Figueroa, 'Jurisprudencia nacional', pp. 42–3.

[48] *BDNT*, no. 16 (31 March 1911), p. 59.

[49] *Ibid.*, p. 61.

true also in the case *Aquiles Panella v. Juan Ferrari*,[50] where Panella sued Ferrari for damages due to the death of his son Rómulo, who had been employed in the defendant's store (*almacén*). The tragic incident occurred when Rómulo, at the order of his employer, had gone to the basement to fetch a container of alcohol. He had taken with him a candle, which apparently constituted the only lighting available in the establishment. When reaching for the container on the shelf, which was situated almost two metres above ground, the minor lost his balance, spilling alcohol on his clothes which then caught on fire, and the boy died some days later as the result of the burns.

Judge E. Giménez Zapiola, of the Capital's Civil Court of the first instance, ruled on 14 March 1910 that, 'when hiring the services of the minor, [the defendant] contracted the obligation to look after him, preventing him from performing any act that would involve a danger to his life'.[51] The notion that the employer had special responsibility for the safety of employees who were minors was also invoked in the case *Eloísa Moreno v. F.C.C.A.* In revoking the sentence of B. Palacios, federal judge of Santiago del Estero, the court of appeals in Córdoba resolved that Eloísa Moreno was entitled to 4,000 pesos in damages for the accident suffered by her seventeen-year-old son, Fortunato Moreno, which resulted in the loss of his left hand.[52] The court ruled that 'the admission made by the company … to have set the minor Moreno … to perform such delicate and dangerous tasks as those of switch operator is sufficient to attribute to it the harmful consequences of its carelessness'.[53]

Despite the fact that most judges were not willing to follow Quesada's example in adopting the doctrine of occupational risk, the principle of the inverted burden of proof was applied in various sentences in the period between 1905 and 1915. This was of utmost importance for workers as plaintiffs since meeting the burden of proof constituted one of the major obstacles for workers in the courtrooms. Often, the only proof the worker could present was the testimony of other workers. Most workers, however, would not want to challenge their boss by testifying against him in court, for fear of losing their job or suffering other forms of reprisals. The uneven situation of power made it especially difficult for the plaintiff to meet the burden of proof. If the judge was willing to accept an inversion of the burden of proof, it significantly increased the worker's chances of winning the lawsuit.

One kind of accident where judges found it possible to invoke the principle of inverted proof was when a machine in the workplace had directly

[50] Published in its entirety in *BDNT*, no. 19 (31 Dec. 1911), pp. 817–23.
[51] *Ibid.*, p. 819.
[52] The sentence is reproduced in its entirety in Garmendia, *Jurisprudencia del trabajo*, pp. 102–6.
[53] *Ibid.*, p. 105.

caused the injury. In these cases, some judges found room for applying the Article 1133 of the Civil Code, which states: 'When damage is inflicted by any kind of inanimate object, its owner is responsible for the compensation, unless he can prove that there exists no fault (*culpa*) on his behalf … '. This was the case, for example, in *María Bravi De Mazzoni v. Ruizli y Ortiz*,[54] where Judge R. Naveira of the Capital's Civil Court in the first instance on 11 December 1913 ruled:

> As the damages were caused by a machine moved by electrical force …, it should be considered an inanimate object, which makes the Civil Code's Article 1133 applicable. If the owner of the factory or workshop pretends to free himself from paying the compensation, he is the one who must prove his lack of fault. As this lack of fault has not been proved, he is legally responsible for the compensation corresponding to the victim.[55]

The sentence was also upheld in the Court of Appeals.

In some cases, the principle of the inverted burden of proof was invoked with a different rationale than Article 1133 of the Civil Code. Rather, it was based on what was referred to as the doctrine of contractual fault (*falta contractual*). This doctrine, espoused by several of the European jurists concerned with the new field of labour legislation, was based on the tenet that there are certain rights and obligations inherent to a contractual agreement where the worker agrees to sell his labour to the employer.[56] A cornerstone of this arrangement was the employer's obligation to pay the worker for his labour. In addition, however, these theorists considered the employer's responsibility to provide for his employee's safety while performing tasks at his order to be inherent to the labour contract.[57] If it is an automatic and inherent part of the labour contract that the employer should ensure the safety of his employee, then it is the employer who must be assumed responsible in the case of an occupational accident. In effect, this was the same principle, albeit with a different justification, established in the doctrine of occupational risk. In both cases, the burden of proof lay with the employer rather than with the worker.[58]

[54] The sentence is partially reproduced in *ibid.*, p. 33.

