

# ***Brady v. Safety-Kleen Corp.*: Tipping Ohio's Workers' Compensation Scale in Favor of the Employee**

"At a very early stage, . . . it became apparent [in Ohio] that uttering the magic words 'intentional tortious act' was all that was necessary to bypass the exclusiveness bar . . . ."<sup>1</sup>

## I. INTRODUCTION

In 1991, the Ohio Supreme Court, through its holding in *Brady v. Safety-Kleen Corp.*,<sup>2</sup> asserted judicial eminence to usurp legislative power by deeming Ohio Revised Code Section 4121.80 unconstitutional *in toto*.<sup>3</sup> Section 4121.80, as part of Amended Substitute Senate Bill 307,<sup>4</sup> was the Ohio General Assembly's response to a line of cases that attempted to establish the circumstances under which an employee could sue an employer for intentional tort.<sup>5</sup> The *Brady* court held that such a response, as codified, conflicted with legislative authority under Article II, Sections 34 and 35 of the Ohio Constitution and was consequently unconstitutional.<sup>6</sup> As it stands today in

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<sup>1</sup> 2A ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 68.15(b), 13-85 (1993).

<sup>2</sup> *Brady v. Safety-Kleen Corp.*, 576 N.E.2d 722 (Ohio 1991).

<sup>3</sup> *Id.* at 724-25.

<sup>4</sup> Act of May 23, 1986, 1986 Ohio Laws 718.

<sup>5</sup> See *Jones v. VIP Dev. Co.*, 472 N.E.2d 1046 (Ohio 1984); *Blankenship v. Cincinnati Milacron Chems.*, 433 N.E.2d 572 (Ohio), *cert. denied*, 459 U.S. 857 (1982); *Delamotte v. Unitcast Div. of Midland Ross*, 411 N.E.2d 814 (Ohio Ct. App. 1978); *Mercer v. Uniroyal, Inc.*, 361 N.E.2d 492 (Ohio Ct. App. 1976).

Section 4121.80 was repealed by Ohio Senate Bill 192, effective December 1, 1992, 1992 Ohio Legis. Serv. 5-347 (Baldwin).

<sup>6</sup> *Brady*, 576 N.E.2d at 728-30. Article II, § 34 provides: "Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power." OHIO CONST. art. II, § 34.

Section 35 provides in pertinent part:

For the purpose of providing compensation to workmen . . . for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers . . . . Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law . . . shall not be

Ohio, recovery under workers' compensation is no longer exclusive. Consequently, Ohio's workers' compensation system is unbalanced, with the employee benefiting at the expense of the employer.

This Comment will trace the development of workers' compensation law in Ohio, including a discussion of the relevant case law that led up to the enactment of Section 4121.80. An analysis of *Brady* will follow, discussing the impact the case has had and will have on workers' compensation law in Ohio. The Comment will conclude by presenting proposals for future development of intentional tort law in the workers' compensation arena, as well as briefly analyzing Ohio's recent reform of its workers' compensation system and its effect on intentional tort in the workplace.

## II. THE HISTORY AND DEVELOPMENT OF OHIO'S WORKERS' COMPENSATION LAW

### A. *Early History*

At common law, before the advent of workers' compensation acts, the master owed a very limited duty to his servant, who "was expected . . . to accept and take upon himself all of the usual risks of the trade, together with any unusual risks of which he had knowledge, and to relieve the employer of any duty to protect him."<sup>7</sup> By 1921, practically all states had enacted some form of workers' compensation law aimed at balancing the risks and responsibilities between employer and employee regarding injury in the workplace.<sup>8</sup> The financial burden of accident losses was removed from the employee and placed upon the employer, who subsequently transferred the additional cost to the consumer.<sup>9</sup> The employer, in return, was protected by compulsory liability insurance, spreading the burden over the entire industry.<sup>10</sup>

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liable to respond in damages at common law or by statute for such death, injuries or occupational disease.

OHIO CONST. art. II, § 35.

<sup>7</sup> W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 80, at 568 (5th ed. 1984).

<sup>8</sup> *Id.* at 573.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* For a more thorough analysis of the history and theories behind workers' compensation law in the United States, see KEETON ET AL., *supra* note 7, § 80. See also 1 ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION, §§ 1-2 (1993); Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775 (1982); Cynthia S. Miller, Note, *Blankenship v. Cincinnati Milacron*

Ohio's first workers' compensation system was established in 1911,<sup>11</sup> based upon the findings of a five-member bipartisan committee created to review the subject.<sup>12</sup> Participation in the program did not become compulsory, however, until an amendment to the Ohio Constitution was adopted in 1912.<sup>13</sup>

Prior to 1924, the Ohio Constitution did not completely eliminate an employee's right to sue an employer at common law. Section 1465-76 of the Ohio General Code permitted an employee to seek common-law redress if the employer: (1) acted willfully or (2) did not comply with a specific safety requirement.<sup>14</sup> In 1914, an amendment to Section 1465-76 defined a willful act as one done "knowingly and purposely, with the direct object of injuring another."<sup>15</sup> Thereafter, in *Gildersleeve v. Newton Steel Co.*, the Supreme Court of Ohio emphasized that, to bring an action under Section 1465-76, an employer's act must exhibit a conscious intent to inflict injury upon another.<sup>16</sup>

The Ohio Constitution was again amended in 1924 to provide additional compensation to employees injured as a result of specific safety violations of employers and to abolish the "open liability" of employers.<sup>17</sup> Although the court in *Bevis v. Armco Steel Corp.*<sup>18</sup> viewed the 1924 amendment as an implicit repeal of Section 1465-76, that Section was not expressly repealed until 1931.<sup>19</sup>

As a result of the changes in the Ohio Constitution, workers' compensation was deemed to be the exclusive remedy of an employee injured in the workplace. Regardless, Ohio courts attempted to circumvent the harshness of the act through holdings such as *Triff v. National Bronze & Aluminum Foundry*

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Chemical Co.: *Workers' Compensation and the Intentional Tort A New Direction for Ohio*, 12 CAP. U. L. REV. 287 (1982); Donald A. Nickerson, Jr., Comment, *Ohio's Attempt to Circumvent the Concept of Intentional Tort—Enactment of Revised Code Section 4121.80*, 16 CAP. U. L. REV. 278 (1986); Scott Washam, Comment, *The New Workers' Compensation Law in Ohio: Senate Bill 307 Was No Accident*, 20 AKRON L. REV. 491 (1987).

<sup>11</sup> Act of June 15, 1911, 1911 Ohio Laws 524.

