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In Wake of Mandolidis: A Case Study of Recent Trials Brought under the Mandolidis Theory--Courts Are Grappling with Procedural Uncertainties and Juries are Awarding Exorbitant Damages for Plaintiffs

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IN WAKE OF MANDOLIDIS: A CASE STUDY OF RECENT TRIALS BROUGHT UNDER THE MANDOLIDIS THEORY— COURTS ARE GRAPPLING WITH PROCEDURAL UNCERTAINTIES AND JURIES ARE AWARDING EXORBITANT DAMAGES FOR PLAINTIFFS

Four years ago, the West Virginia Supreme Court of Appeals decided Mandolidis v. Elkins Industries, Inc.,¹ drastically altering Workmen’s Compensation Law in West Virginia. The decision which consolidated three cases² concerned the primary issue of the liability of an employer, covered under the State Workmen’s Compensation Act, to his employee.³ The court held that under the Act an employer is subject to common law tort action for damages or for wrongful death when the employer commits an intentional tort or engages in willful, wanton and reckless misconduct.⁴

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² The three cases consolidated for the purpose of review were Mandolidis v. Elkins Industries, Inc., Snodgrass v. United States Steel Corp., Dishmon v. Eastern Assoc. Coal Corp. Id.
³ In Mandolidis, the plaintiff lost two fingers and part of his right hand on a table saw he was operating which did not have a safety guard. The plaintiff alleged that the employer refused to install a proper safety guard on the saw knowing that it was a violation of safety laws; that the employer knew the consequences of operating the saw without a guard because employees had been injured before, and that the employer ordered his employees to operate the saw without a guard or be fired. The employee alleged that these acts by the employer constituted willful and intentional misconduct. Id. at 914-15.
⁴ In Snodgrass, four employees were injured and one was killed when a metal cable dislodged a wooden platform on which the men were standing and caused them to fall nearly twenty-five feet into an excavation. The plaintiffs alleged that the employer failed to provide a safe place to work, that the employer failed to warn the plaintiffs of the danger, and the employer violated several state and federal safety laws. The plaintiffs here also alleged that such conduct was willful and intentional. Id. at 916-17.
⁵ In Dishmon, the suit was brought by the decedent of an employee who was killed in a mine slatefall. The widow alleged that the defendant deliberately, willfully and wantonly allowed employees to work in conditions that violated state and federal safety laws. Id. at 919-20.

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* I would like to thank all of the attorneys who provided information to me, without which I would not have been able to write this paper. Special thanks go to Michael Victorson, Associate, Love, Wise, Robinson & Woodroe, Charleston, West Virginia.

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893
The basis of Workmen's Compensation Law is to provide the workman with automatic benefits regardless of fault if his injuries are work-connected while protecting the employer from common law suits by the employee. Indeed, the system is mutually advantageous for the employer and the employee. In the United States, the employer alone contributes to the fund from which employee benefits are paid (the employee and the government contribute nothing) and in return the employee and his dependents give up their common law right to sue for damages for any injury covered by the act. The social philosophy of the law is that the fund compensates the employee for work-related injuries while the employer passes the cost to the most appropriate source of payment, the consumer of the product. Insofar as the employer is concerned, his costs of doing business are stabilized and decreased in the long run, because he is not subject to high common law tort damages.

However, under most Workmen's Compensation Acts, including the West Virginia Act, the employer's immunity from common law suit by his employee is not absolute. In West Virginia there are two exceptions to this immunity. First, an employer who in any way fails to provide compensation coverage is liable to the employee for all damages suffered by reason of personal injuries sustained in the course of employment. In addition, the employer in this situation cannot avail himself of the defenses of fellow servant, assumption of the risk or contributory negligence.

The second exception to employer immunity under the Act

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6 Larson, supra note 5, at § 1.10. In West Virginia, an employer contributing to the state workmen's compensation fund is immune from common law damages for the injury or death of an employee. W. Va. Code § 23-2-6 (1981 Replacement Vol.).

7 Larson, supra note 5, at § 2.20.

8 W. Va. Code § 23-2-8 (1981 Replacement Vol.) An employer may fail to provide compensation coverage by refusing to subscribe to the fund, defaulting in payments to the fund, or not complying with all the provisions relating to self insurers under W. Va. Code § 23-2-9 (1981 Replacement Vol.).

in West Virginia occurs when an employer intentionally injures his employee. In such a situation, should injury to or death of an employee result, Article 4, section 2 (hereinafter § 23-4-2) of the Act grants the employee or his survivors a cause of action against the employee for damages at common law in excess of the amount of workmen's compensation benefits. More specifically:

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 a 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.

In Mandolidis, the employees based their common law action against their employers on this exception.

The significance of the supreme court's decision lies specifically in its interpretation of the requisite behavior of the employer necessary to remove his immunity, under § 23-4-2. Justice McGraw, writing for the court, held that the employer loses his immunity from common law actions “where such employer's conduct constitutes an intentional tort or willful, wanton and reckless misconduct.” The court defined such conduct as action "undertaken with a knowledge and an appreciation of the high degree of risk of harm to another . . . [and a finding of] liability will require a strong probability that harm will result.” Moreover, the court noted that proof that an employer knowingly failed to obey safety laws would serve as evidence that the employer acted with a knowledge and appreciation of risk of harm created by that course of conduct. Since the court failed to distinguish an intentional failure to heed safety violations from a negligent failure,

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10 W. VA. CODE § 23-4-2 (1981 Replacement Vol.).
11 Id.
12 In its decision, the Supreme Court of Appeals determined that the plaintiffs' claim in each of the three consolidated cases presented genuine issues of material fact concerning the deliberate intent of the employer under § 23-4-2. Therefore, the court held that the cases were not subject to summary dismissal, 246 S.E.2d at 916-21. The court thus reversed the lower courts in Mandolidis and Snodgrass which had granted motions for summary judgment and the lower court in Dishmon which had granted a judgment on the pleadings. Id. at 907.
13 246 S.E.2d at 914. (citation omitted).
14 Id.
15 Id. at 914 n. 10.
it further muddled the distinction between intentional and negligent conduct necessary to remove the immunity bar.\textsuperscript{16}

Before \textit{Mandolidis}, the requisite behavior on the part of the employer necessary to remove the immunity under § 23-4-2 was interpreted to require, at a minimum, specific intent. In \textit{Allen v. Raleigh-Wyoming Mining Co.},\textsuperscript{17} the court held that an employee seeking damages from his employer for work-related injury must show a specific intent on the part of the employer to injure him. In overruling \textit{Allen}, the supreme court in \textit{Mandolidis} ignored the strong basis upon which \textit{Allen} rested.\textsuperscript{18} Further, the jurisdictions from which the West Virginia Legislature adopted § 23-4-2, interpret that section as requiring proof of specific intent before the employer can lose his immunity.\textsuperscript{19} Moreover, the expert in the

\textsuperscript{16} \textit{Id.} at 912.
\textsuperscript{17} \textit{Allen}, 117 W. Va. 631, 636-37, 186 S.E. 612 (1936).
\textsuperscript{18} The specific intent requirement in \textit{Allen} was not inconsistent with the standard set forth two years earlier in \textit{Maynard v. Island Creek Coal Co.}, 115 W. Va. 249, 175 S.E. 70 (1934). In that case the court stated that "Gross negligence is not tantamount to 'deliberate intention' to inflict injury." \textit{Id.} at 253, 175 S.E. at 72. The specific intent requirement was reaffirmed in a 1976 case. \textit{Eisnaugle v. Booth}, 226 S.E.2d 259 (W. Va. 1976).
\textsuperscript{19} In Washington, the statute for an action against an employer for deliberate intention reads:

\begin{quote}
If injury or death results to a workman from the deliberate intention of his employer to produce such injury or death, the workman, the widow, the widower, child, or dependent of the workman shall have the privilege to take under this title and also have a cause of action against the employer as if this title had not been enacted, for any excess of damages over the amount received or receivable under this act.
\end{quote}

\textit{WASH. REV. CODE ANN.} § 51.24.020. For Washington cases that have interpreted deliberate intent to require specific intent on the part of the employer see \textit{Higley v. Weyerhaeuser Co.}, 13 Wash. App. 269, 534 P.2d 596 (1975); \textit{Biggs v. Donovan Corkery Logging Co.}, 185 Wash. 284, 54 P.2d 235 (1936); \textit{Perry v. Beverage}, 121 Wash. 652, 209 P. 1102 (1922). In \textit{Perry}, the Washington court held that where a foreman strikes an employee on the face with a water jug, the injury is within the statute.

In Oregon the statute for an action against an employer for deliberate intention reads:

\begin{quote}
If injury or death results to a worker from the deliberate intention of his employer to produce such injury or death, the worker, the widow, widower, child or dependent of the worker may take under ORS 656.001 to 656.794, and also have cause for action against the employer as if such statutes had not been passed, for damages over the amount payable under those statutes.
\end{quote}

\textit{OR. REV. STAT.} § 656.156(2). Oregon also requires specific intent in order to remove the employer's immunity from suit. See \textit{Caline v. Maede}, 239 Or. 239, 396 P.2d 694 (1964); \textit{Heikkila v. Ewen Transfer Co.}, 135 Or. 631, 297 P. 373 (1931); \textit{Jenkins
field, Larson, has stated that willful misconduct by the employer falls short of the actual intention needed to remove the employer's protection under the Act. Thus by lowering the standard necessary to remove the employer's immunity from a specific intent to willful, wanton and reckless conduct, the West Virginia Supreme Court of Appeals ignored legal treatises and several years of precedent not only in West Virginia but in those states from which the legislature adopted § 23-4-2.