[55] *Ibid.*

[56] When using the term 'contractual agreement', I am not referring to a specific written labour contract between the worker and the employer. Rather, these were rights and obligations considered inherent to a labour contract *sui generis*, without the necessity of a written contract.

[57] For an explanation of the doctrine of contractual fault, see Ruzo, 'Fundamentos jurídicos del riesgo profesional', pp. 14–15.

[58] The doctrine of contractual fault was invoked in the sentence *Aurelio Guevara v. Ferrocarril de Buenos Aires al Pacífico*, not in the first instance, but in the federal court of appeals in the capital of Buenos Aires. The sentence was pronounced on 30 May 1916 and was thus posterior to the passing of the 1915 Occupational Accident Law. Since the accident itself had occurred before the law was passed, however, the lawsuit was filed for damages according to the principles of the Civil Code, due to the impossibility of invoking the new

## *The Special Case of Railroad Workers*

Railroad workers found themselves in a special position when it came to occupational accidents, for various reasons. First, they were employed in one of the most dangerous industries that existed at the time, and where accidents happened frequently. Second, they belonged to an industry that had developed in the nineteenth century, one that had occupied a central position in the nation-building project. Because of its centrality to the economic life of the new republic, separate laws had regulated the operation of the railroad from the very beginning of its existence. The first national railroad law, for example, had been passed in 1872 and had been replaced in 1891 by Law 2873.[59] The National Railroad Law contained a detailed regulation of the railroad companies' operations and established schedules and prices. It also defined the railroad companies' obligations to their passengers as well as to the companies and individuals for whom the railroad was essential in the transportation of merchandise (*cargadores*). An important aspect of the law was to establish appropriate security measures to insure the smooth functioning of trade and transportation. Article 5 outlined a range of measures the railroad company was obliged to adopt to avoid accidents, and Article 91 established that any breach of the law's regulations automatically made the railroad company responsible. Although these articles were intended to regulate the relationship between the railroad companies and their customers, railroad workers who had been victims of occupational accidents invoked these dispositions in the courtrooms in an attempt to establish the employer's responsibility.

This was the case, for example, in *Miguel González v. F.C.C. Argentino*.[60] The complaint was first heard in 1912 in the Federal Court of the first instance in Rosario, Santa Fe, and subsequently in the Federal Court of Appeals on 11 March 1915. The judge of the first instance, Eugenio Pucci y Benza, applied the traditional interpretation that the plaintiff had to prove fault on behalf of

law retroactively. Even if the new law could not be applied in this case, it is interesting to note that the doctrine of contractual fault was invoked *after* the employer's responsibility had already been established by law according to the principle of occupational risk. In two different lawsuits against the same company, the first filed by Victoria Graint de Coch and the second by José Castiñeiras, the same court of appeals ratified the doctrine of contractual fault. The court of appeals pronounced their final decisions on 12 August 1916 and 29 March 1917, respectively. The doctrine was also invoked in Catalina Monreal de Lara de Hurtado v. Gobierno Nacional, sentenced in the federal court in the first instance in the capital of Buenos Aires on 5 November 1915 and in the court of appeals on 15 May 1916. The Supreme Court upheld the sentence on 30 November 1916. As is evident, all the sentences were posterior to the passing of the Occupational Accident Law. Garmendia, *Jurisprudencia del trabajo*, pp. 71–86.

[59] Ley de Ferrocarriles Nacionales, *Anales de Legislación Argentina* (hereafter *ALA*) (1889–1919), pp. 239–48.

