Notre Dame Law Review

Volume 58 | Issue 4 Article 7

4-1-1983

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Workers' Compensation: Expanding the Intentional Tort Exception to Include Willful, Wanton, and Reckless Employer Misconduct

For more than seventy years, workers' compensation has provided the exclusive remedy for job-related injuries arising from employer negligence.[1] The courts, however, have recognized an exception for an employer's intentional torts.[2] Intentional torts do not conform with the philosophy underlying workers' compensation and are therefore remedied through common law recovery. Courts and legislatures have almost uniformly limited an employee to exclusive recovery under workers' compensation for any employer misconduct lacking a specific intent to injure.[3] Consequently, the present system permits employers to impose obviously dangerous working conditions on employees—at workers' compensation's relatively reduced level of recovery—because the employee frequently cannot prove an employer's specific intent to cause harm. This result offends the dual policy of the workers' compensation system—to encourage a safe workplace while providing adequate compensation for certain injuries. Furthermore, workers' compensation was never intended to cover such employer misconduct.[4] But for more than seventy years,

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1 States began to enact workers' compensation statutes in the early 1900's. These statutes were subject to constitutional attack as an unconstitutional taking of property without due process, and many lived a short life. As a result, many states proposed "elective" statutes, granting the employer the option to be bound by the compensation or subject to common law tort liability without the three common law defenses of contributory negligence, assumption-of-the-risk, and the fellow servant rule. In 1917, New York amended its constitution to permit a compulsory compensation law. That same year, the Supreme Court of the United States held this compulsory-type law, the election-type law, and an "exclusive-state-fund"-type law constitutional. Presently, all fifty states have statutorily provided a version of workers' compensation. *See* 1 & 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 5.20, 5.30, 65.11 & n.2, 67.00 (1982).

2 *See generally* 2A A. LARSON, *supra* note 1, § 68.00-68.13. *See also* notes 37-49 *infra* and accompanying text.

3 *See, e.g.*, Shearer v. Homestake Mining Co., 557 F. Supp. 549 (D.S.D. 1983); Houston v. Bechtel Assocs., 522 F. Supp. 1094, 1096-98 (D.D.C. 1981); Griffin v. George's, Inc., 267 Ark. 91, 96, 589 S.W.2d 24, 27 (1979); Williams v. International Paper Co., 129 Cal. App. 3d 810, 816-19, 181 Cal. Rptr. 342, 345-47, *hearing denied* (1982); Great Western Sugar Co. v. District Ct., 610 P.2d 717, 720 (Mont. 1980). *See also* 2A A. LARSON, *supra* note 1, § 68.13.

4 Workers' compensation is meant to cover workplace accidents. *See* notes 12, 15, 16, 40, 41, 80, 87-91 *infra* and accompanying text. Where the employer willfully and deliberately fails to provide a safe workplace, the injured employee should be allowed to sue at common

courts and legislatures have mistakenly placed willful employer misconduct within the system's exclusive coverage.

This note examines the fallacies underlying the present rationale for including willful employer misconduct within the statutory scheme. Part I sets forth the basic workers' compensation scheme and its underlying social philosophy. It also presents the problem of erroneous judicial and legislative treatment of willful employer misconduct. Part II examines both negligence and intentional torts and the attendant problems regarding their statutory coverage and noncoverage. Part III presents the judicial treatment of willful, wanton, and reckless employer misconduct. Part IV evaluates the purported justification for exclusive statutory inclusion of willful employer misconduct. And Part V suggests an approach for according willful employer misconduct a common law remedy.

I. Present Judicial and Legislative Treatment of Workers' Compensation

A. *The Workers' Compensation Scheme*

Workers' compensation laws compromise the employee's right to a common law tort suit for job-related injuries in return for relatively quick, certain, and standardized compensation.[5] The injured employee need not prove any employer negligence; nor will the employee's own negligence bar compensation. The employer gives up his common law defenses of contributory negligence, assumption-of-the-risk, and the fellow servant rule, for the exclusive, limited, insurance-like remedy provided by the particular workers' compensation scheme.[6]

The system's indifference to fault allows for a virtually guaranteed employee recovery but necessarily precludes an amount comparable to any common law recovery.[7] It does not nor was it ever intended to supplant the common law tort system.[8] The workers'

law. Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 333 (1912).

5 Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 229 (1952) [hereinafter cited as *Nature and Origins*].

6 W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 80, at 531 (4th ed. 1971).

7 The basis of workers' compensation is its certain and standardized recovery. Because the employer cannot assert his three common law defenses, it would be unfair to entitle the injured employee to compensation equal to a common law recovery. The system is not purely tort-based but retains aspects of socialism. *Nature and Origins*, *supra* note 5, at 216. This hybrid quality bars recovery equal to that at common law.

8 *See generally Nature and Origins*, *supra* note 5. *See also* note 91 *infra*.

compensation system compensates an injured employee for his employer's negligence,[9] but does so according to the system's original design of merely providing benefits sufficient to avoid economic and social degradation.[10] This "duty" to provide is not a penalty imposed to deter wrongful employer misconduct; penalties are appropriate only where fault is in issue.[11] Yet, the system ultimately deters employer misconduct since it works to the employer's advantage to reduce workplace accidents and their attendant compensatory liability.[12]

The inquiry in a workers' compensation claim is focused not upon a person's fault in relation to an event; rather, it is upon the relationship of the event to the employment.[13] The injury must be shown to "arise out of" and occur "in the course of" the employment.[14] Additionally, statutes and judicial interpretation commonly provide that coverage extends to all workplace "accidents."[15] Thus, the scheme is meant to provide compensation for those "accidents" that are thought to be naturally associated with the business operation.[16] The workers' compensation theory provides that the employer should compensate the injured employee and then "cost-out" the injuries in the sale of the product.[17] Ultimately, then, the consumer provides for the compensation coverage.[18]

Despite the focus of workers' compensation on the accidental nature of the injury, broad interpretation of the statutes erroneously

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9 The workers' compensation system was meant to cover only *negligently* caused industrial accidents. *See* Mandolidis v. Elkins Indus., 246 S.E.2d 907, 913 (W. Va. 1978).

10 *See* Bohlen, *supra* note 4, at 329-32. Workers' compensation was designed to prevent injured employees from becoming dependent upon public and private forms of charity. *Id.* at 331-32. The employees were recognized as being unable to bear the costs of suffering and the accompanying social degradation. *Id.* at 331.

11 Bohlen, *supra* note 4, at 332-33.

12 *Id.* at 333.

13 *Nature and Origins*, *supra* note 5, at 208-09.

14 The term "arising out of" concerns primarily a showing of causal connection. *See* 1 A. LARSON, *supra* note 1, § 6.10. The term "in the course of" concerns a showing that the injury occurred within the time and place boundaries of the employment. *See* 1 A. LARSON, *supra* note 1, § 14.00.

15 All but the following nine states require that the injury be the result of an accident: California, Iowa, Maine, Massachusetts, Minnesota, Pennsylvania, Rhode Island, South Dakota, and Texas. 1B A. LARSON, *supra* note 1, § 37.10 n.1.

16 Because the "accidents" result from the employer's operation of his business, he is held socially responsible for compensation. The theory holds that the cost of compensation by accident should be borne by the industry creating it. The cost may then be passed on to the consumer. Bohlen, *supra* note 4, at 16.