Reaction to Mandolidis was widespread. The plaintiffs' bar initially felt Mandolidis type suits were untouchable. Their concern was that even with the changed standard, whatever damages awarded under § 23-4-2 would be subject to an offset by those funds "received or receivable" under the Workmen's Compensation Act. To overcome this offset would require a high verdict.

Defense counsel reacted more vituperatively. A 1978 article, published in this review, attacked the Mandolidis decision on several grounds. The authors concluded that the court's opinion went against the clear intent of the West Virginia legislature; failed to adequately articulate the willful, wanton and reckless standard; would not be clearly understood and correctly applied by juries; and would open a floodgate of litigation creating great employer liability.

In his dissent in Mandolidis, Justice Neely voiced some of these same concerns. He felt that the court was "legislating"
and that the issue of statutory immunity should be a matter of law which juries should not interpret. What concerned Justice Neely the most, however, was the implication of the decision on employer liability. He stated that the tone of the majority opinion inspires "the bar to do a substantial disservice to the economy of this state by instituting frivolous suits every time a workman is injured by anything other than his own negligence."

The handling of a Mandolidis type suit has been characterized by an attitude of uncertainty. Without any definite guidelines, attorneys have been asking themselves what steps should be taken to successfully proceed with such a case. One area of uncertainty centers on the offset of the workmen's compensation award against the common law damage award. "[T]he amount received or receivable" under the Workmen's Compensation Act has yet to be clearly defined. Without any clear definition of this the computation of the offset becomes problematic. Other unsettled areas concern the availability of common law defenses and whether the jury should be informed of the workmen's compensation awarded to the plaintiff. This article will examine how trial courts are now grappling with these procedural difficulties and whether and to what extent the fears about the impact of Mandolidis are justified.

I. INTRODUCTION TO CASES BROUGHT UNDER MANDOLIDIS

Since 1978, at least six cases brought under Mandolidis have reached the trial stage (several other have been settled). Three

[28] Id. at 923 (Neely, J., dissenting).
[29] Id. at 922. Neely went on to say that:
The tone of the majority opinion invites nuisance lawsuits, a high percentage of which will be settled (particularly by small employers) in preference to sustaining the cost of litigation. The risk, not necessarily the eventuality, of an enormous common law jury award in the event of a capricious judicial process, i.e., an unusually plaintiff oriented trial judge combined with faulty appellate review are such that some settlements not contemplated by the statutory scheme will inevitably be forthcoming. Id. at 923.

[30] None of the six cases studied here have reached the appellate level, nor have any of the cases been published in regional or Southeastern reporters. Therefore, the development of this paper will be different from most law review articles. For authority, the author depended primarily on pleadings, motions, briefs and memoranda that are a matter of public record. However, he also relied to a great extent on conversations with the attorneys involved in the cases. All of these are noted.

A seventh case has recently been decided, but because of the timing constraints on publication, it could not be incorporated into the text. Santee v. Eastern

A. *Smith v. A.C.F. Industries*

A.C.F. manufactures railroad cars. The plaintiff, Ellis Smith, an employee of A.C.F. Industries at its Huntington plant, was injured March 8, 1978.37 The plaintiff had gone to pick up an oil
can located between two assembly lines which were approximately two feet apart. One of the assembly lines called the "pushin" is a large steel superstructure which pushes in the sides of the railroad cars. The other assembly line called the "rotator" (or rollover) is a hydraulic structure which picks up the cars and rotates them on their sides allowing the pushin to carry out its function. When the plaintiff was between the two assembly lines, an arm of the rotator caught the plaintiff in the lower part of the body, lifted him, and wedged him between the "pushin" support beam and the frame of the "rotator", crushing his chest.  

The plaintiff alleged that the employer failed to provide a safe workplace without adequate safeguards and warning devices on the assembly lines. The plaintiff further alleged that the defendant knew of those inadequacies, but did nothing to remedy the situation until after the accident. More specifically, he alleged the warning lights and bells, designed to kick on when the "rotator" was operating were themselves not functioning despite warning given by the safety administer four days prior to the accident. Because of this, the plaintiff charged willful, wanton and reckless misconduct by the defendant and demanded $750,000.00 in compensatory damages.

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38 Smith, Civ. No. 80-3063 (S.D. W. Va. Feb. 1, 1980) (Plaintiff's Complaint & Plaintiff's Pre-Trial Memorandum); Telephone conversation with plaintiff's attorney and defendant's attorney, Smith. More specifically, the plaintiff sustained a non-union fracture of his clavicle. Id.


40 Id.

41 Plaintiff's Complaint, supra note 39.
There were several facts militating against the plaintiff's case. First, there were no safety violations by the defendant. Second, the defendant presented evidence that the warning devices had been repaired prior to the accident. Third, the defendant presented evidence that the plaintiff was contributorily negligent because he should not have been near the assembly lines.

After a two day trial, the jury returned a verdict for the plaintiff in the amount of $170,000.00. The parties stipulated that they would offset the workmen's compensation award which was finally determined to be $34,507.45, when it was final. This case has been appealed to the Fourth Circuit.


In this case, the plaintiff, Leslie Haverty, was an employee at the defendants' wheel rim plant, at Spencer, West Virginia. In March, 1978 he lost three fingers while operating a machine called the Pontiac Spinner. The Spinner is comprised of two main working parts, a nest with rollers around the edges and a piston that comes down from the top. The downward thrust of the piston does not occur unless the operator pushes both buttons simultaneously, and continues only as long as the buttons remained pressed. If the operator releases either button, the piston would immediately return to its upward position even if the piston was as close as one-fourth of an inch from the nest.

How the plaintiff's hand got caught in the rollers of the nest is not clear. The plaintiff contended that because of the lack of safety guards on the machine, he inadvertently pushed one of the buttons with his forearm and exposed his hand to the working area. The plaintiff disclosed that the Michigan Occupational Safety and Health Administration (MIOSHA) had cited similar Norris Industries plants in Michigan for not having guards on their Pon-

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42 Telephone conversation with plaintiff's attorney and defendant's attorney, Smith.
43 Telephone conversation with defendant's attorney, Smith.
44 Id.
46 See supra note 37.
48 Telephone conversation with plaintiff's attorney and defendant's attorney, Haverty.
49 Id.
50 Telephone conversation with plaintiff's attorney, Haverty.
tiac Spinners and subsequently required the installation of guards. The plaintiff thus alleged that because the defendant knowingly required its employees to operate hazardous machinery, it failed to provide a safe place to work and was guilty of willful, wanton and reckless conduct.51

The defendant contended that the plaintiff's negligence caused the accident. It claimed that the plaintiff tried to operate the machine with one hand and the elbow of the opposite arm in order to leave one hand free. In this way the plaintiff attempted to obviate the safety features of the machine.52 In addition, the defendant submitted that it had not been cited for any safety violation at the Spencer plant regarding the accident.53 The jury returned a verdict for the defendant, the only one of the six cases examined here to find for the defendant.54

C. Littlejohn v. Conrail and A.C.F. Industries

The plaintiff was a brakeman for the defendant, A.C.F. Industries, in its railcar repair yard in Putnam County.55 He lost his right hand when he caught it between two railcars.56 The plaintiff was new at his job but he had served as an apprentice to a veteran brakeman for 19 days.57 His duties were to couple and uncouple cars as they were to be rearranged throughout the railyard,58 and he used a multichannel two-way radio to communicate with the engineer.

The plaintiff contended that he was hurt as he was attempting to open the coupling of a standing car. He said he had radioed the engineer to stop, and the engineer did stop. He had trouble opening the coupling and while he attempted to open that coupl-

50 Telephone conversation with plaintiff's attorney, Haverty.
The plaintiff claimed compensatory damages, punitive damages, and the plaintiff's wife claimed damages for loss of consortium. Id.
52 Telephone conversation with defendant's attorney, Haverty.
53 Id.
The plaintiff is appealing the case.
57 Id.
58 Plaintiff had worked on his own for two days before the accident. Conversation with defendant's attorney, Littlejohn.
59 Plaintiff's Complaint, supra note 56.
ing, the engineer began moving the cars back again. Before the
plaintiff was able to remove his hand, the backing cars crushed
it in the coupling of standing car. The defendant contended that
the plaintiff failed to radio the engineer to stop as he attempted
to open a coupling he had mistakenly left closed. The defendant
said that the plaintiff hoped to correct his mistake before anyone
could discover it, but not having enough time caught his hand
between the cars.

Basing his claim on Mandolidis, the plaintiff averred that the
defendant failed to adequately instruct and train him properly
for his job. He claimed that the defendant failed to provide a
safe place to work and inadequately instructed him in the proper
use of the two-way radio. The plaintiff also claimed that the defend-
ant failed to provide adequate equipment because the railcars
would not couple and uncouple automatically. The defendant
claimed that the plaintiff was grossly negligent and that his fellow
employee was also negligent. At trial the defendant disclosed
that no one in the yard, including the engineer, heard the plain-
tiff over the two-way radio request the engineer to stop.

The jury returned a verdict for the plaintiff for $600,000.00, believed to be the largest verdict ever returned in the United
States District Court for the Southern District of West Virginia.
Since the workmen's compensation award was final at $52,449.83,
the final judgment was offset by this amount. The defendant has
moved the district court to set aside the verdict.

