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Workers' Compensation: The Assault on the Shield of Immunity - Coming to Blows with the Exclusive-Remedy Provisions of the North Dakota Workers' Compensation Act

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WORKERS' COMPENSATION: THE *ASSAULT* ON THE SHIELD OF IMMUNITY—*COMING TO BLOWS* WITH THE EXCLUSIVE-REMEDY PROVISIONS OF THE NORTH DAKOTA WORKERS' COMPENSATION ACT

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I. INTRODUCTION 906
II. HISTORICAL PERSPECTIVE 907
III. COMPENSABILITY OF ASSAULTS 914
A. THE EFFECT OF A COOLING-OFF PERIOD 922
B. THE "AGGRESSOR DEFENSE" 924
IV. MAINTAINING A COMMON-LAW TORT ACTION 926
A. RECEIVING COMPENSATION BENEFITS BARS ANY COMMON-LAW RECOVERY 927
B. SEARCHING FOR AN EXCEPTION TO EXCLUSIVITY 932
1. *Noncomplying Employer Exception* 932
2. *Third-Party Exception: The Cumulative-Remedy Provision* 932
3. *"Intentional Injury" Exception?* 937
a. Schlenk v. Aerial Contractors, Inc., 268 N.W.2d 466 (N.D. 1978) 938
b. Hulne v. International Harvester Co., 496 F. Supp. 849 (D.N.D. 1980) 942
c. Schreder v. Cities Service Co., 336 N.W.2d 641 (N.D. 1983) 944
V. FOUNDATION FOR AN "INTENTIONAL-*INJURY*" EXCEPTION 946
VI. RECONCILING THE COMPENSATION vs. COMMON LAW DICHOTOMY 951
VII. PROPOSAL FOR REFORM 958
A. HOUSE BILL 1032: A PREVIOUS LEGISLATIVE EFFORT 959
B. A SUGGESTED APPROACH FOR LEGISLATIVE REFORM 960
VIII. CONCLUSION 962

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I. INTRODUCTION

It is abundantly clear that when an injury to an employee is determined to be covered by a workers' compensation act and the employer has acted with ordinary *negligence*, the statutorily prescribed compensation is the sole remedy and any recovery against the employer in tort is barred.[1] An employer's immunity from common-law liability under such circumstances is unqualified and virtually absolute.[2] It is also clear that an employer's agents are likewise afforded protection under the shield of immunity for negligent conduct by virtue of the exclusive-remedy provisions of most workers' compensation acts.[3] It is not so clear, however, that the exclusive-remedy provisions of North Dakota's Workers' Compensation Act were designed or intended to be construed in a fashion to bar an injured employee's common-law action when an employer or fellow servant has acted with the intention of causing harm by physically assaulting an employee.[4]

Although certainly not purporting to be an exhaustive analysis, this article will examine the current state of the law with respect to the compensability of workplace assaults. The analysis regarding the compensability of such assaults serves as a necessary predicate for the

1. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 80, at 574 (5th ed. 1984). *See, e.g.*, Stine v. Weiner, 238 N.W.2d 918, 925 (N.D. 1976) (ruling that the exclusive-remedy provisions of the North Dakota Workers' Compensation Act effectively bar any otherwise maintainable common-law action).

2. *See* Peak v. Small Business Administration, 666 F.2d 1121, 1122 (8th Cir. 1981) (adhering to the notion that an action under workers' compensation is one of "strict liability").

3. *See* N.D. CENT. CODE § 65-01-08 (1985). *See also* Gabriel v. Minnesota Mut. Fire & Casualty, 506 N.W.2d 73, 77 (N.D. 1993); Stuhlmiller v. Nodak Mut. Ins. Co., 475 N.W.2d 136, 138 (N.D. 1991); Hulne v. International Harvester, Co. 496 F. Supp. 849, 852 (D.N.D. 1980); Latendresse v. Preskey, 290 N.W.2d 267, 270 (N.D. 1980); Schlenk v. Aerial Contractors, Inc., 268 N.W.2d 466, 471 (N.D. 1978); Stine v. Weiner, 238 N.W.2d 918, 925 (N.D. 1976) (noting that it is well established that a common-law action against a co-employee is barred by the exclusive-remedy provisions of North Dakota's Workers' Compensation Act). The rationale for extending the shield of immunity to co-employees or fellow servants rests in part upon the notion that since "the employee's own negligence . . . does not defeat compensation for his injuries, then certainly it cannot be held that the negligence of his fellow workman, or that disobedience of a fellow workman to the employer's directions, can defeat compensation to the injured workman." Badger Furniture Co. v. Champeau, 217 N.W. 734, 736 (Wis. 1928). Therefore, it would appear appropriate that the shield of immunity should likewise be extended since the question of whether the employer, the employee, or a fellow employee is guilty of negligence is immaterial for compensation purposes. *See infra* notes 126-131 & accompanying text.

4. The focus of this article is on those workplace assaults which occur between either co-workers or between an employer and a subordinate. Common law tort actions in which an injured employee attempts to hold an employer vicariously liable for the actions of his servants are, for the most part, not contemplated by this article. Additionally, assaults perpetrated upon an employee by third parties who have no connection with the particular employment are, for the most part, beyond the intended scope of this article, as are the rules and cases regarding "horseplay."

resolution of an ultimate issue. The ultimate issue being: whether an employee who is the subject of an intentional assault may proceed in tort against an employer or fellow servant[5] *directly* for the injuries sustained, or whether that employee will be barred from maintaining an action at law due to the exclusive-remedy provisions of North Dakota's Workers' Compensation Act.

The article begins by providing a brief perspective on the historical development of workers' compensation law in the United States. In setting the stage for resolving the ultimate issue as previously articulated, the article proceeds to trace the development of compensable work-related assaults. It next highlights specific categories of assaults which still seem to pose problems for judicial decisionmakers when making compensability determinations. The final scene consists of turning the tables and examining a battered employee's prospects for maintaining a common-law action in North Dakota directly against the battering employer or fellow servant. The satisfactory resolution of this inquiry is made in light of very broad language in the exclusive-remedy provisions of the North Dakota Workers' Compensation Act which at first blush appear to effectively bar virtually *any* common-law action. The article highlights general rules which have emerged and discusses North Dakota authority highly relevant to the settlement of the issue. In attempting to provide a logical and equitable basis for its resolution, the article concludes by suggesting the codification of an *exception* to the rule of exclusivity for a *narrow* category of employment-related injuries.

II. HISTORICAL PERSPECTIVE

Workers' compensation legislation in America emerged from conditions created by modern industrial development, coupled with the inability of remedies provided by the common law to adequately cope with injuries suffered by workers.[6] The dissatisfaction with the tort system's fault-based method of compensating injured workers for

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5. The terms "fellow servant," "co-worker," and "co-employee" are used interchangeably in this article and include supervisors.

6. 82 AM. JUR. 2D *Workers' Compensation* § 1 (1992). The common law was largely ineffectual in resolving those disputes between an employee and employer regarding workplace injuries. Larry Kraft, *The North Dakota Equity for Tortfeasors Struggle—Judicial Action vs. Legislative Over-Reaction*, 56 N.D. L. REV. 67, 82 (1979). It has been estimated that between seventy and ninety-four percent of industrial accidents under the common-law system went completely uncompensated. KEETON ET AL., *supra* note 1 § 80, at 572 n.43 (citing various authorities). During the late nineteenth century, uncompensated industrial accidents had reached such alarming proportions that communities found it necessary to support "large numbers of maimed workers and their families as public charges." Leslie Hertz Kawaler, Note, *Intentional Torts Under Workers' Compensation Statutes: A Blessing or a Burden?*, 12 HOFSTRA L. REV. 181, 183 (1983).

personal injuries brought about by work-related[7] accidents prompted every jurisdiction in the United States to promulgate comprehensive workers' compensation legislation.[8]
Workers' compensation effectively substitutes the concept of *fault* with the principle of *compensation*. The correlative rights and obligations of employers and employees under the compensation scheme are fixed by statutes which usually mandate compulsory coverage, and generally any employee covered by the statutory scheme is automatically entitled to compensation for work-related injuries.[9] The boundaries of coverage are marked and distinctively defined by a "coverage formula" contained in all compensation acts.[10] However, the right to compensation benefits is in all cases and under all acts dependent upon the relationship of the particular injury to an employee's work.

It is clear that the introduction of workers' compensation legislation has radically changed the law of employer liability. Moreover, because the common law left most work-related injuries uncompensated, the transition from a common-law remedy to an exclusive remedy under workers' compensation acts was not a significant sacrifice for workers.[11] Prior to workers' compensation, recovery under the common law hinged

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7. "Work-related" as used in this article refers to those injuries which both "arise out of the employment" and occur while the employee was acting "in the course of employment." Additionally, the terms "employer" and "employee" are used throughout this article without more than cursory reference. Although meant to be used in the traditional and ordinary sense herein, it should be noted that the terms are significant to the threshold requirement of compensability and have specific meanings within the provisions of workers' compensation acts. *See, e.g.*, N.D. CENT. CODE § 65-01-02(15) & (16) (Supp. 1993). The relationship of employer and employee must exist in order to entitle a claimant to recover in a proceeding for compensation. Schaefer v. North Dakota Workers' Compensation Bureau, 462 N.W.2d 179, 180 (N.D. 1990); Starkenberg v. North Dakota Workmen's Compensation Bureau, 13 N.W.2d 395, 397 (N.D. 1944) (noting that an injured worker must be an "employee" in order to make the Act applicable); Mutual Life Ins. Co. v. State, 298 N.W. 773, 777 (N.D. 1941).

8. Jean C. Love, *Actions for Nonphysical Harm, Relationship Between Tort System and No-Fault Compensation (With an Emphasis on Worker's Compensation)*, 73 CAL. L. REV. 857, 857 (1985). Although the seeds to a consciously enlightened social policy for workplace injuries can arguably be traced to the early 1100's, 1 ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 4.10, at 2-1 & 2-2 (1990), the "compensation movement" originated in Germany with the adoption of the German Compensation Act of 1884. JOSEPH W. LITTLE ET AL., WORKERS' COMPENSATION 46 (3d ed. 1993). It was, however, England's Workmen's Compensation Act of 1897 which in many respects served as the model for subsequent American acts. *See* Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 797 (1982). All but eight states had enacted compensation acts by 1920, and on January 1, 1949, Mississippi, the final state, adopted its compensation act. *Id.* § 5.30, at 39. *Contra* W. KEETON, ET AL. *supra* note 1, § 80, at 573 (noting that Hawaii was the last state to promulgate workers' compensation legislation in 1963). North Dakota entered into the mainstream movement and promulgated its compensation act in 1919. *See* 1919 N.D. LAWS ch. 162.

9. Woods v. Hughes Oil Co., 226 N.W. 586 (N.D. 1929).

10. *See, e.g.*, N.D. CENT. CODE § 65-01-02(9) (Supp. 1993).

11. *See* Dana M. Leonard, Note, *Exclusivity Provisions of Workers' Compensation Statutes: Will the Dual Injury Principle Crack the Wall of Employer Immunity?*, 55 U. CIN. L. REV. 549, 549 (1986).

upon proof of employer negligence, and at least four obstacles existed which effectively prevented successful actions by workers against their employers.[12] First, although the common law imposed duties upon employers for the protection of employees, those duties were limited, making a breach of a duty difficult to prove.[13] Second, even on those occasions when an employee's injuries resulted from the demonstrated negligence of the employer, the common-law defenses of the fellow--servant rule, contributory negligence, and assumption of risk were onerous and therefore usually barred recovery.[14] Third, the concomitant litigation which was a necessary incident to any recovery generally meant delay, pressure upon the injured worker to settle any claim in order to merely survive, and exorbitant expenses and attorneys' fees which often left the worker with only a fraction of any money ultimately paid.[15] Fourth, the recovery of injured workers was further frustrated by the fact that co-workers often refused to testify against their employers for fear of losing their jobs.[16]

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12. *Id.* at 550. Prior to workers' compensation legislation, an estimated 80% of workers and their dependents who brought actions seeking compensation for workplace injuries lost their cases. Samuel B. Horovitz, *Assaults and Horseplay Under Workmen's Compensation Laws*, 41 NW. U. L. REV. 311, 311 (1946). As one court noted: "More than one-half of all . . . suits [at law for work-related injuries] were lost by the injured employee, and a very considerable per cent of the remainder resulted in little material help to him." Phil Hollenbach Co. v. Hollenbach, 204 S.W. 152, 156 (Ky. 1918).

13. Leonard, *supra* note 11, at 550. *See* KEETON ET AL., *supra* note 1, § 80, at 569 (classifying the specific common-law duties imposed on the employer for the protection of employees). The employer had an advantage under the common-law system because the burden of proving a cause of action was upon the injured employee. S. Paige Burress, Comment, *The Intentional Tort Exception to the Exclusivity Provision of Workers' Compensation: A Comparison of West Virginia and Ohio Law*, 18 OHIO N.U. L. REV. 273, 273 (1991).

14. *See* Zarski v. Creamer, 59 N.E.2d 704, 705 (Mass. 1945) (denying recovery because of the fellow-servant rule); Schlemmer v. Buffalo, Rochester & Pittsburgh Ry., 220 U.S. 590, 598-99 (1911) (barring recovery for accidental death because of contributory negligence); Bonner v. Texas Co., 89 F.2d 291, 294 (5th Cir. 1937) (denying recovery for injuries sustained from an explosion despite apparent defects in working conditions because the risks of the job were assumed by the employee).

15. KEETON ET AL., *supra* note 1, § 80 at 572-73.

16. Leonard, *supra* note 11, at 550. The fear of job loss has been vitiated to some extent in a number of jurisdictions by either statute or judicial creation of a limited class of exceptions to the "employment-at-will" doctrine. *See* Hillesland v. Federal Land Bank Ass'n, 407 N.W.2d 206, 211-12 (N.D. 1987) (acknowledging the public policy exception to the employment-at-will rule). One of these exceptions is grounded in public policy and prohibits the retaliatory discharge of an employee for filing a workers' compensation claim. *See, e.g.*, Frampton v. Central Indiana Gas Co., 297 N.E.2d 425, 427-28 (Ind. 1973) (holding that the fear of discharge for filing a workers' compensation claim "would have a deleterious effect on the exercise of a statutory right[;]" consequently, a retaliatory discharge is actionable in a court of law despite the exclusive-remedy provisions of a workers' compensation statute); Springer v. Weeks & Leo Co., 429 N.W.2d 558, 559 (Iowa 1988) (holding that an employer's discharge of a worker for merely pursuing a statutory right to compensation for a work-related injury will support a civil claim based upon public policy despite the general rule of exclusivity); Krein v. Marian Manor Nursing Home, 415 N.W.2d 793, 794 (N.D. 1987) (opining that the retaliatory discharge of an employee for seeking workers' compensation violates public policy and, accordingly, will give grounds for a tort action against the employer). In some jurisdictions grounds for a tort action for retaliatory discharge will exist despite the fact that the employee was terminated

Although the advent of workers' compensation legislation by states marked the removal from the tort system of a large number of lawsuits brought against employers by injured workers, the statutory regime represents a codification of a mutual compromise or bargain whereby both employees and employers surrender certain advantages in exchange for others. In return for assuming absolute liability (liability regardless of fault) for all work-related injuries an employee may incur at a statutorily prescribed amount,[17] the employer under the workers' compensation act is granted immunity from all common-law actions based on negligence.[18] The traditional common-law obstacles of the fellow-servant rule, contributory negligence, and assumption of risk are abolished and unavailable as defenses to the employer.[19] The injured employee, in return for surrendering his or her common-law right of action for *negligence*, secures relatively swift and certain compensation for work-related injuries that affords at least nominal relief which might otherwise be unavailable.[20]

In order to effectuate the mutual compromise, compensation acts generally provide that *the benefits recoverable under the act are "exclusive" of all other remedies available to those employees or their dependents in cases in which the injuries sustained fall within the scope*

"before" applying for workers' compensation benefits. *See* Richardson v. Illinois Bell Tel. Co., 510 N.E.2d 134, 136 (Ill. Ct. App. 1987) (holding that it is not necessary to a cause of action for retaliatory discharge that the injured worker had "actually" filed a workers' compensation claim while employed); Wright v. Fiber Indus., Inc., 299 S.E.2d 284, 287 (N.C. Ct. App. 1983) (noting that an employee does not need to file a workers' compensation claim to be protected from retaliatory discharge). *But see* Griffey v. Prestige Stamping, Inc., 473 N.W.2d 790, 792 (Mich. Ct. App. 1991) (ruling that a claim for retaliatory discharge could not be based upon a discharge because of the employer's anticipation that the injured worker might file a claim for workers' compensation). *See generally* Theresa Ludwig Kruck, Annotation, *Recovery for Discharge from Employment in Retaliation for Filing Worker's Compensation Claim*, 32 A.L.R.4th 1221 (1984).

17. Workers' compensation statutes contain detailed and elaborate schedules with specific compensation rates for prescribed injuries which provide some measure of monetary relief which is less than full compensation. *E.g.*, N.D. CENT. CODE §§ 65-05-12, -13 (Supp. 1993).

18. David S. Goldberg, Comment, 17 ST. MARY'S L.J. 513, 515 (1986). The real benefit to the employer under a workers' compensation act is the relief from personal injury liability and the concomitant risk of a large jury award.

19. *See, e.g.*, Pace v. North Dakota Workmen's Compensation Bureau, 201 N.W. 348, 350 (N.D. 1924) (opining that it was the intention of the legislature in enacting the North Dakota Workers' Compensation Act to ensure that an employee injured in the course of employment recover in cases regardless of questions of negligence, contributory negligence, or assumption of risk).

20. Goldberg, *supra* note 18, at 515-16; State v. E.W. Wylie Co., 58 N.W.2d 76, 81 (N.D. 1953). The remedy afforded by the workers' compensation provisions "was never intended by [even] the most ardent advocates of workmen's compensation to give full remuneration for loss of wages, because this would remove much of the inducement of workmen to exercise care and caution, and would be an inducement to malinger." 1 WILLIAM R. SCHNEIDER, WORKMEN'S COMPENSATION § 3, at 6 (3d ed. 1941).

of the act.[21] This rule of exclusivity is the cornerstone of the compensation compromise and is enshrined to greater or lesser degrees in every compensation act in America.[22]

The "no-fault" system of workers' compensation, which imposes unilateral employer liability, is premised in part on a legislative view that it is economically more efficient for employers to absorb the expense of work-related injuries as normal costs of doing business since work--related accidents are an inevitable accompaniment of industrial production.[23] It was also regarded as more equitable for the employer

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21. The exclusivity provisions of North Dakota's Workers' Compensation Act are extremely broad and manifested in sections 65-01-01, 65-01-08, 65-04-28, 65-05-06 of the North Dakota Century Code. *See* Smith v. Vestal, 494 N.W.2d 370, 372-73 & n.2 (N.D. 1992) (explaining further the North Dakota Century Code sections regarding exclusivity). Section 65-01-01 provides:

> The state of North Dakota, exercising its police and sovereign powers, declares that the prosperity of the state depends in a large measure upon the well-being of its wage workers, and, hence, for workers injured in hazardous employments, and for their families and dependents, sure and certain relief is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding, or compensation, except as otherwise provided in this title, and to that end, all civil actions and civil claims for relief for such personal injuries and all jurisdiction of the courts of the state over such causes are abolished except as is otherwise provided in this title.

N.D. CENT. CODE § 65-01-01 (Supp. 1993). Section 65-01-08 provides:

> Where a local or out-of-state employer has secured the payment of compensation to his employees by contributing premiums to the fund, the employee, and the parents of a minor employee, or the representatives or beneficiaries of either, have no claim for relief against such contributing employer or against any agent, servant, or other employee of such employer for damages for personal injuries, but shall look solely to the fund for compensation.

N.D. CENT. CODE § 65-01-08 (1985). Section 65-04-28 provides:

> Employers who comply with the provisions of this chapter shall not be liable to respond in damages at common law or by statute for injury to or death of any employee, wherever occurring, during the period covered by the premiums paid into the fund.

N.D. CENT. CODE § 65-04-28 (1985). Section 65-05-06 provides:

> The payment of compensation or other benefits by the bureau to an injured employee, or to his dependents in case death has ensued, are in lieu of any and all claims for relief whatsoever against the employer of the injured or deceased employee.

