St. Mary's Law Journal

Volume 17 | Number 2 Article 8

1-1-1986

An Employer's Intentional Failure to Maintain a Safe Work Place is Not an Intentional Act Unless the Employer is Substantially Certain That Such Conduct Would Cause the Injury.

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WORKERS' COMPENSATION — Intentional Injury Exception To The Exclusive Remedy Provision — An Employer's Intentional Failure To Maintain A Safe Work Place Is Not An Intentional Act Unless The Employer Is Substantially Certain That Such Conduct Would Cause The Injury

Reed Tool Co. v. Copelin
689 S.W.2d 404 (Tex. 1985)

George Copelin, while in the course of employment,[1] was severely and permanently injured when a chain tong from the lathe he was operating struck him in the head.[2] Shortly after the accident, Copelin filed a workers' compensation claim and began receiving benefits under the Texas Workers' Compensation Act.[3] Judy Copelin, George's wife, subsequently sued Reed Tool Company alleging damages for the loss of consortium resulting from her husband's injuries.[4] Mrs. Copelin initially based her suit on allegations that her husband's injuries were caused by Reed Tool's negligence, gross negligence, or intentional misconduct.[5] Mrs. Copelin specifically claimed that her husband's injuries were caused by Reed Tool since it knew that the lathe Copelin operated was unsafe;[6] it failed to meet minimum safety requirements; and it was defectively modified by Reed Tool.[7] Upon the case's first appeal to the Texas Supreme Court, the court dismissed Mrs. Copelin's negligence and gross negligence actions since such actions were barred by her husband's workers' compensation agreement.[8] The supreme court re-

1. *See* TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967) (Workers' Compensation Act not applicable if injury not sustained in course of employment).

2. *See* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 405 (Tex. 1985) (injury caused severe brain damage and left Copelin in coma).

3. *See* Reed Tool Co. v. Copelin, 610 S.W.2d 736, 740 (Tex. 1980); *see also* TEX. REV. CIV. STAT. ANN. arts. 8306-8309i (Vernon 1967 & Supp. 1985) (stating, *inter alia,* that receipt of benefits under Act bars all other suits or claims).

4. *See* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 405 (Tex. 1985).

5. *See* Reed Tool Co. v. Copelin, 610 S.W.2d 736, 738 (Tex. 1980).

6. *See* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 405 (Tex. 1985). The lathe was the cause of several previous injuries to Reed Tool employees, and was nicknamed "jaws". *See id.* at 408.

7. *See id.* at 405. These factors formed the basis of Mrs. Copelin's claim that Reed Tool intentionally maintained an unsafe workplace. *See* Copelin v. Reed Tool Co., 679 S.W.2d 605, 607 (Tex. App.—Houston [1st Dist.] 1984), *rev'd,* 689 S.W.2d 404 (Tex. 1985).

8. *See* Reed Tool Co. v. Copelin, 610 S.W.2d 736, 740 (Tex. 1980) (wife's derivative ac-

manded Copelin's case to the district court to determine whether intentional misconduct by Reed Tool was the cause of her husband's injuries.[9] The district court, upon finding no issue of material fact regarding Reed Tool's intentional misconduct, granted summary judgment for the employer.[10] The Houston Court of Appeals, reversing the district court, held that Mrs. Copelin's allegation that Reed Tool intentionally maintained an unsafe work place was sufficient to maintain her action for intentional misconduct.[11] The Texas Supreme Court granted Reed Tool's writ of error to clarify whether an employer's maintenance of an unsafe work place, which results in an employee's injury, constitutes an intentional injury.[12] Held — *Reversed.* An employer's intentional failure to maintain a safe work place is not an intentional act unless the employer is substantially certain that such conduct would cause the injury.[13]

The first laws dealing with workers' compensation originated in Europe in the late nineteenth century.[14] Using European laws as a model, New York became the first state to pass a workers' compensation statute in 1910.[15] Shortly thereafter, the Texas Legislature passed the Texas Employers' Liability, or Workmen's Compensation, Act.[16] By 1963, workers' compensa-

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tion for intentional impairment of consortium, being a separate property claim, not barred by husband's receiving compensation under Act).

9. *See id.* at 740 (Copelin can recover for consortium only if Reed Tool caused husband's injuries intentionally).

10. *See* Copelin v. Reed Tool Co., 679 S.W.2d 605, 606 (Tex. App.—Houston [1st Dist.] 1984) (lack of Copelin's response resulted in granting of summary judgment), *rev'd on other grounds,* 689 S.W.2d 404 (Tex. 1985).

11. *See id.* at 608 (intent to maintain unsafe work place transferred into intent to cause injury). The court of appeals held that intent is established when one's legally protected interests, such as having a safe work place, are invaded. *See id.* at 608.

12. *See* Reed Tool Co. v. Copelin, 28 Tex. Sup. Ct. J. 167 (Dec. 19, 1984).

13. *See* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 407 (Tex. 1985).

14. *See* Batson-Milholme Co. v. Faulk, 209 S.W. 837, 841 (Tex. Civ. App.—Galveston 1918, writ ref'd n.r.e.) (Germany enacted first workers' compensation act in 1884); *see also* BLAIR, WORKMEN'S COMPENSATION LAW § 1.00, at 1-1 (1974) (England enacted workers' compensation statute in 1897).

15. *See* Ives v. South Buffalo Ry. Co., 94 N.E. 431, 436, 201 N.Y. 271, 285 (1911) (citing 1910 N.Y. Laws, ch. 674); *see also* BLAIR, WORKMEN'S COMPENSATION LAW § 1:00, at 1-1 (1974) (discussing history of workers' compensation law); 1 A. LARSON, WORKMEN'S COMPENSATION LAW § 5.20, at 37-39 (1985) (discussing origins of workers' compensation law in United States).