D. Cline v. Joy Manufacturing Co.

The plaintiff, Tim Cline, brought this action against two defen-
dants for injuries he sustained in a coal mining accident. The first,
Joy Manufacturing Company, manufactured the coal mining equip-
ment that injured the plaintiff. The second, Jumacris Mining Com-

60 Id.; conversation with plaintiff's attorney.
61 Conversation with defendant's attorney, Littlejohn.
62 Plaintiff's Complaint, supra note 56; conversation with plaintiff's attorney.
63 Plaintiff's Complaint, supra note 56.
64 Id.
66 Conversation with defendant's attorney, Littlejohn.
68 Charleston Gazette, Dec. 4, 1981 at __________, col. ____________.
pany, a small privately owned operation, employed the plaintiff.70

The accident occurred in March, 1977, at the Jumacris No. 5 Mine on Ben Creek in Mingo County where the plaintiff, as section foreman, was working the second shift.71 A continuous miner operator in plaintiff's section of the mine informed him that he would not mine any longer in that area because water was rushing in on the machine. When the operator left the continuous miner the plaintiff, himself, began operating it.72

The operator runs a continuous miner from a seat in a cage or canopy located low and to the side of the machine. The control panel in the operator's canopy contains the levers which move the continuous miner on its tracks. These tracks are very similar to the tracks on a bulldozer or tank. Since each track is independent, the operator must push both the right and left levers forward in order to move the machine straight ahead and pull both levers back to move the machine backwards. When the operator pushes only one of the levers forward, only that track moves, causing the machine to turn toward the opposite direction. Also located in the canopy are two safety features. On the floor of the canopy is the "deadman switch." It must be depressed continuously in order for the machine to move. When the operator takes his foot off this button, the machine will not move. At the operator's shoulder is the "panic bar." Pushing this bar causes the machine to shut down.

When the plaintiff operated the continuous miner, instead of sitting in the canopy, he stood beside the machine and reached into the canopy to operate the control levers.73 The "deadman switch" had been wedged down in a depressed position permitting the machine to be operated in this manner.74 He then tried to tram the machine backwards. What happened next is unclear, but apparently as the plaintiff trammed the machine back, the

71 Id.
72 Telephone conversation with plaintiff's attorney and defendant's attorney, Cline. The continuous miner is a heavy piece of mining equipment built very low to the ground which digs coal. Large rotating bits located at the front of the machine literally chew the coal out of the coal face while another apparatus shovels the coal onto a conveyor belt built into the machine itself. The conveyor belt moves the coal to the back of the machine while more coal is shoveled on.
73 Telephone conversation with plaintiff's attorney and defendant's attorney, Cline.
74 Id.
left lever stuck in the backwards position while the right lever was in the neutral or non-moving position. Consequently, the machine moved to the right pinning the plaintiff between the wall and the machine. The plaintiff could not stop the machine because the “deadman switch” had been wedged down and the “panic bar” was beyond the reach of the plaintiff. As a result of the accident, the plaintiff lost his right arm and part of his right lung and severely crushed his chest.

The plaintiff contended that a broken spring caused the left lever to remain in the backward position, and if the spring had been in good working order, the machine would not have turned on him. The plaintiff alleged that Joy Manufacturing negligently designed and manufactured the continuous miner because it did not install proper safety features or give proper warnings. The plaintiff also alleged that Joy Manufacturing had breached a warranty that the machine was fit for a particular purpose. The plaintiff alleged that Jumacris Mining Company knew of the machine’s manufacturing defects and its general state of disrepair, yet required the plaintiff to operate the machine in this dangerous condition. The plaintiff, therefore, alleged that the defendant mining company was guilty of willful, wanton and reckless conduct, even though the plaintiff could not plead that the defendant violated any safety regulation.

Jumacris based its defense on the contributory negligence of the plaintiff. The plaintiff’s duty as section foreman was to oversee all safety matters in his area. His operation of the continuous miner from outside of the canopy with a cap wedge on the “deadman switch” violated all safety rules. Joy Manufacturing also based its defense on contributory negligence. However, a day before the case reached trial, Joy Manufacturing settled out of court with the plaintiffs.

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The defendant, Jumacris Co., contended that there was nothing wrong with the levers whatsoever.

Id.

Plaintiff’s Complaint, supra note 70; Telephone conversation with plaintiff’s attorney and defendant’s attorney, Cline.

Id.

Telephone conversation with plaintiff’s attorney, Cline.

Id.

Telephone conversation with defendant’s attorney, Cline.

Telephone conversation with attorney, for defendant, Joy Mfg., Cline.
After a four hour deliberation, the jury returned a verdict for the plaintiff. The jury awarded $2,500,000.00 in compensatory damages to Tim Cline, $500,000.00 in punitive damages to Tim Cline, and $1,000,000.00 in compensatory damages to Bonnie Cline for loss of consortium, amounting to a total verdict of $4,000,000.00, believed to be the largest verdict in the state of West Virginia. The court set aside the verdict as excessive, and granted defendant's motion for a new trial only on the issue of damages.

E. **Mooney v. Eastern Associated Coal Co.**

After her husband was killed by a roof collapse in a coal mine, the plaintiff, Sandra Mooney, as administratrix, brought this action against the defendant. The deceased, Roger Mooney, was a section foreman in Eastern's Number Two mine in Barrett, Boone County. As section foreman, he was responsible for insuring that there were no unsafe working conditions in the mine. One of his duties was to make a "fire boss" run before the other miners entered the mines. This primarily entailed checking methane levels, but also involved making sure that roofs were safely supported and that passageways were clear. While on his fireboss run for the night shift, a large slate rock fell on him crushing him to death.

The plaintiff alleged that the defendant was guilty of willful, wanton and reckless conduct because it knew that the area of the mine in which the deceased was killed was extremely hazardous, but that the defendant required the deceased and others to work there anyway. In addition, she alleged deliberate intent because there was a broken roof bolt in the same area that had

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85 *Cline*, Civ. No. 79-C-8036 (Cir. Ct., Mingo Cty., Aug. 10, 1981) (Judgment Order). Interestingly, the only evidence the plaintiff put on regarding loss of consortium was Bonnie's testimony which was to the effect that she and her husband did not enjoy themselves as much as they used to. When asked about loss of consortium, Tim said he would rather not talk about it. Telephone conversation with plaintiffs attorney and defendant, Jumacris Co.'s attorney, *Cline*.


88 *Id.*

89 Telephone conversation with defendant's attorney, *Mooney*.

90 Telephone conversation with plaintiff's attorney, *Mooney*.

been reported to the defendant, but which the defendant had failed to replace.92

To substantiate her claims, the plaintiff produced Mine Safety and Health Administration (MSHA) citations for failure to properly maintain roof supports.93 In addition, the plaintiff presented evidence that the area of the mine had a history of roof problems.94 Finally, the plaintiff introduced into evidence a "fire boss log book" with entries that showed that the roof had fallen before and that roofbolts had been sheered off.95 Eastern contended that it was not negligent with regard to roof maintenance. It asserted that it had taken extra precautions to insure adequate roof support and that it had developed a proved program with the help of MSHA96 for such purpose. Moreover, the defendant claimed that roof falls occur in the ordinary course of business in deep mining.97

On March 23, 1981, the jury returned a verdict for the plaintiff in the amount of $850,000.00. Three hundred fifty thousand dollars were awarded to Sandra and $500,000.00 was awarded to her daughter, Melissa.98 Although the plaintiff claimed punitive damages, none were awarded. The offset in this case also has yet to be determined.99

F. Marcum v. Windsor Power House Coal Co.

The plaintiff, Wendell Marcum, was a miner at the defendants' Beech Bottom Mine in Brooke County.100 On May 2, 1978, a de-energized hi-line voltage cable fell on the plaintiff's head and shoulders.101 The cable weighed about four and one-half pounds per foot. The plaintiff, under the supervision of a temporary section foreman, was helping another fellow worker take about 100 feet of the cable down.102

92 Id.
93 Telephone conversation with plaintiff's attorney and defendant's attorney, Mooney.
94 Id. The plaintiffs proved that there were extra-geological fractures in part of the mine due to water seepage.
95 Id.
96 Telephone conversation with defendant's attorney, Mooney.
97 Id.
98 Verdict, Mooney.
99 Telephone conversation with defendant's attorney, Mooney.
100 Marcum, Civ. No. 80-C-152 (Cir. Ct. Brooke Cty. 1980) (Plaintiff's Complaint).
101 Id.
102 Telephone conversation with plaintiff's attorney, Marcum.
The gist of the plaintiff's allegation was that the regular section foreman had required four to six men to do the job, but that on this occasion the temporary section foreman required the plaintiff to do the work with only one other worker.\textsuperscript{103} The plaintiff contended that the defendant knew or should have known that to require work which is usually done by four to six men to be performed by two men was unreasonably dangerous. Thus, the plaintiff claimed that the defendant was guilty of willful, wanton and reckless misconduct.\textsuperscript{104} The plaintiff also alleged that the defendant failed to provide a safe place to work.\textsuperscript{105}

The defendants contended that the work could have safely been performed by one man. Testimony by a United Mine Workers safety representative and a district safety officer established that such an operation by two men was not unsafe.\textsuperscript{106} The defendants also demonstrated that they had not violated any safety violations regarding the accident.\textsuperscript{107} Finally, the defendants pleaded the affirmative defenses of contributory negligence, contributory recklessness and assumption of risk.\textsuperscript{108}

The plaintiff's injuries were also disputed. The plaintiff claimed the blow knocked him unconscious. Since the accident he has suffered from severe headaches, depression, dizziness, disorientation, loss of memory, and general psychological problems.\textsuperscript{109} The defendants contended that there was no evidence of any kind of physical injury. The defendants proved that the plaintiff had seen a psychiatrist before the accident and had complained of the same afflictions a year and a half before the injury.\textsuperscript{110}

On July 23, 1981, the jury found for the plaintiff. Though punitive damages were demanded, none were awarded. However, the jury awarded $425,000.00 in compensatory damages to the plaintiff and $100,000.00 compensatory damages to his wife, Hattie, for loss of consortium. The $525,000.00 total was reduced by 25%
because the jury determined that the defendants were 75% reckless and the plaintiff was 25% reckless. The defendants' motion to set aside the verdict was denied and the offset has yet to be determined.