17 *Id.*

18 *Id.*

includes serious employer misconduct within their exclusive coverage. Such a reading cloaks the employer with an unjustified immunity from common law liability. Courts readily agree that ordinary negligence is covered exclusively by workers' compensation,[19] and intentional torts are outside the exclusive coverage.[20] The problem, however, involves treatment of those levels of misconduct that lie above ordinary negligence yet fail to rise to an intentional tort. In determining whether conduct is accompanied by the required level of intent to permit common law relief in addition to the workers' compensation remedy, courts grope for fine distinctions in a continuum of mental states.

The most problematic area in judicial and statutory treatment of workers' compensation involves the so-called "willful, wanton, and reckless" misconduct of the employer. Such misconduct appears in two distinguishable and reccurring lines of cases. The first group involves disease-related injury; the other involves injury from an employer's violation of safety statutes or regulations.

1. Disease-related Cases

Recently, courts have faced a dramatic increase in the number of cases involving employees contracting work-related diseases.[21] The most notable increase in litigation lies in the asbestos-manufacturing industry.[22] In these cases, the employer is alleged to have willfully exposed unsuspecting employees to a work environment likely to cause an asbestos-related disease.[23] Courts usually deny the employee's recovery for failing to prove the employer's specific intent to injure.[24] Proof that an employer willfully, wantonly, and recklessly

19 *See* Houston v. Bechtel Assocs., 522 F. Supp. 1094, 1096 (D.D.C. 1981).

20 *See* 2A A. LARSON, *supra* note 1, § 68.13 n.10.1.

21 *See* Smith & Channon, *The Rising Storm*, 17 FORUM 139 (1981).

22 As many as 25,000 asbestos-related tort suits have been filed since 1980. Podgers, *Toxic Time Bombs*, 67 A.B.A.J. 139 (1981). Estimates indicate that between 8 and 11 million workers have been exposed to asbestos since the early 1940's. Smith & Channon, *supra* note 21, at 140. If these estimates are correct, at least two million will die of asbestos-induced lung cancer, one million of asbestos-induced gastrointestinal cancer, and one million of non-malignant asbestosis. *Id.* at 142. Moreover, these figures do not include disabling yet non-fatal asbestos-related injuries. *Id.* at 142 n.16.

23 *See, e.g.*, Austin v. Johns-Manville Sales, 508 F. Supp. 313 (D. Me. 1981).

24 *Id. See also* Sernia v. Statewide Contractors, Inc., 6 Ariz. App. 12, 429 P.2d 504, *reh'g denied, review denied* (1967)(numerous inspector warnings to employer regarding unsafe ditch shoring held insufficient to show employer's intent to injure in a cave in killing two employees); Williams v. International Paper Co., 129 Cal. App. 3d 810, 181 Cal. Rptr. 342, *hearing denied* (1982) (failure to provide a safe workplace does not rise to the level of an intentional tort); McAdams v. Black & Decker Mfg. Co., 395 So. 2d 411, *reh'g denied* (La. App. 1981), *cert.*

exposed the employee to the risk fails to meet the requirement that the employer intended the result.[25] Although the employer misconduct is intended, the resulting employee injury is not intended.[26] Thus, courts refuse to hold that the conduct falls within the intentional tort exception. The employee typically is disabled for life (often terminally) with only the limited statutory workers' compensation remedy available as compensation.[27] And the employer remains largely undeterred from exposing employees to known risks of hazardous workplaces.

2. Employer's Violation of Safety Statutes and Regulations

The second group of cases involves an employer's intentional violation of a statute or regulation designed to ensure workplace safety. In one common situation, the employer intentionally removes a safety guard from a piece of machinery because it slows production. The employee is next instructed or permitted to operate the machinery without the guard. Frequently, the employee is then injured and often permanently disabled. The employee who brings suit alleging both intentional and willful employer misconduct is denied recovery on the basis that, though the employer may have intentionally re-

denied, 400 So.2d 1380 (1981) (removal of or failure to provide a safety device insufficient to prove that the employer believed the result substantially certain to follow); Great Western Sugar Co. v. District Ct., 610 P.2d 717 (Mont. 1980)(numerous allegations in complaint failed to constitute claim for intentional employer tort); Foster v. Allsop Automatic, Inc., 86 Wash. 2d 579, 547 P.2d 856 (1976)(employee failed to show his employer's specific intent to injure); Winterroth v. Meats, Inc., 516 P.2d 522, 525 (Wash. App. 1973)(an employer "guilty of serious and willful misconduct by knowingly refusing to comply with a statute or rule intended to protect a workman [may not] necessarily hav[e] a deliberate intention to produce such injury").

25 *See* note 100 *infra* and accompanying text.

26 *See, e.g.*, Austin v. Johns-Manville Sales, 508 F. Supp. 313 (D. Me. 1981); Oman v. Johns-Mansville Corp., 482 F. Supp. 1060 (E.D. Va. 1980); Petruska v. Johns-Manville Corp., 83 F.R.D. 39 (E.D. Pa. 1979).

27 See, e.g., Waldrop v. Vistron Corp., 391 So. 2d 1274, *cert. denied*, 394 So. 2d 281 (1980), where the employee contracted colon cancer from his continuous exposure to acrylonitrile, a known carcinogen. *Id.* at 1275. The employee alleged that he did not know the substance's danger and that the employer exposed him to the carcinogen "intentionally, knowingly and with willful, wanton and reckless disregard" for his safety. *Id.* The court refused to broaden the "intentional tort exception," holding such properly belongs to the legislature, and denied recovery. *Id.* at 1277. The court noted that the life of the employee's wife "has been converted from a normal one to one filled with doctors, hospitals, operations, medication and recuperation. She must watch her husband, consumed by the ravages of cancer, as he awaits death." *Id.* at 1278. Regarding the wife's claims for mental anguish, the court stated, "[B]ecause of the long line of jurisprudence and because our Supreme Court has had many opportunities to change the law but has failed to do so, we reluctantly must reject [her] . . . claims as not being recoverable under current Louisiana law." *Id.* at 1278.

moved the device, he did not, thereby, intend to injure the employee.[28] Although the employer recognizes the probability of injury, the courts treat the conduct as a form of gross negligence, and therefore relegate the employee to a workers' compensation recovery.[29] The employer faces little deterrence from removing the devices especially as long as the marginal increase in production out-distances the cost of the workers' compensation recovery.[30]

II. Traditional Treatment of Misconduct Under Workers' Compensation

Traditionally, whenever the employee is injured because of the employer's negligence, the employee's exclusive remedy is through workers' compensation. Under these statutes, the employee's burden of proving the employer's liability is light. He must show only that the injury arose from and occurred in the course of employment.[31] Also, these statutes bar the employer from presenting defenses to the employee's claim.[32] The employee's burden is thus relatively simple and the recovery certain.

Treating negligence under statutory coverage is consistent with and naturally follows from the underlying policy of workers' compensation. As in negligence analysis, where the actor's state of mind is not at issue,[33] workers' compensation schemes provide recovery

28 *See, e.g.*, Fryman v. Electric Steam Radiator Corp., 277 S.W.2d 25 (Ky. 1955); McAdams v. Black & Decker Mfg. Co., 395 So. 2d 411, *reh'g denied* (La. App. 1981), *cert. denied*, 400 So. 2d 1380 (1981); Duk Hwan Chung v. Fred Meyer, Inc., 276 Or. 809, 556 P.2d 683 (1976); Winterroth v. Meats, Inc., 10 Wash. App. 7, 516 P.2d 522 (1973).

