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WORKERS' COMPENSATION IN OHIO: SCOPE OF EMPLOYMENT AND THE INTENTIONAL TORT

INTRODUCTION

SINCE THE ENACTMENT of Ohio's first workers' compensation law in 1911¹ an Ohio employer has been immune from common law damages when an employee is injured in the scope and course of his employment.² In exchange for this immunity, the employer must pay his injured employee compensation for work-related injuries regardless of fault.³ The workers' compensation system is regarded as the exclusive remedy of the injured employee.⁴ Exceptions to this exclusivity of remedy doctrine are evolving however, with employees attempting more frequently to remove themselves from the scope of the workers' compensation system in order to recover common law damages.⁵ Most of these "assaults"⁶ on the exclusivity of remedy doctrine in Ohio are based on one or more of the following theories: (1) the employer intentionally injured his employee;⁷ (2) the employee was acting in a dual capacity at the time of the

¹1911 Ohio Laws 524.

²OHIO CONST. art. II, § 35; OHIO REV. CODE ANN. § 4123.74 (Baldwin 1983).

³This exchange was termed the "*quid pro quo*" of workers' compensation in NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, COMPENDIUM ON WORKMEN'S COMPENSATION 21 (1973) and was explained in *Varnes v. Willis Day Moving & Storage Co.*, No. C182-1949, at 2 (Ct. C.P., Lucas County, Ohio Mar. 31, 1983) as follows:

Historically, workers' compensation statutes were designed to serve a social and economic purpose. They were intended to eliminate certain common law defenses to recovery by an employee, but in return for the worker's ability to recover regardless of fault the amount which could be recovered was limited, depending upon the type and extent of injury; in return for the liability to compensate employees regardless of fault, the employer was granted immunity from an additional common law tort or statutory action.

Laffon v. Bell & Zoller Coal Co., 27 Ill. App. 3d 472, 327 N.E.2d 147 (1975). See also, 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 65.10 (1982).

⁴*United States v. Demko*, 385 U.S. 149 (1966); *Proctor v. Ford Motor Co.*, 32 Ohio App. 2d 165, 289 N.E.2d 366 (1972); OHIO REV. CODE ANN. § 4123.74 (Baldwin 1983).

⁵*Conference on Worker's Compensation and Workplace Liability* (1981), FOURTH NATIONAL CONFERENCE OF THE NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST. The Conference notes: "The issues of the 1970s in the field of workers' compensation involved fairly clear-cut decisions on *how much* to pay, such as changes in numerical limits or artificial obstacles to recovery. The issues of the 1980s focus on the appropriate *scope of coverage* . . ." *Id.* at IX.

One example of the "scope of coverage" issue can be found in *Littlefield v. Pillsbury Co.*, 6 Ohio St. 3d 389, 453 N.E.2d 570 (1983), where it was held that a worker who is injured on the way to his place of employment is within the scope of the workers' compensation system. In a vehement dissent, Justice Locher concluded that "[t]oday's decision will ruin the Workers' Compensation Fund in Ohio." *Id.* at 396, 453 N.E.2d at 577 (Locher, J., dissenting).

⁶*Cruikshank, The Erosion of Employer's Immunity in Ohio*, Ohio St. B. Ass'n. Service Letter 1 (Mar. 1983).

⁷This theory is based primarily upon *Blankenship v. Cincinnati Milacron Chem. Inc.*, 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982).

injury;⁸ or (3) the employee suffered a dual injury.⁹

The purpose of this comment is to discuss the issues and developments in the intentional tort area. Although analogies are drawn from developments in other jurisdictions, the primary focus will be on Ohio decisions. As will be demonstrated, Ohio courts are now being faced with the following question: Is an employer protected from common law damages no matter how his employee is injured, or should he be "punished" by a common law action when he intentionally injures his employee? Within this query are many others: What is an intentional injury? Can the employee recover workman's compensation *and* common law damages when intentionally injured? If the worker can only elect one remedy, when does a binding election occur? Various Ohio courts of common pleas have been forced to answer these questions, and the results have been inconsistent. This paper will explore the various approaches taken by the courts and will suggest a legislative solution designed to restore consistency and some degree of certainty to the area.