II. PROCEDURAL DIFFICULTIES

A. Offset of Compensation Award

Article four section two of the Workmen's Compensation Act states that where an employer intentionally harms his employee, the employee shall have "a cause of action against the employer for any excess of damages over the amount received or receivable under the [Act]." Therefore, an employee who wins a common law action against his employer must credit the employer for payments received under the Workmen's Compensation Act. On its face, the calculation required by the statute seems easy enough. To determine the amount of damages allowed by § 23-4-2 all that need be done is subtract the amount "received or receivable" under workmen's compensation from the common law damages. If the workmen's compensation award is greater than the amount of damages awarded in the suit at common law, the plaintiff receives no additional monetary award.

However, the meaning of the term "received or receivable" has become the subject of much debate. The initial question is whether "received or receivable" includes future benefits that have not yet been awarded. The plaintiffs in Mooney v. Eastern Associated Coal Co. argued that it did not. Their position was that "received or receivable" means benefits actually received, or accrued but not paid. They based this interpretation of "received or receivable" on an analogy to the phrase "paid or payable" in § 23-4-6(1) of the Compensation Act. Under that statute, compensation terminates on an employee's death "except that any unpaid compensation which would have been paid or payable to the employee up to the time of his death, if he had lived, would..."

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112 Telephone conversation with defendant's attorney, Marcum.
115 Plaintiff's Memorandum of Law RE: Offset For Workmen's Compensation Benefits "Received or Receivable," at 3, Mooney.
shall be paid to his [dependents]." The plaintiff argued that under that statute, the West Virginia Supreme Court of Appeals had interpreted payable to mean payments which had actually accrued and which were due to be paid prior to the employee's death. The plaintiff urged that the same should apply to "received or receivable" so that receivable should be only that award which has accrued before the date of verdict.

The plaintiff also contended that since the term was in the disjunctive, the legislature intended to provide alternative remedies. He argued that the legislature intended that only the award already received should be offset or only that which will be received should be offset, but the cumulative total of both could not be offset. Finally, the plaintiff in Mooney argued that "receivable" could not include future awards because of their speculative nature. The possibility of unknown future events which might change the amount receivable should not be allowed to serve as a deduction from the jury amount.

The defendant in Mooney emphasized that to exclude future compensation awards would permit a double recovery by the plaintiff. The clear intent of the last clause of the statute was to bar any double recovery by the plaintiff. To construe the statute otherwise would totally contravene the legislature's intent. In interpreting the term in its plain meaning, the defendant argued that it could only mean payments that will be received in the future. Any other interpretation would distort the language of the statute. In addition, the defendant attempted to show that the word "or" was used loosely, and not intended to be disjunctive. The defendant argued that given the plaintiff's interpretation of the phrase, the word receivable would be mere surplusage.

To this date, the court in Mooney has not ruled on the briefs by opposing counsel. Whether "received or receivable" includes

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118 Plaintiff's Memorandum of Law, note 116 supra.
119 Id. at 5.
120 Id. at 6.
121 Id.
122 Defendant's Memorandum of Law: Workmen's Compensation Benefits Received or Receivable to be Offset Against Jury's Verdict, 9, Mooney.
123 Id.
124 Id. at 8.
125 Id. at 9.
future workmen's compensation payments is still a matter of dispute. However, given that the purpose of § 23-4-2 is to provide an additional rather than an alternative remedy, future workmen's compensation benefits will probably be included in the computation of the offset.

This is only the threshold question; if future benefits do offset the common law damages, the calculation of those future benefits becomes yet another obstacle to the resolution of a Mandolidis suit. The only cases as yet to offset the workmen's compensation benefits from the common law damages are Smith v. A.C.F. Industries and Littlejohn v. A.C.F. Industries. The offset in these cases was possible because the plaintiffs were only partially disabled. Under this classification the plaintiffs received a fixed amount of compensation benefits. The final payments had been made soon after the verdicts, so the offset computations were only a matter of arithmetic. In addition, the parties agreed that if the plaintiff should reopen his compensation claim, or obtain more benefits in the future, the defendant would be able to recover those amounts paid.

In Mooney, the debate was not that simple. Because her husband died, the plaintiff and her child were eligible for the same benefits the deceased would have received had he lived and been totally disabled. Under the total disability classification, the injured worker receives the smaller of 70% of his average weekly wage or the West Virginia average weekly wage. Under the statute the widow receives payments until her death or remarriage and the child receives payments until he reaches 18 years of age or if in school, 25 years of age. In Mooney, the widow was receiving monthly payments based on the West Virginia average wage and will continue to receive payments the rest of her life, if she does not remarry. Her daughter will share in those benefits until she is 25. The average weekly wage for the fiscal

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126 See also Haverty, Civ. No. 78-2262 (S.D. W. Va., filed July 28, 1978).
127 Telephone conversation with plaintiff's attorney, Smith. The plaintiff was classified as 20% permanently partially disabled.
128 W. VA. CODE § 23-4-6 (1981 Replacement Vol.). There is an 80 week limit on payments under the classification of twenty percent permanently partially disabled.
129 Telephone conversation with plaintiff's attorney, Smith.
130 W. VA. CODE § 23-4-10 (1981 Replacement Vol.).
131 W. VA. CODE § 23-4-6 (1981 Replacement Vol.).
132 W. VA. CODE § 23-4-10 (1981 Replacement Vol.).
133 Defendant's Memorandum of Law, supra note 122, at 17-18. Seventy per-
The year of 1980-81 was $262.80; however, this average weekly wage is recalculated every year and the 1980-81 figure of $262.80 rose about nine percent from the previous year.

The difficulties in estimating the total future payments to be offset are obvious. Mortality tables must be consulted and the annual change in the average weekly wage must be predicted. In Mooney, the defendant argued that the recent nine percent increase would be a good measure of subsequent annual changes in the average weekly wage. The plaintiff disputed this as too speculative and offered a much smaller figure.

In addition, both sides have argued for increases or decreases in the figures based on the chance of remarriage or reopening. In the Mooney case the plaintiff argued that if future payments are allowed to be deducted some allowance should be given to the possibility of the plaintiff remarrying. If the widow would remarry all payments would terminate; thus, the probability of marriage should be used to reduce the total calculation of future payments. The defendant countered that such a calculation would be too speculative and that no statistical study would be sufficiently reliable for calculating total benefits. Further, the defendant

The plaintiff suggested calculating the amount receivable by accepting the figure the state workmen’s compensation commissioner establishes as a reserve for payments to be made in that particular case. Plaintiff’s Memorandum of Law supra note 115, at 16.

The defendant dismissed the reserve fund as a reliable indicator of the amount receivable in this case because (1) the reserve is used for accounting purposes only; (2) its figures for factoring in the chance of remarriage are unreliable; (3) the reserve doesn’t take into account the increase in the state average weekly wage; (4) the reserve doesn’t account for the DWRF contributions. Defendant’s Memorandum of Law supra note 122, at 26.

In this case the defendant’s approximation of the amount received or receivable under the Act was $400,000 higher than the plaintiff’s estimate of $200,000. Telephone conversation with defendant’s attorney, Mooney.

$298.80. This was greater than the West Virginia average weekly wage, so the widow was only entitled to the average weekly wage.

134 Id. at 18.

135 Id. To complicate matters further, the defendant contended that the Disabled Workers Relief Fund (DWRF) kicks in when the workers' average weekly wage dips below 33 1/3% of the state's average weekly wage. So in the future, the defendant claimed, if $426.00 was ever below 33 1/3% of the average weekly wage because of inflation, the DWRF would contribute more funds to the support of the widow.

136 Id. at iii.

137 The plaintiff suggested calculating the amount receivable by accepting the figure the state workmen's compensation commissioner establishes as a reserve for payments to be made in that particular case. Plaintiff's Memorandum of Law supra note 115, at 16.

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138 Defendant's Memorandum of Law supra note 122, at 19.


140 Defendant's Memorandum of Law supra note 122, at 23. In this case the defendant's approximation of the amount received or receivable under the Act was $400,000 higher than the plaintiff's estimate of $200,000. Telephone conversation with defendant's attorney, Mooney.
contended that the workmen’s compensation payments would act as an incentive for her to remain single.\footnote{141}

The parties in \textit{Marcum v. Windsor Power House Coal Company}\footnote{142} faced the problem of reopening as a factor in recalculating the compensation claim. Under article 5, section 2a of the Compensation Act, any claimant may at any time apply for additional benefits if his injury worsens.\footnote{143} In \textit{Marcum}, the plaintiff suffered psychiatric problems from a blow to the head. Although he was only classified as partially disabled, his injuries were of the type that could worsen at any time.\footnote{144} Thus, the possibility of reopening to increase benefits could be considered in calculation of the offset. The problem with reopening is the same as with the possibility to remarry. In neither case could there be adequate statistical data which could be sufficiently reliable.