29 *See, e.g.*, Griffin v. George's, Inc., 267 Ark. 91, 589 S.W.2d 24 (1979); Johns-Manville Sales v. Workers' Compensation, 96 Cal. App. 3d 923, 158 Cal. Rptr. 463, *reh'g denied, hearing denied* (1979).

30 It would be nice to think that employers are impelled by humane motives to consider the health and safety of their employees as the paramount concern. But the unfortunate truth is that business reacts best to hopes of profit maximization. Where some employers can avoid more costly protections for their employees without incurring additional liability, they usually will do so. Employers generally will act only if given the monetary incentive to do so. *See* Bohlen, *supra* note 4, at 334-35.

31 *See* note 14 *supra*.

32 The employer, for his part in the workers' compensation bargain, relinquishes his right to assert the three common law defenses of contributory negligence, assumption-of-the-risk, and the fellow servant rule. *See* note 6 *supra* and accompanying text.

33 The standard of care in negligence is imposed by law for the protection of others against unreasonable risks of harm, thus existing even where the actor has supposedly "exercised his best judgment" after carefully considering the consequences. W. PROSSER, *supra* note 6, § 31, at 145. The negligent actor need not desire or know to a substantial certainty the consequences that result. *Id. See also* Mandolidis v. Elkins Indus., 246 S.E.2d 907, 913-14, 925 (W. Va. 1978). In *Mandolidis*, the court noted that " '[n]egligence' conveys the idea of advertence as distinguished from premeditation or formed intention." *Id.* at 914. In Johns-

where the employer does not intend to injure the employee.[34] The schemes provide recovery simply because the employer should provide for the *inherent* risks of the workplace.[35] Negligence can be considered an inseparable aspect of the job, but intentional torts cannot. Negligence is also difficult to prevent since it is not always contemplated conduct.[36] Allowing common law recovery for negligence would do little to deter future negligence. Accordingly, the statutes properly provide the exclusive remedy for employer negligence.

A. *The Intentional Tort Exception*

Nearly all states have held the exclusive remedy provisions of workers' compensation acts to bar common law tort recovery by an employee for any employer misconduct not rising to the level of an intentional tort.[37] However, where the employer has acted with the requisite intent, the employee is no longer limited to the statutory recovery and thus may bring suit outside the statute for compensatory and punitive damages.[38] Three theories have been advanced to

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Manville Sales v. Workers' Compensation, 96 Cal. App. 3d 923, 932, 158 Cal. Rptr. 463, 467 (1979), the court noted that

> [s]erious and wilful misconduct is basically the antithesis of negligence, and . . . the two types of behavior are mutually exclusive; an act which is merely negligent and consequently devoid of either an intention to do harm or of knowledge or appreciation of the fact that danger is likely to result therefrom cannot at the same time constitute wilful misconduct.

Id. at 932, 158 Cal. Rptr. at 467 (quoting Mercer-Fraser Co. v. Industrial Accident Comm'n, 40 Cal. 2d 102, 120, 251 P.2d 955, 964 (1953)).

34 *See Nature and Origins*, *supra* note 5, at 208. Recall that workers' compensation does not examine fault. *See* notes 5-7 *supra*. Consider two possible scenarios. Under the first, the employer is negligent and the employee fault-free. Under the second, the employer is innocent and the employee is negligent. The injured employee recovers in both circumstances as the system is blind to fault. *See also* Mandolidis v. Elkins Indus., 246 S.E.2d 907, 910-11 (W. Va. 1978)(describing the "no-fault" aspects of workers' compensation).

35 *See* 1 A. LARSON, *supra* note 1, § 7.10. Such injuries associated with employment include fingers getting caught in gears, machinery breaking, tractors tipping, and excavations caving in. *Id.* This assumes, of course, that the employer does not knowingly permit such injuries.

36 *See* note 33 *supra* and accompanying text.

37 For a listing of those states recognizing the intentional tort exception, see 2A A. LARSON, *supra* note 1, § 68.13, and the cases cited in note 10.1.

38 *See, e.g.*, Wade v. Johnson Controls, Inc., 693 F.2d 19 (2d Cir. 1982); Boek v. Wong Hing, 180 Minn. 470, 231 N.W. 233 (1930); Blankenship v. Cincinnati Milicron Chems., Inc., 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982) (allowing employees' suit against employer for intentional exposure of employees to dangerous chemicals and intentional failure to report this dangerous condition to various state and federal agencies). A classic case is Sumski v. Sauquoit Silk Co., 66 Lackawanna Jurist 118 (1965). There, an employee became severely ill from inhaling a dry cleaning solution of carbon tetrachloride. The employer, knowing that a substitute solution would not clean as well, placed the original solution in unmarked bottles

support this result, but only one offers a logical justification.[39]

The only logical theory justifying the intentional tort exception states that the employer's intentional tort bars the employer from claiming his act was "accidental" and under statutory coverage.[40] Thus, the legal justification for the common law suit is its non-accidental character.[41] Under this "non-accidental" theory, once the conduct strays from an accidental character, usually associated with pure accidents and negligent acts, and involves more serious moral blameworthiness, as found in intentional torts, the employer's reliance on workers' compensation ceases.[42] This theory thus comports with basic equity principles—an employer should not be protected when committing intentional torts.

Courts seem unwilling to narrow the workers' compensation statutory coverage.[43] The courts will find an intentional tort only where the employer knew to a *substantial certainty* that harm would in fact occur.[44] Thus, courts have refused common law recovery outside

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and returned them to the employee to use, causing further injury. The court found that the employer "deliberately acted" to injure his employee.

39 *See* 2A A. LARSON, *supra* note 1, § 68.11. Although three theories exist, two are less frequently advanced. One theory states that through an intentional act, the employer has severed the employment relationship. *Id.* The fallacy of the theory appears when the employee never actually terminates his employment, but rather continues working after the tort. *Id.* Another theory, the most fictitious, states that the assault does not "arise out of" the employment. *Id.*

40 *See* 2A A. LARSON, *supra* note 1, § 68.11.

41 *See, e.g.*, Neal v. Carey Canadian Mines, 548 F. Supp. 357, 379 (E.D. Pa. 1982).

42 *See* Mandolidis v. Elkins Indus., 246 S.E.2d 907, 911 (W. Va. 1978). The court examined the legislative history of an earlier workers' compensation act. The history clearly revealed that the act was intended to cover "injuries happening through *inadvertent* failure, without real moral turpitude." *Id.* (emphasis added) (quoting Milwaukee v. Miller, 144 N.W. 188, 191 (Wis. 1913)); Sydenstricker v. Unipunch Products, Inc., 288 S.E.2d 511, 517 (W. Va. 1982)(workers' compensation traditionally held to cover employee injuries or death from industrial *accidents*).

