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INTENTIONAL TORTS UNDER WORKERS’ COMPENSATION STATUTES: A BLESSING OR A BURDEN?

Workers’ Compensation statutes were enacted as a response to the increased financial burden placed on society by victims of industrial accidents who were left uncompensated by the traditional tort system. Their primary goal is to compensate the greatest number of employees for work-related injuries. To facilitate plaintiffs’ recovery, these statutes relieve employees of the burden of proving fault and prevent employers from asserting the common law defenses of contributory negligence, assumption of risk, and the fellow servant rule. Balanced against these advantages to employees, the statutes limit the dollar amount of available compensation, and their “exclusivity” language provides employers with immunity from civil suit.

It is clear that once the conditions for coverage are met and the employer has acted negligently, the employee’s only remedy is a Workers’ Compensation award. It is not so clear, however, that the statutory exclusivity provisions of the various states were designed to bar an injured employee’s common law suit when an employer has acted with the intention of causing harm.

The statutes of several states, including Arizona, Louisiana, Oregon, Washington, and West Virginia, expressly provide that an intentional tort committed by an employer falls outside the scope of their exclusivity provision. Courts in these jurisdictions focus on the nature of the employer’s act; the resultant analyses are clear and

1. See infra text accompanying notes 10-18; see also 1 W. Schneider, Workmen’s Compensation § 1 (1941).
2. See infra text accompanying notes 17-18, 27.
3. See 1 W. Schneider, supra note 1, § 4; infra text accompanying notes 10-27.
4. See id.; see also infra text accompanying notes 29, 39-42.
5. See infra text accompanying notes 10-31.
the holdings are consistent. If the act is found to be intentional, the employee is permitted the option of bringing a personal injury suit.\(^9\) In other states, where there is no such limitation on the bar to civil suits, plaintiffs who have been victims of intentionally inflicted injuries face the prospect of less than adequate compensation as a result of being denied the opportunity to sue in court.

Once the statute is triggered and the plaintiff is deemed within its ambit, the opportunity for a civil suit is cut off. Because the statutes have been broadened to aid the greatest possible number of plaintiffs, an increasing number of workers are finding that instead of being helpful, the statutes are acting as barriers, precluding the recovery of full damages in a civil suit when their injuries have been intentionally inflicted.

This note will briefly describe the purpose for which Workers' Compensation was developed. It will then discuss the reasons why Workers' Compensation should not be the exclusive remedy for an employee who has been intentionally injured in the workplace. The note will then focus on the courts' present methodology for deciding these cases, specifically addressing the issue of intentional infliction of emotional distress, and the current confused state of the law. Finally, it will propose an alternative statutory provision and explain how its adoption will lead to increased consistency in analysis and, ultimately, in result.

I. HISTORY AND PURPOSE OF WORKERS' COMPENSATION STATUTES

Before the enactment of Workers' Compensation statutes in the nineteenth century, employees rarely brought suit against their employers for work-related injuries.\(^10\) For a variety of reasons plaintiffs faced a high probability that such a suit would be unsuccessful.\(^11\) First, the burden of proof as to fault was on the employee; however, often no one was at fault, the injury being merely a risk inherent in

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\(^9\) See, e.g., cases cited supra note 8.
\(^10\) H. SOMERS & A. SOMERS, WORKMEN'S COMPENSATION 17 (1954) [hereinafter cited as SOMERS].

\(^11\) Id. at 21 (quoting E.H. DOWNEY, WORKMEN'S COMPENSATION 144 (1924)) (seven-eighths of all work-related injuries left uncompensated). See 1 A. LARSON, WORKMEN'S COMPENSATION LAW § 4.30 (1977) (at common law the employee was without a remedy in at least 83% of the cases); 1 W. SCHNEIDER, supra note 1, § 1 (approximately 70% of wage loss was borne by the workers themselves).
Second, co-employees were reluctant to testify against their employer. Third, and most devastating to the injured employee's case, the employer was often able to raise the common law defenses of contributory negligence, assumption of risk and the fellow servant rule. As a result of this "unholy trinity of defenses" the employee was unlikely to prevail in court.

During the late nineteenth century, the industrial accident rate had reached alarming proportions. Industrial towns found it necessary to support "large numbers of maimed workers and their families as public charges." Common law defenses were acting as insurmountable barriers in too many cases. The early employer liability laws, generally confined to extra-hazardous industries such as the railroad industry, were inadequate to relieve the increasing burden being placed on society by the uncompensated victims of industrial accidents. Although the early laws somewhat modified common law defenses, their effect was most commonly aimed at limiting the fellow servant doctrine. It was gradually recognized that "in a modern industrial state the risk of injury to workmen . . . is a social risk, chargeable against the business itself, the losses arising from which are to be added to the productive cost and to be borne ultimately by the community." The idea was that the economic costs of industrial accidents should be internalized to the industry by being passed on to the consumers of that industry's product.

The new statutes were specifically designed to ensure adequate and prompt compensation. Predetermined benefits were calculated by looking at the nature of the disability and the wages of the injured worker as well as the number of his dependents. The system was intended to eliminate wasteful litigation and legal fees.

12. Somers, supra note 10, at 22 n.7.
13. Id. at 18.
14. Under the fellow servant rule, the injured employee could not recover against his employer if he was injured as a result of a co-employee's negligence. Id.
15. Id.
17. See id. § 4.0.
19. See statutes cited in 1 A. Larson, supra note 11, § 4.50 n.20.
21. Id. at 21.
22. Id.
24. Id.; see also 1 W. Schneider, supra note 1, § 3.
25. Somers, supra note 10, at 27.
26. Id.
tainty of payment was also an important objective of this legislation, a goal substantially furthered by the elimination of the employer's common law defenses. Finally, it was hoped that the statutes would aid in promoting safety in the workplace. To balance the employer concessions, the various legislatures immunized the employer against common law suit.

Although these systems were designed to remove industrial accidents due to negligence from the common law tort system, there is no indication that they were enacted to similarly remove intentionally inflicted harm from the tort system.

II. INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS

Since the focus of this note is the intentional infliction of emotional distress, it is useful to examine the general state of the law with respect to this relatively new tort.

The common law has been slow to afford protection to the interest in freedom from emotional distress caused by nonphysical events when those events result in purely mental injuries. Since the early part of the twentieth century, "commentators have recognized that a person's interest in his own emotional tranquility is, in and of itself, worthy of protection." It is only in recent years, however, that the intentional infliction of emotional distress has been fully recognized as a distinct basis of tort liability.

Generally, courts have found liability only where the defendant's conduct has been extreme and outrageous. One instance in which conduct has been deemed to rise to this level is where there is an "abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or

27. Id.
28. Id. at 27-28.
29. Id. at 28-29 n.18.
31. See infra notes 48-67 and accompanying text.
32. RESTATEMENT (SECOND) OF TORTS § 46 comment b (1965).
34. See RESTATEMENT, supra note 32, § 46 comment b.
power to affect his interests."

Certainly, an abuse of the employment relationship qualifies as "extreme" under this definition.

Since the various Workers' Compensation statutes are remedial in nature, the scope of their coverage has generally "been broadened by interpretation to provide benefits to workers whose [resulting] injuries are intangible."