I. HISTORICAL BACKGROUND

It is not the purpose of this article to present an in-depth analysis of the history of worker's compensation laws in Ohio.¹⁰ A basic understanding of historical concepts is necessary, however, for as one commentator has noted, "[t]he principal barrier to understanding the nature of workmen's compensation lies in the very natural attempt to classify it into one of the more familiar or common legal concepts. Such attempts fail because workmen's compensation is a unique area of the law having its own individual characteristics."¹¹ In other words, "[t]o rightly understand the purpose, scope and object of [workers' compensation laws], a brief review of some of the causes which culminated in their adoption may throw some light upon the construction that should be given their provisions."¹²

⁸The dual capacity doctrine was introduced to Ohio in *Mercer v. Uniroyal, Inc.*, 49 Ohio App. 2d 279, 361 N.E.2d 492 (1976). For an excellent overview of the subject, see Cruikshank, *supra* note 6.

⁹Under the dual injury doctrine, an employee is entitled to bring a common law action against his employer when a compensable injury is aggravated by the employer: i.e., when the employer fraudulently conceals the existence of the injury. For further discussions of the dual injury doctrine, see *Delamotte v. Unitcast Div. of Midland Ross Corp.*, 64 Ohio App. 2d 159, 411 N.E.2d 814 (1978) and *Varnes v. Willis Day Moving and Storage Co.*, No. CI 82-1949 (Ct. C.P., Lucas County, Ohio, Mar. 31, 1983). See also, 2A A. LARSON, *supra* note 3 at § 68.32(C).

¹⁰For more complete discussions of the history of the workers' compensation system in Ohio, see J. YOUNG, *WORKMAN'S COMPENSATION LAW OF OHIO* (1963); *Vayto v. River Terminal & Ry.*, 18 Ohio N.P. (n.s.) 305 (1915), and J. LAMNECK, *OHIO WORKMEN'S COMPENSATION* (1946).

¹¹J. YOUNG, *supra* note 10 at 1. These "individual characteristics" were explained by an early case which stated that workers' compensation:

[I]s neither charity, nor pension, nor indemnity, nor insurance, nor wages, though, if each and all of these terms were placed in parallel columns with a definition of compensation, certain elements would be found common to all. The term 'compensation' has no striking similarity to any of them except the term wages. Lexicographers define 'compensation' as an equivalent. Wages are universally regarded as compensation — the equivalent of the expenditure of human energy.

Id. at 1-2, quoting *Austin Co. v. Brown*, 121 OHIO ST. 271, 277, 67 N.E. 874, 876 (1929).

¹²18 Ohio N.P. (n.s.) at 307.

Prior to the establishment of Ohio's workmen's compensation system in 1911,¹³ an employee attempting to recover damages for work-related injuries had to bring an action at common law. Unfortunately, employees were only recovering damages in approximately twenty percent of the cases brought¹⁴ due to the common law defenses of contributory negligence, assumption of the risk, and the fellow servant rule.¹⁵ In 1910, however, the Norris bill¹⁶ was passed. The Norris bill provided for comparative negligence and reduced, but did not eliminate, assumption of the risk and fellow servant defenses.¹⁷ Shortly after the passage of the Norris bill,¹⁸ the General Assembly appointed a Commission "to make an inquiry, examination and investigation into the subject of a direct compensation law or a law affecting the liability of employers to employees for industrial accidents."¹⁹ This Commission discovered the problems workers faced when bringing an action at common law. For example, it was found that:

Under the present system the Ohio workman who is killed while at employment gets an average settlement of \$344.88.

Under the present system the widow and the children of the injured are having to pay twenty-four per cent of this \$344.88 to lawyers and courts.

Under the present system only thirty-six per cent of those workmen who are killed while at their work receive anything at all, leaving sixty-four per cent, receiving absolutely nothing. . . . Under the present system where the workman is killed the widow and children of the thirty-six per cent, who get anything at all, have to wait from one to five years before they get it.²⁰

In addition, it was found that less than twenty percent of workmen injured and killed had a cause of action against their employer at common law.²¹ The Commission summarized its findings as follows:

¹³1911 Ohio Laws 524.

¹⁴Ratliff, *The New Workman's Compensation Law*, 9 OHIO L. REP. 207, 211 (1912).