43 *See* Houston v. Bechtel Assocs., 522 F. Supp. 1094, 1097 (D.D.C. 1981)(court unwilling to upset balance struck by the legislature regarding exclusivity provisions); Rosales v. Verson Allsteel Press Co., 41 Ill. App. 3d 787, 793, 354 N.E.2d 553, 558 (1976)("[N]either moral aversion to the employer's act nor the shining prospect of a larger damage verdict justifies interference with what is essentially a policy choice of the legislature."); Kittel v. Vermont Weatherboard, Inc., 138 Vt. 439, 441, 417 A.2d 926, 927 (1980)(court unwilling to upset legislature's choice favoring quick, certain workers' compensation over contingent, full common law recovery); 2A A. LARSON, *supra* note 1, § 68.13. *See also* notes 123-24 *infra* and accompanying text.

44 *See* Shearer v. Homestake Mining Co., 557 F. Supp. 549 (D.S.D. 1983). In *Shearer*, defendant's employees were crushed to death when a mine ceiling slab gave way. *Id.* at 551. Although the plaintiffs alleged that by sending the employees to the shaft the employer intended to injure the employees, the court held that the evidence failed to support such a finding. *Id.* at 559. Additionally, the court reaffirmed that a high risk or probability of harm does not equal substantial certainty. *Id.*; Neal v. Carey Canadian Mines, 548 F. Supp. 357,

of workers' compensation for allegations of knowingly permitting an unsafe work environment,[45] knowingly ordering the employee to perform extremely dangerous jobs,[46] willfully failing to provide a safe workplace,[47] and willfully and unlawfully violating a safety statute.[48] Although the workers' compensation statutes were intended to cover employers' negligent conduct, the courts have interpreted such statutes to include all employer misconduct rising above negligence but still falling short of intentional harm.[49] This expansive reading of workers' compensation abuses its design and should not be continued.

B. *Intentional Torts: Vicarious Liability Problems and the Defense of Consent*

An employer's negligence gives rise to a workers' compensation claim even without a showing of employer liability.[50] But, an employee who asserts a claim outside the workers' compensation statute must attach blame to the employer.[51] Where the employer personally assaults an employee, the employee has little difficulty establish-

380 (E.D. Pa. 1982). In *Neal*, the court noted that the employer's liability was subject only to claims for "accidents." *Id.* at 378-79. His liability could not be held to include such accidents caused by his "gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute or other misconduct . . . short of intentional injury." *Id.* at 379. *See also* Keating v. Shell Chem. Co., 610 F.2d 328, 332 (5th Cir. 1980); Austin v. Johns-Manville Sales, 508 F. Supp. 313, 316 (D. Me. 1981); Martinkowski v. Carborundum, 108 Misc. 2d 184, 185-86 (1981)(mere knowledge or even appreciation of the risk does not constitute intent; the act must be committed with the desire to bring about the consequences that actually result); W. PROSSER, *supra* note 6, § 8, at 31; 2A A. LARSON, *supra* note 1, § 68.13; cases cited at note 3 *supra*.

45 *See* 2A A. LARSON, *supra* note 1, § 68.13 & n.14. *See also* Houston v. Bechtel Assocs., 522 F. Supp. 1094 (D.D.C. 1981); Sernia v. Statewide Contractors, Inc., 6 Ariz. App. 3d 12, 429 P.2d 504, *reh'g denied, review denied* (1967); Williams v. International Paper Co., 129 Cal. App. 3d 810, 181 Cal. Rptr. 342, *hearing denied* (1982); Great Western Sugar Co. v. District Ct., 610 P.2d 717 (Mont. 1980).

46 *See* 2A A. LARSON, *supra* note 1, § 68.13 & n.15. *See also* Griffin v. George's, Inc., 267 Ark. 91, 93, 589 S.W.2d 24, 25 (1979). *But see* Mandolidis v. Elkins Indus., 246 S.E.2d 907 (1978).

47 *See* 2A A. LARSON, *supra* note 1, § 68.13 & n.16. *See also* Great Western Sugar Co. v. District Ct., 610 P.2d 717 (Mont. 1980).

48 *See* 2A A. LARSON, *supra* note 1, § 68.13 & n.17. *See also* Shearer v. Homestake Mining Co., 557 F. Supp. 549 (D.S.D. 1983); Winterroth v. Meats, Inc., 10 Wash. App. 7, 516 P.2d 522 (1973).

49 *See* note 3 *supra*.

50 *See* note 34 *supra*.

51 Where the employer's negligence is concerned, the employee need not attribute blame to the employer. The employee need only meet the tests of "arising out of" and "in the course of" employment as well as the "accident" criterion, if required by the particular statute. But in intentional torts, the injured party must always connect liability to the party who commit-

ing the employer's liability.[52] Likewise, liability may be proven where the tortfeasor is an *alter ego* of the employer.[53] However, where the tortfeasor is a co-employee who merely sits one rung higher on the corporate ladder than the injured employee, the employee's ability to prove the employer's liability becomes more difficult and the rationale somewhat more tenuous.[54]

Little problem exists for holding the employer liable for torts he directs or authorizes against his employees. There, the employer acts with such personal moral culpability that he must be held responsible. Courts fail, however, to explicitly distinguish those cases from incidences where the intentional tort is committed not by the employer personally,[55] but by a foreman or supervisor. This failure causes a major problem in determining the employer's liability. Although the foreman may be personally at fault, it does not necessarily follow that this moral culpability can be shifted to the employer simply by asserting the doctrine of *respondeat superior*.[56] The employer cannot be said to have intentionally committed such torts absent any knowledge of their likelihood of occurrence.[57] The employee's remedy, at best, would be a claim of negligent employer supervision or negligent hiring.[58] But such a claim, based on negligence, is limited to the exclusive remedy under workers' compensation.

An additional concern in determining employer liability for a "supervisory employee's" intentional tort is the injured employee's

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ted the tort. Where a co-employee commits the tort, attributing blame to the employer becomes an issue.

52 Where the employer is also the assailant, he is obviously the responsible party. *See Nature and Origins*, *supra* note 5, at 207 n.3.

53 *See, e.g.*, Heskett v. Fisher Laundry & Cleaners Co., Inc., 217 Ark. 350, 230 S.W.2d 28 (1950)(employer liability found where employee alleged an assault by the officer/general manager of the corporation having the corporation's same name); Daniels v. Swofford, 286 S.E.2d 582 (N.C. App. 1982)(corporation will not be imputed with employee's intentional tort where employee was mere supervisor and not *alter ego*). *See also* 2A A. LARSON, *supra* note 1, § 68.22.

54 *See, e.g.*, Jablonski v. Moltack, 63 Ill. App. 3d 908, 380 N.E.2d 924 (1978)(mere superior not *alter ego* to justify removal of employer immunity from suit); Daniels v. Swofford, 286 S.E.2d 582 (N.C. App. 1982).

55 2A A. LARSON, *supra* note 1, § 68.21, at 13-28. *But see* Shearer v. Homestake Mining Co., 557 F. Supp. 549 (D.S.D. 1983).

56 2A A. LARSON, *supra* note 1, § 68.21, at 13-28.

57 *See, e.g.*, Bryan v. Utah Int'l, 533 P.2d 892 (Utah 1975)(suit against employer barred since knowledge by supervisors of intentional torts was insufficient to attribute liability to employer).