N.D. CENT. CODE § 65-05-06 (1985).

The sweeping language of North Dakota's exclusive-remedy provisions similarly limits an injured worker's spouse or dependents in most cases from maintaining a cognizable claim in tort. *See, e.g.*, Wald v. City of Grafton, 442 N.W.2d 910, 912 (N.D. 1989) (holding the exclusive-remedy provisions precluded recovery by the spouse of an injured worker of damages for loss of consortium).

22. *See generally*, INTERNATIONAL ASSOCIATION OF INDUSTRIAL ACCIDENT BOARDS AND COMMISSIONS, *Exclusive Remedy Survey* (1990) (setting forth a relatively comprehensive multi-jurisdictional comparison of exclusive-remedy provisions of various statutory schemes). The rule of exclusivity is broadly interpreted in order to effectuate the public policy underlying workers' compensation. Smith v. Vestal, 494 N.W.2d 370, 375 (N.D. 1992); Barry v. Baker Elec. Co-op, Inc., 354 N.W.2d 666, 673 (N.D. 1984).

23. Edward J. Higgins, *So Much "Quo" for So Little "Quid": Time for Michigan to Re-Examine the Intentional Tort Exception to Workers' Compensation Exclusivity*, 1992 DET. C.L. REV. 27, 34. As one commentator so eloquently noted:

> The theory underlying the workers' compensation acts never has been stated better

rather than the individual worker to shoulder, in the first instance, the burden of all costs associated with industrial production since:

> [t]he industry or employment which requires human agency for its operation should look to the care and upkeep of that agency; and the [workers' compensation] acts have been said to give merely recognition of the desirability of shifting the loss of injury from the individual to the persons who benefited by his engaging in the occupation in which he was injured.[24]

Such costs can in turn be distributed to the consumers of a particular product in the form of higher prices.[25] Disabled employees and the families of those workers who die from work-related injuries under the system can recover medical expenses and a portion of lost wages at "fixed" amounts.[26] In cases in which the work-related injury results in an employee's death, workers' compensation statutes additionally provide moderate funds to cover burial expenses and prescribe death benefits to the workers' dependents.[27] The recovery attained in any event, while guaranteed and relatively expedient, insures limited and determinate liability for employers.[28] This limited liability makes insurance against such losses possible since from a broad economic point of view, the costs are relatively moderate and reasonably predictable.[29]

In addition to cost distribution, staunch supporters of workers' compensation laws vehemently proclaim that the prospect of an employer's unilateral liability for every work-related injury serves as

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> than in the old campaign slogan, "the cost of the product should bear the blood of the workman." The human accident losses of modern industry are to be treated as a cost of production, like the breakage of tools or machinery. The financial burden is lifted from the shoulders of the employee, and placed upon the employer, who is expected to add it to his costs, and so transfer it to the consumer. In this he is aided and controlled by a system of compulsory liability insurance, which equalizes the burden over the entire industry. Through such insurance both the master and the servant are protected at the expense of the ultimate consumer.

KEETON ET AL., *supra* note 1, at 573 (footnotes omitted). *Accord* Tepesch v. Johnson, 296 N.W. 740, 743 (Iowa 1941) (opining that the burdens and costs of employee injuries should be simply treated as overhead and imposed upon the industrial enterprise).

24. 99 C.J.S. *Workmen's Compensation* § 5, at 41 (1958) (footnotes omitted). *See generally* Breitwieser v. State, 62 N.W.2d 900, 902 (N.D. 1954) (noting that the object of workers' compensation is to make the "industry" carry the burden of industrial injuries so that they are not borne by the individual employee).

25. Higgins, *supra* note 23, at 34-35.

26. *Id.* at 35 & n.50.

27. *See, e.g.*, N.D. CENT. CODE §§ 65-05-16 to -27 (1985 & Supp. 1993).

28. Kuhnert v. John Morrell & Co. Meat Packing, Inc., 5 F.3d 303, 305 (8th Cir. 1993).

29. Higgins, *supra* note 23, at 35-36.

strong incentive for the maintenance of workplace safety measures.[30] The "true science" of workers' compensation has in fact been proclaimed to be "accident" prevention.[31]

Judicial and statutory exceptions to the exclusive-remedy provisions of workers' compensation acts, however, are illustrative of a growing dissatisfaction with the system as originally bargained. Due to the perceived inequities that the cloak of immunity affords employers and their agents for certain categories of conduct, much litigation centers on testing the resolve of the exclusive-remedy provisions of the workers' compensation acts. The challenge to exclusivity has been precipitated in part due to the changes in the law which now represent improved prospects for recovery under the modern tort system.[32] Consequently, workers are, with increasing frequency, questioning the conditions under which they ceded their common-law rights and are turning to the judiciary with the hopes of supplementing or supplanting their statutory benefits with recovery in tort.

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30. *Id.* at 37. It has been said that "[n]ever before . . . has the movement for accident prevention and providing safety devices of every description in the factory, on the railroad, and in the mine, been carried forward with such zeal." *Id.* at 37 n.57. "No system for compelling the installation of safety devices and methods, enforceable by penal statutes or executive orders, could bring about the degree of [safety], perfection and efficiency along that line which is attained today by many . . . employers operating under the [c]ompensation [l]aw." *Id.* *Contra* Michael F. Marlow, *Exclusive Remedy Provisions in the Workers' Compensation System: Unwarranted Immunity for Employers' Wilful and Wanton Misconduct*, 31 S.D. L. REV. 157 (1985). At least one commentator, however, has stated that the goal of workplace safety has not been achieved by workers' compensation legislation:

> It would be nice to think that employers are impelled by humane motives to consider the health and safety of their employees as the paramount concern. But the unfortunate truth is that business reacts best to hopes of profit maximization. Where some employers can avoid more costly protections for their employees without incurring additional liability, they usually will do so. Employers generally will act only if given the monetary incentive to do so.
>
> The employer faces little deterrence . . . especially as long as the marginal increase in production out-distances the costs of the workers' compensation recovery. Actually, the cost of the total workers' compensation recovery would be the *upper* limit to the employer's cost under the present system. Most employers would pay only the increased premiums that might result after the carrier pays the compensation.

Id. at 162 (footnotes omitted). The failure of the workers' compensation system to achieve workplace safety has been one reason proffered by Congress for enacting OSHA legislation. Arthur J. Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers*, 34 LABOR L.J. 683, 686 (1983) (citing Congressman Phillip Burton, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1971, 91st Cong., 2d Sess. 891 (1970)).

31. Paul Raymond Gurtler, Comment, *The Workers' Compensation Principle: A Historical Abstract of the Nature of Workers' Compensation*, 9 HAMLINE J. PUB. L. & POL'Y 285, 296 (1989).

32. *See, e.g.*, N.D. CENT. CODE § 32-03.2-02 (Supp. 1993) (abrogating the common-law doctrine of contributory negligence and substituting the doctrine of comparative negligence in its place). New or expanded bases of tort liability such as the advent of products liability and vicarious liability under the doctrine of *respondeat superior* are representative examples of changes in the law which now represent improved prospects for recovery.

III. COMPENSABILITY OF ASSAULTS

The early general rule for intentional workplace assaults in many jurisdictions was simple: No recovery![33] The rationale for the rigid rule was that employees were hired to work, not to assault one another.[34] It was not viewed as fair to charge the damages resulting from such lamentable conduct to an innocent and unsuspecting employer.[35] Moreover, courts could not view such assaults as traditional "compensable work accidents" due to the existence of a "personal flavor" to them—such a peril could not reasonably be viewed as incidental to the employment.[36]

With the passage of time, injured workers began testing the resolve and rationale of a rigid adherence to the rule of noncompensability for work-related assaults. Even conservative courts began to eventually recognize that certain maliciously assaulted employees should be afforded relief under the compensation acts.[37] In order to ameliorate the harsh effects of such a rule, a number of exceptions to the general rule of noncompensability began to develop.

For example, an exception to the rule of noncompensability was made under circumstances in which an employer knew of the violent or drunken nature of an employee but still kept the worker on the job, and a readily foreseeable assault upon a fellow employee occurred.[38] Courts

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33. Horovitz, *supra* note 12, at 328. *See, e.g.*, Pierce v. Boyer Van Kuran Lumber & Coal Co., 156 N.W. 509, 510 (Neb. 1916) (ruling that an injury by a worker to a fellow employee, whether in anger or in play, is not a compensable injury arising out of the employment; compensation denied), *overruled by* Socha v. Cudahy Packing Co., 181 N.W. 706, 708 (Neb. 1921).

34. Horovitz, *supra* note 12, at 328.

35. *Id.*

36. *Id.* at 326-27. *See* Urak v. Morris & Co., 186 N.W. 345, 345-46 (Neb. 1922) (believing the "dividing line" for accidental injuries to be a workplace assault; compensation denied); Mountain Ice Co. v. McNeil, 103 A. 184, 185 (N.J. 1918) (holding that a claimant's injury sustained as a result from a workplace dispute was not a risk within the reasonable contemplation of the employer; compensation denied); Union Sanitary Mfg. Co. v. Davis, 115 N.E. 676, 677 (Ind. Ct. App. 1917) (finding that an injury resulting from a workplace assault which began as a quarrel regarding tools to do the work, was not an injury which could be contemplated by a reasonable person to be a natural incident of the work; compensation denied).

37. Horovitz, *supra* note 12, at 329-30.

38. *Id.* (citing *In re* Employer's Liability Assur. Corp., 102 N.E. 697, 698 (Mass. 1913) (finding that the injury arose out of and in the course of employment and was therefore compensable, where an obviously intoxicated employee, whose dangerous disposition was well known to the employer, assaulted and killed a fellow employee)); Dodson v. F.W. Woolworth Co., 224 N.W. 289, 289-90 (Neb. 1929). The *Dodson* court stated:

> Whenever an employer puts his employees at work with fellow servants who are known to him to be incompetent, insane and dangerous, and injuries to such employees, while engaged in their master's business, result therefrom, which may reasonably said to have been induced by the peculiar conditions of the employment thus created and permitted by

reasoned that the causal connection to the employment was clear even though the specific injury was not the result of the particular work for which the injured worker was hired.[39] Since a reasonable person could very well anticipate the result, assaults under such circumstances were viewed as incidental to the employment.[40]

Similarly, another exception to the general rule of noncompensability was made in a case in which a fatal attack was precipitated by an employee against a supervisor in retaliation for being discharged from employment.[41] The risk of assault was found to be intimately connected with the work since it was the supervisor's duty to terminate employees.[42]

Eventually, the number of exceptions began to multiply and overwhelm the general rule in such a manner that the decisions among the various fora were inconsistent and unpredictable.[43] The disarray that existed in assault cases was analyzed and clarified in 1940 by Justice Rutledge in the landmark decision of *Hartford Accident & Indemnity Co. v. Cardillo*,[44] a case in which he catalogued assault cases and prescribed a solution which has since become the *general rule* with respect to workplace assaults.

The claimant in *Cardillo* sustained a personal injury when, while engaged in work that he was hired to perform, a supervisor maliciously assaulted him after a name-calling exchange which was initiated by the

> the master, such injuries so inflicted may properly be said to be not only received in the course of employment, but also as arising out of said employment.

Id. at 289-90.

39. Horovitz, *supra* note 12, at 328 (citing McNicol's Case, 102 N.E. at 697)).

40. *Id.*

41. *See* Cranney's Case, 122 N.E. 266 (Mass. 1919). The foreman in *Cranney's Case* was shot and killed by a worker who he discharged for insubordination. *Id.* The court, in holding that the injury received arose out of and in the course of employment, was careful to note that the attack was unprovoked and that the supervisor was not the aggressor. *Id.*

42. *Id.* The fact that the particular assault in this case took the form of a murder rather than a broken bone was found to be immaterial since the risk of harm, irrespective of its result, was a natural incident of the employment. *Id.* As such, compensation was awarded to the supervisor's family. *See In re* Reithel, 109 N.E. 951 (Mass. 1915). In *Reithel*, the employer specifically directed the supervisor, who was subsequently assaulted, to order a repeated trespasser from the premises. *Id.* The court held that although a danger of being assaulted was not a usual concomitant of employment, when a special duty arises which creates a corresponding special risk of personal violence, that duty and risk become correlative. *Id.* at 952. The court in *Reithel* found that the risk could not be said to be one which was not incidental to the employment. *Id.*

43. Assault cases in the realm of workers' compensation during this period were perhaps best characterized as cases where "confusion and conflict . . . reign." Hartford Accident & Indem. Co. v. Cardillo, 112 F.2d 11, 15 (D.C. Cir.), *cert. denied*, 310 U.S. 649 (1940). *See generally*, Annotation, *Workmen's Compensation: Injury from Assault*, 112 A.L.R. 1258 (1938); Annotation, *Workmen's Compensation: Injury from Assault*, 72 A.L.R. 110 (1931)(discussing the early and diverse treatment of assault cases).

44. 112 F.2d 11 (D.C. Cir.), *cert. denied*, 310 U.S. 649 (1940).

supervisor.[45] The plaintiff in this case was the insurance carrier that appealed an order dismissing its complaint which sought to enjoin the enforcement of a compensation award granted by the compensation commission in favor of the claimant. The plaintiff contended that the assault had no relation to the work, but rather was brought about by a purely personal quarrel.[46]

The District of Columbia Circuit Court of Appeals began its analysis by examining the rules and exceptions set forth in a number of assault and horseplay cases, noting that the work itself often brings an employee within a particular peril and makes the particular risk a part of the employment for compensation purposes.[47] The court found a passage from a decision by Justice Cardozo to be instrumental in framing its analysis: "'The claimant was injured, not merely while he was in a factory, but because he was in a factory, in touch with associations and conditions inseparable from factory life.'"[48] In examining the work environment, the court cogently reasoned that:

> associations include the faults and derelictions of human beings as well as their virtues and obedience. Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness and camaraderie, as well as emotional make-up. In bringing men together, work brings these qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotion flare-up. Work could not go on if men became automatons repressed in every natural expression. "Old Man River" is a part of loading steamboats. These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment.[49]

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45. Hartford Accident & Indem. Co. v. Cardillo, 112 F.2d 11, 13 (D.C. Cir.), *cert. denied*, 310 U.S. 649 (1940).

46. *Id.* at 13.

47. *Id.* at 14.

48. *Id.* (quoting Leonbruno v. Champlain Silk Mills, 128 N.E. 711 (N.Y. 1920)).

49. *Id.* at 15. Justice Rutledge opined that it was "[n]ot the particular or peculiar character of the associations and conditions [that is pivotal], but that the work [itself] surrounds the employee with them is the basic thing." *Id.* at 14.

It should be noted that there were a small number of early "state court" decisions which sustained awards of compensation to the victims of assaults. *See, e.g.*, Inland Steel Co. v. Flannery, 163 N.E. 841, 841 (Ind. Ct. App. 1928). The court in *Flannery* noted:

> When coemployees are working together, it is expected that disagreements will arise in

The court explained that the resistance to a broad rule which would bring workplace assaults into the realm of compensable injuries was based on a number of factors which were no longer critical to the determination of compensability.[50] In further articulating its position, the court adopted the view that:

> rejects the test of immediate relevancy of the culminating incident. That is regarded, not as an isolated event, but as part and parcel of the working environment, whether related directly to the job or to something which is a by-product of the association. This view recognizes that work places men under strains and fatigue from human and mechanical impacts, creating frictions which explode in myriads of ways, only some of which are immediately relevant to their tasks. Personal animosities are created by working together on the assembly line or in traffic. Others initiated outside the job are magnified to the breaking point by its compelled contacts. No worker is immune to these pressures and impacts upon temperament. They accumulate and explode over incidents trivial and important, personal and official. But the explosion point is merely the culmination of the antecedent pressures. That is not relevant to the immediate tasks, involves a lapse from duty, or contains an element of volition or illegality does not disconnect it from them nor nullify their causal effect in producing its injurious consequences. Any other view would reintroduce the conceptions of contributory fault, action in the line of duty, nonaccidental character of voluntary conduct, and independent, intervening cause as applied in tort law, which it was the purpose of the statute to discard. It would require the application of different basic tests of liability for injuries caused by volitional conduct of the claimant and those

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> connection with the work, and there may be blows and fighting. Injury to an employee from such a source is one of the risks of the employment, and is an accidental injury arising out of the employment, within the meaning of those terms as they are used in the Compensation Act.

Flannery, 163 N.E. at 841.

50. *Cardillo*, 112 F.2d at 15. One factor was premised upon the notion that quarrels and willful assaults were always viewed as something personal and there was a fundamental opposition between "personal" acts and "official" (work-related) acts. *Id.* This view was repudiated due to a recognition that quarrels and fights could be caused by work. *Id.* Consequently, although workplace quarrels and fights involve fault and volition, have no tendency to forward the employment, and are inundated with the personal element of animosity and anger, this will not necessarily be sufficient to sever the causal connection between the injury and the work. *Id.*

resulting from negligent action, mechanical causes and the volitional activities of others.[51]

The court found the entire sequence of events leading up to the injury to be the normal and natural product of working together.[52] Consequently, the court affirmed the judgment awarding compensation.[53]

It was the *dictum* of Justice Rutledge's opinion, however, which marked the boundary for the rule of compensability for assault cases when he expressed the view that "[t]he limitation, of course, is that the accumulated pressures [of working together] must be attributable in *substantial part* to the working environment. This implies that their causal effect shall not be overpowered and nullified by influences originating *entirely* outside the working relation and not substantially magnified by it."[54]

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51. *Id.* at 16-17 (footnotes omitted). Vestiges of the reasoning utilized by Justice Rutledge in *Cardillo* can be found in cases as early as 1920. *See, e.g.*, Verschleiser v. Stern & Son, 128 N.E. 126 (N.Y. 1920) (opining that workers' compensation was designed to ameliorate a social condition rather than to fix liability by an adherence to common-law concepts).

Although critical to the court's analysis is the notion that tort concepts of fault, etc. have no place in compensation determinations, the panel was unable to refrain from repeatedly noting that the claimant was not the "aggressor" in the affray. *See Cardillo*, 112 F.2d at 13 & 18. The circuit court also distinguished the case at hand from another case it had decided in which it denied compensation on the grounds that the claimant in that case was the "aggressor." *Id.* at 18 (citing Fazio v. Cardillo, 109 F.2d 835 (D.C. Cir. 1940)). Such attention to this fact seems paradoxical regardless of the reasons asserted in behalf of the aggressor defense in general, since the introduction of considerations of who was the aggressor in a particular banter necessarily involves the element of fault. More interestingly, the subsequent attitude of the District of Columbia since its landmark recitation in *Hartford Accident & Indemnity Co. v. Cardillo* was indeed to deny recovery to an aggressor. *See* Ackerman v. Cardillo, 140 F.2d 348, 349 (D.C. Cir. 1944). A number of courts have, however, utilized the *Cardillo* decision as precedent for abrogating any distinctions between an innocent victim and an aggressor for compensability purposes. *See, e.g.*, Petro v. Martin Baking Co, 58 N.W.2d 731, 735 (Minn. 1953).

52. Hartford Accident & Indem. Co. v. Cardillo, 112 F.2d 11, 17-18 (D.C. Cir.), *cert. denied*, 310 U.S. 649 (1940). The *Cardillo* decision was indeed significant to the development of compensability for workplace assaults. However, the idea that workplace injuries should be compensable since it is the work environment which brings together in close proximity workers with differing ideas, nationalities, and temperaments and a resulting injury is often a natural product of such associations was not necessarily a novel notion in workers' compensation law. Cases regarding "horseplay" had reached the same conclusion at least fifteen years earlier. *See, e.g.*, Kansas City Fibre Box Co. v. Connell, 5 F.2d 398, 399-400 (8th Cir. 1925).

53. *Cardillo*, 112 F.2d at 17. The fact that the claimant may have been at fault for engaging in a banter with his superior made him guilty of at most contributory fault. *Id.* at 18. Compensability determinations under workers' compensation acts, however, do not hinge upon comparing fault. *See id.*

54. *Id.* at 17. (emphasis added). This limitation is perhaps best typified in the "imported quarrel" cases:

> When the animosity or dispute that culminates in an assault is imported into the employment from claimant's domestic or private life, and is not exacerbated by the employment, the assault does not arise out of the employment under any test.