[60] The sentence is cited and analysed in Garmendia, *Jurisprudencia del trabajo*, pp. 87–90.

the defendant in order to be eligible for damages and consequently rejected González's claim. The Court of Appeals, however, revoked the sentence on the basis that the company had failed to adopt the security measures outlined in Article 87 in the *Reglamento de Ferrocarriles* and sentenced the company to pay González 6,000 pesos in compensation.[61] Again, it should be noted that this was a significant amount. According to statistics assembled by Carlos Díaz Alejandro, the average annual salary for a railroad worker in the period 1909–1914 was 1,081 pesos, the compensation therefore was approximately six times this amount.[62]

While the appeals court decision was an application of the expanded notion of fault, there were other cases in which the judges went further in presuming the responsibility of the employer. Interesting in this respect is the invocation of the National Railroad Law's Article 65, which stated: 'In the case of accidents, it falls to the companies to prove that the damage is due to unforeseen circumstances (*caso fortuito*) or *force majeure*.'[63] It logically followed that the company's responsibility in the case of an accident should be automatically presumed, inverting the burden of proof. If one reads Article 65 in its entirety, however, it becomes clear that its dispositions were intended to regulate the relationship between the company and its passengers rather than the relationship between the company and its employees.[64]

Two rulings by Federal Judge Juan Alvarez in Rosario, Santa Fe, are particularly noteworthy with regard to the application of the National Railroad Law's Article 65 to cases of occupational accidents. In the first case, Luis Caballero sued the *Compañía General de Ferrocarriles en la Provincia de Buenos Aires* for damages after his son Luis lost his left hand while at work for the company. Alvarez ruled in favour of the plaintiff, applying the latter part of Article 65 of the National Railroad Law and on 31 March 1913 sentenced the company to pay the plaintiff a compensation of 2,000 pesos within three days.[65] When the sentence was appealed, the court upheld the decision to compensate the plaintiff, but was hesitant to accept Alvarez's rationale to apply the Railroad Law's Article 65. In fact, the Supreme Court had previously ruled that the last part of Article 65 only referred to the relationship between the companies and their passengers and *cargadores*, which made it difficult to claim it could be applied to cases of occupational accidents. The

[61] The *Reglamento de Ferrocarriles* was the detailed specification of the Railroad Law's practical implementation.

[62] Carlos F. Díaz Alejandro, *Ensayos sobre la historia económica argentina* (Avellaneda, Buenos Aires, 2002), p. 53.

[63] *ALA* (1889–1919), p. 244.

[64] Preceding the part cited above, Article 65 states: 'It is the duty of the companies to assure that all their employees are diligent and competent. Their responsibility toward their passengers and *cargadores* for damages caused by faults of their employees extends to all acts executed by the latter in the performance of their duties.' *Ibid.*

[65] Garmendia, *Jurisprudencia del trabajo*, pp. 91–4.

Court of Appeal instead decided to uphold the sentence on the basis that the company had been at fault by not complying with security regulations. The court, by choosing to rely on an expanded notion of fault rather than the National Railroad Law's Article 65 to establish the employer's responsibility, reiterated the interpretation that fault had to be proved rather than presumed.[66]

In spite of the Appeals Court's rationale, Federal Judge Juan Alvarez repeated his interpretation of the National Railroad Law in *Agapito Miranda v. Ferrocarril Central Argentino*.[67] In his decision, he again claimed that the company's fault was automatically presumed in all cases of accidents – including occupational accidents – unless the company could prove that the accident was due to unforeseen circumstances or *force majeure*.[68] On 7 October 1915, the Federal Court of Appeals again confirmed the plaintiff's right to compensation, but with the same rationale as in the above-mentioned *Luis Caballero v. Compañía General de Ferrocarriles en la Provincia de Buenos Aires*. The court's pronunciation is confusing and shows its hesitation and vacillation in employing the National Railroad Law in matters of occupational accidents at all:

> It has been proved that the accident happened due to the inobservance of the regulations and the negligence of the defendant company's employees … This establishes the company's responsibility for the damages incurred, in accordance with Articles 65 and 83 of the National Railroad Law …, although it is true that according to what has been resolved repeatedly by this court and by the jurisprudence of the Supreme Court, the latter part of Article 65 … only refers to the relationship between the companies and their passengers and *cargadores*.[69]

*José Alleva v. Compañía Francesa de los Ferrocarriles de la Provincia*[70] was another case involving railroad workers that illustrates the eclectic application of different legal principles to cases of occupational accidents before 1915. In their ruling in the Court of Appeals in the city of Santa Fe on 31 October 1910, the judges chose to invoke the Commercial Code rather than the National Railroad Law. Claiming that a railroad company was primarily a commercial establishment, they considered the articles of the Commercial Code to be applicable. Basing its decision on the Code's Article 156, the Court of Appeals determined that the victim was eligible for compensation in accordance with the principle of occupational risk.[71] Together with Quesada's and Alvarez's sentences, this ruling belonged among the more

[66] *Ibid.*, pp. 94–6.
[67] Sentence reproduced in *ibid.*, pp. 97–9.
[68] *Ibid.*, p. 97.
[69] *Ibid.*, p. 98.
[70] Sentence published in *BDNT*, no. 17 (31 June 1911), pp. 281–92.
[71] The Commercial Code's Article 156 established that principals of commercial establishments were responsible for all damages suffered by their employees (*dependientes*) while in their service.

radical reinterpretations of the existing legal framework in cases of occupational accidents.