16. *See* Texas Employers' Insurance Association Act, ch. 179, 1913 Tex. Gen. Law, Gen. 429, *amended by* Act of Mar. 28, 1917, ch. 103, 1917 Tex. Gen. Laws 269, 269-94 (the amending act's language is in its present form in TEX. REV. CIV. STAT. ANN. arts. 8306-8309i (Vernon 1967 & Supp. 1985)); *see also* Middleton v. Texas Power & Light Co., 108 Tex. 96, 104, 185 S.W. 556, 557 (1916) (noting date of statute's enactment); Batson-Milholme Co. v. Faulk, 209 S.W. 837, 838 (Tex. Civ. App.—Galveston 1918, writ ref'd n.r.e.) (Texas workers' compensation law passed in 1913).

tion statutes had been enacted in every state.[17] These statutes have promoted economic growth and social stability through minimizing business costs and providing adequate compensation for work-related injuries.[18]

The fundamental concept underlying the enactment of the workers' compensation scheme is to establish a system of mandatory no-fault insurance.[19] The system is one of mutual compromise between employers and employees.[20] The employer, in return for assuming absolute liability for work-related injuries and a statutorily prescribed measure of damages, is granted immunity from all common law actions for negligence.[21] The injured em-

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17. *See* BLAIR, WORKMEN'S COMPENSATION LAW § 1:00, at 1-1 (1974); *see also* W. PROSSER & W. P. KEETON, HANDBOOK OF THE LAW OF TORTS § 80, at 573 (5th ed. 1984) (since 1963, all states have had workers' compensation statutes in effect).

18. *See* BLAIR, WORKMEN'S COMPENSATION LAW § 1:00, at 1-1, 1-2 (1974) (workers' compensation system more appropriately viewed as system which provides societal "economic insurance," not merely system providing individual "social insurance"); *see also* Employers' Reinsurance Corp. v. Holland, 162 Tex. 394, 396, 347 S.W.2d 605, 606 (1961) ("the purpose of the Act is to compensate an injured employee, not for the loss of earnings or for the injury itself, but for loss of earning capacity").

19. *See, e.g.*, Cudahy Packing Co. v. Parramore, 263 U.S. 418, 423 (1923) (employer's liability under scheme not based upon acts or omissions, but upon employer-employee relationship); Kofron v. Amoco Chems. Corp., 441 A.2d 226, 231 (Del. 1982) (scheme's purpose is to provide assured compensation for work-related injuries); Reed Tool Co. v. Copelin, 610 S.W.2d 736, 739 (Tex. 1980) (system of liability without fault created by Act); *see also* 1 A. LARSON, WORKMEN'S COMPENSATION LAW § 2.20, at 5-9 (1985) (discussing underlying social policies of scheme); Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers*, 34 LAB. L.J. 683, 684 (1983) (discussing no-fault premise underlying workers' compensation scheme). The workers' compensation scheme, by establishing a no-fault basis of compensation, eliminated the employer's common law defenses of contributory negligence, the fellow servant rule, and assumption of risk. *See* Middleton v. Texas Power & Light Co., 108 Tex. 96, 108, 185 S.W. 556, 560 (1916) (workers' compensation act disregards common law defenses); *see also* Castleberry v. Frost-Johnson Lumber Co., 283 S.W. 141, 146 (Tex. Comm'n App. 1926, opinion adopted) (approximately 80 percent of work-related injuries in pre-workers' compensation era went uncompensated due to severity of common law defenses). *See generally* W. PROSSER & W. P. KEETON, HANDBOOK OF THE LAW OF TORTS § 80, at 573 (5th ed. 1984) (discussing abolition of common law defenses with regard to workers' compensation statutes).

20. *See* Johns-Manville Prods. Corp. v. Contra Costa Super. Ct., 612 P.2d 948, 953, 165 Cal. Rptr. 858, 863 (1980) (mutual compromise balances scheme's costs with benefits); *see also* Comment, *Workmen's Compensation and Employer Suability: The Dual Capacity Doctrine*, 5 ST. MARY'S L.J. 818, 818 (1974) (system based on mutual compromise).

21. *See* Reed Tool Co. v. Copelin, 610 S.W.2d 736, 739 (Tex. 1980) (employers given immunity from employees' common law negligence actions). Immunity applies even if the plaintiff alleges willful gross negligence on the part of the defendant. *See* Castleberry v. Goolsby Bldg. Corp., 617 S.W.2d 665, 666 (Tex. 1981). *See generally* Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers*, 34 LAB. L.J. 683, 685 (1983) (stating employees surrender many, if not all, common law rights under system).

ployee, in return for surrendering his common law rights,[22] is granted relatively swift and certain compensation.[23] To effectuate the mutual compromise, workers' compensation statutes generally contain exclusive remedy provisions[24] for injuries falling within the scope of the statute.[25] Thus, when an employee is accidently injured in the course of employment,[26] the employee has no choice but to seek the statutorily prescribed compensation.[27] For example, the Texas Workers' Compensation Act bars an injured employee's action for ordinary or gross negligence.[28] If, however,

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22. *See* Paradissis v. Royal Indem. Co., 507 S.W.2d 526, 529 (Tex. 1974) (employee's common law rights diminished by Act). The Act mandates that "employees of a subscriber . . . shall have no right of action against their employer . . . for damages for personal injuries . . . ." *See* TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967).

23. *See* Paradissis v. Royal Indem. Co., 507 S.W.2d 526, 529 (Tex. 1974) (Act provides prompt compensation to injured employees); *see also* Middleton v. Texas Power & Light Co., 108 Tex. 96, 108, 185 S.W. 556, 560 (1916) (Act provides relatively quick and assured compensation regardless of employee's fault). *See generally* Tomita, *The Exclusive Remedy of Workers' Compensation for Intentional Torts of the Employer: Johns-Manville Products v. Superior Court,* 18 CAL. W. L. REV. 27, 27 (1982) (describing employee compensation as relatively swift, although limited).

24. *See* Reed Tool Co. v. Copelin, 610 S.W.2d 736, 739 (Tex. 1980) (essential element of workers' compensation scheme is exclusive remedy provision); *see also* TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967) (injured employees shall look solely to statute for compensation). *See generally* 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 65.00, at 12-1 (1983) (discussing exclusiveness of compensation remedy).

