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WORKPLACE INJURY LITIGATION

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I. INTRODUCTION

Workplace accidents occur in significant numbers in West Virginia¹ due, in large part, to the state's industrialized and labor-intensive structure. Many accidents are the result of defective equipment, dangerous products and material, or negligence on the part of employees and employers. Entities such as chemical, steel, and electric companies that own or operate the facilities where accidents occur are often at fault.

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1. In 1992, 70,317 work-related injuries were reported in West Virginia. This figure includes both regular subscribers to the West Virginia Workers' Compensation Fund and self-insured companies. West Virginia Workers' Compensation Division, Annual Financial and Statistical Tables, Table 15 (1992).

Lawyers evaluating a workplace injury cases must engage in the most thorough investigation possible. Unlike some types of litigation such as medical malpractice or commercial work, where potential defendants are readily identifiable, workplace injury litigation may involve several defendants, not all of whose roles or duties are clear or easily ascertainable. Additionally, the specific circumstances of the injury will determine who the appropriate defendants are in most instances. Without a thorough investigation, the action may not be initiated against all proper defendants prior to the expiration of the statute of limitations or may not assert all appropriate theories against the defendants. In order to avoid the difficulty of moving to amend an action to add other defendants or to allege other causes of action, especially where the statute of limitations has expired after the filing of the original complaint, an investigation of the facts of the injury and an interview of the injured worker or at least of his or her co-workers must be performed in order to fully and professionally represent the interests of the injured worker and his or her family.

With that in mind, the purpose of this Article is to survey for the reader the more common types of workplace accidents, the potential defendants in workplace injury litigation, and the possible theories of recovery against such defendants.

II. CLASSES OF WORKPLACE INJURY LITIGATION

A. *Workers' Compensation*

Although the focus of this article is not workers' compensation, an abbreviated discussion of the remedy is necessary to alert the reader to the circumstances of when injured workers will be able to maintain both a workers' compensation claim and a civil action for their injuries.

In West Virginia, as in most states, an injured person's workers' compensation claim is his or her exclusive remedy² for injuries received in the course of and resulting from employment.³ The historical

2. W. VA. CODE § 23-2-6 (Supp. 1992)

3. W. VA. CODE § 23-4-1 (Supp. 1992); *Archibald v. Workman's Compensation*

purpose for the exclusivity requirement was to remove the litigation of workplace injuries from the courts and to replace it with a remedy which would not require a determination of the parties' fault and which would provide a more predictable outcome than one ascertained by a jury's verdict.⁴

In certain circumstances, however, where a worker can prove an employer's "deliberate intent" to cause the worker physical harm, the employer loses the immunity otherwise extended by the Workers' Compensation Act.⁵ The Supreme Court of Appeals of West Virginia first recognized this cause of action in *Mandolidis v. Elkins Industries, Inc.*⁶ Following the court's opinion in *Mandolidis*, the West Virginia Legislature amended section 23-4-2 of the West Virginia Code and codified certain requirements which an employee must prove to exist if he or she is to succeed in a civil action against his or her employer.⁷

Comm'r, 87 S.E. 771 (W. Va. 1916).

4. For a historical overview of the West Virginia Workers' Compensation Program and its current status, see Emily A. Spieler, *Injured Workers, Workers' Compensation, and Work: New Perspectives on the Workers' Compensation Debate in West Virginia*, 95 W. VA. L. REV. 333 (1992-93).

5. W. VA. CODE § 23-2-6 (Supp. 1992).

6. *Mandolidis v. Elkins Indus. Inc.*, 246 S.E.2d 907 (W. Va. 1978).

7. The statute now reads:

The immunity from suit provided under this section and under section six-a [§ 23-2-6A], article two of this chapter, may be lost only if the employer or person against whom liability is asserted acted with "deliberate intention." This requirement may be satisfied only if:

(i) It is proved that such employer or person against whom liability is asserted acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee. This standard requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of (A) Conduct which produces a result that was not specifically intended; (B) conduct which constitutes negligence, no matter how gross or aggravated; or (C) willful, wanton or reckless misconduct; or

(ii) The trier of fact determines, either through specific findings of fact made by the court in a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the following facts are proven:

(A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;

(B) That the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and of the high degree

These statutory criteria have been the subject of interpretation in recent decisions of the Supreme Court.⁸

The importance of *Mandolidis* and its progeny is that in certain (albeit rare) circumstances, an injured worker may maintain a direct action against his or her employer as well as any third parties who could ordinarily be named. The injured worker's lawyer must carefully investigate the circumstances of the injury to determine whether a *Mandolidis* action is appropriate. Simply because an employee works with or around dangerous equipment and is injured does not mean that the employee will be able to satisfy the requirements of section 23-4-2 of the West Virginia Code in maintaining a direct action against his or her employer.⁹

Finally, one other provision of the Workers' Compensation Act has potential importance in industrial accident litigation. Section 23-2-8 of the West Virginia Code essentially provides that an employer which

of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;

(C) That such specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of such employer, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

(D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C) hereof, such employer nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally; and

(E) That such employee so exposed suffered serious injury or death as a direct and proximate result of such specific unsafe working condition.

W. VA. CODE § 23-4-2(c)(2) (Supp. 1992).

8. See *Mayles v. Shoney's, Inc.*, 405 S.E.2d 15 (W. Va. 1990); *Sias v. W-P Coal Co.*, 408 S.E.2d 321 (W. Va. 1991).

9. See, e.g., *Blevins v. Beckley Magnetite, Inc.*, 408 S.E.2d 385 (W. Va. 1991). The evidence demonstrates that the tail pulley portion of the conveyor belt system was guarded in a way which was accepted and approved by the MSHA inspector. Further, the evidence indicated that it only became unsafe when the guard was removed and a workers entered the unguarded area while the machinery was in operation. By the appellant's own evidence, it was the responsibility of the dryer-hopper operator [the plaintiff/appellant] to turn the machinery off while clearing ore spillage.

Id. at 391-92.

is not a subscriber to the Workers' Compensation Fund or self-insured, and is otherwise required to be, loses its common-law defenses and is liable in a direct action.¹⁰ The lawyer should determine the employer's status, whether a subscriber or self-insured, on the date of injury because that is the date which governs whether the employer can be sued. That is, remedial compliance by the employer after the date of injury does not eliminate the worker's cause of action against the employer. For example, in *Kosegi v. Pugliese*,¹¹ the court held that the employer's subsequent payment of premiums for quarters when it was in default and during which the decedent was killed did not cure its delinquency and therefore allowed the decedent's estate to maintain a common-law negligence action under section 23-2-6 of the West Virginia Code.¹²

10. This section states:

All employers required by this chapter to subscribe to and pay premiums into the workers' compensation fund, except the state of West Virginia, the governmental agencies or departments created by it, and municipalities and political subdivisions of the state, and who do not subscribe to and pay premiums into the workers' compensation fund as required by this chapter and have not elected to pay individually and directly or from benefit funds compensation and expenses to injured employees or fatally injured employees' dependents under the provisions of section nine [§ 23-2-9] of this article, or having so subscribed or elected, shall be in default in the payment of same, or not having otherwise fully complied with the provisions of section five or section nine [§ 23-2-5 or § 23-2-9] of this article, shall be liable to their employees (within the meaning of this article) for all damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer or any of the employer's officers, agents or employees while acting within the scope of their employment and in the course of their employment and also to the personal representatives of such employees or personal representative thereof, such defendant shall not avail himself of the following common-law defenses: The defense of the fellow-servant rule; the defense of the assumption of risk; or the defense of contributory negligence; and further shall not avail himself of any defense that the negligence in question was that of someone whose duties are prescribed by statute: Provided, That such provision depriving a defendant employer of certain common-law defenses under the circumstances therein set forth shall not apply to an action brought against a county court, board of education, municipality, or other political subdivision of the state or against any employer not required to cover his employees under the provisions of this chapter.

