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NOTES

EMPLOYER INTENTIONAL TORTS IN VIRGINIA: PROPOSAL FOR AN EXCEPTION TO THE EXCLUSIVE WORKERS' COMPENSATION REMEDY

I. INTRODUCTION

Workers' compensation is a no-fault¹ system of recovery implemented by statute in every state.² Originating in the nature of a compromise, the workers' compensation system is the exclusive remedy between the employee and employer.³ The majority of states, however, recognize an exception⁴ to this exclusivity provision where an employer's actions constitute an intentional tort.⁵ Virginia has yet to recognize such an exception by statute or judicial action.⁶

1. However, employee fault is relevant in the statutory scheme as to whether the employee receives compensation. See, e.g., IND. CODE ANN. § 22-3-2-8 (Burns 1986 Repl. Vol.); N.C. GEN. STAT. § 97-12 (1985); VA. CODE ANN. § 65.1-38 (Repl. Vol. 1987) (prohibiting compensation if the injury or death results from certain employee misconduct); see also *infra* notes 127-31 and accompanying text.

2. E.g., VA. CODE ANN. §§ 65.1-1 to -163 (Repl. Vol. 1987 & Cum. Supp. 1990). For a list of each state's codified workers' compensation laws, see Note, *Michigan Worker's Disability Compensation Act: The Intentional Tort Exception to the Exclusive Remedy Provision*, 23 VAL. U.L. REV. 371, 379 n.47 (1989) [hereinafter Note, *Michigan Tort Exception*].

3. All fifty states' workers' compensation statutes expressly include an exclusive remedy provision. For a list of each state's codified exclusivity provision, see Note, *Michigan Tort Exception*, *supra* note 2, at 383 n.74. "The Virginia Workers' Compensation Act provides the exclusive remedy to an employee for recovery against his employer for an injury arising out of and in the course of employment," without a choice of remedies. VA. CODE ANN. § 65.1-40 (Repl. Vol. 1987); see also L. PASCAL, VIRGINIA WORKERS' COMPENSATION: LAW AND PRACTICE § 2.19 (1986 & Supp. 1990).

4. Some states enacted exceptions by statute, while other states recognize exceptions by judicial action in the absence of legislative enactment. See *infra* notes 36-83 and accompanying text.

5. Often the issue of whether a common law suit for damages will lie against the employer in an intentional tort claim is presented in the form of an "upside-down" case, where the exclusiveness of the Workers' Compensation Act is used defensively by the employer. 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 68.30, at 13-86 n.42.2 (1990). In this case the parties' usual interests are reversed, "with the employee seeking a restrictive interpretation of compensation and the employer an expansive one." *Id.*

6. See *Haddon v. Metropolitan Life Ins. Co.*, 239 Va. 397, 389 S.E.2d 712 (1990) (Su-

The history, philosophy, and purpose of the workers' compensation system is discussed in Section II of this Note. Section III reviews the judicial and legislative exceptions recognized by other states for employers' intentional injuries and the bases for these exceptions. Part IV discusses and evaluates the Virginia Workers' Compensation Act (the Act) and judicial refusal to recognize an intentional tort exception. Finally, Part V argues for a Virginia statutory exception to the exclusive remedy rule for intentional injury by employers, which would promote fairness, consistency, and deterrence of employer misconduct⁷ in accord with the purposes of the Act.⁸

II. HISTORY AND PURPOSE OF THE WORKERS' COMPENSATION SYSTEM

The modern workers' compensation system originated in Germany in 1884.⁹ Its roots were philosophical or political, expounding a socialistic view into an industrial type of insurance.¹⁰ Later, England enacted its Workers' Compensation Act in response to dissatisfaction with the common law fellow-servant rule.¹¹ The British Act, containing the "arising out of" and "in the course of employment" language,¹² stimulated widespread interest and served as a model for the acts passed by many American states in the early 1900's.¹³

The first American compensation acts were constitutionally challenged.¹⁴ In 1916, the United States Supreme Court upheld the constitu-

preme Court of Virginia held injuries suffered by an employee as a result of harassment and sexual discrimination by a fellow employee to be an "accident" under the Virginia Workers' Compensation Act, and therefore, a common law suit for damages was barred by the Act's exclusive remedy). *But see* McGreevy v. Racal-Dana Instruments, 690 F. Supp. 468 (E.D. Va. 1988) (U.S. District Court, applying Virginia law, held an employee's claim for intentional infliction of emotional distress was not an "accident" and thus not barred by the Workers' Compensation Act's exclusive provision).

7. See *infra* notes 135-53 and accompanying text. See generally Comment, *Intentional Employer Torts: A Matter for the California Legislature*, 15 U.S.F. L. REV. 651 (1981).

8. See *infra* notes 29-30 and accompanying text.

9. 1 A. LARSON, *supra* note 5, § 5.10, at 33; L. PASCAL, *supra* note 3, at 1. However, the German system is distinguishable from the American systems in that contributions were made by the German worker himself, whereas only the employer contributes in the American systems. 1 A. LARSON, § 5.10 at 34-35.

10. 1 A. LARSON, *supra* note 5, § 5.10 at 33-34; L. PASCAL, *supra* note 3, at 1.

11. This dissatisfaction with the common law rules was similarly seen in the American states. For a discussion of the common law defenses to an employee's action against his employer which often prevent recovery, see *infra* notes 18-22 and accompanying text.

12. This language is explicitly used in today's workers' compensation statutes by various states to define what kind of "injury" is covered. See, e.g., VA. CODE ANN. § 65.1-7 (Repl. Vol. 1987).

13. L. PASCAL, *supra* note 3, at 2.

14. See, e.g., *In re Madden*, 222 Mass. 487, 111 N.E. 379 (1916) (employers claimed that responsibility without fault in Massachusetts's Worker's Compensation Act amounted to a taking of property without due process of law).

tionality of the no-fault system.¹⁵ Thereafter, states gradually enacted workers' compensation acts. The first Virginia Workers' Compensation Act was enacted in 1918.¹⁶ By 1949, every American state had workers' compensation statutes.¹⁷

The rapid acceptance of workers' compensation statutes¹⁸ was largely due to frustration with the limited tort liability of the master to his servant at common law.¹⁹ An injured worker could sue his employer under a negligence theory,²⁰ but the possibility of recovery was restricted by the "unholy trinity" of common law defenses: contributory negligence, assumption of the risk, and the fellow-servant rule.²¹ Hence, under the common law system, the greater burden in industrial accidents fell upon the worker, who was least able to support that burden. The prevalence of industrial accidents as a by-product of the industrial revolution and the limited chance of recovery at common law in the courts led to the enactment of today's workers' compensation system. The underlying theory is to place the limited economic burden of these injuries on industry, as a cost of production, and thereby pass it ultimately to the consumer.²²

15. *New York Cent. R.R. v. White*, 243 U.S. 188 (1916).

16. Act of March 21, 1918, ch. 400, 1918 Va. Acts 637. When enacted, the Virginia Act was based on the act in existence in Indiana. Accordingly, the Virginia courts have often relied on Indiana decisions when construing the Virginia statute. *See Barksdale v. H.O. Engen, Inc.*, 218 Va. 496, 499, 237 S.E.2d 794, 796 (1977) ("The Virginia Workmen's Compensation Act is based upon the Indiana statute, so that the construction placed upon the Indiana law by the courts of that state merits our consideration."); *see also* Ray, Evans & Steele, *Recovery for Accidental Injuries Under the Virginia Workmen's Compensation Act*, 14 U. RICH. L. REV. 659, 660 n.2 (1980). *But see* Haddon v. Metropolitan Life Ins. Co., 239 Va. 397, 399, 389 S.E.2d 712, 714 (1990) ("Although . . . we have considered decisions interpreting provisions of the Indiana Act when similar to our Act, we are not persuaded by Indiana decisions which may be at odds with substantial Virginia precedent . . .").

17. *See* 1 A. LARSON, *supra* note 5, § 5.10 at 33, § 5.30 at 39.

18. "[N]o subject of labor legislation ever has made such progress or received such general acceptance of its principles in so brief a period." W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 80, at 530 & n.36 (4th ed. 1971) (citing U.S. Bureau of Labor Statistics, Bull. No. 126 at 9 (1913)).

19. *See id.* at 530.

20. A common law negligence suit was the only way for an employee to receive any compensation for work-related injuries, unless the employer voluntarily compensated the employee. *See generally* 1 A. LARSON, *supra* note 5, § 4.30, at 25-28.

21. For a detailed discussion of each defense, *see* W. PROSSER, *supra* note 18, § 80, at 526-27. For instance, the risk of hazards often existing in an industry were deemed to be accepted by an employee as an incident of his employment. He assumed the risk, thereby barring any recovery for the usual industrial accident. *See id.* at 527.

22. *See* 1 A. LARSON, *supra* note 5, § 1.00, at 1; W. PROSSER, *supra* note 18, § 80, at 531.

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.

Thus, workers' compensation is founded upon insurance principles.

Workers' compensation is a mechanism for providing cash benefits²³ and medical care to individuals injured in employment-related accidents²⁴ without regard to fault. The workers' compensation system developed as a compromise between the employer and employee, with each surrendering common law rights to gain advantages under the act.²⁵ The compensation system was designed as a quid pro quo exchange between the employee and employer.²⁶ Employers became liable for their employees' work-related injuries without regard to negligence or fault, but were protected from common law suits and unlimited liability. In return, employees accepted lower benefits, but were given a greater likelihood of recovery, since employers could not rely on the common law defenses.²⁷

As a result of this no-fault compromise, the workers' compensation system was the exclusive remedy²⁸ for employees injured in work-related accidents. Attaining a humanitarian, beneficent and remedial result in favor of the worker was a noted purpose of workers' compensation acts.²⁹ The

23. See, e.g., VA. CODE ANN. §§ 65.1-54 to -82 (Repl. Vol. 1987 & Cum. Supp. 1990). The Act provides cash benefits for partial and total incapacity, loss of specific body parts, and death. It also includes compensation for lost earnings based on average weekly wages. Ray, Evans & Steele, *supra* note 16, at 660 n.3. Compensation under the Act does not restore the actual loss sustained, but gives the claimant enough, when added to his remaining earning capacity, to enable him to exist without being a burden to others. 1 A. LARSON, *supra* note 5, § 2.50 at 11. The rationale is that full recovery for the actual loss, although recognized by tort principles, may encourage malingering. *Id.* at 12.