25. *See* TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967). The section states in the pertinent part:

> The term "injury sustained in the course of employment," as used in this Act, shall not include:
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> (1) An injury caused by an act of God, unless the employee is at the time engaged in the performance of duties that subject him to a greater hazard from an act of God responsible for the injury than ordinarily applies to the general public.
>
> (2) An injury caused by an act of a third person intended to injure the employee because of reasons personal to him and not directed against him as an employee, or because of his employment.
>
> (3) An injury received while in a state of intoxication.
>
> (4) An injury caused by the employee's willful intention and attempt to injure himself, or to unlawfully injure some other person, but shall include all other injuries of every kind and character having to do with and originating in the work, business, trade or profession of the employer received by an employee while engaged in or about the furtherance of the affairs or business of his employer whether upon the employer's premises or elsewhere.

Id. § 1.

26. *See* Middleton v. Texas Power & Light Co., 108 Tex. 96, 109, 185 S.W. 556, 560 (1916) (Act limited in scope to accidental injuries); *see also* Richardson v. The Fair, Inc., 124 S.W.2d 885, 885 (Tex. Civ. App.—Beaumont 1939, writ dism'd judgmt cor.) (only accidental injuries covered by Act).

27. *See* TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967) (employees must look to Act for sole compensation of work-related accidental injuries).

28. *See, e.g.,* Castleberry v. Goolsby Bldg. Corp., 617 S.W.2d 665, 666 (Tex. 1981) (Act

the employee is killed, the Act provides for the recovery of punitive damages when gross negligence is established as the cause of the employee's death.[29] Employers are also not granted immunity from intentional acts which injure or kill an employee.[30]

The prevailing rule nationwide is that an employer's common law liability applies only to "genuine" intentional misconduct.[31] Therefore, an employer may knowingly permit a dangerous work condition to exist,[32] or knowingly

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exempts employers from ordinary and gross negligence actions); Reed Tool Co. v. Copelin, 610 S.W.2d 736, 739 (Tex. 1980) (all causes of action for accidental injuries barred by Act); Middleton v. Texas Power & Light Co., 108 Tex. 96, 109, 185 S.W. 556, 561 (1916) (Act denies employee any cause of action for accidental injuries).

29. *See, e.g.,* Burk Royalty Co. v. Walls, 616 S.W.2d 911, 913 (Tex. 1981) (citing constitutional and statutory authority for suit for punitive damages in death cases); Paradissis v. Royal Indem. Co., 507 S.W.2d 526, 529 (Tex. 1974) (in death cases, certain exemplary damages provided by Act); Grove Mfg. Co. v. Cardinal Constr. Co., 534 S.W.2d 153, 155 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) (gross negligence action not maintainable if injury to employee not fatal); *see also* TEX. CONST. art. XVI, § 26 ("every person, corporation, or company, that may commit a homicide, through willful act, or omission, or gross neglect, shall be responsible, in exemplary damages"); TEX. REV. CIV. STAT. ANN. art. 8306, § 5 (Vernon 1967) (stating that nothing prohibits action for gross negligence by surviving spouse or heirs of decedent's body).

30. *See, e.g.,* Castleberry v. Goolsby Bldg. Corp., 617 S.W.2d 665, 666 (Tex. 1981) (Act does not exempt employers from liability for intentional acts); Reed Tool Co. v. Copelin, 610 S.W.2d 736, 739 (Tex. 1980) (employers liable at common law for intentional injuries); Middleton v. Texas Power & Light Co., 108 Tex. 96, 109, 185 S.W. 556, 560 (1916) (legislature cannot deny access to courts for redress of intentional injuries); *see also* TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967) (Act not "intended to lessen or alter the employees [sic] existing rights or cause of action . . . against his employer . . . ."). Furthermore, the Texas Constitution guarantees a cause of action for intentional injury. *See* TEX. CONST. art. I, § 13. The section states: "[E]very person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." *Id.* § 13.

31. *See, e.g.,* Williams v. International Paper Co., 181 Cal. Rptr. 342, 347 (Ct. App. 1982) (workers' compensation only remedy unless specific intent proven); Rosales v. Verson Allsteel Press Co., 354 N.E.2d 553, 558 (Ill. App. Ct. 1976) (willful and wanton actions are not intentional acts); Santiago v. Brill Monfort Co., 176 N.E.2d 835, 835, 219 N.Y.S.2d 266, 266 (1961) (no action against employer unless deliberate act proven). *See generally* 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 68.13, at 13-9 (1983) (discussing need for actual intent to injure). Professor Larson states that accidental injuries caused by an employer's "gross, wanton, willful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct" still do not translate into the requisite "genuine" intentional injury. *See id.* at 13-9. *But see* Mandolidis v. Elkins Indus., 246 S.E.2d 907, 914 (W. Va. 1978) (willful, wanton, or reckless conduct is not "accidental," but "deliberate"); *accord* Blankenship v. Cincinnati Milacron Chems., 433 N.E.2d 572, 578 (Ohio 1982) (if employer knew chemicals were harmful and did not warn employees, intent established).

32. *See, e.g.,* Penton v. Southern Shipbldg., 667 F.2d 500, 501 (5th Cir. 1982) (employer's refusal to allow covering of greasy floor in work area not intentional act); Provo v. Bunker Hill Co., 393 F. Supp. 778, 784 (Idaho 1975) (knowingly permitting dangerous work condition not intentional act); Kerrigan v. Firestone Tire & Rubber Co., 207 N.W.2d 578, 579 (Iowa 1973)

require an employee to perform ultra-hazardous work,[33] or even knowingly violate a safety statute,[34] and such misconduct by the employer is not genuinely intentional.[35] The judiciary's interpretation of "intentional misconduct" is of great importance to an injured employee since the court's conclusion on the issue may preclude recovery outside the worker's compensation system.[36] Most courts have restricted the scope of the intentional injury exception by requiring a high standard of proof to establish an intentional injury.[37]

When confronted with an inquiry into an employer's intentional actions, many courts have held intent to be established if one of two elements is satisfied.[38] An employer will be held liable if he consciously desired to cause

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(employer's failure to repair defective machine which made workplace unsafe not intentional act).

33. *See* Wright v. FMC Corp., 146 Cal. Rptr. 740, 740 (Ct. App. 1978) (employer's concealment of danger created by noxious chemicals not intentional act); *accord* Russell v. United Parcel Serv., 666 F.2d 1188, 1192 (8th Cir. 1981) (assignment to hazardous work area not grounds for intentional infliction of emotional distress).