(Supp. 1992.)

11. 407 S.E.2d 388 (W. Va. 1991).

12. *Id.* at 391-92.

B. Toxic Torts

Toxic tort litigation embraces causes of action arising from an individual's exposure to a variety of hazardous substances in the work place. While the most well-known litigation has involved asbestos manufacturers, successful litigation has also taken place against, to name only a few others, silica, nickel, benzene, and lead manufacturers. Although some differences in the litigation are present, depending upon the toxin and the individual's physical reaction, virtually all toxic tort cases have some common qualities, given the type of injuries which are sustained and the nature of the allegations against the defendants.

In toxic tort cases, the most difficult and time consuming work will take place during discovery. It is during that time that plaintiffs will need to testify specifically to the products to which they were exposed, as well as to their manufacturers. Corroborative testimony from the plaintiff's co-workers or other individuals who can testify as to product names and manufacturers is also helpful. Depending upon the period in which the plaintiff was exposed, this may not be an easy task since memories tend to fade over time and many witnesses and co-workers are unable to testify because they become ill or die.

However, the plaintiff's inability to recall specific product exposures is not always fatal to his or her case. In *Abel v. Eli Lilly & Co.*,¹³ the Supreme Court of Michigan held that the plaintiff's allegations of exposure to diethylstilbestrol (DES) were sufficient to support a concert of action theory and an alternative liability theory against the manufacturers.¹⁴ The *Abel* court concluded that Michigan's public policy would be violated if a plaintiff's inability to recall a product allowed a negligent defendant to avoid liability.¹⁵ *Abel* has since been relied upon as a basis for circumventing the usual requirement that a plaintiff be able to identify the specific manufacturer of the product which he or she maintains was harmful.¹⁶ DES exposure was obvi-

13. 343 N.W.2d 164 (Mich.), *cert. denied*, 469 U.S. 833 (1984).

14. *Id.* at 176-77.

15. *Id.* at 176.

16. *See, e.g., Cousineau v. Ford Motor Co.*, 363 N.W.2d 721 (Mich. Ct. App. 1985);

ously not occupational; however, *Abel* has been used in occupational exposure cases for its discussion of product identification and theories of recovery against multiple manufacturers of the same or similar products.¹⁷

Likewise, in *Roehling v. National Gypsum Co. Gold Bond Building Products*,¹⁸ the United States Court of Appeals for the Fourth Circuit agreed with the district court that the testimony of the plaintiff and his co-workers had not established the exposure of the plaintiff at two job sites. However, their testimony regarding exposure at a third site made summary judgment on the defendants' behalf improper.¹⁹ The court recognized the problems inherent in using co-worker or bystander product identification:

Roehling should not be required to remember product names some thirty years later when he had been a pipefitter, breathing the dust, not handling the products. Such requirements would, in essence, destroy an injured bystander's cause of action for asbestos exposure. Rarely would bystanders take note of names of materials used by others. Moreover, the witnesses should not be required to know Roehling. They were employees of different companies, with different responsibilities in the work area. Bystanders often go unrecognized, but still receive injuries.²⁰

While *Abel* and *Roehling* demonstrate that a court may not always require specific and extensive product identification, the plaintiff's lawyer should endeavor to obtain as much precise product identification as possible, to avoid the dilemma confronted by the plaintiffs in *Abel* and *Roehling*.

In addition to the discovery which must take place regarding the plaintiff's exposure to products, there is the need to develop testimony

Marshall v. Celotex Corp., 651 F. Supp. 389 (E.D. Mich. 1987).

17. See, e.g., Zands v. Nelson, 797 F. Supp. 805, 813 (S.D. Cal. 1992); Bixler v. Avondale Mills, 405 N.W.2d 428, 430 (Minn. 1987); Annotation, "Concert of Activity," "Alternative Liability," "Enterprise Liability," or Similar Theory as Basis for Imposing Liability of One or More Manufacturers of Defective Uniform Products, In Absence of Identification of Manufacturer of Precise Unit or Batch Causing Injury, 22 A.L.R.4th 183 (1980).

18. 786 F.2d 1225 (4th Cir. 1986).

19. *Id.* at 1226.

20. *Id.* at 1228. *But see* Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984); Lohrmann v. Pittsburgh Coming Corp., 782 F.2d 1156 (4th Cir. 1986).

regarding the plaintiff's medical condition and evidence related to the "state of the art," which deals with the available knowledge on a subject. This type of information can come from all available communities such as medicine, science, engineering, and any other relevant segment of society. By necessity, most toxic tort cases will require documentary or testimonial evidence from scientists associated with nationally known research centers who have been directly involved in research with the toxin which is the subject of the plaintiff's suit.

Significant deposition testimony from experts on behalf of each side will be introduced regarding safe levels of exposure at various points in time, the importance and significance of various studies conducted by both industrial groups and health organizations, and testimony regarding how exposure to a specific toxin does or does not result in disease, disability, and death.

The compilation of information, such as exposure levels, industrial and medical research, and etiological and epidemiological data, constitutes that body of knowledge known as the "state of the art." The state of the art is one of the most hotly contested issues in toxic tort litigation and has been defined by one court as:

State of the art includes all of the available knowledge on a subject at a given time, and this includes scientific, medical, engineering, and any other knowledge that may be available. State of the art includes the element of time: what is known and when was this knowledge available.²¹

If asbestos cases or other toxic tort cases sound more formidable than other types of industrial accident cases, it is because they are. By their very nature, toxic tort cases tend to involve more than one plaintiff and more than one defendant. The effort and resources devoted by both sides will therefore be critical, exhaustive, and critical.

Unlike the types of injuries which will be discussed in other sections of this article, toxic tort cases are least likely to be handled like a traditional tort case. They are capital intensive and require enormous amounts of manpower and support staff, especially in the trial preparation phase.

21. *Lohrmann*, 782 F.2d at 1165.

The Supreme Court of Appeals of West Virginia has not yet accepted any appeals on the particular issue of product liability in the asbestos cases in which verdicts have been returned. The several petitions for appeal which have been presented to the court have been refused, thereby leaving intact the judgments rendered by the trial courts. The Supreme Court of the United States has refused three petitions for a *writ of certiorari* presented by three defendants involved in asbestos litigation in Monongalia County, West Virginia.²² Until the Supreme Court addresses the issue, general principles of product liability law are an effective tool in these types of cases.²³

The court's unwillingness to review such cases may be based upon its philosophy announced in *Blankenship v. General Motors Corp.*²⁴ In *Blankenship*, the court incorporated the "crashworthiness" doctrine into the jurisprudence of West Virginia products liability. In an effort to guide the trial courts, the court held that in any "crashworthiness" case, under theories of product liability, whenever there is a national split of authority on an issue about which the Supreme Court of Appeals of West Virginia has not spoken, the trial courts should apply the rule most favorable to the plaintiff.²⁵ Thus, the trial courts in West Virginia have great latitude in looking the jurisprudence of other states in determining and molding the law in "crashworthiness" cases.²⁶ By analogy, West Virginia workers exposed to asbestos or other toxic substances should have similar "liberal" protection where the state supreme court has yet to address particular issues and theories.²⁷

22. *Owens Corning Fiberglass Corp. v. Adams*, 61 U.S.L.W. 3865 (June 28, 1993); *Keene Corp. v. Adams*, 113 S. Ct. 461 (1992); *Owens-Illinois, Inc. v. Bolyard*, 113 S. Ct. 462 (1992).