Although the Workers' Compensation statutes of most states allow recovery for "purely" mental injuries, there is a need to allow access to the courts to an employee with a common law claim for intentional infliction of emotional distress.

III. INTENTIONAL TORTS & WORKERS' COMPENSATION EXCLUSIVITY PROVISIONS

A. Exclusivity and Punitive Damages

The plaintiff's retention of his common law right of action is important in a very practical sense. Unlike recovery in tort, the recovery under these statutes is limited. The only injuries compensated under Workers' Compensation are those which produce disability and, thereby, affect earning power. Damages for pain and suffering are not available under Workers' Compensation statutes. Recoveries are so limited because their purpose is not to restore plaintiffs to their former positions, but to keep them from becoming burdens on the community. The typical Act awards one-half to two-thirds of a worker's previous salary with some maximum weekly recovery set by statute.

The magnitude of an employee's loss is evidenced by examining the punitive damages awarded in a typical case of intentional infliction of emotional distress where no employment relationship existed between the plaintiff and the defendant.

In Fletcher v. Western National Life Insurance Co., the plain-

36. Restatement, supra note 32, § 46 comment e.
37. Freeman v. Kelvinator, Inc., 469 F. Supp. 999, 1000 (E.D. Mich. 1979). But see Renteria v. County of Orange, 82 Cal. App. 3d 833, 839, 147 Cal. Rptr. 447, 450 (1978) ("We are aware of no decisional or statutory authority for the proposition that mental suffering, as such, is a compensable injury.") (emphasis in original).
38. 1B A. Larson, supra note 11, §§ 42.20 to .23. "Purely" mental injury is distinguished from mental harm which results from physical injury. It is the former type of harm which the courts have been slow to recognize as a basis of tort liability.
39. Id. § 2.40.
40. Id.
41. Id. § 2.50.
42. Id.
43. 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).
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Fiff successfully sued his insurance company and its agent for the intentional infliction of emotional distress.\(^\text{44}\) The claim was based on the company's willful discontinuance of the plaintiff's disability payments.\(^\text{45}\) The court reasoned that the plaintiff was "frightened, worried and upset" about how he was going to support his family as a result of the defendant's actions.\(^\text{46}\) The jury awarded Fletcher $10,000 in punitive damages against the agent and $640,000 against the insurance company. Although he subsequently accepted a reduction in the latter award to $180,000,\(^\text{47}\) Fletcher actually received $190,000 more than would have been available if Workers' Compensation had governed. A plaintiff should not be denied the amount of compensation which a court would find adequate simply because he was misfortunate enough to be employed by the one who intentionally caused his injury.

B. Legislative Intent and the Exclusivity Provision

It is highly unlikely that the various legislatures intended that Workers' Compensation should be plaintiffs' exclusive remedy where an intentional tort is involved. "Universally, harmful conduct is considered more reprehensible if intentional. . . . Even a dog distinguishes between being stumbled over and being kicked."\(^\text{48}\) In his treatise on Workers' Compensation, Samuel Horovitz proposes that where the employer is guilty of a felonious or willful assault on an employee, he should not be able to relegate the employee's claim to the compensation act for recovery. "It would be against sound reason to allow the employer deliberately to batter his helper, and then compel the worker to accept moderate workmen's compensation benefits, . . . from his insurance carrier . . . ."\(^\text{49}\)

Several states, among them Arizona, Louisiana, Oregon, Washington and West Virginia, expressly provide for a civil suit in the event that an employer intentionally injures his employee.\(^\text{50}\) Even where this is not provided, courts of various jurisdictions have recognized that their legislature did not intend plaintiffs to give up their

\(^{44}\) Id. at 384-85, 89 Cal. Rptr. at 81-82.
\(^{45}\) Id. at 392, 89 Cal. Rptr. at 87.
\(^{46}\) Id. at 397, 89 Cal. Rptr. at 91.
\(^{47}\) Id. at 408, 89 Cal. Rptr. at 99.
\(^{50}\) See supra notes 7-9 and accompanying text.
right to a tort suit for intentionally inflicted injuries in the workplace.\(^1\)

In *Jablonski v. Multack*,\(^2\) an Illinois appellate court stated that the Workers’ Compensation law must avoid shielding the wrongdoer from liability. The court reasoned that the Illinois legislature would not permit the intentional tort-feasor to shift his liability to a fund paid for with premiums collected from innocent employers.\(^3\)

In *Kissinger v. Mannor*,\(^4\) a Michigan appellate court also faced the issue of the intent of the legislature in enacting the exclusivity provision. The plaintiff in *Kissinger* sued his foreman for the intentional infliction of emotional distress stemming from an incident in which he was forced to evacuate his bowels in his clothing because the foreman refused to allow him to use the toilet facilities.\(^5\) Shortly thereafter, the defendant informed the other employees of the plaintiff’s embarrassing situation.\(^6\) The court allowed the plaintiff to recover on the basis that the legislature “could not have intended the exclusive remedy section of the act be construed to preclude a plaintiff’s recovery for injury suffered in an intentional tort.”\(^7\)

In *Copelin v. Reed Tool Co.*,\(^8\) a Texas appellate court looked to the state constitution for guidance in deciding whether the legislature intended Workers’ Compensation to be the plaintiff’s exclusive remedy.\(^9\) It interpreted the clause which states that “every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law,”\(^10\) to mean a right of redress in the courts of the land, rather than by an administrative board.\(^11\) The court stated, “[i]t is, therefore, not to be doubted that the Legislature is without the power to deny the citizen the right to

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52. 63 Ill. App. 3d 908, 380 N.E.2d 924 (1978). In *Jablonski*, the plaintiff brought a partially successful action for assault and battery against a co-employee and his employer for injuries sustained when he was assaulted by the co-employee. Finding that the co-employee was not acting as an “alter ego” for the employer corporation, the court affirmed the summary judgment in favor of the employer.
53. *Id.* at 915, 380 N.E.2d at 928.
55. *Id.* at 574, 285 N.W.2d at 215.
56. *Id.* at 574-75, 285 N.W.2d at 216.
57. *Id.* at 577, 285 N.W.2d at 217.
59. *Id.*
61. *Copelin*, 596 S.W.2d at 303.
resort to the courts for the redress of any intentional injury,” since that right is constitutionally protected.63

When faced with the exclusivity question in *Heskett v. Fisher Laundry & Cleaners Co.*,64 the Supreme Court of Arkansas analo-

gized the instant employer-employee relationship to that between an employee and a third party. The Arkansas statute permits not only a compensation claim but also a third party action where the third party is responsible for the harm either through negligence or willful misconduct.65 The court reasoned that “‘[a]n employer who intentionally and maliciously inflicts bodily injuries on his servant should occupy no better position than would a third party not under a Com-
pensation Act.’”66 By analogizing a third-party tort in the workplace to an employer’s intentional tort, the court determined that the in-
tent of the lawmakers was “not to destroy such employee’s right to full damage when the injury results from the wilful and intentional act of the employer.”67

C. Exclusivity and Increased Awards for Employers’ Willful Misconduct

Several states’ statutes provide for a percentage increase in the award to the plaintiff when the employer engages in “serious and willful misconduct.”68 Courts in California have grappled with the question of whether, in light of a statutory “add-on” for willful misconduct,69 the legislature intended to completely abrogate the em-
ployee’s right to recover damages in a civil suit.70 In *Magliulo v. Superior Court*71 an intentional assault in the workplace case,72 the California court rejected the argument that section 455373 of the