34. *See* Brown v. P. S. & Sons Painting, 680 F.2d 1111, 1114 (5th Cir. 1982) (violation of safety regulations not sufficient to avoid exclusive remedy provision); *see also* Cortez v. Hooker Chem. & Plastics Corp., 402 So. 2d 249, 250-51 (La. Ct. App. 1981) (intentional failure to comply with OSHA standards not intentional misconduct); Evans v. Allentown Portland Cement Co., 252 A.2d 646, 648 (Pa. 1969) (employee's sole remedy provided by Act, even when violation of statutory duty alleged).

35. *See* Duncan v. Perry Packing Co., 174 P.2d 78, 83 (Kan. 1946) (intentional versus accidental injury at issue, not gravity of employer's misconduct); *see also* 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 68.13, at 13-9 (1983) (stating any conduct except specific intent to injure falls within Act's scope).

36. *Compare* Keating v. Shell Chem. Co., 610 F.2d 328, 332 (5th Cir. 1980) (employer's extreme negligence regarding chemical fumes not intentional act to injure, employee denied recovery) *with* Mandolidis v. Elkins Indus., 246 S.E.2d 907, 915-18 (W. Va. 1978) (employer's reckless misconduct in ordering employee to operate saw which violated OSHA standards held intentional, recovery awarded).

37. *See, e.g.,* Rosales v. Verson Allsteel Press Co., 354 N.E.2d 553, 556 (Ill. App. Ct. 1976) (any exceptions to exclusive remedy provision must be strictly construed); Great W. Sugar Co. v. District Ct., 610 P.2d 717, 720 (Mont. 1980) (act not intentional unless specifically directed at employee); Foster v. Allsop Automatic, Inc., 547 P.2d 856, 857 (Wash. 1976) (there must be specific intent not merely negligence, however gross). *See generally* 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 68.13, at 13-8 (1983) (majority holds nothing less than "genuine" intent imposes liability on employer).

38. *See, e.g.,* Williams v. International Paper Co., 181 Cal. Rptr. 342, 344 n.1 (Ct. App. 1982) (desire or substantial certainty to cause injury denotes intent); Bazley v. Tortorich, 397 So. 2d 475, 482 (La. 1981) (either desire or substantial certainty to cause result is intentional act); Bennight v. Western Auto Supply Co., 670 S.W.2d 373, 377 (Tex. App.—Austin 1984, writ ref'd n.r.e.) (stating that "desire" and "substantial certainty" definitions are well-established in Texas); *see also* W. PROSSER & W. P. KEETON, HANDBOOK OF THE LAW OF TORTS § 8, at 33-37 (5th ed. 1984) (discussing meaning of intent). *See generally* RESTATEMENT (SECOND) OF TORTS § 8A (1965) (defining intentional conduct).

the injury,[39] or if he knew with substantial certainty that the injury would occur.[40] The courts' alternative approach to allegations of intentional injury, however, has not greatly increased an employee's prospect for recovery because the standard of proof for either approach is substantially similar.[41] Two states, recognizing certain inequities inherent to exclusive remedy provisions, have judicially sought to relax the rigid definition of intentional misconduct;[42] however, these states are in a clear minority.[43] The Texas courts,

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39. *See, e.g.,* Bazley v. Tortorich, 397 So. 2d 475, 482 (La. 1981) (desire to injure imposes liability on employer); Cortez v. Hooker Chem. & Plastics Corp., 402 So. 2d 249, 252 (La. Ct. App. 1981) (employer's desire to injure not protected by workers' compensation system); Schreder v. Cities Serv. Co., 336 N.W.2d 641, 644 (N.D. 1983) (specific intent to injure imposes liability). *See generally* 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 68.13, at 13-8 (1983) (discussing necessity for actual intent to injure).

40. *See, e.g.,* Williams v. International Paper Co., 181 Cal. Rptr. 342, 344 n.1 (Ct. App. 1982) (intent defined as knowing with substantial certainty of result); Shores v. Fidelity & Casualty Co. of N. Y., 413 So. 2d 315, 318 (La. Ct. App. 1982) (employer liable if injury substantially certain to result); VerBouwens v. Hamm Wood Prods., 334 N.W.2d 874, 876 (S.D. 1983) (court applied substantial certainty element in defining intentional conduct). Professors Prosser and Keeton state that:

> [T]he mere knowledge and appreciation of a risk — something short of substantial certainty — is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong. In such cases the distinction between intent and negligence obviously is a matter of degree. The line has been drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable person would avoid, and becomes in the mind of the actor a substantial certainty.

W. PROSSER & W. P. KEETON, HANDBOOK OF THE LAW OF TORTS § 8, at 36 (5th ed. 1984); *accord* RESTATEMENT (SECOND) OF TORTS § 8A, comment b (1965).

41. *Compare* Duk Hwan Chung v. Fred Meyer, Inc., 556 P.2d 683, 685 (Or. 1976) (employee failed to establish deliberate intent to injure, recovery denied) *and* Kittel v. Vermont Weatherboard, 417 A.2d 926, 927 (Vt. 1980) (affirming judgment for employer since employee failed to prove specific intent to injure) *with* Shores v. Fidelity & Casualty Co., 413 So. 2d 315, 317 (La. Ct. Ap. 1982) (employee's intentional injury action failed since no proof employer had substantial certainty injury would result) *and* VerBouwens v. Hamm Wood Prods., 334 N.W.2d 874, 876 (S.D. 1983) (employee's injury was not substantial certainty, recovery denied); *see also* Johns-Manville Prods. Corp. v. Contra Costa Super. Ct., 612 P.2d 948, 953, 165 Cal. Rptr. 858, 863 (1980) (employer held liable for intentional acts only in "exceptional circumstances"). The California Supreme Court further stated that allowing any misconduct to be considered "intentional" would greatly disturb the system's balance of costs and benefits. *See id.* at 953-54; *see also* Kofron v. Amoco Chems. Corp., 441 A.2d 226, 231 & n.3 (Del. 1982) (even if statute provided action for intentional injury, only substantial evidence of specific intent warrants recovery).