23. See, e.g., *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666 (W. Va. 1989); *Ilosky v. Michelin Tire Corp.*, 307 S.E.2d 603 (W. Va. 1983); *King v. Kayak Mfg. Co.*, 387 S.E.2d 511 (W. Va. 1989); Frances C. Whiteman, *Toxic Emotional Distress Claims: The Emerging Trend for Recovery Absent Physical Injury*, 20 CAP. U. L. REV. 995 (1991).

24. 406 S.E.2d 781 (W. Va. 1991).

25. *Id.* at 786.

26. "The term 'crashworthiness' is defined . . . as 'the protection that a passenger motor vehicle affords its passengers against personal injury or death as a result of a motor vehicle accident.'" *Id.* at 782 n.1 (citing the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. § 1901(14) (1990 Supp.); see also *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1069 n.3 (4th Cir. 1974) (judicial definitions of "crashworthiness").

27. The court has, however, addressed the issue of a successor corporation's liability

C. Defective Machinery and Equipment

The cases which arise from the operation or maintenance of defective equipment or machinery do not differ significantly from most products liability cases. The primary considerations in a case where a worker has been injured while operating a piece of machinery are whether the person was operating the equipment or machine in a manner contemplated by its manufacturer and whether the employer or owner of the piece of machinery equipment substantially modified or changed the equipment so that it was significantly different from when it was manufactured. Another important consideration is whether latent flaws or defects were present in the equipment which caused or contributed to the accident.

For example, in *Jowers v. Commercial Union Ins. Co.*,²⁸ the Court of Appeals of Louisiana held that a supplier of concrete had a duty to warn individuals using the concrete in a residential setting of the caustic quality of raw concrete and its tendency to cause burn injuries.²⁹ The court found that the supplier's failure to warn the users breached its duty and rendered it liable to the injured plaintiff.³⁰

Jowers merits some discussion beyond its straightforward facts. First, the Louisiana court acknowledged that "Ready-mix concrete does not contain a defect in the ordinary sense of design, composition or manufacturing defect, since the evidence reveals the concrete had been

for the debts and obligations, including punitive damages, of a predecessor corporation in asbestos cases. *Davis v. Celotex Corp.*, 420 S.E.2d 557 (W. Va. 1992). In *Davis*, the court held

[A] successor corporation can be held liable for the debts and obligations of a predecessor corporation if there was an express or implied assumption of liability, if the transaction was fraudulent, or if some element of the transaction was not made in good faith. Successor liability will also attach in a consolidation or merger under W. VA. CODE, 31-1-37(a)(5). Finally, such liability will also result where the successor corporation is a mere continuation or reincarnation of its predecessor.

Id. at 563.

28. 435 So. 2d 575, 579 (La. Ct. App. 1983).

29. *Id.* at 579.

30. *Id.*

properly mixed.”³¹ Rather, the supplier’s error was in its “failure to warn of a risk known to it and not to others, that created unreasonable risk of injury to others.”³² This statement demonstrates the importance of an investigation and inquiry into the exact circumstances of an individual’s injury to ensure that all viable theories are asserted against all proper defendants. A failure to warn theory against the supplier was successful in *Jowers*, whereas an “unsafe” product liability theory would probably not have been availing.

Much the same rationale applies to the status of the injured party. The injury in *Jowers* took place in a residential setting. The same circumstances in an industrial workplace could give rise to a cause of action against the supplier of the concrete or the entity which had directed its use, although the “sophisticated user” defense may be asserted.³³ Without an investigation, however, counsel risks asserting incomplete or inappropriate theories of recovery.

A more traditional concept of liability based on defective equipment was involved in *Church v. Wesson*.³⁴ The plaintiff, an underground miner, sued the manufacturer of a roof bolting machine after the roof bolt wrench fractured and caused injuries to his face, mouth, and teeth.³⁵ At the conclusion of the evidence, the trial court directed a verdict for the manufacturer on the theories of defective design and failure to warn. The court did allow the theory of defective manufacturing to go to the jury.³⁶ The jury returned a verdict for the manufacturer.³⁷

On appeal, the Supreme Court restated the West Virginia standard for establishing strict liability in tort as “whether the involved product is defective in the sense that it is not reasonably safe for its intended use.”³⁸ This standard is necessarily determined by what a reasonably

31. *Id.*

32. *Id.*

33. For a discussion of the “sophisticated user” defense, see *infra* notes 49-50 and accompanying text.

34. 385 S.E.2d 393 (W. Va. 1989).

35. *Id.* at 394.

36. *Id.*

37. *Id.*

38. *Id.* at 396 (quoting *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666,

prudent manufacturer's standards are at the time the product is made. The court found that the plaintiff had failed to make a *prima facie* case of strict liability, since the other method of production, which the plaintiff's expert had testified was preferable, was not technologically available at the time the defendant's roof bolter was manufactured.³⁹ Additionally, evidence was introduced which indicated that the defendant's manufacturing system was the state-of-the-art at the time the roof bolting machine was manufactured.⁴⁰ Because the time of manufacture is the relevant point in time, the court found that the plaintiff did not present any evidence that it was foreseeable to the manufacturer that the wrench on the roof bolting machine would fracture. The court, therefore, affirmed the jury's verdict for the defendant manufacturer.⁴¹

The *Church* court relied upon *Morningstar v. Black & Decker Mfg. Co.*⁴² in affirming the jury's verdict.⁴³ *Morningstar* set forth the rule in West Virginia for establishing a manufacturer's strict liability.⁴⁴ In addition to *Morningstar*, any attorney contemplating a products liability case must look to the analysis set forth in *Ilosky v. Michelin Tire Corp.*⁴⁵ regarding a manufacturer's duty to warn and its discussion of what constitutes a defective product.⁴⁶ Additionally, since comparative negligence will almost always be a defense in a products liability action, a review of *King v. Kayak Mfg. Co.*,⁴⁷ with its analysis of comparative negligence, contributory negligence, and assumption of the risk, is also helpful.⁴⁸

As mentioned earlier, modification of equipment or machinery may result in the employee's cause of action actually being against his or

syl. pt. 4 (W. Va. 1979)).

39. *Id.* at 396.

40. *Id.*

41. *Id.*

42. *Morningstar*, 253 S.E.2d 666 (W. Va. 1976).

43. *Church*, 385 S.E.2d at 396.

44. *Morningstar*, 253 S.E.2d at 676.

45. 307 S.E.2d 603 (W. Va. 1983).

46. *Id.* at 609.

47. 387 S.E.2d 511 (W. Va. 1989).

48. *Id.*

her employer and/or the operator or owner of the equipment, rather than the manufacturer. In these circumstances, the United States Court of Appeals for the Fourth Circuit recently held that, as a matter of Virginia law:

the sophisticated user defense may be permitted in cases involving an employer who was aware of the inherent dangers of a product which the employer purchased for use in its business. Such an employer has a duty to warn his employees of the dangers of the product, and the manufacturer is absolved of any concurrent duty to warn those same employees.⁴⁹

According to the "sophisticated user" defense, if an employer is aware of the dangers inherent in a product and fails to warn its employees of those dangers, then the employee's cause of action is against the employer and not the manufacturer.⁵⁰ Although the sophisticated user defense has been frequently used in asbestos cases on the theory that purchasers of asbestos products, such as large chemical and manufacturing concerns, were as aware of the dangers of asbestos products as were the products' manufacturers and had a duty to warn their employees, the same argument can also be made with a piece of equipment or machinery.