<sup>12</sup> Act of May 17, 1910, 1910 Ohio Laws 231. For a discussion on the committee's findings, see Donald P. Wiley, Comment, *Workers' Compensation in Ohio: Scope of Employment and the Intentional Tort*, 17 AKRON L. REV. 249 (1983).

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

<sup>14</sup> OHIO GEN. CODE ANN. § 1465-76 (Anderson Supp. 1916).

<sup>15</sup> Act of Feb. 17, 1914, 1914 Ohio Laws 193, 194.

<sup>16</sup> *Gildersleeve*, 142 N.E. 678, 680 (Ohio 1924).

<sup>17</sup> H.R.J. Res. 40, 85th Leg., Reg. Sess., 1923 Ohio Laws 631; see OHIO CONST. art. II, § 35.

<sup>18</sup> 93 N.E.2d 33, 35 (Ohio Ct. App. 1949), *appeal dismissed per curiam*, 91 N.E.2d 479 (Ohio), *cert. denied*, 340 U.S. 810 (1950).

<sup>19</sup> Act of Apr. 7, 1931, 1931 Ohio Laws 26, 39.

*Co.*<sup>20</sup> In *Triff*, an employee died after contracting an occupational disease which was not provided for by the legislature under the Workers' Compensation Act. The court held that employees could sue their employer at common law if the injury was not compensable under workers' compensation.<sup>21</sup> Accordingly, the *Triff* decision invoked an amendment to existing law, bringing occupational diseases within the Act and restoring the exclusivity doctrine.<sup>22</sup>

In 1959, the legislature opened the door for judicial destruction of exclusivity by amending Ohio Revised Code Section 4123.74<sup>23</sup> to read in part: "received or contracted by any employee in the course of or arising out of his employment."<sup>24</sup> Subsequently, courts used the amended language to formulate exceptions to exclusivity,<sup>25</sup> culminating in the ultimate blow to workers' compensation: the intentional tort exception set forth in *Blankenship v. Cincinnati Milacron Chemicals, Inc.*<sup>26</sup> and elucidated in *Jones v. VIP Development Co.*<sup>27</sup>

### B. Cases Leading to Enactment of Section 4121.80

The issue before the court in *Blankenship* was whether the trial court properly dismissed the plaintiffs' complaint on the grounds that Article II, Section 35 of the Ohio Constitution barred employees from bringing an action at law against their employer for intentional tort.<sup>28</sup> The court found that Ohio law did not expressly grant immunity to employers from actions alleging

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<sup>20</sup> 20 N.E.2d 232 (Ohio 1939).

<sup>21</sup> Washam, *supra* note 10, at 498.

<sup>22</sup> Act of May 26, 1939, 1939 Ohio Laws 422. Court decisions reached after the 1939 amendment illustrate how strictly the judiciary adhered to the exclusivity doctrine. In *Bevis v. Armco Steel Corp.*, 93 N.E.2d at 37 (Ross, J., concurring), the court did not allow a common law action against an employer whose intentional misrepresentation aggravated a disease contracted by an employee in the course of employment. *See also* *Greenwalt v. Goodyear Tire & Rubber Co.*, 128 N.E.2d 116 (Ohio 1955), *overruled by* *Vandemark v. Southland Corp.*, 525 N.E.2d 1374 (Ohio 1988).

<sup>23</sup> Act of Aug. 19, 1959, 1959 Ohio Laws 1334.

<sup>24</sup> OHIO REV. CODE ANN. § 4123.74 (Anderson 1991 & Supp. 1992).

<sup>25</sup> *See* *Delamotte v. Unitcast Div. of Midland Ross*, 411 N.E.2d 814 (Ohio Ct. App. 1978) (common law action against employer who fraudulently withheld information concerning employee's contracting of silicosis); *Mercer v. Uniroyal*, 361 N.E.2d 492 (Ohio Ct. App. 1976) (common law action against employer where hazard is one common to the public and not unique to employment situation).

<sup>26</sup> 433 N.E.2d 572 (Ohio 1982).

<sup>27</sup> 472 N.E.2d 1046 (Ohio 1984).

<sup>28</sup> *Blankenship*, 433 N.E.2d at 575.

intentional tort.<sup>29</sup> Furthermore, the court held that an injury occurring as a result of an intentional tort does not arise out of the course of employment and, subsequently, does not fall under the employer immunity umbrella established by Section 4123.74.<sup>30</sup>

*Jones v. VIP Development Co.* further scrutinized the role of the intentional tort in the workers' compensation arena and resolved a number of issues left open by the *Blankenship* court. First, the court defined an intentional tort as "an act committed with the intent to injure another or committed with the belief that such injury is substantially certain to occur."<sup>31</sup> It specifically rejected the argument that a specific intent to injure is an essential element to an intentional tort, holding, alternatively, that intent may be implied when an "actor proceeds despite a perceived threat of harm to others which is substantially certain, not merely likely, to occur."<sup>32</sup>

The court also held that receipt of workers' compensation benefits does not bar employees from maintaining a common-law action against their employer based on intentional tort or receiving damages therefrom.<sup>33</sup> Finally, the court stated that an employer found liable for an intentional tort is not entitled to a set-off of damages based on the amount of workers' compensation benefits received by the employee.<sup>34</sup> The court denied that its decision would result in a double recovery of damages, holding that an intentional tort award is supplemental to an award under the Act.<sup>35</sup>

As one commentator noted, the liberal construction of the court in both *Blankenship* and *Jones* sparked heated debate in legal, business, and industrial communities.<sup>36</sup> The strongest debate and subsequent reaction, however, came from the General Assembly as part of Amended Substitute Senate Bill 307.<sup>37</sup>

### C. The Legislative Response Pre-Brady

In August 1986, a new section of the Ohio Revised Code dealing with workers' compensation claims became effective. Essentially, Section 4121.80

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<sup>29</sup> *Id.* at 576.

<sup>30</sup> *Id.*

<sup>31</sup> *Jones*, 472 N.E.2d at 1051 (quoting 1 RESTATEMENT (SECOND) OF TORTS § 8A (1965)).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1055.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Washam, *supra* note 10, at 505.