42. *See* Mandolidis v. Elkins Indus., 246 S.E.2d 907, 915 (W. Va. 1978) (wanton and reckless misconduct translates into intent); *accord* Blankenship v. Cincinnati Milacron Chems., 433 N.E.2d 572, 579 (Ohio 1982) (Celebrezze, J., concurring) (knowing failure to warn of dangerous chemicals should always translate into intent). *See generally* Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers,* 34 LAB. L.J. 683, 687 (1983) (discussing merits of *Mandolidis* and

seemingly unpersuaded by the minority view, have closely followed the majority position and, as a result, have maintained a relatively rigid interpretation of intentional misconduct.[44]

In *Reed Tool Co. v. Copelin,*[45] the Texas Supreme Court held that an employer will not be held liable at common law for an employee's injury, even though the employer intentionally failed to provide a safe work place,[46] unless that employer was substantially certain that the conduct would cause injury.[47] The holding is based on the court's determination that the exclusive remedy provision is a vital component of the workers' compensation system and serves to maintain the overall effectiveness of the system.[48] The court, looking to previous Texas case law which stated that an intentional injury is not established even by proving that an employer acts with "willful gross negligence,"[49] reasoned that the requisite element necessary to impose liability is the specific intent to injure.[50] The court further determined that

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Blankenship holdings). *But see* 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 68.13, at 13-8 (1983) (discussing "out-of-line" holdings of *Mandolidis* and *Blankenship).*

43. *See* Mandolidis v. Elkins Indus., 246 S.E.2d 907, 921 (W. Va. 1978); *accord* Blankenship v. Cincinnati Milacron Chems., 433 N.E.2d 572, 578 (Ohio 1982); *see also* Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers,* 34 LAB. L.J. 683, 687 (1983) (discussing rejection of majority view by West Virginia and Ohio courts).

44. *See, e.g.,* Massey v. Armco Steel Co., 652 S.W.2d 932, 933 (Tex. 1983) (workers' compensation act bars all common law actions except intentional torts); Castleberry v. Goolsby Bldg. Corp., 617 S.W.2d 665, 666 (Tex. 1981) (even willful gross negligence not intentional act); Middleton v. Texas Power & Light Co., 108 Tex. 96, 109, 185 S.W. 556, 560 (1916) (only intentional injuries warrant employee's resort to courts).

45. 689 S.W.2d 404 (Tex. 1985).

46. *See id.* at 407. The court cited *Kofron v. Amoco Chems. Corp.,* 441 A.2d 226, 231 (Del. 1982) (court refused to find intentional act even though employer maintained dangerous work place) and *McCoy v. Liberty Foundry Co.,* 635 S.W.2d 60, 63 (Mo. App. 1982) (failure to provide safe work place not grounds for intentional injury action) to support its position. *See* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 406 (Tex. 1985).

47. *See* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 407 (Tex. 1985).

48. *See id.* at 407. The court reasoned that the balance of costs and benefits must be maintained, and that exposing employers to additional liability would diminish their ability to effectively spread losses, thereby creating an imbalance in the system. *See id.* at 407.

49. Castleberry v. Goolsby Bldg. Corp., 617 S.W.2d 665, 666 (Tex. 1981).

50. *See* Reed Tool v. Copelin, 689 S.W.2d 404, 406 (Tex. 1985). The court, while not expressly stating as such, apparently applied the Restatement definition of intent to workers' compensation cases when an intentional injury is alleged. *See id.* at 406. The supreme court stated that:

> The fundamental difference between negligent injury, or even grossly negligent injury, and intentional injury is the specific intent to inflict injury. The Restatement Second of Torts [sic] defines intent to mean that "the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." Restatement (Second) of Torts [sic] § 8A (1965).

Id. at 406.

Copelin produced no evidence raising a material question of fact regarding Reed Tool's intent to injure Copelin.[51] For this reason, the supreme court upheld the trial court's granting of Reed Tool's motion for summary judgment.[52]

The *Reed Tool* decision is a confirmation of the judiciary's desire to maintain the integrity of the workers' compensation system.[53] The preference for a conservative definition of intentional injury is well-established in case law.[54] Some states have tempered the rigid "desire" requirement with a "substantial certainty" element.[55] The Texas Supreme Court has now endorsed the substantial certainty standard as it applies to the intentional injury exception of the Workers' Compensation Act.[56] A Texas employer is not granted immunity under the Act if the employer desires to injure an employee[57] or knows with substantial certainty that his conduct will result

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51. *See* Reed Tool v. Copelin, 689 S.W.2d 404, 408 (Tex. 1985). Copelin introduced no conclusive evidence that Reed Tool was substantially certain that her husband would be injured. *See id.* at 408.

52. *See id.* at 408. Summary judgment is proper when plaintiff's evidence raises no material fact questions. *See id.* at 408; *see also* Wesson v. Jefferson Sav. & Loan Ass'n, 641 S.W.2d 903, 904-05 (Tex. 1982) (summary judgment warranted as matter of law when no fact issues presented). Copelin also did not respond to Reed Tool's summary judgment motion. *See* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 408 (Tex. 1985).

53. *See, e.g.,* Johns-Manville Prods. Corp. v. Contra Costa Super. Ct., 612 P.2d 948, 954, 165 Cal. Rptr. 858, 863 (1980) (workers' compensation provides sole remedy even if employer deliberately fails to provide safe work place); Kofron v. Amoco Chems. Corp., 441 A.2d 226, 231 (Del. 1982) (declining even to consider whether intentional failure to maintain safe work place constitutes intent to injure); Sanford v. Presto Mfg. Co., 594 P.2d 1202, 1204 (N.M. Ct. App. 1979) (permitting dangerous work place not intentional act). *See generally* 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 68.13, at 13-22 (1983) (stating employer not liable for simply allowing unsafe work place).

54. *See, e.g.,* Williams v. International Paper Co., 181 Cal. Rptr. 342, 347 (Ct. App. 1982) (workers' compensation is exclusive remedy unless specific desire proven); Great W. Sugar Co. v. District Ct., 610 P.2d 717, 720 (Mont. 1980) (specific intentional harm must be established); Kittel v. Vermont Weatherboard, 417 A.2d 926, 927 (Vt. 1980) (no conduct but specific desire falls outside Act's scope). For a general discussion of intentional conduct within the context of workers' compensation statutes, see generally Annot., *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 (1980).