Probably the best known West Virginia case dealing with modifications made to a piece of machinery is *Mandolidis v. Elkins Industries, Inc.*⁵¹ In *Mandolidis*, the plaintiff had operated a ten-inch table saw which was not equipped with a safety guard and had lost two fingers and part of his right hand when it came in contact with the saw blade.⁵² The plaintiff sued his employer on the grounds that defendant employer deliberately removed the safety guard to increase production and profits.⁵³ *Mandolidis* also sued on the grounds that it was a violation of federal and state safety laws to operate the machine without a guard, that the employer had been cited for violations of the Occupational Safety and Health Act for operating the machine without

49. *Willis v. Raymark Indus., Inc.*, 905 F.2d 793, 796 (4th Cir. 1990).

50. *Id.*; RESTATEMENT (SECOND) OF TORTS § 388 & cmt. n (1965).

51. 246 S.E.2d 907 (W. Va. 1978).

52. *Id.* at 914.

53. *Id.* at 915.

a guard, and that the employer had been ordered not to use the machine without a safety guard.⁵⁴

The Supreme Court of Appeals of West Virginia held that the employer's acts constituted a deliberate intention to harm the plaintiff and reversed the trial court's dismissal of the plaintiff's action. Modifications to machinery and equipment by employers or operators are fairly common, so the lawyer should be alert to any changes that have been made and the possible effect they may have had on producing the employee's injuries. Consultation with the manufacturer of the piece of machinery or equipment may be necessary. Manufacturer's are likely to be very helpful since any modification or change to its equipment by another party would reduce the manufacturer's potential liability. Thus, the manufacturer may be willing to provide information regarding the operation of its product as it was originally intended, in order to prove that the changes or modifications made by another absolve the manufacturer of any liability for the injuries which the employee sustained.

D. *Unsafe Place to Work Actions*

Unsafe place to work actions are based upon violations of section 21-3-1 of the West Virginia Code which states: "Every employer and every owner of a place of employment, place of public assembly, or a public building, now or hereafter constructed, shall so construct, repair and maintain the same as to render it reasonably safe." The theories of recovery advanced under a violation of this statute are as varied as the circumstances of the injuries themselves.

For example, in *Pack v. Van Meter*,⁵⁵ an employee was injured when she fell down the steps of the dress store in which she was employed and sued the landlord of the building where the dress store was located.⁵⁶ She prevailed in the trial court, and the landlord appealed.⁵⁷ The Supreme Court of Appeals of West Virginia distin-

54. *Id.*

55. 354 S.E.2d 581 (W. Va. 1986).

56. *Id.* at 583.

57. *Id.*

guished between those safety requirements in the West Virginia Code which are clearly the responsibility of an employer because they involve instrumentalities or activities directly related to the employment or over which the employer had sole control and those which are legitimately shared between the employer and the landlord.⁵⁸ The court concluded that the maintenance of the stairway with handrails and safety tread on the steps was a responsibility shared between the landlord and the employer.⁵⁹

The *Pack* court noted that other jurisdictions have held that an employees who are injured at work premises through the landlord's violation of a safety statute or other applicable law could recover against the landlord.⁶⁰ The court referred to its opinion in *Sanders v. Georgia-Pacific Corp.*,⁶¹ where it held that "the owner or occupier of premises owes to an invitee such as a non-employee workman or an independent contractor the duty of providing him with a reasonably safe place in which to work and has the further duty to exercise ordinary care for the safety of such persons."⁶² Thus, the court declined to require only the employer to exercise the responsibility for maintaining a safe place to work and concluded that, at least in some circumstances, the responsibility to provide a safe work environment was a duty shared between the employer and the landlord.⁶³

Lawyers must be alert to the specific safety requirement involved because, as the court pointed out, some of the responsibilities in sections 21-3-1 to -18 of the West Virginia Code are solely the province of the employer either because of the function of the work or because the employer has exclusive control over the instrumentality or activity.⁶⁴ Where possible, however, it is preferable to have a third-party, such as a landlord or owner or operator of a building, as a defendant

58. *Id.* at 585.

59. *Id.* at 586-87.

60. *Id.* at 587.

61. 225 S.E.2d 218 (W. Va. 1976).

62. *Pack*, 354 S.E.2d at 587 (quoting *Sanders v. Georgia-Pacific Corp.*, 225 S.E.2d 218, syl. pt. 2 (W. Va. 1976)).

63. *Id.* at 586-87.

64. *Id.* at 586.

in order to avoid any possible workers' compensation immunity defenses.

The Supreme Court of Appeals of West Virginia has recently issued some opinions regarding unsafe place to work actions which reflect the variety of the circumstances in which people are injured. The most interesting of these recent opinions is *Johnson v. West Virginia University Hospitals, Inc.*⁶⁵ In *Johnson*, a police officer with the West Virginia University Security Police was helping to restrain a patient who, unbeknownst to the policeman, had told some hospital personnel that he had AIDS.⁶⁶ The policeman was called to subdue the patient after he had made this statement, so the policeman was unaware of the patient's condition.⁶⁷ The patient then proceeded to bite the police officer's forearm.⁶⁸ The police officer sued the hospital on the theory that the hospital had negligently failed to advise him that the patient had AIDS and that as a result of his altercation with the AIDS patient he had suffered emotional distress.⁶⁹

The plaintiff avoided the defense of workers' compensation immunity because he was employed by the West Virginia University Security Police but sued West Virginia University Hospitals, an independent corporation separate from West Virginia University. The hospital asserted the defense of workers' compensation immunity, but did not do so until it filed its motion for judgment notwithstanding the verdict.⁷⁰ There had been no evidence presented in support of that defense and the court found that there was no evidence to suggest that the hospital had employed the plaintiff in a capacity which would support the same.⁷¹

The court found that the hospital was negligent in failing to warn the plaintiff that the patient he was restraining had stated that he had

65. 413 S.E.2d 889 (1991).

66. *Id.* at 891.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 891 n.1

71. *Id.* at 896 n.8

AIDS.⁷² Apparently, the hospital had a policy of warning that certain patients carried infectious diseases. Because hospital personnel were aware that the patient had AIDS but had failed to so advise the plaintiff, the court found that this deviation from its policy constituted negligence.⁷³ The thrust of the court's opinion is its discussion of the damages to which the plaintiff was entitled because of the speculative nature regarding the disease.⁷⁴ The court established several criteria for recovering against a hospital based upon a fear of contracting AIDS.⁷⁵ The criteria set forth in *Johnson* laid the groundwork for further AIDS related third-party liability cases as well as expanding arguments for emotional distress damages in West Virginia.⁷⁶

Another recent unsafe place to work decision is *Blake v. Wendy's International, Inc.*⁷⁷ In *Blake*, the plaintiff, an electrician, had been advised by the manager of Wendy's to put his metal ladder in a certain position in order to repair a faulty sign.⁷⁸ Although the plaintiff first began to work in one location, he claimed that he was told by the manager of the restaurant to move his truck because it was blocking the parking lot of the restaurant.⁷⁹ After he moved his truck and began to work in another location, some wires sprang out of a raceway, causing him to fall and sustain serious injuries.⁸⁰ Wendy's maintained that Mr. Blake had assumed the risk of his injuries, and its motion for summary judgment was granted by the trial court.⁸¹

72. *Id.* at 892.

73. *Id.* at 894-95.

74. *Id.* at 892.