24. The definition of "accident" in determining coverage under a workers' compensation statute varies from state to state. See *infra* note 46 and accompanying text.

25. See *Feitig v. Chalkley* 185 Va. 96, 98-99, 38 S.E.2d 73, 73-74 (1946); see also Special Project, *Intentional Acts: Finding a Legal Remedy*, 30 How. L.J. 563 (1987); Comment, *supra* note 7, at 651.

26. Special Project, *supra* note 25, at 563. See generally 1 A. LARSON, *supra* note 5, § 1.10, at 1-2.

27. See *Feitig*, 185 Va. at 98-99, 38 S.E.2d at 73-74.

28. See Special Project, *supra* note 25, at 563; Comment, *supra* note 7, at 651. By operation of law, the employee surrendered his common law right of action for full damages against his employer and agreed to accept a sum fixed by statute. *Fauver v. Bell*, 192 Va. 518, 522, 65 S.E.2d 575, 577 (1951). The Virginia Act provides:

The rights and remedies herein granted to an employee . . . on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death.

VA. CODE ANN. § 65.1-40 (Repl. Vol. 1987) (emphasis added).

Professor Larson states that the two central purposes of exclusiveness are maintaining the balance of sacrifices between the employer and employee in their substitute no-fault liability and minimizing litigation despite its merit. Furthermore, he states that "unjust" results are commonplace in a no-fault system. 2A A. LARSON, *supra* note 5, § 68.15, at 13-65.

29. See, e.g., *Griffith v. Raven Red Ash Coal Co.*, 179 Va. 790, 796, 20 S.E.2d 530, 533 (1942) ("Although in derogation of the common law, [the Virginia Workers' Compensation Act] is highly remedial and should be liberally construed in favor of the workman."); Bur-

promotion of a safe work environment was another avowed purpose.³⁰ Thus, the dual policy of the workers' compensation system is to provide adequate compensation for certain injuries and to encourage a safe workplace.

III. JUDICIAL AND LEGISLATIVE TREATMENT OF THE INTENTIONAL TORT EXCEPTION BY OTHER STATES

Historically, the exclusive no-fault liability of the workers' compensation system was based on ordinary negligence principles.³¹ Courts readily agree that ordinary employer negligence is covered by the exclusive remedy; it naturally flows from, and is consistent with, the underlying policy of the system. However, a majority of states maintain that employer intentional torts are outside the exclusive coverage of the workers' compensation system.³² States have recognized such an exception by judicial,³³ as well as legislative,³⁴ action and have imposed varying standards³⁵ to satisfy the "intentional tort" exception.

A. Judicial Bases for the Intentional Tort Exception

Judicially created intentional tort exceptions to the exclusive remedy of the workers' compensation system are prevalent because few states have

lington Mills Corp. v. Hagood, 177 Va. 204, 210, 13 S.E.2d 291, 293 (1941) ("The Compensation Act is intended to be remedial and must be liberally construed in favor of the employee."); A.N. Campbell & Co. v. Messenger, 171 Va. 374, 377, 199 S.E. 511, 513 (1938) ("[I]t is always the endeavor of the court to construe the compensation statute liberally, in order to carry out its beneficent purpose.").

30. Blankenship v. Cincinnati Milacron Chems., 69 Ohio St. 2d 608, —, 433 N.E.2d 572, 577, cert. denied, 459 U.S. 857 (1982)(superseded by statute); see also Note, *Right of Employee to Sue Employer for an Intentional Tort*, 26 IND. L.J. 280 (1951) [hereinafter Note, *Right to Sue*]; Note, *Workers' Compensation: Expanding the Intentional Tort Exception to Include Willful, Wanton, and Reckless Employer Misconduct*, 58 NOTRE DAME L. REV. 890 (1983) [hereinafter Note, *Willful, Wanton Exception*].

31. See *supra* notes 19-22 and accompanying text.

32. For a listing of those states recognizing the intentional tort exception, see 2A A. LARSON, *supra* note 5, § 68.13, at 13-10 n.11 and the cases cited therein.

33. For a detailed discussion of the judicial bases for recognizing an exception to the exclusive remedy for employer intentional injury where no statutory exception exists, see *infra* notes 36-67 and accompanying text.

34. For example, the Washington statute provides:

If the injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker or beneficiary of the worker shall have the privilege to take under this title and also have cause of action against the employer as if this title had not been enacted, for any damages in excess of compensation and benefits paid or payable under this title.

WASH. REV. CODE ANN. § 51.24.020 (1990) (emphasis added). See *infra* notes 75-83 and accompanying text.

35. See *infra* notes 68-74 and accompanying text.

statutorily created the exception.³⁶ This judicial action relies on several legal theories and policy arguments for support.

1. The "Nonaccident Exception"

One theory applied by many courts is that an employer is prevented from claiming his intentional act was "accidental" under the exclusive coverage of the workers' compensation act.³⁷ This "nonaccidental" exception is based on an estoppel theory.³⁸ Under this theory, the employer is estopped from relying on the limited workers' compensation recovery once the employer's conduct strays from accidental acts and instead involves intentional, blameworthy conduct, as in the case of intentional torts. The "nonaccidental" exception has been judicially adopted by many states, including Georgia,³⁹ South Carolina,⁴⁰ Pennsylvania,⁴¹ Michigan,⁴² New York,⁴³ Minnesota⁴⁴ and Indiana.⁴⁵ The applications of this exception tend to vary depending on the individual state's accepted definition of "accident."⁴⁶

36. Many states' acts have only a provision stating that workers' compensation is the exclusive remedy. Without codified statutory exceptions to this general rule, courts are left to interpret the statute as written. For example, the Supreme Court of Michigan interpreted the Michigan act to allow an exception "[b]ecause the Legislature was addressing accidental, not intentional, injuries, and employee's preexisting remedy for intentional torts by the employer was not affected by the act absent clear expression to the contrary." *Beauchamp v. Dow Chem. Co.*, 427 Mich. 1, —, 398 N.W.2d 882, 887 (1986) (superseded by statute).

37. 2A A. LARSON, *supra* note 5, § 68.11, at 13-4. Although Larson believes this theory is the best, the theory only applies where the states impose the "by accident" requirement in their workers' compensation statutes. *Id.*; see also Comment, *supra* note 7, at 674 n.118.

38. Comment, *supra* note 7, at 674.

39. *Skelton v. W.T. Grant Co.*, 331 F.2d 593 (5th Cir.), *cert. denied*, 379 U.S. 830 (1964); *Smith v. Rich's, Inc.*, 104 Ga. App. 883, 123 S.E.2d 316 (1961).

40. *Stewart v. McLellan's Stores Co.*, 194 S.C. 50, 9 S.E.2d 35 (1940).

41. *Reader v. Gottschall*, 201 Pa. Super. 134, —, 191 A.2d 694, 696 (1963) (intentional assault held not within the purview of the Pennsylvania act when interpreting an "accident in the course of the employment").

42. *Beauchamp v. Dow Chem. Co.*, 427 Mich. 1, 398 N.W.2d 882 (1986) (superseded by statute).

43. *Le Pochat v. Pendleton*, 187 Misc. 296, 63 N.Y.S.2d 313 (1946), *aff'd*, 271 A.D. 964, 68 N.Y.S.2d 594 (1947).

44. *Boek v. Wong Hing*, 180 Minn. 470, —, 231 N.W. 233, 234 (1930) ("An employer who intentionally and maliciously inflicts bodily injuries on his servant should occupy no better position than would a third party not under a Compensation Act, and should not be heard to say, when sued at law for damages, . . . that the injury was accidental . . .").

45. *National Can Corp. v. Jovanovich*, 503 N.E.2d 1224 (Ind. Ct. App. 1987). Indiana's exception is especially significant since Virginia modeled its workers' compensation act after Indiana's. See *supra* note 16.

46. In case law, states construe differently the "accident" requirement in their respective acts. If a state broadly defines "accident," then the state's workers' compensation act becomes more inclusive and protects a greater range of employer (mis)conduct within the exclusive remedy. The inverse is true if a state narrowly defines "accident." Compare *Reader v. Gottschall*, 201 Pa. Super. 134, —, 191 A.2d 694, 696 (1963) (in Pennsylvania,

To prevent such fortuitous results, Professor Larson offers an alternative construction of "accident." Larson suggests that viewing whether an incident is an "accident" should be determined from the viewpoint of the person seeking protection under the exclusive remedy of the act.⁴⁷ Larson theorizes that employers defending themselves against intentional tort claims would typically plead civil immunity from suit under the exclusive remedy provision of an act. Therefore, under Larson's view, an incident involving an intentional tort would probably not be deemed an accident. Accordingly, the common law action would not be barred.

2. The "Severed" Relationship Exception

A second theory advanced by some courts in recognizing an intentional tort exception is that the employment relationship is "severed" by an employer's act of violence.⁴⁸ Although this theory is criticized as being fictitious,⁴⁹ it has been accepted and followed by several courts.⁵⁰ The theory also has been utilized to allow a common law right of action for damages involving nonphysical torts,⁵¹ despite the implication that the theory is

"accident" means any undesigned event) *with Reserve Life Ins. Co. v. Hosey*, 208 Va. 568, 159 S.E.2d 633 (1968) (in Virginia, "accident" means an unusual event, unexpected by the person to whom it happens).

47. 2A A. LARSON, *supra* note 5, § 68.12, at 13-9. Difficulty arose because courts, by viewing the affair from the viewpoint of the victim rather than the assailant, found deliberate assaults by co-employees or third persons to be "accidents" under the acts. However, Larson suggests a better approach may be to view the affair from the person claiming an act's protection as a matter of pleading. If the employee is seeking benefits under an act, then whether the incident is an accident would be determined from his perspective. Where the employer is pleading the exclusive remedy provision as a defense, whether the incident is considered an accident would be determined from his perspective. *See id.*; *see also Beauchamp v. Dow Chem. Co.*, 427 Mich. 1, —, 398 N.W.2d 882, 888 (citing 2A A. LARSON, *supra* note 5, § 68.12, at 13-8).