55. *See, e.g.,* Shearer v. Homestake Mining Co., 557 F. Supp. 549, 555 (D. S.D. 1983) (if employer substantially certain injury will result, intent established); Bazley v. Tortorich, 397 So. 2d 475, 482 (La. 1981) (intent defined to include substantial certainty element); VerBouwens v. Hamm Wood Prods., 334 N.W.2d 874, 876 (S.D. 1983) (substantial certainty of result is intentional act).

56. *See* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 406-07 (Tex. 1985) (defining intent as desire or substantial certainty). The court's opinion recognized that other jurisdictions have applied this definition to workers' compensation cases. *See id.* at 406.

57. *See, e.g.,* Castleberry v. Goolsby Bldg. Corp., 617 S.W.2d 665, 666 (Tex. 1981) (employer liable for intentional acts); Middleton v. Texas Power & Light Co., 108 Tex. 96, 109,

in injury.[58] The *Reed Tool* court addressed the intent issue only in the limited context of whether intentional failure to maintain a safe work place translates into an intent to injure.[59] The court's dicta, however, indicates that regardless of the basis for the intentional injury allegation, the same standard will be applied.[60]

The court's decision is well-founded if the practical considerations underlying the workers' compensation system are to be upheld.[61] The system is designed to provide compensation to injured employees with the cost being borne directly by the employer.[62] The expense simply becomes a cost of doing business and can thereafter be widely distributed to the consuming public.[63] The court recognizes that a relatively bright line must be maintained between accidental and intentional injuries.[64] Any blurring of the

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185 S.W. 556, 560 (1916) (intentional injuries not barred by Act); Bennight v. Western Auto Supply Co., 670 S.W.2d 373, 376 (Tex. App.—Austin 1984, writ ref'd n.r.e.) (only accidental injuries covered by Act). While *Bennight* is technically still good law, it is important to recognize that reliance on it may be misplaced, especially on the the issue of whether an employer's intentional failure to provide a safe work place constitutes an intentional injury, for the Texas Supreme Court has expressly stated as such and has limited *Bennight* to its facts. *See* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 407 (Tex. 1985).

58. *See, e.g.,* Williams v. International Paper Co., 181 Cal. Rptr. 342, 344 n.1 (Ct. App. 1982) (intent not limited to desire, but includes substantial certainty); Shores v. Fidelity & Casualty Co. of N.Y., 413 So. 2d 315, 317 (La. Ct. App. 1982) (intent may be established by showing employer knew with substantial certainty injury would result); Reed Tool Co. v. Copelin, 689 S.W.2d 404, 407 (Tex. 1985) (adopting substantial certainty element).

59. *See* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 407 (Tex. 1985) (court confined holding to single inquiry). The court implicitly held that no translation is made unless substantial evidence supports the allegation of intentional injury. *See id.* at 408 (evidence insufficient to support intentional injury allegation); *see also* Foster v. Allsop Automatic, Inc., 547 P.2d 856, 859 (Wash. 1976) (en banc) (evidence must at least create reasonable inference of intentional injury).

60. *See* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 406-07 (Tex. 1985).

61. *See id.* at 407 (system's effectiveness founded on practical balance of costs and benefits); *see also* Middleton v. Texas Power & Light Co., 108 Tex. 96, 96-111, 185 S.W. 556, 556-62 (1916) (comprehensive discussion of Act's purpose and scope).

62. *See* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 407 (Tex. 1985) (employer assumes direct cost through payment of insurance premiums). *See generally* 1 A. LARSON, WORKMEN'S COMPENSATION LAW § 2.70, at 14 (1985) (initial cost borne by employer).

63. *See* Hite v. Evart Prods. Co., 191 N.W.2d 136, 138 (Mich. Ct. App. 1971) (consuming public ultimately bears cost of compensating work-related injuries); *see also* Gunter v. Mersereau, 491 P.2d 1205, 1206-07 (Or. Ct. App. 1971) (major principle underlying workers' compensation scheme is distribution of costs between employers and consumers). *See generally* Weisgall, *Product Liability in the Workplace: The Effect of Workers' Compensation on the Rights of Liabilities of Third Parties,* 1977 WIS. L. REV. 1035, 1036 (1977) (author implies that cost of worker compensation benefits are passed indirectly to consumers).

64. *See* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 407 (Tex. 1985) (distinction between accidental and intentional injury is focus of inquiry); *see also* Middleton v. Texas Power & Light Co., 108 Tex. 96, 109, 185 S.W. 556, 560 (recognizing importance of accidental-intentional distinction).

distinction could possibly undermine the workers' compensation system's effectiveness.[65] If the Texas Supreme Court were to greatly liberalize the exclusive remedy provision, common law tort liability could potentially supplant the workers' compensation system.[66] The court's decision is also a pragmatic one since a broadening of the intentional injury exception would invariably result in a steady increase in lawsuits by employees, further burdening clogged Texas court dockets.[67]

The Texas Supreme Court in *Reed Tool* declined an invitation to construe more liberally the intentional injury exception to the exclusive remedy provision.[68] A minority position has recently emerged which declares that the rationale underlying the exclusive remedy provision is inequitable.[69] The minority's primary argument is that the exclusive remedy provision provides little incentive for employers to maintain safety in the work place.[70] Some

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65. *See* Shearer v. Homestake Mining Co., 557 F. Supp. 549, 555 (D. S.D. 1983) (liberalizing intentional injury exception undermines purpose of workers' compensation system). The *Shearer* decision, expressly rejecting the *Mandolidis* holding, provides a thorough analysis supportive of the majority view. *See id.* at 554-58; *accord* Houston v. Bechtel Assocs. Professional Corp., 522 F. Supp. 1094, 1097 (D. D.C. 1981) (declining to follow "strained" reasoning of *Mandolidis); see also* Johns-Manville Prods. Corp. v. Contra Costa Super. Ct., 612 P.2d 948, 953, 165 Cal. Rptr. 858, 863 (1980) (workers' compensation system would be undermined if intentional-accidental distinction blurred); Blankenship v. Cincinnati Milacron Chems., 433 N.E.2d 572, 582 (Ohio 1982) (Krupansky, J., dissenting) (majority's relaxation of intentional injury standard undermines purpose of Act).