<sup>37</sup> Act of May 23, 1986, 1986 Ohio Laws 718.

created a statutory cause of action for employees injured as a result of the intentional torts of their employers.<sup>38</sup> While codifying an employee's right to avoid the exclusivity of workers' compensation in a limited number of circumstances, the statute also placed limitations on the employee that were not present at common law.<sup>39</sup> Specifically, these limitations included: (1) a set-off provision for an excess of damages received or receivable under the Act,<sup>40</sup> (2) a requirement that the determination of damages in intentional tort cases against employers be set by the Industrial Commission and not a jury,<sup>41</sup> and (3) a state-managed tort fund from which all damage awards are to be paid to employees successful in intentional tort suits against their employers.<sup>42</sup>

In its first opportunity to discuss the viability of Section 4121.80, the Ohio Supreme Court in *Brady v. Safety-Kleen Corp.*<sup>43</sup> deemed the statute unconstitutional *in toto*.

### III. *BRADY V. SAFETY-KLEEN CORP.*

#### A. *The Facts*

Mike O. Brady was a truck driver for Safety-Kleen Corporation.<sup>44</sup> Among his duties was the hauling of hazardous materials to and from Safety-Kleen's recycling facility.<sup>45</sup> On July 24, 1987, Brady and several co-workers were in two trucks traveling through Pennsylvania en route to the recycling facility.<sup>46</sup> The truck ahead of Brady spilled perchloroethylene which subsequently splashed onto Brady's windshield.<sup>47</sup> Brady claimed thereafter that he was exposed to phosgene gas which was produced when the perchloroethylene came in contact with the exhaust manifold of Brady's truck.<sup>48</sup> He was diagnosed with progressive fibrosis of the lungs and a restrictive lung disease precipitated by

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<sup>38</sup> OHIO REV. CODE ANN. § 4121.80 (repealed 1992). For an in-depth analysis of Section 4121.80, see Douglas L. Hertlein, Comment, *Intentional Torts by Employers in Ohio, The General Assembly's Solution: Ohio Revised Code Section 4121.80*, 56 U. CIN. L. REV. 247 (1987); Nickerson, *supra* note 10; Washam, *supra* note 10.

<sup>39</sup> Hertlein, *supra* note 38, at 247.

<sup>40</sup> OHIO REV. CODE ANN. § 4121.80(A) (Anderson 1991) (repealed 1992).

<sup>41</sup> OHIO REV. CODE ANN. § 4121.80(D) (Anderson 1991) (repealed 1992).

<sup>42</sup> OHIO REV. CODE ANN. § 4121.80(E) (Anderson 1991) (repealed 1992).

<sup>43</sup> 576 N.E.2d 722 (Ohio 1991).

<sup>44</sup> *Id.* at 723.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* Perchloroethylene is a dry cleaning agent. *Id.*

<sup>48</sup> *Id.*

scarring in his lungs, conditions medically determined to be a direct result of his exposure to the gas on July 24, 1987.<sup>49</sup>

Brady filed a complaint in federal court alleging, inter alia, that the injuries he sustained were a direct and proximate result of Safety-Kleen's intentionally tortious conduct.<sup>50</sup> Thereafter, Safety-Kleen filed a motion for summary judgment on the pleadings, claiming that it was immune from liability under Ohio's workers' compensation law.<sup>51</sup> Finding that the complaint set forth a properly pleaded intentional tort cause of action, the trial court overruled the motion.<sup>52</sup>

Brady also requested a jury trial.<sup>53</sup> Safety-Kleen filed a motion to strike both the claim for damages and the request for a jury trial with regard to the intentional tort on the grounds that both were prohibited under Ohio Revised Code Section 4121.80.<sup>54</sup> In response, Brady asserted that Ohio Revised Code Section 4121.80 violated his rights to a jury trial and to equal protection.<sup>55</sup>

Upon review of the parties' briefs, the trial court issued an order holding Ohio Revised Code Section 4121.80 constitutional and declaring that diversity jurisdiction did not exist in the case because the State of Ohio, as custodian of the Intentional Tort Fund, was the real party defendant in interest.<sup>56</sup> Regardless, the cause was certified to the Supreme Court of Ohio to determine whether Ohio Revised Code Section 4121.80 was unconstitutional in whole or in part.<sup>57</sup>

## B. *The Opinion*

### 1. *The Majority*

The supreme court endeavored to determine if Section 4121.80, as a whole, transcended the boundaries of legislative power under the Ohio Constitution.<sup>58</sup> The court ultimately held that Section 4121.80 exceeded and

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<sup>49</sup> *Id.* at 722.

<sup>50</sup> *Brady v. Safety-Kleen Corp.*, 710 F. Supp. 684 (S.D. Ohio 1989).

<sup>51</sup> *Brady*, 576 N.E.2d at 723.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 728.

conflicted with the authority granted to the General Assembly under two provisions of the constitution and was, thus, unconstitutional *in toto*.<sup>59</sup>

First, the court found Section 4121.80 totally repugnant to Article II, Section 34.<sup>60</sup> It agreed with Brady that the statute did not promote the health and safety of employees.<sup>61</sup> Because Section 4121.80 attempted to remove the right to a remedy under common law that would otherwise benefit the employee, it was in direct violation with the law that mandated the furtherance of the general welfare of all employees.<sup>62</sup>

Next, the court examined Section 4121.80 in light of Article II, Section 35.<sup>63</sup> Citing its opinion in *Blankenship*,<sup>64</sup> the court reaffirmed that the protection afforded employees under workers' compensation is for negligent, not intentional, conduct.<sup>65</sup> Further, adopting the analysis set forth by Justice Douglas in his dissent to the majority opinion in *Taylor v. Academy Iron & Metal Co.*,<sup>66</sup> the court found that the legislature cannot constitutionally enact legislation governing intentional torts that occur within the employment relationship because such conduct necessarily will always take place outside of the scope of employment.<sup>67</sup> Therefore, any attempt to regulate intentionally tortious acts occurring within the workplace is beyond the scope of legislative power granted under Article II, Section 35.<sup>68</sup>

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<sup>59</sup> *Id.* at 730.

<sup>60</sup> *Id.* at 728; see OHIO CONST. art. II, § 34.

<sup>61</sup> *Brady*, 576 N.E.2d at 728.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*; see OHIO CONST. art. II, § 35.

<sup>64</sup> See *supra* notes 26–30 and accompanying text.

<sup>65</sup> *Brady*, 576 N.E.2d at 729.

<sup>66</sup> 522 N.E.2d 464 (Ohio 1988).