48. 2A A. LARSON, *supra* note 5, § 68.11, at 13-4; Comment, *supra* note 7, at 674.

49. The facts in such a case must show that the parties treated the employment relationship as terminated from the time of the intentional act. 2A A. LARSON, *supra* note 5, § 68.11, at 13-4. Often, however, the partially disabled employee will continue to work for the employer, creating a fictitious argument. *Id.*; Note, *supra* note 2, at 386 n.92.

50. *See, e.g., Sontag v. Orbit Valve Co.*, 283 Ark. 191, —, 672 S.W.2d 50, 51 (1984) (The Supreme Court of Arkansas stated "[w]henver an employee is injured by the willful and malicious acts of the employer he may treat the acts of the employer as a breach of the employer-employee relationship and seek full damages in a common law action."); *Boek v. Wong Hing*, 180 Minn. 470, —, 231 N.W. 233, 234 (1930) (The Supreme Court of Minnesota stated "[b]y committing a felonious assault upon a servant the master willfully severs the relation of master and servant . . ."); *Blankenship v. Cincinnati Milacron Chems.*, 69 Ohio St. 2d 608, —, 433 N.E.2d 572, 576 n.7, *cert denied*, 459 U.S. 857 (1982) (superseded by statute) (The Supreme Court of Ohio recognized that "at some point, the employment relationship terminates and the intentionally inflicted injury cannot be considered compensable . . .").

51. The category of "nonphysical intentional torts" according to Professor Larson includes false imprisonment, fraud, deceit, libel, and intentional infliction of emotional dis-

only applicable to physical violence, such as assault and battery.⁵²

3. The "Arising Out of" Exception

A third theory espoused by courts to recognize an exception to the exclusive remedy provision of workers' compensation laws is that the intentionally tortious act did not "arise out of" the employment.⁵³ The rationale underlying this theory appears to be a corollary of the common law defense of assumption of the risk. The reasoning is that the risk of an intentional tort is not considered a natural and inherent risk of employment contemplated by an employee.⁵⁴ Accordingly, this exception has been successfully used in intentional tort claims alleging fraud against employers.⁵⁵ Like the "nonaccident" exception, however, this exception is

stress. See generally 2A A. LARSON, *supra* note 5, § 68.30, at 13-85; Larson, *Nonphysical Torts and Workmen's Compensation*, 12 CAL. W.L. REV. 1 (1975). Professor Larson points out an additional consideration in nonphysical intentional tort common law suits against the employer. Based on the premise that workers' compensation is generally limited to physical injuries, he summarizes his "essence of the tort" test:

If the essence of the tort, in law, is non-physical, and if the injuries are of the usual non-physical sort, with physical injury being at most added to the list of injuries as a makeweight, the suit should not be barred. But if the essence of the action is recovery for physical injury or death, the action should be barred even if it can be cast in the form of a normally non-physical tort.

2A A. LARSON, *supra* note 5, § 68.34(a), at 13-117; Larson, *supra*, at 12-13. *Contra* Burlington Mills Corp. v. Hagood, 177 Va. 204, 211, 13 S.E.2d 291, 293 (1941) (emotional distress from fright sustained at work without physical impact was deemed an "accident" and thus a suit was barred by the act's exclusive remedy).

52. Apparently, Professor Larson bases the legal theories for recognizing an employer intentional tort exception to the exclusive remedy rule on the physical intentional tort of assault. See 2A A. LARSON, *supra* note 5, § 68.11, at 13-1. Although these theories are most compelling in the context of physical intentional injury to the employee, they are not confined to physical intentional torts. Compare *Boek*, 180 Minn. 470, 231 N.W. 233 (severance of employment relationship theory applied to allow common law action where employer physically assaulted employee with a broom handle) with *Sontag*, 283 Ark. 191, 672 S.W.2d 50 (severance of employment relationship rationale applied to acknowledge common law right of action where supervisory co-employees' conduct constituted intentional infliction of emotional distress at the direction of employer; however, recovery denied because of previous settlement of claim under the act).

53. 2A A. LARSON, *supra* note 5, § 68.11, at 13-5; see also Comment, *supra* note 7, at 674; Note, *supra* note 2, at 386. Larson considers this to be the most fictitious theory of all "for if it is a work-connected assault, it is no less so because the assailant happens to be the employer." 2A A. LARSON, *supra* note 5, § 68.11, at 13-5.

54. See *Blankenship*, 69 Ohio St. 2d at —, 433 N.E.2d at 576.

55. E.g., *Ramey v. General Petroleum Corp.*, 173 Cal. App. 2d 386, 343 P.2d 787 (1959). In *Ramey*, the employer made fraudulent representations regarding the employee's right of action against the employer's partner for a prior injury sustained at work. The fraud caused the employee to lose his cause of action because the statute of limitations had expired. Using a dual injury approach (viewing the fraud injury separately from the initial physical work-related injury), the court allowed a separate right of action for the fraudulent concealment in addition to the compensation already received under the act. The court stated that

also somewhat dependent upon particular statutory language.⁵⁶

4. Moral and Public Policy Justifications

In addition to these legal theories, some courts have made moral pronouncements to justify an intentional tort exception to the exclusive remedy statutory rule.⁵⁷ The moral reasoning that permits common law suits is based on the outrage one feels against a person who deliberately injures another.⁵⁸ These courts conclude that the resulting immunity of the exclusive remedy provisions operates "a travesty on the use of the English language."⁵⁹

Other policy bases for a judicial exception stem from the recognized purposes and philosophy underlying the workers' compensation system. Courts reason that the application of the exclusivity principle perverts the purposes of their workers' compensation acts.⁶⁰ First, many courts reason that sheltering an employer from liability for his intentional tortious injuries frustrates the humanitarian purpose of the act, which is to improve the plight of the injured worker.⁶¹ This sheltering is tantamount

"[i]t is clear that the fraud injury did not occur while the plaintiff was performing service growing out of or incidental to his employment when he was acting in the course of his employment." *Id.* at ___, 343 P.2d at 796. Thus, the court concluded, "we do not believe that an injury caused by the employer's fraud arises out of the employment nor is it proximately caused by the employment." *Id.* at ___, 343 P.2d at 789.

56. The California statute, for example, has the "arising out of" language, but not the "by accident" requirement, making this exception more useful. *See Magliulo v. Superior Ct.*, 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1975); CAL. LAB. CODE § 3600 (West 1989 & Supp. 1991); Comment, *supra* note 7, at 674.

57. 2A A. LARSON, *supra* note 5, § 68.11, at 13-8.

58. *Id.* at 13-75. Larson believes that this moral reasoning is often misplaced by the courts in vicarious liability situations. Such reasoning has even been applied to allow a right of action against the employer where the employee was intentionally injured by a supervisory manager co-employee, rather than the employer himself. *Id.*; *see, e.g., Stewart v. McLellan's Stores Co.*, 194 S.C. 50, 9 S.E.2d 35 (1940), *overruled by, Thompson v. J. A. Jones Constr. Co.*, 199 S.C. 304, 19 S.E.2d 226 (1942) (common law action for wilful, intentional, and malicious assault and battery against the employer was permitted in South Carolina where a female employee was slapped in the face by a store manager).

59. *Stewart*, 194 S.C. at ___, 9 S.E.2d at 37. The *Stewart* court specifically stated:

To say that an intentional and malicious assault and battery by an employer on an employee is . . . an accident is a travesty on the use of the English language; and the travesty becomes the more pronounced when it is argued that the employee is restricted for his recovery to the provisions of the Workmen's Compensation Act. . . .

Id.; *see also Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244, (1985).

60. *See Boek v. Wong Hing*, 180 Minn. 470, ___, 231 N.W. 233, 234 (1930); *see also National Can Corp. v. Jovanovich*, 503 N.E.2d 1224, 1232 (Ind. Ct. App. 1987).

61. Recovery under workers' compensation is limited to only a portion of the actual loss incurred by an injured worker. *See, e.g., VA. CODE ANN. §§ 65.1-55, -56* (Cum. Supp. 1990); L. PASCAL, *supra* note 3, §§ 5.6, 5.7 (approximating a two-thirds recovery). The worker would only recover a fractional amount of his actual loss if the employer's intentional conduct is sheltered by the workers' compensation act. The injured employee is further disad-

to encouraging the employer's tortious conduct.⁶² Cloaked with the acts' civil immunity, the employer may cause intentional harm with impunity.⁶³ In effect, sheltering the employer from liability grants the employer intentional tort liability insurance, which is against public policy.⁶⁴

Second, many courts reason that the exclusive remedy operates as a disincentive for employers to improve unsafe working conditions, frustrating another purpose of the act.⁶⁵ Finally, courts reason that intentional torts are misplaced in the worker's compensation system because they are not part of the historical quid pro quo bargain struck between employers and employees.⁶⁶ The common law negligence defenses foregone in the original compromise are not applicable to intentional torts.⁶⁷ Since there is only a benefit to the employer, and not to the employee, application of the exclusive remedy rule frustrates the philosophy of compromise inherent in the act.

B. *The "Intentional" Tort Standard Imposed by Other States*

Courts recognizing an intentional tort exception have imposed various standards relating to the employer's state of mind. The requisite intent is difficult to establish, and the sufficiency of pleadings becomes crucial. In order to survive a motion to dismiss and escape the statutory scheme, the complaint must do more than merely allege the employer's intention to injure. It must allege facts showing the employer's deliberate intent to cause injury.⁶⁸ As a rule, "the common law liability of the employer cannot be stretched to include . . . injuries caused by the gross, wanton, wil-

vantaged by the loss of potential damage recovery since exemplary, as well as compensatory, damages are recoverable at common law for intentional torts. See Note, *Right to Sue*, *supra* note 30, at 282. This disadvantage does not apply to negligence actions, which do not allow punitive damages.

62. See *Blankenship v. Cincinnati Milacron Chems. Co.*, 69 Ohio St. 2d 608, ___, 433 N.E.2d 572, 577, *cert. denied*, 459 U.S. 857 (1982) (superseded by statute); *accord Jovanovich*, 503 N.E.2d at 1232.