¹⁵A brief discussion of these common law defenses and how they operated as a complete bar to recovery can be found in R. STEFFEN & T. KERR, *CASES AND MATERIAL ON AGENCY-PARTNERSHIP*, 144-210 (4th ed. 1980).

¹⁶1910 Ohio Laws 195.

¹⁷The Norris bill expanded the definition of a superior servant which had been offered in *Little Miami R. Co. v. John Stevens*, 20 Ohio 416 (1851).

¹⁸The Norris bill was enacted on April 30, 1910.

¹⁹1910 Ohio Laws 231. The Wainwright Report, *quoted in* A. MILLUS & W. GENTILE, *WORKERS' COMPENSATION LAW AND INSURANCE* 21 (2d ed. 1980) states that by 1916, 31 states and the federal government had initiated similar investigations.

²⁰Findings of the Commissioners as reported in Ratliff, *supra* note 14 at 210.

²¹*Id.* Similarly, a New York study conducted in 1909 found that when a married man was killed on the job, his family received less than \$500, even though the average annual salary for the man was in excess of \$700. The New York Commission also stated:

In many of these cases there was a permanent injury, such as the loss of an eye, which did not prevent the man suffering it from taking up his work at the same wage he carried before the accident.

In . . . 44% [of these cases], nothing was paid by the employer, not even medical expenses.

A. MILLUS & W. GENTILE, *supra* note 19, at 22-23.

1. That only a small proportion of workmen injured by accidents of employment get substantial compensation, and, therefore, as a rule, they and their dependents are forced to a lower standard of living, and often become burdens upon the state . . .
2. That the sytem [sic] is wasteful, being costly to employers and to the state and of small benefit to the victim of the accident . . .
3. That the system is slow in operation . . .
4. That the operation of the law breeds continually increasing antagonism between employer and employes [sic] . . .²²

In response to these findings, the first workers' compensation law of Ohio was passed.²³ The Act was entitled, "[t]o create a state insurance fund for the benefit of injured, and the dependents of killed employes [sic], and to provide administration of such fund by a state liability board of awards."²⁴ However, its scope was less broad than the title would indicate. Participation in the program was not mandatory; both the employer and the employee had to agree to participate, and the employee had to contribute ten percent of the premium.²⁵ Finally, in 1912, a constitutional amendment was adopted which created a fund for injured workers through compulsory contribution.²⁶ The portion of the constitutional provision which provides additional compensation for workers injured by specific safety violations is the result of a 1924 amendment.²⁷ Legislative implementation of the constitutional provision created the fund,²⁸ classified injuries,²⁹ and recognized injury, death and occupational disease claims.³⁰

²²Ratliff, *supra* note 14. The Supreme Court of Ohio echoed these criticisms when it summarized the Commission's findings in *State ex rel Yapple v. Creamer*, 85 Ohio St. 349, 97 N.E. 602 (1912) as follows: [T]hat the system which has been followed in this country of dealing with accidents in industrial pursuits, is wholly unsound, that there is intelligent and widespread public sentiment which calls for its modification and improvement, and that the general welfare requires it. That there has been tremendous waste under the present system, and that the action for personal injuries by an employee against an employer no longer furnishes a real and practical remedy, annoys and harasses both, and does not meet the economic and social problems which has resulted from modern industrialism.

Id. at 389, 97 N.E. at 604 (1912).

²³1911 Ohio Laws 524.

²⁴*Id.*

²⁵The fact that 1911 Ohio Laws 524 was unsatisfactory is evidenced by the enactment of OHIO CONST. art. II, § 35 in 1912. Nevertheless, 1911 Ohio Laws 524 was held to be constitutional in *Yapple*, 85 Ohio St. 349, 97 N.E. 602 (1912).

²⁶OHIO CONST. art. II, § 35.

²⁷Prior to this amendment, some employees were able to recover common law damages by claiming that the violation of the specific safety requirement amounted to an intentional tort. *See, e.g., McWeeny v. Standard Boiler & Plate Co.*, 210 F. 507 (N.D. Ohio, E.D. 1914), *aff'd.*, 218 F. 361 (6th Cir. 1914).

²⁸OHIO REV. CODE ANN. § 4123.29.