<sup>67</sup> *Brady*, 576 N.E.2d at 729 (quoting *Taylor*, 522 N.E.2d at 476 (Douglas, J., dissenting)). Justice Douglas stated in part:

Injuries resulting from an employer's intentional torts, even though committed at the workplace, are utterly outside the scope of the purposes intended to be achieved by Section 35 and by the Act. *Such injuries are totally unrelated to the fact of employment.* When an employer intentionally harms his employee, that act effects a complete breach of the employment relationship, and for purposes of the legal remedy for such an injury, the two parties are not employer and employee, but intentional tortfeasor and victim. . . . The employer has forfeited his status as such and all the attendant protections fall away. . . . Section 35 concerns itself solely with compensation for injuries arising from employment. R.C. 4121.80 concerns itself solely with injuries which by their nature have no connection whatsoever with the fact of employment.

*Taylor*, 522 N.E.2d at 476 (citations omitted).

<sup>68</sup> *Brady*, 576 N.E.2d at 729.



## 2. Concurring Opinions

Justice Douglas wrote separately to address the constitutionality of the various parts of Section 4121.80. Section 4121.80(D) placed a cap on damages recoverable by an employee claiming intentionally tortious conduct by his employer.<sup>69</sup> Justice Douglas argued that, as a result, employees were treated differently from other victims of intentional torts solely because of their status.<sup>70</sup> He noted that reasonable grounds must exist in order to create a special category of intentionally injured employees within the class of all intentional tort victims.<sup>71</sup> Because he found no reason for creating the subcategory, Justice Douglas concluded that Section 4121.80(D) violated the right of equal protection guaranteed in Article I, Section 2 of the Ohio Constitution.<sup>72</sup>

Justice Douglas also found Section 4121.80(D) to be in violation of Article I, Section 5 of the constitution which guarantees the right to a trial by jury.<sup>73</sup> He believed that Section 4121.80(C)(2) could secure a jury trial on the issue of liability. It was clear to him, however, that Section 4121.80(D), by requiring the Industrial Commission to determine damages, deprived employees of their constitutional rights.<sup>74</sup> He also found Section 4121.80 as a whole to be in violation of Article I, Section 16 of the constitution which guarantees every person access to all courts to seek a remedy for injury.<sup>75</sup>

Although Justice Brown agreed with the result of the majority opinion, he wrote separately because he felt that the legislature could modify intentional tort law through its exercise of police power.<sup>76</sup> Therefore, he believed it necessary to go beyond the analysis of the majority opinion to test Section 4121.80 against other constitutional provisions.<sup>77</sup>

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<sup>69</sup> *Id.* at 730 (Douglas, J., concurring).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* (quoting *Porter v. Oberlin*, 205 N.E.2d 363 (Ohio 1965)).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* Section 4121.80(C)(2) stated that the "court" may dismiss an action "[u]pon a timely motion for a directed verdict against the plaintiff if after considering all the evidence and every inference legitimately and reasonably raised thereby most favorably to the plaintiff, the court determines that there is not sufficient evidence to find the facts required to be proven." OHIO REV. CODE ANN. § 4121.80(C)(2) (Anderson 1991) (repealed 1992).

<sup>75</sup> *Brady*, 576 N.E.2d at 731.

<sup>76</sup> *Id.* at 733; cf. *State ex rel. Yapple v. Creamer*, 97 N.E. 602 (Ohio 1912).

<sup>77</sup> *Brady*, 576 N.E.2d at 733.

He agreed with Justice Douglas that Section 4121.80 violated the right to trial by jury.<sup>78</sup> He also agreed that the damage cap provision of Section 4121.80(D) was unconstitutional.<sup>79</sup> He expanded on this notion by stating that, even if the need to limit damages was to survive the rational basis test, it would probably fail on equal protection grounds.<sup>80</sup>

### 3. *The Dissent*

Justice Holmes vehemently opposed the majority opinion.<sup>81</sup> First, he argued that disagreement over the wisdom of the policy embodied by the legislature's enactment of Section 4121.80 had no bearing on its constitutionality.<sup>82</sup> Because he believed that Brady did not show that Section 4121.80 was clearly incompatible with Article II, Section 34 of the Ohio Constitution, Justice Holmes concluded that the challenge to the statute's constitutionality should fail.<sup>83</sup>

Justice Holmes next addressed the validity of Section 4121.80 under Article II, Section 35 of the constitution.<sup>84</sup> He found it absurd that the majority should rely on the dissent in *Taylor* or adopt the *Blankenship* view that an intentional tort does not arise in the course of employment but necessarily occurs outside of an employment relationship.<sup>85</sup> Rather, Justice Holmes relied on the language in *Industrial Commission v. Ahern*,<sup>86</sup> which defines the terms "in the course of employment" under Article II, Section 35 as "an injury sustained in the performance of some required duty done directly or incidentally in the service of the employer."<sup>87</sup> Therefore, under a broad

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 734.

<sup>80</sup> *Id.* (citing *Morris v. Savoy*, 576 N.E.2d 765 (Ohio 1991); *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Wright v. Central DuPage Hosp. Ass'n*, 347 N.E.2d 736 (Ill. App. Ct. 1976)).

<sup>81</sup> Chief Justice Moyer concurred with Justice Holmes' dissent. Justice Wright concurred for the most part, but, unlike Justice Holmes, he agreed with the ultimate decision in *Blankenship*. *Id.* at 745.

<sup>82</sup> *Id.* at 739. Justice Holmes relied on *State ex rel. Yapple v. Creamer*, 97 N.E. 602 (Ohio 1912), and *Central Ohio Transit Auth. v. Transport Workers Union Local 208*, 524 N.E.2d 151 (Ohio 1988), as authorities for the proposition that legislative power under Article II, Section 34 of the Ohio Constitution should be broadly construed.

<sup>83</sup> *Brady*, 576 N.E.2d at 740.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 741.

<sup>86</sup> 162 N.E. 272 (Ohio 1928).

<sup>87</sup> *Brady*, 576 N.E.2d at 741 (quoting *Industrial Comm'n v. Ahern*, 162 N.E. at paragraph two of the syllabus).

interpretation, any injury occurring in the workplace is compensable, including an intentional injury, and a statute so allowing is constitutional.<sup>88</sup>

Justice Holmes went on to discuss other constitutional challenges. As for equal protection, he argued that there is no constitutional requirement that workers' compensation claimants who are intentional tort victims be treated the same as all other intentional tort victims.<sup>89</sup> Furthermore, the legislature is entitled to balance the interests of employers as against employees through regulation where, as in this case, it has a legitimate interest.<sup>90</sup>

On the issue of open courts, Justice Holmes stated that Section 4121.80 did not violate the Article I, Section 16 guarantee of open courts and the right to a remedy.<sup>91</sup> Relying on *State ex rel. Yaple v. Creamer*, he argued that, through enactment of workers' compensation laws, workers consented to forego common-law causes of action in exchange for statutory protection.<sup>92</sup> If anything, Section 4121.80 improved a worker's chances of obtaining a remedy for an intentional tort claim.<sup>93</sup>