### *Obstacles for Labour in the Courts*

The fact that after 1905 judges started interpreting the classical notion of fault more extensively by no means meant that the courts provided a satisfactory alternative to an occupational accident law. The courts were important primarily by default because there was nowhere else for the workers and their families to turn when they struggled to make ends meet in the aftermath of an accident. Besides, workers faced substantial obstacles when resorting to the court system. One of the main problems, as seen above, was meeting the burden of proof. If the worker failed to show the employer's negligence or carelessness, or a lack of proper security measures, the chance that the ruling would result in his favour was significantly diminished.

The following cases serve as poignant illustration to this point. In *Genaro Freire v. La Compañía Cervecería Palermo*,[72] Freire had been the victim of an occupational accident when one of the beer bottles he was stowing suddenly exploded. As a result of the accident, he lost a good part of the feeling in his hand and could move his fingers only with great difficulty, which made him unable to continue performing his job. The plaintiff alleged the responsibility of the employer by claiming the accident had occurred because of the faulty way the company stored the beer, which caused the bottles to explode as a result of the fermentation of the alcohol. Consequently, the company was at fault according to Article 1109 of the Civil Code.[73] In order to prove the company's responsibility, Freire had three of his co-workers testify that the bottle exploded due to the fermentation of the beer, and that the situation was caused by the bottle's change in temperature after leaving the pasteurising machine and before stowing. The judge, however, swiftly dismissed the testimony of the plaintiff's co-workers with the following reasoning:

> … [T]he declarations of the named witnesses are without merit, as they are mere eye witnesses and can only validly testify to the concrete events, and not to a question of technical character, whose assessment undoubtedly requires special knowledge and should be clarified by experts.[74]

He continued to rule that the company's responsibility had not been proved and rejected the plaintiff's claim. The sentence was pronounced in the Capital's Civil Court of the first instance on 11 June 1910 and was upheld in the court of appeals on 10 December the same year.

[72] The sentence is published in *BDNT*, no. 19 (31 December 1911), pp. 812–16.
[73] *Ibid.*, p. 812. [74] *Ibid.*, p. 814.

The case aptly illustrates several of the major obstacles workers encountered in lawsuits over damages for occupational accidents. First, even if one applied an expanded notion of fault, many accidents were simply the result of the inherent risk of work itself and could not be attributed to even the slightest lack of precaution on behalf of the employer, or to the failure of specific equipment, as was Freire's case. This shows how anything short of the adoption of the concept of occupational risk, embodied in law, constituted a highly insufficient solution to the problem of occupational accidents. Second, the case is a poignant illustration of the difficulties involved in having to prove the employer's fault. Not only was it difficult in itself to document the existence of fault, but workers were also at a disadvantage compared to their employers with respect to witnesses. In Freire's case, he at least managed to have three co-workers testify for him. A more common scenario was that it was very difficult for workers to find colleagues who were willing to testify against their employers. As the case further illustrates, even when the worker *did* find witnesses to testify on his behalf, their testimonies could easily be dismissed, since the testimonies of 'simple' workers could not be compared to that of more technical 'experts'. Last, but not least, it was easier for employers than for workers to present witnesses with a high social status and therefore increase their credibility.

One of the most obvious obstacles workers faced when forced to rely on the court system to remedy their grievances was the costly and time-consuming nature of a regular civil lawsuit. Most workers did not have the money to hire a lawyer to take their case and were even less able to support the risk of accumulating additional expenses if they should lose. Workers' generally poor financial circumstances were additionally worsened in the aftermath of an accident, making the financial obstacles to litigation insurmountable to most.[75] A civil lawsuit for damages could also take a long time to bring to conclusion. From what can be discerned from the cases studied in this article, it could take years between a case was initiated and the final ruling was pronounced.