²⁹*Id.* at § 4123.57.

³⁰*Id.* at § 4123.54.

II. THEORY OF WORKERS' COMPENSATION

Many theories have been offered to explain these historical developments.³¹ Perhaps the best-known theory is that "the cost of the product should bear the blood of the working man."³² Ohio courts have followed this theory, albeit less descriptively. As the court in *Kenning v. Interurban Ry. & Terminal*³³ stated:

The new theory emanates from a more consistent economic view that it is proper for the industry itself, as part of the cost of production, to furnish relief to the incapacitated servant and to assume the burden of all industrial casualty to its employees. Indeed, it is now generally recognized that industrial risks are necessary accompaniments and incidental expenses of all industrial enterprises.³⁴

The significance of this theory cannot be over emphasized. As one commentator explained:

This is a new right which was not known in Ohio before the passage of the Workmen's Compensation Act. It is a reversion to some of the earlier theories that one who causes harm, no matter how innocently, must make it good; and it is opposed to the modern theory of torts that fault is essential to liability.³⁵

Thus, contrary to the old view that an employee assumed the risks of his employment,³⁶ the modern theory places responsibility for accidental injuries incurred in the work place upon the employer.³⁷ The only questions that remain are: (1) Does an intentional tort fall outside the coverage of the Workers' Compensation system; and, if so, (2) What is an "intentional tort"?

III. INTENTIONAL TORT V. SCOPE OF EMPLOYMENT

The Ohio constitution provides workers' compensation "to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment . . ."³⁸ This provision was implemented by the legislature in the Ohio Revised Code which provides that "[e]mployers 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 occupa-

³¹For an excellent overview of the various social, economic, and legal theories of workers' compensation laws, see Arnold *Gradually Developed Disabilities: A Dilemma For Worker's Compensation*, 15 AKRON L. REV. 13, 14-15 (1981).

³²*Id.* at 14, quoting NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, COMPENDIUM ON WORKMEN'S COMPENSATION 21 (1973) (where the statement is attributed to Lloyd George).

³³18 Ohio N.P. (n.s.) 526 (1915).

³⁴*Id.* at 528.

³⁵J. LAMNECK, *supra* note 10, at 7 (citing *Vayto v. River Terminal & Ry.*, 18 Ohio N.P. (n.s.) 305 (1915)).

³⁶*Id.*

³⁷The employer does not bear *full* responsibility for injuries because pain and suffering are not a part of the workman's award. The reason for this was given in State, *ex rel.* Crawford v. Indus. Comm'n., 110 Ohio St. 271, 275, 143 N.E. 574, 575 (1924) where it was explained that, "It was never intended by the most ardent advocates of workmen's compensation to give full and adequate remuneration, because this would remove much of the inducement of working men to exercise care and caution on their own part."

³⁸OHIO CONST. art. II, § 35.

tional disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment”³⁹

The phrase, “in the course of or arising out of his employment”⁴⁰ has caused both the courts and the commentators a great deal of confusion.⁴¹ As one English court stated:

The few and seemingly simple words ‘arising out of and in the course of the employment’ have been the fruitful (or fruitless) source of a mass of decisions turning upon nice distinctions and supported by refinements so subtle as to leave the mind of the reader in a maze of confusion. From their number counsel can in most cases, cite what seems to be an authority for resolving in his favor, on whichever side he may be, the question in dispute.⁴²

Despite these “nice distinctions” which leave the reader in a “maze of confusion,”⁴³ the law is well settled throughout the country that an intentionally inflicted injury is not one that arises in the scope and course of employment.⁴⁴ In *Blankenship v. Cincinnati Milacron Chemicals, Inc.*,⁴⁵ the Supreme Court of Ohio held that “intentional conduct does not arise out of employment, [thus] R.C. 4123.74 does not bestow upon employers immunity from civil liability”⁴⁶ Prior to *Blankenship*, the Ohio Supreme Court had denied a worker’s common law action for intentional harm on at least two prior occasions.⁴⁷ In *Blankenship*, the court recognized an employee’s right to plead

³⁹OHIO REV. CODE ANN. § 4123.74. In *Triff v. Nat’l Bronze & Aluminum Foundry Co.*, 135 Ohio St. 191, 20 N.E.2d 232 (1939), it was held that an employee could maintain a common law action if his injury was non-compensable. Section 4123.74 of the Ohio Revised Code has since been amended to bar a common law action “whether or not such injury, occupational disease, bodily condition, or death is compensable” *Id.*

⁴⁰*Id.*

⁴¹Professor Larson notes, “[f]ew groups of statutory words in the history of law have had to bear the weight of such a mountain of interpretation as has been heaped upon this slender foundation.” 1 A. LARSON, *supra* note 3, at § 6.10.

