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# Workmen's Compensation--The Deliberate Intent Statute: Providing for the Victims of Industry

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visions of the statute in effect at the time of his death, his widow was entitled to benefits of \$75.00 per month. The statute in effect at the time of his last exposure to the hazards of silicosis, however, limited her recovery to \$65.00 per month. In granting the claimant a recovery of \$65.00 per month, the court determined that the amendment increasing the benefits would not be given retroactive operation as it affected the substantive rights of the parties to the compensation contract; and that to the extent the holdings in *Webb* and *Peak* were inconsistent with the decision in *Maxwell* they were overruled.

Thus, while the law in West Virginia as to the presumption against the retroactivity of workmen's compensation statutes has been subject to some confusion, it now appears to be settled that any statute which affects substantive rights of the parties is to be prospective in effect unless the Legislature by clear, strong and imperative words has expressed the intent that its provisions are to operate retrospectively. Since no intention of retroactivity is manifested in the "occupational pneumoconiosis" amendment, one must conclude that, in the absence of a return to the judicial legislation of the *Webb* and *Peak* cases, only those workers subject to the hazards of pneumoconiosis on or after July 1, 1969, are entitled to benefits under the provisions of the current statute.

*Kenneth Joseph Fordyce*

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**WORKMEN'S COMPENSATION —  
THE DELIBERATE INTENT STATUTE:  
PROVIDING FOR THE VICTIMS OF INDUSTRY?**

I.

SOME ALTERNATIVES TO COMPENSATION BENEFITS

One of the basic objectives of the Workmen's Compensation Law is to relieve employers of the burden of tort actions for personal injuries to their employees resulting from their employment. An employer, who pays into the workmen's compensation fund is not liable for damages under common law or statute for the injury or death of his employee as the result of an employment-related

accident.<sup>1</sup> In West Virginia this basic purpose is qualified by the provision that if the injury or death results from the deliberate intention of the employer to cause such injury or death, then the injured employee, or the dependents of a deceased employee have cause of action against the employer in addition to the benefits receivable under the Workmen's Compensation Act.<sup>2</sup> Other jurisdictions have completely excluded intentional torts by employers from compensation coverage through a rule to the effect that the compensation acts apply only to accidental injuries and not to intentional injuries.<sup>3</sup> This view is expressed in *Lavin v. Goldberg Bldg. Material Corp.* as follows:<sup>4</sup>

It would be abhorrent to our sense of justice to hold that an employer may assault his employee and then compel the injured workman to accept the meagre allowance provided by the Workmen's Compensation Law.

The opposite view that compensation is the exclusive remedy for intentional torts by an employer has been criticized as "a perversion of the purpose of the act"<sup>5</sup> and as "a travesty on the use of the English language."<sup>6</sup>

Consequently, several jurisdictions, by statute, have provided the employee with an election to sue at common law or a percentage increase in compensation as an additional benefit where the employee's injury was caused by the employer's misconduct such as: willful misconduct generally, failure to provide safety devices, or willful intent to cause injury. An option to sue at common law is

<sup>1</sup>W. VA. CODE ch. 23, art. 2, § 6 (Michie 1966).

<sup>2</sup>W. VA. CODE ch. 23, art. 4, § 2 (Michie Supp. 1969).

<sup>3</sup>E.g., *Le Pochat v. Pendleton*, 187 Misc. 296, 63 N.Y.S.2d 313, *aff'd*, 271 App. Div. 964, 68 N.Y.S.2d 594 (1947); *De Coigne v. Ludlum Steel Co.*, 251 App. Div. 662, 297 N.Y. Supp. 636 (1937); *Stewart v. McLellan's Stores Co.*, 194 S.C. 50, 9 S.E.2d 35 (1940).

<sup>4</sup>274 App. Div. 690, 693-94, 87 N.Y.S.2d 90, 93 (1949), *appeal denied*, 275 App. Div. 865, 89 N.Y.S.2d 523 (1949).

<sup>5</sup>*Boek v. Wong Hing*, 180 Minn. 470, 471, 231 N.W. 233, 234 (1930).

<sup>6</sup>*Stewart v. McLellan's Stores Co.*, 194 S.C. 50, 55, 9 S.E.2d 35, 37 (1940).