Another factor that must be weighed in calculating the workmen’s compensation award which is deducted from the common law recovery is present value. The total of payments paid throughout the claimant’s life under the Workmen’s Compensation Act must be discounted to reflect its actual value in today’s dollars. This discounting enables the offset to more accurately reflect the actual worth of the compensation benefits to the claimant. In \textit{Mooney} the plaintiff argued for a present value reduction of the total award under Workmen’s Compensation by fourteen percent.\footnote{145} The defendant contended that no present value reduction was necessary, but if any, only a four percent reduction should be made.\footnote{146} The consensus in the legal community is that the total figure should be reduced to present value, but there is no agreement on amount of reduction.\footnote{147}

The problem with determining the amount of workmen’s compensation benefits received or receivable is an exceedingly complex one. Though most of the plaintiffs’ counsel in the cases analyzed have conceded that future benefits are calculable for the purposes of deduction no one is sure how to make such calcula-

\footnote{141} Id. at 24.\footnote{142} \textit{Marcum}, Civ. No. 80-C-152 (Cir. Ct. Brooke Cty. 1980).\footnote{143} \textit{W. VA. CODE} § 23-5-1a (1981 Replacement Vol.).\footnote{144} Telephone conversation with defendant’s attorney, \textit{Marcum}.\footnote{145} \textit{Supra} note 116, at 15.\footnote{146} \textit{Supra} note 122, at 21.\footnote{147} Telephone conversations with both plaintiff’s and defendant’s attorneys in all six cases examined here.
tions. Since it is so confusing both sides are resorting to the use of economists and actuaries as expert witnesses in order to prove their figures. Generally, the area of permanent total awards presents the biggest problem because payments extend over the claimant's life, while permanent partial awards are limited. Thus for permanent total awards one must determine the claimant's lifespan and the payments based on the average weekly wage. This is complicated by the yearly changes in the average weekly wage which is in itself speculative.

B. Punitive Damages and the Jury's Knowledge of Workmen's Compensation Award

The West Virginia Supreme Court has held punitive damages to be awardable when circumstances indicate malice, willful or wanton disregard of the rights of others. This standard of conduct is virtually identical with the standard the West Virginia Supreme Court has required for the imposition of employer liability in Mandolidis. Since both standards require willful and wanton conduct on the part of the defendant, an employee who has proven the elements necessary to bring a Mandolidis suit, has necessarily proven the elements for an award of punitive damages.

In four of the six cases studied here, plaintiffs claimed punitive damages. In Haverty, where the plaintiff caught his hand in the press, the parties bifurcated the trial and decided the issue of liability first. Since the verdict was for the defendant, Judge Copenhaver did not rule on the issue of punitive damages.

In Cline, where the plaintiff lost his arm, the jury awarded $500,000 in punitive damages. However, as mentioned before, the court in Cline has set aside the entire verdict as excessive and granted

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148 Attorneys have used economists in the Mooney, Marcum and Cline cases.
149 Addair v. Huffman, 156 W. Va. 592, 195 S.E.2d 739 (1973); Commonwealth Fire Co. v. Tri-State Tire Co., 156 W. Va. 351, 193 S.E.2d 544 (1972); RESTATEMENT (SECOND) OF TORTS § 908 (1977) states that punitive damages may be awarded for "conduct that is outrageous because of the defendant's evil motive or his reckless indifference to the rights of others."
150 See notes 10-16 supra, and accompanying text.
152 Telephone conversation with plaintiff's attorney, Haverty.
153 Id.
a new trial solely on the issue of damages. In *Mooney*, where a roof collapse killed the plaintiff's decedent, the jury refused to award the punitive damages demanded.

In *Marcum*, where a cable fell on the plaintiff's head and shoulders, Judge Tsapis dismissed the claim for punitive damages while denying the defendants' motions for a directed verdict as to liability. The defendants based their motion for a directed verdict on the grounds that the plaintiff had failed to prove willful, wanton and reckless conduct by the employer. Since the elements necessary for an award of punitive damages and the burden of proof in a *Mandolidis* action are the same, Judge Tsapis should have either directed a verdict for the defendants or allowed the claim for punitive damages. Therefore, this points out that if a showing of punitive damages has not been made, courts should be more willing to grant directed verdicts as to employer liability in *Mandolidis* cases.

Whether punitive damages are subject to offset should raise some fear among defendants. Since punitive damages are designed to punish the defendant, plaintiffs' counsel have been arguing that punitive damages should not be diminished by what was received from workmen's compensation benefits. In addition, workmen's compensation benefits are compensatory and not designed to be punitive in nature. Therefore, any benefits "received or receivable" under the act should be deducted from only compensatory award. If a court allows punitive damages to be untouched, it would not only increase the award received by the plaintiff but further complicate the calculations of the offset.

Whether the jury should be informed that the plaintiff has received compensation benefits creates another troubling area. The argument cuts both ways. To inform the jury of the compensation benefits the plaintiff has received may cause the jury to award a higher amount to overcome the offset. This was supposedly part of the jury's reasoning in *Cline*. However, such informa-

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155 Telephone conversation with defendant's attorney, *Marcum*.
156 *Id.*
157 Affidavit of Esta Arlene Kirk, *Cline*. The affidavit states:

I am Esta Arlene Kirk and I reside at Kermit, West Virginia. I was one of the jurors who sat on the jury in the trial of Tim and Bonnie Cline versus Jumacris Mining Company. After our approximate four-
tion may cause the jury to award a smaller amount since they would believe there is no reason to compensate him further.

In the cases studied here, only in Cline did the court inform the jury that the plaintiff received workmen's compensation benefits. The jury deliberations indicate that knowledge of the workmen's compensation award was an important factor in their

hour deliberation and when we came into the court room, the Judge asked each of us if that was our verdict. When it came to me, I replied, "I reckon so," because I could not have said yes, because I did not agree with it and if I had been asked to explain what I meant, I would have said that there were some questions that needed to be answered in my mind before I could come to a decision in the case. These questions came to mind at different times in the jury room. Some of them are the following:

I did not understand the meaning of what I now have been told is punitive damages. When I asked what punitive damages were, I was told that because it had something to do with the coal mining industry that they had to be given in this case.

I was told that whatever we gave to the Clines, half of it would go to the lawyers, and out of the other remaining half, Cline would have to pay back to Compensation everything that he had drawn.

When some members of the jury said they were for giving six million dollars, the amount that he sued for, I objected to this. After a long discussion, during which time people were getting upset, including myself, and since I did not feel it right to award such sums, I said that I would disqualify myself. I was told that if I did that this was the only chance that Tim and Bonnie Cline would have. During this discussion as some of the jurors were saying we should give six million dollars, they considered the fact that Buck Harless not only owned the mining company, but banks and many other companies. Sometime during this discussion some juror said that I was a liar, which I denied.

At one point, I asked to go out and ask the Judge a question about what I now have been told is punitive damages, and some of the jurors objected saying that if we did, they would think we were stupid people.

The only time any member of the jury mentioned anything that the Court instructed us was the question I had about punitive damages and the fact that I called to their attention that the Judge had told us that we should not be influenced by sympathy. Other members of the jury kept saying that I should consider what I would do if it was my husband, and at another time members of the jury said that we should give an award in this case so that it would open up the way for other miners who had gotten hurt on the job to get more than just Workmen's Compensation.

At no time during the jury deliberations was there any talk about what willful, wanton and reckless conduct was.

Toward the last of our discussion, I went to the restroom, and when I came out, they told me that they had reached a decision and said, "Come on, let's go outside." I asked them what the decision was, and
verdict.\textsuperscript{158} Since the jury verdict in \textit{Cline} was by far the largest of any case analyzed here, this might imply that to mention the award of compensation benefits would cause the jury to inflate their verdict. However, this might not be the case.

In \textit{Marcum}, Judge Tsapis prohibited the parties from mentioning that the plaintiff had received a compensation award.\textsuperscript{159} Both parties felt it was to their advantage to not inform the jury of the award, but after the case, defending counsel reconsidered that position. They felt the jury might have awarded less if they had known the plaintiff was being compensated.\textsuperscript{160}

On the other hand, defending counsel in \textit{Mooney} indicated that the verdict might have been higher had there been mention of the compensation award.\textsuperscript{161} The court in \textit{Mooney} kept any mention of workmen's compensation from the jury.\textsuperscript{162} In two of the remaining cases, the defendants had the option to bring the fact of workmen's compensation benefits into the case or leave it out.\textsuperscript{163} In both, the defense chose to keep it out of the trial.

There is a possibility that if mention is not made of workmen's compensation benefits, the jury will not understand the context of the case. Instead of seeing it as an excess suit, they might see it as a mere negligence suit. Viewed in simplistic terms, the jury sees that someone has been injured and that he should be compensated for it. Therefore, despite the result in \textit{Cline} it is probably better to mention that workmen's compensation benefits have been awarded so that the jury can understand the case as an excess suit not as a negligence suit. From the defendant's viewpoint

\phantomsection\addcontentsline{toc}{section}{Notes}
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\begin{itemize}
\item\textsuperscript{158} Telephone conversation with plaintiff's attorney, \textit{Cline}.
\item\textsuperscript{159} Telephone conversation with defendant's attorney, \textit{Marcum}.
\item\textsuperscript{160} \textit{Id}.
\item\textsuperscript{161} Telephone conversation with defendant's attorney, \textit{Mooney}.
\item\textsuperscript{162} \textit{Id}.
\item\textsuperscript{163} In \textit{Smith}, the judge left the decisions to the defendant where in \textit{Littlejohn} the judge let the parties agree not to mention compensation payments to the jury.
\end{itemize}
the best way to bring this about would be to say that compensation benefits have been paid, but not mention how much have been paid. The plaintiff, of course, would want the jury to be informed of how much has been paid in hopes the jury might inflate their verdict.