63. Criminal liability may still exist for actions such as assault and battery, but is beyond the scope of this Note.

64. See *Blankenship*, 69 Ohio St. 2d at ___, 433 N.E.2d at 577; *Beauchamp v. Dow Chem. Co.*, 427 Mich. 1, ___, 398 N.W.2d 882, 889 (1986) (superseded by statute); Note, *Right to Sue*, *supra* note 30, at 282.

65. *Blankenship*, 69 Ohio St. 2d at ___, 433 N.E.2d at 577. Without the deterrent and punitive effects of exemplary damages available at common law, there is no inducement for improving safety conditions. Rather, the most detrimental effect on an employer for not improving his safety conditions is a slight increase in his worker's compensation insurance premiums. *Id.*; *accord* Note, *Right to Sue*, *supra* note 30, at 282-83. Notably, however, Occupational Safety and Health Act (OSHA) regulations provide rules for the promotion of a safe work environment.

66. See *Beauchamp*, 427 Mich. at ___, 398 N.W.2d at 889; *see also supra* notes 25-27 and accompanying text.

67. See Note, *Right to Sue*, *supra* note 30, at 283.

68. 2A A. LARSON, *supra* note 5, § 68.14, at 13-46.

ful, deliberate, intentional, reckless, culpable or malicious negligence, or other misconduct of the employer short of genuine intent to cause injury."⁶⁹

Most states limit the recovery under the intentional tort exception by implementing the "true intentional tort" or "actual, specific, and deliberate" intent standard.⁷⁰ Under this view, the employer must have intended the specific injury as well as the act. Other states utilize the *Restatement (Second) of Torts* definition of "intent."⁷¹ Under this definition, the employer must only have intended the act that caused the injury, with knowledge that the injury was substantially certain to follow. Thus, the "substantially certain" standard defines "intentional tort" more broadly than the "specific intent" standard. Still other states have employed a lesser "wilful, wanton, and reckless" misconduct standard for the intentional act exception.⁷² Under this view, the employer must have only a subjective realization of the risk of bodily injury created by his activity.⁷³ The more stringent "specific intent" standard, however, has been the most widely accepted standard.⁷⁴

69. *Id.* § 68.00, at 13-1. However, some states have altered the requisite "intent" for the intentional tort exception by statute. For a lesser standard of "wilful and unprovoked aggression," see OR. REV. STAT. § 656.018 (1989).

70. For instance, Arkansas, Washington, Indiana, and Oregon courts use this "specific intent" standard. See *Sontag v. Orbit Valve Co.*, 283 Ark. 191, 672 S.W.2d 50 (1984); *National Can Corp. v. Jovanovich*, 503 N.E.2d 1224 (Ind. Ct. App. 1987); *Palmer v. Bi-Mart Co.*, 92 Or. App. 470, 758 P.2d 888 (1988); *Foster v. Allsop Automatic, Inc.*, 86 Wash. 2d 579, 547 P.2d 856 (1976).

71. RESTATEMENT (SECOND) OF TORTS § 8A (1965). "The word 'intent' is used . . . to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." *Id.*

Michigan and Louisiana have adopted the "substantially certain" standard. See *Bazley v. Tortorich*, 397 So. 2d 475 (La. 1981); *Beauchamp v. Dow Chem. Co.*, 427 Mich. 1, 398 N.W.2d 882 (1986).

72. For example, West Virginia and North Carolina have used this lower standard. See *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985); *Mandolidis v. Elkins Indus., Inc.*, 161 W. Va. 695, 246 S.E.2d 907 (1978). See generally Special Project, *supra* note 25; Note, *Willful, Wanton Exception*, *supra* note 30 (discussing this lower standard).

73. This standard is distinguished from any type of negligence standard, because "negligence conveys the idea of inadvertence . . . [A]n act into which knowledge of danger and wilfulness enter is not negligence of any degree, but is wilful misconduct." *Mandolidis*, 161 W. Va. at —, 246 S.E.2d at 914. This interpretation also comports with RESTATEMENT (SECOND) OF TORTS § 500 comment g (1965).

74. "In light of the quid pro quo underlying . . . Indiana's Workmen's Compensation Act, we believe a stringent standard of specific intent is necessary to avoid the workmen's compensation scheme from being 'swallowed up' by a glut of common law suits outside the Act." *Jovanovich*, 503 N.E.2d at 1233 n.14. "It seems prudent to hold . . . as the vast majority have done, . . . that 'intentional injury' means 'intended injury.'" 2A A. LARSON, *supra* note 5, § 68.15, at 13-68.

C. *Legislative Treatment of the Intentional Tort Exception*

Some states solve the employer intentional tort dilemma by statutory action rather than leaving it to the judiciary. However, these states have widely varying approaches to the way they structure the statutory intentional tort exception into their workers' compensation schemes. For example, the Washington and Oregon acts provide a single exclusionary sentence for injuries caused by the "deliberate intention" of the employer.⁷⁵ The Arizona and West Virginia legislatures, on the other hand, promulgated a detailed and exacting exclusionary section with multi-part requirements.⁷⁶ The gravity of employer misconduct expressly required in

75. The Oregon statute in its entirety provides:

If injury or death results to a worker from the *deliberate intention of the employer of the worker* to produce such injury or death, the worker, the widow, widower, child or dependent of the worker may take under ORS 656.001 to 656.794, and also have cause of action against the employer, as if such statutes had not been passed, for damages over the amount payable under those statutes.

OR. REV. STAT. § 656.156(2) (1989) (emphasis added).

The Washington statute in its entirety provides:

If injury results to a worker from the *deliberate intention of his or her employer to produce such injury*, the worker or beneficiary of the worker shall have the privilege to take under this title and also have cause of action against the employer as if this title had not been enacted, for any damages in excess of compensation and benefits paid or payable under this title.

WASH. REV. CODE ANN. § 51.24.020 (1990) (emphasis added).

76. The Arizona statute in part provides:

The right to recover compensation pursuant to this chapter for injuries sustained by an employee or for the death of an employee is the exclusive remedy against the employer or any co-employee acting in the scope of his employment . . . *except that if the injury is caused by the employer's wilful misconduct, . . . and the act causing the injury is the personal act of the employer . . . and the act indicates a wilful disregard of the life, limb or bodily safety of employees, the injured employee may either claim compensation or maintain an action at law for damages against the person or entity alleged to have engaged in the wilful misconduct.*

ARIZ. REV. STAT. ANN. § 23-1022(A) (Supp. 1990-91) (emphasis added).

W. VA. CODE § 23-4-2(b) (Repl. Vol. 1985) provides a general exclusion strikingly similar to that of Washington. See *supra* note 75. However, section § 23-4-2(c)(2) additionally provides:

The immunity from suit provided under this section . . . may be lost only if *the employer . . . acted with "deliberate intention."* This requirement may be satisfied only if: (i) It is proved that such employer . . . *acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee.* This standard requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of (A) conduct which produces a result that was not specifically intended; (B) conduct which constitutes negligence, no matter how gross or aggravated; or (C) willful, wanton or reckless misconduct.

W. VA. CODE § 23-4-2(c)(2) (Repl. Vol. 1985) (emphasis added). Section 23-4-2(c)(2)(ii)(A-E) of the West Virginia Code goes on to expressly indicate the required findings of fact for the act's civil immunity exception in the case of injury resulting from the maintenance of unsafe working conditions.

the statutory exceptions, as with the judicial exceptions, also differs.⁷⁷ The standards range from intentional injury to wilful misconduct to gross negligence.⁷⁸

States which recognize a statutory exception also vary in the recovery permitted to an injured worker. Many states provide for alternative remedies when an employer's actions satisfy the required standard, and the employee must "elect" between workers' compensation remedies and a suit for damages at common law.⁷⁹ This type of provision has been criticized, however, because often there is no real choice.⁸⁰ Other states allow concurrent or cumulative remedies, whereby an employee may accept workers' compensation and maintain his right to a common law tort action.⁸¹ The possibility of double recovery is usually foreclosed by an ex-

77. These standards have been imposed and defined expressly within the statutory provision by some states, and not by others. Compare W. VA. CODE § 23-4-2(c)(2) (defining "deliberate intention" under 23-4-2(b)) with WASH. REV. CODE ANN. § 51.24.020 ("deliberate intention" expressed as the requirement for the exception, but undefined). Without a codified standard, the judiciary is again left to interpret the "intentional" exception as they see fit, leading to varying and haphazard results.

78. Compare W. VA. CODE § 23-4-2(c)(2) (actual specific intent required by statute comporting with the true intentional tort standard) with *id.* § 23-4-2(c)(2)(ii) (lesser standard required for unsafe working conditions) and ARIZ. REV. STAT. ANN. § 23-1022(A) (employer wilful misconduct required by statute). See generally 2A A. LARSON, *supra* note 5, § 69.20, at 13-203 ("The gravity of general employer misconduct . . . ranges downward from intentional injury through serious and willful misconduct to gross negligence.")

79. *E.g.*, ARIZ. REV. STAT. ANN. § 23-1022(A); cf. VA. CODE ANN. § 65.1-23.1(B) (Cum. Supp. 1990) which provides:

Notwithstanding the provisions of this Act, an employee who is sexually assaulted and can identify the attacker *may elect to pursue an action-at-law* against the attacker, even if the attacker is the assaulted employee's employer or co-employee, for full damages resulting from such assault *in lieu of pursuing benefits under this Act*, and upon repayment of any benefits received under the Act.

VA. CODE ANN. § 65.1-23.1(B) (emphasis added).

80. Forcing an injured employee to choose between these alternative remedies at a time when he is vulnerable is unfair. If the employee elects to pursue his common law remedy, he is faced with a difficult burden of proof and the prospect that he will be precluded from recovery under the statute if he fails. One commentator asked:

Is it necessary that the workman by accepting money from the employer or insurer, be it under an award or without it, forfeits the right to sue the third party for damages? He might be in urgent need of money. He might still be suffering from the accident. The needs of his family, which has been deprived of the breadwinner, might weigh heavily on his mind. He might be unable to pay for hospital and medical help. Does he lose his right when he accepts money at a time when he is in no financial condition to await the results of protracted litigation?