62. Id.
63. Id.
64. 217 Ark. 350, 230 S.W.2d 28 (1950).
66. *Heskett*, 217 Ark. at 355, 230 S.W.2d at 31 (quoting Boek v. Wong Hing, 180 Minn. 470, 231 N.W. 233, 234 (1930)).
67. Id. (emphasis added).
72. Id. at 762-63, 121 Cal. Rptr. at 623.
California Workers’ Compensation Act was intended as a substitute for common law remedies in the case of an intentional injury. The court agreed with the proposition that although an employee may be willing to give up his common law right of recovery for work-related injuries, "[i]t is not so clear that the employee . . . contemplates that his employer is going to assault him, or, that if he does, the employee will have to be satisfied with an award of one-half the compensation . . . with a limit which at the time of the injury . . . was $7,500." In reviewing the applicable case law, the court, quoting the statutory language, determined that section 4553 is to be applied where "the serious and willful misconduct [of the employer] is that which falls between ordinary negligence and an intentional act." Conduct that rises to this level is such where the circumstances surrounding the act . . . 'evidence a reckless disregard for the safety of others and a willingness to inflict the injury complained of.' The employer need not have intended the injury; it suffices that he should have realized that the conduct was likely to cause harm.

Five years after Magliulo was decided, the California Supreme Court, in Johns-Manville Products Corp. v. Superior Court, rejected the lower court's finding that section 4553 does not refer to intentional misconduct. The court accepted the defendant's argument that the term "willful misconduct" as used in the statute included intentional wrong doing. Despite this conclusion, however,

74. Magliulo, 47 Cal. App. 3d at 779, 121 Cal. Rptr. at 635.
75. Id. at 778, 121 Cal. Rptr. at 635.
76. Id. at 778-79, 121 Cal. Rptr. at 635 (quoting 2 A. Larson, supra note 11, §§ 69, 69.10 and 69.20).
77. Id. at 779, 121 Cal. Rptr. at 635 (quoting Louisville, N.A. & Chi. Ry. v. Bryan, 107 Ind. 51, 53, 7 N.E. 807, 808 (1886)).
78. See, e.g., Bekins Moving & Storage Co. v. Workers' Compensation Appeals Bd., 103 Cal. App. 3d 675, 163 Cal. Rptr. 213 (1980) (serious and willful misconduct found where the employee injured himself on a defective walkway about which he had warned the employer many times); Johns-Manville Sales Corp. Private Carriage v. Workers' Compensation Appeals Bd., 96 Cal. App. 3d 923, 158 Cal. Rptr. 463 (1979) (where an employer fails to correct defects which have the potential of causing serious harm, he may be held to have committed serious and willful misconduct).
79. 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980).
80. CAL. LAB. CODE § 4553 (West Supp. 1982).
81. Johns-Manville, 27 Cal. 3d at 473, 612 P.2d at 953, 165 Cal. Rptr. at 863.
82. Id. at 472-73, 612 P.2d at 952-53, 165 Cal. Rptr. at 862-63. The court adopted language that was set forth in Mercer-Fraser Co. v. Industrial Accident Comm'n, 40 Cal. 2d 102, 251 P.2d 955 (1953), in which the term "willful" was defined as necessarily involving "deliberate, intentional, or wanton conduct." Id. at 117, 251 P.2d at 962 (emphasis in original).
the plaintiff was permitted to maintain a civil action based not on the original injury, but rather on the employer's intentional aggravation of that injury by deliberately concealing the knowledge that the injury would develop from the work environment. To rationalize its apparently inconsistent decision, the court opined that in some exceptional circumstances the employer is not free from liability for his intentional acts—even if the resulting injuries are compensable under the Workers' Compensation Act.

When such an award is authorized, its purpose is to provide the employee with additional compensation in the strict sense and not to award punitive damages against the employer. Professor Arthur Larson has hypothesized that one explanation for the so-called penalty provision is to ensure that the employer will provide a safe place to work. Another idea is that it will further the goal of deterrence. The theory is that if the employer is forced to pay additional damages out of his own pocket he will be more likely to install safety features in the workplace and less likely to injure his employee intentionally. Note, however, that in California, even though the "penalty" is in the form of a fifty percent surcharge with a $10,000 maximum, where there is no compensable injury, as in the case of purely emotional injury, "50 percent of nothing is still nothing." In such a case, section 4553 of the California Labor Code will certainly fail in its objectives of deterring reprehensible behavior in the workplace and providing a safer work environment.

IV. COURTS' PRESENT METHODOLOGY

A. Focus on "Accidental"

Courts focus on various factors to determine whether the act complained of is covered by Workers' Compensation; and, if it is

83. Johns-Manville, 27 Cal. 3d at 478, 612 P.2d at 956, 165 Cal. Rptr. at 866. The plaintiff claimed to have developed asbestosis from the work environment. Id. at 477, 612 P.2d at 950, 165 Cal. Rptr. at 865.
84. Id. at 473, 612 P.2d at 953, 165 Cal. Rptr. at 863.
85. Magliulo, 47 Cal. App. 3d at 779, 121 Cal. Rptr. at 635.
86. See 2A A. Larson, supra note 11, § 70.10.
87. An insurer is forbidden to insure against the liability of the employer for the additional compensation recoverable for serious and willful misconduct. See, e.g., Cal. Ins. Code § 11661 (West 1972).
89. See infra text accompanying notes 126-28.
covered, whether statutory damages are the plaintiff's only remedy for an intentionally inflicted tort. Where Workers' Compensation statutes have as their purpose to compensate plaintiffs for "industrial accidents," courts focus on the incident causing injury to determine whether it was in fact "accidental" within the meaning of the statute. That term has been broadly defined to mean "traceable to a definite time, place and cause." There is a danger, however, that by adhering to this definition, a court may well find an intentional injury to be "accidental." It is anomalous, however, to allow an employer to categorize an injury he has intentionally inflicted as an accident.

In Daniels v. Swofford, a North Carolina court defined an "accident" as "an unlooked for and untoward event which is not expected or designed by the injured employee." It concluded, therefore, that an unexpected assault can be categorized as an "accident" despite its intentional nature. In Daniels, a co-employee, rather than the employer, was charged with an intentional assault and the intentional infliction of emotional distress. Under North Carolina's Workers' Compensation Act, this is analogous to an employer's liability since the Act provides immunity from civil suit to