Freire, for example, had suffered the accident on 29 May 1909. The court in the first instance pronounced its ruling on 11 June 1910 and the Court of Appeals on 16 December the same year. With a year and a half between the occurrence of the accident and the Court of Appeal's final ruling, his case was actually fairly swift in comparison to many others. In the case *Aquiles Panella v. Juan Ferrari*, the accident had taken place on 23 April 1908, and the final sentence was pronounced by the Court of Appeals on 23 March 1911, almost three years later.[76] The situation was even worse in the case of

[75] Unfortunately, the sources do not contain information about the legal cost amounts in these lawsuits.

[76] *Ibid.*, pp. 817, 823.

*José Orlando v. Enrique Fynn*, where the Court of Appeals pronounced the final sentence five and a half years after the incident.[77] It goes without saying that this drawn-out process prevented a majority of occupational accident victims from ever considering initiating litigation. Even those who did and won would have to be prepared to subsist for years before seeing the slightest sign of compensation.

A final obstacle that workers faced when resorting to the courts in matters of occupational accidents was the highly confusing jurisdictional situation. Argentina, due to the country's federal system of government, had two parallel court systems: one federal and one provincial, which meant that every province operated with two different jurisdictions. The capital and the national territories were their own jurisdiction, but just like the provinces, they operated with the division between federal and common courts. In general, cases of occupational accidents belonged in the common civil courts, since the legal norms that applied were the dispositions of the Civil Code. This seemingly straightforward situation was significantly changed when, for example, the employer was either an agency of the state, a railroad company, or if the accident had occurred on board a ship.

As established by the Constitution's Article 100, cases where the state was party, the litigating parties belonged to different provinces, and which related to maritime jurisdiction, were all of federal jurisdiction. In fact, a large part of the occupational accident cases were tried under the federal jurisdiction. First, as a result of the rapid expansion of infrastructure and construction of public buildings at the turn of the century, as well as a result of the expansion of state institutions, the state was an important employer with a significant part of the country's workforce on its payrolls. Second, the railroads had a high incidence of accidents, many of which were serious and even fatal. Court cases involving railroad companies were generally considered to belong to the federal jurisdiction because of the inherently federal nature of this form of transportation. In addition, they were often state-owned, making the state party to the litigation. In other cases, the federal jurisdiction applied because the litigating parties belonged to different provinces.

Although the general rule was that occupational accidents involving railroad companies were of federal jurisdiction, the above-mentioned *Alleva v. La Compañía Francesa de Los Ferrocarriles de la Provincia* constitutes an exception. It was presented to the Provincial Court of the first instance in the city of Santa Fe and continued to the Court of Appeals. The issue of jurisdiction was contested in the very sentence. When the case arrived in the Court of Appeals, the railroad company claimed it should be dismissed and reinitiated in the federal court because it had been presented in the wrong jurisdiction.

[77] *BDNT*, no. 16 (31 March 1911), pp. 56–60.

A dismissal would obviously have been to the benefit of the company, as the plaintiff most likely did not have the funds to start the judicial process all over again. The Provincial Court of Appeals – contrary to what was procedure in other cases involving railroad companies – determined that the provincial jurisdiction was appropriate since the lawsuit concerned damages and damages were a matter of general civil law. The judges therefore dismissed the company's objection and continued to uphold the ruling from the first instance, granting the plaintiff compensation.[78]

The contested jurisdiction in cases of occupational accidents involving railroad companies is further illustrated in *Angel Lorenzo v. F.C. Sud*.[79] Called to rule on the appropriate jurisdiction for the case, the Capital's Federal Court of Appeals resolved on 3 February 1916 that it belonged to the federal jurisdiction in which it had been initiated. The decision was not unanimous, however. Judge José N. Matienzo dissented from the interpretation of the majority and sustained that, since the case concerned damages according to the principles of the Civil Code, and it did *not* invoke an article of the Constitution, a national law, or a treaty, the case was not under federal jurisdiction.[80] The issue was also debated in *Gerardo Bugallo v. F.C.S.*,[81] wherein the same Court of Appeals Judge Tomás Arias joined Judge Matienzo in his interpretation that the case was not of federal jurisdiction. However, with the three other appeals court judges voting to the contrary, the federal jurisdiction was confirmed. Nevertheless, the court's division illustrates the contested nature of the issue.[82] These kinds of procedural vacillations and confusions constituted a serious obstacle for workers in their encounter with the courts. Without unequivocal precedent with regards to jurisdiction there was always a risk that a lawsuit could be dismissed if the judge decided it had been initiated in the wrong jurisdiction. The result of a dismissal was in practice the same as losing the case, since the worker was not in a position to afford two lawsuits.