Finally, Justice Holmes argued that Section 4121.80(D), by conferring upon the Industrial Commission the power to determine damages, did not violate the right to a jury trial.<sup>94</sup> The constitutionality of this provision is further evidenced by the fact that there is no federal guarantee to a jury trial in the remedy stage of a civil proceeding.<sup>95</sup> Further, Justice Holmes pointed out that the right to a jury trial is not applicable in an administrative proceeding.<sup>96</sup>

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<sup>88</sup> *Id.* Justice Holmes noted that the facts showed that Brady allegedly sustained his injuries while he was driving a truck and employed by Safety-Kleen to do precisely what he was doing when exposed to the perchloroethylene. Therefore, he was injured "in the course of employment." *Id.*

<sup>89</sup> *Id.* at 743.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* (citing *State ex rel. Yaple v. Creamer*, 97 N.E. 602, 607 (Ohio 1912)).

<sup>93</sup> *Id.* Justice Holmes went on to argue that the cap on damages provided for in Section 4121.80 also did not violate equal protection. *Id.* at 744. He believed that, while the statute places a limit on damages, not compensation, it is part of an overall scheme allowing employees to recover benefits on a no-fault basis. *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* (citing *Tull v. United States*, 481 U.S. 412 (1987)).

<sup>96</sup> *Id.*

## IV. ANALYSIS

A. *Constitutionality Under Article II, Section 34 of the Ohio Constitution*

A number of inadequacies exist in the court's reasoning that Section 4121.80 was unconstitutional under Article II, Section 34 of the Ohio Constitution. The majority's premise was that, because Section 4121.80 removed an employee's right of redress from the common-law system, it necessarily abrogated the general welfare protection of Section 34.<sup>97</sup> The same argument could be made for the workers' compensation system as a whole. Ohio Revised Code Section 4123.74, which codifies workers' compensation, states in part: "Employers who comply with Section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of employment . . . ." <sup>98</sup> Certainly, this is a legislative enactment which attempts to remove a right to a remedy under common law that would otherwise benefit the employee. It must be noted, however, that the constitutionality of workers' compensation laws in Ohio was upheld in 1912.<sup>99</sup>

Perhaps the court should have elaborated on the notion that, while removing the right to a remedy through negligence actions promotes the safety and health of the worker, restricting the right to remedy through intentional tort does not.<sup>100</sup> The court did not cite any statistics supporting its conclusion that regulating intentional torts between employee and employer fails to enhance the well-being of the employee. In fact, the rationale behind workers' compensation in general is to provide a quid pro quo: employees give up their right to seek a common-law remedy against their employer in return for a guaranteed and speedy recovery, without the complications of a formal lawsuit.<sup>101</sup> Without specifying how Section 4121.80 digressed from this theory, the *Brady* court too quickly dismissed it under Section 34. If the court's

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<sup>97</sup> *Id.* at 728.

<sup>98</sup> OHIO REV. CODE ANN. § 4123.74 (Anderson 1991 & Supp. 1992).

<sup>99</sup> *See State ex rel. Yapple v. Creamer*, 97 N.E. 602 (Ohio 1912).

<sup>100</sup> Whether the institution of a workers' compensation system actually affects the well-being of the worker is questionable according to the 1972 report of the National Commission on State Workmen's Compensation Laws. The Commission found that the overall safety record of an employer is not measurably affected by increased workers' compensation insurance costs. NAT'L COMM'N ON STATE WORKMEN'S COMPENSATION LAWS, REPORT OF THE NAT'L COMM'N ON STATE WORKMEN'S COMPENSATION LAWS 39 (1972).

<sup>101</sup> *See supra* notes 7-10 and accompanying text.

rationale is taken literally, it, in essence, holds workers' compensation itself unconstitutional.

### B. *Constitutionality Under Article II, Section 35 of the Ohio Constitution*

It is also not altogether clear from the court's brief reasoning why Section 4121.80 was unconstitutional under Article II, Section 35. The court's basic contention was that injuries from intentional torts do not fall within those "occasioned in the course of employment" as set forth in the Ohio Constitution.<sup>102</sup> Therefore, the attempt to include intentional torts in the workers' compensation scheme by way of Section 4121.80 was unconstitutional.<sup>103</sup> The contention, however, is not ironclad.

The court conveniently mentioned, but then disregarded, the traditional approach on review of legislative acts. According to *Bishop v. Hybud Equipment Corp.*,<sup>104</sup> two rules of statutory construction must be applied. First, a court is bound, whenever possible in interpreting a statute, to preserve its constitutionality.<sup>105</sup> In keeping with the doctrine of separation of powers, a court should presume the constitutionality of a legislative enactment, and that presumption should be overcome in only the most extreme instances.<sup>106</sup> There is no indication in *Brady* that the court deferred in the least to the intent or authority of the General Assembly.

Second, when a statute is susceptible to two meanings, one constitutional and one not, courts are bound to give the statute that construction which would uphold its validity.<sup>107</sup> Article II, Section 35 covers those injuries arising in the course of employment. There is a valid argument that an intentional injury sustained by an employee while performing work-related duties occurs in the *course of employment*. According to the court in *Industrial Commission v. Ahern*,<sup>108</sup> under Article II, Section 35, "in the course of employment" connotes an injury contracted "in the performance of some required act done directly or indirectly in the service of the employer."<sup>109</sup> Instead of adopting this position and upholding the constitutionality of that aspect of Section 4121.80, however,

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<sup>102</sup> OHIO CONST. art. II, § 35.

<sup>103</sup> See *supra* notes 63-68 and accompanying text.

<sup>104</sup> 536 N.E.2d 694 (Ohio Ct. App. 1988).

<sup>105</sup> *Id.* at 697; see also *United Air Lines Inc. v. Porterfield*, 276 N.E.2d 629 (Ohio 1971); *State v. Meyer*, 470 N.E.2d 156 (Ohio Ct. App. 1983).

<sup>106</sup> *Central Ohio Transit Auth. v. Transport Workers Union Local 208*, 524 N.E.2d 151, 156 (Ohio 1988).

<sup>107</sup> *Bishop*, 536 N.E.2d at 697.

<sup>108</sup> 162 N.E. 272 (Ohio 1928).