It would not seem unreasonable to assume that the compensation statutes were never designed to replace causes of action for intentional torts. However, in this regard, the Georgia supreme court, in a questionable decision, held that no assault had been committed where the allegations were that a company president, who unsuccessfully attempted to learn from an employee the names of other employees who attended a union organization meeting, knowingly forced the reluctant employee to work with his bare hands in an acid vat. (The employee was unaware of the dangerous propensities of the acid.) *Southern Wire & Iron, Inc. v. Fowler*, 217 Ga. 727, 124 S.E.2d 738 (1962), *reversing* 104 Ga. App. 401, 122 S.E.2d 157 (1961).

provided by statute for willful failure to conform to statutes or orders in South Dakota,<sup>7</sup> and New Hampshire,<sup>8</sup> while percentage increases in compensation awards result from failure to provide safety devices or to obey safety regulations, or failure to comply with duties imposed by statute or regulation in Kentucky,<sup>9</sup> Missouri,<sup>10</sup> New Mexico,<sup>11</sup> North Carolina,<sup>12</sup> Ohio,<sup>13</sup> Utah,<sup>14</sup> and Wisconsin.<sup>15</sup> In California<sup>16</sup> and Massachusetts<sup>17</sup> increased awards of 50 percent and 100 percent respectively are assessed as penalties where the employer, or his supervisory personnel, are guilty of willful and serious misconduct. Also, an option to sue at common law for intentional injury by the employer is given in Kentucky,<sup>18</sup> Maryland,<sup>19</sup> Oregon,<sup>20</sup> Washington,<sup>21</sup> and West Virginia,<sup>22</sup> whereas Texas<sup>23</sup> requires a willful act or gross negligence causing death.

Since the enactment of such statutes, the courts have been confronted with serious and perplexing questions concerning the meaning of such terms as: "willingful," "willful and serious misconduct," "intentional injury," "and deliberate intention." The decisions in many cases have turned on the particular import or definition that the court decided to attach to these ambiguous terms. The problem is magnified by the fact that most courts avoid attempting to explain what these terms mean by merely deciding whether a particular set of facts constitutes the statutory description necessary for maintaining the action. In a recent Arizona case,<sup>24</sup> for example, decedent's employer had been warned repeatedly that the ditch in which decedent was working was unsafe. Subsequently, the ditch collapsed, killing decedent.

<sup>7</sup>S.D. COMPILED LAWS ANN. TITLE 62, ch. 3, § 13 (1967).

<sup>8</sup>N.H. REV. STAT. ANN. § 281.10 (1966).

<sup>9</sup>KY. REV. STAT. ANN. § 342.165 (1963).

<sup>10</sup>MO. STAT. ANN. § 287.120 (1965).

<sup>11</sup>N.M. STAT. ANN. ch. 59, art. 10, § 7, 36 (1953).

<sup>12</sup>N.C. GEN. STAT. ch. 97, § 11 (1965).

<sup>13</sup>OHIO CONST. art. II, § 35.

<sup>14</sup>UTAH CODE ANN. TITLE 35, ch. 1, § 12 (1966).

<sup>15</sup>WIS. STAT. ANN. § 102.57 (1957).

<sup>16</sup>CAL. LABOR CODE § 4553 (Deering 1960).

<sup>17</sup>MASS. LAWS ANN. ch. 152, § 28 (Michie 1965).

<sup>18</sup>KY. REV. STAT. ANN. § 342.015 (1963).

<sup>19</sup>MD. CODE ANN. art. 101, § 44 (1957).

<sup>20</sup>ORE. REV. STAT. § 656.156 (1967).

<sup>21</sup>WASH. REV. CODE ANN. § 51.24.020 (1962).

<sup>22</sup>W. VA. CODE ch. 23, art. 4, § 2 (Michie Supp. 1969).

<sup>23</sup>TEX. CIVIL STAT. art. 8306, § 5 (1967).

<sup>24</sup>*Serna v. Statewide Contractors, Inc.*, 429 P.2d 504 (Ariz. App. 1967).  
*But see, Collins v. Dravo Contracting Co.*, 114 W. Va. 229, 171 S.E. 757 (1933).