94. The seeming absurdity in classifying an intentional injury as accidental can be best understood by recognizing that the term can be used in two different contexts. The purpose of this definition, (traceable to a definite time, place, and cause) was to distinguish compensable accidents from noncompensable "gradually debilitative diseases." In International Harvester Co. v. Industrial Comm'n, 56 Ill. 2d 84, 305 N.E.2d 529 (1973), the plaintiff, a welder, sought to recover under Workers' Compensation for emphysema which he claimed was caused, or at least aggravated, by the fumes he breathed at work. Id. at 87-88, 305 N.E.2d at 530-31. The court concluded that the plaintiff "did not suffer from an accidental injury within the meaning of the Act. He suffered from a gradually debilitative disease." Id. at 90, 305 N.E.2d at 533. The court went on, stating: "He suffered no sudden disablement from the aggravation, nor was there a sudden giving way of his body structure. . . ." Id. Finally, the court noted that the plaintiff "[could] point to no definite time, place or cause of the aggravation except to say that it occurred over the six-year span of time during which he worked as a welder. . . ." Id.
95. 55 N.C. App. 555, 286 S.E.2d 582 (1982).
96. Id. at 558, 286 S.E.2d at 584 (quoting Harding v. Thomas & Howard Co., 256 N.C. 427, 428, 124 S.E.2d 109, 110-11 (1962)).
97. Id.
98. Id. at 556, 286 S.E.2d at 583.
co-employees as well as to the employer. To compensate the injured plaintiff, the court allowed the plaintiff to maintain a civil suit against the co-employee on the basis that an intentional tort constitutes an implied exception to the statute’s exclusivity provision. The court reasoned that the same person cannot commit an intentional assault and then allege that it was accidental to shield himself from liability at common law. Because the court first made the determination that the intentional act met its definition of “accidental,” the plaintiff was forced to overcome a second obstacle: He was required to show that an intentional tort was not covered by the exclusivity provision.

Since courts have the option of holding that an injury may be considered accidental from the employee’s viewpoint, notwithstanding the fact that it was intentionally inflicted, there is the ever-present danger that an employee may have his civil suit precluded in such a case.

B. Focus on the Scope of Employment

Since some states’ Workers’ Compensation statutes provide coverage for injury arising out of and in the course of employment, there must be a certain nexus between the injury and the plaintiff’s occupation. In these states, the plaintiff will sometimes attempt to escape an exclusivity provision by alleging that an employer who enters into a course of intentionally harmful conduct is acting outside the scope of employment. If this assertion is successful, the plain-

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100. See Altman v. Sanders, 267 N.C. 158, 148 S.E.2d 21 (1966) (interpreting the phrase “those conducting his business” to include fellow employees).
101. Daniels, 55 N.C. App. at 559-60, 286 S.E.2d at 586.
102. Id. at 562, 286 S.E.2d at 586. Although the court allowed the tort suit against the co-employee, it properly dismissed the suit against the employer. The court was correct in refusing to impute the malice of the assaulting employee to the employer in a situation where the acts were unauthorized. When the assailant and the defendant are two different people, as in Daniels, the assault may indeed be accidental from the employer’s perspective. See 2A A. Larson, supra note 11, § 68.21 (“Unless the employer has commanded or expressly authorized the assault, it cannot be said to be intentional from his [viewpoint].”). But see Meyer v. Graphic Arts Int’l Union Local No. 63-A, 88 Cal. App. 3d 176, 151 Cal. Rptr. 597 (1979) (imputing the intentional assault of the agent to the employer-principal, thus allowing the employee to sue the employer at law).
105. See, e.g., Heskett v. Fisher Laundry & Cleaners Co., 217 Ark. 350, 230 S.W.2d 28
tiff will be permitted to seek judicial redress. Courts, however, often look past the mere fact that the conduct was intentional and examine instead, the motivation underlying that conduct. If the motivation was work-related, the employee is relegated to a compensation award. If the motivation for the abuse is not work-related, then the injured plaintiff is permitted to sue in tort on the ground that Workers' Compensation does not govern in this situation.

Note the inequity which may result if courts employ this method of analysis. In Smith v. Lannert, the plaintiff was spanked while taking an unauthorized rest break. This Missouri court allowed the plaintiff to maintain her suit because taking the rest break, thereby disobeying a direct order from her superior, removed the incident from the scope of employment. This implies that had she been spanked while taking an authorized rest break, Workers' Compensation would have been her only remedy.

In Alpine Roofing Co. v. Dalton, the plaintiff's jaw was broken by his foreman following a heated dispute concerning the number of hours worked by the plaintiff. He sought civil damages stemming from the assault on the grounds that since he had been fired moments before, he was not an employee at the time of the incident and that the motivation for the assault was personal in nature. The Colorado court found that the assault was sufficiently close in time to the discharge to be considered work-related. By focusing on the surrounding circumstances and the fact that the plaintiff and his employer were arguing about business at the time of the act, the court determined that the incident arose out of and in the course of employment and the plaintiff was denied his civil suit.

107. See cases cited supra note 106.
109. Id. at 10.
110. Id. at 13.
111. Id. at 13.
113. Id. at 317, 539 P.2d at 488.
114. Id.
115. Id. at 319, 539 P.2d at 489.
116. Id.
117. Id.
Despite the fact that the injuries in both of these cases were intentionally inflicted, the courts' analyses led to very different results. The courts seemed to be making distinctions where there were no real differences.

In *Heskett v. Fisher Laundry & Cleaners Co.*,\(^\text{118}\) the Arkansas Supreme Court opined that an employer's willful behavior severs the employment relationship.\(^\text{119}\) Under this theory, the plaintiff is given the option of considering the employment relationship as still existing and suing under Workers' Compensation, or considering it at an end and seeking redress in a civil suit. Professor Arthur Larson notes that unless the specific facts of the case support the thesis that the parties did, indeed, treat the relationship as having been severed, the assertion is fictitious.\(^\text{120}\)

Although courts may attempt to circumvent an exclusivity provision by treating the intentional tort as falling outside the employment relationship, that very relationship should be one focus of inquiry in assessing the outrageousness of the conduct.\(^\text{121}\) "[P]laintiff's status as an employee should entitle him to a greater degree of protection from insult and outrage than if he were a stranger to defendants."\(^\text{122}\) Instead of straining to deny the existence of the relationship,\(^\text{123}\) and thereby allowing the plaintiff to bring an action at law, a statutory enactment providing a cumulative remedy in the case of an intentional tort would permit courts to acknowledge that relationship and consider the alleged abuse in light of the fact that the employer is in a position of authority with respect to that plaintiff.

C. Focus on the Nature of the Injury

Some courts have disposed of the question of the propriety of a civil suit between employee and employer for intentionally inflicted injuries by determining whether the resulting injury is compensable under the applicable statute.\(^\text{124}\) If the injury is not covered then the

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119.  Id. at 355-56, 230 S.W.2d at 32.
120. 2A A. Larson, *supra* note 11, § 68.11.
121.  *See supra* text accompanying note 36.
123.  *See supra* text accompanying notes 109-11.
plaintiff may be allowed to maintain a civil suit.\textsuperscript{126}

Colorado and California are two states that do not allow recovery for emotional injury under their Workers' Compensation statutes.\textsuperscript{129} In California, once the court determines that any part of the injury is compensable under Workers' Compensation, the exclusivity provision is triggered and the plaintiff is barred from bringing a civil suit for punitive and additional compensatory damages.\textsuperscript{127} As a result, plaintiff-employees must carefully avoid pleading any resulting physical disability along with their claims of emotional suffering. This method of analysis, however, results in an unwarranted distinction between the outcome of cases in which the plaintiff alleges intentional infliction of emotional distress and those in which intentionally inflicted physical injury is also claimed.\textsuperscript{128}

In a leading California case, Renteria v. County of Orange,\textsuperscript{129} a social service investigator claimed that he was subjected to acts that were intended to cause him mental anguish.\textsuperscript{130} He alleged only psychological injury.\textsuperscript{131} Using a two-pronged analysis, the court first noted that there was no statutory or decisional authority for the proposition that purely mental injuries are compensable.\textsuperscript{132} The court then made a second important observation: "The existence of a non-compensable injury does not, by itself, abrogate the exclusive remedy provisions of the Workers' Compensation Act."\textsuperscript{133} The court was distinguishing Williams v. State Compensation Insurance Fund,\textsuperscript{134} where an employee sued for injuries to his genitals which occurred


\textsuperscript{127} See Gates v. Trans Video Corp., 93 Cal. App. 3d 196, 155 Cal. Rptr. 486 (1979) (judgment below, awarding damages for the intentional infliction of emotional distress, reversed because of allegation that physical injury and actual disability resulted).