1 LARSON, *supra* note 8, § 11.20(a), at 3-274.

The rule for the compensability of workplace assaults as promulgated in *Hartford Accident & Indemnity Co. v. Cardillo* stemmed from what some courts had previously characterized as an exception to the general rule. However, the rule was clear:

> The *vital question* must be: was the assault part and parcel of the work or working environment, *i.e.*, was it a work-induced assault, in which case the injury due to the assault is compensable; or was the assault motivated by influences originating entirely outside the working relation and not substantially magnified by it; *i.e.*, was it a *purely* personal matter, in which case no right to a compensation award exists?[55]

Mere inferences, without direct evidence, are generally sufficient to establish that a particular quarrel which arose out of the employment was not the result of a purely personal matter.[56] It should be noted, however, that where the workplace happens to be merely the fortuitous site of an assault which is otherwise purely personal in origin, compensation benefits will be properly denied if the employment does not otherwise impact the altercation.[57]

Justice Rutledge's formulation has set the pattern for the current legal theory of compensability for workplace assaults.[58] Although early courts originally characterized the majority of assaults to be wholly personal in order to avoid compensability, the prevailing *general rule* today is: if the assault can even in part be reasonably attributed to the conditions or nature of the employment, courts will generally regard the altercation to be a *work-related assault*, rather than a purely personal

55. Horovitz, *supra* note 12, at 331 (emphasis added).

56. *Id.* at 333.

57. Carnegie v. Pan American Linen, 476 So. 2d 311, 312 (Fla. Dist. Ct. App. 1985); Tampa Maid Seafood Products v. Porter, 415 So. 2d 883, 884 n.2 (Fla. Dist. Ct. App. 1982). By the same token, it is not necessarily a prerequisite that the assault take place on the premises of employment, as a continuation of a quarrel which was initiated on the premises has been found to be compensable even though the actual assault took place on the street or sidewalk. *See* Appleford v. Kimmel, 296 N.W. 861 (Mich. 1941).

58. Horovitz, *supra* note 12, at 331. *See, e.g.*, Anderson v. Hotel Cataract, 17 N.W.2d 913, 916-17 (S.D. 1945) (utilizing the *Cardillo* decision as precedent for reversing the denial of an award when an assault between co-employees stemmed from a quarrel about work abilities); Cunning v. City of Hopkins, 103 N.W.2d 876, 882 (Minn. 1960) (citing *Cardillo* with approval and noting that the decision "has found acceptance in liberalizing the application of compensation laws" in assault cases); York v. City of Hazard, 191 S.W.2d 239, 241 (Ky. 1945). *See also* 1 LARSON, *supra* note 8, § 11.00, at 3-178 (stating that an assault is considered to arise out of the employment if either the reason for the assault was an argument which had its origin in the employment or the risk of assault was increased because of the setting or nature of the work; an assault arising from personal reasons do not arise out of the employment unless the work was a contributing factor).

matter.[59] Thus, compensability will be established and a claimant may recover modest monetary relief from workers' compensation. By contrast, the *general rule* for a *purely personal assault* is: when an assault is *not work-related* but rather motivated solely by personal animosity, arising from circumstances wholly unconnected with the employment, the injury will not be compensable and monetary relief from workers' compensation will be unavailable.[60] Of course, an employer or co-employee will not be protected by the shield of immunity conferred by the various compensation acts. A battered worker, therefore, may freely pursue his or her common-law remedies directly against the assailant and potentially receive full remuneration.

The critical inquiry in distinguishing a work-related assault from a purely personal assault in most instances becomes whether the totality of the circumstances demonstrate the presence of a sufficient nexus or degree of job-relatedness between the employment and the injury. It is not necessary that *prior* to the injury-producing event the employer or a reasonable person should have foreseen the assault. It is sufficient if *after* the injury-producing event a reasonable person can see a connection between the working environment and the resultant injury. If the injury is foreseeable by a reasonable person under an objective analysis, the assault arises out of the employment and the employee's right to compensation is established.[61] Practically speaking, the burden of establishing a sufficient nexus between the injury and the employ-

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59. Horovitz, *supra* note 12, at 334-35. The *origin* of a particular dispute between two protagonists is crucial when determining whether a given assault is "work-related." *See* Orozo v. Texas Gen. Indem. Co., 611 S.W.2d 724, 725 (Tex. Civ. App. 1981) (finding plaintiff's testimony to the fact that he had no idea why his fellow employee attacked him to be insufficient to prove, as a matter of law, that the attack was purely personal and not in any way related to his employment); Slusher v. Fire Department, 280 N.W. 78 (Mich. 1938) (ruling that where there was no proof of any disagreement over the work, the resulting unexplainable death which resulted in a shooting from a supervisor was not compensable).

60. Some jurisdictions, including Minnesota, have created an "assault exception" to the threshold requirement of compensability by directly including the rule of noncompensability for purely personal assaults in the definition of compensable personal injuries. *See, e.g.*, MINN. STAT. ANN. § 176.011 subd. 16 (1993). The applicable statutory definition in Minnesota provides:

> "Personal injury" means injury arising out of and in the course of employment . . .; but does not cover an employee except while engaged in, on, or about the premises where the employee's services require the employee's presence as a part of such service at the time of the injury and during the hours of such service. Where the employer regularly furnished transportation to employees to and from the place of employment such employees are subject to this chapter while being so transported, *but shall not include an injury caused by the act of a third person or fellow employee intended to injure the employee because of personal reasons, and not directed against the employee as an employee, or because of the employment.*

Id. (emphasis added). *See* Foley v. Honeywell, Inc., 488 N.W.2d 268 (Minn. 1992); Bear v. Honeywell, Inc., 468 N.W.2d 546 (Minn. 1991) (applying the "assault exception").

61. Horovitz, *supra* note 12, at 234.

ment in assault cases is generally not onerous since the line of demarcation between a "purely personal" assault and one whose roots are seeded in the employment is at times not capable of being drawn with precision. The difficulty in making such distinctions is owed in part to an interweaving of the facts, the natural escalation that generally precedes most affrays, the necessity of gauging the intent of the parties, and judicial attempts to construe the facts in a manner which favors a finding of coverage.

The vast majority of compensation acts, including North Dakota's, contain the statutory requirement that the injury must arise by "accident" in order to be compensable.[62] Indeed, the application and scope of most compensations acts are usually measured by this threshold criterion. The "accident" requirement was initially problematic for early courts dealing with assault cases. The difficulty encountered arose because of the compelling argument that injuries from an assault were the product of *intention* as distinguished from *accident* which was mandated by the various compensation acts.[63] This argument was quickly overcome "by the simple expedient of viewing the affair from the point of view of the victim rather than the assailant, since from the victim's point of view the assault was an unexpected and untoward mishap."[64] The "accident" component of workers' compensation is thus not construed in a strict or technical sense under modern schemes but, rather, in a fashion which effectuates the spirit and true intent of the legislation. Consequently, the well-established and prevailing *general rule* is that an injury sustained by an employee from an assault may be fairly regarded as an "accidental" injury as the term is used in the coverage formulas of the various compensation acts.[65] Stated differently, an unexpected assault may be

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62. *See, e.g.*, N.D. CENT. CODE § 65-01-02(9) (Supp. 1993). Notwithstanding the absence of specific statutory language in some jurisdictions, a number of courts nevertheless hold that only injuries which result from an "accident" may be compensable under workers' compensation.

63. 2A LARSON, *supra* note 8, § 68.12, at 13-11, -12. Readinger v. Gottschall, 191 A.2d 694, 695-96 (Pa. 1963) (noting that there can be no recovery of benefits under workers' compensation where the work-related injury is not the result of an "accident"); Shamp v. Landy Clark Co., 277 N.W. 802 (Neb. 1938) (observing that there can be no recovery under the compensation scheme if any essential element of an "accident" is lacking).

64. 2A LARSON, *supra* note 8, § 68.12, at 13-11, -12. *See* Stout v. North Dakota Workmen's Compensation Bureau, 236 N.W.2d 889, 894 (N.D. 1975) (noting that an injury is "accidental" if the result was not foreseen, anticipated, or intended *by the injured person*); Breimhorst v. Beckman, 35 N.W.2d 719, 728-29 (Minn. 1949); Hagger v. Wortz Biscuit Co., 196 S.W.2d 1, 3-4 (Ark. 1946).

65. *See, e.g.*, Jablonski v. Barry Multack & Max Lee Corp., 380 N.E.2d 924, 925-26 (Ill. App. Ct. 1978) (ruling that the injuries sustained by an employee as a result of an unprovoked, work-related assault by a fellow worker are compensable as accidental injuries within the meaning of that term as used in compensation law); Gallimore v. Marilyn's Shoes, 233 S.E.2d 529, 531 (N.C. 1977) (ruling that "[a]n assault may be an accident within the meaning of the Workmen's Compensation Act when it is unexpected and without design on the part of the employee who suffers from it."); Heskett v. Fisher

fairly regarded as an accident or accidental injury notwithstanding its characterization as an intentional tort.[66]

Currently, there are two categories of work-related assaults that have posed difficulty for decisionmakers and on occasion have resulted in the denial of compensation: (A) instances in which an assault resumes after there has been a cooling-off period; and (B) instances in which the claimant has been the aggressor in the assault.[67]

A. THE EFFECT OF A COOLING-OFF PERIOD

The existence of a cooling-off period between a workplace quarrel and the act of personal violence creating the injuries has led a number of courts to deny an award of compensation due to the view that an assault arises out of the employment only if it transpires immediately.[68] If an altercation or dispute is interrupted and then later resumed, some courts have deemed the assault to have been transformed into private animosity which has no connection to the work (become purely personal).[69] This view has, on occasion, prevailed even though no independent basis for

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Laundry & Cleaners Co., Inc., 230 S.W.2d 28, 30 (Ark. 1950).

66. Daniels v. Swofford, 286 S.E.2d 582, 584 (N.C. 1982). "An injury may be the result of accidental means though the act involving the accident was intentional." Lovely v. Cooper Indus. Products, Inc., 429 N.E.2d 274, 277 (Ind. Ct. App. 1981). "The circumstance that the injury was the result of a willful or criminal assault by another does not exclude the possibility of injury by accident." ARTHUR B. HONNOLD, HONNOLD ON WORKMEN'S COMPENSATION § 87 at 283 (1917).

67. 1 LARSON, *supra* note 8, § 11.12, at 3-225. The above-mentioned categories are generally expressed as employer defenses to a compensability determination. Professor Larson identifies a third category of assaults which on occasion has resulted in the denial of compensation: where the subject matter of the quarrel which produced the assault was not technically within the scope of the claimant's employment. *Id.* However, he concedes that such cases are quite old and are often criticized for making hairsplitting distinctions about the employee's duties. *Id.* § 11.14, at 3-235. Moreover, it is generally still possible to hold in a broader sense that such a quarrel arose out of the employment. *Id.*

68. *Id.* § 11.13, at 3-225 (citing authority).

69. *Id.* at 3-225-26 (citing authority).

private vengeance has subsequently intervened and nothing whatsoever has occurred except for the lapse of time.[70]

Professor Larson, however, criticizes a number of such cases which deny compensation, opining that an assumption that the mere passage of time converts a work-related dispute into one which is purely personal is generally not warranted.[71] The key inquiry in such cases, Larson asserts, should be on what transpired during the cooling-off period, rather than the mere length of the cooling-off period.[72] The length of the interval should be immaterial if the only contacts between the protagonists in the meantime were employment contacts.[73] Similarly, an assault should be found to be compensable even when there is no contact between the parties during the interval if the "purity of the [assault's] connection with the employment remains undiluted by any possible unknown personal element . . . ."[74] Professor Larson intimates that compensation should be denied only in situations when an unqualified departure from the employment transpires (for example, "let's-step-outside" cases), or in cases where some clear intervening element of a personal nature destroys the link between the work origin of the altercation and the resulting assault.[75] Moreover, the "cooling-off period" should at most be merely an evidentiary consideration rather than relied on as a rule of law which *ipso facto* severs the causal connection from the employment.[76]

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70. *Id. See* Martin v. Sloss-Sheffield Steel & Iron Co., 113 So. 578 (Ala. 1927) (noting that although the original fight was connected with the employment, its subsequent renewal after a rest period made it purely personal). *See also* Brown v. Industrial Comm'n, 82 N.E.2d 878 (Ohio 1948). The altercation in *Brown* originated from a dispute over the kind of boxes being used in connection with the particular task at hand. It was clear that the work being done at the time of the altercation was being performed for the employer. *Id.* at 879. After grappling around on the floor for two minutes, the claimant left the room after his adversary pulled a knife. Upon returning to the scene approximately five minutes later, the claimant was hit over the head with a pipe. The court in *Brown* denied compensation to the injured worker because in its view the five-minute interval terminated the work-connected assault and transformed the subsequent blow into a purely personal altercation: "It is our conclusion that the cessation of hostilities broke the causal chain between the employment and the injury at the time it was received." *Id.* at 880.

Professor Larson criticizes the decision in *Brown* and points out that it ignores human behavior in that an accosted worker within minutes after a heated argument, "is to be expected to forget the whole matter and resume friendly relations with his antagonist—on penalty of being adjudged guilty of carrying on a purely personal quarrel from that point forward. The expectation of such saintly forbearance in ordinary men flies in the face of known facts." 1 LARSON, *supra* note 8, § 11.13 at 2-228.

71. 1 LARSON, *supra* note 8, § 11.12, at 3-228.

72. *Id.* at 3-229.

73. *Id.*

74. *Id.*

75. *See generally* 1 LARSON, *supra* note 8, § 11.14, at 3-232.

76. Ward v. Typhoon Air Conditioning, Co., 277 N.Y.S.2d 315, 317 (1967). *See* Hegler v. Cannon Mills Co., 31 S.E.2d 918, 919 (N.C. 1944) (ruling that although the final assault transpired two days after an argument stemming from two years of intermittent bickering and stemmed from anger or revenge, it was "still rooted in and grew out of the employment").

B. THE "AGGRESSOR" DEFENSE

In its early development, the rule which permitted compensation in assault cases allowed only *innocent* victims to recover. Courts, in *dicta*, began to comment on and later create an exception for the assailant or the "aggressor" in the assault.[77] The exception itself became a rule and provided that there was no relief available under the compensation acts for aggressors. The notion that "initiators" or "aggressors" could not recover in assault cases stemmed from a "natural repugnance one has for a guilty party" coupled with the firmly entrenched belief imported from the common law of torts that such parties should not be allowed to "profit by their own wrong."[78] The rationale seemed simple and logical. No one should recover compensation for an affray he or she started. The aforementioned reasoning was further buttressed by the prevailing view that the aggressor in the affray had voluntarily and completely abandoned the status as an employee and was akin to a criminal.[79] Such an individual was deemed to be obstructing, rather than furthering the business of the employer even when the precipitating cause of the aggression could be attributable to the work.[80] This view was pervasive in a number of jurisdictions even when the workers' compensation statutes were silent with respect to aggressors.[81]

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77. *See* Hartford Accident & Indem. Co. v. Cardillo, 112 F.2d 11, 18 (D.C. Cir.), *cert. denied*, 310 U.S. 649 (1940) (stating that the "[c]laimant may have been at fault, but he was the aggressor neither in the banter nor in the physical encounter"). *See also* Pierce v. Boyer-Van Kuren Lumber & Coal Co., 156 N.W. 509 (Neb. 1916) (ruling that no recovery was available for the aggressor in the assault).

78. Horovitz, *supra* note 12, at 323. Wooley v. Minneapolis Equip. Co., 196 N.W. 477, 477 (Minn. 1923) (ruling that it would be rather a monstrous thing to hold that an employee may resort to unlawful means to further the ends of his or her master and recover compensation if injured by reason of the unlawful act of aggression). The "aggressor" defense was enacted in part to make the new rule of compensability for workplace assaults more palatable. Horovitz, *supra* note 12, at 323. It provided a "judicial bone of solace to the losing employer or insurer." *Id.* The "aggressor" defense further provided the courts with a relatively quick and easy way to sustain an award in favor of an innocent victim while at the same time not requiring an employer to assume liability for all injuries by assaults. *Id.* at 323-24.

79. *See* Note, *Workmen's Compensation—Assault of Fellow Employee—Recovery by Aggressor*, 38 MINN. L. REV. 83, 84 (1953). Various rationales were propounded by courts in order to support the interposition of the "aggressor" defense:

> [T]he employee starting an injurious affray was not performing any duty for, or advancing any interest of, the employer and was not hired to incite trouble; rather, the aggressive employee was acting for his own wrongful purposes and had voluntarily abandoned his employer's work.

Id. (footnotes omitted).

80. Fischer v. Industrial Comm'n, 96 N.E.2d 478, 482 (Ill. 1951).

81. *See, e.g.*, Horvath v. La Fond, 8 N.W.2d 915, 917 (Mich. 1943) (ruling that the aggression severed any causal connection with the employment and made the altercation purely personal despite the absence of a specific statutory provision dealing with aggressors; compensation denied); Staten v.

The majority of jurisdictions now generally reject the position that initiating an assault by a claimant is by itself sufficient to remove the ensuing injuries from the character of "arising out of the employment."[82] In a sizable minority of jurisdictions, however, the "aggressor" defense is still in force either by statute or judicial proclamation.[83] The aggressor defense is, however, becoming an antiquated canon of law and has been characterized by Professor Larson to be one of the most rapid "doctrinal reversals in the volatile history of compensation law."[84] One of the rationales which has supported the abolition of the defense centers on the view that the defense improperly relies too heavily on a fault-based concept which has been borrowed from the law of torts and is argued to have no place in the law of workers' compensation.[85] It creates a fault-based defense in a no-fault system. As noted by the Supreme Judicial Court of Massachusetts in reversing the determination of the Industrial Accident Board which denied compensation since the claimant struck the first blow:

> The striking of the first blow is not the sole and ultimate test as to whether the injury arose out of the employment. We think it is possible for an injury to arise out of the employment in the broad sense of workmen's compensation law, even though the injured employee struck the first blow. We must constantly remind ourselves that in compensation cases fault is not a determining factor, whether it be that of the employee alone or that of the employee contributing with the fault of others . . . . [T]he question is whether the injury occurred in the line of

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Long Turner Constr. Co., 185 S.W.2d 375, 381 (Mo. Ct. App. 1945) (finding the aggressive conduct to be outside the course of employment; compensation denied).

82. 1 LARSON, *supra* note 8, § 11.15(a) at 3-235. *See, e.g.*, Cunning v. City of Hopkins, 103 N.W.2d 876, 885 (Minn. 1960) (finding the question of who was the aggressor to be immaterial to the compensation determination).

83. 1 LARSON, *supra* note 8, § 11.15(a) at 3-238 & 242-43. *See* Brady v. Clark Equip. Co., 249 N.W.2d 388, 389 (Mich. Ct. App. 1976) (noting that if a "plaintiff's injury occurred in the course of his employment, the injury arose out of the employment as a matter of law, unless it can be shown that plaintiff received his injury while perpetrating a malicious assault 'of such gross and reprehensible nature as to constitute intentional and wilful misconduct'" (quoting Crilly v. Ballou, 91 N.W.2d 493, 506 (Mich. 1958)).

84. 1 LARSON, *supra* note 8, § 11.15(c), at 3-244. North Dakota, however, continues to firmly adhere to the "aggressor" defense. *See* N.D. CENT. CODE § 65-01-02(9)(b)(3) (Supp. 1993) (excluding from the statutory definition of "compensable injury" "[a]n injury that arises out of an altercation in which the injured employee is the initial physical aggressor").

85. 1 LARSON, *supra* note 8, at 3-247. Analogizing to "horseplay" cases where the aggressor defense has been argued in support of a denial of compensation, it was long ago said that:

> The question as to who started the [fight] can become material only for the purpose of fixing the fault, and . . . fault of the injured employee . . . does not constitute a reason for not allowing compensation. . . . [It] partakes of the nature of contributory negligence, and assumption of the risk, of an action of a fellow-servant, neither of which have any place in the Workmen's Compensation Act.