An additional complication concerning jurisdiction presented itself if the accident victim was covered by an insurance policy, bought by the employer. In the case of an occupational accident, the insurance policy would cover the damage according to a fixed scale; i.e., the kind of injury suffered by the worker would determine the amount he was entitled to as compensation.

[78] *BDNT*, no. 17 (30 June 1911), pp. 281–92.
[79] Garmendia, *Jurisprudencia del trabajo*, pp. 65–9.
[80] For a discussion of the ideas of José Nicolás Matienzo, as he expressed them in the *Revista Argentina de Ciencias Políticas*, see Eduardo Zimmermann, 'José Nicolás Matienzo en la *Revista Argentina de Ciencias Políticas*: Los límites del reformismo liberal de comienzos de siglo', in Darío Roldán (ed.), *Crear la democracia: La Revista Argentina de Ciencias Políticas y el debate en torno de la República Verdadera* (Buenos Aires, 2006), pp. 269–97.
[81] Garmendia, *Jurisprudencia del trabajo*, pp. 84–6.
[82] *Ibid*. See also pp. 107–8.

The arrangement had several advantages for both workers and employers. An obvious benefit for the employer was to be freed from a possible lawsuit, as well as the potential outcome of having to face a significant expense if sentenced to compensate his employee. For the worker, the benefits were even more important. For one, he would automatically have the right to compensation in the case of an accident, completely regardless of any notion of fault. Thus, he was spared a lengthy, costly and complicated lawsuit with a highly uncertain outcome.

In 1907, the recently created National Labour Department sent a letter to the Argentine Industrial Union requesting information about private accident insurance in the city of Buenos Aires. According to the Argentine Industrial Union, there were 942 valid accident insurance policies, covering 51,869 workers in the capital in that year,[83] leading the representatives of the Labour Department to state:

> The customs of industry in our country have preceded legislation on occupational accidents. The number of employers who spontaneously recognize their obligation to compensate workers incapacitated in these accidents is increasing constantly and significantly. At the present time, there are various insurance companies in the city of Buenos Aires that insure against this type of risks in the form of collective insurance. The insurance is paid by the employer to the benefit of his workers, and, in addition, protects him against the civil responsibility that these accidents produce.[84]

Nationwide, in 1910, the numbers reached 3,045 policies, covering a total of 102,964 workers.[85] In 1912, the numbers were 5,900 and 162,775, respectively.[86] Between 1907 and 1912, then, there was a steady increase in the number of private accident insurance policies, although the nation-wide numbers fluctuated and in 1914 returned to 1910 levels.[87] In 1912, there were apparently 17,686 cases of occupational accident compensation paid by insurance companies in the whole of the Republic. In 1913, the number was 15,502, and in 1914, 11,838.[88] These numbers make it evident that judges were not the only ones who attempted to offer solutions to the legal vacuum that existed in cases of occupational accidents; employers – and insurance companies – did too. However, it is likely that the two solutions related to each other. One may speculate that judges actively intended to give employers a powerful incentive to take out accident insurance for their employees when they handed out steep sums in accident compensation.

[83] *BDNT*, no. 2 (30 September 1907), p. 160.
[84] *Ibid.*, p. 161.
[85] *BDNT*, no. 17 (30 June 1911), p. 296.
[86] *BDNT*, no. 33 (30 January 1916), pp. 236–7.
[87] *Ibid.*
[88] *BDNT*, no. 33 (30 January 1916), p. 240 bis (2). It is not clear why the trend declined, or if the numbers reflect inaccuracies in the statistics of the National Labour Department.