Behrendt, *The Rationale of the Election of Remedies Under Workmen's Compensation Acts*, 12 U. CHI. L. REV. 231, 256 (1945).

81. See, *e.g.*, OR. REV. STAT. § 656.156(2) (1989); WASH. REV. CODE ANN. § 51.24.020 (1990); W. VA. CODE § 23-4-2(b) (Repl. Vol. 1985) (providing "the employee shall have the privilege to take under this chapter, and shall also have cause of action against the employer, as if this chapter had not been enacted, for any excess of damages over the amount received or receivable under this chapter").

press offsetting provision requiring subtraction of the compensation recovery from the ultimate damage recovery in tort.⁸² Other states utilize a different approach. In lieu of common law damage recovery, these states have penalty provisions for intentional employer misconduct which provide for a percentage increase in compensation benefits under the workers' compensation act.⁸³

IV. VIRGINIA'S TREATMENT OF THE EMPLOYER INTENTIONAL TORT

A. *An Overview of Virginia Case Law*

In order to obtain workers' compensation in Virginia, an injury must be "by accident" and "aris[e] out of and in the course of the employment."⁸⁴ The Virginia courts consistently utilize these requirements to evade the issue of deciding whether to adopt an exception to the exclusive remedy rule in the case of intentional injury by the employer.⁸⁵

Virginia's treatment of the "accident" requirement for workers' compensation coverage has been most determinative in the judiciary's refusal to recognize such an exception. The Virginia Supreme Court originally adopted its broad definition of "accident" for workers' compensation coverage in *Big Jack Overall Co. v. Bray*.⁸⁶ Virginia courts have construed the "by accident" requirement to allow coverage for wilful and intentional assaults by third parties or co-employees,⁸⁷ as well as emotional injuries.⁸⁸

82. See, e.g., W. VA. CODE § 23-4-2(b).

83. See, e.g., ARK. STAT. ANN. § 11-9-503 (1987) (25% penalty for violating safety provisions); CAL. LABOR CODE § 4553 (West, 1989) (50% penalty provision); KY. REV. STAT. ANN. § 342.165 (Repl. Vol. 1983) (15% penalty for injury for intentional violation of safety regulations); N.C. GEN. STAT. § 97-12 (1985) (10% penalty provision). See generally 2A A. LARSON, *supra* note 5, § 69.10, at 13-199 to -203.

84. VA. CODE ANN. § 65.1-7 (Repl. Vol. 1987).

85. Virginia courts have justified their refusal to implement an employer intentional tort exception based on the legislature's lack of action on the matter. See *Haigh v. Matsushita Elec. Corp. of Am.*, 676 F. Supp. 1332, 1354 (E.D. Va. 1987); cf. *Haddon v. Metropolitan Life Ins. Co.*, 239 Va. 397, 400, 389 S.E.2d 712, 714 (1990) (concluding that the General Assembly agrees with the courts' rationale that the judiciary should not expand the scope of the Act when the General Assembly has not acted to do so).

86. 161 Va. 446, 171 S.E. 686 (1933). "Accident" is defined as "an event happening without any human agency, or, if happening through human agency, an event which, under the circumstances, is unusual and not expected by the person to whom it happens." *Id.* at 451, 171 S.E.2d at 687 (quoting *Vance on Insurance*, cited in *Newsoms v. Commercial Casualty Ins. Co.*, 417 Va. 471, 474, 137 S.E. 456, 457 (1927)).

87. *Continental Life Ins. Co. v. Gough*, 161 Va. 755, 172 S.E. 264 (1934) ("accident" found for workers' compensation coverage where insured was intentionally struck with a hatchet by a client's son); accord *Tinsley v. Hercules, Inc.*, No. 90-00606-R (E.D. Va. Feb. 27, 1991) (Merhige, J., presiding).

88. See *Burlington Mills Corp. v. Hagood*, 177 Va. 204, 13 S.E.2d 291 (1941) (sudden shock or fright received at work by an employee, without physical impact, causing traumatic neurosis was deemed an "accident" for coverage under the Act).

Under this liberal interpretation, an event need only be unexpected by the victim to qualify as an "accident."⁸⁹ Virginia's "accident" definition, therefore, as contrasted with Professor Larson's view, includes intentional torts, since the incident is viewed as unexpected from the employee's perspective. Accordingly, the definition attributed to "accident" in Virginia is determinative of the intentional tort exception issue.⁹⁰

Federal courts in Virginia have tried to apply the "accident" requirement in cases where an intentional tortious injury was alleged against an employer.⁹¹ The decisions in *Haigh v. Matsushita Electric Corp. of America*,⁹² *McGreevy v. Racal-Dana Instruments, Inc.*⁹³ and *Joyce v. A.C. and S., Inc.*,⁹⁴ illustrate the frustration and inconsistencies produced in the courts trying to equitably apply Virginia's compensation requirements.⁹⁵

The *Haigh* court held that an employee's common law claim against his former employer for intentional infliction of emotional distress was barred because the slander and blacklisting at issue was deemed unexpected by the employee.⁹⁶ The court applied the traditional Virginia *Big Jack Overall* definition of "accident" for purposes of the Act's exclusive

89. See generally L. PASCAL, *supra* note 3, § 3.2, at 27-29. The accepted Virginia definition of "accident" was criticized by Larson for producing unfortunate results. See *supra* note 47 and accompanying text.

90. Federal courts in Virginia have achieved varying results in trying to apply Virginia law and predict what the Supreme Court of Virginia would do. Compare *Haigh v. Matsushita Elec. Corp. of Am.*, 676 F. Supp. 1332 (E.D. Va. 1987) (The employee's common law claim against his former employer for intentional infliction of emotional distress was held barred by the Act. The court strictly applied the *Big Jack Overall* definition of "accident" to determine that the emotional distress was secondary to slander and that blacklisting was "not expected" by employee.) with *McGreevy v. Racal-Dana Instruments, Inc.*, 690 F. Supp. 468 (E.D. Va. 1988) (The employee's common law claim against his former employer for intentional infliction of emotional distress held not barred by the Act. The court utilized Larson's view of "accident" to determine similar acts were done with intent to injure and therefore were not accidental from the employer's perspective). See *infra* notes 91-102 and accompanying text.

91. See *supra* note 90 (varying outcomes produced by lower federal courts on this issue); see also *Joyce v. A.C. and S., Inc.*, 785 F.2d 1200 (4th Cir. 1986). The *Joyce* court determined that a claim against an employer for intentional failure to warn or remove asbestos was barred because it fell under the "occupational disease" provision of the Act's coverage. *Id.* at 1206-07. The court admitted that it had not yet addressed the question and evaded the issue of recognizing a "nonaccidental" exception where an employer knowingly and wilfully permitted a hazardous working condition to exist. *Id.* In dicta, however, the court speculated that Virginia might recognize a "nonaccidental" exception given Indiana's position, but determined that the evidence was insufficient to support a claim for fraudulent concealment in this case. *Id.*

92. 676 F. Supp. 1332 (E.D. Va. 1987).

93. 690 F. Supp. 468 (E.D. Va. 1988).

94. 785 F.2d 1200 (4th Cir. 1986).

95. Competing policy justifications have been articulated to support the result either way.

96. *Haigh*, 676 F. Supp. at 1332.

remedy coverage.⁹⁷ While the court acknowledged Indiana's recognition of an intentional tort exception, it suggested that Virginia would not similarly recognize such an exception.⁹⁸ The court based its decision on legislative inaction in Virginia regarding this matter. Since the Virginia General Assembly had not recognized an exception, the *Haigh* court refused to take such a "monumental step."⁹⁹

On the other hand, the *McGreevy* court held that an employee's common law claim against his former employer for intentional infliction of emotional distress was not barred.¹⁰⁰ The *McGreevy* court applied Professor Larson's view of "accident," which deemed similar conduct nonaccidental, reasoning that, since the Indiana courts adopted his analysis for recognizing an exception and the Virginia Act is modeled after the Indiana Act, Virginia would follow Indiana's lead.¹⁰¹ Similarly, albeit in dicta, the Court of Appeals for the Fourth Circuit speculated in *Joyce* that if Virginia recognized a nonaccidental exception for intentional torts, it would most likely adopt Indiana's position.¹⁰² The inconsistent results emanating from federal courts in Virginia emphasize the need for decisive state action on this matter.

The Virginia Supreme Court recently confirmed its broad definition of the "by accident" requirement in the case of *Haddon v. Metropolitan Life Insurance Co.*¹⁰³ In *Haddon*, the employee sought damages from her employer for intentional infliction of emotional distress and defamation due to harassment and sexual discrimination by a fellow employee.¹⁰⁴ The *Haddon* court concluded that the claim against the employer was barred because these injuries were "accidental" under the Act.¹⁰⁵ The court provided minimal rationale for its conclusion.¹⁰⁶ However, the result is not surprising since the court had already determined that emotional injuries come within the purview of the "accident" requirement.¹⁰⁷ The *Haddon* decision is a logical extension of that interpretation. The recent *Haddon* case serves as the decisive law of the judiciary and clearly demonstrates that Virginia courts are unwilling to accept the "nonaccidental" basis for a judicial intentional tort exception to the workers' compensation exclu-

97. See *supra* notes 86-89 and accompanying text.

98. *Haigh*, 676 F. Supp. at 1353-54; accord *supra* note 16.

99. *Haigh*, 676 F. Supp. at 1353-54.

100. *McGreevy*, 690 F. Supp. at 468.

101. *Id.* at 470-71.

102. *Joyce*, 785 F.2d at 1206-07; see also *supra* note 91.

103. 239 Va. 397, 389 S.E.2d 712 (1990).

104. *Id.* at 398, 389 S.E.2d at 713.

105. *Id.* at 400, 389 S.E.2d at 714.

106. The *Haddon* court simply relied on "long standing" and "substantial Virginia precedent" regarding the definition of "accident" to find exclusive workers' compensation coverage and did not address the specific facts of the case. *Id.* at 399, 389 S.E.2d at 714.