Stark v. State Indus. Acc. Comm'n, 204 P. 151, 157 (Or. 1922).

> consequences resulting from circumstances and conditions of the employment, and not who was to blame for it. . . . So even where the employee himself strikes the first blow, that fact does not break the connection between the employment and the injury, if it can be seen that the whole affair had its origin in the nature and conditions of the employment, so that the employment bore to it the relation of cause to effect.[86]

Additionally problematic is the fact that it is generally quite difficult, if not impossible, to draw clear lines and effectively determine who was in fact the aggressor. Historically, incongruous decisions have been the natural by-product of judicial attempts to affix a label to "the" aggressor.[87]

The issue of whether an award of compensation should be refused to an aggressor in a work-related assault must be analyzed both from the questions of whether the particular injury "arose out of" and occurred "in the course of employment." "It is the character and nature of the assault" which is the determinative issue for deciding whether a particular assault arises out of the employment; who initiates the assault has no real bearing on that query.[88] Questions of culpability and an aggressor determination, however, do have relevance when considering whether the culpability amounts to "an actual" or "willful intent to injure."[89]

IV. MAINTAINING A COMMON-LAW TORT ACTION

Workers' compensation statutes are broadly interpreted in order to aid the greatest possible number of workers.[90] Despite the focus of

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86. Dillon's Case, 85 N.E.2d 69, 71-72 (Mass. 1949) (citations omitted).

87. *E.g.*, *compare* Kimbro v. Black & White Cab Co., 177 S.E. 274, 275 (Ga. Ct. App. 1934) (finding the utterance of "strong language" to be the act of aggression even though the other worker struck the first blow), *with* York v. City of Hazard, 191 S.W.2d 239, 241 (Ky. 1945) (opining that the mere utterance of vile words is not tantamount to an act of aggression).

88. Horovitz, *supra* note 12, at 347.

89. *See generally* N.D. CENT. CODE § 65-01-02(b)(1) (Supp. 1993) (excluding from the definition of "compensable injury" injuries caused by an employee's willful intent to injure another).

90. *See* Lambertson v. Cincinnati Corp., 257 N.W.2d 679, 684 (Minn. 1977) (stating that workers' compensation is broadly remedial; consequently, compensation laws should be construed to favor the employee recovery of benefits in order to effectuate the act's purpose); Fischer v. Malleable Iron Range Co., 225 N.W.2d 542, 545 (Minn. 1975) (holding that too narrow a construction of workers' compensation statutes is to be avoided when the result is to exclude an employee from coverage); Pleinis v. North Dakota Workers Compensation Bureau, 472 N.W.2d 459, 462 (N.D. 1991) (acknowledging that the Workers' Compensation Act should be liberally construed with the view of extending its provisions to all who can fairly be brought within them); Balliet v. North Dakota Workmen's Compensation Bureau, 297 N.W.2d 791, 794 (N.D. 1980) (recognizing that the workers' compensation statutes should be liberally construed to avoid forfeiture and afford relief whenever possible); Morel v. Thompson, 225 N.W.2d 584, 587 (N.D. 1975) (noting that where there is a question as to whether an employer should be exempt from coverage, the doubt should be resolved in favor of

workers' compensation on the accidental nature of a particular injury, broad interpretations of compensation statutes have included serious misconduct within their exclusive coverage. Accordingly, an increasing number of employees are finding that instead of being helpful, the statutes act as barriers which preclude the recovery of damages through a civil action even when the injuries sustained have been intentionally inflicted. The determinative issue is often whether a battered employee can maintain a cause of action *directly* against the fellow employee or employer who committed an intentional assault occurring at the workplace.

Reported authority which satisfactorily addresses this issue appears scant in a number of jurisdictions, including North Dakota, for a variety of reasons. First, when a common-law suit is instituted and the defendant asserts the exclusive-remedy provisions as an affirmative defense, generally the issue is either summarily disposed of or proceeds at law without workers' compensation being at issue. Second, due to the "deep-pocket" theory, most actions are brought against the employers vicariously rather than against a fellow servant whose actions actually produced the worker's injuries, and are therefore largely ineffectual. Third, as a practical matter, certain and swift recovery is often preferable to a costly litigious battle.[91] This is especially the case in circumstances in which the damage sustained, relatively speaking, is moderate. The concomitant risk of workplace friction and fear of job loss is not a risk that most are willing to readily undertake unless the potential benefit outweighs any possible detriment. Furthermore, a tort action will only make economic sense if the injured worker can expect to obtain a recovery that substantially exceeds the benefits afforded by the workers' compensation statutes.

A complete and satisfactory resolution of this issue would appear to be a matter of first impression for a North Dakota court. For reasons set forth more fully below, however, North Dakota practitioners and jurists are not completely without guidance from North Dakota authority.

A. RECEIVING COMPENSATION BENEFITS BARS ANY COMMON-LAW RECOVERY

As previously intimated, once a workers' compensation act is triggered and an employee having a compensable injury is deemed to be within its ambit, any opportunity for an independent civil suit is

the injured worker).

91. An injured worker who may not be financially secure is more likely to accept workers' compensation benefits and forego any otherwise maintainable tort claim because there would be no real alternative. Barrino v. Radiator Specialty Co., 340 S.E.2d 295, 308 (N.C. 1986).

generally cut off. Of course, the negative pregnant to this proposition is that an employee whose injuries are not within the coverage formula of a workers' compensation act whatsoever is not restricted to the rights and remedies afforded therein.[92] The rule of exclusivity, under such circumstances, is wholly inapplicable and an injured employee may seek redress through the common law.

When ascertaining whether an employer or a fellow servant is immune from civil suit due to the exclusivity provisions of the North Dakota workers' compensation statutes, it must be recognized that the inquiry is a question of law to be determined by the court.[93] An employee cannot, by merely refraining from filing a claim, defeat the limited immunity afforded an employer and fellow employees under the exclusive-remedy provisions of the workers' compensation statutes.[94] The Eighth Circuit Court of Appeals has in fact opined that an injured worker who is covered by a workers' compensation act but who makes no claim under it, generally has no other cause of action available.[95] The North Dakota Supreme Court has similarly ruled that under the exclusive-remedy provisions of North Dakota's Workers' Compensation Act, an injured employee "has *no ability to elect* whether or not to bring suit against his or her employer [or co-worker]."[96] Consequently, when determining whether the filing of a workers' compensation claim bars an action at law, the operative issue should be one of "coverage" and not "election".[97] If an injury is cognizable under the provisions of workers' compensation, then any common-law remedy is usually barred. Common-law principles generally should not be used to expand or circumvent the statutory rights, remedies, and limitations of an injured worker who falls within the coverage formula of the Act.[98]

92. *See* Dunlavey v. Economy Fire & Casualty Co., 887 F.2d 893, 894 (8th Cir. 1989).

93. Westman v. Dessellier, 459 N.W.2d 545, 548 n.1 (N.D. 1990). The plaintiff in *Westman* argued that summary judgment was not proper under Rule 56 of the North Dakota Rules of Civil Procedure since there was a genuine issue of material fact as to whether the employer was entitled to immunity under the exclusive-remedy provisions. *Id.* The North Dakota Supreme Court, however, affirmed the summary dismissal of the case and ruled that the question of an employer's immunity under the North Dakota Workers' Compensation Act was "of course, a legal question, not a factual one." *Id.*

94. *See* Olson v. American Oil Co., 474 F. Supp. 560, 562 (D.N.D. 1978); Hoerr v. Northfield Foundry & Mach. Co., 376 N.W.2d 323, 331 (N.D. 1985).

95. Smith v. Gould, Inc., 918 F.2d 1361, 1365 (8th Cir. 1990) (applying Nebraska law).

96. Hoerr v. Northfield Foundry & Mach. Co., 376 N.W.2d 323, 331 (N.D. 1985) (emphasis added).

97. Marlow v. Maple Manor Apartments, 228 N.W.2d 303, 306 (Neb. 1975).

98. Effertz v. North Dakota Workers' Compensation Bureau, 481 N.W.2d 223, 225 (N.D. 1992). *See* N.D. CENT. CODE § 1-01-06 (1987) (declaring that there is no common law where the law is set forth in the North Dakota Century Code).

It is generally agreed that once a party has participated in the fund by successfully applying for and receiving workers' compensation benefits, a civil lawsuit may no longer be maintained against an employer or fellow employee.[99] This axiom is an integral component of the rule of exclusivity in the majority of jurisdictions and is codified by statute in North Dakota.[100] It holds true even when the worker's injuries are *intentionally inflicted* or when the injuries sustained are not completely compensable under the Act.[101] The fact that an injured employee mistakenly had the impression that the law afforded another remedy does not change this result.[102]

A determination by the North Dakota Workers' Compensation Bureau that an injury is covered by the Act operates as a final judgment and, therefore, subsequently bars a party from collaterally attacking a decision of the Bureau in another forum. It must be therefore recognized that decisions of a compensation bureau, board, and commission are on equal footing with decisions of a court of law.[103] As such, absent an appeal, a workers' compensation decision has *res judicata* effect as to those matters which were adjudicable at the time of the

99. *Westman*, 459 N.W.2d at 548; Gosnell v. Mullenix, 11 F.3d 780, 781 (8th Cir. 1993); Gernand v. Ost Servs., Inc., 298 N.W.2d 500, 503 (N.D. 1980). The acceptance of workers' compensation benefits operates essentially as an estoppel to any claim of damages which might otherwise be available. Behr v. Soth, 212 N.W. 461, 464 (Minn. 1927). *See* Nyland v. Northern Packing Co., 218 N.W. 869 (N.D. 1928) (ruling that when a worker injured in the course of employment elects to proceed under the workers' compensation act, he or she is precluded from maintaining an action at law against the employer); Schnoor v. Meinecke, 33 N.W.2d 66, 68 (N.D. 1948). *See also* Lovelette v. Braun, 293 F. Supp. 41, 44 (D.N.D. 1968) (noting that even if a common-law cause of action were otherwise maintainable, the tort action would be barred since benefits under the workers' compensation act were applied for and received); Werner v. State, 424 N.E.2d 541, 544 (N.Y. 1981) (opining that the receipt of compensation benefits resulted in a forfeit of the right to maintain an action at law).

100. *See* N.D. CENT. CODE § 65-05-06 (1985). Section 65-05-06 provides: "The payment of compensation or other benefits by the bureau to an injured employee, or to his dependents in case death has ensued, are in lieu of any and all claims for relief whatsoever against the employer of the injured or deceased employee." *Id.*

101. Hulne v. International Harvester Co., 496 F. Supp. 849, 853 (D.N.D. 1980); Schlenk v. Aerial Contractors, Inc., 268 N.W.2d 466, 472-73 (N.D. 1978) (observing that even if an exception to exclusivity existed in North Dakota for intentionally inflicted injuries, the receipt of compensation constitutes an election of remedies which accordingly precludes a civil remedy). *See* Barrino v. Radiator Specialty Co., 340 S.E.2d 295, 303 (N.C. 1986) (opining that even if the complaint alleged intentionally inflicted injuries, a binding election of remedies was made when compensation benefits were applied for and received).

102. Behr v. Soth, 212 N.W. 461, 464 (Minn. 1927).

103. N.D. CENT. CODE § 65-05-03 (Supp. 1993). Section 65-05-03 provides: "The bureau shall have full power and authority to hear and determine all questions within its jurisdiction, and its decisions, except as provided in chapter 65-10 [(Appeals)], are final and are entitled to the same faith and credit as judgment of a court of record." *Id.*

decision.[104] It is likewise immaterial that workers' compensation may have even been applied for and received *after* the commencement of a civil suit directly against the alleged wrongdoer:

> Since a workmen's compensation award was made, such constitutes a finding that plaintiff's injuries arose out of and in the course of employment and is binding and conclusive. . . . [E]ven after this action was begun and after Plaintiff was examined before trial, he processed his Workmen's Compensation claim and accepted the award. Under such circumstances, Plaintiff's right, in any event, to 'maintain a common-law action for assault is lost and the jurisdiction of the Workmen's Compensation Board becomes exclusive.'[105]

Moreover, a party who receives benefits under workers' compensation may be effectively foreclosed from subsequently attacking the constitutionality of the statutory scheme which afforded the remedy.[106]

Based upon the foregoing, the *general rule* in North Dakota appears to be well-established and clear: An injured employee or dependent who

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104. Lass v. North Dakota Workmen's Compensation Bureau, 415 N.W.2d 796, 800 (N.D. 1987). *See* Westman v. Dessellier, 459 N.W.2d 545, 547 (N.D. 1990) (ruling that the trial court erred by not giving *res judicata* effect to the determination of the Workers' Compensation Bureau). As noted by Professor Larson:

> The sequence in which the issue of res judicata is most frequently encountered is that of a compensation claim followed by a common-law suit. If the conventional elements of res judicata are present, a prior decision or finding on any relevant issue in a compensation proceeding is res judicata as to the same issue in a subsequent suit at law to recover for the same injury or death, whether the effect is to defeat the suit or to defeat the defense to the suit.

2 LARSON, *supra* note 8, § 79.72(d). It should be noted, however, that an adjudication that an injury is *not* covered by workers' compensation is conclusive only of the fact that a workers' compensation bureau, board, or commission lacks jurisdiction over the matter and does not bar an employee's recourse to a remedy in tort. Marlow v. Maple Manor Apartments, 228 N.W.2d 303, 306 (Neb. 1975).

105. Stine v. Weiner, 238 N.W.2d 918, 923 (N.D. 1976) (quoting Moakler v. Blanco, 364 N.Y.S.2d 526, 527-28 (1975)). The plaintiff in *Stine* commenced a civil action in North Dakota for injuries sustained in an automobile accident. *Id.* at 919. Although Stine and his supervisor lived and generally worked in New York, they were supervising the installation of component parts for a missile system that was being constructed by the federal government in North Dakota at the time of the accident. *Id.* at 920. The fundamental issue in *Stine* was whether the plaintiff, after seeking and receiving benefits under the New York Workers' Compensation Act as an employee injured in North Dakota in the course of his employment may subsequently advance a common-law action in North Dakota. *Id.* at 923. Finding the applicable New York workers' compensation provisions to be substantially similar to those in North Dakota, the North Dakota Supreme Court gave full faith and credit to the provisions and applied them in resolving the issue at hand. *See id.* at 921. The court affirmed the summary dismissal of plaintiff's complaint asserting that the Stine himself actively pursued a claim for compensation under New York law. *Id.* at 926. Accordingly, the exclusive-remedy provisions barred any common-law action. *Id.*

106. *See* Hulne v. International Harvester Co., 496 F. Supp. 849, 853 (D.N.D. 1980). See *infra* note 182 and accompanying text.

receives compensation or accepts other benefits from workers' compensation is exclusively relegated to that measure of recovery in lieu of *any* and *all* rights of action against an employer or fellow servant that may otherwise be available.[107] Injured employees, or their dependents, who receive benefits under the compensation system have their fate sealed regardless of the nature of their injuries.[108] As stated by the North Dakota Supreme Court, "[u]nder our law, once a claimant is allowed to participate in the fund, he or she may no longer elect to bring a lawsuit against the employer or a coworker."[109]

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107. N.D. CENT. CODE § 65-05-06 (1985). See *supra* note 103 for text.

108. It is significant to note that not *all* jurisdictions steadfastly adhere to the rule that receiving workers' compensation bars any otherwise maintainable action at law in *all* instances. Some jurisdictions that have made exceptions to the rule of exclusivity for intentionally tortious conduct have refused to find that the acceptance of benefits from the compensation system precludes an intentionally injured worker from seeking common-law damages for the same injury. *See, e.g.*, Jones v. VIP Devel. Co., 472 N.E.2d 1046, 1054 (Ohio 1984); Le Pochat v. Pendleton, 63 N.Y.S.2d 313, 314-16 (N.Y. Sup. Ct. 1946). It has been reasoned by at least one court that:

> [T]he protection afforded by the Act has always been for negligent acts and not for intentional tortious conduct." To limit a worker injured by the employer's intentional misconduct to workers' compensation benefits would actually encourage such conduct. To bar an intentionally injured worker from the courtroom because he has received such benefits would have the same effect. An employer in such a case could merely refrain from contesting the claim, thereby facilitating the receipt of limited compensation, and then reap the rewards of absolute immunity from further liability. This court will not foster such practices.
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> . . . .
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> Nor does the determination of the Industrial Commission that the injury arose out of employment constitute *res judicata*, barring the claimant from litigating the issue of intentional conduct. *Res judicata* and collateral estoppel do not apply unless there is an identity of parties and issues. The requisite identity of issues is absent here. The question of intentional infliction of injury is not an issue before the Industrial Commission in awarding workers' compensation benefits. The conclusion of the commission that the injury arose out of the employment will not estop the claimant from pursing his common-law remedies for intentional tort.

Jones, 472 N.E.2d at 1054-55 (citations omitted). In order for an injury to fall within the coverage formula of the North Dakota Workers' Compensation Act, it must be determined that the injury was by "accident." Any subsequent action at law on the theory that the very same injury was "intentional" would not likely succeed in North Dakota. *See generally* Morris v. Ford Motor Co., 31 N.W.2d 89, 90 (Mich. 1948) (ruling that a worker who adopted one theory in order to establish his right to compensation, "may not thereafter bring other proceedings based upon an inconsistent, opposite theory or claim").

109. Westman v. Dessellier, 459 N.W.2d 545, 548 (N.D. 1990) (citations omitted). As set forth earlier, the *general rule* is that an employee who has an injury that falls within the coverage formula of the North Dakota Workers' Compensation Act has no right to an "election" of remedies, but is relegated solely to those remedies afforded by the Act. As can be gleaned from the above quoted passage, however, North Dakota authority does not appear altogether consistent on this point. *See, e.g.*, Schlenk v. Aerial Contractors, Inc., 268 N.W.2d 466, 472 (N.D. 1978) (noting that an injured employee's *election* to pursue a workers' compensation remedy precludes a later common-law action for intentional injuries); Breitwieser v. State, 62 N.W.2d 900, 903 (N.D. 1954) (opining that when the claimant "made her application for compensation under North Dakota workmen's compensation law she elected to come under that law").

B. SEARCHING FOR AN EXCEPTION TO EXCLUSIVITY

The exclusive-remedy rule determines under what circumstances, if any, an injured worker's remedy against his or her employer or fellow employees is limited to workers' compensation and when, if at all, that worker may proceed against such individuals under other theories of recovery such as common-law tort. An employee seeking to avoid the broad immunity granted by the exclusive-remedy rule must generally find an exception to exclusivity in order to avail him or herself of a common-law remedy.

1. *Noncomplying Employer Exception*

The shield of immunity from common-law liability that an employer and its agents maintain arises by virtue of the fact that the employer contributes financially to the compensation fund through premiums.[110] Absent such contribution, no immunity exists and the rule of exclusivity is inapplicable even in actions for ordinary negligence.[111] Recovery under the common law is completely open to an injured employee when an employer who is subject to the Act has failed to comply with its terms as required by North Dakota law. Moreover, a noncomplying employer in North Dakota is by statute precluded from affirmatively interposing the traditional common-law defenses of the fellow-servant rule, assumption of risk, or contributory negligence.[112]

2. *Third-Party Exception: The Cumulative-Remedy Provision*

Workers' compensation is intended to govern only the rights between employers and employees.[113] As such, the exclusive-remedy provisions are intended to be a bar only to actions against an employer or fellow servant by an employee, or actions which are derivative from the employee's claim. An employee's right of action at law against a third party who either caused or contributed to an injury is expressly

110. Blumhardt v. Hartung, 283 N.W.2d 229, 233 (S.D. 1979).

111. *Id.*; Moen v. Melin, 231 N.W. 283, 285 (N.D. 1930) (ruling that an employee who sues his uninsured employer is entitled by law to have the damages sustained measured by the rules applicable to common-law actions). *See* Olson v. Hemsley, 187 N.W. 147, 149 (N.D. 1922) (holding that either a personal representative or a dependent of a deceased employee can maintain a cognizable claim at law against a noncomplying employer).