Although the point of accident insurance was to ensure the worker automatic compensation, insurance companies on various occasions refused to pay the premium stipulated in the policy contract, leaving the victim with no other option but to claim the right to compensation in the courts. When a worker was covered by an insurance policy, however, the procedure was different from regular lawsuits for damages. Since the Commercial Code regulated activities of insurance companies, claims had to be initiated in the commercial courts, rather than in the civil courts, despite the fact that cases over damages were regulated by dispositions of the Civil Code. An illustrative example of some of the confusions and difficulties this created for the workers is the case *Catalina Ciarnelo de D'Onofrio v. Faustino Di Vaco*,[89] sentenced by Judge Juan B. Estrada in the capital's commercial court of the first instance on 24 December 1914. The plaintiff was the mother of Domingo D'Onofrio, who had died from an occupational accident on 4 March 1913 while working for Faustino Di Vaco. Di Vaco had insured all of his employees against occupational accidents with the insurance company *The River Plate*. When the victim's mother did not receive the compensation of 4,800 pesos stipulated by the insurance policy, she contacted the insurance company to make her claim. The insurance company, however, referred her to Di Vaco, who again referred her back to the insurance company as the party responsible for providing the compensation.

Frustrated in her attempts to obtain what was rightfully hers, she filed a lawsuit in the commercial court against the employer Di Vaco. Her claim, however, was rejected on the grounds that the employer Di Vaco could not be made responsible for the accident, since the insurance policy replaced his financial responsibility with that of the insurance company. The ruling was upheld in the court of appeals on 22 June 1915. In addition, the ruling established that in cases where workers were covered by accident insurance, and the provider failed to pay, then judicial action should be taken against the *insurance company* rather than the employer. This was confirmed in the following cases: *Luoni y Delbosco v. La Industrial*, *Gelsomina Belardi v. La Industrial*, *Ana B. de Tranquilli v. La Rural*, *Margarita R. de Pérez y sus hijos menores v. Carols De Cillis y la Compañía La Nueva Zelandia*.[90] The courts thereby effectively stopped the insurance companies' attempts to dodge their financial obligations to the workers. Nevertheless, the confusion reigning over whom it was appropriate to sue for damages in these cases, as well as the separate commercial jurisdiction for cases involving insurance companies, constituted additional obstacles in the workers' encounter with the judicial system.

Last, but not least, one of the most serious obstacles for workers was the vacillation in jurisprudence and the wide and often eclectic range of laws,

[89] Garmendia, *Jurisprudencia del trabajo*, pp. 38–44.

[90] *Ibid.*, p. 44.

articles and dispositions that were invoked by the judges in their rulings. While in some cases judges attempted to establish the principle of the inverted burden of proof and the doctrine of contractual fault and occupational risk, these attempts did not constitute juridical precedent. There was no guarantee that one judge's interpretation would be followed by another's in a different ruling. As this discussion has shown, the only principle to have been established as something close to a precedent was the expanded notion of fault. All the other ways that judges tried to stretch and adapt the existing legal framework to accommodate the new social reality were highly contested and not unanimously accepted or applied.

The lack of a coherent judicial precedent created considerable insecurity for potential plaintiffs – for whom going to court was a costly and risky enterprise in itself – and surely led many to desist from legal action. Alejandro Unsain, one of the foremost experts on labour law at the time and a prominent personality in the National Labour Department, later summed up the situation succinctly in his book on the 1915 Occupational Accident Law:

> Before the passage of Law 9688, the situation for the worker plaintiff in [cases of] occupational accidents could not have been more wretched with respect to the procedure. Following to the letter the general terms of a regular civil suit (*juicio ordinario*), the lawsuits lasted interminably, benefiting the employer, but exhausting the patience of the worker. It was also the worker's obligation, in the position of plaintiff, to provide all the proof. This latter circumstance constituted a powerful obstacle. The result of the situation was predictable. Tired of all the inconveniences put in his way, the worker ended up rescinding his right, or accepting whatever he was offered. Regular civil law resulted contrary to the interests of the victim, both because of the content of its legal provisions, as well as due to its procedure. One could even claim that, in many cases, the true obstacle was to be found in the procedural code, rather than in the civil code.[91]

## *Conclusion*

By 1915, the courtrooms had been a reflection of Argentina's new social and economic conditions for over a decade. Workers employed in the country's incipient industry or the frenetic construction activities so characteristic of the turn-of-the-century's nation-building project lived a precarious existence of frequent exposure to accidents. The only way accident victims had any hope of confronting the terrible financial perspectives facing them was by trying to obtain compensation from their employers through the judicial system. Even if courtrooms were a reflection of the new reality, however, the current legislation was not. Confronted with this legal vacuum, judges were

[91] Alejandro Unsain, *Accidentes del trabajo: Exposición y comentarios a la Ley N° 9688 y a sus decretos reglamentarios* (Buenos Aires, 1917), pp. 237–8.

forced to rely on a legal framework, which had never been designed to accommodate occupational accidents nor any other of the peculiar characteristics of the rapidly changing relationship between labour and capital.