⁴²*Herbert v. Fox*, 1 A.C. 405 (1916), as reported in R. STEFFEN & T. KERR, *supra* note 15, at 165.

⁴³*Id.*

⁴⁴*Butler, Workers’ Compensation in the Eighties*, 139 REFERENCE MANUAL FOR CONTINUING LEGAL EDUCATION PROGRAM § 3.02 (1983). “No one (including Larson and other writers in the field) would deny that an assault and battery or any other obviously intentional tort by an employer is and should be outside the purview of Workers’ Compensation immunity.” *Id.* at § 3.02. On this subject, Professor Larson stated:

Intentional injury inflicted by the employer in person on his employee may be made the subject of a common-law action for damages on the theory that, in such an action, the employer will not be heard to say that his intentional act was an “accidental” injury and so under the exclusive provisions of the compensation act.

2A A. LARSON, *supra* note 3 at § 68. Professor Larson goes on to note that the above rule is not applicable to an intentional injury inflicted by a co-employee. *Id.* (Perhaps a new application of the fellow servant defense?).

⁴⁶69 Ohio St. 2d 608, 433 N.E.2d 572 (1982).

⁴⁷*Id.* at 613, 433 N.E.2d at 576.

⁴⁸See *Bevis v. Armco Steel Corp.*, 86 Ohio App. 525, 93 N.E.2d 33 (1949), *appeal dismissed*, 153 Ohio St. 366, 91 N.E.2d 479 (1950) (action for intentional misrepresentation); *Greenwalt v. Goodyear Tire & Rubber Co.*, 164 Ohio St. 1, 128 N.E.2d 116 (1955) (action for intentional fraud); *Cf. Delamotte v. Unitcast Div. Midland Ross*, 64 Ohio App. 2d 159, 411 N.E.2d 831 (1978), where it was held that “[a]n employee’s remedy under the Workers’ Compensation Act is not exclusive, and he may resort to a civil action in tort when he has been injured by an employer’s intentional or malicious tort.” *Id.* at 159, 411 N.E.2d at 831.

a claim for intentional harm against his employer,⁴⁸ concluding that "the protection afforded by the Act has always been for negligent acts and not for intentional tortious conduct."⁴⁹ Unfortunately, the court did not define what an intentional tort is. Instead, it indicated that "it is for the trier of fact to initially determine whether the alleged conduct constitutes an intentional injury."⁵⁰ Thus, it becomes necessary to examine the issues presented when defining "intentional tort."

IV. DEFINING INTENTIONAL INJURY

The basic problem a trial court faces when defining "intentional injury" is this: Must the employer have intended to inflict a specific injury on his employee or is a reckless disregard for the safety of the employee enough? Two recent Ohio trial court cases have struggled with this dilemma, reaching different conclusions.

In *Gains v. Webster Manufacturing Co.*,⁵¹ the Court of Common Pleas for Lake County charged the jury that an intentional act includes wilful or wanton misconduct.⁵² The court defined wilful to include "intentionally failing to do that which should be done . . . actual ill will or an intent to injure need not be present."⁵³ "Wanton" was defined to include the employer's failure to exercise enough care under the circumstances such that "the defendant knew or should have known that the probability of injury . . . as a result of such failure was great."⁵⁴ An actual intent to inflict injury upon the employee was not necessary.⁵⁵

In reaching this decision, the trial court was in accord with a West Virginia case cited favorably by the Supreme Court of Ohio in *Blankenship*. In *Mandolidis v. Elkins Industries*,⁵⁶ the Supreme Court of West Virginia held that an intentional tort included wilful, wanton and reckless misconduct on the part of the employer.⁵⁷ However, West Virginia has had a number of excessive verdicts remitted since the *Mandolidis* decision,⁵⁸ and in February of

⁴⁸69 Ohio St. 2d at 613, 433 N.E.2d at 576.