112. N.D. CENT. CODE § 65-09-01 (1985).

113. Guillard v. Niagara Mach. & Tool Works, 488 F.2d 20, 23 (8th Cir. 1973).

preserved by most compensation acts, including North Dakota's.[114] Thus, the workers' compensation acts generally do not shield third-party tortfeasors from liability for damages in tort, even if the cause of action is based on ordinary negligence. The rationale underlying the allowance of third-party actions is the moral notion that the ultimate loss ensuing from one's wrongdoing should, as a general proposition, be borne by the actual wrongdoer whenever possible.[115] Moreover, it is universally agreed that the compensation system was not formulated to extend the shield of immunity to strangers to the employment relationship.[116]

The statutory provision which specifically preserves third-party actions in North Dakota despite the fact that the injuries sustained may come within the "coverage formula" of the Act, is set forth at section 65-01-09 of the North Dakota Century Code and is commonly referred to as the "cumulative-remedy provision." The measure provides in pertinent part that:

> When an injury or death for which compensation is payable under provisions of [the Workers' Compensation Act] shall have been sustained under circumstances creating in some person other than the fund a legal liability to pay damages in respect thereto, *the injured employee, or the employee's dependents may claim compensation under this title and proceed at law to recover damages against such other person.* The fund is subrogated to the rights of the injured employee or the employee's dependents to the extent of fifty percent of the damages recovered up to a maximum of the total amount it has paid or would otherwise pay in the future in compensation and benefits for the injured employee.[117]

As can be readily discerned from the foregoing statutory provision, an employee's remedy for work-related injuries under North Dakota law against a third-party tortfeasor is *cumulative* rather than alternative. An injured worker is not forced to an election of remedies when a "third party" has caused or contributed to the injury. An injured employee may recover full benefits under workers' compensation and still commence an action at law against a third-party tortfeasor for the

114. *See, e.g.*, N.D. CENT. CODE § 65-01-09 (Supp. 1993). An injured employee's right of action against third parties is not imparted to an employee by the workers' compensation acts, but is a previously existent common-law right that is preserved by the acts. Rehn v. Bingaman, 36 N.W.2d 856, 859 (Neb. 1949).

115. 2 LARSON, *supra* note 8, § 71 at 14-1.

116. *See id.*

117. N.D. CENT. CODE § 65-01-09 (Supp. 1993) (emphasis added).

recovery of damages.[118] The fact that a particular plaintiff has applied for and received workers' compensation benefits for the same injury has absolutely no bearing on his or her right to recover for injuries against a third-party tortfeasor, and evidence tending to demonstrate that fact is generally held to be inadmissible.[119] The North Dakota Supreme Court has observed that the cumulative-remedy provision was clearly designed as "incentive for the worker to pursue and litigate legal claims against culpable third parties."[120]

An employee who recovers compensation benefits is, of course, not permitted to retain the entire amount of *both* the benefits under workers' compensation and the damages recovered under the common law against a third party. To permit otherwise would allow an employee to attain an undeserved windfall essentially at the employer's expense. Consequently, both under the express statutory language of the cumulative-remedy provision and by continuing construction of the courts, an employer or compensation insurer who has paid workers' compensation benefits to an employee injured or killed by a third-party tortfeasor is "subrogated" *pro tanto* to the "rights" of the employee or the employee's dependents.[121] Up to one-half of any amount ultimately recovered against a third party must be reduced by, or offset against, the amount of benefits paid or payable to an injured employee.[122] Should an injured worker

118. *Id.*

119. Guile v. Greenberg, 257 N.W. 649 (Minn. 1934). The introduction of evidence to a jury that demonstrates the plaintiff received or is entitled to workers' compensation benefits has been held to constitute prejudicial error necessitating a new trial or a reversal. *See, e.g.*, Altenbaumer v. Lion Oil Co., 186 F.2d 35, 35-36 (5th Cir. 1950), *cert. denied*, 341 U.S. 914 (1951).

120. Lawson v. North Dakota Workmen's Compensation Bureau, 409 N.W.2d 344, 347 (N.D. 1987).

121. *See* N.D. CENT. CODE § 65-01-09 (Supp. 1993). *See also* Ness v. North Dakota Workmen's Compensation Bureau, 313 N.W.2d 781, 782 (N.D. 1981) (noting that if an injured employee recovers damages from a third party, specifically described subrogation rights attach); Breitwieser v. State, 62 N.W.2d 900, 903 (N.D. 1954). The North Dakota Supreme Court has noted that the term "subrogation" is not defined in the workers' compensation law or elsewhere in the North Dakota Century Code, but has defined the term as: "'a legal operation by which a third person who pays a creditor succeeds to his rights against the debtor as if he were his assignee.'" Ness v. North Dakota Workmen's Compensation Bureau, 313 N.W.2d 781, 782 (N.D. 1981) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY).

An argument that the subrogation interest of the North Dakota Workers' Compensation Bureau should be proportionately reduced by the percentage of fault attributable to the injured employee in a suit against a third party has been rejected by the North Dakota Supreme Court. *See* Kelsh v. North Dakota Workmen's Compensation Bureau, 388 N.W.2d 870, 871 (N.D. 1986).

122. Breitwieser v. State, 62 N.W.2d 900, 903 (N.D. 1954). The North Dakota Supreme Court has opined that:

> The purpose of [a] provision for subrogation is to make the wrongdoer who caused the injury, contribute to the payment of compensation for that injury to employee or his dependents whenever possible. This subrogation is a part of the rights yielded by the employee for the right of speedy compensation without regard to his own fault. The injured employee or his dependents receive compensation allowed by law irrespective of

choose not sue a third-party tortfeasor for the injuries sustained, the insurer, compensation bureau, or employer is generally entitled to "indemnity" against a "third party" and may sue in the place of the employee to obtain reimbursement.[123] The purpose of indemnity and subrogation rights under the compensation scheme, therefore, is to reimburse the fund at the expense of the "third party" whose fault made the payment of workers' compensation benefits necessary.[124] However, it should be noted that the exclusive-remedy provisions of North Dakota's Workers' Compensation statutes insulate the employer whose negligence has played a part in the employee's harm from contribution to a tortfeasor in a third-party action in the absence of an express agreement to the contrary.[125]

The question of who is a "third party," and accordingly subject to a separate action for common-law damages by virtue of the cumulative--remedy provisions of the various compensation acts, frequently arises. The class of persons amenable to third-party actions generally does not include the "employer," or others who may be so treated, in most instances.[126] Similarly, a "co-employee" acting in the course of employment is either by statute or judicial decision excluded from the category of a "third party" in the majority of jurisdictions.[127] The

> the result of the lawsuit. If recovery is made that reimburses the fund for the compensation allowed the employee or his dependent. Anything recovered above that is retained by the employee or his dependent.

Id.

It is significant to note that the North Dakota Workers' Compensation Bureau is required to pay fifty percent of the concomitant litigation costs associated with prosecuting an action against a third-party tortfeasor. Lawson v. North Dakota Workmen's Compensation Bureau, 409 N.W.2d 344, 347 (N.D. 1987).

123. Ness v. North Dakota Workmen's Compensation Bureau, 313 N.W.2d 781, 782 (N.D. 1981).

124. Blaskowski v. North Dakota Workmen's Compensation Bureau, 380 N.W.2d 333, 335 (N.D. 1986).

125. Stuhlmiller v. Nodak Mut. Ins. Co., 475 N.W.2d 136, 139 (N.D. 1991) (ruling that "although the workers [sic] compensation statutes ordinarily prohibit a third-party tortfeasor from obtaining contribution from the employer, there is an exception when the employer has entered into an express contract to indemnify the third-party tortfeasor"); Barsness v. General Diesel & Equip. Co., 422 N.W.2d 819, 822 (N.D. 1988) (opining that the exclusive remedy provisions of North Dakota's Workers' Compensation Act effectively preclude a third-party tortfeasor from obtaining contribution from an employer, irrespective of the Joint Tortfeasor Contribution Act set forth in the North Dakota Century Code); Sayler v. J.D. Holstrom, 239 N.W.2d 276, 279 (N.D. 1976).

126. "If an employer . . . has a second legal persona creating completely independent duties, a few jurisdictions have held that he may be sued as a third person for violation of those duties." 2A LARSON, *supra* note 8, § 72 at 14-84. This theory of liability is often expressed as the "dual capacity" doctrine and operates as an exception to the rule of exclusivity. North Dakota has expressly refused to adopt this exception. *See* Latendresse v. Preskey, 290 N.W.2d 267, 271 (N.D. 1980); Schlenk v. Aerial Contractors, Inc., 268 N.W.2d 466, 474 (N.D. 1978) (opining that "[t]he North Dakota Workmen's Compensation Act does not permit the application of the dual capacity theory").

127. *See* 2A LARSON, *supra* note 8, § 72.21 at 14-119. *But see* LITTLE ET AL., *supra* note 8, at 450 (noting that "[i]n the absence of a special provision in the compensation statute, coworkers are generally considered third parties subject to suit by an injured employee"). *See generally* Annotation, *Right to Maintain Direct Action Against Fellow Employee for Injury or Death Covered by Workmen's Compensation*, 21 A.L.R.3d 845 (1968).

rationale for excluding an "employer" and "co-employee" from the reach of the various statutes which preserve third-party actions inures from the immunity afforded an employer and extended to his or her agents by virtue of the exclusive-remedy provisions.[128] The legislative extension of immunity to a "co-employee," and the concomitant rationale for excluding a "co-employee" from the category of a "third party," is a necessary and consistent corollary to the fundamental underpinnings of the "compensation principle":

> The reason for the employer's immunity is the *quid pro quo* by which the employer gives up his normal defenses and assumes automatic liability, while the employee gives up his right to common-law verdicts. This reasoning can be extended to the tortfeasor coemployee; he, too, is involved in this compromise of rights . . . . [O]ne of the things he is entitled to expect in return for what he has given up is freedom from common-law suits based on industrial accidents in which he is at fault.[129]

Moreover, in view of the fact that the bureau, employer, or compensation insurer is universally afforded a right of subrogation or indemnity against culpable "third parties," imposing traditional tort liability upon a "co-employee" as such a "third party" would seem inimical to the goals of the compensation scheme. The practical result may in essence relieve the employer of the cost of compensation and shift the financial responsibility for work-related injuries from the industry onto the shoulders of workers by virtue of their status as "co-employees."

Although a small minority of jurisdictions has regarded a "co-employee" as a "third party" amenable to civil suit, it is generally the specific terms of the statutes which govern that result.[130]

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128. *See, e.g.*, N.D. CENT. CODE § 65-01-08 (1985) (extending an employer's immunity from common-law suit to "any agent, servant, or other employee"). It is, however, worth noting that the three other statutory provisions which are integral to the rule of exclusivity in North Dakota are completely silent with respect to co-employees, agents, and servants. *See supra* note 32.

129. 2A LARSON, *supra* note 8, § 72.21 at 14-119 to -152. It has been further argued that:

> [I]f co-employees were routinely subject to negligence claims by other co-employees, employer would be pressured to provide them with liability insurance. Accordingly, the costs of subjecting co-employees to tort liability might well ultimately end up being borne by employers, not by way of vicarious liability, but by their employees' liability. This could indirectly subvert the employer's immunity.

Joseph H. King, Jr., *The Exclusiveness of an Employee's Workers' Compensation Remedy Against His Employer*, 55 TENN. L. REV. 405 (1988).

130. *See, e.g.*, Blumhardt v. Hartung, 283 N.W.2d 229, 231 (S.D. 1979); Vittum v. New Hampshire Ins. Co., 369 A.2d 184, 187 (N.H. 1977); Garcheck v. Gorton, 226 N.W.2d 432, 434 (Wis. 1975) (noting that a common-law action may be maintained by a worker against a co-employee as a "third party"); Rehn v. Bingaman, 36 N.W.2d 856, 859-60 (Neb. 1949); Elliott v. Brown, 569 P.2d

An interpretation of the cumulative-remedy provision of the North Dakota Workers' Compensation Act, when construed in tandem with the exclusive-remedy provisions and the interpretation thereof by the North Dakota Supreme Court, seems to lead to the conclusion that a third-party action against a "co-employee" acting in the scope of employment is foreclosed in North Dakota.[131] Such a view preserves third-party actions against only "true strangers" to the employment relation and is more consonant with the immunity afforded co-employees for their negligent conduct in most jurisdictions by the tacitly bargained-for *quid pro quo*.

3. *"Intentional-Injury" Exception?*
Injured Employees: 0
Employers & Co-Employees: 3

Injured employees have on at least three occasions attempted to avoid the "exclusive" coverage of the North Dakota Workers' Compensation Act by arguing that an exception to exclusivity exists for injuries which are intentionally inflicted. The battle over exclusivity on this front has on all three occasions resulted in a victory for the employer and

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1323, 1327 (Alaska 1977) ("When an employer or fellow employee commits an intentional tort, he can be considered to be outside the purview of the statute and can be treated as a third person."). One court has noted that a previously existing common-law right of action against a "co-employee" is preserved under the workers' compensation scheme:

> [I]t is generally the rule that a fellow employee would also be [a third party] regardless of the capacity of his employment, so long as he did not occupy the relationship of employer of plaintiff.
>
> "When the term 'third party' is mentioned in the Workmen's Compensation Act, it means any person other than the master, or those whom the act makes master, the employee who is seeking compensation under their agreement. The act is careful to preserve the status of a third person by not defining the term; so the presumption must be that the law as to third persons in every respect stands as it was before the act." To hold otherwise would unjustly confer upon every employee freedom to neglect his duty toward a fellow employee and thus escape with impunity from all liability for damages proximately caused by his own negligence.

Rehn, 36 N.W.2d at 859-60 (citations omitted). In these jurisdictions, the fact that the accident may be covered by workers' compensation law does not necessarily bar a separate tort action against a co-employee as a third party.

A number of jurisdictions have by statute created an exception to exclusivity which permits common-law actions to be maintained against co-employees for certain categories of misconduct. *See, e.g.*, MINN. STAT. ANN. § 176.061 subd. 5(c) (Supp. 1993) (setting forth under the cumulative remedy-provision of third party liability: "A coemployee working for the same employer is not liable for a personal injury incurred by another unless the injury resulted from the gross negligence of the coemployee or was intentionally inflicted by the coemployee.").

131. *See generally* Stuhlmiller v. Nodak Mut. Ins. Co., 475 N.W.2d 136, 138 (N.D. 1991) (ruling that a co-employee is statutorily immune from a common-law action); Stine v. Weiner, 238 N.W.2d 918, 925 (N.D. 1976) (holding that the "sole remedy" of a worker who sustained a work-related injury due to the negligence of a co-employee is workers' compensation); Boettner v. Twin City Constr. Co., 214 N.W.2d 635 (N.D. 1974) (opining that the statutes granting immunity from suit are applicable to the employer and fellow employees of the employee who is injured); Lacy v. Grinsteinner, 190 N.W.2d 11, 16 (N.D. 1971) (noting that an employee injured by the negligent act of co-employee has no right of action against that co-employee).

co-employees, with the shield of immunity being at most only dented rather than pierced.[132]

a. *Schlenk v. Aerial Contractors, Inc.*, 268 N.W.2d 466 (N.D.1978)

In *Schlenk v. Aerial Contractors, Inc.*,[133] an injured employee who had availed himself of the compensation system by applying for and accepting workers' compensation benefits, brought suit against his employer and fellow employees alleging that he was willfully and intentionally injured because the defendants were aware of a particular hazard and did nothing to alleviate the danger.[134]

Schlenk was employed as a telephone lineman by Aerial Contractors. He became seriously injured while using a piece of equipment furnished by the company which was allegedly hazardous to operate. Schlenk asserted that the defendants' conduct was the cause of his injuries and constituted a "deliberate, intentional, and willful" act, and thereby fell outside the scope of the North Dakota Workers' Compensation Act.[135] The defendants argued that even if their conduct could be fairly characterized as intentional or willful, the statutory provisions of the North Dakota Workers' Compensation Act did not contain an exception for intentional or willful injuries inflicted upon an employee by an employer or fellow employees.[136]

The North Dakota Supreme Court, applying a former version of the Act, affirmed the summary dismissal of the plaintiff's complaint.[137] Chief Justice Erickstad, writing on behalf of a unanimous court, agreed with the defendants that no language of the Act provided an exception for intentional or willful injuries when inflicted upon a worker by an employer or fellow worker when the injuries were sustained in the course of employment.[138] The unified court in *Schlenk* opined, however, that "*public policy*" could very well require the finding of an "*exception*" to the exclusive-remedy provisions of the North Dakota workers' compensation statutes "where the circumstances involve *an actual intent to*

132. It is significant to note that in each challenge to exclusivity, the injured worker or his dependents applied for and received benefits from workers' compensation and that each case resulted in the affirmance of a motion for summary judgment.

133. 268 N.W.2d 466 (N.D. 1978).

134. Schlenk v. Aerial Contractors, Inc., 268 N.W.2d 466, 468 (N.D. 1978).

135. *Id.*

136. *Id.* at 468-69.

137. *Id.* at 474.

138. Schlenk v. Aerial Contractors, Inc., 268 N.W.2d 466, 471 (N.D. 1978).

injure, such as in the case of an intentional assault and battery, or where the negligence is so gross as to be equivalent to an actual intent to injure."[139] The North Dakota Supreme Court quickly disposed of the matter at hand by finding that the facts of the case did not come within "*either*" of those possible public-policy "exception*s*" to exclusivity.[140] Consequently, the court held "that an actual intent to injure would be necessary to rob the injury of the accidental character and thus have the injury fall within the exception for intentional or willful injuries."[141] The court concluded that the conduct attributed to the defendants in the case was "accidental" rather than "intentional" in character and, thus, would be encompassed by the North Dakota Workers' Compensation Act.[142] Since Schlenk's injuries were covered by the Act, the court was of the view that he was relegated solely to that measure of recovery. As such, the North Dakota Supreme Court ruled that Schlenk's right to institute a common-law action against his employer and co-employees for the injuries he sustained was effectively barred by the exclusive-remedy provisions.[143]

The North Dakota Supreme Court in *Schlenk* carefully avoided resolving whether an exception to exclusivity actually existed under North Dakota law for intentionally inflicted injuries. However, the court, although in *dicta*, for the first time recognized the possibility of an employee's right to pursue a common-law action against an employer or fellow employee in certain circumstances, and thereby avoid the rule of exclusivity for those injured in work-related accidents. As previously set forth, the court opined that "public policy" *could* require an exception to exclusivity in cases in which there existed an "actual intent to injure."

One of the most significant aspects of the *Schlenk* opinion can be found in the court's recitation of the ostensibly alternative standards available for satisfying the "actual intent to injure" requirement and the possible exception to exclusivity. The court expressed the seemingly unmistakable sentiment that the "actual intent to injure" requirement could be satisfied by adequately demonstrating that *either*: 1.) the circumstances involved "an actual intent to injure" "*or*" 2.) the "negligence was so gross" as to be tantamount to an actual intent to injure.[144]

139. *Id.* (emphasis added).
140. *Id.* (emphasis added).
141. *Id.* at 472.
142. *Id.* at 471 & 472 (emphasis added).
143. *Schlenk*, 268 N.W.2d at 472.
144. *Id.* at 471 (emphasis added). When read in isolation, the North Dakota Supreme Court's use of the phrase "negligence was so gross" seems to be an inartful articulation of and even inconsistent with the actual intent to injure standard the court set forth in *dicta*. However, a reading of this phrase

In doing so, the *Schlenk* court unanimously acknowledged *two* "potential" fronts of attack on the shield of immunity for workers who were willfully or intentionally injured. The North Dakota Supreme Court, however, failed to fully clarify its position with respect to the issue of what injurious conduct of an employer or co-employee could fairly be considered sufficiently "intentional" to allow an injured worker to pursue a common-law tort action in avoidance of the rule of exclusivity. More problematic was the fact that the court did not delineate any standards or provide any meaningful guidance for determining when the "negligence was so gross as to be equivalent to an actual intent to injure."[145]

Attempting to examine the level of intent required to fulfill the alternative avenues of the "actual intent to injure" standard as the *Schlenk* court posited in *dicta* is fraught with difficulty and somewhat speculative in the absence of a more complete articulation from the court. A fair reading of the opinion can, however, readily lead to the conclusion that a deliberate act of an employer or co-employee which evinces a subjective, conscious, and specific intent to bring about an injury will satisfy the standard. Similarly, it seemed quite evident from the court's analysis that *merely* "gross negligence" was insufficient to fulfill the "actual intent to injure" standard and surmount the exclusiveness bar. Equally apparent from the opinion language and the natural inferences to be drawn therefrom is that the court was of the view that some level of culpability

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in conjunction with the opinion as a whole and the phrase "as to be equivalent to an actual intent to injure" which immediately follows, leads one to conclude that the court meant something *different* from and *more* than mere gross or culpable *negligence*. When read as a whole, the phrase "negligence was gross as to be the equivalent to an actual intent to injure," imports a sense of deliberateness and not mere inadvertence or lack of judgment. It seems to connote conduct to which moral blame attaches.