\textsuperscript{128} Compare Luna v. City & County of Denver, 537 F. Supp. 798 (D. Colo. 1982) (allowing plaintiff to bring a civil suit since emotional distress, humiliation, and embarrassment were not compensable under the Act) with Ellis v. Rocky Mountain Empire Sports, Inc., 43 Colo. App. 166, 602 P.2d 895 (1979) (holding that Workers' Compensation is the plaintiff's only available remedy where an intentional physical injury is alleged).

\textsuperscript{129} 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978).

\textsuperscript{130} Id. at 835, 147 Cal. Rptr. at 447.

\textsuperscript{131} Id.

\textsuperscript{132} Id. at 839-40, 147 Cal. Rptr. at 450-51; see CAL. LAB. CODE § 3208 (West Supp. 1983).

\textsuperscript{133} Renteria, 82 Cal. App. 3d at 840, 147 Cal. Rptr. at 451.

\textsuperscript{134} 50 Cal. App. 3d 116, 123 Cal. Rptr. 812 (1975).
while he was operating a spraying machine.\textsuperscript{135} The Williams court held that these injuries were not compensable under the Act since there was no resulting disability.\textsuperscript{136} However, the plaintiff still could not maintain a tort suit on the ground that his particular injuries happened to be noncompensable\textsuperscript{137} because the conditions for coverage existed and the statute, complete with its exclusivity language, was triggered. The Renteria court distinguished Williams by classifying the latter as an isolated instance of a noncompensable physical injury.\textsuperscript{138} In comparison, the Renteria court was faced with "an entire class of civil wrongs outside the contemplation of the workers' compensation system."\textsuperscript{139} This second determination, although very important, has been given little recognition by other California courts.\textsuperscript{140}

The following year, Renteria was distinguished in Gates v. Trans Video Corp.\textsuperscript{141} While the plaintiff in Renteria had alleged only noncompensable mental injuries,\textsuperscript{142} the plaintiff in Gates claimed that the mental injuries he suffered as a result of his employer's abuse culminated in a compensable physical disability.\textsuperscript{143} The Gates court, in holding that the plaintiff who fell within the ambit of the Workers' Compensation Act could not maintain a civil action for damages,\textsuperscript{144} never addressed the policy issue that was such an important factor in the Renteria decision: That the intentional infliction of emotional distress comprised a class of wrongs outside the contemplation of Workers' Compensation.\textsuperscript{145} The plaintiff in Renteria prevailed because of the broad policy determination that the "essentially 'no-fault' workers' compensation system would not provide a sufficient deterrent to intentional wrongdoing."\textsuperscript{146} The plaintiff in Gates was denied the opportunity to sue at law notwith-

\begin{thebibliography}{9}
\bibitem{135} Id. at 118, 123 Cal. Rptr. at 813.
\bibitem{136} See CAL. LAB. CODE \S 3208 (West Supp. 1983).
\bibitem{137} 50 Cal. App. 3d at 120-23, 123 Cal. Rptr. at 814-15.
\bibitem{138} Renteria, 82 Cal. App. 3d at 841, 147 Cal. Rptr. at 451.
\bibitem{139} Id.
\bibitem{140} See, e.g., Gates v. Trans Video Corp., 93 Cal. App. 3d 196, 155 Cal. Rptr. 486 (1979); Ankeny v. Lockheed Missiles & Space Co., 88 Cal. App. 3d 531, 151 Cal. Rptr. 828 (1979) (note that no mention is made of the portion of Renteria which allowed for the maintenance of a civil suit despite the fact that under Williams, a noncompensable injury, in and of itself, will not remove the bar to a civil action).
\bibitem{141} 93 Cal. App. 3d 196, 155 Cal. Rptr. 486 (1979).
\bibitem{142} Renteria, 82 Cal. App. 3d at 839-40, 147 Cal. Rptr. at 450-51.
\bibitem{143} Gates, 93 Cal. App. 3d at 207, 155 Cal. Rptr. at 492.
\bibitem{144} Id. at 204-05, 155 Cal. Rptr. at 491-92.
\bibitem{145} Renteria, 82 Cal. App. 3d at 841, 147 Cal. Rptr. at 451.
\bibitem{146} Id. at 841, 147 Cal. Rptr. at 451.
\end{thebibliography}
standing the fact that the same policy was at issue.

In *McGee v. McNally*, the court took a small step away from *Gates*. In *McGee*, the plaintiff, a foreman at Stanford University Hospital, alleged that he was "the victim of a campaign of harassment designed by his supervisors to deprive him of his job." In addition to his emotional injuries, however, this employee also alleged some physical injury as a result of the harassment. The court allowed the plaintiff to maintain his suit because it determined that the essence of the damage was nonphysical and the physical injury alleged in the complaint was merely "makeweight." The court cited Professor Arthur Larson for the proposition that "[i]f the essence of the tort, in law, is non-physical, and if the injuries are of the usual non-physical sort, with physical injuries being at most added to the list of injuries as a makeweight, the suit should not be barred."

The *McGee* court moved away from the narrow holding of *Gates* by allowing a plaintiff who alleged some compensable injury to sue outside the statute; its analysis, however, is not without problems. In situations where emotional harm has led to physical injury, the court should not have to distinguish between "makeweight physical injuries" and injuries that are themselves compensable under the Act.

Note also the dilemma that a plaintiff faces if he chooses to sue at common law. A plaintiff strengthens his case on the damage issue by pleading that his emotional injury is accompanied by physical manifestations. He runs the risk, however, of having his civil suit precluded by that very same allegation.

In several cases where the court expressly followed the compensable/noncompensable line of reasoning, there is a sense, nevertheless, that the dismissal was actually based on other factors. In *Russell v. United Parcel Service*, a United Parcel Service employee sought recovery for psychological harm stemming from an incident where she was assaulted and raped while on her usual

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148. Id. at 893, 174 Cal. Rptr. at 254.
149. Id. at 894, 174 Cal. Rptr. at 255.
150. Id. at 895, 174 Cal. Rptr. at 255.
151. Id. (quoting A. Larson, supra note 11, § 68.34).
152. See, e.g., Russell v. United Parcel Serv., 666 F.2d 1188 (8th Cir. 1981); Ankeny v. Lockheed Missiles & Space Co., 88 Cal. App. 3d 531, 151 Cal. Rptr. 828 (1979); see also infra text accompanying notes 154-64.
153. 666 F.2d 1188 (8th Cir. 1981).
route. The plaintiff claimed that the incident was foreseeable since her employer was aware of the dangerous nature of the area in which she was required to work. She alleged that the failure to provide safeguards amounted to the intentional infliction of emotional distress. The court dismissed her civil suit because injuries resulting from an unsafe work environment were covered by the Missouri Workers' Compensation Act. However, instead of ending its opinion at that point, the court went on to note that:

"Even when the conduct of the employer 'goes beyond aggravated negligence, and includes such elements as knowingly . . . ordering claimant to perform an extremely dangerous job, [or] willfully failing to provide a safe place to work . . . this still falls short of the kind of actual intent to injure that robs the injury of [its] accidental character."  