Nevertheless, the court held that the employer's failure to act under these circumstances, at least, did not constitute "willful misconduct" so as to permit an action for negligence. Even where an employer failed to rectify a condition which had injured the employee twice before, the Oregon court has held that there was no "deliberate intent" to produce the injury.<sup>25</sup>

Generally, tort actions alleging injuries caused by the employer's willful misconduct have met with little success either because all such injuries were held to be compensable under the compensation statute<sup>26</sup> or because there was no proof of a specific intent to injure the employee.<sup>27</sup> Thus, where the plaintiff alleged that his employer intentionally and unlawfully removed safety devices from machines operated by plaintiff for the purpose of increasing profits and production, such allegations were held insufficient to remove plaintiff's injuries from the compensation act because there was no allegation that the employer had acted with a deliberate intent to injure the plaintiff.<sup>28</sup> Some courts have also refused to entertain the tort action under those compensation acts which permit employees to collect compensation and bring a tort action if they can prove that their injuries resulted from the deliberate intent of their employer to injure or kill, where there was no specific proof that the employer intended to injure the particular plaintiff.<sup>29</sup>

## II.

### THE DELIBERATE INTENT DILEMMA IN WEST VIRGINIA

An historical review of the West Virginia cases dealing with the so-called "deliberate intent" statute provides a picture of uncer-

<sup>25</sup>*Caline v. Meade*, 239 Ore. 239, 396 P.2d 694 (1964).

<sup>26</sup>*E.g.*, *Pearson v. Rogers Galvanizing Co.*, 115 Ind. App. 426, 59 N.E.2d 364 (1945); *Duncan v. Perry Packing Co.*, 162 Kan. 79, 174 P.2d 78 (1946); *Kennecott Copper Corp. v. Reyes*, 75 Nev. 212, 337 P.2d 624 (1959); *Roberts v. Barklay*, 369 P.2d 808 (Okla. 1962).

<sup>27</sup>*E.g.*, *Wilkinson v. Achber*, 101 N.H. 7, 131 A.2d 51 (1957); *Breimhorst v. Beckman*, 227 Minn. 409, 35 N.W.2d 719 (1949); *Cummings v. McCoy*, 192 S.C. 469, 7 S.E.2d 222 (1940).

<sup>28</sup>*Santiago v. Brill Monfort Co.*, 10 N.Y.2d 718, 176 N.E.2d 835, 219 N.Y.S.2d 266 (1961).

<sup>29</sup>*See e.g.*, *Fryman v. Electric Steam Radiator Corp.*, 277 S.W.2d 25 (Ky. 1955); *Jenkins v. Carman Mfg. Co.*, 79 Ore. 448, 155 Pac. 703 (1916); *Biggs v. Donovan-Corkery Logging Co.*, 185 Wash. 284, 54 P.2d 235 (1936); *Delthony v. Standard Furniture Co.*, 119 Wash. 298, 205 Pac. 379 (1922); *Allen v. Raleigh-Wyoming Mining Co.*, 117 W. Va. 631, 186 S.E. 612 (1936). *But see* *Collins v. Dravo Contracting Co.*, 114 W. Va. 229, 171 S.E. 757 (1933), and *Weis v. Allen*, 147 Ore. 670, 35 P.2d 478 (1934).

tainty and confusion which suggests a need for statutory modification. The West Virginia statute provides in part:<sup>30</sup>

If injury or death result to an employee from the deliberate intention of his employer to produce such injury or death, the employee, the widow, widower, child or dependent of the employee shall have the privilege to take under this chapter, and shall also have cause of action against the employer, as if this chapter had not been enacted, for any excess of damages over the amount received or receivable under this chapter.

The West Virginia Supreme Court of Appeals has found this to be a troublesome statute.

In a 1933 case, *Collins v. Dravo Contracting Co.*,<sup>31</sup> the plaintiff alleged that the employer willfully and deliberately allowed plaintiff's decedent to work under an overhanging bank, which the employer well knew was about to collapse; and that plaintiff's decedent was thereby killed by being buried alive. The court indicated that the difficulty in bringing actions under this statute lies in defining "deliberate intention." Some definitions, the court said:<sup>32</sup>

[R]ange from the statement that a man is presumed to intend the ordinary and usual consequences of his acts, to definitions which make intent practically depend upon the existence of actual malice. In its nature, it is bound to be the existence of a state of mind, and since that state of mind must be arrived at in proof by the establishment of facts extraneous to the mind itself, it seems to us that it is always bound to be a deduction or conclusion from the facts so established.