145. *See id.*

or tortious conduct which is *less than* a deliberate intent to injure could penetrate the shield of immunity.[146] To give the express language of the opinion in *Schlenk* any other construction would, in essence, ignore the plain distinction the court drew in setting forth alternative standards and render that part of the decision mere surplusage.

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146. A plausible interpretation of what level of culpability or conduct on the continuum from gross negligence to a specific intent to injure that would satisfy the degree of intent characterized by the court in *Schlenk* to be the functional "equivalent to an actual intent to injure" can be made. Virtually every jurisdiction in the United States has either by statute or judicial construction recognized an intentional tort exception to exclusivity. Alternative standards or tests have been utilized in order to determine whether an employer's or co-employee's conduct was "intentional" for the purposes of the particular exception—the "true intentional tort" test and the "substantial certainty" test. *See* Beauchamp v. Dow Chem. Co., 398 N.W.2d 882, 891 (Mich. 1986); Jones v. VIP Dev. Co., 472 N.E.2d 1046, 1050 (Ohio 1984) (holding that conduct that lacks a specific intent to injure can be properly deemed to be intentional for compensation purposes). *See also* Mandolidis v. Elkins Indus., 246 S.E.2d 907, 912-13 (W. Va. 1978) (overruling an earlier holding that found a "deliberate intent" means a "specific intent").

Under these alternatives, a "true intentional tort" has been said to occur when an employer or co-employee "truly intended the injury as well as the act." *Id.* Moreover, one commentator has noted that an actual intent to injure implies that the acting party intended the consequences of his or her conduct. Sheila L. Birnbaum, *Workers' Compensation Viewed From the State Level—Inroad in the Immunity Shield: Employee Tort Actions Against Employers*, FINAL EDITED PROCEEDINGS OF THE NATIONAL CONFERENCE ON WORKERS' COMPENSATION AND WORKPLACE LIABILITY, 115, 117 (1981). Mere constructive intent is insufficient. *Id.* It is interesting to note that the requisite *mens rea* for various forms or degrees of murder or homicide can be satisfied in virtually every jurisdiction without establishing a specific, subjective intent to kill. *See, e.g.*, N.D. CENT. CODE § 12.1-16-01 (Supp. 1993). In this light, criminal intent may be inferred from conduct which will not rise to a sufficient level of culpability to penetrate the shield of immunity under the "true intentional tort" test.

The "substantial certainty" test, which can arguably be said to akin to one of the alternative standards enunciated in *Schlenk*, incorporates the definition of "intent" found in the RESTATEMENT (SECOND) OF TORTS and denotes "that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it." RESTATEMENT (SECOND) OF TORTS § 8A (1965). In defining the term "intent," the RESTATEMENT further instructs that:

> All consequences which the actor desires to bring about are intended . . . . Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness . . . . As the probability decreases further and amounts only to a risk that the result will follow, it becomes ordinary negligence . . . .

Id. cmt. b. *Cf.* Johnson v. Miera (*In re* Miera), 926 F.2d 741, 744 (8th Cir. 1991); Dahlgren & Co. v. Lacina (*In re* Lacina), 162 B.R. 267, 275 (Bankr. D.N.D. 1993) (applying the RESTATEMENT "substantial certainty" test in order to ascertain whether the actor's conduct amounted to a "willful" and "malicious" "*injury*" and therefore falls within the exception to the general rule of dischargeability of debts).

Proponents of the "substantial certainty" test contend that in order to remove the immunity bar, the injurious conduct must be undertaken with a subjective realization of the *risk* of bodily harm. *See, e.g.*, *Mandolidis*, 246 S.E.2d at 913-14. Such a standard, it is argued, imports knowledge or premeditation that an injury is to be the probable result of a particular course of conduct or of an omission to act. *See id.* at 914. "Negligence," by contrast, conveys the notion of inadvertence rather than a consciousness or premeditation. *Id.*

b. *Hulne v. International Harvester Co.*, 496 F. Supp. 849 (D.N.D. 1980)

The plaintiff in *Hulne v. International Harvester Co.*[147] was the surviving spouse of a worker who was fatally injured when the tractor truck and trailer he was operating in connection with his employment left the road and rolled over.[148] Although applying for and receiving workers' compensation benefits, the plaintiff brought suit directly against the decedent's principal officer at the time of the incident seeking to recover for injuries which were not covered by workers' compensation. The plaintiff alleged that the defendant, in ordering the modification of the frame of the tractor, knowingly created a danger which was so gross as to be tantamount to an actual intent to injure.[149] The defendant moved for summary judgment, seeking the dismissal of plaintiff's complaint and cause of action. In support of the motion, the defendant argued that a common-law suit was barred by the exclusive-remedy provisions of the North Dakota Workers' Compensation Act.[150]

The plaintiff did not dispute well-established precedent which held that the exclusive-remedy provisions of the Act generally preclude any common-law action against either an employer or co-employee when the employer has secured workers' compensation coverage.[151] Instead, the plaintiff contended that there existed an exception to the bar of civil suits in circumstances in which the alleged negligence was so gross as to be the equivalent of an actual intent to injure.[152] The gravamen of the plaintiff's complaint was that the doctrine of exclusivity was inapplicable in the instant case since the defendant's conduct fell within the scope of the aforementioned exception.

The United States District Court for the District of North Dakota, applying North Dakota law, granted defendant's summary judgment motion and entered an order dismissing the complaint and cause of action.[153] Although the district court expressly refrained from determining whether an exception for intentional or willful injuries existed under North Dakota law, it assumed, *arguendo*, that an exception to exclusivity existed in order to address the plaintiff's contentions.[154]

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147. 496 F. Supp. 849 (D.N.D. 1980).
148. Hulne v. International Harvester Co., 496 F. Supp. 849, 850 (D.N.D. 1980).
149. *Id.* at 852.
150. *Id.* at 851.
151. *Id.* at 852.
152. *Id.*
153. *Hulne*, 496 F. Supp. at 853.
154. *Id.* at 852.

The district court quoted a passage from the *Schlenk* decision and concluded that allegations of *gross negligence* were insufficient to give rise to the application of a "public-policy" exception.[155] The district court relied on the *Schlenk* decision for precedent and, in doing so, opined that the "plaintiff does not seriously allege that [the] defendant . . . manifested an actual intent to kill or injure the decedent."[156] The court determined that the pled allegations fell short of a claim of "*intentional wrongdoing*."[157] Based upon the foregoing, the district court concluded that it was "clear" that the North Dakota Workers' Compensation Act barred the plaintiff's common-law action.[158]

The summary dismissal of the plaintiff's complaint in *Hulne* was unquestionably the correct result, especially since the plaintiff subjected herself to the rights, remedies, and limitations provided in the Act by applying for and receiving workers' compensation benefits.[159] By doing so, the plaintiff, however unwittingly, affirmatively asserted the "accidental" nature of the injuries. Nonetheless, the federal district court arguably misinterpreted the North Dakota Supreme Court's view of the *potential* public-policy exception to exclusivity for intentional or willful injuries as espoused in *Schlenk*. The district court seemed to misread *Schlenk* insofar as it impliedly found that the case *dicta* stood for the proposition that *only* a conscious, subjective intent to injure could satisfy the aforementioned public-policy exception under North Dakota law. Such an interpretation of the *Schlenk* opinion seems unduly parsimonious. As previously set forth, the North Dakota Supreme Court expressly acknowledged in *Schlenk* that the shield of immunity could possibly be pierced, and thereby potentially enable an injured worker to maintain a cause of action at law for the injuries sustained, in cases in which the "negligence was so gross as to be equivalent to an actual intent to injure" *as well as* in cases in which a conscious, subjective intent to injure was demonstrated. Significantly, nowhere in the district court's opinion in

155. *Id.* at 852-53.

156. *Id.* at 852.

157. *Id.* The district court further noted that the plaintiff "*elected*" to pursue workers' compensation as her sole remedy since she applied for and received benefits. *Id.* at 853. The court cited *Schlenk* and noted that "[o]nce the employee or his beneficiaries have received workmen's compensation benefits, they are precluded from pursuing a common law action, *even for intentionally inflicted injuries.*" *Id.* (emphasis added). In further articulating its position, the court stated that "[i]t is *immaterial* that the pain and suffering injuries sought in [the] action are not compensable under the act." *Id.* (emphasis added). The court held that a plaintiff cannot collaterally attack a decision by the workers' compensation bureau which had already determined the injuries to be compensable under the Act. *Id.*

158. *Id.*

159. *See supra* notes 92-109 and accompanying text.

Hulne is there any discussion or analysis of this potential exception to exclusivity as espoused by Chief Justice Erickstad in *Schlenk.*

c. *Schreder v. Cities Service Co.,* 336 N.W.2d 641 (N.D. 1983)

In *Schreder v. Cities Service Co.,*[160] the worker's widow brought a wrongful death action against the decedent's employer and fellow employee.[161] The decedent was employed by the TRG Drilling Corporation and was fatally injured while operating machinery which malfunctioned. The plaintiff alleged that the defendants either knew or should have known that the equipment the decedent was operating at the time of his death was not functioning properly, and pointed to corroborating evidence which seemed to support her assertion.[162] The gravamen of the complaint was that requiring the decedent to operate knowingly malfunctioning equipment was negligence so gross that it amounted to an actual intent to injure.[163] The defendants filed a motion for summary judgment contending that the plaintiff could not maintain a common-law cause of action because the complaint was barred as a matter of law by the exclusive-remedy provisions of the North Dakota Workers' Compensation Act.[164]

Justice Vande Walle, writing for a unanimous court, prefaced his analysis by noting that the court in *Schlenk* had "held" that the North Dakota Workers' Compensation Act itself did not allow for an exception to the immunity afforded an employer or its agents when an employee's injuries are intentionally inflicted.[165] In order to lay the foundation for the court's opinion which was premised upon whether public policy required recognition of an exception to exclusivity, Justice Vande Walle quoted the federal district court decision of *Hulne.*[166] The court opined that *Hulne* set forth a distinction for compensation purposes between an intentional *tort* and an intentional *injury* since "not all intentional *torts* are intentional *injuries.*"[167] An intent to commit a tort which results in injury cannot, opined the court, in all cases be said to be the same as an intent to injure. The North Dakota Supreme Court specifically rejected

160. 336 N.W.2d 641 (N.D. 1983).
161. Schreder v. Cities Serv. Co., 336 N.W.2d 641, 642 (N.D. 1983).
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* at 642. Interestingly, Justice Vande Walle was not a member of the panel which decided *Schlenk.*
166. *Schreder,* 336 N.W.2d at 643.
167. *Id.*

the premise that an injured employee covered by workers' compensation may institute a civil suit for all intentional torts without regard to whether or not there existed "an actual intent to injure."[168] By distinguishing an intentional injury from an intentional tort, the court completely closed the door on the latter as amounting to an exception to the rule of exclusivity in North Dakota. Thus, the court concluded that the application of the exclusive-remedy provisions to the undisputed facts of the case led to the inescapable conclusion that the defendants were immune from a common-law action which sought damages.[169] The holding was premised in part on the fact that the employee's death was precipitated by an "accident" and was not the result of "an actual intent to injure."[170]

The North Dakota Supreme Court expressly left open the issue of whether public policy necessitated an exception to the exclusivity of the North Dakota Workers' Compensation Act.[171] Once again, the court deliberately skirted resolving whether an injured employee was permitted to maintain a common-law action against a fellow employee or an employer for an intentional injury because it was clear that no intentional "injury" had been proven.[172] The North Dakota Supreme Court did, however, adhere to the conclusion it previously set forth in *Schlenk* which found that "an actual intent to injure" could conceivably serve as a basis for moving an injury from the requisite category of "accidental," and thereby permitting an injured employee to pursue a common-law remedy directly against an employer or co-employee for injuries that are intentionally inflicted.[173] At least one recent decision in North Dakota, while again refusing to rule on the existence of an intentional-injury exception to exclusivity, has reaffirmed the necessity of an actual intent to injure standard.[174]

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168. *Schreder*, 336 N.W.2d at 643.

169. *Id.* The court was quick to point out that the plaintiff-widow in *Schreder* had previously received $18,486.42 in compensation benefits from the North Dakota Workmen's Compensation Bureau. *Id.* at 642.

170. *Id.*

171. *Id.*

172. *Id.* at 643.

173. *Schreder*, 336 N.W.2d at 643-44.

174. *See* Smith v. Vestal, 494 N.W.2d 370, 374-75 (N.D. 1992). In *Smith*, The North Dakota Supreme Court affirmed the summary dismissal of a defendant's cross-claim and third-party indemnity and contribution action for fraud and deceit against the employer of a worker who was fatally injured by the collapse of a silo. *Id.* at 376. The defendant argued that an exception to exclusivity should exist and allow contribution in cases where the employer commits fraud against a third party and a subsequent injury results. *Id.* at 373. Chief Justice Erickstad, writing for a unanimous court, stated in *dicta*: "In both *Schlenk* and *Schreder* we expressly refused to allow an exception to the exclusive remedy rule for any conduct less than an actual intent to injure before allowing a common law action against the employer." *Id.* at 374.

Despite the fact that the *Schlenk, Hulne, & Schreder* trilogy of decisions set forth in *dicta* the broad parameters of an intentional-injury exception, the precise elements of any such exception in North Dakota remain elusive. More significantly, the fundamental issue of whether an exception to exclusivity actually exists for an intentional injury under North Dakota law continues to remain an open question.[175] The North Dakota Supreme Court has been reticent to engage in judicial legislation by establishing an exception to exclusivity for intentionally inflicted injuries. The judicial reluctance to adopt such an exception is quite understandable since any standard that tends to erode the exclusiveness of the compensation remedy strikes at the very heart of the statutory scheme and threatens the viability of the fixed terms of a carefully calibrated legislative bargain.

V. FOUNDATION FOR AN "INTENTIONAL-*INJURY*" EXCEPTION

A court is certainly not free to disregard the rule of exclusivity which is firmly entrenched in the North Dakota Workers' Compensation Act by judicially declaring the existence of a remedy previously removed from the sphere of available common-law actions. However, in a compulsory, no-fault system which relegates injured employees solely to accident recovery, it would seem doubtful that any legislature intended to *completely* abrogate an employee's right to recover damages in a civil action. It is equally true that precluding injured workers from maintaining tort claims directly against their employers or co-employees by virtue of a blind and rigid adherence to the rule of exclusivity cannot be justified in *all* instances.

Workers' compensation was specifically designed to provide an alternative system of compensation for those risks inherent in the workplace. Workers' compensation statutes prescribe standards for segregating compensable work-related injuries from those that are not compensable in order to carve out strictly *employment risks* from the general body of hazards that beset all humankind.[176] It is clear that the workers' compensation statutes in North Dakota were designed to provide an alternative compensation system primarily for those injuries arising out of and in the course of employment which are *accidental* in

175. Gernand v. Ost Servs., Inc., 298 N.W.2d 500, 504 (N.D. 1980) (noting that there are "some exceptions to the exclusive remedy rule").

176. LITTLE ET AL., *supra* note 8, at 186.

nature.[177] The "accident" requirement is the benchmark by which the boundary and applicability of the exclusive-remedy rule should generally be measured. An examination of the origin and evolution of the law of workers' compensation unequivocally supports this proposition for most work-related injuries.[178]

The sole function of exclusivity in workers' compensation is to impart efficacy to the compensation bargain.[179] Although the workers' compensation bargain clearly contemplates a reciprocal yielding of common-law rights for new and enlarged rights and remedies, the *quid pro quo* concerns work-related "accidents"; intentionally injurious conduct by an employer or co-employee was not a part of the bargain. The original bargain *never* contemplated the relinquishment of an employee's common-law rights for intentionally caused injuries which were by way of legal definition unaffected by the traditional common-law defenses available to an employer or co-employee in a *negligence* action.[180] Simply because a legislature intended through the enactment of workers' compensation legislation to limit and diffuse liability for accidental injuries does not likewise compel the conclusion that a legislature intended to limit and diffuse liability for intentional injuries.[181] Intended wrongs introduce an ingredient of "moral hazard" which was never intended to be governed *exclusively* by a set of rules

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177. *See* N.D. CENT. CODE § 65-01-02(9) (Supp. 1993) (defining a compensable injury to be "an injury by accident"). *See also id.* §§ 65-01-02(9)(b)(1) (self-inflicted injuries), (2) (injuries caused by willful use of controlled substances), (3) (injuries incurred by act of aggression) (Supp. 1993) (evidencing the legislative view that certain categories of intentional injuries are not compensable). The foregoing provisions illustrate that intent plays a significant role in ascertaining whether an injury is compensable.

178. *See supra* notes 6-32 and accompanying text.

179. Shoemaker v. Myers, 801 P.2d 1054, 1062 (Cal. 1990).

180. Edward J. O'Connell, Jr., Note, *Intentional Employer Misconduct and Pennsylvania's Exclusive Remedy Rule After* Poyser v. Newman and Co.*: A Proposal for Legislative Reform*, 49 U. PITT. L. REV. 1127, 1129-30 (1988).

> Worker's compensation statutes were enacted to furnish exclusive coverage for injuries that resulted from an employer's negligent failure to provide safe working conditions for hired employees. There is no evidence that employer [or co-employee] actions amounting to more than negligence or gross negligence were similarly intended to be affected by workers' compensation legislation. The common law defenses of contributory negligence, assumption of the risk, and fellow servant doctrine precluded an injured employee from recovering on a claim of employer negligence. These defenses, however, could not be invoked when an employee initiated an action for intentional misconduct.

Id. at 1152-53 (footnotes omitted). *See id.* at 1153 n.156 (citing authority which observes that the traditional common-law defenses have little or no application to deliberate or willful misconduct).

181. Beauchamp v. Dow Chemical Co., 398 N.W.2d 882, 889 (Mich. 1986). *See* Fermino v. Fedco, Inc., 872 P.2d 559 (Cal. 1994) (noting that in calibrating the compensation bargain legislatures were focused on eradicating concepts of common-law negligence; consequently, common-law intentional torts were not explicitly addressed in the workers' compensation system).

specifically designed to redress accidental injuries. Similarly, intentional harms are not the type of wrongs intended to be a bar to maintaining a common-law suit against an employer or employee notwithstanding the breadth of the exclusive-remedy provisions of most compensation acts. It is further arguable that interpreting the provisions of the North Dakota Workers' Compensation Act in a fashion which abrogates an injured employee's cause of action in tort for intentional harms cannot be made in all circumstances without running afoul of fundamental principles embodied in the North Dakota Constitution.[182]

To view intentional harms as an inevitable accompaniment of industrial production, whose costs, like any other cost of production, should be borne exclusively by the industry and ultimately by the consumer would seem repugnant to the very purpose for which workers' compensation legislation was promulgated. Intentionally injurious conduct would seem to be the type of behavior that every legislature in the United States would most want to discourage.[183] Subjecting intentional harms to the rule of exclusivity would be counterproductive to that end and would in essence allow intentional tortfeasors to shift their liability to a fund generally financed with employer-paid

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182. *See, e.g.*, N.D. CONST. art. I § 9 ("All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have a remedy by due process of law . . . ."); N.D. CONST. art. I § 13 ("The right of trial by jury shall be secured to all, and remain inviolate."). At least one court has recognized that constitutional principles mandate an exception to exclusivity for intentional injuries:

> Notwithstanding the breadth of [the act's] terms, its evident purpose was to confine its operation to only accidental injuries, and its scope is to be so limited. . . . The Bill of Rights, Section 13, Article I of the Constitution provides that "every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." . . . It is therefore not to be doubted that the Legislature is without the power to deny the citizen the right to resort to the courts for the redress of any intentional injury to his person by another. Such a cause of action may be said to be protected by the Constitution and could not be taken away. . . . This Act does not affect the right or redress for that class of wrongs. The injuries, or wrongs, with which it deals are accidental injuries or wrongs.