66. *See* Mandolidis v. Elkins Indus., 246 S.E.2d 907, 923 (W. Va. 1978) (Neely, J., dissenting) (adversarial legal process could have distortive effect on workers' compensation scheme); *see also Workers' Compensation and Workplace Liability,* Fourth Nat'l Conf. of the Nat'l Legal Center for the Public Interest, 122 (1981) (too many exceptions to exclusive remedy provision could threaten workers' compensation system).

67. *See* Blankenship v. Cincinnati Milacron Chems., 433 N.E.2d 572, 582 (Ohio 1982) (Krupansky, J., dissenting) (broadening exceptions will eventually create flood of lawsuits); Mandolidis v. Elkins Indus., 246 S.E.2d 907, 922 (W. Va. 1978) (Neely, J., dissenting) (pursuance of frivolous lawsuits encouraged by liberalizing exceptions to exclusive remedy provision).

68. *Compare* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 406 (Tex. 1985) (to avoid exclusive remedy provision, employee must establish "specific intent" to injure either by proving desire or substantial certainty) *with* Mandolidis v. Elkins Indus., 246 S.E.2d 907, 914 (W. Va. 1978) (for purposes of workers' compensation act, injury resulting from willful, wanton or reckless misconduct is deliberately intentional).

69. *See* Mandolidis v. Elkins Indus., 246 S.E.2d 907, 914 (W. Va. 1978) (allowing reckless misconduct to constitute intentional act makes exclusive remedy less harsh); *accord* Blankenship v. Cincinnati Milacron Chems., 433 N.E.2d 572, 577 (Ohio 1982); *see also* Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers,* 34 LAB. L.J. 683, 687 (1983) (exclusive remedy provisions have been recognized as inequitable).

70. *See* Blankenship v. Cincinnati Milacron Chems., 433 N.E.2d 572, 577 (Ohio 1982) (one purpose of workers' compensation act is promotion of work place safety; exclusive remedy defeats this purpose); *see also* Kasper, *The Faults of No-Fault: The Case of Workers'*

commentators suggest that exposing employers to greater common law tort liability will better compensate work-related injuries.[71] The decision of *Mandolidis v. Elkins Industries,*[72] which held that the employer's "wanton" and "willful" conduct constituted an intentional act, exemplifies the minority position.[73] The minority position, however, overlooks the fact that the workers' compensation system is intended to provide swift and certain compensation as a substitute for adversarial tort actions which often leave employees without compensation.[74] Since the mutual compromise between employers and employees is the foundation upon which the system is constructed, any erosion of the delicately balanced compromise has been effectively prevented, and correctly, by the *Reel Tool* decision.[75]

Upon first glance, the *Reed Tool* decision appears to be harsh.[76] Had Mr. Copelin been fatally injured, his wife could have recovered exemplary damages if the death was attributable to Reed Tool's gross negligence.[77] Mr.

Compensation, 53 CAL. ST. B.J. 92, 92 (1978) (workers' compensation system provides inadequate safety incentives).

71. *See Worker's Compensation and Workplace Liability,* Fourth Nat'l Conf. of the Nat'l Legal Center for the Public Interest, 50-53 (1981) (Professor Jerry J. Phillips encouraging return to tort liability for work place injuries); *see also* Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers,* 34 LAB. L.J. 683, 686 (1983) (if liable at common law, employers would purchase insurance to further compensate work-related injuries caused by their negligence); Kasper, *The Faults of No-Fault: The Case of Workers' Compensation,* 53 CAL. ST. B.J. 92, 94-95 (1978) (proposing that present no-fault workers' compensation system needs to incorporate beneficient elements of tort system).

72. 246 S.E.2d 907 (W. Va. 1978).

73. *See id.* at 915.

74. *See* Castleberry v. Frost-Johnson Lumber Co., 283 S.W. 141, 146 (Tex. Comm'n App. 1926, opinion adopted) (workers' compensation system intended as substitute for ordinary and gross negligence actions). The commission of appeals stated that under the tort system only 20 percent of all injured employees received an adequate recovery, while the other 80 percent went without any recovery. *See id.* at 146; *see also* Kofron v. Amoco Chems. Corp., 441 A.2d 226, 231 (Del. 1982) (one purpose of workers' compensation system is to avoid uncertainties and costs of tort litigation). *See generally* 1 A. LARSON, WORKMEN'S COMPENSATION LAW § 2.70, at 14 (1985) (stating that workers' compensation system is intended to be non-adversarial).

75. *See* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 407 (Tex. 1985); *see also* Johns-Manville Prods. Corp. v. Contra Costa Super. Ct., 612 P.2d 948, 953, 165 Cal. Rptr. 858, 863 (1980) (system's underlying premise is maintaining balance of costs and benefits); Blankenship v. Cincinnati Milacron Chems., 433 N.E.2d 572, 582 (Ohio 1982) (Krupansky, J., dissenting) (majority's opinion disrupts careful balance of employer-employee interests and erodes system's underlying purpose).

76. *See* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 408 (Tex. 1985) (even though court stated Copelin's evidence might prove gross negligence, no recovery allowed since no evidence of intent).

77. *See, e.g.,* Burk Royalty Co. v. Walls, 616 S.W.2d 911, 922 (Tex. 1981) (exemplary damages recoverable if gross negligence results in employee's death); Paradissis v. Royal In-

Copelin, however, was not fatally injured, and his wife's only recourse, in order to recover exemplary damages, was to allege an intentional injury.[78] Exemplary damages are usually awarded to punish the defendant's unacceptable conduct and to deter him from future wrongdoings.[79] In awarding exemplary damages, the two policies of punishment and deterrence are strictly adhered to and admit that the focus should be upon the defendant, not the plaintiff.[80] Therefore, some argue that to hinge recovery on whether the employee dies is irrational.[81] The Texas courts, however, rely upon the Texas Constitution to justify the preservation of the distinction.[82] The constitutional guarantee that exemplary damages are recoverable where gross negligence results in death provides the justification for this otherwise "irrational" distinction.[83] The supreme court, therefore, bound by the constitu-

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dem. Co., 507 S.W.2d 526, 529 (Tex. 1974) (if gross negligence results in death, exemplary damages recoverable); Grove Mfg. Co. v. Cardinal Constr. Co., 534 S.W.2d 153, 155 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) (employer liable for exemplary damages if gross negligence kills employee).