<sup>109</sup> *Id.* at 274.

the court chose to adopt the *dissenting* opinion of Justice Douglas in *Taylor v. Academy Iron & Metal Co.*<sup>110</sup> As a result, it adopted the alternative view that a workers' compensation injury arises out of employment. Thus, the court concluded that an intentional tort *necessarily* severs the employment relationship.<sup>111</sup>

### C. *The Results of the Holding*

#### 1. *Double Recovery*

Section 4121.80(A) stated that employees, if successful in an intentional tort case against their employer, have the right to recover workers' compensation benefits and tort damages in excess of the amount "received or receivable under Chapter 4123."<sup>112</sup> In deeming Section 4121.80 unconstitutional *in toto*, the Supreme Court of Ohio has subjected employers to the possibility of double damages for intentional tort. The result is both inequitable and illogical. First, as one commentator noted, "to allow a double recovery would violate the purpose of the workers' compensation system and would place an insurmountable burden on the employer."<sup>113</sup> Employers would continue to pay workers' compensation premiums yet still be responsible for the additional cost and possible damage award arising from a common-law proceeding.<sup>114</sup> Although the ultimate solution to this problem, the election of remedies,<sup>115</sup> is arguably inequitable for employees, rejecting the supplemental

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<sup>110</sup> See *supra* notes 66–68 and accompanying text. For a discussion of the consequences of this view see *infra* notes 115–18 and accompanying text.

<sup>111</sup> *Taylor*, 162 N.E. at 274.

<sup>112</sup> OHIO REV. CODE ANN. § 4121.80(A) (Anderson 1991) (repealed 1992).

<sup>113</sup> Miller, *supra* note 10, at 310.

<sup>114</sup> *Id.*

<sup>115</sup> For a discussion on election of remedies, see John C. West, Comment, *In the Wake of Blankenship: Following Footprints into the Mire of Intentional Torts in the Workplace in Ohio*, 12 N. KY. L. REV. 267 (1985). West claims that employees "should not be put to an election, because this would make a suit at law a paper remedy unobtainable by virtually all injured employees." *Id.* at 293. He also inquires:

In a practical sense, can the claimant really be held to his election? There are generally three prerequisites to the application of the election doctrine. These are the existence of two or more remedies, the inconsistency of the remedies, and a choice of one of them. Without benefit of counsel can the average employee make an informed choice of remedy? Would the average employee be aware that he may be making an election when he filed a claim for compensation?

theory set forth in Section 4121.80(A) creates an insurmountable burden on employers.

According to the court's reasoning, an employer's intentionally tortious conduct cannot arise out of the employment relationship.<sup>116</sup> Hence, any attempt to regulate such conduct is unconstitutional.<sup>117</sup> By allowing an employee to recover benefits for a workers' compensation claim *and* full damages in tort regardless of the benefits received, however, the court is implying that the injury was both accidental *and* intentional. In *Ritchie v. Dravo Corp.*,<sup>118</sup> the federal district court found that because the "plaintiff has already been compensated for his injury under workers' compensation, and since an award under workers' compensation necessarily means that plaintiff's injury arises out of or was received in the course of his employment . . . his injury cannot be the result of the intentional tortious conduct of his employer."<sup>119</sup> As noted, one solution to this inconsistency is the election of remedies theory, arguably acrimonious to the employee. Another solution is the illogical result of *Brady* which is clearly detrimental to employers. The only balance between the two extremes was the supplemental proposition of Section 4121.80(A).

## 2. *The Unbalancing of the Workers' Compensation Scale*

*Brady* also represents a disruption of the quid pro quo theory embodied in the workers' compensation system. In attempting to strike a balance between the injured worker and the employer, the court eliminated the certainty and predictability aspects of workers' compensation.<sup>120</sup> Without Section 4121.80, an employee's remedies for intentional tort revert back to the common-law courts—a system of justice that proved to be so inequitable and inefficient for both employees and employers that a statutory scheme of recovery, workers' compensation, was implemented to provide relief. In *Brady*, the supreme court destroyed the balance which is the foundation of the workers' compensation system.<sup>121</sup> The employee loses the right to a guaranteed, speedy recovery. The

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*Id.* at 279–80 (citing 25 AM. JUR. 2D *Election of Remedies* §§ 8, 22, 23 (1966 & Supp. 1984)).

<sup>116</sup> *Brady v. Safety-Kleen Corp.*, 576 N.E.2d 722, 729 (Ohio 1991).

<sup>117</sup> *Id.*

<sup>118</sup> 585 F. Supp. 1455 (S.D. Ohio 1984).

<sup>119</sup> *Id.* at 1456.

<sup>120</sup> Wiley, *supra* note 12, at 259.

<sup>121</sup> At least one commentator advocates that any modification in the quid pro quo of workers' compensation should come only from the legislature. Helga L. Leftwich, *The Intentional-Tort Exception to the Workers' Compensation Exclusive Remedy Immunity Provision*: Woodson v. Rowland, 70 N.C. L. REV. 849, 884–87 (1992).

employer loses not only its immunity from common-law redress but must compensate the employee during the intentional tort litigation, without an offsetting reduction in damage liability.

### 3. *A Definition of Intent Open to Interpretation and Misapplication*

In *Brady*, the court rejected the Section 4121.80 definition of "intentional tort," adopting instead the *Jones* definition which states that "an intentional tort is an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur."<sup>122</sup> Most courts adhere to the position that only specific allegations of provable intent to injure will suffice for intentional tort recovery.<sup>123</sup> As Professor Larson noted, "[t]he intentional removal of a safety device or toleration of a dangerous condition may . . . set the stage for an accidental injury later. But . . . it cannot be said, if such injury does happen, that this was deliberate infliction of harm comparable to an intentional left jab to the chin."<sup>124</sup> Apparently, courts do not employ the "substantially certain" test for the simple reason that it is so difficult to construe and apply.

In order for the substantial certainty test to constitute a workable standard, it must be applied by narrow application.<sup>125</sup> Ohio courts, however, have misconstrued "substantially certain" into a standard whereby negligence cases are transformed into intentional tort cases.<sup>126</sup> As Professor Larson noted:

Since the legal justification for the common-law action is the nonaccidental character of the injury from the defendant employer's standpoint, the common-law liability of the employer cannot, under the almost unanimous rule, be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of

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<sup>122</sup> *Jones v. VIP Dev. Co.*, 472 N.E.2d 1046, 1051 (Ohio 1984).