C. Consortium

Wives of the plaintiffs received loss of consortium in two of the cases studied here. In Cline, the jury awarded Bonnie Cline one million dollars in spite of little evidence presented to substantiate such a claim. Bonnie Cline took the stand and testified that her sex life was not as good as it used to be after her husband's accident and Tim Cline said that he would rather not talk about it. Nevertheless, the jury awarded large damages for Bonnie Cline's claim. In Marcum, the jury also awarded the wife of the injured plaintiff damages for loss of consortium; in that case the amount was $100,000.00. Although these claims were made and verdicts were won, a claim for consortium may not be proper in a Mandolidis suit. The pertinent part of § 23-4-2 states that "the employee, the widow, widower, child or dependent of the employee shall have . . . [a] cause of action against the employer as if this chapter had not been enacted . . . ." This indicates that the legislature intended that either the employee or his dependent would have the right to sue at common law. To permit an award of consortium would exceed the scope of the Act. Furthermore, the class of persons described in §23-4-2 is generally that of dependents, the same class of persons described for the purposes of death benefits in Article 4, Section 10, of the Compensation Act. Both sections are describing the same class of persons for the same purpose—death benefits. The right of any person other than the employee to take under the act would depend upon the death of the employee. Until the employee dies, the legislature has vested him with the only right to sue under common law pursuant to §23-4-2. Moreover,

165 See note 85, supra.
167 W. VA. CODE § 23-4-2 (1981 Replacement Vol.).
since the legislature chose the word "widow" instead of the word "spouse" indicates that a wife's claim for loss of consortium would not be proper.

Following this reasoning, a federal district court in West Virginia dismissed a wife as a plaintiff in a suit brought under Mandolidis. Judge Knapp in Grayley v. Armaco Steel\textsuperscript{169} concluded that §23-4-2 does not provide a cause of action for loss of consortium for spouses of employees intentionally injured by their employer. The basis of the judge's determination was that §23-4-2 provided a cause of action for a spouse only on the death of the employee.\textsuperscript{170}

D. Common Law Defenses

Another area of uncertainty in Mandolidis suits is whether the common law defenses of contributory (comparative) negligence, assumption of risk, and fellow servant rule are available. The problem with these defenses is that they are usually asserted when the defendant has committed a negligent act, but here, under Mandolidis the defendant has allegedly committed an intentional act of omission. Therefore, the question arises whether the defendant can raise the "negligence" defenses in a case of deliberate intention. The answer is different for each of the defenses.

1. Contributory (Comparative) Recklessness

In a Mandolidis action, the defendant can not properly assert the defense of contributory or comparative negligence since such defense is not available where the defendant has committed willful or wanton acts.\textsuperscript{171} However, some defendants' counsel have asserted the defense of contributory recklessness alleging that the plaintiff is guilty of willful and wanton misconduct. For support the defendants have relied on the Restatement (Second) of Torts which states in pertinent part of Section 503(3) that "[a] plaintiff whose conduct is in reckless disregard of his own safety is barred from recovery against a defendant whose reckless disregard of the plaintiff's safety is a legal cause of the plaintiff's harm."\textsuperscript{172} In addition, defendants' counsel have relied upon other jurisdictions

\textsuperscript{170} Id.
\textsuperscript{171} Barr v. Curry, 137 W. Va. 364, 71 S.E.2d 313 (1952).
\textsuperscript{172} RESTATEMENT (SECOND) OF TORTS § 503(3) (1977).
which have upheld contributory recklessness defenses.  

In response, plaintiffs' counsel have asserted that contributory recklessness is not a valid defense since the West Virginia court adopted comparative negligence in *Bradley v. Appalachian Power.* Contributory recklessness is not consistent with a comparative doctrine because it operates as a complete bar to any claim. They claim that the only consistent approach would be a defense that does not act as a bar but only reduces the plaintiff's recovery by the proportionate amount of his recklessness.

In the six cases studied here, the courts were split, four giving contributory recklessness instructions, and two giving comparative recklessness instructions. In *Smith,* Judge Staker charged the jury, as follows: "Furthermore, a plaintiff is in reckless disregard of his own safety and which proximately causes the plaintiff's injuries, is barred from recovering against a defendant even where the defendant's reckless disregard of the plaintiff's safety is a proximate cause of the plaintiff's injuries..." Judge Copenhaver gave virtually the same instruction as to contributory recklessness in *Haverty* and *Littlejohn* as did Judge Bronson in the *Cline* case. In each of the cases the defense would act to completely bar the plaintiff from recovery.

The courts in *Mooney* and *Marcum* however, refused to give

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174 *Bradley v. Appalachian Power,* 256 S.E.2d 879 (W. Va. 1979) (citing Stone v. Rudolph 127 W. Va. 335, 32 S.E.2d 742 (1944)).

175 Instructions given, *Smith.*

176 Instructions given, *Haverty.* Instructions given, *Littlejohn.* Judge Copenhaver gave the further instruction:

Finally, even though you may find by a preponderance of the evidence in this case that the defendant, ...[acted] in reckless disregard of the safety of the plaintiff... with a knowledge and appreciation of the high degree of risk of physical harm to plaintiff thereby created, [and] if you also find by a preponderance of the evidence that at the time [plaintiff]... was injured... [his conduct] constituted a reckless disregard for his own safety which was a proximate cause of his injury, then you should return a verdict for the defendant.

177 The defendant's instruction given in *Cline* was:

The Court instructs the jury that a plaintiff whose conduct is in reckless disregard of his own safety and which proximately causes the plaintiffs [sic] injuries is barred from recovering against the defendant,
an instruction on contributory recklessness but would only charge
the jury as to comparative recklessness. The charge given by
Judge Tsapis in *Marcum* is indicative of a comparative
recklessness charge. He said in pertinent part:

[I]f you find that the recklessness of Mr. Marcum did not
equal or exceed the recklessness, if any, of Windsor, you must
then determine the total award of damages sustained by Mr.
Marcum and Mrs. Marcum. ... Then as a next step you should
determine the percentage of recklessness which you attribute
to Mr. Marcum and to Windsor. ... The Court will then com-
pute the award of damages, if any to the plaintiffs against the
defendants by reducing the amount found in response to ques-
tion number one by the percent of his own negligence found
in question number two.

The jury in this case found the plaintiff 25% reckless and the
defendant 75% reckless, and Judge Tsapis reduced the total
damage figure accordingly.

Because the instructions the courts gave were split, a con-
clusive prediction as to what instructions will be given in the
future would be difficult. However with the court's relatively re-
cent adoption of comparative negligence, the comparative
recklessness defense will probably be the one allowed in upcom-
ing cases.

2. Assumption of Risk

Whether one can assume the risk of another's willful and wan-

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178 Telephone conversation with plaintiff's attorney and defendant's attorney, *Mooney*.

179 Defendant's Instruction No. 24, given, *Marcum*.

Order).
ton act poses another problem in Mandolidis suits. The federal
district court held in Santiago v. Clark\textsuperscript{161} that "[t]he doctrine of
assumption of risk, . . . retains its viability in West Virginia."\textsuperscript{162} The
court affirmed the same position in Cross v. Noland\textsuperscript{163} where
it stated that the essence of assumption of risk is that the plain-
tiff had been venturous in his actions.\textsuperscript{184} If all that is required is
that the plaintiff be venturous it would seem that the defense
is still alive. However, in Korzun v. Shahan,\textsuperscript{185} one of the cases
on which Santiago relied, the court stated that the defense of
assumption of risk is not available to a defendant guilty of willful
and wanton conduct which operates to injure the plaintiff.\textsuperscript{186}
Therefore, whether assumption of risk can still validly be used
in Mandolidis actions is not clear.

Nevertheless, of the six cases studied here courts in three of
the cases allowed instructions on assumption of risk. Only in
Haverty and Marcum, did the Judges explicitly refuse to charge
the jury as to assumption of risk. Judge Cooper in Mooney and
Judge Bronson in Cline did instruct the jury on assumption of
risk.\textsuperscript{187} Furthermore, in Smith, Judge Staker instructed the jury that

\begin{quote}
if you should find from a preponderance of the evidence in this
case that by his actions the plaintiff thus assumed the risk of
any hazard that may have been posed to his safety by the rotator
and push mentioned in the evidence, then the plaintiff may not
recover in this case even though you may likewise believe that
the defendant was guilty of willful, wanton and reckless miscon-
duct which proximately contributed to the plaintiff's injuries.\textsuperscript{188}
\end{quote}

Although Korzun suggests otherwise, some courts are instructing
juries on assumption of risk in Mandolidis cases. Therefore defend-
ing attorneys may continue to attempt to assert assumption of
risk as a defense in Mandolidis suits citing as authority the cases
mentioned above.

3. Fellow Servant Rule

The fellow servant rule has grown into disuse because it has

\textsuperscript{162} Id. at 1079.
\textsuperscript{163} 156 W. Va. 1, 190 S.E.2d 18 (1972).
\textsuperscript{184} Id. at 6-7, 190 S.E.2d at 22.
\textsuperscript{185} 151 W. Va. 243, 151 S.E.2d 287 (1966).
\textsuperscript{186} Id.
\textsuperscript{187} Telephone conversation with plaintiffs' attorneys, Mooney, Cline.
\textsuperscript{188} Instructions given in Smith.
been statutorily replaced by the Workmen's Compensation Act. However, with the advent of Mandolidis, the fellow servant rule is again being asserted in West Virginia. The supreme court of appeals recently held the defense to be still valid in Shackleford v. Catlett. The court stated that members of a county court who were eligible non-subscribers to the Workmen's Compensation Fund could assert the fellow servant defense when sued in their official capacity.

However, there are factors that mitigate against the effective use of the defense in Mandolidis cases. In West Virginia the court long ago held that the fellow servant defense cannot be invoked where the employer is found to be concurrently negligent with the fellow employee. In Mandolidis actions, the employer would be at least concurrently negligent since the employee must prove not mere negligence but willful and reckless misconduct by the employer.