58 *See, e.g.*, LaBonte v. National Gypsum Co., 110 N.H. 314, 269 A.2d 634, *modified for denial of reh'g* (1970)(employee's injury from co-employee's assault established the employer's negligent supervision, held an accidental injury, and thus compensable under workers' compensation).

potential for recovering from an employer merely by showing that the supervisory employee is "one notch higher on the totem-pole" than he.[59] Allowing this type of recovery would present practical problems. Consider a large industrial setting with a typical labyrinthian hierarchy. Under the theory outlined above, a foreman at the bottom of the hierarchy could subject the employer to common law liability without any employer awareness. As one commentator argues, liability would no longer turn upon the work-relatedness of the injury but would be subordinated to a determination whether the tortfeasor outranks the injured employee.[60]

Another problem concerning any intentional tort is the possibility of a consent defense. Valid consent precludes the existence of a tort.[61] An employer, for example, could argue that because his employees complained that safety guards hampered their work, he removed the safety guards from a piece of machinery, despite a safety statute or regulation prohibiting their removal. The employer could argue that the employee consented to subsequent operation of the machine and the attendant likelihood of injury.

Such an argument immediately gives rise to two traditional considerations that vitiate consent. First, as a matter public policy, employers and employees are not capable of negotiating around legally imposed requirements.[62] The safety statutes exist for the employee's benefit. To allow him to contract around the statute would not only limit the effectiveness of the legislation but completely frustrate its purpose. Second, the employer and employee cannot reasonably be considered to have equal bargaining power.[63] The employer usually has far superior bargaining strength. Where such unequal bargaining power exists, it is highly doubtful that any consent was freely given.

III. Judicial Treatment of Willful, Wanton, and Reckless Employer Misconduct

While courts have readily supported an intentional tort exception to the exclusivity provisions of workers' compensation, they have

59 2A A. LARSON, *supra* note 1, § 68.21, at 13-34.

60 *Id.*

61 W. PROSSER, *supra* note 6, § 18, at 101.

62 *Id.* § 18, at 101. Two justifications support this conclusion. First, the state has an interest in protecting its citizenry. Second, the employer will be deterred from such future misconduct. *Id.* at 107. Additionally, such statutes are meant to protect a limited class of persons from their own lack of judgment. *Id.*

63 *See* W. PROSSER, *supra* note 6, § 68, at 453-54.

been stubborn in recognizing a similar exception for willful, wanton, and reckless employer misconduct. Courts have described willful, wanton, and reckless conduct as occurring under three possible states of mind: (1) deliberately for the purpose of injuring another; (2) intentionally with knowledge that serious injury will probably result; and (3) intentionally in disregard of the consequences.[64] The intent element applies only to the act; there is usually a conscious indifference to the results. Where the intent is not so evident but the conduct is far from a "proper state of mind," the intent may be implied.[65] Because courts usually do not permit a willful employer misconduct exception, and because an employee faces a difficult burden in proving an employer's intentional tort, the employee is often limited to workers' compensation even in cases of serious employer misconduct.[66]

Judicial interpretation of the statutes exempts willful employer misconduct from common law suits.[67] Some statutes provide a penalty award to the employee where the conduct rises above that of simple negligence.[68] The awards usually increase the compensation

64 Johns-Manville Sales v. Workers' Compensation, 96 Cal. App. 3d 923, 933, 158 Cal. Rptr. 463, 468, *reh'g denied, hearing denied* (1979). *See also* Thompson v. Bohlken, 312 N.W.2d 501, 505 (Iowa 1981)(setting forth three elements for "wanton neglect": 1) knowledge of the peril; 2) knowledge that the injury is *probable*; and 3) *conscious* failure to avoid the peril)(emphasis added). "Serious and willful misconduct has been described as being 'much more than mere negligence, or even gross or culpable negligence,' and as involving 'conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences." *In re* Burns, 218 Mass. 8, 10, 105 N.E. 601, 602 (1914). *See also* W. PROSSER, *supra* note 6, § 34, at 184-86.

65 W. PROSSER, *supra* note 6, § 34, at 184.

66 *See* notes 44-49 *supra* and accompanying text.

67 *See* note 3 *supra*. *But see* Mandolidis v. Elkins Indus., 246 S.E.2d 907 (W. Va. 1978).

68 *See, e.g.*, CAL. LAB. CODE § 4553 (West 1971 & Supp. 1982)(increased penalty award for "serious and willful misconduct" of the employer). Other states allow an increased award for violation of a statute or regulation. *See, e.g.*, ARK. STAT. ANN. § 81-1310(d) (1976 & Supp. 1981)(15% increase in compensation where the employer violates a state safety statute or regulation); KY. REV. STAT. § 342.165 (1979)(15% increase in compensation where the employer fails to comply with a safety statute or regulation); MO. ANN. STAT. § 287.120(4) (Vernon 1965 & Supp. 1983) (15% increase in compensation where the employer fails to comply with state safety statute or commission order); N.M. STAT. ANN. § 52.-1-10 (1978) (10% increase in compensation where the employer fails to observe statutory safety regulations); N.C. GEN. STAT. § 97-12 (1979) (10% increase in compensation where the employer willfully fails to comply with statutory requirement or commission order); UTAH CODE ANN. § 35-1-12 (1953) (15% increase in compensation where the employer fails to provide safety devices or maintain a safe workplace); WIS. STAT. ANN. § 102.57 (West 1973)(15% increase in compensation for the employer's failure to comply with safety statute or lawful order of department, but not to exceed $7,500); OHIO CONST. art. II, § 35 (15-50% increase in compensation for the employer's failure to comply with specific requirements for protection of workers' safety).

by fifty percent but never more than one hundred percent. Where the initial recovery falls below an adequate common law remedy, an increased "penalty" award usually does not as seriously affect the employer nor as adequately recompense the injured employee.[69] Some states go so far as to require the injured employee to make an exclusive election between a workers' compensation remedy and a common law suit.[70] Given the employee's difficult burden of proof, an election to sue may result in no remedy at all.

A well-reasoned judicial approach to the willful misconduct question is presented in *Mandolidis v. Elkins Industries.*[71] There the court concluded that willful, wanton, and reckless conduct constituted "deliberate intent" within the meaning of the state's workers' compensation statute.[72] Thus, the court permitted the employee to sue under common law. In *Mandolidis*, the employer had placed into operation, without safety guards, a ten-inch table saw that federal inspectors had tagged as inoperable.[73] The employee objected to operating the saw in such a dangerous condition.[74] The employer nev-

69 The penalty statutes may still render a recovery less than that at common law. As such, the deterrent effect on the employer is not as great as could be under a common law recovery. Moreover, penalty statutes attempt to find fault under a workers' compensation system that pretends to be blind to fault. Penalty awards, therefore, are inconsistent with the system's underlying no-fault premise.

70 Among the states mandating an election are Arizona, Colorado, Delaware, Idaho, Maine, Maryland, Oklahoma, and Rhode Island. 2A A. LARSON, *supra* note 1, § 73.10 n.40.

71 246 S.E.2d 907 (W. Va. 1978). *See* Annot., 96 A.L.R.3d 1064 (1979).

72 246 S.E.2d 907 (W. Va. 1978). Section 23-4-2 of the West Virginia Code provides in part: "If injury or death result to any employee from the *deliberate intention* of his employer to produce such injury or death, the employee, the widow, widower, child or dependent of the employee shall have the privilege to take under this chapter, and shall also have cause of action against the employer, as if this chapter had not been enacted, for any excess of damages over the amount received or receivable under this chapter." W. VA. ACTS, ch. 10, § 28 (1913) (emphasis added).