75. Damages for emotional distress may be recovered from a hospital based upon a fear of contracting AIDS if: the plaintiff is not an employee of the hospital, but has a duty to assist hospital personnel in dealing with an AIDS-infected patient; the plaintiff's fear of contracting AIDS is reasonable; the patient infected with AIDS physically injures the plaintiff and the injury exposes the plaintiff to the HIV virus; and the hospital failed to follow a regulation which requires it to warn the plaintiff of the fact that the patient has AIDS. *Id.* at 893-94.

76. Practitioners involved in similar litigation should note, however, Justice McHugh's statement that the holding in *Johnson* was limited to the facts of the case. *Id.* at 894.

77. 413 S.E.2d 414 (W. Va. 1991).

78. *Id.* at 415.

79. *Id.*

80. *Id.* at 416.

81. *Id.*

The focus of the court's opinion did not deal so much with whether Wendy's had provided Mr. Blake with a safe place to work, but whether the grant of summary judgment was appropriate under the circumstances.⁸² The court reviewed the testimony and indicated that it contained several inconsistencies which constituted issues as to material facts properly resolved by the jury.⁸³ Thus, summary judgment on Wendy's behalf was improper and the court reversed the trial court's summary judgment for the defendant.⁸⁴

E. Electrocutions and Electrical Injuries

An electrocution or electrical injury case typically occurs when an individual comes into contact with a source of high voltage such as a power line or a piece of machinery which, unbeknownst to the worker, is energized. An electrocution or electrical injury case is usually directed against the power company or other operator of the electrical equipment, such as an independent contractor which has a contract with a utility company or is working near or around utility company equipment. An action may sometimes also be maintained against the employer if the employee can satisfy the criteria established in *Mayles* and *Sias*.⁸⁵

The West Virginia Supreme Court of Appeals' most recent discussion of the duties owed by a power company to its contractors and employees is *Pasquale v. Ohio Power Co.*⁸⁶ In *Pasquale*, an independent contractor hired to work on the power company's premises, was killed when he cut into an energized cable.⁸⁷ Evidence adduced at trial indicated that a cable carrying 2,300 volts of electricity had short-circuited and that the cable was de-energized prior to the decedent's attempt to repair it.⁸⁸ Additionally, the decedent's supervisor pointed

82. *Id.*

83. *Id.*

84. *Id.* at 418.

85. *Mayles v. Shoney's, Inc.*, 405 S.E.2d 15 (W. Va. 1990); *Sias v. W-P Coal Co.*, 408 S.E.2d 321 (W. Va. 1991).

86. 418 S.E.2d 738 (W. Va. 1992).

87. *Id.* at 744.

88. *Id.* at 743.

out the de-energized cable prior to the commencement of the repair effort.⁸⁹ The plaintiffs sued the decedent's employer and the power company on the theories of failure to identify the de-energized cable and a lack of safety equipment.⁹⁰ The jury found the decedent to be zero percent negligent, the independent contractor to be eighty-five percent negligent and the power company to be fifteen percent negligent. The jury awarded the plaintiff \$6.17 million.⁹¹

The court was presented with several issues, including the power company's right to contribution from the independent contractor, the status of the independent contractor, and various evidentiary questions. The portion of the court's opinion most pertinent to workplace injuries deals with the independent contractor doctrine. Basically, the power company argued that it should not be liable for the death of the employee of its independent contractor. The court acknowledged that this was the general rule, but pointed out that there were several exceptions.⁹² The court concluded that "[a]n employer owes a duty to provide a reasonably safe place to work to employees of independent contractors who are on the premises."⁹³ Looking to the facts, the court found several specific instances of the power company's negligence,⁹⁴ which the court concluded were

sufficient to allow the jury to consider whether the power companies' negligence contributed to the decedent's death, particularly when we view it under our traditional rule that power companies owe a high degree of care with regard to electricity.⁹⁵

The court reversed the verdict only to the extent that a recalculation of prejudgment interest was necessary and affirmed the remainder of the verdict.⁹⁶

89. *Id.*

90. *Id.* at 744.

91. *Id.*

92. *Id.* at 749.

93. *Id.* at 750.

94. *Id.*

95. *Id.* at 752 (citations omitted).

96. *Id.* at 757.

Prior to *Pasquale*, the Supreme Court in *Huffman v. Appalachian Power Co.*,⁹⁷ reversed a \$1.2 million verdict which had been returned for the plaintiff. An important difference between *Huffman* and the facts of *Pasquale* and other cases dealing with electrical injuries in the workplace is that the injured plaintiff was not an employee of the Appalachian Power Company (APCO) nor an employee of a contractor, but was a trespasser who climbed one of the power company's transmission towers and was injured. Despite the plaintiff's status as a trespasser, however, *Huffman* is relevant to an electrical injury case because of the court's discussion of the nature of high voltage electricity lines and the duties relative thereto.

The court had previously held that those who operate and maintain high voltage electricity lines are required to exercise a degree of care commensurate with the dangers present. However, the operators do not insure against all injuries.⁹⁸ The *Huffman* court found that while the nature of the high voltage wires did not change with respect to the plaintiff, that is, they constituted a dangerous instrumentality to the plaintiff even though he was a trespasser, the plaintiff did not establish liability on APCO's part.

The judgment for the plaintiff in *Huffman* was reversed because the plaintiff was found to be a trespasser who was aware of the risk undertaken when he climbed the power company's transmission tower.⁹⁹ The court also noted that Huffman had a history of climbing other structures¹⁰⁰ which indicated that this was not an isolated incident for the plaintiff.

In *Huffman*, the plaintiff failed to show that APCO had reason to believe that a trespasser would not discover the risk posed by the lines. Further, APCO had posted warning signs on the tower advising of the dangerous nature of the electricity. Thus, the court reversed the jury's verdict in favor of the plaintiff.¹⁰¹ Although not stated explicit-

97. 415 S.E.2d 145 (W. Va. 1991).

98. *Miller v. Monongahela Power Co.*, 403 S.E.2d 406, *cert. denied*, 112 S. Ct. 186 (W. Va. 1991).

99. *Huffman*, 415 S.E.2d at 154.

100. *Id.* at 147.

101. *Id.* at 155.

ly, the court decided the plaintiff had assumed the risk as a matter of law.¹⁰²

In an interesting dissent, Justice Workman chided the majority for creating a standard in its opinion which did not exist previously and then concluding that the plaintiff had not met the standard.¹⁰³ She suggested that the court should have remanded the case to the circuit court so that the plaintiff could have an opportunity to meet the new standard the court had established.¹⁰⁴

A case which the *Huffman* court cited and which, like *Pasquale*, is more typical of this type of injury is *Miller v. Monongahela Power Co.*¹⁰⁵ Miller, an electrician working for the Homer Laughlin China Company in its plant, inadvertently wandered into a substation owned and operated by the Monongahela Power Company but which was located on Homer Laughlin's property. Homer Laughlin operated seven substations in its plant and the power company operated one, but the power company's substation had not been marked so as not to alert employees or other trespassers to the power company's substation which operated at a much higher voltage. Miller had never been to any of the substations in the Homer Laughlin plant and had no experience with the higher level of voltage. He sustained injuries which required the amputation of his right arm.¹⁰⁶

Miller's action against Homer Laughlin was dismissed by the trial court due to the company's workers' compensation defense of immuni-

102. *Id.*

103. *Id.* at 156. The *Huffman* court held that:

[F]or a trespasser to establish liability against the possessor of property who has created or maintains a highly dangerous condition or instrumentality upon the property, the following conditions must be met: (1) the possessor must know or, from the facts within his knowledge should know, that trespassers constantly intrude in the area where the dangerous condition is located; (2) the possessor must be aware that the condition is likely to cause serious bodily injury or death to such trespassers; (3) the condition must be such that the possessor has reason to believe trespassers will not discover it; and (4), in that event, the possessor must have failed to exercise reasonable care to adequately warn the trespassers of the condition.