78. *See* Reed Tool Co. v. Copelin, 610 S.W.2d 736, 739 (Tex. 1980) (only intentional injury action not barred by Act); *see also* Grove Mfg. Co. v. Cardinal Constr. Co., 534 S.W.2d 153, 155 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) (gross negligence action not maintainable under Act if injury not fatal).

79. *See* Bernal v. Seitt, 158 Tex. 521, 527, 313 S.W.2d 520, 523-24 (1958) (exemplary damages intended to punish defendant); Bank of N. Am. v. Bell, 493 S.W.2d 633, 636-37 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ) (exemplary damages serve to deter defendant from future misconduct).

80. *See* Bennett v. Howard, 141 Tex. 101, 109, 170 S.W.2d 709, 713 (1943) (exemplary damages serve to punish defendant, not compensate plaintiff with excess award); Bank of N. Am. v. Bell, 493 S.W.2d 633, 636-37 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ) (purpose of exemplary damages to deter defendant's future wrongdoings).

81. *See* Castleberry v. Frost-Johnson Lumber Co., 283 S.W. 141, 145 (Tex. Comm'n App. 1926, opinion adopted) (recognizing some merit in contention that distinction between fatal and non-fatal injuries is immaterial); *see also* Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers*, 34 LAB. L.J. 683, 691 (1983) (stating distinction is irrational for basis of exemplary damages award).

82. *See* Burk Royalty Co. v. Walls, 616 S.W.2d 911, 913 (Tex. 1981) (constitutional mandate justifies recovery of exemplary damages when employer's gross negligence results in employee's death); Castleberry v. Frost-Johnson Lumber Co., 283 S.W. 141, 145 (Tex. Comm'n App. 1926, opinion adopted) (improper judicial action not to give recognition to constitutional provisions); *see also* TEX. CONST. art. XVI, § 26 (exemplary damages are recoverable when defendant's gross negligence causes another's death). The courts also seek to preserve the legislative intent of the Workers' Compensation Act by barring actions for exemplary damages when the employee is merely injured, not killed. *See* Castleberry v. Frost-Johnson Lumber Co., 283 S.W. 141, 146 (Tex. Comm'n App. 1926, opinion adopted); *accord* Castleberry v. Goolsby Bldg. Corp., 617 S.W.2d 665, 666 (Tex. 1981) (to maintain gross negligence action under Act, employee's death is prerequisite).

83. *See* Castleberry v. Frost-Johnson Lumber Co., 283 S.W. 141, 145 (Tex. Comm'n App. 1926, opinion adopted) (constitution is basis for legislative distinction between ordinary and gross negligence in death cases). The commission of appeals believed that the legislature, when enacting the Workers' Compensation Act, would have made no distinction between fatal

tion's mandate,[84] and not seeking to contradict the legislative intent of the Workers' Compensation Act,[85] decided the case on the practical considerations which maintain the system's overall effectiveness.[86]

The fundamental premise underlying the workers' compensation scheme is the maintenance of a no-fault insurance system whereby employees are quickly and assuredly compensated for work-related injuries. The system seeks to balance labor's interest in receiving adequate compensation with management's interest in minimizing and spreading the cost of on-the-job injuries. To effectuate the balancing of these interests, exclusive remedy provisions have been utilized within the workers' compensation system. In Texas, injured employees forfeit their right to seek damages for the employer's ordinary or gross negligence. An employee, however, retains his right to sue for intentionally inflicted injuries. After *Reed Tool,* an intentional injury will be established if either the employer desired to injure, or if the employer knew with substantial certainty that injury would result. While the definition appears to lessen the employee's burden of proof in establishing intent, in actuality, the employee still must overcome the formidable hurdle of proving an actual intent to injure. The court in *Reed Tool* held that an employer's intentional failure to maintain a safe work place does not translate into an intentional act unless actual intent is proven. While it is apparent that the court is not willing to greatly liberalize the intentional

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and non-fatal injuries in cases involving gross negligence if not for the explicit constitutional provision. *See id.* at 145; *see also* Burk Royalty Co. v. Walls, 616 S.W.2d 911, 913 (Tex. 1981) (constitution guarantees action for exemplary damages when death attributable to defendant's gross negligence).

84. *See* Gragg v. Cayuga Indep. School Dist., 539 S.W.2d 861, 866 (Tex. 1976). It is the courts' "duty in construing the Constitution [sic] to ascertain and give effect to the plain intent and language of the framers of a constitutional amendment and of the people who adopted it." *Id.* at 866; *see also* Deason v. Orange Co. Water Control & Improvement Dist. No. One, 151 Tex. 29, 35, 244 S.W.2d 981, 984 (Tex. 1952) (courts must ascertain and give effect to intent underlying constitutional provisions); Cramer v. Sheppard, 140 Tex. 271, 281, 167 S.W.2d 147, 152 (Tex. 1942) (constitutional language presumed to have been carefully selected).

85. *See* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 407 (Tex. 1985) (legislatively created no-fault compensation system upheld by court's decision); *accord* Kofron v. Amoco Chems. Corp., 441 A.2d 226, 231 (Del. 1982) (court declined to change workers' compensation law since it would be acting in legislature's stead).

86. *See* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 407 (Tex. 1985) (stating maintenance of system's effectiveness lies in effectively distributing costs through equitable balance of interests). One commentator argues that the exclusive remedy provision is grossly inequitable and urges the judiciary, where possible, to broaden an employee's ability to hold his employer liable at common law. *See* Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers,* 34 LAB. L.J. 683, 696 (1983). However, worker compensation benefits are purely a statutory remedy, thus it is the legislatures, not the courts, which must broaden an employer's liability at common law. *Cf.* Kofron v. Amoco Chems. Corp., 441 A.2d 226, 231 (Del. 1982) (legislature is proper forum in which to instigate changes in workers' compensation laws).

injury exception to the exclusive remedy provision; it is equally apparent that the employee will not be denied recovery if the evidence supports the allegation of actual intent to injure. The degree of employer misconduct which will constitute a "substantial certainty" to injure, however, is less clear and invariably will be defined by future case law.

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