However, in the two cases where the fellow servant defense was applicable, the judges instructed the jury on that defense. In Smith, where the plaintiff was trapped in machinery of the assembly lines, Judge Staker charge the jury:

Moreover, if you find, from a preponderance of the evidence, that the injuries suffered by plaintiff Ellis W. Smith, were proximately caused by the negligence of one of his fellow employees, then you may not return a verdict for plaintiff and must return a verdict for defendant, ACF Industries.

In Marcum, Judge Tsapis charged the jury with a similar instruction. With some courts willing to instruct the jury on the doctrine of fellow servant, defending attorneys can use such instructions as a powerful weapon against a plaintiff since it is a complete bar to recovery.

### III. OTHER FACTORS

#### A. Third Party Actions

According to Article 2 Section 6 of the West Virginia Com-

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159 Shackleford, 244 S.E.2d 327 (1978).
191 Instructions given in Smith.
192 The doctrine of last clear chance has been judicially abolished by the Supreme Court of Appeals and so is unavailable in Mandolidis cases as it is in all others. Ratliff v. Yocum, Civ. No. 14507 (W. Va., filed July 14, 1981).
pensation Act, the employer who pays into the Workmen's Com-
pensation Fund is not to be held "liable to respond in damages
at common law or by statute for the injury or death of any
employee, however occurring," unless the employer defaults in pay-
ments to the fund. This section protects employers from suits by
third parties, usually manufacturers, for contribution after the
third party has been sued by the employee.

But as in §23-4-2, the employer's immunity extends only toward
his négligent acts that injure the employee. The statute extends
immunity from liability "to every officer, manager, agent, repre-
sentative or employee of such employer when he is acting in fur-
therance of the employer's business and does not inflict an injury
with deliberate intention." So, if the employer is guilty of willful
misconduct, he conceivably can lose his immunity from third party
actions under §23-2-6. This possibility which was relatively remote
before Mandolidis is no longer remote.

The federal district court has addressed this issue in two cases.
In Belcher v. J. H. Fletcher & Co., a third party brought an ac-
tion for contribution from the employer of the deceased employee.
The deceased who worked for Allied Chemical Company, was
killed in a mining accident while operating a roof bolter. His wife
as administratrix, subsequently brought an action against J. H. Flet-
cher & Company, who had manufactured the machine. J. H. Flet-
cher in turn sought contribution from Allied Chemical alleging
that Allied was primarily negligent. The court held that con-
tribution could not be had from Allied because it was immune
from third party actions by the provisions of §23-2-6. The court
then went on to say that Allied did not fall into either of the ex-
ceptions to the Workmen's Compensation Fund. Second and more
importantly; the court held that Allied could not be held liable
on the basis of deliberate intent because neither the plaintiff nor
the third party had alleged willful, wanton and reckless conduct
necessary under Mandolidis.

The Belcher decision opened the door for Sydenstricker v.
Unipunch Products. In that case a third party again sought con-

196 Id.
197 Id.
198 Id.
tribution from the employer of an injured employee. However, in *Unipunch*, the third party manufacturer alleged willful, wanton, and reckless misconduct on the part of the employer, contending that this conduct removed any employer immunity. The district court declined to decide the question because there was no local state authority on that point of law. Instead the court certified the question to the West Virginia Supreme Court of Appeals. The West Virginia court held that the deliberate intent exception contained in § 23-4-2 permitted the defendant to bring a third-party action in contribution against the employer of the injured plaintiff. The prospect of costly third party actions is now a reality with employers subject to liability regardless of whether the plaintiff employee chooses to sue his employer or not.

B. Settlements

Since *Mandolidis*, several employees and deceased employees' families have been settling for sums much larger than they would have obtained before *Mandolidis*. Perhaps the best examples are the settlements obtained by the families of the construction workers killed in the Willow Island disaster. The accident, which occurred in April 1978, resulted in fifty-one deaths. Immediately thereafter some fifty-one claims were brought against the utilities, contractors, suppliers, designers, testing laboratories, and engineers. However, the claims did not name the employer of the workers, Research Cottrell. When the court decided *Mandolidis* two months later all of the plaintiffs amended their comp-

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200 Id.
201 Id.
202 N.Y. Times, Apr. 28, 1978, § 1 at 1, Col. 1; Wash. Post, April 28, 1978, § 1 at 1, Col. 1. The workers were building a cooling tower for an electric generating plant. They were standing on a scaffolding that was anchored on the twenty-eighth layer of concrete while they were pouring the concrete for the next layer. Apparently, the concrete layer that was supposed to support them hadn't sufficiently dried. Id.
203 Telephone conversation with attorney representing the employer, Research Cottrell. The defendants were: Allegheny Power System, Monongahela Power, West Penn., Potomac Edison (utility companies); Pittsburgh Testing Laboratories, Ohio Valley Testing Laboratories (tested concrete mixture); Marquette Cement, Criss Concrete, Master Builders (supplied concrete); United Engineers and Constructors, Inc. (contractors); Cohen-Baretto-Machertas (engineers); Hamon-Sobelco, S.A. (designers of cooling tower). Plaintiff's amended Complaint, Bafile v. Alleghany Power Systems, Civ. No. 79-C-62 (Cir. Ct. Pleasants County, filed 1979).
204 Telephone conversation with attorney representing the employer.
plaints to include Research Cottrell as a defendant. Most of the complaints demanded two to three million dollars compensatory damages plus punitive damages. About half of the cases have now been settled. According to counsel of Research Cottrell, the plaintiffs are settling in the $150,000.00 range.

Since the Mandolidis decision there have been several settlements by employees or their beneficiaries with their employers. In Hicks v. Gould Mines Inc., where the plaintiff suffered a leg injury while on the job, the parties settled for approximately $200,000.00. The spouses and dependents of the miners killed in the 1979 explosion at Westmoreland Mines in West Virginia have also recently settled for over $500,000.00. These settlements are in addition to any workmen's compensation benefits received by the employees or their beneficiaries. Since Mandolidis more claims have been settled for larger amounts than ever before. These claims, no matter how frivolous or meritorious are imposing a substantial burden upon employers in this state.

C. Insurance

The most troubling aspect of Mandolidis liability is that it is not an insurable risk. The self insuring companies such as Eastern Coal Co. and Windsor Power House Coal Co. are able to factor the cost into their underwriting. However, other companies, not self insured, generally cannot obtain insurance coverage for a Mandolidis type claim. Neither the State

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205 Telephone conversation with attorney representing the employer. It does not take much contemplation to deduce that the Supreme Court of Appeals was influenced by the Willow Island Disaster. The Mandolidis decision followed on the heels of the accident.

206 Id.

207 Hicks, Civ. No. 79-C-1352 (Cir. Ct. Greenbrier Cty., 1979).

208 The plaintiff alleged willful, wanton, and reckless misconduct by the employer, because the foreman shut off one of the four malfunctioning brakes prior to the accident. Conversation with attorney for the defendant, Gold Mines, Inc.

209 Chas. Gazette, Sept. 23, 1981, § 1 at 4, Col. 1. "Because of this disaster, the State Department of Mines cited the company with 250 violations of state laws and proposed $319,000 in fines." Id.

210 In Boone County, two of the families settled for $560,00 each and in Logan County, a family settled for $500,000. Two remaining claims are not yet settled. If these claims are settled for $500,000 or more, Westmoreland will have to pay over two and one half million dollars. Telephone conversation with attorney representing the employer, Westmoreland Coal Company.
Workmen's Compensation Fund nor private insurers will pay an employer's liability costs when an employer has intentionally, willfully or recklessly injured his employee. As a result, the employer must absorb the entire cost of the litigation and his damages himself. This cost must be eventually charged to the consumer of the employer's product increasing the product's cost and making it much less competitive. Some non-admitted insurers are providing expensive though limited coverage to employers for Mandolidis claims. The net effect of such limited insurance is that employers must still bear the heavy burden of the possibility of a Mandolidis type claim.

III. IMPACT OF MANDOLIDIS

A thorough analysis of recent cases brought under Mandolidis convincingly illustrates that the worst fears expressed by Justice Neely in his dissent in Mandolidis have come true. The verdicts of the cases studied have been exorbitant. Small companies, such

211 W. VA. CODE § 23-4-2 (1981 Replacement Vol.).
212 Telephone conversation with attorney representing American Insurance Institute.
213 But see Hensley v. Erie Ins. Co. 283 S.E.2d 227 (W. Va. 1981), where a plaintiff sued the defendant’s insurance company for punitive damages. The W. Va. Supreme Court of Appeals stated that such right exists when the insurance company’s policy has only excluded damages caused by the insured’s intentional wrong and the insured was found to have committed an act of gross, reckless or wanton negligence.

The supreme court’s standard here can do nothing but further muddle the distinction between an intentional wrong and a negligent wrong in West Virginia. Under Mandolidis an employer is said to have committed a deliberate wrong by willful, wanton and reckless misconduct. Yet in Hensley, a defendant’s gross recklessness or wanton negligence is not an intentional wrong, and therefore a wrong said to be covered by the defendant’s insurance policy.

Apparently willful, wanton, and reckless misconduct is a bit more grievous than gross recklessness or wanton negligence. Therefore, conduct of the Mandolidis severity might be deemed intentional, and thus not covered by an insurance policy which expressly excludes coverage of damages caused by the defendant’s intentional act.

The coverage problem in Mandolidis terms still is not changed then. The supreme court in Erie said the determining factor was that the policy there only expressly excluded damages caused by the defendant’s intentional wrong. The court recognized that an insurance company can decline to move against paying punitive damages by simply including an express exclusion in its policy. As has already been mentioned, most insurance companies expressly exclude coverage of damages caused by defendant’s willful, wanton and reckless misconduct.