⁴⁹*Id.* at 614, 433 N.E.2d at 577.

⁵⁰*Id.* at 615, 433 N.E.2d at 578.

⁵¹No. 81 CIV 091 (Ct. C.P. Lake County, Ohio, Nov. 29, 1982), *rev'd*, No. 9-258 (Ohio Ct. App. 11th D., Jan 8, 1984).

⁵²*Id.* as reported in Cruikshank, *supra* note 6, at 1.

⁵³*Id.*

⁵⁴*Id.*, reporting that the jury returned a verdict for the employee (who had already received workers' compensation benefits) in the amount of \$128,622.50 as compensatory damages.

⁵⁵*Gains v. Webster Mfg. Co.* has been reversed by the Eleventh District Court of Appeals, (Case No. 9-258, Jan. 8, 1984), but the possibility of other districts adopting this broad definition of "intentional" injury remains.

⁵⁶246 S.E.2d 907 (W. Va. 1978).

⁵⁷*Id.*

⁵⁸Garvin, *Worker's Compensation in the Eighties*, 139 REFERENCE MANUAL FOR CONTINUING LEGAL EDUCATION, § 3.06 (1983) reports that:

One study of post-*Mandolidis* suits concludes that verdicts have been 'exorbitant.' In one suit, the

1983 legislation was enacted which essentially overrules the case.⁵⁹

Contrary to the holding in *Mandolidis* and *Gains*, the view held throughout the United States is that a deliberate intent to injure is necessary to recover common law damages.⁶⁰ In *Varnes v. Willis Day Moving and Storage Co.*,⁶¹ the Court of Common Pleas of Lucas County followed the majority view in holding that, "to fall within the intentional conduct exception to the exclusivity rule, an employer's alleged intentional conduct must have had as its purpose the intention to inflict injury on the employee."⁶² The court stated that "it is the almost unanimous rule that intentional conduct does *not* include the following, *unless* done with the intention to inflict injury on the employee":⁶³

- (1) accidental injuries caused by gross, wanton, wilful, malicious negligence or conduct of the employer⁶⁴;
- (2) an employer's intentional toleration of a dangerous condition which sets the stage for an accidental injury⁶⁵;
- (3) "an employer's conduct requiring an employee to perform dangerous tasks"⁶⁶;
- (4) an employer's orders requiring an untrained employee to work in a dangerous situation, even if the employer was aware that the untrained employee lacked the experience necessary to appreciate the danger⁶⁷;
- (5) "an employer's failure to rectify conditions which previously injured an employee"⁶⁸;
- (6) "an employer has knowledge of risks and similar occurrences but disregards the risks"⁶⁹; and

jury returned a verdict of \$2,500,000 in compensatory damages, \$500,000 in punitive damages and \$1,000,000 for loss of consortium in a suit stemming from a coal mining accident. The judgment was three times the total assets of the defendant company. The suit was based upon failure to keep a machine in good working order. The verdict was set aside as excessive, and the case is to be retried on the issue of damages.

Id. See Note, *In Wake of Mandolidis*, 84 W. VA. L. REV. 893 (1982), which discusses other verdicts.

⁵⁹Section 23-4-2(C)(2)(i) of the West Virginia Code requires an employee bringing an intentional tort action to prove a conscious, subjective intent to produce the specific result or injury. "This standard requires a showing of an actual, specific intent and may not be satisfied by allegations or proof of . . . willful, wanton or reckless misconduct." W.V. CODE § 23-4-2(C)(2)(i) (Supp. 1983).

⁶⁰Cruikshank, *supra* note 6 at 1-2.

⁶¹No. CI 82-1949 (Ct. C.P., Lucas County, Ohio, Mar. 31, 1983).

⁶²*Id.* at 5 (citing *Gildersleeve v. Newton Steel Co.*, 109 Ohio St. 341, 142 N.E.2d 678 (1924)).

⁶³*Id.* at 6.

⁶⁴*Id.* (citing 2A A. LARSON, *supra* note 3 at § 68.13.).