As I have attempted to show, after 1905, Argentine judges attempted to make room for this new social reality within the old legal structures as they stretched and bent the general dispositions of the Civil Code and, in some cases, the Commercial Code and the National Railroad Law when ruling in cases of occupational accidents. Sometimes, their interpretations were truly radical and innovative, such as Ernesto Quesada's claim that the principle of occupational risk was embodied in the Civil Code by analogous interpretation. Juan Alvarez's interpretation of the National Railroad Law's Article 65 was equally novel in presuming the railroad companies' automatic responsibility for all kinds of accidents, regardless of whether the victims were passengers or employees. Generally, however, few judges were willing to go as far as Quesada and Alvarez in abandoning entirely the notion of fault when determining workers' right to compensation. In sum, the main characteristic of the judicial decisions pronounced between 1905 and 1915 was the tendency to make room for workers' demands by interpreting the notion of fault more extensively than what had been the case in the period of the classical or restrictive interpretation.

Nevertheless, even the more modest applications of an expanded notion of fault demonstrated the judges' attempts to channel social conflict through institutional structures and respond to the increasingly conflictive nature of labour-capital relations. As such, judges carved out for themselves a niche as professionals and proposed their own solution to the social question. Whether judges went far or not in their interpretation and application of the existing legal framework to cases of occupational accidents, their decisions were all filling a gap in the existing legislation. Since there was no law regulating occupational accidents at this time, the judges who ruled in these cases effectively came to make labour law. That we should have a situation of court-made labour law might seem surprising in a country like Argentina, which in the aftermath of independence had adopted a French civil law system where one of the fundamental tenets was the limitation of judges' powers.

Despite judges' often creative stretching and bending of the existing legal dispositions, however, there were severe limitations to how far they could go in their creativity of interpretation if they were to avoid undermining their own professional authority. Miguel Angel Garmendia gave an apt description of the situation before the passage of the Occupational Accident Law in 1915:

> Having failed in all their efforts, the judges could not apply the doctrine of occupational risk in the complete and categorical way established by the special Occupational Accident Law. The jurisprudence could not go that far. That would

have meant, in truth, a usurpation of functions corresponding to the Legislative Power …. The judges could not create special rules for occupational accidents, and they limited themselves to favouring, where possible, within the norms of the existing written law, the situation of the accident victims or their families ….[92]

More generally, the interpretations of Argentine judges in these occupational accident cases have implications for how we understand state-labour relations and the development of social policy in Argentina at the beginning of the twentieth century. First of all, it becomes evident that Argentine workers were not averse to claiming rights from the state. Secondly, the state – in the shape of the judiciary – showed responsiveness to workers' demands by accommodating their grievances on a case-to-case basis, where possible. However, these judicial decisions should not make us exaggerate Argentine judges' social progressivism. Rather, their 'judicial activism' had socially conservative ends: That of containing social conflict by channelling it through institutional structures.

In the end, the existing juridical situation with respect to occupational accidents was highly unsatisfactory to all the parties involved. For the workers, the courts could never constitute a satisfactory alternative to a special occupational accident law. This was not only because the changes in the jurisprudence were modest, but also because of all the other obstacles workers faced in their encounter with a slow and complex court system. The endless duration of the lawsuits and the confusing jurisdictional situation were factors that made resorting to the courts an unattractive, if not impossible, alternative for most victims of occupational accidents. For the employer, even if the odds were in his favour in the case of a lawsuit, the jurisprudence had made clear that it was possible for him to lose and be sentenced to paying a significant sum in compensation to the accident victim. Thus, the judicial situation forcefully illustrated the need to pass a specific law that would terminate the insecurities involved for both workers and employers in cases of occupational accidents. Indeed, one might say that the courts in fact exposed and publicised the workers' lack of legal rights and made evident that only the legislature could effectively do something about the situation. The jurisprudence that had taken shape in the period between 1900 and 1915 therefore contributed directly to the making of social policy when Law 9688 was finally passed in 1915 which adopted, precisely, the principle of occupational risk.

[92] Garmendia, *Jurisprudencia del trabajo*, 31.