<sup>123</sup> Edward J. O'Connell, Jr., Comment, *Intentional Employer Misconduct and Pennsylvania's Exclusive Remedy Rule After Poyser v. Newman & Co.: A Proposal for Legislative Reform*, 49 U. PITT. L. REV. 1127, 1148 (1988) (citing *Hulne v. International Harvester Co.*, 496 F. Supp. 849 (D.N.D. 1980); *Mingachous v. CBS*, 491 A.2d 368 (Conn. 1985); *Handley v. Unarco Indus.*, 463 N.E.2d 1011 (Ill. App. Ct. 1984); *Tribbett v. Tay Mor Indus.*, 471 N.E.2d 332 (Ind. Ct. App. 1984); *Leonard v. All-Pro Equities, Inc.*, 386 N.W.2d 159 (Mich. Ct. App. 1986)).

<sup>124</sup> LARSON, *supra* note 1, § 68.13, 13-71.

<sup>125</sup> See generally Nickerson, *supra* note 10, at 292-95.

<sup>126</sup> *Id.* at 292 (citing *Bradfield v. Stop-N-Go Foods, Inc.*, 477 N.E.2d 621 (Ohio 1985) (Holmes, J., dissenting)).



statute, or other misconduct of the employer short of a conscious and deliberate intent directed to the purpose of inflicting an injury.<sup>127</sup>

To avoid the danger of differing interpretations, "intentional tort" must be codified, as was the case before *Brady*.

#### D. *Alternative Solutions*

##### 1. *Right to Set-Off*

One way to arrive at some kind of compromise between *Brady* and Section 4121.80 is to allow a set-off for compensation paid to employees in intentional tort cases. Under a set-off theory, past benefits paid would be subject to being set-off against a judgment for the employee. Additionally, future benefits would be reduced to present value and similarly set-off.<sup>128</sup> This would allow an employee to pursue both statutory and common-law remedies, with the possibility of receiving: (1) workers' compensation benefits or (2) punitive damages. In addition, the employer, if innocent of intentional tort charges, is protected by the insurance scheme of workers' compensation. If guilty, the employer is liable for punitives but also maintains the protection that exists under workers' compensation. Hence, the balance is regained and double recovery is eliminated.

##### 2. *Damages Limit*

Set-off of damages was an idea adamantly opposed in *Jones*,<sup>129</sup> which was affirmed by *Brady*. An alternative solution was the one established in Section 4121.80(D): a limit on damages for intentional tort.<sup>130</sup> In his *Brady*

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<sup>127</sup> LARSON, *supra* note 1, §§ 68.13, 13-12, -13 (citations omitted).

<sup>128</sup> See generally West, *supra* note 115, at 280-82.

<sup>129</sup> Jones v. VIP Dev. Co., 472 N.E.2d at 1055.

<sup>130</sup> Section 4121.80(D) stated in relevant part:

[T]he commission shall consider the compensation and benefits payable under Chapter 4123. of the Revised Code and the net financial loss to the employee caused by the employer's intentional tort. In no event shall the total amount to be received by the employee or his estate from the intentional tort award be less than fifty per cent of no more than three times the total compensation receivable pursuant to Chapter 4123. of the Revised Code, but in no event may an award under this section exceed one million dollars.

concurrence, however, Justice Douglas argued that the cap on damages was violative of the equal protection guarantee of Article I, Section 2 of the Ohio Constitution.<sup>131</sup> Perhaps, instead of capping damages per se, Ohio could follow the lead of some state statutes which provide for a specified percentage increase in the employer's compensation benefits for various types of employer misconduct.<sup>132</sup> The advantages to this approach are twofold. One, it keeps the entire case within the workers' compensation system, so as to maintain the quid pro quo previously discussed.<sup>133</sup> Two, according to one commentator, it "protects the system against the indirect erosion that occurs when the intent requirement is attenuated to include mental states that are insufficient to support either criminal punishment or . . . punitive damages."<sup>134</sup>

### 3. Intent Requirement

As Justice Douglas also suggested, the "intent" requirement of Section 4121.80(G) is ambiguous.<sup>135</sup> The legislature must specify whether specific intent is required to sue under workers' compensation or whether conduct that is substantially certain to cause injury will suffice. There are advantages and disadvantages to both definitions. The specific intent requirement, as set forth in the workers' compensation laws of West Virginia,<sup>136</sup> removes from consideration all occurrences of an accidental nature, thereby protecting against frivolous lawsuits. If such a definition were adopted, intentional torts must

OHIO REV. CODE ANN. § 4121.80(D) (repealed 1992).

<sup>131</sup> See *supra* notes 69-72 and accompanying text.

<sup>132</sup> Joseph H. King, Jr., *The Exclusiveness of an Employee's Workers' Compensation Remedy Against His Employer*, 55 TENN. L. REV. 405, 442 (1988) (citing LARSON, *supra* note 1, §§ 69.00-.22, 69.24-70.20). Ohio already incorporates such a remedy in cases of violations of safety regulations in the workplace. See *supra* note 17 and accompanying text.

<sup>133</sup> See *supra* notes 119-20 and accompanying text.

<sup>134</sup> Epstein, *supra* note 10, at 814.

<sup>135</sup> *Brady v. Safety-Kleen Corp.*, 576 N.E.2d 722, 731 (Ohio 1991). Justice Douglas was referring to the intentional tort requirement of Section 4121.80(G) which stated:

As used in this section:

(1) "Intentional tort" is an act committed with the intent to injure another or committed with the belief that the injury is substantially certain to occur.

. . . .

"Substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition, or death.

OHIO REV. CODE ANN. § 4121.80(G) (Anderson 1991) (repealed 1992).

<sup>136</sup> W. VA. CODE § 23-4-2(C)(2)(i) (Supp. 1992).

necessarily fall outside of workers' compensation. Thereafter, the rationale behind workers' compensation—guaranteed and speedy recovery in return for waiver of common-law rights—would be destroyed.

Alternatively, the “substantially certain to occur” requirement protects the employee in the frequent circumstances involving deliberate maintenance of hazardous work conditions and concealment of workplace dangers. Arguably, such a definition could be maintained within the workers' compensation system so as to sustain the quid pro quo. This would, however, involve compensating employers for the immunity they are relinquishing—perhaps by limiting damages in cases of proven intentional tort or mandating a narrow application of the intentional tort definition.

Regardless of the definition finally approved, it should be set forth by the legislature that originally formulated the workers' compensation scheme. By establishing a solid definition with directions as to its application, the legislature can eliminate the opportunity for misapplication and varied interpretations.