The court did not state that a deliberate intent to injure could be inferred from the facts alleged but held that these allegations were sufficient to admit evidence, in addition to the facts alleged, to show such intent.

The *Collins* decision raised at least two important questions - (1) did the court recognize that an employee may be injured or killed through omissions which may constitute deliberate intent

<sup>30</sup>W. VA. CODE ch. 23, art. 4, § 2 (Michie Supp. 1969).

<sup>31</sup>114 W. Va. 229, 171 S.E. 757 (1933).

<sup>32</sup>*Id.* at 235, 171 S.E. at 759.

and not mere negligence only; and (2) in order to state a good cause of action under this statute, is it only necessary that one allege facts extraneous to the mind, from which a conclusion or deduction of the existence of deliberate intent may be drawn?

Perhaps as a result of the court's failure to answer these questions adequately, one year later it was faced again with the problem of applying this statute to a bizarre set of facts. In *Maynard v. Island Creek Coal Co.*<sup>33</sup> the plaintiff alleged that a conveyer of a continuous chain of buckets had come into a state of disrepair which an employee of the defendant attempted to ameliorate by inserting a bolt that protruded above the surface covering of the conveyer at a place where the covering was broken and the moving buckets exposed. As a result, plaintiff's decedent stumbled over the extended bolt, fell into the open conveyer, and was killed. Plaintiff further alleged that the covering was frequently out of repair and that the danger of its breaking and momentarily coming open was so apparent that defendant had notice that plaintiff's decedent was required to work in a veritable death trap. To the plaintiff the events allegedly constituted "willful, deliberate, and unlawful negligence" done with deliberate intent to injure or kill plaintiff's decedent. However, in ruling on these allegations the court said:<sup>34</sup>

Gross negligence is not tantamount to "deliberate intention" to inflict injury. It may be that the carelessness indifference and negligence of an employer may be so wanton as to warrant a judicial determination that his ulterior intent was to inflict injury. But in the very nature of things, a showing which would warrant such finding would have to be *clear and forceful in high degree.*

Thus the court, rather than dispelling the uncertainty left by *Collins*, clouded the issue considerably more by the indefiniteness of the terms "clear," "forceful," and "high degree."

In *Maynard* the court recognized the allegations in *Collins* as "incriminatory" and "revolting" but refused to go further.<sup>35</sup> The uncertainty following *Collins* was thus increased in *Maynard* because in the latter the court denied the sufficiency of the allegations upon the rationalization that *Collins* presented a far more ag-

<sup>33</sup>115 W. Va. 249, 175 S.E. 70 (1934).

<sup>34</sup>*Id.* at 253, 175 S.E. at 72 (emphasis added).

<sup>35</sup>*Maynard v. Island Creek Coal Co.*, 115 W. Va. 249, 175 S.E. 70 (1934).

gravated situation and seldom can such facts as alleged in *Collins* be pleaded.

Perhaps realizing that the questions raised under the deliberate intent statute had not been adequately answered in either *Collins* or *Maynard*, the court in *Allen v. Raleigh-Wyoming Mining Co.*<sup>36</sup> began to look elsewhere for help. The court in *Allen* did not even attempt to apply the clouded principles previously established in *Collins* and *Maynard*, but rather discussed the history of West Virginia's compensation statute and compared the decisions of other jurisdictions with similar statutes. The court's approach in *Allen* seemed to be as if West Virginia had no prior case law in this area. The court merely stated the ruling in *Collins* and *Maynard* and then, without stating a reason, held the allegations in question insufficient to allow the plaintiff the additional cause of action.

It seems ironic that what may have been the weakest set of facts from the plaintiff's standpoint has prompted the court to make, perhaps, its strongest statement favorable to a plaintiff, on the deliberate intent statute. In *Brewer v. Appalachian Const. Inc.* the court said in syllabus 3:<sup>37</sup>

In an action by an employee against an employer, who is a subscriber to the Workmen's Compensation Fund and not in default, for an injury committed with deliberate intent, the allegations of the declaration must allege facts showing, or *clearly implying, such intent*; negligence, however wanton does not supply such intent.