The quoted language seems to indicate that what really underlies the court's dismissal is that the element of "intent" was not adequately pleaded. A more clearly reasoned analysis might have followed if the court had dismissed on the basis that it did not find the requisite intent rather than on the basis that the injury was of the sort contemplated by the statute.  

In Ankeny v. Lockheed Missiles & Space Co., the employer allegedly deprived the plaintiff of stewardship in a union, permitted other employees' insults, and passed him over for promotion. The employee claimed that these actions caused him emotional distress, made him physically sick and caused him to incur some permanent disability. The California court was troubled because the complaint did not allege conduct sufficiently outrageous to maintain an action for intentional infliction of emotional distress. The suit was not dismissed on that ground alone, however, but also on the ground that unlike the plaintiff in Renteria, the Ankeny plaintiff suffered some compensable physical injury. By disallowing this plaintiff's

154. Id. at 1189.
155. Id. at 1191-92.
156. Id. at 1192.
157. Id.
158. Id. at n.6 (quoting 2A A. LARSON, supra note 11, § 68.13) (emphasis added).
159. See id. at 1192.
161. Id. at 534, 151 Cal. Rptr. at 830.
162. Id.
163. Id. at 536, 151 Cal. Rptr. at 831.
164. Id. at 535-36, 151 Cal. Rptr. at 831.
civil suit because he alleged some injury that fell under the protective umbrella of the Act, the court’s overbroad holding may also be read to preclude the suits of those plaintiffs who are exposed to extreme conduct but who allege physical disability. If the court was not convinced of the causal relationship between the defendant’s nonextreme actions and the ensuing injury, it should have dismissed the complaint on that basis.

In states such as California and Colorado which do not allow recovery under their Workers’ Compensation statutes for psychological injury, cases where emotional injuries form the basis of the claim result in different verdicts from those in which intentionally inflicted physical injury is claimed. In Ellis v. Rocky Mountain Empire Sports Inc., the plaintiff football player alleged that he was forced to participate in drills before a knee injury was fully healed. As a result, he reinjured his knee and was unable to participate in the 1975 football season. Even though the essence of his claim was that of an intentionally inflicted physical injury, he alleged some accompanying emotional distress as well. The court explicitly barred his civil suit on the ground that intentional torts were covered by the statute.

The opposite result was reached in Luna v. City and County of Denver, where the essence of the damage was emotional, and the physical injuries alleged were a minimal aspect of damages. The plaintiff in Luna brought a common law action against his employer for the intentional infliction of emotional distress resulting from racial discrimination. The court allowed him to proceed with his civil suit because his claim was “based mainly on mental suffering and humiliation,” which are not compensable under the Colorado Workmen’s Compensation Act. Had Colorado exempted all inten-

166. See infra text accompanying notes 167-76.
168. Ellis, 43 Colo. App. at 169, 602 P.2d at 896.
169. Id.
170. Id. at 173, 602 P.2d at 898.
171. Id.
173. Id. at 801.
174. Id. at 799.
175. Id. at 801.
tional torts from the Act and focused the court’s attention on the intentional nature of the tort itself, the inconsistency would have been eliminated.

The Michigan courts have decided a line of cases in which the basis of the allegation of intentional infliction of emotional distress has been a claim of discrimination. In cases where the discrimination was claimed to have resulted in disabling conditions, courts have held that the exclusive remedy provision is applicable. Where the damages alleged were purely emotional in nature, courts have held that the exclusivity provision does not act as a bar to a common law claim. For example, in *Freeman v. Kelvinator, Inc.* the court cited Professor Arthur Larson for the proposition that where the harm is solely emotional and flows from nonphysical sources the suit should not be barred. The court then took the brave step of positing that even when a compensable disability results from the discrimination there may be a need for an additional remedy by way of a civil suit:

To dismiss the mental distress claim on the basis that the injured person is covered by the [Michigan Worker’s Disability Compensation Act] is to put the cart before the horse. Even if the disability is compensable, the mental distress that preceded it is not and should not be dragged to the Bureau along with the disability claim.

By focusing on whether or not the injuries are compensable, many courts form unwarranted distinctions that result in arbitrary compensation of employees who are injured by intentional discrimination: those who are harmed psychologically may sue at common law; those whose mental injuries culminate in a physical disability may not.

**D. Focus on the Classification of the Tort**

Instead of looking to the “intentional” or “negligent” nature of the tort, some courts look to the theory underlying the action. In

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177. See cases cited infra notes 173-74.
181. *Freeman*, 469 F. Supp. at 1002 (quoting 2A A. *Larson*, supra note 11, § 68.34.)
183. *Id.*
Moll v. Parkside Livonia Credit Union,\textsuperscript{184} the court focused on the fact that the claim was one of sexual discrimination brought under Michigan’s Civil Rights Act.\textsuperscript{185} It concluded that limiting damages available to an injured plaintiff in an employment discrimination case to those available under the Workers’ Compensation statute would severely undermine the purpose of the Civil Rights Act.\textsuperscript{186} The plaintiff, therefore, was allowed to avail herself of civil damages.

In Moore v. Federal Department Stores,\textsuperscript{187} the plaintiff alleged that she was both falsely accused and imprisoned by her employer for failing to ring up a sale.\textsuperscript{188} She brought an action for false imprisonment, seeking damages for humiliation, embarrassment, and nervous distress.\textsuperscript{189} The court allowed her to continue her suit at common law, stating that “the gist of an action for false imprisonment is unlawful detention irrespective of any physical or mental harm.”\textsuperscript{190}

In Freeman v. Kelvinator Inc.,\textsuperscript{191} psychological injuries stemming from discrimination were distinguished from those sustained from compensable sources.\textsuperscript{192} The Freeman court declared that the “source [of the injury] is deliberate or inadvertent disregard by the employer of the fundamental rights of his employees.”\textsuperscript{193} However, this is not substantially different from the theory underlying the tort of intentional infliction of emotional distress. The right to be free from insult and indignity is sufficiently analogous to the right not to be discriminated against so as to merit similar treatment. If the court’s analysis had been predicated on an express statutory provision removing intentional torts from the exclusive realm of Workers’ Compensation, all those complaining of injuries resulting from intentional wrongdoing would have had equal access to the court system. Since the courts are already willing to focus their inquiry on the nature of the tort with respect to its broad classification, e.g., false imprisonment\textsuperscript{194} or discrimination,\textsuperscript{195} then shifting the inquiry

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\footnotesize
185. \textit{Id.} at 787; MICH. COMP. LAWS ANN. §§ 37.2101-.2803 (West Supp. 1982).
186. 525 F. Supp. at 790.
188. \textit{Id.} at 557-58, 190 N.W.2d at 263.
189. \textit{Id.} at 558, 190 N.W.2d at 263.
190. \textit{Id.} at 559, 190 N.W.2d at 264.
192. \textit{Id.} at 1000.
193. \textit{Id.} (citation omitted).
194. \textit{E.g.}, Moore, 33 Mich. App. at 556, 190 N.W.2d at 262.
195. \textit{E.g.}, Moll, 525 F. Supp. at 786; Freeman, 469 F. Supp. at 1000.
\end{flushright}
slightly to encompass the state of mind of the actor would not be overly burdensome.