Mandolidis involved three consolidated cases. In Snodgrass v. United States Steel, four employees were injured and one killed when a platform on which they were working fell 25 feet into an excavation. 246 S.E.2d at 916. The employees and decedent employee's plaintiff alleged *inter alia* numerous willful and intentional violations of safety regulations. *Id.* The court reversed the lower court's summary judgment for the employer. *Id.* at 919. Dishmon v. Eastern Associated Coal Corp., involved allegations of intentional, willful, and wanton employer misconduct for allowing the decedent employee to work in an unsafe workplace. *Id.* at 919-20. The employee was crushed to death when the slate ceiling of his mine shaft fell on him. *Id.* at 919. The court reversed the lower court's dismissal, stating that the complaint stated a claim for relief under the West Virginia Workers' Compensation Act. *Id.* at 921.

But see Shearer v. Homestake Mining Co., 557 F. Supp. 549, 554 (D.S.D. 1983) (expressly rejecting *Mandolidis* and stating that, "Wilful, wanton or reckless misconduct is not an intentional tort").

73 246 S.E.2d at 915.

74 *Id.*

ertheless issued an ultimatum: use the saw or go home.[75] The employee resumed operating the saw but when his hand came in contact with the saw blade it severed two fingers and part of his hand.[76] The employee alleged, and the court agreed, that the employer had shown willful, wanton, malicious, and deliberate disregard for the employee's safety, with a "deliberate intent to injure or kill."[77]

In allowing suit for willful, wanton, and reckless employer misconduct, the *Mandolidis* court examined the legislative intent of the state's workers' compensation statute.[78] The court noted that years ago, an employee's scant likelihood of recovery under the common law tort system was inimical to the public interest.[79] Consequently, the legislature passed the workers' compensation act, intending to cover all *negligently*-caused industrial accidents.[80] Later judicial interpretations of the statute revealed a notable distinction between gross negligence and "deliberate intent" as worded in the statute:[81] only where the employee proved deliberate intent, which included willful misconduct, was he permitted common law recovery.[82] The *Mandolidis* court cited past decisions as evidence that the legislature did not intend to protect an employer where he willfully subjects an employee to situations involving a high probability of serious harm or death.[83]

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75 *Id.* at 915, 916.

76 *Id.* at 914.

77 *Id.* at 918. The employee's pre-trial depositions revealed that former employees had been similarly injured while operating the employer's saws without safety guards. *Id.* at 915-16. One employee had been sent home for refusing to operate such a saw. *Id.* at 916. Former employees noted that the foreman removed the guards because they slowed production. *Id.* When the former union president informed the plant manager that Mandolidis had been injured, he replied, "So what?" "He's getting compensation." *Id.* at 916.

78 *See* note 72 *supra*.

79 246 S.E.2d at 910-11.

80 *Id.* at 911 n.4. The legislature envisioned "a system dealing with employees, employers, and the public as necessarily mutual participants in bearing the burdens of such *accidents*, displacing the one dealing only with the class of injuries happening through *inadvertent failure, without real moral turpitude, to exercise average human care.*" *Id.* at 911 (quoting Milwaukee v. Miller, 144 N.W. 188, 191 (1913)(emphasis in original)).

81 246 S.E.2d at 912. *See* Maynard v. Island Creek Coal Co., 115 W. Va. 249, 175 S.E. 70 (1934)(acts of gross negligence do not rise to the level of deliberate intent).

82 246 S.E.2d at 912. The court noted "that the carelessness, indifference, and negligence of an employer may be so wanton as to warrant a judicial determination that his ulterior intent was to inflict injury." *Id.* (quoting Maynard v. Island Creek Coal Co., 115 W. Va. 249, 253, 175 S.E. 70, 72 (1934)).

83 246 S.E.2d at 912. Although two later opinions precluded recovery absent a showing of a "specific deliberate intent" to cause injury, they were rejected as non-controlling since they lacked any discussion of the legislative purpose of the workers' compensation act. *See*

Mandolidis rejected the idea of equating willful misconduct with negligence.[84] The court concluded that although the words willful, wanton, and reckless may be interchangeable, they represent a standard different in *kind* rather than simply in degree from negligence.[85] Willfulness and negligence are mutually exclusive terms implying "radically different mental states."[86] The court adopted the "non-accidental" theory of the intentional tort exception.[87] Applying that theory, the court concluded that where injury or death is caused by an employer's willful, wanton, or reckless misconduct, it can no longer be considered "accidental in any meaningful sense of the word."[88]

IV. A Critical Analysis of Present Statutory Inclusion of Willful Employer Misconduct

An accident happens by chance, without foresight or expectation.[89] Workplace accidents are either unavoidable or occur through the negligence of the employer or employee.[90] Intentional torts have been exempted from workers' compensation coverage since these torts demonstrate a state of mind *inconsistent* with that found in accidents.[91] Deciding whether or not the injury was an accident therefore necessitates looking at the actor's state of mind.

In negligence analysis, the standard is imposed as a matter of law[92] without regard to the actor's specific state of mind.[93] Willfulness, however, requires a subjective realization of a risk of bodily injury.[94] A major difference between negligence and willful torts regards their subjective realization of the risk. In negligence, this realization is either absent or minimal. The difference in realization of

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Brewer v. Appalachian Constructors, Inc., 135 W. Va. 739, 65 S.E.2d 87 (1951); Allen v. Raleigh-Wyoming Mining Co., 117 W. Va. 631, 186 S.E. 612 (1936).

84 246 S.E.2d at 913-14.

85 *Id. See also* note 95 *infra* and accompanying text.

86 246 S.E.2d at 913-14.

87 *Id.* at 914.

88 *Id. See* notes 40-42 *supra* and 89-91 *infra* and accompanying text.

89 BLACK'S LAW DICTIONARY 15 (rev. 5th ed. 1979).

90 Because accidents are unforeseeable or unexpected, it would distort the meaning of the term to attribute it to conduct accompanied by an intent to create the injury. Clearly, an assault could never be considered an accident from the employer's point of view.

91 *See* Mandolidis v. Elkins Indus., 246 S.E.2d 907 (W. Va. 1978). The court stated that "[t]he workmen's compensation system completely supplanted the common law tort system only with respect to *negligently* caused industrial accidents." *Id.* at 913 (emphasis in original).

92 W. PROSSER, *supra* note 6, § 31, at 145.

93 *See* note 33 *supra*.

94 *See* note 64 *supra* and accompanying text.

risk, therefore, is generally one of degree, but is so great as to constitute a difference in *kind*.[95] Also, the level of culpability differs substantially between the two.