107. See *supra* note 88 and accompanying text.

sive remedy rule.

In contrast with the broadly interpreted "accident" requirement, Virginia decisions illustrate a conservative interpretation of the "arising out of" requirement for workers' compensation coverage.¹⁰⁸ Virginia employs the "actual risk" test to satisfy the causal connection between the employment and the injury sustained.¹⁰⁹ It requires the employee's injury to be a natural incident of, or received as a consequence of, his employment, and not to be of a personal nature. This test has been applied by the Virginia courts in sexual assault cases, to determine that the Act does not apply.¹¹⁰

In *Reamer v. National Service Industries, Inc.*,¹¹¹ the Supreme Court of Virginia held that the sexual assault of an employee at work by a third party was personal in nature, and did not "arise out of" the employment. Therefore, the *Reamer* court did not bar the employee's common law neg-

108. See, e.g., *Hopson v. Hungerford Coal Co.*, 187 Va. 299, 46 S.E.2d 392 (1948) (The injury failed the "arising out of" requirement for workers' compensation coverage where the employee was shot by an insane third party on a trip related to employment. The shooting may have been directed against the employee for causes other than his employment.); see also *infra* note 110.

109. The test was articulated by the Supreme Court of Virginia:

[A]n injury "arises 'out of' the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

Bradshaw v. Aronovitch, 170 Va. 329, 335, 196 S.E. 684, 686 (1938) (quoting *In re McNicol*, 215 Mass. 497, —, 102 N.E. 697, 697 (1913)); see also *Hill City Trucking v. Christian*, 238 Va. 735, 385 S.E.2d 377 (1989) (Virginia rejected the "positional risk" test in favor of the "actual risk" test to determine whether the injury "arose out of" the employment).

110. See *Reamer v. National Serv. Indus., Inc.*, 237 Va. 466, 377 S.E.2d 627 (1989) (sexual assault of employee on work premises by third party failed the "arising out of" requirement because the attack was deemed personal in nature); *City of Richmond v. Braxton*, 230 Va. 161, 335 S.E.2d 259 (1985) (sexual assault of employee by supervisor failed "arising out of" requirement because employment was not traceable as the proximate cause of the assault). This rationale, however, has only been extended where assaults are sexual in nature. See *supra* note 108; see also *Hiles v. Richardson*, 15 Va. Cir. 422 (County of Chesterfield 1989) ("arising out of" requirement satisfied where supervisor's assault on employee involved physically removing employee from office and where assault was not sexual in nature).

111. 237 Va. 466, 377 S.E.2d 627 (1989).

ligence claim against her employer for maintaining an unsafe workplace and determine that the act was not the employee's exclusive remedy. This decision is significant for several reasons. First, it confirms a judicial exception to the exclusive remedy rule in cases of sexual assault.¹¹² Second, it permits a negligence claim against the employer.¹¹³ Third, it implies that the Virginia judiciary is not averse to applying the "arising out of" exception,¹¹⁴ used by other states, for intentional injuries if the circumstances of the case are sufficiently offensive.

The *Reamer* and *Haddon* decisions are reconcilable on the basis of public policy, with *Haddon* stating the general rule in Virginia. Sexual assault rises to a higher level of moral repulsiveness and leniency in these cases will not be tolerated by the courts or legislature.¹¹⁵ *Reamer* suggests that the nature of the alleged injuries in an intentional tort claim against an employer may be a factor in the court's decision to allow a Virginia exception to the exclusive remedy rule.¹¹⁶ Based on implied public policy,

112. A judicial exception predated the legislative exception for sexual assault. The judiciary implied this exception as early as 1985 in the *Braxton* case, which is noted with approval in *Reamer*, 237 Va. at 471, 377 S.E.2d at 629-30. The Virginia legislature confirmed this construction in 1988 by enacting VA. CODE ANN. § 65.1-23.1(B) (Cum. Supp. 1990). See *infra* note 123. This code section affords the employee/victim of a sexual assault by his employer or by a co-employee a right of action. The *Reamer* case also has merit beyond its statutory interpretation. Although decided after § 65.1-23.1(B) was enacted, it recognized a cause of action against the employer when the attacker is a third party.

113. Conceding that the court did not express its opinion on the merits of the claim, it seems extreme to permit an exception based only upon a claim of negligence against the employer, since negligence principles were surrendered as part of the workers' compensation system compromise. If the court is willing to create an exception when mere negligence is alleged, should they not also do so when an intentional tort is alleged?

114. Indeed, the Supreme Court of Virginia recently granted an appeal and heard arguments in the case of *Kelly v. First Va. Bank-Southwest*, No. 90-1144 (Va. Sup. Ct. argued Mar. 1, 1991), where the employer's demurrer was sustained in the lower court on the basis of *Haddon*. In *Kelly*, the employee alleged intentional infliction of emotional distress based on claims of sexual harassment and humiliation by her supervisor/employer resulting in physical damages and constructive discharge. Brief for Appellant at 4-6. Notably, the crux of the employee's argument on appeal is that her injuries did not "arise out of" her employment with the bank. Brief for Appellant at 9-10.

115. See, e.g., *City of Richmond v. Braxton*, 230 Va. 161, 335 S.E.2d 259 (1985); VA. CODE ANN. § 65.1-23.1 (Cum. Supp. 1990).

116. Intentional infliction of emotional distress is a nonphysical intentional tort with intangible injuries. Intangible injuries are less egregious from a policy standpoint and therefore are more tolerable within the current system of compensation. Interestingly, a great many of the Virginia cases alleging an intentional tort against an employer involve intentional infliction of emotional distress. See *McGreevy v. Racal-Dana Instruments, Inc.*, 690 F. Supp. 468 (E.D. Va. 1988); *Haigh v. Matsushita Elec. Corp. of Am.*, 676 F. Supp. 1332 (E.D. Va. 1987); see also *supra* note 90. Hence, the possibility exists that the Supreme Court of Virginia would not foreclose the idea of a judicial exception for an intentional tort of a more physical and offensive nature, yet falling short of sexual assault. It is submitted that the court may have granted the appeal in *Kelly* in order to address these distinctions. [Editor's note: The Virginia Supreme Court recently ruled that the *Kelly* employee's tort claim was

it may be that a claim for a physical intentional tort has a better chance to escape the exclusive remedy rule in the Virginia judiciary system.¹¹⁷

In summary, the long line of Virginia cases broadly interpreting the "by accident" requirement presents the biggest obstacle to creating a judicial exception to the exclusive remedy rule in the case of employer intentional torts. The broad interpretation of the "accident" requirement, confirmed in *Haddon*, may lead to absurd future results.¹¹⁸ The court in *McGreevy v. Racal-Dana Instruments, Inc.*¹¹⁹ pointed out the anomalous results that may follow:

An employer could be held personally liable in tort for pinching or squeezing, but not for punching an employee in the nose or hitting him on the head with a two-by-four. Worse yet, failure to adopt an intentional tort exception would mean that the General Assembly intended that an employee whose face was disfigured by an employer's intentional tort be deprived of a remedy, that an employee deliberately assaulted physically by an employer be limited to workers' compensation, but that an employee pinched or fondled sexually be permitted the full range of tort and compensation remedies against the employer.¹²⁰

Although there are signs that the judiciary may recognize an exception for employer intentional torts in some limited instances,¹²¹ the courts in Virginia have exhibited their general unwillingness to do so under the Act. Virginia courts await legislative action on this matter.

barred by the Act.] See *supra* note 114. In *Kelly* the employee alleged physical damages including severe weight loss, nausea, headaches, sleeplessness and depression which accompanied the alleged intentional infliction of emotional distress. Brief for Appellant at 6.

117. This contradicts the results of Professor Larson's "essence of the tort" test. See *supra* note 51 and accompanying text. However, Professor Larson's suggested outcome presupposes that nonphysical torts are not covered by the typical workers' compensation statute, but the Virginia Workers' Compensation Act has been interpreted to include such nonphysical injuries within its "accident" requirement. See *supra* note 88 and accompanying text.

118. Admittedly, the holding in *Haddon* is specifically limited to barring a common law claim against the employer where the intentional infliction of emotional distress and defamation were committed by co-employees, and imputed to the employer. However, this decision may serve as precedent for immunizing from civil suit intentional injuries of any kind and extending the immunity to intentional acts committed by the employer himself.

119. 690 F. Supp. 468 (E.D. Va. 1988).

120. *Id.* at 473.

121. The Supreme Court of Virginia recently granted appeals and heard arguments in two circuit court cases dismissed by demurrers on the basis of *Haddon's* conclusion that the Act was the exclusive remedy available to the plaintiff employees. See *Kelly v. First Va. Bank-Southwest*, No. 90-1144 (Va. Sup. Ct. argued Mar. 1, 1991); *Snead v. Harbaugh*, No. 90-1119 (Va. Sup. Ct. argued Mar. 1, 1991); see also *supra* note 114 and accompanying text. Rulings have not been rendered on these to cases to date. [Editor's note: The Virginia Supreme Court recently ruled that the *Kelly* employee's intentional infliction of emotional distress tort claim was barred by the Act, while the *Snead* claim of defamation was not barred.]

B. *Evaluation of the Virginia's Workers' Compensation Act*

Virginia's Workers' Compensation Act provides the exclusive statutory remedy for an injured employee against his employer.¹²² The Virginia General Assembly has failed to carve out a legislative exception to this hard and fast rule for intentional or wilful employer misconduct.¹²³ In 1988, the General Assembly enacted section 65.1-23.1(B) which operates as a narrow exception to the exclusive remedy rule in the case of sexual assault by an employer.¹²⁴ Unfortunately, though, an employee in Virginia must elect between the alternative remedies of workers' compensation coverage and an action at law in a case of sexual assault.¹²⁵ Because the legislature has not created an exception for lesser types of misconduct, the judiciary has also refused to recognize an exception, even for intentional injuries.¹²⁶

On the other hand, while the legislature has failed to create an employer intentional torts exception that would benefit employees, the legislature has already carved out an express exception to the Act's coverage to deny compensation benefits in the case of wilful *employee* misconduct. Under section 65.1-38,¹²⁷ an employee forgoes his statutory right of recov-

122. Virginia's exclusive remedy provision provides:

The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident *shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service of death.*

VA. CODE ANN. § 65.1-40 (Repl. Vol. 1987) (emphasis added).