E. Focus on Dual Capacity

A final method for avoiding an exclusive remedy provision is via the "dual capacity doctrine." Under this doctrine, an employer is considered to have two simultaneous, yet distinct, relationships to the employee. He may therefore be liable in tort, if, in addition to his role as an employer, he is related in a second capacity that imposes obligations that are independent of those relating to his status as employer.\(^\text{196}\) Although this doctrine has limited use, Illinois is one state which does recognize "dual capacity" as a viable argument against an employer.\(^\text{197}\)

In *In re Johns-Manville Asbestosis Cases*,\(^\text{198}\) an action was instituted, inter alia, on the grounds of willful and wanton conduct in concealing information from employees concerning dangers from exposure to asbestos.\(^\text{199}\) The plaintiffs claimed that in addition to its role as an employer, the company also acted as a supplier of asbestos and as plaintiffs' physician.\(^\text{200}\) The court rejected the former allegation since defendant's duty to provide a safe work environment would neither be augmented nor diminished had the company used an outside supplier;\(^\text{201}\) therefore, the court concluded that the corporation never entered into the separate legal relationship which would have been necessary to trigger the dual capacity doctrine.\(^\text{202}\) The employees' second theory, the existence of a medical relationship, was rejected because medical malpractice was never alleged.\(^\text{203}\)

V. ALTERNATIVE STATUTORY PROVISION

A. The Proposal

To comport more closely with legislatures' intended compensation schemes,\(^\text{204}\) and to simplify the courts' determination of the pro-

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196. 2A A. Larson, *supra* note 11, § 72.80.
198. 511 F. Supp. 1229 (N.D. Ill. 1981). Although Illinois does recognize the dual capacity doctrine, the plaintiffs here were unsuccessful due to pleading problems.
199. *Id.* at 1231-32; *see supra* notes 81-91 and accompanying text.
201. *Id.* at 1233.
202. *Id.*
203. *Id.*
204. *See supra* text accompanying notes 13-32.
priety of the maintenance of a civil suit, state statutes should include a provision to the effect that an employee who is intentionally injured by his employer is not precluded from suing in tort. Forcing the arguments of counsel to center on whether or not an act was in fact "intentional" eliminates the inconsistencies that result from the courts' present methods of analysis. Courts will not need to recast an intentional tort as nonaccidental in order to allow the plaintiff to recover tort damages. Similarly, the legal fiction that allows intentional torts to be classified as "accidental" will become unnecessary if the proposed modification is adopted. Courts will no longer need to resort to the theory that when an employer acts maliciously towards his employee he acts "outside the scope" of the employment relationship. When the focus is on the issue of intent, an employee who is harassed or humiliated by an employer whose motive is work-related will be able to sue for punitive damages in the same manner as the employee who is the victim of personally motivated harassment.

Finally, an inquiry into the element of intent will obviate the disparity that results when plaintiffs, in conjunction with claims of intentional infliction of emotional distress, either allege or do not allege a physical disability. The courts instead will allow a civil suit to be maintained whenever the complaint properly alleges conduct necessary to sustain the claim of an intentional tort. The following provision is suggested to accomplish these goals:


206. For example, the Louisiana Workers' Compensation Act allows maintenance of a civil suit when the defendant's acts are intentional. LA. REV. STAT. ANN. § 23:1032 (West Supp. 1983). The court's inquiry is therefore reduced to determining whether the action was sufficiently "intentional" to escape the bar to suit at common law. See, e.g., Citizen v. Theodore Daigle & Brother, 392 So. 2d 741 (La. Ct. App. 1980), aff'd, 418 So. 2d 598 (La. Sup. Ct. 1982); Maggio v. St. Francis Medical Center, 391 So. 2d 948 (La. Ct. App. 1980).

207. See supra text accompanying notes 91-103.

208. See supra text accompanying notes 105-20.

209. See supra text accompanying notes 124-83.

210. See generally cases cited supra note 206. These cases are illustrative of courts' analysis in determining what conduct rises to the level of intentional.
MODEL STATUTE

Employer's Intentional Misconduct:

(1) If injury or death results to the worker from the intention of his or her employer to produce such injury or death, the worker, surviving spouse, child or dependent of the worker shall have the privilege to take under this statute and also shall have a cause of action against the employer as if this statute had not been enacted, for any excess of damage over the amount received or receivable under this statute.212

(2) “Intent” shall be defined as the desire to bring about the harm or knowledge to a substantial certainty that the harm would occur.213

(3) In any suit so brought, the trial shall be de novo and no presumption shall exist that any award, ruling or finding of the Worker's Compensation Board is correct. That finding shall neither be pleaded nor offered into evidence.214

B. Defining Intent

The term “intent” should be defined within the statutory framework to eliminate the confusion that may result from an ambiguous statute.215 A definition in terms consistent with those utilized in the Restatement (Second) of Torts is suggested.216

When the facts alleged support the proposition that the defendant desired to bring about the injury, it is clear that intent has been adequately pleaded.217 The more difficult case arises when the desire is not clear, yet the actor's carelessness is so wanton as to warrant judicial determination of an ultimate intent to injure.218 In a leading West Virginia case, Mandolidis v. Elkins Industries,219 the court

211. The model statute is comprised of three sections. Two sections are taken from existing state statutes. The third section is based on a Restatement of the law.
213. Restatement, supra note 32, § 8A.
215. The Louisiana statute, LA. REV. STAT. ANN. § 23:1032 (West Supp. 1983), does not define the conduct necessary to escape the exclusivity provision. As a result, the courts are divided on this issue. See Bazley v. Tortorich, 397 So. 2d 475, 480-82 (La. Sup. Ct. 1981).
216. “Intent” as used in the Restatement means the desire to cause consequences or the belief that they are substantially certain to occur. Restatement, supra note 32, § 8A.
218. See Maynard v. Island Creek Coal Co., 115 W. Va. 249, 253, 175 S.E. 70, 72 (1934).
construed the West Virginia statute, which did not clearly define intent as permitting the maintenance of a suit at common law where the natural and probable consequence of the employer’s act was death or serious injury. In a concurring opinion, Justice Miller looked at two factors to determine whether or not the element of intent was present. First, an inquiry was conducted into the degree of probability that the conduct would produce a given result. The higher the degree of probability, the greater the likelihood that intent would be inferred. Second, the degree of seriousness of the harm threatened was examined. The more serious the harm threatened, the more likely the court would find the requisite intent.