⁶⁵*Id.* In support of this theory, the court could have recognized that OHIO CONST. art II, § 35 was amended in 1924 to allow added compensation for injuries caused by violations of specific safety requirements. See *supra* note 30 and accompanying text.

⁶⁶*Id.* (citing *Lowery v. Universal Match Corp.*, 6 Ariz. App. 98, 430 P.2d 444 (1967)).

⁶⁷*Id.* (citing *McCray v. Davis H. Elliott Co.*, 419 S.W.2d 542 (Ky. Ct. App. 1967)).

⁶⁸*Id.* (citing *Caline v. Maede*, 239 Or. 239, 396 P.2d 694 (1964)).

⁶⁹*Id.* (citing *Provo v. Bankers Hill Corp.*, 393 F. Supp. 778 (D. Idaho 1975)).

(7) "when an employer violates a specific safety requirement."⁷⁰

V. SUGGESTED APPROACH

It is clear that an employer cannot claim immunity from common law damages when he intentionally injures his employee.⁷¹ However, it is up to the trier of fact to determine whether the injury is intentional⁷² and at least two Ohio trial courts are in disagreement regarding the definition of intentional injury.⁷³ A better approach might be to allow the employee to recover workers' compensation benefits *and* bring an action at common law with a legislative definition of "intentional injury." In this regard, the West Virginia experience⁷⁴ provides an excellent example.

Under the present system in West Virginia, an employer is not granted immunity from a common law action for intentionally inflicted injuries.⁷⁵ Instead, the worker is entitled to recover compensation benefits and bring a common law action against the employer.⁷⁶ The West Virginia legislature has created an Employers' Excess Liability Fund⁷⁷ "to provide insurance coverage for employers subject to this chapter who may be subjected to liability . . . for any excess of damages over the amount received or receivable under this chapter."⁷⁸ The fund is kept separate from the workmens' compensation fund⁷⁹ and participation in it is voluntary.⁸⁰

A similar system would be desirable in Ohio. By allowing the worker or his dependents to recover compensation benefits immediately, the family will not be unduly financially burdened or faced with the difficult choice of which remedy to pursue. At the same time, the worker can maintain a common law action against his employer who may, if he has chosen to participate in the excess liability fund, have insurance coverage for the liability. In addition, the legislation could contain a definition of "intentional injury" to remove the problem of conflicting court opinions.

This type of approach would also be more desirable for economic well being of the employers and the state of Ohio. "The theory behind this doc-

⁷⁰*Id.* (citing *State ex rel. Buehler Food Markets, Inc. v. Indus. Comm'n*, 64 Ohio St. 2d 16, 412 N.E.2d 945 (1980)).

⁷¹69 Ohio St. 2d 608, 433 N.E.2d 572.

⁷²*Id.* at 614, 433 N.E.2d at 577.

⁷³See *supra* note 47 and accompanying text.

⁷⁴See Garvin, *supra* note 58 at § 3.05.

⁷⁵W. VA. CODE § 23-4-2(b). The elements needed to prove an intentional tort are provided in *Id.* at 23-4-2(C)(2)(i). See *supra* note 61.

⁷⁶*Id.* at § 23-4-2(b).

⁷⁷*Id.* at § 23-4C-2.

⁷⁸*Id.* at § 23-4C-1.

⁷⁹*Id.* at § 23-4C-2.

⁸⁰*Id.* Note that the West Virginia fund provides "insurance" for intentional torts a proposition that is usually held contrary to public policy. See *Northwestern Nat'l Casualty Co. v. McNulty*, 307 F. 2d 432 (5th Cir. 1962).

trine of exclusiveness is that the workers' compensation system provides predicatable compensation for any on the job injury."⁸¹ In other words, these "predetermined Workers' Compensation benefits create an environment of economic predictability for the employee, employer, and the employer's insurer."⁸² Under the present state of affairs, this environment of predictability is being removed. Workers' compensation, once seen as "an identifiable cost of doing business, has been undermined through employee tort claims,⁸³ thus interjecting unpredictable tort exposures into the business, labor, insurance and legal communities."⁸⁴ If predictability is removed from the marketplace, businesses will leave the Ohio marketplace and move into states with more identifiable costs of doing business.