See note 213, supra.
215 Mandolidis 246 S.E.2d at 926 (Neely J. dissenting).
as Jumacris, in no way can absorb verdicts which are three times their total assets.\textsuperscript{216} Nor can larger companies, such as Easter, continually lose verdicts of 850,000 dollars and continue to make a profit.\textsuperscript{217} Not only may employers be subject to great liability to their employees but they may become liable to third parties.\textsuperscript{218} This is because third party manufacturers may circumvent the employer immunity to contribution under §23-2-6\textsuperscript{219} by claiming that the employer acted willfully, wantonly and recklessly toward his employee. The lack of available insurance only compounds the problem in West Virginia, helping to create a totally hostile climate for all business enterprises in this state. This especially applies to small businesses such as the corner grocer, who could easily be put out of business by such large verdicts.

Not only have the number of employee claims increased since Mandolidis but the cost of settlements are rising as well. As Justice Neely predicted, with the proliferation of suits that followed Mandolidis employers are facing many frivolous claims such as the slip and fall cases that have been filed recently.\textsuperscript{220} These claims must be met and the prospect of multi-million-dollar verdicts has forced many employers to settle, whereas, before Mandolidis employers could rest assured that they were protected by §23-4-2 from most suits by their employees. Now, after Mandolidis, the employers must defend every suit brought since the West Virginia court, in Mandolidis, foreclosed virtually all prospect of obtaining a summary judgment by implying that all cases must go to the jury for a factual determination of whether the employer was guilty of willful, wanton and reckless misconduct.\textsuperscript{221}

These nuisance suits that Justice Neely feared are a real and present threat to the ability of a company to carry on a business. As Justice Neely stated: "The settlements I hypothesize combined over the course of a year, plus the attendant costs of defending frivolous law suits, are the type of expenses which not only divert needed resources from the fund available for wages, plant moder-

\textsuperscript{216} Telephone conversation with defendant's attorney, Cline. The verdict of four million dollars was three times the total assets of Jumacris.

\textsuperscript{217} The $850,000 verdict rendered against Eastern cut into its annual profit by 33 percent.

\textsuperscript{218} See notes 191-99 \textit{supra} and accompanying text.

\textsuperscript{219} W. VA. CODE § 23-2-6 (1981 Replacement Vol.)

\textsuperscript{219} Mandolidis, 246 S.E.2d at 921.

\textsuperscript{220} See notes 12-16 \textit{supra} and accompanying text. \textit{See also} notes 155-56 where Judge Tsapis was willing to grant summary judgment as to issue of punitive damages but refused to direct verdict as to issue of liability.
nization, and stockholders' dividends, but contribute to inflation \ldots\)\textsuperscript{222} Unfortunately, Justice Miller's statement that the mere difficulty in proving a Mandolidis suit will protect employer's from liability\textsuperscript{223} has proven to be grievously incorrect. The facts and results of the six cases analyzed here prove him incorrect.

In most of the cases discussed in this article, the facts suggest at most the existence of negligent conduct by the employer, but not conduct \textit{intended} to harm. Even when one views the facts most favorably for the plaintiff, the defendants' conduct in all six cases extends no higher than gross negligence. Moreover, the facts in Marcum, Smith and Littlejohn indicate that the plaintiffs' injuries in each of these cases resulted from the plaintiffs' own carelessness. In the most astounding case, Cline, the injured plaintiff did everything an operator should not do when running a continuous miner.\textsuperscript{224} The plaintiff claimed that the mining company intended to kill him because one of the levers malfunctioned. This case should not even be sustained on negligence grounds because the sole and proximate cause of his injuries was the plaintiff's own recklessness. If he had not operated the machine from outside the canopy, the injury would have never happened. In light of all this, the jury awarded a verdict against the employer of four million dollars.

Obviously, the juries do not understand the willful, wanton and reckless standard necessary under Mandolidis to remove the employer's immunity. They have mistaken this standard as a negligence standard. This is understandably so, since the West Virginia Supreme Court did not adequately define what conduct it envisioned to be willful, wanton and reckless.\textsuperscript{225} Perhaps the problem lies in the "capricious judicial process"\textsuperscript{226} that Justice Neely mentioned in his dissent in Mandolidis. In the Smith case, five out of the six jury members were union members at a time when members working at the defendant's ACF plant were on strike.\textsuperscript{227} In the Mooney case several miners were on the jury and most of the jurors were mine connected.\textsuperscript{228} Finally, in Cline, eight of the jurors were United Mine Workers members and the United Mine

\textsuperscript{222} Mandolidis 246 S.E.2d at 923.
\textsuperscript{223} Id.
\textsuperscript{224} See notes 70-99 \textit{supra} and accompanying text.
\textsuperscript{225} See notes 12-16 \textit{supra} and accompanying text.
\textsuperscript{226} Mandolidis 246 S.E.2d at 923.
\textsuperscript{227} Telephone conversation with defendant's attorney, Smith.
\textsuperscript{228} Telephone conversation with defendant's attorney, Mooney.
Workers were on strike at the time the case went to trial. In an affidavit by one of the jurors in the Cline case, the juror stated that the only time any member of the jury mentioned anything about the court’s instructions concerned punitive damages. Their discussion of punitive damages was that they should be awarded because they had something to do with the coal mining industry. Never did the jury mention or discuss willful, wanton and reckless misconduct.

The danger of letting these cases go to the jury is self evident. As in Cline, the jury simply does not understand or cannot apply the standard to the facts. But beyond the gut feelings of jurors as to who is hurt and who should be compensated, the defense is in a compromising position because it has no real defenses with which to counter the plaintiff’s claims. Comparative recklessness is as nebulous as willful misconduct and harder to prove. Assumption of risk may not even be available and the fellow servant doctrine has limited applicability. Therefore, an employer becomes in essence strictly liable for all injuries sustained by an employee who alleges willful and wanton misconduct by the employer.

Employees should be compensated; it is just that they should not be compensated twice at the expense of the employer. The policy of workmen’s compensation is to compensate the employee for work-related injuries while protecting the employer from a common law claim for damages. Mandolidis has completely annihilated the effective operation of this philosophy in West Virginia. Now, not only is an employee compensated by workmen’s compensation benefits, but he also has a chance of obtaining a high common law recovery even though the defendant isn’t guilty of deliberate intent. This is not what the legislature intended. The common law damages have been so high that even with an offset the worker is the recipient of an enormous windfall. And, an employee can obtain this windfall without proving his case because the juries simply do not understand the standard. All of this is at the employers’ expense, and it will not go without repurcussion. With Mandolidis exposing employers to massive liability, many employers will be forced to leave the state while others will be discouraged from locating here in the first place.

229 Telephone conversation with defendant’s attorney, Cline.
231 Id.
IV. Solution

The only adequate solution would be for the legislature to correct the statute that gave the supreme court the opportunity to make its mistake. There are several states that have intentional employer injury statutes as part of their workmen's compensation laws. Some states provide that the compensation award be increased by 50 per cent or even 100 per cent if it is determined that the employer intentionally injured the employee.

This would be a large improvement over §23-4-2 especially if the determination of intentional injury would be made in the administrative forum. This would relieve the employer of the costly burden of defending himself in suits at law (while also subjecting himself to massive liability). In addition, under the increased award system, the ultimate employee award would be much less than employees are currently receiving. This is proven by the cases analyzed above where the jury award has been as much as twelve times the workmen's compensation award. Moreover, the automatic increase of the award on determination of intent to injure would eliminate the offset under §23-4-2 which has been so troublesome. Then there would be no problems with delay, complex hearings, and the need for statisticians to calculate the offset. Also the possibility of juries subjectively awarding higher sums to overcome the offset would be obviated.

Other states have statutes that provide that where the employer intentionally injures his employee, the employee must elect between taking his workmen's compensation award or suing at law. This too has advantages over §23-4-2. If an employee realizes that he waives the right to receive workmen's compensation benefits by suing at law he will be more reluctant to sue at law. Under the present situation, the employee has nothing to lose by suing his employer. If the new act were enacted the risk would be much greater. Then the frivolous suits, especially

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233 See notes 56-69 supra and accompanying text.

the slip and fall suits, would never be brought, and accordingly the employer would be relieved from having to defend against such suits. Thus the supreme court's holding in *Mandolidis* that all intentional injury suits were questions of fact that must go to the jury rather than having the court summarily dismiss them would be indirectly overcome for the same reasons—the questionable suits would not be brought. Finally, the election statute would also eliminate the need for the offset and all the problems that come with it.

If West Virginia adopted either one of these statutes, the prospect of employer liability would be much improved, but still would not be solved. The willful, wanton, and reckless standard would still exist, juries would still not understand it, trial attorneys would have no defense against it and juries would continue to find employers liable for acts or omissions that barely qualify as negligence. The solution is to rewrite the statute to require specific intent. If the language of the statute required *specific* intent, and excluded gross negligence and recklessness, the supreme court could not intelligently or honestly construe the statute to provide employer liability for other than a purposeful act.

At the time of this writing, there is a bill in the West Virginia Legislature that would accomplish this objective if passed. Its purpose is to negate the *Mandolidis* decision. The bill would require "a showing of an actual specific intent." It redefines deliberate intent as a "consciously, subjectively, and deliberately formed intention to produce the specific result of injury or death to an employee." This would completely do away with the willful, wanton and reckless standard. It would therefore also do away with the test of employer's awareness of a high degree of risk to the employee as being sufficient to find the employer liable. The legislature needs to pass this bill, otherwise the cost of doing business in West Virginia will continue to be prohibitive and the future for industry in this state would be bleak.

*David A. Mohler*

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235 Chas. Gazette Feb. 11, 1982 § 5 at 5 Col. 4.
236 Id.
237 Id.