123. Several states have explicitly excluded intentional tort actions from the exclusive remedy provision in their statutory schemes. *See, e.g.,* ARIZ. REV. STAT. ANN. § 23-1022 (1983); OR. REV. STAT. ANN. § 656.156 (1989); *see also supra* notes 75-76.

124. VA. CODE ANN. § 65.1-23.1(B) (Cum. Supp. 1990) provides:

Notwithstanding the provisions of this Act, an employee who is sexually assaulted and can identify the attacker may elect to pursue an action-at-law against the attacker, even if the attacker is the assaulted employees' employer or co-employee, for full damages resulting from such assault in lieu of pursuing benefits under this Act, and upon repayment of any benefits received under the Act.

125. *Id.* The election requirement contravenes the Act's humanitarian and remedial purposes and disserves the injured employee. The humiliated, vulnerable and injured employee faces a difficult choice at a time when he or she is probably not emotionally prepared to handle it. Faced with the prospect of being without a remedy if the action at law fails, the election provision operates as a disincentive to pursue a civil suit and instead encourages the employee to opt for the guaranteed statutory recovery. *See supra* note 80 and accompanying text. Injuries of this kind were not contemplated by the Act when the original compromise was made; neither should the recoveries be limited by it.

126. "Until the legislature . . . expressly states otherwise, this Court is of the opinion . . . that an employer intentional tort exception is not appropriate." *Hiles v. Richardson*, 15 Va. Cir. 422, 426 (County of Chesterfield, 1989).

127. VA. CODE ANN. § 65.1-38 (Repl. Vol. 1987) provides:

No compensation shall be allowed for an injury or death: (1) Due to the employee's

ery by intentionally injuring himself or others, and for injury due to intoxication, wilful misconduct, wilful failure to use safety equipment, and breach of duties or rules. The Virginia judiciary has treated this type of employee misconduct as an abandonment of the employment relation.¹²⁸ The standard used by the courts for "wilful" employee misconduct only requires the employee to intend the act, and not the injury.¹²⁹

By enacting section 65.1-38 of the Virginia Code, the General Assembly has already contemplated and injected the concept of "fault" into the Virginia statutory scheme.¹³⁰ For instance, specific actions amounting to intentional misconduct within an employee's control will prevent the Act's guaranteed recovery. Likewise, where there are intentional actions amounting to employer misconduct, the employee should not be limited to exclusive recovery under the Act. It would be consistent to afford equal treatment in the case of similar employer misconduct.¹³¹ Since the workers' compensation system was originally based on notions of a quid pro quo tradeoff between employers and employees, a statutory exception for injuries caused by intentional employer misconduct would provide bal-

willful misconduct, including intentional self-inflicted injury, (2) Growing out of his attempt to injure another, (3) Due to intoxication, or (4) Due to willful failure or refusal to use a safety appliance or perform a duty required by statute or the willful breach of any rule or regulation adopted by the employer and approved by the Industrial Commission and brought prior to the accident to the knowledge of the employee. The burden of proof shall be upon him who claims an exemption or forfeiture under this section.

128. See *American Safety Razor Co. v. Hunter*, 2 Va. App. 258, 343 S.E.2d 461 (1986) (an employee may abandon his employment by reaching an advanced state of intoxication). This view is consistent with the "severed" employment relation exception recognized by other jurisdictions in the case of intentional injury by the employer. Accordingly, Virginia courts may be willing to construct a statutory exception based on similar rationale.

129. "Wilful" means with deliberate intent. If the employee intentionally acts, knowing the act is forbidden, he has "wilfully" failed to obey the rule. See *Riverside & Dan River Cotton Mills, Inc. v. Thaxton*, 161 Va. 863, 172 S.E. 261 (1934). This is a lesser standard than that of "specific" intent, which requires the injury, as well as the act, to be intended. This lower standard for employee misconduct emphasizes the inherent unfairness in not holding employers to any standard for their conduct.

130. This section appears to be a codified extension of the common law tort defense of contributory negligence. However, a higher degree of misconduct is required under this section due to the original quid pro quo surrender of common law rights.

131. It is inconsistent to allow the employer to hide behind an exception that the employee cannot. Other states have applied statutory intentional injury exceptions for employees and employers equally. See, e.g., OR. REV. STAT. § 656.156 (1989). The Oregon statute provides:

(1) If the injury or death results to a worker *from the deliberate intention of the worker* to produce such injury or death, . . . the worker . . . shall [not] receive any payment whatsoever . . . (2) If injury or death results to a worker *from the deliberate intention of the employer of the worker* to produce such injury or death, the worker . . . may take under [the Act] and also have cause for action against the employer. . . .

Id. (emphasis added).

ance and consistency to the Virginia statutory scheme.

In the event of a work-related injury caused by a third party, Virginia's Act allows an employee to accept compensation and sue the third party for common law damages.¹³² Section 65.1-41 provides for assignment and subrogation rights of an employer against any "other party" where concurrent remedies are obtained.¹³³ Logic suggests that similar recourse should be available when the employee is intentionally harmed by the employer.¹³⁴ This result could be achieved on the ground that the employer occupies the position of a third party, using the same abandonment of the employment theory applied to employee misconduct in Virginia. Therefore, a statutory exception allowing common law remedies for intentional injury by employers would be consistent with Virginia's current treatment of third party misconduct and the statutory scheme as a whole.

V. A SUGGESTED LEGISLATIVE APPROACH FOR VIRGINIA

Currently, Virginia's statutory workers' compensation scheme is deficient. An employer enjoys complete civil immunity from his intentional wrongs under the present system. The Virginia judiciary's failure to create a clear exception to the exclusive statutory remedy without legislative authority deserves the interests of workers in the state and contravenes the remedial and beneficent purposes of the Act. A legislative approach is required to afford consistency, fairness, and deterrence of employer misconduct in the Virginia workers' compensation system. It is submitted that Virginia should enact a legislative provision similar to that of West Virginia.¹³⁵

A. *Advantages of the West Virginia Approach*

West Virginia's statutory exception serves as an excellent model for Virginia to follow for several reasons. First, it expressly provides equal treatment of employee and employer misconduct. Section 23-4-2(a) of the West Virginia Code exempts workers' compensation entitlement in the

132. VA. CODE ANN. § 65.1-40 (Repl. Vol. 1987), affords the exclusive remedy which applies only to an employee, his employer, and those considered to be conducting the employer's business. If the party does not come within the meaning of the Act's exclusivity provision, the common law right of action is preserved. See *Griffith v. Raven Red Ash Coal Co.*, 179 Va. 790, 20 S.E.2d 530 (1942).

133. VA. CODE ANN. § 65.1-41 (Repl. Vol. 1987).

134. Similar to other states' offsetting provisions, the compensation paid under the Act could be in mitigation of damages of the employer's common law liability. Assuming the employer is insured, the employer's insurer would also have subrogation rights to the employee's recovery. See Note, *Right to Sue*, *supra* note 30, at 284-85.

135. See W. VA. CODE § 23-4-2 (Repl. Vol. 1985); see also *supra* note 76 and accompanying text.

case of certain employee conduct,¹³⁶ whereas its counterpart, section 23-4-2(b) of the West Virginia Code, excepts deliberately intended injuries inflicted by an employer from the act's exclusive remedy.¹³⁷ Similarly, Virginia could add a counterpart provision to include employer misconduct, yet maintain the four-category exception for employee misconduct. This approach would comport with the nature of the quid pro quo basis of the system more than Virginia's present inconsistent treatment.

Second, the West Virginia approach affords the employee concurrent and cumulative remedies in the case of intentional injuries by an employer.¹³⁸ It also prevents a double recovery to the employee by only allowing damages in excess of what is recoverable under the statute.¹³⁹ Permitting an action at law against the employer is an effective deterrent to all types of intentionally tortious conduct and promotes a safer work environment,¹⁴⁰ thereby serving the purposes of the legislation. This approach is preferable to the forced election of remedies which often leaves the employee without remedy,¹⁴¹ such as that currently used by Virginia in the case of sexual assaults. Virginia should similarly incorporate a concurrent remedy provision to insure complete restitution to the employee who has been intentionally injured and to serve adequately the remedial purpose of the Virginia's Workers' Compensation Act.

Third, the West Virginia provision statutorily defines the standard for the intentional tort exception. The West Virginia legislature made clear what will and will not constitute employer "deliberate intent" in section 23-4-2(c)(2)(i) of the West Virginia Code.¹⁴² It also expressly provides the

136. W. VA. CODE § 23-4-2(a) provides that "no employee or dependent of any employee shall be entitled to receive any sum from the [worker's] compensation fund . . . on account of any personal injury to or death to any employee caused by a self-inflicted injury or the intoxication of such employee."

137. *Id.* § 23-4-2(b) provides that:

If injury or death result to any employee from the deliberate intention of his employer to produce such injury or death, the employee . . . shall have the privilege to take under this chapter, and shall also have cause of action against the employer, as if this chapter had not been enacted, for any excess of damages over the amount received or receivable under this chapter.

138. *Id.*

139. *Id.* This principle is similar to Virginia's treatment of an employee's action at law against a third party and the employer's assignment rights. *See* VA. CODE ANN. § 65.1-41 (Repl. Vol. 1987).

140. Exemplary as well as compensatory damages are recoverable in intentional tort actions. Since a cumulative remedy provision allows a civil suit in addition to the workers' compensation benefits, the possibility of large damage awards constitutes a strong deterrent for the employer.

141. *See supra* notes 80-81 and accompanying text. The deterrent effect of the election of remedies approach is minimal. The small number of actions that would proceed—and the smaller number that would end successfully for the employee—would be an insufficient incentive for the employer to alter his conduct.