After reviewing the previous cases in West Virginia dealing with this issue, the court recognized that the charge of deliberate intention is necessarily only a deduction from the allegations of knowledge of the dangers involved. Nevertheless, relying upon the

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<sup>36</sup>117 W. Va. 631, 186 S.E. 612 (1936). The plaintiff was injured while riding on the front end of a trip of empty mine cars when he struck a wooden trap door which hung across the track. Prior to the day of this accident a piece of canvass was used in place of this wooden trap door. Plaintiff denied that he had knowledge of the installation of the wooden door.

<sup>37</sup>135 W. Va. 739, 65 S.E.2d 87 (1951) (emphasis added). The plaintiff alleged that the defendant stored a large quantity of powder and explosives, fifteen hundred dynamite caps, three hundred sticks of dynamite, and a large quantity of gasoline in or near mine buildings where plaintiff worked. The declaration alleged that these acts were done with a deliberate intent to injure or kill the plaintiff and further that these acts were in violation and disregard of a state statute prohibiting the storage of such explosives in or near mine buildings.

previous cases, the court followed the narrow view that the carelessness, negligence, and recklessness of the defendant in failing to obviate these dangers are not sufficient to show a deliberate intention to injure or kill.

### III.

#### CONCLUSION

Normally, the perpetrator of an intentional tort is liable for exemplary or punitive damages.<sup>38</sup> However, if an employer who commits an intentional tort need only pay workmen's compensation benefits, he not only enjoys a substantial windfall, but also escapes a deterrent against similar future behavior. An employer who knows that if certain changes are effected or certain conditions are continued, an unreasonable risk of harm to his employees will exist, may not be far removed, in terms of culpability, from an employer who intentionally abuses his employees. Therefore, if the courts were to take a more solicitous attitude toward such employees, this should serve as a deterrent to continued reckless, indifferent industrial practices.

It has been suggested that the employee be given a tort remedy at law, in addition to compensation benefits, where the employee is injured as a result of his employer's negligence.<sup>39</sup> Several arguments are offered in support of this proposal. First, an employer who negligently injures another's property is liable for the full amount of the loss, and therefore his liability should not be less for negligently injuring a human being. Since workmen's compensation is primarily a wage loss insurance system, it looks upon the employee as an instrument of production and not as a human being. It seems unreasonable that a system which excludes his value as a human being should be his exclusive remedy.<sup>40</sup> Second, when personal injuries with such tragic severity as pain and suffering, permanent disfigurement, impotence or sterility would be fully compensable to a non-employee victim, an employee suffering such injuries should not go uncompensated merely because a loss of a different nature is insured by his employer.<sup>41</sup> Third, with the downfall of such doctrines as charitable and governmental immun-

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<sup>38</sup>See McCORMICK, DAMAGES § 81 (1935).

<sup>39</sup>Marcus, *Advocating The Rights Of The Injured*, 61 MICH. L. REV. 921 (1963).

<sup>40</sup>*Id.* at 933-34.

<sup>41</sup>*Id.* at 934.

ity,<sup>42</sup> full restoration for negligently inflicted injuries seems to be the general rule. Therefore, since the rationale behind workmen's compensation from the employer's standpoint is to prevent tort actions by injured employees, perhaps this is no longer a sufficient reason for the law to discriminate against a negligently injured person merely because the tortfeasor is his employer.<sup>43</sup> Fourth, the fact that avoidable injuries could cost more than unavoidable injuries should create an effective economic motivation for accident prevention and safety.<sup>44</sup>

As long as compensation benefits remain inadequate along with continued gaps in coverage, employees will continue to assert tort actions against their employers wherever possible. The fundamental premise that all work injuries should be compensated under workmen's compensation is being challenged by attacks on the exclusivity provisions in the compensation acts. These attacks reflect dissatisfaction with the present status of workmen's compensation and suggest that reform may be desirable.

*Larry Andrew Winter*

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<sup>42</sup>See e.g., *Muskof v. Corning Hosp. Dist.*, 55 Cal.2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (governmental immunity); *Mullikin v. Jewish Hosp. Ass'n*, 348 S.W.2d 930 (Ky. 1961) (charitable immunity); *Adkins v. St. Francis Hosp.*, 149 W. Va. 705, 143 S.E.2d 154 (1965) (charitable immunity).

<sup>43</sup>Marcus, *supra* note 39, at 934.

<sup>44</sup>*Id.* at 935.