Actually, willful torts border so closely on intentional torts that they differ in only one respect: willful torts require a *strong probability* that harm may result; intentional torts require a *substantial certainty* that harm may result.[96] Both require an act intended by the actor.[97] The willful actor makes a conscious choice of his course of action, though the resultant harm is not intended.[98] It is sufficient that he knows of the strong probability of harm, even if he hopes no harm will result.[99]

But because a willful tort does not require an intended result, it cannot be said to equal an intentional tort.[100] Yet, willful conduct departs so far from the meaning of "accident" that it should not be included in workers' compensation's exclusivity provisions. In willful misconduct cases, speaking of *accidents* at the workplace is inappropriate, for in no way can the injurious results be considered unexpected or unforeseen. Rather, the employer acts intentionally with at least a *conscious* disregard of the probable results. Unfortunately, the present statutory coverage of willful conduct permits employers who create outrageously dangerous work environments to enjoy the relative protection of the limited workers' compensation recovery. The injured employee is forced to accept an often inadequate workers' compensation award as his sole remedy. And because the relatively small workers' compensation recovery provides little deterrence to the em-

95 RESTATEMENT (SECOND) OF TORTS § 500 comment g (1965). As Justice Holmes once noted, "Even a dog distinguishes between being stumbled over and being kicked." O. HOLMES, THE COMMON LAW 3 (1881). Proof of the subjective realization of risk must generally be by circumstantial evidence. The employer's knowledge of applicable safety laws and past deaths or injuries is relevant evidence. *See* Mandolidis v. Elkins Indus., 246 S.E.2d 907, 914 n.10 (W. Va. 1978).

96 RESTATEMENT(SECOND) OF TORTS § 500 comment f (1965).

97 *Id.*

98 *Id.* comment g. The distinction between intentional and willful torts is that the intentional actor affirmatively wishes to injure another while the willful actor is merely willing to do so. Siesseger v. Puth, 213 Iowa 164, 172, 239 N.W. 46, 50 (1931).

99 RESTATEMENT (SECOND) OF TORTS § 500 comment f. The Restatement characterizes willfulness as involving "an easily perceptible danger of death or substantial physical harm." *Id.* comment a.

100 *See* note 98 *supra*. *See also* Shearer v. Homestake Mining Co., 557 F. Supp. 549, 559 (D.S.D. 1983); Williams v. International Paper Co., 129 Cal. App. 3d 794, 181 Cal. Rptr. 342, *hearing denied* (1982). The court stated that willful torts "are labeled 'intentional' only because the law implies intent in such conduct." *Id.* at 819, 181 Cal. Rptr. at 347. However, the court concluded that such torts could be considered accidents and a hazard of the workplace since the resulting injuries were not actually intended. *Id.*

ployer who creates unsafe work environments, the statute designed to encourage safe work environments fails its purpose.

The initial workers' compensation plans were adopted during a surge in industrial growth in the United States.[101] Production was paramount and worker safety poor.[102] Employer negligence suits were difficult to prove. At its inception, workers' compensation favored the employee in his exchange of reduced but certain damages for the employer's surrender of his three common law defenses.[103] But today, the employee gives away more than he receives in the exchange. When considering an employer's willful misconduct in light of both the reduced worth of the common law defenses[104] and the increased plaintiffs' recoveries,[105] the workers' compensation recovery is inadequate. The exchange between an employee's reduced level of compensation and an otherwise possible common law recovery for willful misconduct no longer appears just.

In agreeing to accept reduced awards under workers' compensation statutes, the employee sacrificed his right to sue for negligence in exchange for his employer's sacrifice of the following defenses: contributory negligence, assumption-of-the-risk, and the fellow servant rule.[106] It does not follow, however, that the employee meant to include in this exchange his right to sue for willful misconduct.[107]

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101 The first workers' compensation acts were enacted in the early 1910's. 1 J. BOYD, THE LAW OF COMPENSATION FOR INJURIES TO WORKMEN § 5 (1913). A major factor influencing enactment of workers' compensation acts was the unprecedented acceleration of industrial growth. H. SOMERS & A. SOMERS, WORKMEN'S COMPENSATION 9 (1954). Other factors include immigration, corporate organization of industry, twelve-hour workdays, and child labor. *Id.* at 7-9.

102 Industrial accident rates peaked in 1907-1908. H. SOMERS & A. SOMERS, *supra* note 101, at 9. *See also Nature and Origins*, *supra* note 5, at 228.

103 The injured employee no longer faced the likelihood of denial in his common law suit against his employer. His recovery, albeit reduced, was certain.

104 *See* notes 108-14 *infra* and accompanying text. *See also* Herrera, Jr. & Scarzafava, *Workplace Safety—The Prophylactic and Compensatory Rights of the Employee*, 13 ST. MARY'S L.J. 911, 948-49 (1982).

105 *See* E. CHEIT & M. GORDON, OCCUPATIONAL DISABILITY AND PUBLIC POLICY 17 (1963). In addition to increased verdicts, the probability of recovery is on the rise. *Id.*

106 *See* note 6 *supra* and accompanying text.

107 For example, in Ives v. South Buffalo Ry., 201 N.Y. 271, 94 N.E. 431 (1911), the court overthrew a workers' compensation statute regarding dangerous activities. The statute covered employment injuries arising out of the employment *or* by the negligence of either the employer or employee. The statute exempted the workman's own "serious and wilful misconduct" from coverage. *Id.* at 275, 94 N.E. at 433. Recall that such misconduct is a bar to employer's serious and willful misconduct. *See* note 109 *infra* and accompanying text. Because the statute does not cover an employee's serious and willful misconduct, by implication, the statute exempts an employer's serious and willful misconduct. Even the British Compensation Act, which served as a basis for American legislation, allowed an exception (although

Several reasons support excluding willful misconduct from the employer-employee exchange. First, contributory negligence is not a bar to an action for willful misconduct;[108] thus, if in willful misconduct cases the employee traded away his right to sue for his employer's contributory negligence defense, the employee received nothing in the exchange. The bar to a claim of willful misconduct is one's own willful misconduct.[109] Second, although assumption-of-the-risk technically bars a claim of willful misconduct,[110] its application today is questionable. In difficult economic times, an employee depends upon his job security. When faced with the alternative of working in an unsafe environment or quitting his job, the employee will in all likelihood feel compelled to "choose" working. Regarding this as a truly voluntary choice distorts the meaning of the word "voluntary." Additionally, in some cases, like the disease-aggravation cases,[111] the employee is unaware of any possible risk of harm. He could not possibly assume such a risk, since he fails to meet the doctrine's knowledge requirement.[112] Third, the fellow servant rule has virtually disappeared with the advent of workers' compensation.[113] Its resurgence, although theoretically possible, is unlikely.[114] These three common law defenses have little or no application to willful torts. Consequently, by refusing to allow suits for willful employer misconduct, courts hold not that the employee has traded away his right to sue, but that he has in fact been robbed of it.

Allowing a common law recovery for willful employer misconduct removes these torts from coverage by the workers' compensation system's exclusivity provisions.[115] As with the intentional tort exception, however, the employee must establish the employer's liability[116]

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at an exclusive election by the employee) for injuries resulting from an employer's "wilful act." Workmen's Compensation Act, 1897, 60 & 61 Vict., ch. 37, § 1.

108 RESTATEMENT (SECOND) OF TORTS § 503(1) (1965). *See also* W. PROSSER, *supra* note 6, § 65, at 426.

109 RESTATEMENT (SECOND) OF TORTS § 503(3) (1965). *See also* W. PROSSER, *supra* note 6, § 65, at 426.

110 RESTATEMENT (SECOND) OF TORTS § 503(4) (1965). *See also* W. PROSSER, *supra* note 6, § 68, at 456.

111 *See, e.g.*, Neal v. Carey Canadian Mines, 548 F. Supp. 357 (E.D. Pa. 1982); Johns-Manville Products Corp. v. Contra Costa Super. Ct., 165 Cal. Rptr. 858, 612 P.2d 948 (1980).