Id. at 152.

104. *Id.*

105. 403 S.E.2d 406 (W. Va. 1991).

106. *Id.* at 408-09.

ty from suit. Miller then proceeded against the power company based on product liability and simple negligence theories. The product liability count was dismissed because the plaintiff failed to state a claim.¹⁰⁷

The court found that Miller was a technical trespasser because he was on property where he should not have been. The court also found that the power company deliberately refused to mark its property and therefore "intentionally induced confusion about ownership" to discourage vandalism or other mischief with its property.¹⁰⁸

The court explained the distinction among trespassers, licensees, and invitees and noted that it did not intend to change the law or blur those distinctions. However, the court also discussed the danger inherent in electricity and acknowledged that "although we have never gone so far as to make electric companies insurers, we have come reasonably close by making it clear that any deviation from the *highest* possible standard of care is sufficient to impose liability."¹⁰⁹ The duty owed by the power company extends to every member of the general public and the court found that it was reasonable for a jury to conclude that the plaintiff would not have intruded upon the power company's property had it been marked clearly. The extreme danger inherent in electrical power requires that corresponding precautions be taken, and the power company's failure to take these precautions and to warn of the danger would not permit it to benefit from the plaintiff's technical trespass.¹¹⁰

In *Miller*, the power company argued that the combination of West Virginia's system of comparative negligence, its rule on joint and several liability, and its statutory workers' compensation immunity violated federal due process and equal protection principles.¹¹¹ The Supreme Court of Appeals of West Virginia did not believe that the power company had articulated the appropriate federal standard and

107. *Id.* at 409.

108. *Id.* at 412.

109. *Id.* at 411 (emphasis added).

110. *Id.* at 412.

111. *Id.* at 413.

therefore declined to adopt the argument.¹¹² Justice Neely invited the federal courts to establish some uniformity on personal injury matters, but refused to change West Virginia's tort law without more federal guidance.¹¹³ Ultimately, the court remanded the case to the circuit court with directions to enter judgment on the plaintiff's behalf for almost two million dollars.

The situation in *Miller* is vastly different from that in *Huffman* where the court found that the plaintiff was a willful trespasser to whom the power company owed no duty other than the general duty owed to the public regarding the nature of high voltage wires and the care which the power company must always exercise.¹¹⁴ In our opinion, the difference in the legal status of the plaintiffs in *Miller* and *Huffman* is the main reason for the opposite results.

Another recent industrial accident case involving electric power is *Helmick v. Potomac Edison Co.*¹¹⁵ Helmick was working for a contractor who was performing work on another party's property. His claim against Potomac Edison was based on his moving a guy wire connected to a utility pole which supported power lines operated by Potomac Edison. That movement caused Helmick to receive an electrical shock and resulted in the amputation of his left arm at the elbow.¹¹⁶

Helmick was awarded damages at trial and on appeal Potomac Edison alleged many of the same errors as had Monongahela Power in *Miller*. The majority opinions in both *Miller* and *Helmick* were written by Justice Neely who pointed out that "[Potomac Edison] asks us to replot the ground that we covered in the recent case of *Miller v. Monongahela Power Co.*"¹¹⁷ The *Helmick* court declined to revisit its holding in *Miller* and affirmed the jury's verdict in favor of the plaintiff. The importance of *Miller* and *Helmick* is that the Supreme Court of Appeals of West Virginia has indicated its unwillingness to accept

112. *Id.* at 414.

113. *Id.*

114. *Huffman*, 415 S.E.2d at 154.

115. 406 S.E.2d 700 (W. Va. 1991), *cert. denied*, 112 S. Ct. 301 (1991).

116. *Id.* at 703.

117. *Id.* at 704.

anything less than the highest standard of care from electric power companies.

Electrocution and electrical injury cases almost always involve serious injury and special damages which are significant due to the very nature of electricity and the manner in which it injures someone. Despite the dangerousness of electricity, as indicated by *Huffman*, *Miller*, and *Helmick*, it is rare that an individual will be totally blameless or free of fault in his or her actions regarding the source of contact with the electricity. *Pasquale* demonstrates that there are situations where a decedent or plaintiff did nothing to contribute to his own death or injuries, but the more common scenario is where some degree of comparative negligence on the part of the plaintiff is present. Given the inherent properties of electricity, however, the plaintiff should be able to recover if *any* breach of the power company's duty can be shown.

Counsel should always bear in mind, however, that the same properties of electricity which will allow a plaintiff to get his or her case to the jury for a determination of damages may also be a trap for the plaintiff because a judge or jury is going to expect an individual to treat a source of high voltage or electricity with a higher degree of respect and care simply because of its nature and its potential for harm a compared to a piece of machinery.

The plaintiff in *Miller* was permitted to recover because the power company had deliberately failed to identify its equipment and thereby caused the plaintiff's injury by failing to advise him of the substation's dangerousness. The court's opinion in *Helmick* mentioned that the plaintiff was injured because he and his co-workers were forced to perform work which the power company had refused to undertake.¹¹⁸ The inequity of the plaintiff's performing work not rightfully his responsibility which then lead to physical harm seemed to offend the court. Likewise, there was evidence in *Pasquale* that the power companies refused to allow the independent contractor's foreman to take a diagram out of the print room into the pit where the actual de-ener-

118. *Helmick*, 406 S.E.2d at 703.

gized cable could have been identified.¹¹⁹ These outcomes, however, do not alter the fact that even the danger inherent in electrical power will not absolve a plaintiff of outright stupidity or obliviousness to danger.

Other jurisdictions have reached similar results in electrical injury and death cases. For example, in *Pearson v. Hevi-Duty Electric*,¹²⁰ the decedent's family brought suit against his employer and two manufacturers of components on which he was working. Evidence introduced at trial indicated that the decedent's employer had removed a warning sticker which had been attached by the manufacturer to a piece of equipment and had replaced it with a warning that was less descriptive.¹²¹ The jury found no liability on the defendants' part and the plaintiffs appealed. The case turned basically on the nature of the warning and whether the plaintiff should have known of the condition of the switch: "Was the general warning [placed by the employer] adequate where the undisputed evidence revealed that a specific warning would have pinpointed the danger of the fuse being live in the open position?"¹²² The defendants asserted an assumption of the risk defense, but the Texas Court of Civil Appeals found that the decedent had not been warned of the danger:

There is nothing in the evidence to suggest that Pearson was anything but a normal, experienced, hardworking electrician and family man, whose job expertise had elevated him to foreman of the crew, under the facts adduced, it is unbelievable that Pearson, in attempting to cock the arc strangler on the fused switch, knew that in the open position, the switch was alive and that he was purposefully grabbing 7,200 volts of electricity with his bare hand and that he would be seriously harmed or killed by doing so. *To thus believe would be tantamount to believing that Pearson intended to commit suicide.*¹²³

119. *Pasquale*, 418 S.E.2d at 752.

120. 618 S.W.2d 784 (Tex. Civ. App. 1981).

121. *Id.* at 785.

122. *Id.* at 788.

123. *Id.* at 790 (emphasis added).

Because the court did not believe that Pearson would have acted in that fashion if he had known of the danger, it concluded that the warning was inadequate and granted a new trial.