VI. NOTE ON ELECTION OF REMEDIES ISSUE

Professor Larson has noted that:

[t]he most troublesome question . . . is this: if the employee pursues one remedy to a fruitless conclusion, is he barred by his election from pursuing the other? The majority of cases have held that an unsuccessful damage suit does not bar a compensation claim, and that an unsuccessful compensation claim does not bar a damage suit.⁸⁵

Perhaps an even more troublesome question could be stated as follows: If the employee pursues one remedy to a fruitful conclusion, is he barred by his election from pursuing the other?

In *Nayman v. Kilbane*,⁸⁶ the plaintiff had successfully recovered workers' compensation benefits and brought a civil action against his employer alleging intentional harm. After citing *Blankenship*, the Ohio Supreme Court held that the trial court has jurisdiction "to determine whether a cognizable claim exists."⁸⁷ Here too there has been a conflict among the trial courts. In *Gains v. Webster Manufacturing Co.*, it was stated that:

A recovery which compensates one's intentional injuries in no way duplicates a partial award granted by the industrial commission for accidental, work-related injuries. More appropriately, it serves to equitably reimburse the injured employee or his representative while simultaneously ensuring accountability from employers for their intentional and tortious actions. In opening an avenue previously closed, redress is now available for worker pain and suffering⁸⁸

⁸¹No. CI 82-1949 at 3 (Ct. C.P., Lucas County, Ohio, Mar. 31, 1983).

⁸²Cruikshank, *supra* note 6 at 1.

⁸³*Id.*

⁸⁴*Id.*

⁸⁵2A A. LARSON, *supra* note 3 at § 67.31.

⁸⁶1 Ohio St. 3d 269, 439 N.E.2d 888 (1982).

⁸⁷1 Ohio St. 3d at 271, 439 N.E.2d at 890.

⁸⁸No. 81-CIV 0091 at 3 (Ct. C.P., Lake County, Ohio, Nov. 29, 1982).

Accordingly, the injured worker was entitled to keep his workers' compensation award and his jury verdict.⁸⁹ In *Hunter v. Litton Industries, Inc.*,⁹⁰ on the other hand, the trial court denied the worker's claim for intentional harm after receiving compensation benefits by simply stating that "plaintiff could have pursued either avenue; having taken one, she will not be permitted to also follow the other. It appears to this Court that said approaches are exclusive of one another."⁹¹ These cases demonstrate a conflict among the lower courts even in this area.

CONCLUSION

It is obvious that some plaintiff employees are successfully avoiding the workers' compensation system to recover common law damages for intentional injuries while others are unable to do so. Trial courts are in disagreement over what constitutes an intentional tort, resulting in inconsistent verdicts for similarly situated parties. Trial courts also disagree over the election of remedies problem.

The present state of affairs is strikingly similar to that which existed at the turn of the century, before Ohio's workers' compensation law came into being. Uncertainty and inconsistency abound, result in wasted time and creating antagonism between workers and employers. Yet an even more pressing and tangible problem exists. Ohio courts, in attempting to strike a balance between the injured worker and the deep-pocket employer, are removing the certainty and predictability the workers' compensation system meant to provide. In doing so, the economic well-being of the state is endangered. It is easily foreseeable, for example, that a steel company might be faced with the choice of reopening a plant in Steubenville, Ohio, or building a new facility in neighboring Weirton, West Virginia. Even though the cost of building the new West Virginia plant may be higher than reopening the Ohio factory, the employer would be well advised to opt for the West Virginia location, given the current status of the law in both states. If two workers were to sustain an identical injury on different sides of the state line, the West Virginian's recovery would be limited, predictable and planned-for in advance, whereas the Ohioan's recovery could force the entire company into receivership unless a remittitur is granted. An obvious solution would be for Ohio to legislate this area as West Virginia has done, in order to restore certainty, consistency, and fairness to the Ohio system. In doing so, Ohio would be taking a progressive approach to a growing problem for workers while at the same time encouraging employers to remain Ohio taxpayers and to responsibly plan for personal injury liabilities. Hopefully, such a development will soon occur.

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⁸⁹*Id.* at 4.

⁹⁰No. 82CV-03-1608 (Ct. C.P., Franklin County, Ohio, Apr. 29, 1983).

⁹¹*Id.* at 3.