#### V. OHIO AMENDED SUBSTITUTE HOUSE BILL 107

On July 21, 1993, Ohio Governor George Voinovich signed Amended Substitute House Bill 107 into law, effectively overhauling Ohio's workers' compensation system.<sup>137</sup> Although neither representatives of employers nor employees are completely satisfied with the result, the law, as stated by State Representative Jo Ann Davidson, house minority leader, is a “first step toward reform. This bill lays the foundation for further steps.”<sup>138</sup> While the bill is not nearly as comprehensive as former Ohio Revised Code Section 4121.80, its treatment of “intentional tort” warrants discussion.

Section 2745.01 of the bill, the only provision dealing directly with the rights of employees to bring an action against their employer for an intentional tort, states in pertinent part:

(A) An employer is subject to liability to an employee or the dependent survivors of a deceased employee in a civil action for damages for an employment intentional tort.

(B) An employer is liable under this Section only if an employee or the dependent survivors of a deceased employee who bring the action prove by

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<sup>137</sup> Act of July 21, 1993, 1993 Ohio Legis. Serv. 5-865, 5-882 (Baldwin) (to be codified at OHIO REV. CODE ANN. § 2745.01).

<sup>138</sup> Alan Johnson, *No Side Completely Happy with New Law Workers' Compensation*, COLUMBUS DISPATCH, July 22, 1993, at 3B.

clear and convincing evidence that the employer deliberately committed all of the elements of an employment intentional tort.

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(D) As used in this Section:

- (1) "Employment Intentional Tort" means an act committed by an employer in which the employer deliberately and intentionally injures, causes an occupational disease, or death of a specific employee.
- (2) "Employer" means any person who employs an individual.
- (3) "Employee" means any individual employed by an employer.
- (4) "Employ" means to permit or suffer to work.<sup>139</sup>

Clearly, this provision is far less extensive than former Section 4121.80. It represents, however, the Ohio legislature's first attempt to address the issue of intentional tort in the workplace after *Brady v. Safety-Kleen Corp.*<sup>140</sup>

The significance of Section 2745.01 lies in its definition of "intentional tort," and its clarification of the standard required to prove an intentional tort in the workplace. Unlike the "substantially certain to occur" language of *Brady* and *Jones v. VIP Development Co.*,<sup>141</sup> Section 2745.01 requires that it be shown that the employer *deliberately* committed an intentional tort.<sup>142</sup> As stated, this certain yet stringent language has the potential of discouraging frivolous lawsuits against employers.<sup>143</sup>

Perhaps what makes the employment intentional tort reform so interesting, however, is the requirement that employees or their representatives "prove by *clear and convincing* evidence" that the employer committed an intentional tort.<sup>144</sup> Supposedly, the Ohio legislature formulated such a high burden of proof so as to make it more difficult for employees to file suit against employers.<sup>145</sup> It remains to be seen whether the Supreme Court of Ohio, so quick to strike the intentional tort elements contained in Ohio Revised Code Section 4121.80, will approve the stricter "clear and convincing" standard.

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<sup>139</sup> Act of July 21, 1993, 1993 Ohio Legis. Serv. 5-865, 5-882 (Baldwin) (to be codified at OHIO REV. CODE ANN. § 2745.01(B)).

<sup>140</sup> 576 N.E.2d 722 (Ohio 1991).

<sup>141</sup> 472 N.E.2d 1046 (Ohio 1984).

<sup>142</sup> Act of July 21, 1993, 1993 Ohio Legis. Serv. 5-865, 5-882 (Baldwin) (to be codified at OHIO REV. CODE ANN. § 2745.01(B)).

<sup>143</sup> See *supra* notes 134-35 and accompanying text.

<sup>144</sup> Act of July 21, 1993, 1993 Ohio Legis. Serv. 5-865, 5-882 (Baldwin) (to be codified at OHIO REV. CODE ANN. § 2745.01(B)).

<sup>145</sup> See David Adams, *Workers' Comp Package OK'D Lawmakers Reach Agreement on Reforms, Including Claims Processing System, Standard Fees for Doctors*, AKRON BEACON J., July 21, 1993, at C6.

Indeed, chances that the new "employment" intentional tort standard will survive scrutiny by the Ohio Supreme Court is questionable. Specifically, consider Justice Douglas's argument that Section 4121.80(D) was violative of Ohio's Equal Protection Clause:

Solely because a victim is an "employee," such victim is treated differently from other victims of intentional torts. This creates a special category of intentional tort victims within the class of all victims of intentional torts and to meet constitutional muster, such "[l]egislation must apply alike to all persons within a class, and reasonable grounds must exist for making a distinction between those within and those without a designated class." It is difficult to see what legitimate interest the state has (and I find none) in treating victims of intentional torts by employers differently from all other intentional tort victims.<sup>146</sup>

Although Justice Douglas was referring to the unconstitutionality of the cap on intentional tort damages, his analysis could also apply to Amended Substitute House Bill 107's new "employment" intentional tort definition. After all, Section 2745.01 of the bill clearly distinguishes between an intentional tort that occurs in the workplace (a special category) and the entire "substantially certain" class of intentional torts.

Although the more definite definition of intentional tort contained in Amended Substitute House Bill 107 is a step in the right direction, the Ohio legislature's failure to limit the damages recoverable from a successful intentional tort suit is inexcusable. Because Section 2745.01 does not prohibit the receipt of benefits under workers' compensation where damages are awarded in an intentional tort action, the employer is still exposed to the possibility of "paying" double the damages, while the employee may reap double the recovery.

Furthermore, the brief mention of intentional tort in the bill does not solve one of the major problems created by *Brady*: the illogical possibility of workers' compensation recovery for an action that necessarily occurs outside of the workplace.<sup>147</sup> Until this issue is resolved, neither the employer nor the employee, neither the legislature nor the courts, may claim that the workers' compensation system is truly reformed.

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<sup>146</sup> *Brady v. Safety-Kleen Corp.*, 576 N.E.2d 722, 730 (Ohio 1991) (Douglas, J., concurring) (quoting *Porter v. Oberlin*, 205 N.E.2d 363, 364 (Ohio 1965)).

<sup>147</sup> See *supra* notes 112-18 and accompanying text.

## VI. CONCLUSION

*Brady v. Safety-Kleen Corp.* illustrates the power struggle between the Ohio General Assembly and the Ohio courts over workers' compensation. With the *Brady* decision, the supreme court has sent the message that it will not be bullied into maintaining some sort of balance between employers and employees in workplace litigation. *Brady* represents yet another chip at the foundation of workers' compensation. No longer is it an exclusive remedy. No longer is the scale balanced. Indeed, unless the court and the legislature compromise to enforce a statutory scheme consistent with the original quid pro quo rationale, the future of workers' compensation as a viable insurance and recovery system is doomed.

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