In Bazley v. Tortorich, the Louisiana Supreme Court accepted the two-pronged approach of the Restatement (Second) of Torts. It construed intent as including instances where the defendant either desired to bring about the results of his actions or where he believed those results were substantially certain to occur. While the court noted that several appellate level courts had expressed the view that the court must find both that the employer wanted to cause the harm, and that he was substantially certain that harm would result, it determined that “intent is not . . . limited to consequences which are desired.”

In New York, case law has established that intentional torts in the workplace are a proper subject for civil suits, despite the fact that New York’s Workmens’ Compensation Act does not contain an express provision so providing. In Finch v. Swingly, the appel-

221. Mandolidis, 246 S.E.2d at 912, 913.
222. Id. at 925 (Miller, J., concurring).
223. Id.
224. Id.
225. 397 So. 2d 475 (La. 1981).
226. Id. at 482.
227. Id.
229. Bazley, 397 So. 2d at 482.
late court defined "intent" as a deliberate act by the employer causing harm to the employee. The court stated that while knowledge or appreciation of the risk does not equal intent, knowledge to a substantial certainty that a result will occur does rise to the level of intent necessary to escape the statute's exclusivity provision.

The trial court's discretionary power to grant summary judgment should effectively serve to discourage frivolous suits. At least one judge has noted that if trial judges properly perform their function of dismissing those cases that allege only gross negligence, and not intentional conduct, then only one in one hundred cases alleging intentionally inflicted torts will be sent to the jury.

C. Nature of the Remedy—Cumulative or Alternative?

The suggested statutory section provides for a cumulative, rather than an alternative remedy to a Workers' Compensation award. States that consider the plaintiff's option to sue at common law as being merely alternative, do so for several reasons. Before California determined that its Workers' Compensation Act covered intentional torts, one of the courts' inquiries in determining if Workers' Compensation is the appropriate remedy was whether or not the injuries were inflicted within the scope of employment. If the employee sustained an injury that was intentionally inflicted by the employer, he was given a choice either to assert that it occurred by reason of a risk or condition of employment and seek compensation under the statute, or to assert that the injury did not arise out of a risk of employment and sue civilly. Under this approach, the plaintiff may submit the issue to both California forums until one decides that it has jurisdiction, or the plaintiff may submit the question exclusively to either the court or the administrative board. If the first one dismisses for lack of jurisdiction, then the plaintiff can go.
before the other tribunal.\textsuperscript{239} If the first retains jurisdiction, then that jurisdiction is exclusive.\textsuperscript{240} The employee is then deemed to have made a binding election of a remedy and thereby to have waived his right to bring the action before the other tribunal.\textsuperscript{241}

Texas case law has established that recovery for an intentional tort in the workplace is not restricted to that available under the statute unless the plaintiff files a Workers' Compensation claim.\textsuperscript{242} The theory is that the employee is thereby admitting that the injury was "accidental,"\textsuperscript{243} and he is prevented from claiming later that it was intentional just to escape the statute's exclusivity provision.\textsuperscript{244}

In \textit{Collier v. Wagner Castings Co.},\textsuperscript{246} the Illinois Supreme Court's decision to preclude the civil suit, where the plaintiff had already been compensated under the Workmen's Compensation Act, was based on the court's desire to prevent a proliferation of litigation,\textsuperscript{246} as well as on its fear of double recovery.\textsuperscript{247} Since the plaintiff in \textit{Collier} had already been compensated under the Act,\textsuperscript{248} the court refused to allow the employee to then allege that those same injuries fell outside of the Act's provisions.\textsuperscript{249}

By adopting the proposed statutory provision, the foregoing problems will be eliminated. Since the statute expressly permits an employee who is the victim of an intentional tort to pursue both avenues of recovery, courts will no longer need to address the problems of inconsistent pleadings which exist under the current scheme. Furthermore, the fear of double recovery is unfounded since, under the proposed statutory scheme, a civil suit will only be available for damages in excess of those awarded by the Workers' Compensation Board. Double recovery is avoided by allowing the employer a set-off in the event the plaintiff is awarded compensation under the Act.\textsuperscript{250}

\begin{footnotes}
\item 239. \textit{Id.} at 355-56, 298 P.2d at 601.
\item 240. \textit{Id.}
\item 241. \textit{Id.}
\item 243. \textit{Id.} at 304.
\item 245. 81 Ill. 2d 229, 408 N.E.2d 198 (1980).
\item 246. \textit{Id.} at 241, 408 N.E.2d at 204.
\item 247. \textit{Id.}
\item 248. \textit{Id.}
\item 249. \textit{Id.}
\item 250. Cf. \textit{Johns-Manville Prods. Corp. v. Superior Court}, 27 Cal. 3d 465, 478-79, 612 P.2d 948, 956, 165 Cal. Rptr. 858, 866 (1980) ("double recovery may be avoided by allowing the employer a set-off in the event plaintiff is awarded compensation . . . in that proceeding and in the present case as well.").
\end{footnotes}
D. Evidentiary Provision

Subsection three of the model statute is patterned after the Texas Code. Its purpose is to prevent evidentiary problems in the civil suit. By precluding the admission of any evidence of the Workers' Compensation Board's rulings, neither side is prejudiced by the outcome of the prior action. This is proper since evidentiary rules and standards governing most administrative hearings are more lenient than those applied in a court of law. The court, therefore, should be neither bound nor influenced by the administrative tribunal's decision.

VI. CONCLUSION

Although courts have open to them several avenues enabling them to provide plaintiffs relief via suit at common law, each is blocked with its own unique obstacles. In the majority of states (whose statutes do not provide that intentional torts fall outside the exclusivity provision) these cases are decided with only limited success. Some courts focus on the nature of the injury to determine whether it is of the sort which is contemplated by the statute. If the injury is not compensable, then under certain circumstances the plaintiff may bring his civil suit. Other states treat an intentional tort as being nonaccidental. Still other jurisdictions focus on the employment relationship, finding either that the employer's act terminated that relationship or that the act was "outside the scope of employment" and the injuries are therefore compensable in a common law suit. Most courts, in struggling to compensate a plaintiff who has been the victim of intentionally inflicted injuries, apply a combination of these tests. This hodge-podge analysis often leads to inconsistent results. It also causes many deserving plaintiffs who have been victims of intentional torts in the workplace to be under-compensated. To assume that state legislatures intended these

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253. See cases cited supra note 124.
257. See cases cited supra note 105.
victims to be deprived of their right to full and adequate compensa-
tion simply because of their misfortune to be employed by the
tortfeasor, is to ignore the purpose for which Workers' Compensation
was developed.

To permit these employees to maintain civil suits, states should
consider amending their Workers' Compensation statutes to include
a provision that grants the employee the option of pursuing an action
at law when he has been intentionally injured. The statute should
utilize the definition of intent incorporated in the Restatement (Sec-
ond) of Torts as the triggering point for that option. That remedy
should be cumulative rather than alternative.

Once courts have some express statutory guidance that allows
them jurisdiction over the intentionally injured plaintiff, they will no
longer need to artificially manipulate already-present loopholes to
permit these employees full redress. Courts will then be free to focus
on the real issue: whether the employer did, in fact, intend to cause
his employee to suffer injury.

Leslie Hertz Kawaler

258. See supra text accompanying notes 207-13.
259. See supra note 216.