142. W. VA. CODE § 23-4-2(c)(2)(i) (Repl. Vol. 1985). *See supra* note 76 (precise wording

legislative intent behind the standard adopted, thus giving the judiciary a clear and workable standard to apply.¹⁴³ This explicit approach should be used to prevent inconsistency and promote predictability in Virginia case law.¹⁴⁴

B. *The Suggested "Intentional" Standard for Virginia*

Using the West Virginia statute as a model, Virginia should also expressly incorporate the "specific" intent standard into a legislative exception to the exclusive remedy rule.¹⁴⁵ The standard is more stringent and has been adopted by the majority of states which recognize an employer intentional tort exception.¹⁴⁶ This more conservative standard would be consistent with Virginia's current law and policy.¹⁴⁷ Implementing the stricter standard would properly distinguish and prevent any frivolous suits that the new statutory exception may invite.¹⁴⁸ The "specific" intent

of this section).

143. W. VA. CODE § 23-4-2(c)(1). This section provides in part:

[T]he legislature intended to create a legislative standard for loss of that immunity of more narrow application and containing more specific mandatory elements than the common law tort system concept and standard of willful, wanton and reckless misconduct; and that it was and is the legislative intent to promote prompt judicial resolution of the question of whether a suit prosecuted under the asserted authority of this section is or is not prohibited by the immunity granted under this chapter.

This provision was inserted in 1983, when the West Virginia legislature statutorily raised its intentional tort exception standard from one of "willful, wanton and reckless misconduct" to that of "actual, specific intent." See *Mandolidis v. Elkins Indus., Inc.*, 161 W. Va. 695, 246 S.E.2d 907 (1978) (superseded by statute) (applying the prior willful, wanton and reckless standard). Obviously, the intent of the West Virginia legislature is not applicable to Virginia, but the Virginia General Assembly should include a similar statement of its intent behind the creation of a standard for a Virginia intentional tort exception.

144. See *Haddon v. Metropolitan Life Ins. Co.*, 239 Va. 397, 400, 389 S.E.2d 712, 714 (1990) (where the Supreme Court of Virginia presumed the General Assembly's intent regarding the scope of the Act); see also *supra* notes 90-101 and accompanying text.

Workers' compensation, once seen as "an identifiable cost of doing business," has been somewhat undermined by employer intentional tort claims. 2A A. LARSON, *supra* note 5, § 67.31. However, the economic predictability is maximized in statutory provisions such as those in West Virginia. The West Virginia legislature's precise and explicit manner of defining the standard to which the employer is held provides sufficient predictability for guiding his conduct.

145. See W. VA. CODE § 23-4-2(c)(2)(i) (Repl. Vol. 1985); see also *supra* note 70 and accompanying text.

146. See *supra* note 74 and accompanying text.

147. Virginia is often characterized as a conservative state. This is illustrated by the continued existence in Virginia of contributory negligence as an absolute defense to a negligence claim. See, e.g., *Diaz v. United States*, 655 F. Supp. 411, 418 (E.D. Va. 1987); *Smith v. Virginia Elec. & Power Co.*, 204 Va. 128, 133, 129 S.E.2d 655, 659 (1963).

148. See *Mandolidis v. Elkins Indus., Inc.*, 161 W. Va. 695, —, 246 S.E.2d 907, 922 (1978) (Neely, J., dissenting); see also Note, *Willful, Wanton Exception*, *supra* note 30, at 909-10. The "specific intent" standard requires a greater showing by the employee in order for the alleged claim to withstand a motion to dismiss or motion for summary judgment. The Vir-

standard would afford exceptions to the exclusive remedy in limited circumstances. Such a result would not stray far from Virginia's present statutory scheme where the legislature has only recognized an exception to the exclusive remedy rule under the extreme circumstance of sexual assault.

Additionally, it is urged that Virginia should codify a provision lowering the standard for an exception to an employer's immunity from suit in the case of unsafe work practices. Again, West Virginia's provision should serve as an example.¹⁴⁹ The "willful, wanton and reckless" standard should be applied to lower the burden of proof required of the employee where injury results from the employer's knowing refusal to comply with safety laws which causes an appreciated risk of injury. This lesser standard comports with the Act's recognized purpose of promoting safety in the workplace.¹⁵⁰ It does no more than impose the same standard of safety upon the employer that the employee is already held to under Virginia's Act.¹⁵¹ This change would remedy the present disparate treatment of employee and employer misconduct in the Virginia statutory scheme.

The Virginia judiciary should also find this bifurcated standard consistent with existing precedent. The Virginia Supreme Court confirmed its requirement of a high standard for intentional injuries to circumvent the "by accident" requirement in *Haddon v. Metropolitan Life Insurance*

ginia courts could use this device to prevent nuisance suits and minimize litigation.

149. W. VA. CODE § 23-4-2(c)(2)(ii)(A)-(E) (Repl. Vol. 1985). Although the West Virginia provision does not specifically refer to a "willful, wanton" standard in subsections (A) through (E), in the case of an injury caused by unsafe working conditions, the statute uses synonymous language. The statute provides:

(B) That the employer had a *subjective realization and appreciation* of the existence of such specific unsafe working condition and *the high degree of risk* and the strong probability of *serious injury or death* presented by such specific unsafe working condition . . . (C) [it] was a violation of a state or federal safety statute, rule or regulation . . . or well-known safety standard within the industry . . . (D) [and] such employer nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally.

Id. (emphasis added)

150. See *supra* note 65 and accompanying text. An employer may be guilty of serious and wilful misconduct, without necessarily having a deliberate intent to injure the employee, by simply refusing to comply with a statute or rule intended to protect employees. See *Winterroth v. Meats, Inc.*, 10 Wash. App. 7, 12, 516 P.2d 522, 525 (1973). Without this lower standard for the employee, the employer would not be accountable, and there would be no incentive, aside from OSHA compliance, to improve safe work conditions, in contravention of one of the Act's primary purposes.

151. See VA. CODE ANN. § 65.1-38(4) (Repl. Vol. 1987), which provides:

No compensation shall be allowed for an injury or death . . . due to willful failure or refusal to use a safety appliance or perform a duty required by statute or the willful breach of any rule or regulation adopted by the employer and approved by the Industrial Commission and brought prior to the accident to the knowledge of the employee.

See also *Griffey v. Clinchfield Coal Corp.*, 183 Va. 715, 33 S.E.2d 178 (1945); *Riverside & Dan River Cotton Mills, Inc. v. Thaxton*, 161 Va. 863, 172 S.E. 261 (1934).

Co.¹⁵² Yet, the court approved a lesser standard for improperly maintaining a safe work environment in *Reamer v. National Service Industries, Inc.*¹⁵³ The dual standards of "specific" intent for general tortious claims and "willful and wanton" misconduct for work safety claims compliment these decisions. Thus, the judiciary may apply the suggested legislative approach consistently and easily.

C. *Predicted Outcome*

As a solution to the intentional tort problem, the recommended legislative approach is an ideal solution for Virginia. Realistically, however, this approach may not be adopted by the Virginia General Assembly for several reasons.

First, a look at the Virginia position on other issues may be relevant to predicting the outcome of the General Assembly's adoption of a West Virginia-type approach. For example, Virginia has refused to adopt comparative negligence which would balance the negligence of prospective parties. Virginia instead clings to the antiquated doctrine of contributory negligence as an absolute bar to recovery in a negligence claim.¹⁵⁴ Likewise, Virginia has refused to adopt the theory of strict liability in tort in products liability actions.¹⁵⁵ These minority positions suggest a tendency toward protective treatment of defendants in Virginia. Applying existing policy to the workers' compensation situation at hand, a predictably similar protective treatment may be given defendant employers. If so, Virginia is not likely to enact any proposed statutory amendment to the workers' compensation act.

Second, the Virginia legislature may be concerned that adoption of this approach would open the floodgates to litigation. However, adoption of the "specific" intent standard proposed in the majority of intentional tort claims would largely combat these concerns.¹⁵⁶

152. 239 Va. 397, 389 S.E.2d 712 (1990); see *supra* notes 103-07 and accompanying text.

153. 237 Va. 466, 377 S.E.2d 627 (1989); see *supra* notes 111-13 and accompanying text.

154. See *Diaz v. United States*, 655 F. Supp. 411, 418 (1987); *Smith v. Virginia Elec. and Power Co.*, 204 Va. 128, 129 S.E.2d 655 (1963); see also *supra* note 147. The unwillingness to balance the negligence of the respective parties in a negligence claim is likened to the unequal treatment afforded employer and employee misconduct in the present workers' compensation scheme. Virginia may be unwilling to adopt a statutory exclusive remedy exception that treats the parties equally because it would be inconsistent with Virginia's contributory negligence policy. See *supra* note 147 and accompanying text.

155. See *Logan v. Montgomery Ward*, 216 Va. 425, 219 S.E.2d 685 (1975). The policy decision to reject strict liability in tort exhibits a protective treatment of defendant manufacturers and industry. This same policy may be used to protect defendant employers and industry from an intentional tort exception to the workers' compensation exclusive remedy rule.

156. See *supra* note 148 and accompanying text.

It is strongly urged that the Virginia legislature enact an approach such as the proposed statutory amendment to the workers' compensation system for the reasons discussed in this Note: fairness, consistency, and deterrence of employer misconduct, in light of the purposes of the Workers' Compensation Act.

VI. CONCLUSION

Most states recognize an exception to the exclusive remedy provided by the workers' compensation system for employer intentional torts, either by judicial or express legislative action. There are a number of grounds to justify different treatment when an employer intentionally injures an employee. Although the courts show signs of willingness, Virginia has not yet recognized an exception, largely due to the broad meaning given the "by accident" requirement for coverage under the Workers' Compensation Act. Given the Virginia judiciary's hesitancy to recognize a clear judicial exception for employer intentional torts, the Virginia legislature must provide the solution to this potentially far-reaching problem. Virginia should adopt a statutory exception provision similar to that in West Virginia. This suggested legislative approach clearly defines the dual standards to be used by the courts in the case of employer intentional torts and unsafe working conditions. These standards are consistent with existing Virginia law. The suggested approach also serves the Act's purposes of providing adequate compensation for injured workers and improved safety in the workplace, by affording concurrent remedies at common law and under the Act. Although there is justifiable doubt as to whether the Virginia legislature will adopt a West Virginia-type approach because of conflicting policy in other relevant areas, Virginia should seriously consider the statutory approach proposed.

Jodi Parrish Power