112 For a discussion of the doctrine's knowledge of the risk requirement, see W. PROSSER, *supra* note 6, at § 68.

113 W. PROSSER, *supra* note 6, § 80, at 533-534.

114 *Id.*

115 *See* note 38 *supra* and accompanying text.

116 *See* notes 51-60 *supra* and accompanying text.

and meet the consent defense.[117] To establish employer liability absent direct employer action, the employee should allege and prove an element of employer direction or intention to commit the tort.[118] Despite the problems with applying the doctrine of *respondeat superior*,[119] courts generally have no difficulty using it to find employer liability in intentional tort cases. However, a rational justification for applying the doctrine should be set forth. For the doctrine to be properly applied, the employee should have to show sufficient employer awareness of the conduct to justify shifting the personal and moral culpability to the employer.[120] Allowing these willful tort suits also raises the related issue of employee consent. This issue may be disposed of on public policy grounds and the employer's superior bargaining power.[121]

V. A Suggested Approach

Since the inception of workers' compensation plans in the United States, courts have erroneously and irrationally considered willful employer misconduct bound by statutory coverage. To remedy this problem, an employee alleging willful employer misconduct should be permitted to both institute his claim for workers' compensation and bring suit against the employer if he desires. Any recovery of compensatory damages should be offset by the amount of the workers' compensation award, preventing double recovery.[122]

Ideally, recovery for willful employer misconduct should be implemented through the legislature. Statutory exceptions could be enacted in much the same method as statutory exceptions for

117 *See* notes 61-63 *supra* and accompanying text.

118 This point was recently emphasized in Shearer v. Homestake Mining Co., 557 F. Supp. 549 (D.S.D. 1983). In denying the plaintiff's recovery for an alleged intentional tort by the defendant Homestake, the court noted that, "Perhaps a greater defect of paragraph (f) [of the complaint] is that there is no allegation that Homestake intended, commanded, directed or authorized [the supervisor] Wiedenmeyer to commit an injurious act." *Id.* at 559 n.6. *See* Gallegos v. Christian, 95 N.M. 551, 624 P.2d 60 (1981)(employer's liability outside of workers' compensation grounded upon *employer's* actual intent to injure).

119 *See* notes 54-60 *supra* and accompanying text.

120 2A A. LARSON, *supra* note 1, § 68.21, at 13-32 to 13-34.

121 *See* notes 62-63 *supra* and accompanying text.

122 *See, e.g.*, ARIZ. REV. STAT. § 23-1022 (1971 & Supp. 1982)(statute creating express exception to workers' compensation coverage for employer's willful misconduct, granting injured employee election between cliaming compensation and an action at law for damages). This statute sets forth a good model for future legislation. However, it should be amended to permit a non-exclusive election by the injured employee, thereby avoiding an employee's loss of remedy. *See* note 70 *supra* and accompanying text. *See also* 2A A. LARSON, *supra* note 1, § 69.10.

intentional misconduct.[123] In states where willful employer misconduct commands an increased penalty recovery under the workers' compensation plan, the legislative change is imperative. But in states where no such express limitation exists, the courts are as justified in interpreting the willful misconduct exception as they were in the creation of the intentional tort exception. The history of the workers' compensation system demonstrates that the courts have contributed substantially to its developments and supports their further contribution.[124]

In allowing these suits, courts may be accused of undermining the workers' compensation system.[125] Critics could argue that a system intended to cover all work-related injuries cannot possibly allow such suits; to do so would upset the balance in favor of the employee.[126] But the system was designed to cover work-related *accidents*.[127] From the employee's viewpoint, willful injuries may still be considered accidents because the employees do not expect them.[128] Thus, the employee should still be able to elect coverage under the statutory system. But to permit the employer to willfully injure his employees, and face a reduced level of "damages," ignores the legislation's original intent. Willful conduct does not involve an accident from the employer's perspective.[129] Moreover, suits for willful misconduct support the safe work environment policy of workers' compensation.[130]

As with any change in precedent, opponents fear a flood of friv-

123 The rationale for the willful misconduct exception is the same as for the intentional tort exception—neither conduct belongs within the design of workers' compensation. Both conflict with reasonable interpretations of the word "accident" and can be interpreted as outside workers' compensation immunity to common law liability.

124 E. CHEIT & M. GORDON, OCCUPATIONAL DISABILITY AND PUBLIC POLICY 13 (1963). Professor Arthur Larson notes that the courts express their dissatisfaction with archaic legislation. He states, "In fact, sometimes the court, in its accumulated frustration and impatience with an outrageously obsolete statutory provision, will undertake a piece of statutory demolition which makes us applaud as humanitarians but wince as lawyers." *Id.*

125 *See, e.g.*, Williams v. International Paper Co., 129 Cal. App. 3d 810, 814-15, 181 Cal. Rptr. 342, 346, *hearing denied* (1982).

126 *See, e.g.*, *id.* at 814, 181 Cal. Rptr. at 346.

127 *See* notes 41 and 89-91 *supra* and accompanying text.

128 The willfully tortious employer acts with an intent to commit the act and a probable knowledge or disregard of the consequences. *See* note 64 *supra* and accompanying text. With this state of mind, the employer cannot claim the injury was accidental. *See* notes 89-91 *supra* and accompanying text.

129 Whether the injury is an accident is purely a subjective test by the employee. Bohlen, *supra* note 4, at 340. From the employee's viewpoint, the intention or expectation of anyone else is immaterial. *Id.* at 341.

130 Bohlen, *supra* note 4, at 333.

olous litigation designed to increase settlements.[131] Defending and settling these suits may become expensive, forcing employers to divert resources from growth-oriented departments to meet court costs.[132] Emphasizing these fears, however, overlooks the fundamental problem of permitting employers to consciously create dangerous work environments. Workers' compensation philosophy cannot permit employers' willful injury to employees.

An employer who willfully injures an employee should be liable for common law damages. An employer should not be permitted to defend his conduct by arguing that the increased costs of lawsuits must eventually be "costed-out" in production and passed on to the consumer, placing the employer at a competitive disadvantage. The employer who chooses to engage in such tortious activity must suffer the consequences. And if in costing-out the injuries the employer overprices his product, he must bear the loss. Public policy disfavors societal support of a producer who willfully injures his employees and passes the cost on as an ingredient of the product.

VI. Conclusion

Courts and legislatures currently analyze willful, wanton, and reckless employer misconduct erroneously. Workers' compensation statutes were drafted to cover workplace *accidents*; willful misconduct cannot be considered accidental. Yet the courts and legislatures continue to cloak the willfully tortious employer with workers' compensation's limited liability. The employee injured by possibly egregious conduct is relegated to his limited recovery and denied any common law right to sue.

Limiting willful torts to the workers' compensation exclusive remedy provision obstructs the legislations' goal to improve workplace safety. Moreover, it permits employers to consciously create unsafe work conditions without the threat of common law retaliation. Additionally, the *quid pro quo* exchange upon which workers' compensation is premised was never meant to include willful employer misconduct. Because this system is no longer equitable, courts and legislatures should permit employees a common law recovery for injuries caused by the willfully tortious employer.

Thomas D. Schroeder

131 *See* Mandolidis v. Elkins Indus., 246 S.E.2d 907, 922 (W. Va. 1978)(Neely, J., dissenting).

132 *See id.* at 923. (Neely, J., dissenting).