In another action dealing with an alleged failure by a manufacturer to warn, the United States Court of Appeals for the Seventh Circuit in *Gracyalny v. Westinghouse Electric Corporation*¹²⁴ rejected Westinghouse's arguments that it had given purchasers of potentially defective equipment sufficient notice of the nature of a defect. Plaintiffs were injured when an oil circuit breaker exploded in a substation causing serious injuries to two workers and killing a third.¹²⁵ The oil circuit breaker was intended to interrupt the electric current in an electric distribution system.¹²⁶ Westinghouse knew of several malfunctions in the circuit breakers and wrote letters to all buyers advising of the defect and explaining how to make the appropriate safety changes.¹²⁷ The district court granted Westinghouse's motion for summary judgment on the grounds that Westinghouse had provided the plaintiffs' employer with sufficient notice of the defect and further that the employer's failure to make the recommended change constituted a superseding cause of the plaintiffs' injuries.¹²⁸

On appeal, the court extensively discussed a manufacturer's duty to warn and reviewed relevant state and federal case law. The court of appeals identified several considerations in determining the appropriateness of Westinghouse's conduct, such as whether Westinghouse should have followed up its letter with a second letter or should have provided a visit by a sales representative.¹²⁹ The court also questioned whether Westinghouse should have corrected the defect itself and should have warned the plaintiffs of the nature of the defect.¹³⁰ The

124. 723 F.2d 1311 (7th Cir. 1983).

125. *Id.* at 1313.

126. *Id.* at 1314-15.

127. *Id.* at 1315.

128. *Id.* at 1321.

129. *Id.*

130. *Id.* at 1322.

court concluded that these issues made summary judgment inappropriate and reversed the district court.¹³¹

The court of appeals also decided that the failure of the plaintiffs' employer to take the recommended action to correct the defect did not constitute a superseding cause of the plaintiffs' injuries.¹³² The court noted that "since Westinghouse's role in the events surrounding the malfunctioning circuit breaker does not appear to be too remote from appellants' injuries, we cannot conclude as a matter of law that Westinghouse should be insulated from liability due to WPS's [the plaintiff's employer] negligence."¹³³ The court thus concluded that summary judgment for Westinghouse based on WPS's superseding negligence was inappropriate as well.¹³⁴

Gracyalny can be treated as an electrical injury case or as a defective equipment case. The court of appeals' discussion of a manufacturer's duty to warn is enlightening, especially in view of its opinion that Westinghouse could have done more to warn of the defective nature of the oil circuit breaker. This conclusion was reinforced by WPS's confusion about which circuit breakers needed repaired, confusion that the court evidently thought could have been removed had Westinghouse been more thorough in its follow up with WPS and with WPS's employees, the plaintiffs.

F. Explosions

Explosion cases, like electrical injury cases, can occur in several different settings. A typical case is when a gas company's lines leak or rupture and thereby allow gas to accumulate in an area, unbeknownst to those employees working around it, eventually resulting in an explosion. Another case frequently encountered is an explosion caused by defects in the transmission or distribution lines which then injures an individual working on the line or servicing it.

131. *Id.*

132. *Id.* at 1323.

133. *Id.*

134. *Id.*

In an explosion case, the injured worker's attorney's primary analysis should focus on the party who has dominion and control of the gas line. For example, when an explosion occurs in a building whose gas is supplied by the gas company, but whose gas lines or plumbing are not within the gas company's control or dominion, the burden is upon the plaintiff to show a negligent act or an omission on the part of the gas company which caused the injury. This principle was stated in *Everly v. Columbia Gas of West Virginia, Inc.*,¹³⁵ the leading case on gas line explosions in West Virginia.

In *Everly*, Columbia Gas supplied natural gas to the plaintiff's home. An explosion occurred in the home and a resulting fire destroyed the structure.¹³⁶ The plaintiffs brought suit on the theory that a leak had occurred in Columbia's transmission equipment which supplied gas to the house thereby allowing the gas to accumulate and explode.¹³⁷ The defendant prevailed at trial on a jury verdict.¹³⁸

On appeal, the court held that where the gas company does not have dominion or control over all of the gas plumbing in a building which it supplies with gas, the burden is upon the plaintiff to specifically prove a negligent act or omission by the gas company which contributed to the plaintiff's injury.¹³⁹ In a situation where the plaintiff does not control the system of plumbing, however, the plaintiff's only burden is to prove that gas escaped from the gas company's lines and that an explosion occurred. The plaintiff does not need to prove the negligence which caused the gas to escape when he or she was not in control of the leaking gas lines.¹⁴⁰

Regarding, at least, the gas company's own transmission or distribution lines or plumbing, it is initially held to virtually a strict liability standard. For equipment not within the gas company's dominion or control, the standard requires the plaintiff to prove the gas company's

135. 301 S.E.2d 165 (W. Va. 1982).

136. *Id.*

137. *Id.* at 166.

138. *See id.*

139. *Id.* at 168.

140. *Id.*

negligence. *Everly* also discussed issues of comparative and contributory negligence and sole proximate cause.¹⁴¹

Another decision by the Supreme Court of Appeals of West Virginia dealing with a gas explosion is *Peneschi v. National Steel Corp.*¹⁴² Peneschi was injured when he jumped from a water tank located approximately one hundred feet from the explosion of a coke oven battery. He brought suit against several parties, including the National Steel Corporation for whom the work was being performed and two subcontractors.¹⁴³ The circuit court jury returned a verdict for National Steel Corporation and found that it was not negligent in causing the explosion.¹⁴⁴

Justice Neely engaged in an extensive discussion of whether *Fletcher v. Rylands*¹⁴⁵ was applicable in West Virginia and concluded that:

[W]hile an unrelated third party could recover against either Koppers [Peneschi's employer] or National on a strict liability, *Rylands* - type theory, an employee of either the general contractor or a subcontractor who is hired to work under hazardous circumstances is barred from recovery on a strict liability theory.¹⁴⁶

The court based its opinion on the theory that it was not willing to extend to employees of independent contractors who were expressly hired to work with or around an abnormally dangerous instrumentality the same protection that employees of a third party would possess for the same injury. The fact that the contractor and, by extension, its employees were working with a known abnormally dangerous instrumentality was sufficient to insulate the employer of the independent contractor, such as National Steel Corporation, from liability. The court

141. *Id.*

142. 295 S.E.2d 1 (W. Va. 1982).

143. Peneschi attempted to amend his complaint to add his employer as a defendant on a *Mandolidis* theory, but the court rejected the amendment on the grounds it was barred by the statute of limitations. *Id.* at 3.

144. *Id.*

145. 3 H.&C. 774, 159 Eng. Rep. 737 (1865), *rev'd*, L.R. 1 Ex. 265 (1866), *aff'd*, L.R. 3 H.L. 330 (1868).

146. *Peneschi*, 295 S.E.2d at 5.

acknowledged that a contractor's employees would have a cause of action against the contractor and its employer "for negligence that is the proximate cause of the employee's injury,"¹⁴⁷ but no such cause of action existed for injuries based on a strict liability theory.