Middleton v. Texas Power & Light Co., 185 S.W. 556, 560 (1916), *aff'd*, 249 U.S. 152 (1919). *Cf.* Smith v. Gould, Inc., 918 F.2d 1361, 1364 (8th Cir. 1990) (noting in *dicta* that the constitutionality of many early compensation statutes did not depend upon the existence of an exception to exclusivity for intentional injuries).

The plaintiff in Hulne v. International Harvester Co., 496 F. Supp. 849 (D.N.D. 1980) attempted to raise a similar constitutional argument. The Federal District Court of North Dakota ruled, however, that the receipt of compensation benefits under the statutory scheme effectively forecloses such a contention: "Generally, a party who takes advantage of the provisions of a law cannot question its constitutionality." *Id.* at 853 (citing International Printing Pressman & Assistants Union v. Meier, 115 N.W.2d 18, 20 (N.D. 1962)).

183. If one of the avowed purposes of workers' compensation is to promote safety in the workplace, subjecting workers to the rule of exclusivity for intentionally injurious misconduct certainly would not promote that end for an employer could engage in egregious conduct with virtual impunity and rest safe with the knowledge that, at the very most, workers' compensation premiums may increase slightly. Blankenship v. Cincinnati Milacron Chems., Inc., 433 N.E.2d 572, 577 (Ohio 1982).

premiums.[184] Such a result permits an employer to effectively "cost-out" safety issues in disregard of potential injuries as investment decisions.[185] The immunity afforded by workers' compensation should not give employers the unfettered right to carry on their enterprises without regard to the life and limb of those who serve in their employ. Furthermore, a tortfeasor who affirmatively commits an intentionally tortious act such as an assault can not reasonably aver that the resultant injury is a risk or condition incident to the employment.[186]

In light of the foregoing, an employee's common-law right of action for intentional injuries should not be deemed destroyed in the absence of clear language in a statutory provision which commands such a result.[187] It would indeed be a subversion of the workers' compensation laws to allow intentional wrongdoers to utilize the provisions of the workers' compensation statutes to shield themselves from those torts

184. Collier v. Wagner Castings Co., 408 N.E.2d 198 (Ill. 1980). The rationale for an intentional-injury exception becomes even more palatable when suit is brought against a fellow servant who, by virtue of his or her position, has not directly contributed in premiums to the fund that supports compensation coverage. As one court has so aptly noted: "In Workers' Compensation, the immunities of the law inure to those who accept the liabilities imposed therein." Schwartz v. Zippy Mart, 470 So. 2d 720, 725 (Fla. Dist. Ct. App. 1985).

185. *Blankenship*, 433 N.E.2d at 579 (Celebrezze, C.J., concurring). The North Dakota Supreme Court has expressed the concern that if the effect of the rule of exclusivity embodied in the North Dakota Workers' Compensation Act was to preclude an employee from suing an employer for intentionally tortious injuries and thereby enable the employer to "'cost-out' an investment decision to kill workers," it may indeed "be a powerful incentive for the Legislature to amend our current law." Schreder v. Cities Serv. Co., 336 N.W.2d 641, 643 n.2 (N.D. 1983).

186. "No reasonable individual would equate intentional and unintentional conduct in terms of the degree of risk which faces an employee nor would such an individual contemplate the risk of an intentional tort as a natural risk of employment." *Blankenship*, 433 N.E.2d at 576.

187. *See* State v. E.W. Wylie Co., 58 N.W.2d 76, 83 (N.D. 1953) ("An existing common-law right is not to be taken away by statute unless by direct enactment or necessary implication."). This view has been embraced by at least one state district court in North Dakota. *See* Lautt v. Maloney, No. 92941, slip op. (Grand Forks Dist. Ct. 1992). In *Lautt*, the plaintiff was employed as a bookkeeper for National Muffler Shops, Inc., in Grand Forks, North Dakota. The defendant was employed as the manager of the same entity. On May 24, 1991, a work-related argument ensued between the plaintiff and the defendant at their place of employment. The argument turned into an altercation where the defendant was the initial aggressor—plaintiff, immediately after a verbal exchange, retreated into an office and sat behind a desk with his back to the door; the defendant after a brief lapse of time entered the office and assaulted the plaintiff from behind. Following the altercation, the plaintiff terminated his employment and filed a criminal complaint against the defendant with the Grand Forks Police Department. The plaintiff did not attempt to collect workers' compensation, although presumably he would have been successful in his attempt. On September 27, 1991, the defendant pled guilty to a criminal assault charge. The plaintiff subsequently brought suit against the defendant individually due to injuries sustained as a direct result of the aforementioned altercation. The defendant brought a motion for summary judgment arguing that no common-law cause of action could be maintained against the defendant individually due to the exclusive-remedy provisions of the state's workers' compensation provisions. The Grand Forks District Court held, *inter alia*, that the defendant could not use the provisions of workers' compensation as a shield for an intentional assault which he initiated. *Id.* The court found that the exclusivity bar could not be utilized as a sword by a tortfeasor who commits an intentionally injurious act. Accordingly, the court denied the motion for summary judgment and allowed the plaintiff to maintain a common-law action. *Id.*

which are tantamount to intentional or willful injuries in the absence of a clear legislative mandate.[188]

The "accident" requirement insures that the workers' compensation statutes are not utilized in a way for employers and fellow employees to benefit from their own intentional misconduct.[189] One who inflicts an intentional injury upon an employee either directly or indirectly by commanding or authorizing such conduct cannot logically claim that it was accidental.[190] This would be especially true in light of the fact that the very same conduct may readily be found to be criminally punishable in another forum.[191] Affirmatively tortious conduct which rises to the level of criminal assault should readily be sufficient enough to establish "an actual intent to injure" which, as noted in *dicta* by *Schlenk* and its progeny, is necessary to remove any challenge to a common-law action based upon the exclusive-remedy provisions of the workers' compensation statutes.

Almost every jurisdiction, either by express statutory provision or judicial construction, recognizes an intentional-injury exception to the exclusive-remedy rule in some form.[192] Courts in other jurisdictions which have specifically addressed the matter on this point are relatively uniform in opining:

> The Workmen's Compensation Law deals not with intentional wrongs but with only accidental injuries. We entertain not the slightest doubt that where an employer, either directly or through an agent or servant, is guilty of a[n] . . . assault upon an employee, he cannot relegate the latter to the compensation statute as the sole remedy for his tortious act. It would be

188. Application of the principle of exclusivity in such cases has been characterized as "a travesty on the use of the English language" and "a perversion of the purposes of the act." 2A LARSON, *supra* note 8, § 68.12, at 13-10 (footnotes omitted).

189. *Beauchamp*, 398 N.W.2d at 887.

190. *See* 2A LARSON, *supra* note 8, § 68.11, at 13-4. *Compare* Deutsch v. Great Atlantic & Pacific Tea Co., Inc., 452 N.Y.S.2d 469, 470 (1982) (an exception to the exclusiveness of the compensation remedy can be found where an employer instigates or authorizes an assault upon an employee), *with* Bakker v. Baza'r, Inc., 551 P.2d 1269, 1273-74 (Or. 1976) (ratification of an assault was insufficient to create an exception to exclusivity).

191. *See, e.g.*, N.D. CENT. CODE §§ 12.1-17-01 to 12.1-17-02 (1985) (setting forth the provisions for criminal assault in North Dakota).

192. Higgins, *supra* note 23, at 37-38; LITTLE ET AL., *supra* note 8, at 430 n.1. A growing number of jurisdictions has promulgated statutory provisions which expressly preserve an employee's common-law right of action against an employer or co-employee for specified categories of conduct beyond mere negligence. *See* ARIZ. REV. STAT. ANN. § 23-1022 (West Supp. 1983); CAL. LAB. CODE § 3602 (West 1971 & Supp. 1988); IDAHO CODE § 72-209 (1973); KY. REV. STAT. ANN. § 342.610(3), (4) (Baldwin 1993); LA. REV. STAT. ANN. §23:1032 (West 1985); N.H. REV. STAT. ANN. § 281:12(II) (1987); N.J. STAT. ANN. § 34:15-8 (West Supp. 1987); S.D. CODIFIED LAWS ANN. § 62-3-2 (1993); WASH. REV. CODE ANN. § 51.24.020 (1981); W. VA. CODE § 23-4-2 (1985).

> abhorrent to our sense of justice to hold that an employer [or his/her servants] may assault [an] employee and then compel the injured work[er] to accept the circumstance, the one assaulted may avail himself [or herself] of a common law action against [the] assailant where full monetary satisfaction may be obtained.[193]

The vast majority of courts have thus manifested their collective unwillingness to include intentionally injurious conduct by employers or their servants within the rule of exclusivity since there is no "sound reason" to conclude that any legislature intended to limit the liability of an intentional tortfeasor when formulating legislation directed at redressing accidental injuries.[194] North Dakota, however, stands virtually alone in that the existence or nonexistence of such an exception has not been resolved to any degree of certainty.

VI. RECONCILING THE COMPENSATION vs. COMMON LAW DICHOTOMY

Reconciling the notion that an injury which flows from a workplace assault between co-workers or between an employer and a subordinate is and indeed should be compensable under the workers' compensation

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193. Heskett v. Fisher Laundry & Cleaners Co., 230 S.W.2d 28, 31 (Ark. 1950) (quoting Lavin v. Goldberg Material Corp., 87 N.Y.S.2d 90, 93 (1949)). *See* Boek v. Wong Hing, 231 N.W. 233, 233 (Minn. 1930) (finding it to be a "perversion of the purpose" of the workers' compensation statutes to permit a fellow employee who willfully assaults a worker to successfully interpose the exclusive-remedy provisions of the workers' compensation statutes as a defense which thereby relegates an injured to less than full recovery). *See also* Elliott v. Brown, 569 P.2d 1323, 1326 (Alaska 1977) (holding that "the socially beneficial purpose of the workmen's compensation law would not be furthered by allowing a person who commits an intentional tort to use the compensation law as a shield against liability"); Schwartz v. Zippy Mart, Inc., 470 So. 2d 720, 724 (Fla. Dist. Ct. App. 1985) (opining that "[a]n employer, of course, cannot intentionally injure an employee and enjoy immunity from suit. . . . Similarly, an employer cannot command or expressly authorize the intentional infliction of an injury upon an employee and still claim the exclusive remedy provisions of the compensation act").

194. Beauchamp v. Dow Chemical Co., 398 N.W.2d 882, 890 (Mich. 1986). Other legal theories to support the same result have been advanced in jurisdictions which do not require the injury to be accidental. One is that the assailant severs the employment relation by the particular act of violence. 2A LARSON, *supra* note 8, § 68.11, at 13-4. *See, e.g.*, Brady v. Safety-Kleen Corp., 576 N.E.2d 722, 729 (Ohio 1991) ("When an employer intentionally harms his employee, that act effects a complete breach of the employment relationship, and for purposes of the legal remedy for such an injury, the two parties are not employer and employee, but intentional tortfeasor and victim."); Boek v. Wong Hing, 231 N.W. 233, 234 (Minn. 1930). A second treats such an assault as if the conduct does not "arise out of the employment." 2A LARSON, *supra* note 8, § 68.11, at 13-5. Both of these theories, however, are essentially fictitious; hence, the most satisfactory view is the nonaccidental theory. *Id.* at 13-6. In addition to these theories, policy justifications have often been resorted to in order to justify an exception to the general rule of exclusivity. *Id.* § 68.12, at 13-9. For example, a New York court has stated: "It would be anomalous to permit a defendant which, as in this case, . . . assaulted the plaintiff herein, to say, 'I can assault you with impunity and the only remedy you have is to take Workmen's Compensation . . . .'" Garcia v. Gusmack Restaurant Corp., 150 N.Y.S.2d 232, 233 (1954).

acts as an *accidental injury*, with the idea that a common-law action may be maintained directly against the assailant as an exception to exclusivity since the injury is *intentional*, appears at first blush to be conceptually troublesome. For if such an injury can logically be said to be compensable on the one hand under the provisions of the workers' compensation act, should not the exclusive-remedy provisions bar *any* common-law action against an employer or his/her servants? More specifically, how can the very same injury or conduct giving rise to an injury be fairly characterized under the law as *both* accidental and intentional? These questions become particularly perplexing when examining authority which interprets the exclusive-remedy provisions effectively to preclude an employee whose injuries fall within the scope of the Act from *electing* whether or not to receive compensation or bring suit against his or her employer.[195] Additionally problematic is the fact the exclusive-remedy provisions on their face appear to bar virtually all tort litigation against either an employer or co-employee in North Dakota.

The answer to the aforementioned questions ostensibly still lies in the hands of the injured employee in most jurisdictions. If the employee has *elected* to accept the benefits of workers' compensation by filing a claim, the claimant has essentially asserted the "accidental" nature of the particular injury.[196] The injured employee, by applying for and receiving workers' compensation benefits, triggers the applicability of the legal fiction created by the courts in order to allow intentional torts to be classified as "accidental" and thereby fall within the coverage formula of the various compensation acts. However, if the injured worker forgoes any claim for workers' compensation and *elects* to proceed to court in an action for damages against the assailant directly, it is the assailant who must affirmatively plead the exclusiveness of the particular conduct as a

195. *See, e.g.*, United States v. Demko, 385 U.S. 149, 151 (1966); Hoerr v. Northfield Foundry & Mach. Co., 376 N.W.2d 323 (N.D. 1985) (noting that the right to recovery granted for employees whose injuries fall within the scope of workers' compensation coverage is exclusively limited to the statutory scheme). *See supra* notes 92-109 and accompanying text.

196. 2A LARSON, *supra* note 8, § 68.12, at 13-12 n.9.

defense.[197] To do so, the assailant must allege that the injury producing incident was an "accident"—and how can this be accomplished, when it is the assailant who has deliberately brought the injury about?[198] It would indeed seem contrary to reason to allow an employer or co-employee to classify an injury that he or she intentionally inflicted as an accident in order to trigger the exclusivity bar. "Thus, from the point of view of the person who, as a matter of pleading, must allege the accidental character of the injury, the occurrence was not accidental but intentional."[199] A number of courts, under such circumstances, have recast the intentional injury as nonaccidental in order to justify an exception to exclusivity and permit a plaintiff to advance a tort action.

A great number of decisions in this area regard the statutory recovery of compensation and tort recovery of damages to be mutually exclusive alternatives. The theory is premised upon the widely-accepted view that the two remedies, workers' compensation for an accidental injury and tort for an intentional injury, are inconsistent and the pursuit of either remedy to fruition bars the right to pursue the other.[200] This, in turn, puts the injured employee to an *election of remedies* for all practical purposes as to whether to proceed in tort in an attempt to collect damages or to claim compensation through the workers'

197. *Id.* at 13-12.

198. *Id. See, e.g.*, Jablonski v. Multack, 380 N.E.2d 924 (Ill. 1978) (finding that a co-employee, like an employer, cannot be heard to label an injury "accidental" that he himself intentionally inflicted). In construing the "accident" requirement in such circumstances, courts have defined it from the *actor's* point of view and rejected arguments that the "accident" requirement be viewed from employee's perspective. By contrast, the "accident" requirement is viewed quite differently when it is the *injured employee* who asserts the accidental nature of a particular injury: "An assault is an 'accident' within the meaning of the workmen's compensation acts when from the point of view of the workman who suffers from it it is unexpected and without design on his part, although intentionally caused by another." 6 SCHNEIDER, *supra* note 20, § 1560, at 117. *See* 82 AM. JUR. 2D §§ 245-50 (1992); Alice M. Thomas, *The Law of Workers' Compensation: Defining Accidental Injury*, 30 HOW. L.J. 515 (1987); 99 C.J.S. *Workmen's Compensation* §§ 153-61 (1958); SAMUEL B. HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS, at 84-93 (1944); HONNOLD, *supra* note 66, § 85; Francis H. Bolen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328 (1912) (discussing the "accident" requirement and concomitant interpretation thereof under the workers' compensation acts).

199. 2A LARSON, *supra* note 8, § 68.12, at 13-12. Larson notes that there is nothing inconsistent about such a result, although seemingly curious on its face, since it is common to analyze the particular incident in the context of the type of action from the standpoint of the individual who has the burden of establishing or defending the case in question. *Id.*

200. An unsuccessful pursuit of a either a compensation or damages remedy does not generally bar the pursuit of the other. The rationale in such situations is that an election of a remedy which ultimately proves to be nonexistent cannot be fairly said to be an election at all: "Election . . . is a choice between two valid but inconsistent remedies; it is not the mistaken pursuit of a misconceived right when only one right in fact existed." 2A LARSON, *supra* note 8, § 67.31 at 12-157.

compensation provisions.[201] The doctrine of election as applied to questions regarding the exclusiveness of the workers' compensation remedy has been expressed thusly:

> The doctrine of election, usually predicated of inconsistent remedies, consists in holding the party, to whom several courses were open for obtaining relief, to his first election, where subsequently he attempts to avail himself of some further and other remedy not consistent with, but contradictory of, his previous attitude and action upon his claim. The basis for the application of the doctrine is in the proposition that where there is, by law or contract, a choice between two remedies, which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the other.[202]

Hence, an employee is essentially forced to a binding and conclusive election between claiming compensation or suing the assailant directly for damages under the common law even though such an option is not supposed to exist under the law.[203] The binding election occurs when the employee applies for and receives benefits under workers'

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201. The rationale of those courts which steadfastly adhere to the election of remedies doctrine as applied to questions of exclusivity in workers compensation generally opine:

> There is a distinction between "being entitled to take compensation" and "having taken compensation." Assuming the plaintiff had a common-law action for willful assault, we think he lost such a remedy by choosing instead to avail himself of the benefits of work[ers'] compensation, given to him by the statute without requiring him to prove negligence, freedom from contributory negligence, willful assault or anything else except that he was injured during the course of his employment . . . . The statute gave him a remedy. That remedy was predicated upon the theory that his injury was "accidental" within the statutory definition. His common-law action negates the theory of "accidental injury." He bases his cause of action upon a willful and wanton assault by his employers and on the theory that such assault is not an accidental injury under the statute. Assuming that he had two remedies, one by virtue of the statute and one under the common law, it must be held that the two are inconsistent one with the other. He may not pursue both to conclusion. By demanding, receiving and retaining benefits of his first remedy, he is estopped to simultaneously pursue the second. He made his election.

Legault v. Brown, 127 N.Y.S.2d 601, 603-04 (1954) (citation omitted). *See* Williams v. General Servs. Admin., 582 F. Supp. 442 (E.D. Pa. 1984); Irving v. E.F.P.E. Constr. Corp., 337 N.Y.S.2d 4 (1972) (opining that a discovery that the worker was an independent contractor and not an employee after compensation benefits were received barred an action at law against the employer); Morris v. Ford Motor Co., 31 N.W.2d 89, 90 (Mich. 1948) (stating that the filing of a claim under workmen's compensation releases an injured party's claim at law); Werner v. State, 424 N.E.2d 541 (1981) (acceptance of compensation precludes maintenance of common-law action based upon an intentional injury). *See generally* Schnoor v. Meinecke, 33 N.W.2d 66, 68 (N.D. 1948).

202. *Legault*, 127 N.Y.S.2d at 604 (quoting Mills v. Parkhurst, 26 N.E. 1041, 1042 (N.Y. 1891)).

203. 2A LARSON, *supra* note 8, § 68.12, at 13-10. *See supra* notes 92-109 and accompanying text.

compensation.[204] Under such a view, an employee's receipt of workers' compensation benefits by law constitutes a *waiver* of any and all common-law rights of action which might otherwise be available—even for those injuries which are intentionally inflicted.[205]

Although the law with respect to an exception to exclusivity in North Dakota remains unsettled, the statutory scheme as presently constituted as well as the jurisprudence in this area seems to clearly align itself with the election-of-remedies doctrine. As previously outlined, an integral component of the exclusive-remedy doctrine in North Dakota is the seemingly inflexible rule which forecloses an employee from pursuing any other remedy if compensation benefits are received.[206] This rigid rule is codified by statute in North Dakota and is triggered when an injured employee obtains relief through the compensation system.