Prior to *Everly* and *Peneschi*, the court had decided *Reed v. Smith Lumber Co.*,¹⁴⁸ in which it delineated the specific duties which a gas company owes to the public. The plaintiffs in *Reed* filed suit for damages sustained due to the improper installation, assembly, and inspection of a gas furnace and the resulting gas leak.¹⁴⁹ Evidence was introduced that the gas company was aware that the furnace had been improperly installed and that the gas was not properly venting from the furnace when it was lit.¹⁵⁰ The court concluded that these were questions related to the gas company's knowledge of a dangerous condition and its negligence in dealing with them which were issued for the jury.¹⁵¹ Therefore, the court reversed the trial court's grant of summary judgment for the gas company.¹⁵²

The *Reed* court recognized that the dangerous nature of natural gas requires a correspondingly heightened duty or burden for a company which furnishes it: "The gas company, as a distributor of a dangerous substance, has a duty to the public to exercise care and diligence proportionate to any danger, which is known or should be known to the utility. This duty includes 'inspection, oversight and superintendence.'"¹⁵³

Finally, the court noted from its own decision that if a gas company has notice of defects in gas lines, pipes, or customer's appliances that are dangerous to human health and safety, the gas company has a duty to repair the defects or to shut off the gas until the repairs are made.¹⁵⁴ Of course, what constitutes notice is a question for the jury

147. *Id.* at 12.

148. 268 S.E.2d 70 (W. Va. 1980).

149. *Id.*

150. *Id.* at 71.

151. *Id.* at 73.

152. *Id.*

153. *Id.* at 72. (quoting *Groff v. Charleston-Dunbar Natural Gas Co.*, 156 S.E. 881, 882 (W. Va. 1931)).

154. *Id.* (citing *Bell v. Huntington Development & Gas Co.*, 145 S.E. 165, 167-68 (W.

and depends upon the circumstances of the case. Finally, the court pointed out that its standard was not one of strict liability.¹⁵⁵ Before the gas company can be found liable, there must be a finding that the gas company had notice of defect which invoked a duty on the part of the gas company to investigate.

Although neither *Everly* nor *Reed* dealt with injuries sustained in industrial settings, the law which they represent is applicable. The two-part test which *Everly* and *Reed* suggest first deals with determining who has dominion and control and often ownership of the gas line itself. Once this determination is made and dominion and control is established, then either the plaintiff has the burden of proof to make a *prima facie* case or the plaintiff must simply show that a gas leak and explosion occurred without needing to prove how the leak occurred depending on who was in control of the gas lines.¹⁵⁶ The second part of the test examines the knowledge which the gas company had or should have had regarding defects in its gas lines, pipes, or customer's appliances and the duty which it must undertake to protect public health and safety.¹⁵⁷

Peneschi dealt with a gas explosion in an industrial setting and its language regarding independent contractors and abnormally dangerous activities is enlightening. *Peneschi* essentially says that an independent contractor's employees cannot recover on a strict liability theory because they knew what they were getting into. *Peneschi* is a continuation of *Reed* where the West Virginia court declined to hold the gas company strictly liable. Even in an industrial accident like *Peneschi*, the analysis regarding dominion and control established in *Everly* and *Reed* must be performed. The difference between *Peneschi* and *Reed/Everly* will be in determining the plaintiff's status and the theory or theories under which the plaintiff may recover. Obviously, a plaintiff who is not an employee of an independent contractor or of an entity such as a power company would have an easier time advocating a "strict liability" standard than would a *Peneschi*-type plaintiff, who is

Va. 1928)).

155. *Id.* at 73.

156. *Everly*, 301 S.E.2d at 168.

157. *Reed*, 268 S.E.2d at 72.

apparently supposed to appreciate the hazardousness of his or her employment to the degree that he or she may not recover for injuries solely as a result of the hazardousness.

Litigation in explosion cases may involve more parties than only the injured individual and the distributor or supplier of the gas. While the distributor or supplier will almost always be named as a defendant, other possible defendants are companies or entities which have performed work on the pipeline or distribution equipment. Given the standard in *Everly*, if a plaintiff can establish that the gas company has dominion and control over the distribution equipment, then the identification of other defendants and allegation of theories of negligence will normally be something done by the gas company to seek contribution and indemnification.

As mentioned in the introduction to this Article, a thorough investigation is absolutely necessary in an industrial accident. Industrial accident litigation, more than other types of litigation, often involves defendants who have unique corporate structures or relationships with other companies which obscure or even completely hide liability. Therefore, as the plaintiffs in *Peneschi* discovered when they attempted to amend their complaint to name their employer after the expiration of the statute of limitations, it is nothing less than an uphill battle to convince a court that the amendment should relate back¹⁵⁸ to the filing of the original complaint.¹⁵⁹

G. *Blasting*

In his discussion of strict liability in *Peneschi*, Justice Neely identified various activities for which strict liability would be applied if injuries resulted. One such activity was blasting, which the court found to be an abnormally dangerous activity. In *Peneschi*, Justice Neely pointed out that without a strict liability standard, injured parties would have to prove negligence on the part of the blaster in order to recover damages. Justice Neely suggested that he would be unable to prove

158. See also *Maxwell v. Eastern Assoc. Coal Corp., Inc.*, 394 S.E.2d 54 (W. Va. 1990).

159. W. Va. R. Civ. Pro. 15(c).

liability on the part of his neighbor who had elephants parachuting onto his farm if one of the elephants landed not on his neighbor's farm but on his (Neely's) roof. Proving either a negligent pilot or a defective parachute would be impossible and would deprive Justice Neely of a recovery. Similarly, proving negligence for injuries caused by blasting would be impossible, given the nature of the undertaking.

Justice Neely first identified *Whitney v. Ralph Myers Contracting Corp.*¹⁶⁰ for the proposition that a contractor engaged in blasting is strictly liable for the resulting injuries on the grounds that blasting was "intrinsically dangerous and extraordinarily hazardous."¹⁶¹ In *Peneschi*, Justice Neely declared:

The blasting cases stand for the proposition that where an activity is sufficiently hazardous and the likelihood of harm to others so high as to be almost inevitable, even the pursuit of an urgent public purpose like road construction will not defeat *Rylands*-type strict liability with its attendant spreading of the risk among all who, like users of our roads, benefit from the dangerous undertaking.¹⁶²

The subsequent case of *Moore, Kelly & Reddish, Inc. v. Shannondale, Inc.*,¹⁶³ confirmed that the use of explosives in blasting rendered the operator strictly liable even though the explosives were both necessary and utilized properly.

In *Moore*, the court rejected the appellant contractor's contention that strict liability ought not to apply where the injured party had consented to the blasting and had permitted it to take place. The court relied on *Whitney* to reject this assertion, but did not provide a lot of explanation for its decision. Apparently the finding of strict liability in *Whitney* for damages caused by blasting conducted by a contractor who was building a highway was sufficient for the *Moore* court.

In addition to physical injuries, property damage often results from blasting. The decisions of the Supreme Court of Appeals of West

160. 118 S.E.2d 622 (W. Va. 1961).

161. *Peneschi*, 295 S.E.2d at 9 (quoting *Whitney v. Ralph Myers Contracting Corp.*, 118 S.E.2d 622, syl. pt. 2 (W. Va. 1961)).

162. *Id.*

163. 165 S.E.2d 113 (W. Va. 1968).

Virginia do not differentiate between injuries sustained by innocent third parties (like Justice Neely in the parachuting elephant example) and by parties who are employees of a contractor. The ultrahazardous nature of blasting does not distinguish between the status of individuals: if an individual's person or property is damaged as a result of blasting, then the operator is liable for the injuries.

III. CONCLUSION

This article has attempted to identify some of the types of industrial accidents and the theories of recovery which are applicable to each. The scope of this topic does not permit an exhaustive discussion of every theory that can be asserted or of every type of industrial accident. The specific allegations will depend upon the parties and often upon the status of the injured party, i.e., whether the person is an independent contractor, employee, employer, and upon other factors such as workers' compensation immunity and indemnification and contribution between an employer and its contractor. The single most important component in these cases is an extensive investigation into the accident. The fruits of this investigation will yield the proper theories of liability and the appropriate defendants to pursue.