An approach which forces an injured worker to an election of remedies in such circumstances is deficient for a number of reasons.[207] One deficiency is that a severely injured employee who has nominal financial resources might be forced to accept the meager provisions of the workers' compensation system in order to collect certain and speedy recovery rather than pursue a potentially higher, yet riskier, tort award. An injured employee who does not have the financial wherewithal to await the outcome of potentially protracted litigation, despite having a potentially valid claim under an exception to exclusivity, has no real alternative but to forego a tort claim.[208] Conversely, an injured worker who in good faith believes that the injury sustained was brought about by a degree of intent necessary to overcome the exclusiveness bar and forgoes the compensation claim in order to preserve the common-law

204. David W. Robertson, *The Texas Employer's Liability in Tort for Injuries to an Employee Occurring in the Course of the Employment*, 24 ST. MARY'S L.J. 1195, 1211 (1993).

205. *See, e.g.*, Schlenk v. Aerial Contractors, Inc., 268 N.W.2d 466, 472-73 (N.D. 1978) (observing that even if an exception to exclusivity existed in North Dakota for intentionally inflicted injuries, the receipt of compensation constitutes an election of remedies which accordingly precludes any action at law).

206. *See supra* notes 92-109 and accompanying text. *See also* N.D. CENT. CODE § 65-05-06 (1985) (barring claims against an employer by an injured employee if the Workers' Compensation Bureau has already provided compensation or other benefits).

207. The doctrine of election of remedies seems to be incompatible with the notion of an "exception" to the exclusive-remedy rule. In jurisdictions which contain a statute that precludes the pursuit of *any* remedy upon the receipt of compensation benefits as part of their exclusive-remedy rule, such as North Dakota, as well as purport to acknowledge an "exception" to the rule of exclusivity for intentional injuries, should not an "exception" to exclusivity encompass an "exception" to the very statute which is integral to the rule of exclusivity?

208. Woodson v. Rowland, 407 S.E.2d 222, 234 (N.C. 1991).

action, risks losing any right to a remedy in compensation due to the time bar contained in all compensation acts for prosecuting claims.[209]

Since an election of remedies is essentially tantamount to a waiver (the pursuit of one remedy bars the pursuit of another), an election under such circumstances is fundamentally unfair unless the injured employee has an understanding of what rights are being waived. A "waiver" has long been defined in American jurisprudence as "an intentional relinquishment or abandonment of a known right or privilege."[210] A voluntary and informed *choice* is thus the essence of a waiver. Accordingly, an election of remedies should not be said to be made unless a realistic "choice" between alternative avenues of recovery are presented to the employee in the first instance and a conscious intention to waive one such avenue of recovery is made.[211]

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209. All workers' compensation acts contain the requirement that claims be filed within a specified period of time from the date of the accident or discovery of the injury. *See, e.g.*, N.D. CENT. CODE § 65-05-01 (Supp. 1993) (providing a one-year limitation on claims by injured employees and a two-year limitation if death resulted). These time-based restrictions are akin to statutes of limitation and are designed to protect employers from the necessity of defending against claims which are too old to be properly investigated. Section 65-05-01 provides in part:

> All original claims for compensation must be filed by the injured employee, or someone on the injured employee's behalf, within *one year* after the injury or *two years* after the death. . . . No compensation or benefits may be allowed under this title to any person . . . unless that person, or someone on that person's behalf files a written claim for compensation or benefits within the time specified in this section.

Id. (emphasis added). *Cf.* Evejen v. North Dakota Workers Compensation Bureau, 429 N.W.2d 418 (N.D. 1988) (barring a claim as untimely when it was filed more than one year after the date the worker knew or should have known that headaches were work-related). A number of courts construe the repose periods as carrying a conclusive presumption that an employer becomes prejudiced by a late filed claim. LITTLE ET AL., *supra* note 8, at 406. *E.g.*, Cecil W. Perry, Inc. v. Lopez, 425 So. 2d 180 (Fla. Dist. Ct. App. 1983) (disallowing a claim filed one day after the expiration of the limitation period); Asato v. Meadow Gold Dairies-Hawaii, 706 P.2d 13 (Haw. 1985) (opining that untimely filed claims are barred even if the employer does not allege that the lateness prejudiced its ability to investigate the claim).

210. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). *See* United States v. Olano, 113 S. Ct. 1770, 1777 (1993); Neary v. United States, 998 F.2d 563, 565 (8th Cir. 1993). *See also* Steckler v. Steckler, 492 N.W.2d 76, 79 (N.D. 1992) ("For a waiver to be effective, it must be a voluntary and intentional relinquishment and abandonment of a known existing right, advantage, benefit, claim or privilege which, except for such waiver, the party would have enjoyed.").

211. Ramirez v. Pecan Deluxe Candy Co., 839 S.W.2d 101, 106 (Tex. Ct. App. 1992). Recognizing the inequity in applying the election-of-remedies doctrine in workers' compensation cases has prompted at least one court to cogently reason:

> The election of remedies doctrine may constitute a bar to relief when one exercises an informed choice between two or more remedies, rights, or states of facts that are so inconsistent as to constitute manifest injustice. One's choice between inconsistent remedies does not amount to an election that will bar further action unless the choice is made with a full and clear understanding of the problem, facts, and remedies essential to the free exercise of an intelligent choice.

Id. See id. at 107 (ruling that there was no evidence which demonstrated that the injured employee made an informed election between workers' compensation benefits and recovery under the intentional tort exception to exclusivity). *Accord* Taylor v. Hubbel, 188 F.2d 106, 109 (9th Cir. 1951).

Another deficiency is that a claimant in all likelihood will often fail to consult with an attorney and, therefore, will not realize that the filing of a workers' compensation claim for less than full recovery effectively bars any further action against an otherwise culpable employer or co-employee.[212] The existence of an exception to exclusivity for intentional injuries under such circumstances is essentially illusory and of dubious value. The practical effect of the election-of-remedies doctrine is, therefore, to afford employers and co-employees immunity from virtually all tort suits even when egregious or criminal misconduct is involved. Intentional tortfeasors are thus able to absolve or exculpate themselves from the consequences of intentional misconduct in certain circumstances by virtue of their status as employers or co-employees. Moreover, workers' compensation may effectively afford a criminal assailant sanctuary from civil liability—a result surely not intended by the framers of workers' compensation legislation.[213]

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212. For example, a great number of private and public employers (such as universities like the University of North Dakota) have promulgated rules or policies which require that any employee who sustains an injury from a compensable accident or event must report that event to the relevant insurance department on workers' compensation forms. The forms for claiming compensation are perfunctorily provided any time an employee sustains an injury at the workplace. Interview with Dianne G. Schmitz, Chief Deputy Clerk for the United States Bankruptcy Court, Fargo, N.D. (September 30, 1994). Doing so may effectively force the injured employee to an uninformed election of remedies by subsequently serving as a basis for barring an otherwise cognizable common-law action.

213. Jones v. VIP Dev. Co., 472 N.E.2d 1046, 1054 (Ohio 1984). An employer or co-employee who intentionally injures a worker should not be able to avoid liability for traditional common-law damages on the ground that compensation is available and has been received. The purpose and spirit of workers' compensation makes it abundantly clear that workers' compensation was never intended to be a haven for intentionally injurious conduct:

> To limit a worker injured by the employer's intentional misconduct to workers' compensation benefits would actually encourage such conduct. To bar an intentionally injured worker from the courtroom because he has received such benefits would have the same effect. An employer in such a case could merely refrain from contesting the claim, thereby facilitating the receipt of limited compensation, and then reap the rewards of absolute immunity from further liability. This court will not foster such practices.
>
> Nor will we force an intentionally injured employee to choose which remedy to pursue. In most cases, practical considerations will compel the worker to accept the easier, more immediate relief afforded by the Act, even though these benefits do not fully compensate the worker. Most seriously injured workers are not in a financial position to wait out a lengthy, expensive, and risky court proceeding to be compensated for the injury, due to the problems of pressing medical bills, and often the inability to work. Many will thus be forced by harsh realities to accept workers' compensation. To consider the receipt of benefits a forfeiture of an employee's right to pursue the employer in the courts would not only be harsh and unjust, it would also frustrate the laudable purposes of the Act. . . . Further, it would allow the employer to escape any meaningful responsibility for its abuses.

Id. Accord Millison v. E.I. du Pont de Nemours & Co., 501 A.2d 505, 519 (N.J. 1985).

VII. PROPOSAL FOR REFORM

Workers' compensation legislation was promulgated in order to ameliorate a social condition. The workers' compensation system developed during an era when the common law provided little or no recovery to those workers who were injured as a direct result of their employment. The original legislative compromise between employers and employees, however, has not provided an adequate remedy for all work-related injuries. Indeed, although the principle of "exclusivity" is undeniably an integral part of the historical *quid pro quo* between employers and employees, one need not strain the imagination to readily conclude that exclusivity can work harsh results and, in certain circumstances, produce remedies that are wholly inadequate.

This inadequacy can be evidenced by "judicial attempts"[214] to circumvent the exclusive-remedy provisions of workers' compensation acts by interpreting the statutes in such a manner as to permit or preserve a common law right of action—and this is especially the case where the circumstances giving rise to a work-related injury evince an intent to injure.[215]

The resolution of the inadequacies of the provisions of North Dakota's workers' compensation statutes, however, should not lie with the judiciary. Rather, the North Dakota Legislature should take notice of the judicially created exceptions to the exclusive-remedy provisions, as well as the North Dakota Supreme Court's acknowledgment thereof, as a signal that "changing societal conditions require reassessment of the original compensation system."[216] The North Dakota Supreme Court has labored to avoid tampering with the exclusive-remedy rule embodied in the North Dakota Workers' Compensation Act. The court has steadfastly adhered to the view that the appropriate forum for addressing the concerns regarding the rule of exclusivity is legislative, not judicial:

> The public policy encompassing workers' compensation statutes dictates a broad interpretation of the exclusive-remedy

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214. *See generally* Steven E. Goren, *The Workers' Compensation Exclusive Remedy Rule and Its Exceptions*, 71 MICH. BAR J. 59 (Jan. 1992) (highlighting various judicial exceptions to the exclusive-remedy provisions).

215. *See* Leonard, *supra* note 11, at 557.

216. *Id.* at 559. The workers' compensation provisions of a majority of jurisdictions, including North Dakota's, have existed without material alteration since their promulgation. *See generally* Marlow, *supra* note 30, at 158.

rule. If the barrier is to be pierced it should be done by the legislature, which is the policy-making body of our government.[217]

A. HOUSE BILL 1302: A PREVIOUS LEGISLATIVE EFFORT

In the wake of two arguably conflicting decisions (*Schlenk & Hulne*, supra), the North Dakota Legislature attempted to promulgate legislation aimed at providing an exception to the rule of exclusivity for intentionally injurious conduct. On January 26, 1983, a bill was presented in the North Dakota House of Representatives to the Committee of Industry, Business and Labor which would have provided for an exception to the rule of exclusivity embodied in the North Dakota Workers' Compensation Act.[218] House Bill 1302 was an unsuccessful attempt to amend and reenact Section 65-01-08 of the North Dakota Century Code[219] by adding the following provision: "However, if the injury or death was caused by the gross negligence or willful or wanton misconduct of the employer, the right of action against the employer is not abolished."[220] The committee minutes reveal that the bill was intended to respond to situations in which the negligence on the part of the employer was so gross as to be the functional equivalent of an actual intent to injure.[221] Not surprisingly, the proposed amendment to exclusivity was met with strong resistance. The opposition to House Bill 1302 was predicated, at least in part, upon the misconstrued view that:

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217. Smith v. Vestal, 494 N.W.2d 370, 375 (N.D. 1992).

218. H. B. 1302, 48TH LEG. (1983). House Bill 1302 was presented for consideration approximately six months *prior* to the decision of the North Dakota Supreme Court in Schreder v. Cities Serv. Co., 336 N.W.2d 641 (N.D. 1983). Although the court in *Schreder* was cognizant of the attempted amendment, it opined that "action by a subsequent Legislature in attempting to amend a statute cannot be taken as proof of what a previous Legislature intended when it enacted the original statute and that the intent of the Legislature in the enactment of the law is to be ascertained primarily from the language of the law." *Schreder*, 336 N.W.2d at 643 n.2.

219. Section 65-01-08 of the North Dakota Century Code is a statutory component of the exclusive-remedy rule. *See supra* note 21.

220. H. B. 1302, 48TH LEG. (1983).

221. *Id.* The transcription of the taped committee minutes, which provides an indication of the purpose of the proposed amendment, seems to come close to parroting one of the seemingly alternative standards set forth in Schlenk v. Aerial Contractors, Inc., 268 N.W.2d 466 (N.D. 1978). The minutes contain the statement that:

> This bill is intended to respond to the situations in which gross negligance [sic] occured [sic] on the part of the employer, so bad that it appears that the employer intended it. . . . Gross negligence is when someone does something so bad that you believe that they have intended it.

Id. The committee minutes intimate that actual copies of the *Schlenk* decision were distributed to the members of the committee prior to or during the hearing. *See id.* (Rebuttal Comments of Representative John Schneider).

> *The legal action in this bill is both unecessary [sic] and redundent [sic]. A suit would be allowed now under present law because of the definition of injury.* Injury shall [mean] an injury by accident arising out of and in the course of employment. And, it is obvious that if you intend to hurt someone it is not an accident. He felt that gross negligence was defined as the entire want of care, rather than the intent to cause harm.
>
> . . . .
>
> The goal of workmen's compensation is to keep employees and employers out of court. This bill, if passed, would change this . . .[222]

By the narrow vote of nine to seven, the bill was defeated in the committee and not recommended for approval when presented to the full House of Representatives for consideration.

B. A SUGGESTED APPROACH FOR LEGISLATIVE REFORM

As presently constituted, the North Dakota Workers' Compensation Act allows intentional injuries to be bound by statutory coverage. Although workers' compensation statutes were expressly drafted to cover workplace accidents, the legislative scheme in North Dakota arguably cloaks an intentionally tortious employer or co-employee with virtually unqualified immunity. The immunity arises, often by sheer happenstance, when an injured worker applies for and receives workers' compensation benefits. However inadvertent, the worker places intentionally injurious conduct within the system's exclusive coverage by applying for and receiving workers' compensation. The victimized employee is thereby relegated to this limited recovery and effectively denied any common law redress. This result is inconsistent with the terms of the original *quid pro quo* and is antithetical to the workers' compensation policy of improving workplace safety. Legislative revision is necessary in order to restore the integrity of the workers' compensation system in North Dakota. An amendment to the North Dakota Workers' Compensation Act which exempts intentionally injurious conduct, evidencing a state of mind inconsistent with that found on accidents, from the operation of the exclusive-remedy rule truly effectuates both the letter and spirit of the compensation bargain.

222. *Id.* (emphasis added).

Specifically, North Dakota should amend its *cumulative-remedy provision*, codified at section 65-01-09 of the North Dakota Century Code (discussed at Part IV(B)(2) above), and create an exception to the rule of exclusivity for a narrow category of conduct in order to: 1) permit an employee to bring a cause of action *directly* against an employer or co-worker *only* for those torts which can be fairly said to result in an intentionally inflicted injury; and 2) allow that employee to obtain immediate relief through the compensation statutes while at the same time permitting the injured employee to pursue a tort action in order to secure full recovery. This approach provides a more equitable and definitive solution to the treatment of intentional injuries in North Dakota and removes the yoke of oppression from the shoulders of employees who are intentionally injured by providing a vehicle for recovery from the common-law tort system. It would not force the plaintiff to an election between remedies. A plaintiff under this approach may seek certain and immediate relief from workers' compensation while simultaneously pursuing full compensation through the courts, with the burdens and defenses attendant to such a proceeding to operate as a realistic check on vexatious litigation.[223] Under this proposal, a worker intentionally injured need not choose between benefits under workers' compensation or damages under the common law, but instead may freely pursue both, because the very same injury is indeed accidental *and* intentional. Of course, a plaintiff would be entitled to one recovery and not have the benefit of both remedies, because the insurance fund or carrier would be subrogated to any amount collected to the extent of the workers' compensation benefits paid.[224] The current statutory scheme in North Dakota provides for this already. Furthermore, the exclusive-remedy provisions themselves are preserved almost totally intact.

The advantage of a cumulative-remedy theory as outlined above is that it makes the no-fault workers' compensation benefits, with their maximum ceiling, the exclusive remedy for the categories of harm prescribed by the Act, while at the same time allowing the traditional tort

223. Even when the exclusive-remedy provisions of the North Dakota's Workers' Compensation Act do not preclude a tort claim by an injured worker against an employer or fellow servant, there is never a guarantee that the worker will be able to prevail in a tort action. The injured worker must first establish all of the elements of the cause of action by the requisite degree of proof as well as overcome any applicable defenses. Additionally, a complaint should do more than merely allege an intentional injury in order to pierce the shield of immunity. It should allege *facts* sufficient enough to warrant a finding that the conduct was intentionally injurious. Therefore, a motion to dismiss should properly be granted if the complaint contains little more than conclusory allegations.

224. The election-of-remedies doctrine is enacted in order to prevent double recovery. Where a subrogation or set-off mechanism is established, the necessity for the doctrine is questionable.

remedies to fully compensate an injured worker. A cumulative-remedy theory best serves the objectives of both the no-fault and tort systems. It retains the limitations on liability for those injuries naturally associated with the business operation and also permits the imposition of tort liability on those defendants who would otherwise enjoy immunity under the broad reach of the exclusive-remedy provisions. Further, a plan that would exact full compensation effectively operates to deter egregious misconduct while arguably fostering increased job-site safety.

However, in order for the exclusive-remedy rule to fulfill its intended function, the scope of the rule and the applicability of any exception should be quite clear, predictable, and limited. The rule should not be subverted by the operation of an exception such that the protection it affords becomes illusory. Indeed, the continued vitality of the rule of exclusivity is integral to the operation of the compensation system. Care must therefore be taken to restrictively construe the term "intentional" in order to afford employers with an appropriate measure of protection and not unduly tip the scales of the compensation balance in favor of employees.[225] Any amendment to the North Dakota Workers' Compensation Act should establish adequate standards and define what conduct will be considered sufficiently intentional to surmount the exclusivity bar.[226]

VIII. CONCLUSION

The North Dakota Workers' Compensation Act harbors inequities that must be remedied by legislative action. Further, changes in the law and the economy since the inauguration of the original bargain have significantly increased the value of the common law rights that workers long ago relinquished. A system which imposes upon an assailant, be it an employer or co-worker, liability for the full costs of those injuries intentionally inflicted upon an employee, yet protects such individuals from exorbitant recoveries resulting from inevitable and genuine accidents, truly effectuates and preserves both the principle of equity as

225. An overly expansive interpretation of an intentional-injury exception would thwart the purpose of the statutory scheme. However, promulgating a standard so strict that it is essentially unattainable renders an exception to exclusivity itself illusory.

226. *See generally, supra* note 146 (setting forth and discussing two definitions of "intentional injury"). *See* Kuhnert v. John Morrell & Co. Meat Packing, Inc., 5 F.3d 303, 305 (8th Cir. 1993); Shearer v. Homestake Mining Co., 727 F.2d 707, 708 n.2 (8th Cir. 1984); Pyle v. Dow Chem. Co., 728 F.2d 1129, 1130 (8th Cir. 1984) (construing the intentional-injury requirement of state statutory schemes). *See also* David B. Harrison, Annotation, *What Conduct Is Willful, Intentional, or Deliberate Within Workmen's Compensation Act Provision Authorizing Tort Action for Such Conduct*, 96 A.L.R.3d 1064 (1979).

well as the balance and compromise which is at the heart of the workers' compensation system. A broad interpretation of workers' compensation statutes which includes serious misconduct, such as intentional assaults on employees, within its ambit and then operates to effectively bar a common-law action cloaks an undeserving assailant with unjustified immunity. An amendment to the cumulative-remedy provision of the North Dakota Workers' Compensation Act which incorporates an exception to the rule of exclusivity for intentionally injurious conduct, renders the statutory scheme more consonant with the original *quid pro quo*.